

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,

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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 13 OF 19

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68.	Order Granting Defendants’ Motion for Partial Summary Judgment [Oral Argument Requested] ¹	01/04/18	19	4353-4357

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

EXHIBIT 7

EXHIBIT 7



100 WEST LIBERTY STREET, SUITE 940
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BRIAN R. IRVINE
 BIRVINE@DICKINSONWRIGHT.COM
 (775) 343-7507

February 3, 2017

VIA E-MAIL – bmoquin@lawprism.com

Brian P. Moquin
 LAW OFFICES OF BRIAN P. MOQUIN
 3287 Ruffino Lane
 San Jose, California 95148

Re: *Willard v. Berry-Hinckley Industries, et al*, Case No. CV14-01712

Dear Mr. Moquin:

As you are aware, as of the date of this letter we have less than thirty (30) days to complete discovery, less than sixty (60) days to fully-brief and submit dispositive motions to the Court for decision and less than three months until the current trial date. Unfortunately, based upon Plaintiffs repeated failure to comply with their obligations under the Nevada Rules of Civil Procedure, Defendants will not be able to complete discovery on time and will not be able to present the Court with the additional dispositive motions they intend to file in time for full consideration and decision, all to Defendants' prejudice. The purpose of this letter is to address Plaintiffs' failure to meet their critical obligations under the Rule of Civil Procedure, and to demand that Plaintiffs agree to stipulate to vacate the current trial date and certain related discovery deadlines in order to permit Defendants to complete discovery and prepare their defense. Put simply, a continuance is the necessary result of Plaintiffs' own actions, and is absolutely required to provide Defendants with due process in this case.

Daniel Gluhaich.

As you are aware, on December 2, 2016, you purported to serve Defendants with a disclosure of Mr. Gluhaich as a non-retained expert. However, the disclosure is wholly deficient and does not comply with the Nevada Rules of Civil Procedure. Specifically, Plaintiffs' disclosure of Mr. Gluhaich indicated that Mr. Gluhaich would offer testimony regarding twelve separate subject matters, and included Mr. Gluhaich's resume, but did not include "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B). You acknowledged this deficiency in our phone call of December 5, 2016. Later that day, you again acknowledged via email Plaintiffs' non-compliance, and informed me that you would provide me with an amended expert witness disclosure for Mr. Gluhaich by December 8, 2016. You also stated that you would inform me of Mr. Gluhaich's availability to be re-deposed as a non-retained expert:

Brian Moquin
February 3, 2017
Page 2

We also discussed your desire to re-depose Dan Gluhaich as an expert as soon as possible; I will check with him as to available dates and will get back to you shortly. To that end, you agreed to allow Plaintiffs to provide an amended expert witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying in the interest of minimizing the amount of time needed for the deposition.

(December 5, 2016, email, **Exhibit 1**).

You did not provide us with any amended disclosure by December 8, 2016, and, when I asked again for an amended disclosure, you informed me that “I have had a call outstanding to Mr. Gluhaich for the past few days, as I need to speak with him regarding the details of the supplemental disclosure....” (December 9, 2016, email exchange, **Exhibit 2**). Again, I heard nothing from you regarding an amended disclosure.

On December 23, 2016, I again raised the deficiencies in Mr. Gluhaich’s disclosure. (December 2016 email exchange, **Exhibit 3**). On December 27, 2016, you acknowledged your continued failure to provide Defendants with an amended disclosure, granting Defendants “an open extension for submitting any expert reports rebutting the opinions of Mr. Gluhaich until [Defendants] have received Plaintiffs’ amended disclosure, deposed Mr. Gluhaich, and provided any rebuttal expert(s) with sufficient opportunity to review that material and prepare rebuttal report(s).” *Id.*

To date, you have not amended Mr. Gluhaich’s disclosure to comply with NRCP 16.1(a)(2)(B). Thus, despite the expert disclosure deadline having run more than **two months ago**, Plaintiffs inexplicably continue to fail to comply with the expert disclosure requirements. You were indisputably aware of the fact that Plaintiffs’ disclosures did not comply with the Nevada Rules of Civil Procedure at the time that you served the deficient disclosure or immediately thereafter, as demonstrated by our December 5, 2016, telephonic conversation. (*See also* December 5, 2016, email, **Exhibit 1**). Further, Defendants graciously granted you a 6-day extension to comply with the Nevada Rules of Civil Procedure and provide an amended disclosure. However, more than **two months later**, you have still failed to comply without any justification whatsoever.

Plaintiffs’ failure to comply with the Nevada Rules of Civil Procedure in the first instance, or to rectify their failure by providing an amended disclosure, is severely prejudicing Defendants. Indeed, as you are aware, discovery in this case closes on March 2, 2017. Thus, regardless of what Plaintiffs do at this point, this discovery deadline would need to be extended to enable the Defendants to complete discovery and disclose rebuttal experts in the time permitted by rule, the parties’ joint case conference report, and the stipulation and order on file

Brian Moquin
February 3, 2017
Page 3

with the Court. Further, Defendants plan to file significant additional motions to streamline this case for trial and eliminate all of Plaintiffs' unmeritorious claims and requests for damages, and need to complete discovery related to Mr. Gluhaich's opinions, including the deposition of Mr. Gluhaich and the possible disclosure of rebuttal experts, in order to prepare those motions. As motions must be fully briefed and submitted by March 31, 2017, Defendants will be also unable to comply with this deadline based upon Plaintiffs' dilatory conduct. All of this necessitates a continuance of the trial date and certain discovery and related deadlines that are tied to the trial date.

Damages disclosure.

Additionally, as you are aware, Plaintiffs have also failed to provide Defendants with an NRCP 16.1 disclosure of their complete and current damages. You acknowledged as much in open court.

NRCP 16.1(a)(1)(C) requires a party to provide "a computation of any category of damages claimed by disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered" This obligation must be met within fourteen (14) days of the early case conference, which must take place within thirty (30) days of the filing of the answer. NRCP 16.1. Courts interpreting the federal counterpart to NRCP 16.1(a)(1)(C) have explained that "the 'category of damages' disclosure requires more than a list of the broad types of damages." *Olaya v. Wal-Mart Stores, Inc.*, 2:11-CV-997-KJD-CWH, 2012 WL 3262875 (D. Nev. Aug. 7, 2012). Indeed, the rule, "by its very terms," requires "a 'computation,' supported by documents." *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006). NRCP 37(c)(1) provides that "[a] party that without substantial justification fails to disclose information required by Rule 16.1 . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed," and "[t]he burden is upon the disclosing party to show that the failure to disclose information or witnesses was justified or harmless." *Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 594 (D. Nev. 2011).

While the Court provided you with 15 days from the date of the Court's entry of its order regarding Defendants' summary judgment motion to provide Defendants with your NRCP 16.1 damages, this is obviously an absolute outside time limit to comply with your NRCP 16.1 obligations. Nothing is preventing you from doing so sooner; in fact, Plaintiffs were obligated to meet this requirement within a few months of filing their Nevada complaint. Indeed, it would be patently prejudicial to Defendants to receive Plaintiffs' damages model within mere days of the close of discovery, especially since previous correspondence indicates that you are planning on revising Plaintiffs' damages model significantly (which intention seems to be corroborated by the Wooley damages spreadsheet you provided to me for settlement discussions, as that document certainly contains a new damages model and new calculations). Please promptly

Brian Moquin
February 3, 2017
Page 4

provide a supplemental disclosure with a mathematical computation of damages in each category, and produce the documents or other material upon which such computations are based.

Once again, Plaintiffs' failure to comply with the Nevada Rules of Civil Procedure is significantly prejudicing Defendants. As discussed *supra*, discovery closes in less than four weeks. If Plaintiffs are seeking additional or different damages, Defendants are entitled to conduct discovery and disclose expert testimony opining on those damages. Defendants discussed this in detail with you in December of 2016. (December 2016 email exchange, **Exhibit 3**). At this point, it will be impossible for Defendants' expert to opine on new damages theories under the current discovery deadlines. As with Plaintiffs' deficient disclosure of Mr. Gluhaich, Plaintiffs' failure to provide a timely damages disclosure pursuant to NRCP 16.1 also compromises Defendants' ability to prepare dispositive motions and necessitates a continuance.

Outstanding discovery.

Finally, we ask again that Plaintiffs please provide Defendants with any discoverable information and documentation relating to Mr. Wooley's efforts to re-let the Highway 50 Property or to refinance his loan on that property. You have been promising to disclose these documents for more than 10 months, but have yet to do so. (March 23, 2016, email, **Exhibit 4**).

Based on the foregoing, there is no question that a continuance of the trial date and certain discovery and related deadlines is needed. If you and your clients are not amenable to a continuance, we will have no choice but to pursue all available legal remedies, including but not limited to seeking NRCP 37 sanctions or filing a Motion to Continue the Trial Date. We would like to resolve this issue amicably if possible, and therefore believe that a stipulation to a short continuance is the best solution. Thus, I have attached a draft stipulation for your review. See **Exhibit 5**. In light of the time-sensitive nature of these issues, please respond by no later than the close of business on **Tuesday, February 7, 2017** regarding your willingness to sign the stipulation, so that we can act in a timely manner to preserve our clients' rights if you are not willing to sign.

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

Sincerely,



Brian R. Irvine

BRI: mr
Enclosures
Cc: David O'Mara
david@omaraalaw.net

EXHIBIT 1

EXHIBIT 1

Mina Reel

From: Brian Moquin <bmoquin@lawprism.com>
Sent: Monday, December 05, 2016 12:17 PM
To: Mina Reel
Cc: David O'Mara, Esq.; John P. Desmond; Brian R. Irvine; Anjali D. Webster
Subject: Re: Willard Wooley v. BHI
Attachments: 20161205 Wooley Damages Calculation - v1.3.pdf

Brian—

Per our conversation a few minutes ago, attached is a PDF version of the final damages calculation spreadsheet for the Wooley Plaintiffs for use in the ongoing informal settlement negotiations between Tim Herbst and Ed Wooley with Dan Gluhaich evidently serving as intermediary. Please forward this to Tim Herbst as you see fit. Note that I will be tendering supplemental disclosures in the imminent future that will include the actual spreadsheet.

We also discussed your desire to re-depose Dan Gluhaich as an expert as soon as possible; I will check with him as to available dates and will get back to you shortly. To that end, you agreed to allow Plaintiffs to provide an amended expert witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying in the interest of minimizing the amount of time needed for the deposition.

Best,
Brian

Brian P. Moquin, Esq.
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EXHIBIT 2

EXHIBIT 2

Brian R. Irvine

From: Brian Moquin <bmoquin@lawprism.com>
Sent: Friday, December 09, 2016 12:51 PM
To: Brian R. Irvine
Cc: david@omaralaw.net; Anjali D. Webster
Subject: Re: Willard / Wooley v. BHI

Brian—

I have had a call outstanding to Mr. Gluhaich for the past few days, as I need to speak with him regarding the details of the supplemental disclosure. I have attempted to contact him every day but thus far have not received a return call. I will try to contact him again shortly.

With respect to your claim that there are damages in the spreadsheet sent earlier this week that you have never seen before, I have now gone through all the damage claims as related in the Wooley Plaintiffs' Responses to Defendants' First Set of Interrogatories ("the SROG Responses") served on you on July 9, 2015, and here are the differences (decreases in red, increases in green):

- **Highway 50 Property Tax** claim decreased by \$448.99 from \$1,500.00 to \$1,051.01.
- **Highway 50 Insurance** claim decreased by \$3,105.00 from \$3,840.00 claimed in the SROG Responses to \$735.00 due to the fact that only the first payment on the new policy in 2013 was paid directly by the Wooleys, with the remaining payments paid by the property management company and then reimbursed by the Wooleys being reflected in the Property Expenses annual totals.
- **Baring Property Costs of Sale** increased by \$1,381.83 from \$147,847.30 claimed in the SROG Responses to \$149,229.13 — this is because the spreadsheet number includes the \$1,225.34 in property taxes and \$156.49 in sewer use fees that were paid by the Wooleys in advance of closing as indicated on the HUD-1 Settlement Statement for the sale of the Baring Property.
- **Baring Property Diminution in Value** increased by \$30.00 from \$186,522 claimed in the SROG Responses to \$186,552 — this was a typographical error in the SROG responses.
- **Federal Capital Gain Tax Liability** claim decreased by \$34,167.00 from the *estimated* \$378,000.00 claimed in the SROG Responses to the actual amount of \$343,833.00.
- **State Capital Gain Tax Liability** claim increased by \$2,946.00 from the *estimated* \$134,000.00.00 t claimed in the SROG Responses to the actual amount of \$136,946.00.
- **2013 Maintenance Costs** claim decreased by \$2,051.85 from { \$12,374.38 + \$2,500.00 = \$14,874.38 } claimed in the SROG Responses to \$12,822.53 due to reliance on the more accurate end-of-year report contained in the December 2013 Property Management Report.
- **2014 Maintenance Costs** claim decreased by \$5,971.26 from { \$9795.89 + \$6,000.00 = \$15,795.89 } claimed in the SROG Responses to \$9,824.63 due to reliance on the more accurate end-of-year report contained in the December 2013 Property Management Report.
- **Accelerated Rent** claim decreased by \$653,181.35 from \$3,323,543.49 claimed in the SROG Responses to \$2,670,362.14. The larger amount in the SROG Responses had not to take into account the \$5,000.00/month decrease in rent under the terms of the Highway 50 Second Amended Lease Agreement.

These claims were unchanged:

- **Highway 50 Property Diminution in Value** claim of \$2,635,000.00.
- **Special Damages for Attorney Fees for Goldblatt & Associates** claim of \$45,088.
- **Baring Property Diminution in Value** claim of \$186,552.00.

The spreadsheet contains the following additional claims:

- **Carson City Utilities** claim of \$284.48, the invoice for which your office forwarded to my clients when your clients received it.
- **2014 Loss Carry Forward** claim of \$27,293.00 which Plaintiffs had not realized had been incurred until very recently.
- **2015 Property Expenses** claim of \$12,165.99 incurred from January 2015 through December 2016.
- **2016 Property Expenses** claim of \$8,776.74 incurred from January 2016 through September 2016.
- **Highway 50 Appraisal Fee** claim of \$3,000.00 incurred June 10, 2015.

The total additional these claims that were not included in the Wooleys' SROG Responses total \$51,520.21, but of that amount only the claim for Carson City Utilities of \$284.48 was known to the Wooley Plaintiffs when their SROG Responses containing the original damages calculation was tendered.

Overall, the total damages claimed in the spreadsheet decreased by \$660,150.14 from the \$6,882,171.06 claimed in the SROG Responses to \$6,242,963.65. The only supporting documentation regarding the calculations in the spreadsheet that has not yet been formally tendered to you through discovery is the Highway 50 Property Management Report for September 2016, which the Wooleys only recently received.

Hence, contrary to your assertion, the Wooley Plaintiffs have not "changed position" regarding their damages claim, have not added any new categories of damages, and have not failed to meet their obligations under NRCP 16.1(a)(1)(C). Consequently, I cannot see how your clients have been prejudiced — especially given the fact that the total damages claim *decreased* by \$660,155.14 and your clients were already formally provided with all supporting evidence supporting the calculations in the spreadsheet except for a single recent property management report.

After reviewing the analysis above, if you still believe that the Wooley Plaintiffs have not met their obligations under NRCP 16.1(a)(1)(C) or are claiming new categories of damages in the spreadsheet and as a result your clients are prejudiced, please provide me with specific information regarding the perceived deficiencies or prejudicially novel claims and I will rectify any actual deficiencies *post haste*. As I mentioned earlier this week, I will be tendering a supplemental discovery response imminently that will include a copy of the final live spreadsheet in which the damages are calculated as well as a supplemental SROG Response elaborating on how the calculations were made.

With respect to the supplemental expert disclosure, I have been trying to reach Mr. Gluhaich since Tuesday to complete the disclosure but he has not returned my calls. I will be trying to contact him again as soon as I send this reply; if I am successful in reaching him, you will have the supplemental disclosure today. While drafting this response, one of my clients called to tell me that Mr. Gluhaich is in the office today and should be reachable, so I'm confident this will happen today.

In terms of deposition dates, Mr. Gluhaich is available anytime including as early as next week and would like to get this out of the way as soon as possible. I am only not available on Tuesday, December 13th — any other day will work for me. If the deposition will be held in San Jose as it was last time, Mr. Gluhaich will waive the 15 days notice required under NRCP 30(b)(1).

Best,
Brian

Brian P. Moquin, Esq.
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408.843.1678 fax

On Dec 9, 2016, at 8:46 AM, Brian R. Irvine <BR Irvine@dickinson-wright.com> wrote:

Dear Brian-

I did not receive the supplemented expert disclosure for Mr. Gluhaich yesterday that you had promised, nor have I received deposition dates for him. As you know, we have a number of deadlines coming up in the litigation, including the deadline for disclosing rebuttal experts. Obviously, we will be prejudiced by further delay in learning all of the expert opinion testimony that plaintiffs intend to present at trial. Please provide the information immediately.

In addition, in the Wooley plaintiffs' damages spreadsheet you provided me earlier this week, you included new damages calculations that we have never seen before. As you know, we have been demanding that plaintiffs meet their obligations under NRCP 16.1(a)(1)(C) to provide "[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter . . . on which such computation is based" for more than a year. For unknown reasons, plaintiffs have utterly refused to meet this obligation. Given the Wooley plaintiffs' apparent change in position regarding damages, this is concerning to say the least, and continues to prejudice defendants' ability to defend the case. Moreover, it is impossible for us to recommend any settlement to our clients without this information. Please provide NRCP 16.1 damages computations for all plaintiffs, immediately.

Please do not hesitate to contact me with any questions.

Thank you,

Brian Irvine

Brian R. Irvine Member

100 West Liberty Street
Suite 940
Reno NV 89501-1991

Phone 775-343-7507

Fax 844-670-6009

<image73f6b7.JPG><imageeb6169.JPG> Email BIrvine@dickinsonwright.com
<image37df31.JPG>

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EXHIBIT 3

EXHIBIT 3

Mina Reel

From: Brian Moquin <bmoquin@lawprism.com>
Sent: Tuesday, December 27, 2016 10:09 AM
To: Brian R. Irvine
Cc: David O'Mara, Esq.; John P. Desmond; Anjali D. Webster; Mina Reel
Subject: Re: Willard Wooley v. BHI
Attachments: 2014 Wooley HI State Tax Return -redacted.pdf

Brian—

You are granted an open extension for submitting any expert reports rebutting the opinions of Mr. Gluhaich until you have received Plaintiffs' amended disclosure, deposed Mr. Gluhaich, and provided any rebuttal expert(s) with sufficient opportunity to review that material and prepare rebuttal report(s).

Attached is the 2014 Hawaii State Tax return for the Wooleys. The remaining supplemental disclosures as well as the amended expert witness disclosure will be tendered today.

Regards,
 Brian

On Dec 23, 2016, at 10:19 AM, Brian R. Irvine <BIrvine@dickinson-wright.com> wrote:

Dear Brian-

As you know, Plaintiffs disclosed Dan Gluhaich as a lay expert witness on December 2, 2016, the deadline for the disclosure of initial expert witnesses. Plaintiffs' disclosure indicated that Mr. Gluhaich would offer expert testimony in more than ten separate categories, but did not identify any of the actual opinions that Mr. Gluhaich intended to offer at trial.

Defendants disclosed the expert report of Michelle Salazar, also on December 2, 2016. Ms. Salazar's report addressed certain issues with Plaintiffs' damages model (ascertained through the First Amended Complaint and Plaintiffs' responses to interrogatories, rather than through an NRCP 16.1 damages disclosure, which Plaintiffs have never provided) and contained all of the direct (non-rebuttal) opinions that Ms. Salazar intended to offer about Plaintiffs' damages model that existed as of December 2, 2016.

You and I spoke on December 5, 2016. During that phone call, I indicated that we would need significant additional information about Mr. Gluhaich's potential expert testimony, including a supplemental disclosure providing the opinions he intended to offer and an additional deposition of Mr. Gluhaich, before we could prepare and disclose potential expert report(s) rebutting Mr. Gluhaich. During our call, you recognized that the December 2, 2016 disclosure of Mr. Gluhaich did not contain any specific information about the opinions he intended to offer and promised to: (1) provide available deposition dates for Mr. Gluhaich shortly; and (2) provide an amended expert witness disclosure by Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich would be testifying. As of this morning, we have not received any such amended disclosure for Mr. Gluhaich or any deposition dates. Obviously, Plaintiffs' failure to provide this information has made it impossible for Defendants to comply with the January 3, 2017 deadline for disclosing the reports of rebuttal expert witnesses because we simply have no information about the substance of Mr. Gluhaich's opinions that we may wish to rebut. Please confirm that Plaintiffs will grant Defendants an open extension for submitting any expert reports rebutting the opinions of Mr. Gluhaich until we have received your amended disclosure, deposed

Mr. Gluhaich and provided any rebuttal expert(s) with sufficient opportunity to review that material and prepare rebuttal report(s). If we do not receive such an extension, we will seek relief from the Court on shortened time next week. As Ms. Salazar's expert report disclosed December 2 was complete, we expect Plaintiffs to meet the January 3, 2017 deadline for disclosing any expert report rebutting her opinions.

In addition, following our discussion on December 5, you emailed me a spreadsheet with a new damages computation for the Wooley plaintiffs, and indicated that I could provide the spreadsheet to my clients for settlement purposes only. However, the "settlement only" spreadsheet contained a new damages model that Plaintiffs had never before utilized in the case; namely, the spreadsheet used a \$7,500 "fair rental value" deduction as part of the "accelerated rent" calculation. Prior to receiving the spreadsheet December 5, we had never seen any calculation of accelerated rent using that number or applying any formula with any discount for fair rental value. In the Wooley plaintiffs' July 2015 response to Interrogatory No. 7, they indicated that "[t]he remaining amount of rent due under the Lease was calculated as the sum of each year's annual payments shown in red in the table above, yielding a total of \$4,420,244.00. The Net Present Value as of March 1, 2013 was then calculated using the 'NPV' formula in the Apple Numbers spreadsheet application, applying a 4% Discount Rate per the terms of the Lease...". No mention was made of any reduction in that accelerated rent figure for "fair rental value" as is set forth in the new spreadsheet. This poses a significant problem because Defendants have not had the ability to conduct discovery about this new computation of damages or the methodology used to arrive at the numbers in the Wooley spreadsheet. And, because we never saw the spreadsheet (or received any other indication of the new methodology) prior to the expert disclosure deadline, Defendants were prejudiced in that they were unable to have an expert examine the methodology and calculation and comment on it in any way.

Damages for both the Wooley plaintiffs and the Willard plaintiffs have been and continue to be a moving target, and we have not been able to retain experts to opine on the Wooley plaintiffs' new damages (nor have Plaintiffs officially disclosed that damages model - the spreadsheet remains "for settlement purposes only" and we accordingly have not provided it to any potential expert(s)). We still have never received an NRCP 16.1 damages computation from either set of Plaintiffs, despite numerous demands. Please ensure that Plaintiffs meet their obligations to provide such computations immediately, or we will seek to preclude Plaintiffs from seeking any non-disclosed damages at trial, including those contained in the Wooley spreadsheet you sent me on December 5. We also reserve the right to provide Plaintiffs' damages disclosure to Ms. Salazar so she can provide new opinions about any new damages model.

Finally, we still do not have any documentation supporting the Wooley plaintiffs' claim for State Capital Gains Liability. Please provide that immediately.

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

Brian Irvine

From: Brian Moquin [bmoquin@lawprism.com]
Sent: Monday, December 05, 2016 12:16 PM
To: Mina Reel
Cc: David O'Mara, Esq.; John P. Desmond; Brian R. Irvine; Anjali D. Webster
Subject: Re: Willard Wooley v. BHI

Brian—

Per our conversation a few minutes ago, attached is a PDF version of the final damages calculation spreadsheet for the Wooley Plaintiffs for use in the ongoing informal settlement negotiations between Tim Herbst and Ed Wooley with Dan Gluhaich evidently serving as intermediary. Please forward this to Tim Herbst as you see fit. Note that I will be tendering supplemental disclosures in the imminent future that will include the actual spreadsheet.

We also discussed your desire to re-depose Dan Gluhaich as an expert as soon as possible; I will check with him as to available dates and will get back to you shortly. To that end, you agreed to allow Plaintiffs to provide an amended expert witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying in the interest of minimizing the amount of time needed for the deposition.

Best,
Brian

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<imagee66404.JPG><imagea5b9c8.JPG> Email Blrvine@dickinsonwright.com
<imagea86116.JPG>

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EXHIBIT 4

EXHIBIT 4

Mina Reel

From: Brian Moquin <bmoquin@lawprism.com>
Sent: Wednesday, March 23, 2016 8:04 AM
To: Anjali D. Webster; david@omaralaw.net
Cc: Brian R. Irvine; Mina Reel
Subject: Re: Willard et al. v. BHI et al.

In an attempt to review what documents have already been produced, I unzipped the discovery responses in the Gluhaich Subpoena folder, inadvertently doing so in the Dropbox share. No new documents were added.

I was waiting for additional State returns from my clients, and am now in possession of all those that they have, which I will send to you shortly.

I am also putting together additional documents related to the Highway 50 property loan, which was taken over by another lender a few months ago. I have asked Mr. Gluhaich to compile a list of all entities that have expressed an interest in that property, expect to receive those documents either today or tomorrow. Once I have received them, I will be able to send updated SROG responses to my clients for verification.

Brian

On 3/22/16 9:56 AM, Anjali D. Webster wrote:

Dear Brian:

Can you please advise the status of the tax returns? Additionally, as noted in my previous email, you represented that you will provide bates stamped copies of all tax returns, including bates stamped copies of those tax returns which have already been produced (none are presently bates stamped) by last Friday. We have not yet received those.

Additionally, my Dropbox account indicates that numerous documents in the "Gluhaich Subpoena" folder were modified yesterday, but none of these documents appear to be new. Can you please provide me with a list of exactly which documents you have provided/are providing to us this week?

Thanks very much,

Anjali

Anjali D. Webster Attorney

100 West Liberty Street
 Suite 940
 Reno NV 89501-1991
 Phone 775-343-7498
 Fax 775-786-0131
 Email AWebster@dickinsonwright.com



From: Brian Moquin [<mailto:bmoquin@lawprism.com>]
Sent: Monday, March 21, 2016 8:20 AM
To: Anjali D. Webster; david@omaralaw.net

Cc: Brian R. Irvine; Mina Reel

Subject: Re: Willard et al. v. BHI et al.

I'm working on finalizing these for you, will have those in my clients' possession to you mid-morning at the latest.

On 3/17/16 10:24 AM, Anjali D. Webster wrote:

- 2005 Overland Federal Tax Return. You mentioned yesterday that you do not presently have that tax return. Please confirm.
- 2005 Overland State Tax Return.
- 2013 Overland State Tax Return.
- 2014 Overland State Tax Return.
- 2009 Willard State Tax Return.
- 2013 Willard State Tax Return.
- 2014 Willard State Tax Return.
- 2005 Wooley State Tax Return.
- 2007 Wooley State Tax Return.
- 2008 Wooley State Tax Return.
- 2009 Wooley State Tax Return.
- 2010 Wooley State Tax Return.
- 2014 Wooley State Tax Return.

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EXHIBIT 5

EXHIBIT 5

1 **3980**

2 DICKINSON WRIGHT, PLLC

3 JOHN P. DESMOND

4 Nevada Bar No. 5618

5 BRIAN R. IRVINE

6 Nevada Bar No. 7758

7 ANJALI D. WEBSTER

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13 Email: jdesmond@dickinsonwright.com

14 Email: birvine@dickinsonwright.com

15 Email: awebster@dickinsonwright.com

16 *Attorney for Defendants*

17 *Berry Hinckley Industries, and*

18 *Jerry Herbst*

19 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

20 **IN AND FOR THE COUNTY OF WASHOE**

21 LARRY J. WILLARD, individually and as
22 trustee of the Larry James Willard Trust Fund;

23 OVERLAND DEVELOPMENT

24 CORPORATION, a California corporation;

25 EDWARD C. WOOLEY AND JUDITH A.

26 WOOLEY, individually and as trustees of the

27 Edward C. Wooley and Judith A. Wooley

28 Intervivos Revocable Trust 2000,

CASE NO. CV14-01712

DEPT. 6

STIPULATION AND [PROPOSED]
ORDER TO CONTINUE TRIAL

Plaintiff,

vs.

(THIRD REQUEST)

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

Defendants.

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

Counterclaimants,

vs

1 LARRY J. WILLARD, individually and as
2 trustee of the Larry James Willard Trust Fund;
3 OVERLAND DEVELOPMENT
4 CORPORATION, a California corporation;

5
6 Counter-defendants.

7
8 Plaintiffs Edward C. Wooley and Judith A. Wooley, individually and as trustees of the
9 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs/ Counter-
10 defendants Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and
11 Overland Development Corporation (collectively, "Plaintiffs"); and Defendants/ Counterclaimants
12 Berry-Hinckley Industries and Jerry Herbst (collectively, "Defendants," and together with Plaintiffs,
13 "the Parties"), by and through their respective attorneys of record, hereby stipulate and agree that
14 good cause exists for this Court to enter an order to vacate the trial date scheduled to begin on May
15 1, 2017, and to re-set certain discovery and related deadlines to comport with the new trial date set
16 by the Court.

17
18 **RECITALS**

19 1. The deadline for the disclosure of initial expert witnesses in this case was December
20 2, 2016.

21 2. On December 2, 2016, Defendants disclosed Michelle Salazar as an expert on certain
22 of Plaintiffs' claimed categories and computations of damages. Defendants' disclosure of Ms.
23 Salazar fully-complied with the requirements of NRCP 16.1 and NRCP 26, including disclosure of:
24 (a) Ms. Salazar's signed written report containing a complete statement of all opinions to be
25 expressed and the basis and reasons therefor, the data or other information considered by the witness
26 in forming the opinions, and any exhibits to be used as a summary of or support for the opinions; and
27 (b) the qualifications of the witness, including a list of all publications authored by the witness
28 within the preceding 10 years, the compensation to be paid for the study and testimony, and a listing
of any other cases in which the witness has testified as an expert at trial or by deposition within the
preceding four years.

1 3. Plaintiffs did not disclose any expert to rebut Ms. Salazar's opinions by the January 3,
2 2017 deadline for disclosing rebuttal experts.

3 4. On December 2, 2016, Plaintiffs disclosed Dan Gluhaich as a non-retained expert.
4 Plaintiffs' disclosure of Mr. Gluhaich indicated that Mr. Gluhaich would offer testimony regarding
5 twelve separate subject matters and included Mr. Gluhaich's resume, but did not include "a summary
6 of the facts and opinions to which the witness is expected to testify" as required by NRCP
7 16.1(a)(2)(B).

8 5. Because Plaintiffs' disclosure of Mr. Gluhaich did not include a summary of the facts
9 and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B),
10 Defendants have been unable to conduct a meaningful deposition of Mr. Gluhaich or to retain
11 experts to rebut Mr. Gluhaich's opinions, because those opinions remain unknown to Defendants.

12 6. Following receipt of Plaintiffs' supplemental disclosure of Mr. Gluhaich, if any,
13 which includes a summary of the facts and opinions to which the witness is expected to testify as
14 required by NRCP 16.1(a)(2)(B), Defendants intend to depose Mr. Gluhaich and retain experts to
15 rebut his opinions.

16 7. On January 10, 2017, the parties appeared in this Court for a hearing on Defendants'
17 Motion for Partial Summary Judgment. At the hearing, the parties discussed with the Court
18 Plaintiffs' obligation to provide, pursuant to NRCP 16.1(a)(1)(C), "[a] computation of any category
19 of damages claimed by the disclosing party, making available for inspection and copying as under
20 Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on
21 which such computation is based, including materials bearing on the nature and extent of injuries
22 suffered." (January 10, 2017 Hearing Transcript at 18, 42-43 and 61-62). Plaintiffs conceded at the
23 hearing that they have not yet provided Defendants with a complete damages disclosure pursuant to
24 NRCP 16.1(a)(1)(C), and the Court ordered Plaintiffs "to serve, within 15 days after the entry of the
25 summary judgment, an updated 16.1 damage disclosure." *Id.* at 68.

26 8. Upon receipt of Plaintiffs' NRCP 16.1 damages disclosure, Defendants intend to have
27 Michelle Salazar supplement her initial expert report to include any opinions about any new or
28 revised damages claims or calculations submitted by Plaintiffs, and Defendants may also need to

1 conduct additional fact discovery on any new or revised damages claims or calculations submitted
2 by Plaintiffs.

3 9. Discovery in this matter currently is scheduled to close on March 2, 2017, and
4 dispositive motions must be filed and submitted for decision no later than March 31, 2017.

5 10. Because Plaintiffs have not yet provided a complete NRCP 16.1 damages disclosure,
6 Defendants will not be able to complete necessary fact discovery on Plaintiffs' damages, or to
7 disclose an updated expert report of Michelle Salazar within the time currently allowed for
8 discovery. And, because Plaintiffs have not yet provided an expert disclosure of Mr. Gluhaich that
9 includes a summary of the facts and opinions to which the witness is expected to testify as required
10 by NRCP 16.1(a)(2)(B), Defendants will be unable to complete the deposition of Mr. Gluhaich or to
11 retain and disclose experts to rebut Mr. Gluhaich's opinions within the time currently allowed for
12 discovery.

13 11. Moreover, any further extension of the discovery deadlines would prevent the parties
14 from being able to file and submit dispositive motions by March 31, 2017 so such motions can be
15 appropriately considered and decided by the Court prior to trial.

16 12. Therefore, the parties agree that the current trial date of May 1, 2017 must be vacated
17 and rescheduled.

18 13. The parties recognize that this Court has ordered that no further continuances be
19 granted, but in light of the foregoing, agree and stipulate that a brief additional continuance of six
20 months is necessary, and hereby request a continuance of the current trial date and certain discovery
21 deadlines. Undersigned counsel certifies that their respective clients have been advised that a
22 stipulation for continuance is to be submitted on their behalf and that the parties have no objection
23 thereto.

24 **STIPULATION**

25 Based upon the foregoing, the parties hereby stipulate and agree that should this Court enter
26 an order:

- 27 1. Vacating the current trial date of May 1, 2017;

1 2. Requiring the Parties agree to appear and reschedule the trial within five (5) days of
2 the date of this Court's Order approving the Parties' stipulation; and

3 3. Requiring Plaintiffs to serve Defendants with an updated initial expert disclosure of
4 Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26 within thirty (30) days of the
5 date of the Order approving this Stipulation.

6 The parties further stipulate and agree that:

7 1. The discovery deadline shall be extended until seventy-five (75) days before the first
8 day of the rescheduled trial; provided, however, that if the 75th day before trial falls on a weekend or
9 holiday, the deadline shall be the following judicial day;

10 2. The deadline to serve, file, and submit for decision any dispositive motions shall be
11 extended until forty-five (45) days before the first day of the rescheduled trial; provided, however,
12 that if the 45th day before trial falls on a weekend or holiday, the deadline shall be the following
13 judicial day.

14 3. The deadline for Defendants to serve a supplemental expert disclosure of Michelle
15 Salazar providing any opinions about any new or revised damages claims or calculations submitted
16 by Plaintiffs shall be extended until sixty (60) days before the close of discovery; provided, however,
17 that if the 60th day before the close of discovery falls on a weekend or holiday, the deadline shall be
18 the following judicial day.

19
20 ///

21
22 ///

23
24 ///

25
26 ///

1 4. The deadline for Defendants to serve any rebuttal expert disclosures shall be
2 extended until forty-five (45) days after Plaintiffs serve Defendants with an updated initial expert
3 disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26. No rebuttal
4 testimony is permitted for the expert report served by Defendants on December 2, 2016 as that
5 deadline expired prior to this Stipulation.

6 **AFFIRMATION**
7 **Pursuant to NRS 239B.030**

8 The undersigned does hereby affirm that the preceding document does not contain the social
9 security number of any person.

10 Dated this __ day of February, 2017.

Dated this __ day of February, 2017.

11 Attorneys for Plaintiffs

Attorneys for Defendants

12
13
14
15 LAW OFFICES OF BRIAN P. MOQUIN
16 Brian P. Moquin
17 3287 Ruffino Lane
18 San Jose, California 95148

19 THE O'MARA LAW FIRM
20 David C. O'Mara
21 311 E. Liberty Street
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23
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26 DICKINSON WRIGHT, PLLC
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28 BRIAN R. IRVINE
ANJALI D. WEBSTER
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Fax: (775) 786-0131

ORDER

This Court, having reviewed the Stipulation to Continue Trial submitted by the parties, and good cause appearing,

IT IS HEREBY ORDERED that good cause exists to vacate the trial date in the above-referenced matter.

IT IS FURTHER ORDERED that the parties shall reset the trial within five (5) days of this Order.

IT IS FURTHER ORDERED that the discovery deadline shall be extended until 75 days before the first day of the rescheduled trial; provided, however, that if the 75th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.

IT IS FURTHER ORDERED that the deadline to serve, file, and submit for decision any dispositive motions shall be extended until 45 days before the first day of the rescheduled trial; provided, however, that if the 45th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.

IT IS FURTHER ORDERED that the deadline for Defendants to serve a supplemental expert disclosure of Michelle Salazar providing any opinions about any new or revised damages claims or calculations submitted by Plaintiffs shall be extended until ninety (60) days before the close of discovery; provided, however, that if the 60th day before the close of discovery falls on a weekend or holiday, the deadline shall be the following judicial day.

///

///

///

///

1 IT IS FURTHER ORDERED that the deadline for Defendants to serve any rebuttal expert
2 disclosures shall be extended until forty-five (45) days after Plaintiffs serve Defendants with an
3 updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP
4 26. No rebuttal testimony is permitted for the expert report served by Defendants on December 2,
5 2016 as that deadline expired prior to this Stipulation.

6 IT IS SO ORDERED.

7 DATED this ____ day of _____, 2017.

8
9
10 _____
DISTRICT COURT JUDGE

11 *Respectfully submitted by:*

12 DICKINSON WRIGHT, PLLC

13
14
15 _____
JOHN P. DESMOND
16 Nevada Bar No. 5618
BRIAN R. IRVINE
17 Nevada Bar No. 7758
ANJALI D. WEBSTER
18 Nevada Bar No. 12515
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19 Reno, NV 89501
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21 Email: Brvine@dickinsonwright.com
22 Email: Awebster@dickinsonwright.com

23 *Attorneys for Defendants*
24 *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 the attached **STIPULATION AND [PROPOSED] ORDER TO CONTINUE TRIAL (THIRD REQUEST)** on the party(s) set forth below by:

- ☐ 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.
- ☒ By electronic service by filing the foregoing with the Clerk of Court using the E Flex system, which will electronically mail the filing to the following individuals.
- ☐ Certified Mail
- ☐ (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered this date to the addressee(s) set forth below.
- ☐ (BY FACSIMILE) on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the addressees) noted below. addressed as follows:
- ☐ By email to the email addresses below.
- ☐ Federal Express (or other overnight delivery)

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3287 Ruffino Lane
San Jose, California 95148
bmoquin@lawprism.com

David C. O'Mara
THE O'MARA LAW FIRM
311 E. Liberty Street
Reno, Nevada 89501
david@omaralaw.net

DATED this ____ day of February, 2017.

An Employee of DICKINSON WRIGHT, PLLC

EXHIBIT 8

EXHIBIT 8

09:35:40 1 IN THE SECOND JUDICIAL DISTRICT COURT OF THE

2 STATE OF NEVADA

3 IN AND FOR THE COUNTY OF WASHOE

4

5 LARRY J. WILLARD,
individually and as trustee
6 of the Larry James Willard
Trust Fund; OVERLAND DEVELOPMENT
7 CORPORATION, a California
Corporation; EDWARD C. WOOLEY
8 and JUDITH A. WOOLEY, individually
and as trustees of the Edward C.
9 Wooley and Judith A. Wooley
Intervivos Revocable Trust 2000,

10

Plaintiffs,

11

vs. Case No. CV14-01712

12

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

14

Defendants.

15 _____/

16 AND RELATED COUNTERCLAIM.

17 _____/

18

19 DEPOSITION OF DANIEL GLUHAICH

20

21 DATE: August 25, 2015

22 TIME: 9:53 a.m.

23 LOCATION: Legacy Almaden Plaza
99 Almaden Boulevard
24 6th Floor
San Jose, CA 95113

25

1 For the Plaintiffs: LAW OFFICES OF BRIAN P. MOQUIN
2 BY: BRIAN P. MOQUIN,
3 Attorney at Law
4 3506 La Castellet Court
5 San Jose, CA 95148
6 408 300-0022
7 bmoquin@brianmoquin.com

8 For the Defendants: DICKINSON WRIGHT, PLLC
9 BY: BRIAN R. IRVINE,
10 Attorney at Law
11 100 West Liberty Street
12 Suite 940
13 Reno, NV 89501
14 775 343-7507
15 birvine@dickinsonwright.com

16 The Reporter: BELL & MYERS, CSR, INC.
17 BY: IRENE T. FONTANA, CSR, RDR,
18 CRR, CLR
19 2055 Junction Avenue
20 Suite 200
21 San Jose, CA 95131
22 408 287-7500
23 calendar@bellandmyers.com

24 ALSO PRESENT: MARIA HURST,
25 Videographer

10:11:19 1 license?

10:11:20 2 A. No.

10:11:20 3 Q. Can you tell me your current business address

10:11:26 4 and phone number, please?

10:11:28 5 A. 175 East Main Avenue, Suite 130, Morgan Hill,

10:11:34 6 California 95037.

10:11:37 7 Q. And the phone number?

10:11:42 8 A. 408 201-0120.

10:12:03 9 Q. Would you say that over the, oh, I guess,

10:12:08 10 almost 30 years that you have been in the real estate

10:12:10 11 business, that you have developed any areas of

10:12:14 12 specialty?

10:12:14 13 A. Yes. I would say that -- I have done a lot of

10:12:17 14 residential over the last 30 years, but I've also done a

10:12:23 15 lot of net leased investment properties.

10:12:35 16 Q. Have you primarily represented sellers, buyers,

10:12:43 17 both?

10:12:43 18 A. Both.

10:12:44 19 Q. About fifty-fifty, or is there any sort of lean

10:12:56 20 to that ratio?

10:12:57 21 A. I'm probably more of a seller broker.

10:13:01 22 Q. And do you also represent parties on both sides

10:13:08 23 of lease transactions as opposed to sales?

10:13:11 24 A. I have done some leasing. I don't -- I don't

10:13:14 25 do a lot of it.

10:13:16 1 Q. Any particular reason you don't do a lot of

10:13:21 2 work representing lessors or lessees?

10:13:25 3 A. It's just never been something I have put a lot

10:13:31 4 of time in to. I do it when somebody comes to me for

10:13:35 5 it, but I don't go out and actively pursue listing a

10:13:44 6 lease building or anything like that.

10:13:49 7 Q. Understood.

10:13:59 8 I spoke with Mr. Willard on Friday. We had his

10:14:05 9 deposition. And he told me that he has worked with you

10:14:08 10 on a number of real estate deals over the years. And he

10:14:12 11 mentioned the purchase and the sale of, I think, a

10:14:16 12 medical building in Las Vegas?

10:14:17 13 A. Yes.

10:14:18 14 Q. Did you work with him on that deal, or those

10:14:20 15 deals, I guess?

10:14:20 16 A. Yes.

10:14:21 17 Q. Okay.

10:14:29 18 And what percentage of your -- of your work for

10:14:37 19 the last ten years would you say has been in Nevada

10:14:41 20 versus California?

10:14:42 21 A. I would say close to 50 percent.

10:14:46 22 Q. And out of that work in Nevada, what percentage

10:14:54 23 is Las Vegas versus Northern Nevada for the same time

10:15:02 24 period, the last ten years or so?

10:15:04 25 A. I'm going to say -- it's close, again, you

10:15:07 1 know. I mean, maybe it's 60 percent Vegas 40, percent

10:15:11 2 Northern.

10:15:16 3 Q. Can you describe to me generally the types of

10:15:26 4 deals that you have worked on in Northern Nevada. I

10:15:29 5 know you have already mentioned the Jiffy Lube that your

10:15:31 6 mom was involved in. We know you had some involvement

10:15:34 7 in both -- with both Mr. Wooley and Mr. Willard on their

10:15:40 8 properties. What else have you worked on in Northern

10:15:43 9 Nevada?

10:15:43 10 A. I have done some developing myself. I have

10:15:45 11 done some retail strip centers that I have built. I

10:15:54 12 have sold, you know, gas stations. I have sold Jiffy

10:16:05 13 Lubes. I have sold single tenant, you know, IHOPs. I

10:16:12 14 have sold land.

10:16:22 15 Q. And about -- with respect to gas stations, how

10:16:31 16 many -- how many transactions in Northern Nevada have

10:16:33 17 you been involved in where the property was a gas

10:16:35 18 station? Best of your recollection.

10:16:39 19 A. I'm going to say eight or ten.

10:16:54 20 Q. Is that eight to ten purchases and sales

10:16:58 21 combined?

10:16:59 22 A. Probably -- if I did sales and purchases,

10:17:10 23 probably maybe a little bit more. Maybe 12 or 13.

10:17:16 24 Q. Okay.

10:17:27 25 Do you -- are you in the practice of keeping a

11:07:32 1 to handle it with Mr. Goldblatt.

11:07:35 2 Q. Did you ever talk to Mr. Goldblatt about

11:07:38 3 Berry-Hinckley leaving the property?

11:07:41 4 A. I might have. I can't recall what it was

11:07:44 5 about.

11:07:44 6 Q. No specifics?

11:07:45 7 A. No.

11:07:46 8 Q. Okay.

11:08:11 9 Have you ever lived in Northern Nevada?

11:08:13 10 A. No.

11:08:14 11 Q. How many active listings do you have in

11:08:21 12 Northern Nevada, if any?

11:08:28 13 A. Right now I have probably got three or four.

11:08:35 14 Q. What properties are those?

11:08:37 15 A. I have one on Ridgeview off of Mahan in

11:08:46 16 McCarran. I have one in Fernley, Nevada. I have the

11:08:57 17 leasing for Carson City. I have a car wash in Carson

11:09:04 18 City listed. I think those are the main ones right now.

11:09:10 19 Q. Okay.

11:09:11 20 And what are the Ridgeview and Fernley

11:09:13 21 properties?

11:09:14 22 A. They are -- one in Fernley is an office

11:09:17 23 building and Ridgeview is a retail building.

11:09:22 24 Q. And do you have any buyers that you are

11:09:30 25 representing in anything in Northern Nevada right now,

11:09:33 1 whether in the middle of a deal or just interested in

11:09:39 2 investments?

11:09:41 3 A. I have people that are interested in

11:09:42 4 investments that are looking, yeah.

11:09:45 5 Q. Okay.

11:10:25 6 You testified earlier that you thought -- I

11:10:28 7 know this was an estimate -- that you worked on ten,

11:10:32 8 twelve, 134 transactions in Nevada where gas stations

11:10:35 9 were the property that was being bought or sold?

11:10:38 10 A. Yes.

11:10:38 11 Q. Okay.

11:10:40 12 How many of those were in the last five years?

11:10:43 13 A. I don't know. Maybe four or five.

11:10:53 14 Q. Okay.

11:11:12 15 So is it your practice to -- when you are going

11:11:15 16 to list a property for sale, to have a listing

11:11:18 17 agreement?

11:11:18 18 A. Yes.

11:11:19 19 Q. Okay.

11:11:19 20 In all cases?

11:11:21 21 A. Yes.

11:11:21 22 Q. And who typically prepares that listing

11:11:25 23 agreement?

11:11:26 24 A. Either myself or my assistant.

11:11:29 25 Q. And when you have a listing agreement in place,

1 DECLARATION OF DEPONENT

2

3 I, DANIEL GLUHAICH, declare under penalty of
4 perjury that I have reviewed the foregoing transcript;
5 that I have made any corrections, additions, or
6 deletions in my testimony that I deemed necessary; and
7 that the foregoing is a true and correct transcription
8 of my testimony in this matter.

9

10

11 Dated this _____ day of _____,

12 at _____,
13 [City] [State]

14

15

16

DANIEL GLUHAICH

17

18

19

20

21

22

23

24

25

1 CERTIFICATE

2

3 I, IRENE T. FONTANA, CSR, RDR, CRR, CLR, do

4 hereby certify:

5 That prior to being examined, the witness named

6 in the foregoing deposition was by me duly sworn to

7 testify to the truth, the whole truth, and nothing but

8 the truth;

9 That said deposition was taken down by me in

10 shorthand at the time and place therein named, and

11 thereafter reduced to typewriting under my direction.

12 I further certify that I am not interested in

13 the outcome of the action.

14 Dated: September 3, 2015

15

16

17

18

IRENE T. FONTANA, CSR, RDR, CRR, CLR

19

20

21

22

23

24

25

EXHIBIT 9

EXHIBIT 9

DICKINSON WRIGHT
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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.

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

Counterclaimants,

vs

LARRY J. WILLARD, individually and as
 trustee of the Larry James Willard Trust Fund;
 OVERLAND DEVELOPMENT

1 CORPORATION, a California corporation;

2 Counter-defendants.

3 _____ /
4
5 **DECLARATION OF BRIAN R. IRVINE IN SUPPORT OF**
6 **DEFENDANTS'/COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR MOTION**
7 **IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH**

8 I, Brian R. Irvine, pursuant to NRS 53.045, declare and state as follows:

9 1. I am an attorney with the law firm of DICKINSON WRIGHT, PLLC, attorneys
10 for Defendants, BERRY-HINCKLEY INDUSTRIES AND JERRY HERBST in the above-
captioned action.

11 2. I submit this Declaration in support of the Defendants'/Counterclaimants Motion
12 to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich,
13 ("Motions"). I have personal knowledge of the matters set forth in this Declaration and, if called
14 as a witness, could and would competently testify thereto.

15 3. Attached to the Motions as **Exhibit 1** is a true and correct copy of Plaintiffs
16 Initial Disclosures.

17 4. Attached to the Motions as **Exhibit 2** is a true and correct copy of Plaintiff's
18 Initial Disclosure of Expert Witness.

19 5. Attached to the Motions as **Exhibit 3** is a true and correct copy of December 5,
20 2016 email from Brian Moquin to Brian Irvine, John Desmond, Anjali Webster, David O'Mara
21 and staff.

22 6. Attached to the Motions as **Exhibit 4** is a true and correct copy of the December
23 9, 2016 email from Brian Irvine to Brian Moquin, David O'Mara and Anjali Webster.

24 7. Attached to the Motions as **Exhibit 5** is a true and correct copy of the December
25 23, 2016 email from Brian Irvine to Brian Moquin, David O'Mara, John Desmond, Anjali
26 Webster, and staff.
27
28


1 8. Attached to the Motions as **Exhibit 6** is a true and correct copy of the December
2 27, 2016 email chain between Brian Moquin, Brian Irvine, David O'Mara, John Desmond,
3 Anjali Webster, and staff.

4 9. Attached to the Motions as **Exhibit 7** is a true and correct copy of the February
5 3, 2017 letter from Brian Irvine to Brian Moquin.

6 10. Attached to the Motions as **Exhibit 8** is a true and correct copy of Excerpts of
7 the Deposition of Daniel Gluhaich.

8 I declare under penalty of perjury under the law of the State of Nevada that the
9 foregoing is true and correct.

10 DATED this 14th day of November, 2017.

11 
12 _____
13 BRIAN R. IRVINE

\$2160
DICKINSON WRIGHT PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
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*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

**DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Plaintiff,

vs.

[ORAL ARGUMENT REQUESTED]

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

Defendants.

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

Counterclaimants,

vs

LARRY J. WILLARD, individually and as
trustee of the Larry James Willard Trust Fund;

OVERLAND DEVELOPMENT
CORPORATION, a California corporation;

Counter-defendants.

Defendants/Counterclaimants Berry-Hinckley Industries (“BHI”) and Jerry Herbst (collectively, “Defendants”), by and through their counsel of record, Dickinson Wright PLLC, hereby file this Motion for Partial Summary Judgment on the claims for diminution in value damages made by EDWARD E. WOOLEY AND JUDITH A. WOOLEY (“Wooley”) and LARRY J. WILLARD individually and as trustee and OVERLAND DEVELOPMENT CORPORATION (“Willard”). This Motion is supported by NRCP 56, the memorandum of points and authorities, all papers and pleadings on file herein, and any information that this Court may choose to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs seek to recover their purported “diminution in value” damages allegedly resulting from Defendants’ claimed breach of the parties’ respective leases. For the reasons discussed herein, Plaintiffs are not entitled to these damages as a matter of law, and regardless, Plaintiffs have wholly failed to satisfy their burden to prove damages. Accordingly, Defendants respectfully request judgment in their favor on these claims.

PERTINENT FACTS AND PROCEDURAL HISTORY

1. Wooley.

In 2005, BHI and Wooley entered into a Lease Agreement (the “Highway 50 Lease”) for property located at 1820 East U.S. Highway 50, Carson City, Nevada (the “Highway 50 Property”). (Highway 50 Lease, **Exhibit 1**).¹ BHI was the only tenant on the Highway 50 Property, *id.*, and it is undisputed that BHI was not an “anchor tenant.”

¹All Exhibits attached to this Motion were also produced in Defendants’ respective Oppositions to Willard and Wooley’s Motions for Summary Judgment, and were authenticated

1 It is undisputed that BHI never operated the Highway 50 Property at any time during the
2 eight years in which even Wooley admits that BHI was in compliance with the Highway 50
3 Lease. (Decl. of Chris Kemper, **Exhibit 2**). Indeed, the only entity to ever operate on the
4 Property was a subtenant of BHI's, Little Caesar's Pizza. *Id.* It is also undisputed that Wooley
5 never objected to the fact that BHI never operated. *Id.*

6 Wooley is requesting purported diminution in value damages based upon BHI's alleged
7 failure to pay rent, allegedly commencing on March 1, 2013. (First Amended Complaint
8 ("FAC"), on file herein; Wooley Motion for Summary Judgment ("Wooley Motion") at 8, 12, on
9 file herein). Little Caesar's continued to operate on the Property after March 1, 2013, and
10 Wooley has received all monthly payments from Little Caesar's since March of 2013. (Wooley
11 Deposition 41, **Exhibit 3**).

12 To calculate the claimed diminution in value damages, Wooley relies exclusively upon
13 the following: (1) a 2006 appraisal; (2) a 2015 appraisal; and (3) the expert opinion of Daniel
14 Gluhaich, who Wooley claims is "the Wooley Plaintiffs' designated expert." (Wooley Motion at
15 12-13, on file herein). Specifically, Wooley claims that "[t]he fair market value of the Highway
16 50 Property with the lease was determined to be \$3,430,000.00 through an appraisal
17 commissioned in 200[6] by the Wooley Plaintiffs," and that "the Wooley Plaintiffs' designated
18 expert Daniel Gluhaich found the fair market value of the Highway 50 Property immediately
19 prior to BHI's breach of the Highway 50 Lease on March 1, 2013 to be \$3,430,000.00." *Id.* at 12.
20 Likewise, Wooley claims that "[t]he fair market value of the Highway 50 Property without the
21 lease was determined to be \$765,000.00 through an appraisal commissioned in 20[15] by the
22 Wooley Plaintiffs," and that "the Wooley Plaintiffs' designated expert Daniel Gluhaich found the
23 fair market value of the Highway 50 Property without the lease following BHI's breach of the
24 Highway 50 Lease to be \$765,000.00." *Id.* at 13; *see also* (Gluhaich Affidavit, on file herein).

25
26
27 by Brian Irvine in those Oppositions. The exhibits pertinent to this Motion are reattached hereto
28 for ease of reference.

1 Wooley then purports to subtract the \$765,000 from the \$3,430,000 and add “interest applied at
2 the Default Rate” to reach his claimed damages amount. *Id.*

3 Notwithstanding that Wooley relies exclusively upon these appraisals and Gluhaich’s
4 expert opinion to calculate his purported damages, it is undisputed that Wooley never properly
5 disclosed Gluhaich as an expert. (February 9, 2017, Stipulation and Order, on file herein; *see*
6 *also* Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel
7 Gluhaich, on file herein). It is also undisputed that Wooley never disclosed the 2006 appraisal to
8 Defendants prior to filing his Motion. (Declaration of B. Irvine, Exhibit 1 to Defendants’
9 Opposition to Wooley Motion (“Wooley Opposition”).

10 **2. Willard.**

11 In 2005, Willard and BHI entered into a commercial lease (the “Willard Lease”) for the
12 lease of real property in Reno, Nevada (the “Virginia Property”). (Virginia Lease, **Exhibit 4**).
13 BHI was the only tenant on the Virginia Property, *id.*, and it is undisputed that BHI was not an
14 “anchor tenant.”

15 On October 18, 2017, Willard filed a Motion for Summary Judgment (“Willard Motion”),
16 in which he requested diminution in value damages for the very first time in this case. (Willard
17 Motion, on file herein). This new request was made less than one month before the close of
18 discovery, and was made after years of Willard ignoring Nevada law, this Court’s Orders, and
19 Defendants’ requests that Willard disclose his damages as required by NRCP 16.1. (Motion for
20 Sanctions, filed concurrently herewith and incorporated by reference herein; February 9, 2017,
21 Stipulation and Order, on file herein).

22 To calculate the claimed damages, Willard relies exclusively upon the following: (1) a
23 2008 appraisal; (2) a 2014 appraisal; and (3) the expert opinion of Daniel Gluhaich, who Willard
24 claims is “the Willard Plaintiffs’ designated expert.” (Willard Motion at 19-20, on file herein).
25 Specifically, Willard claims that “[t]he fair market value of the Virginia Property with the lease
26 was determined to be \$19,700,000.00 through an appraisal commissioned in 2008 by the Willard
27 Plaintiffs,” and that “the Willard Plaintiffs’ designated expert Daniel Gluhaich found the fair
28

1 market value of the Virginia Property immediately prior to BHI's breach of the Virginia Lease
 2 on June 1, 2013, to be \$19,700,000.00." *Id.* Willard then claims that "[t]he fair market value of
 3 the Virginia Property without the lease was determined to be \$4,720,000.00 through an appraisal
 4 commissioned in 2014 by Longley Partners, LLC," and that "the Willard Plaintiffs' designated
 5 expert Daniel Gluhaich found the fair market value of the Virginia Property without the lease
 6 following BHI's breach of the Virginia Lease to be \$4,720,000.00." *Id.* Willard then purports to
 7 subtract \$4,720,000.00 from \$19,700,000.00 and add "interest applied at the Default Rate" to
 8 reach his claimed damages amount. *Id.*

9 Notwithstanding that Willard relies exclusively upon these appraisals and Gluhaich's
 10 expert opinion to calculate his purported diminution in value damages, it is undisputed that
 11 Willard never properly disclosed Gluhaich as an expert. (February 9, 2017, Stipulation and
 12 Order, on file herein). It is also undisputed that Willard never disclosed the 2008 or 2014
 13 appraisals to Defendants prior to filing his Motion. (Motion for Sanctions, filed concurrently
 14 herewith).

15 ARGUMENT

16 1. Legal standard.

17 "[S]ummary judgment is appropriate if the pleadings and other evidence on file, viewed
 18 in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material
 19 fact remains in dispute, and that the moving party is entitled to judgment as a matter of law."
 20 *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 1221 P.3d 1026, 1029 (2005). A genuine issue of
 21 material fact is one where the evidence is such that a reasonable jury could return a verdict for
 22 the non-moving party. *Butler v. Bogdanovich*, 101 Nev. 449, 451, 705 P.2d 662 (1985). The
 23 United States Supreme Court has noted that summary judgment is "properly regarded not as a
 24 disfavored procedural shortcut, but rather as an integral part of the determination of every
 25 action." *Celotex Com. v. Catlett*, 477 U.S. 317, 327 (1986). Further, "[t]o establish entitlement to
 26 judgment as a matter of law, defendant need only negate one element of plaintiff's case." *See*

generally *Harrington v. Syufy Enterprises*, 113 Nev. 246, 248, 931 P.2d 1378, 1380 (1997) (stating this principle in the context of a negligence claim).

2. Neither Willard nor Wooley are entitled to diminution in value damages as a matter of law.

Both Willard and Wooley claim that they are entitled to diminution in value damages based on the following: (1) they claim that “[u]nder Nevada law, a landlord can recover damages for the diminution in value of a property due to a tenant’s breach of a lease,” citing *Hornwood v. Smith’s Food King No. 1*, 105 Nev. 188, 190, 772 P.2d 1284, 1286 (1989); and (2) they claim that “BHI expressly indemnified the...Plaintiffs against losses in the form of diminution in value in the event that BHI defaulted or otherwise breached the Virginia Lease. (Willard Motion at 19, on file herein; Wooley Motion at 12, on file herein). However, neither *Hornwood* nor the Lease provides a basis for Willard or Wooley to recover diminution in value damages, and Defendants respectfully submit that they are entitled to judgment in their favor on these claims as a matter of law.

First, *Hornwood* is wholly inapplicable to this case. In *Hornwood*, Smith’s, an anchor tenant in a shopping center, ceased its grocery operations but continued to pay base rent and later sublet the space to a Miller’s Outpost clothing retailer. *Hornwood*, 105 Nev. at 189, 772 P.2d at 1285. The landlord filed suit, alleging, among other things, that Smith’s had breached an implied covenant of continuous operation when it ceased operations and vacated the premises, and that this breach had caused the shopping center to decline in value, because Smith’s was the shopping center’s “anchor tenant.” *Id.* at 189, 190-91, 772 P.2d at 1285, 1286. The relevant issue on appeal was whether the claimed diminution in value damages were a foreseeable result of Smith’s breach of its requirement to continuously operate. *Id.* at 190, 772 P.2d at 1286. The Court concluded that they were foreseeable because Smith’s was an anchor tenant. *Id.* at 191, 772 P.2d at 1286.

Specifically, the Court noted that Smiths presented “substantial evidence to support their argument” “that the diminution in value of the shopping center both arose naturally and

foreseeably as a result of the termination of operations by Smith's," including, in pertinent part, testimony that "anchor tenants, (i.e. Smith's) draw the largest amount of customers, attract other 'satellite' tenants, and are necessary for long-term financing," that "when an anchor tenant leaves, the rental value of the shopping center immediately decreases, thereby decreasing the overall value of the shopping center," and that while Smith's attracted approximately 40,000 customers per month into the shopping center, its subtenant only generated about 4,500 customers per month. *Id.* at 190-191, 772 P.2d at 1286.

The fact that Smith's was an anchor tenant was in fact the **sole basis** for the Court to conclude that the claimed diminution in value damages were foreseeable:

Smith's is a sophisticated business entity. Smith's knew that its presence as the anchor tenant had a critical impact on the shopping center's success. Without an anchor tenant, obtaining long-term financing and attracting satellite tenants is nearly impossible for a shopping center. Perhaps most importantly, the anchor tenant insures the financial viability of the center by providing the necessary volume of customer traffic to the shopping center. Therefore, we find that the district court clearly erred in concluding, as a matter of law, that the diminution in value of the Hornwoods' shopping center was unforeseeable. Accordingly, we reverse that portion of the district court's ruling and remand to the district court for an assessment of the Hornwood's damages as a consequence of the loss of their anchor tenant.

Id. at 191, 772 P.2d at 1286.

By contrast, here, it is undisputed that neither Willard nor Wooley were ever anchor tenants, and Plaintiffs have never so argued. (FAC, on file herein; Willard Motion, on file herein; Wooley Motion, on file herein). In fact, the properties at issue are not multi-tenant properties comparable to shopping centers, rendering it impossible for BHI to be an anchor tenant that would attract satellite tenants and attract customers that would benefit a larger shopping center as a whole. (Highway 50 Lease, **Exhibit 1**; Virginia Lease, **Exhibit 4**). Rather, on the Virginia Property, Willard was the **only** tenant, and on the Highway 50 Property (a three-bay strip mall property), BHI never even opened a store—the only tenant to ever operate was a subtenant BHI itself procured to occupy one of the three strip-mall bays years after entering into the Highway

1 50 Lease. *Id.*; (Little Caesar’s Sublease, **Exhibit 5**; Decl. of C. Kemper, **Exhibit 2**). Thus, the
2 reasons for awarding diminution in value damages to landlords of breaching anchor tenants, such
3 as attracting satellite tenants or providing the necessary volume of customer traffic, are not even
4 remotely implicated here. *Contra Hornwood*.

5 To recover the requested diminution in value damages, Plaintiffs must establish that such
6 damages were **foreseeable** at the time the contract was made. *See* Restatement (Second) of
7 Contracts § 351(1) (“Damages are not recoverable for loss that the party in breach did not have
8 reason to foresee as a probable result of the breach when the contract was made.”). Here,
9 Plaintiffs have only vaguely relied upon *Hornwood* to establish foreseeability, but, as discussed,
10 the sole basis for the *Hornwood* finding of foreseeability is absent here. Nor are Plaintiffs correct
11 to broadly cite *Hornwood* for the proposition that “[u]nder Nevada law, a landlord can recover
12 damages for the diminution in value of a property due to a tenant’s breach of a lease.” (Willard
13 Motion at 19, on file herein; Wooley Motion at 12, on file herein). If *Hornwood* could be read so
14 broadly, then every landlord would be entitled to diminution in value damages every time a
15 tenant breached a lease, and Nevada courts would dispense with the foreseeability requirement
16 for Plaintiffs alleging consequential damages. Because the *Hornwood* court found foreseeability
17 based upon Smith’s status as an anchor tenant, and BHI was clearly not an anchor tenant in either
18 lease here, *Hornwood* does not allow Plaintiffs to establish foreseeability in this case. Absent
19 satisfying their burden to establish foreseeability, Plaintiffs may not recover their requested
20 damages as a matter of law, entitling Defendants to judgment in their favor. *See* Restatement
21 (Second) of Contracts § 351(1).

22 *Hornwood* is also distinguishable for an independent reason, particularly with respect to
23 Wooley. In *Hornwood*, the landlord claimed that the diminution of the shopping center was
24 caused by Smith’s breach of an implied covenant to continuously operate as a grocery store. 105
25 Nev. at 188, 772 P.2d at 1284. By contrast, Wooley claims that the “breach” by Defendants here
26 is an alleged failure to pay rent, not a purported violation of a covenant of continuous operation.
27 (FAC, on file herein; Wooley Motion, on file herein). Wooley does not claim that there is a
28

1 covenant of continuous operation, express or implied. *Id.* Thus, Wooley's basis for seeking
2 diminution in value damages is completely different from the landlords' basis for seeking
3 diminution in value damages in *Hornwood*. *Contra Hornwood*, 105 Nev. at 189, 772 P.2d at
4 1285 (wherein "Smith's retained possession of the demised premises and continued to pay
5 minimum rent after closing the store.").

6 In fact, the parties' conduct unequivocally refutes the notion that there was any covenant
7 of continuous operation, or that BHI ever somehow breached such a covenant. In the eight years
8 in which even Wooley does not dispute that BHI was in compliance with the Highway 50 Lease,
9 BHI never operated on the Highway 50 Property and Wooley never objected. (Decl. of Chris
10 Kemper, **Exhibit 2**). The only operations to ever occur on the Highway 50 Property were those
11 by BHI's subtenant, Little Caesar's Pizza. *Id.* Clearly, the lack of operation for eight years
12 without objection conclusively demonstrates that there was no express or implied requirement
13 that BHI continuously operate on the Property. If there were, BHI would have been in breach of
14 the Highway 50 Lease from the first day of the lease term, nearly nine years before Wooley
15 brought this lawsuit. Wooley did not claim that BHI breached in such a manner in 2005 and is
16 not so claiming now. Thus, again, the breach at issue in *Hornwood* is simply not implicated here,
17 and therefore it does not follow that Wooley, by alleging a different breach, is entitled to the
18 same damages as were awarded in *Hornwood*.

19 In sum, *Hornwood* does not provide a basis for Plaintiffs to receive their purported
20 diminution in value damages.

21 With respect to the Lease, Section 15 of each Lease details the tenants' obligations to
22 indemnify the landlords from claims against third-parties related to tenants' activities under the
23 Leases. (Highway 50 Lease, **Exhibit 1**; Virginia Lease, **Exhibit 4**). Plaintiffs attempt argue that
24 this Section entitles them to receive diminution in value damages. (Wooley's Motion at 12, on
25 file herein; Willard's Motion at 19, on file herein). However, Section 15 has no application to
26 this case, because express indemnity provisions in commercial leases, such as Section 15 here,
27 do not apply to claims between the lessor and lessee, but rather only to actions by **third parties**.

1 *Boise Joint Venture*, 806 P.2d at 709-10; *PacifiCorp v. SimplexGrinnell, LP*, 303 P.2d 949, 952-
 2 53 (Or.App. 2013) (indemnity clause intended to protect a party against claims made by third
 3 parties and does not apply to actions between the contracting parties); *May Dept. Stores Co. v.*
 4 *University Hills, Inc.*, 789 P.2d 434, 438 (Colo.App. 1989) (“Generally, indemnity language...is
 5 construed to apply only to claims asserted by third parties against the indemnitee, not to claims
 6 based upon injuries or damages suffered directly by that party.”); *In re Kmart Corp.*, 362 B.R.
 7 361, 393 (N.D. Ill. 2007) (general indemnity provision was intended to protect claimants “from
 8 claims originating from outside sources (which is the typical reason for and purpose of an
 9 indemnity), not for claims between” the contracting parties).

10 This basic principle is supported by the structure of the Lease itself. All of the landlords’
 11 remedies for a breach of the Leases by tenants are found in the same place: Paragraph 20(B).
 12 (Highway 50 Lease, **Exhibit 1**; Virginia Lease, **Exhibit 4**). The indemnity provision cited by
 13 Plaintiffs is not in the remedies paragraph, which provides further support for the conclusion that
 14 the unambiguous indemnity provisions were not intended to serve as additional remedies in a
 15 direct action between the landlord and tenant. When reading the Lease provisions in harmony, as
 16 a court is required to do pursuant to Nevada law, *see Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42,
 17 44 (1993) (a reading of a contractual provision must include reference to the entire contract and
 18 be read as a whole to give reasonable and harmonious meaning to the entire contract), it is
 19 abundantly clear that Plaintiffs’ attempt to rely on the indemnity provisions of the Lease to seek
 20 these damages is unfounded.²

21 Because neither of the purported bases for Plaintiffs’ respective claims for diminution in
 22 value damages actually provides a basis such claims, Plaintiffs are not entitled to diminution in
 23 value damages as a matter of law.

25 ²This Court has already rejected Plaintiffs’ attempt to bootstrap their impermissible
 26 claims for consequential damages under the indemnity provision in Section 15 of the Leases. *See*
 27 Plaintiffs’ August 30, 2016, Opposition to Defendants’ Motion for Partial Summary Judgment,
 on file herein; May 30, 2017 Order, on file herein.

1 **3. Wooley cannot satisfy his burden to prove diminution in value damages.**

2 Even if Plaintiffs are somehow not precluded from seeking diminution in value damages
3 as a matter of law, Plaintiffs indisputably cannot carry their burden to prove diminution in value
4 damages. *See Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543-44 (1994) (“The party
5 seeking damages has the burden of proving the fact that he was damaged and the amount
6 thereof.”).

7 **a. Wooley cannot satisfy his burden to prove diminution in value damages.**

8 First, the purported expert opinion and appraisals upon which Wooley relies are
9 inadmissible. To calculate his purported damages, Wooley points to a 2007 appraisal, which
10 concluded that the value was \$3,430,000. (Wooley Motion at 12, on file herein). However, rather
11 than use the appraiser as an expert, Wooley improperly relies upon Gluhaich who opines the
12 appraisal presents the correct valuation of the property. *Id.*; (Aff. of D. Gluhaich re Wooley ¶ 6,
13 on file herein). Wooley then relies upon a 2015 appraisal, which concluded that the fair market
14 value of the Highway 50 property as of June 19, 2015, was \$765,000. (Wooley’s Motion at 12,
15 on file herein.) However, rather than use the appraiser as an expert, Wooley improperly relies
16 upon Gluhaich who opines that the appraisal presents the correct valuation of the property. *Id.*;
17 (Aff. of D. Gluhaich re Wooley ¶ 9, on file herein).

18 Defendants have filed a Motion to Strike and/or Motion in Limine to Exclude Expert
19 Testimony of Daniel Gluhaich. Gluhaich’s testimony concerning the fair market value of the
20 property at issue should be stricken and/or is inadmissible for all the reasons set forth in that
21 Motion, which is incorporated herein by this reference. Similarly, the appraisals are inadmissible
22 for the reasons set forth in that Motion. Without Gluhaich’s expert opinion or the bases upon
23 which he relies, Wooley indisputably cannot satisfy his burden on this claim, which relies
24 exclusively upon Gluhaich’s expert opinions and the appraisals. *See* (Wooley’s Motion for
25 Summary Judgment at 12-13). Therefore, Defendants are entitled to judgment in their favor on
26 this claim.

Second, even if Gluhaich and the appraisals are somehow admitted in this case, Wooley still cannot satisfy his burden to prove the amount of damages. *See Gibellini*, 110 Nev. at 1206, 885 P.2d at 543-44 (“The party seeking damages has the burden of proving the fact that he was damaged **and the amount thereof.**” (Emphasis added)). Indeed, assessing the amount of purported diminution in value damages is not as simple as subtracting one appraisal from another. For example, Gluhaich relies upon an appraisal from 2006 to aver that this 2006 valuation represents the fair market value of the Highway 50 Lease on March 1, 2013. (Gluhaich Affidavit Re: Wooley, on file herein). Yet, this does not account for multiple other important factors, such as the fact that the worse real estate crisis in recent history occurred during that time period, or that the property in 2013 had a lease with a term that was seven years shorter than it had been in 2006. It is wholly untenable to suggest that considerations like these would not impact the value of the Highway 50 Property. In fact, given that BHI never operated on the Property and the claimed breach is the alleged nonpayment of rent, for which Willard can attempt to seek remedies for alleged nonpayment of rent, it is unclear how BHI’s claimed breach would diminish the value of the Property at all.

Finally, Wooley’s request for default interest on diminution in value is absurd. Nothing in the Lease entitles Wooley to default interest on diminution in value damages, which, at best, is a consequential damage. The fact that the Lease **does** permit default interest on certain other remedies supports the fact that it does **not** on remedies such as consequential damages. *See generally Neuhard v. Range Res.-Appalachia, LLC*, 29 F. Supp. 3d 461, 478 n.24 (M.D. Pa. 2014) (“The doctrine of *expressio unius*...instructs that when certain words are used in a contract and other words omitted, it implies the intentional exclusion of the omitted terms.”); (Highway 50 Lease at 20(B)(vi), **Exhibit 1**). Rather than being a valid claim, this is merely another example of Wooley overreaching.

b. Willard cannot satisfy his burden to prove diminution in value damages.

As inadequate as Wooley’s claim for diminution in value damages is, Willard’s is even worse. First, it is undisputed that Willard did not seek diminution in value damages until the

1 filing of his Motion for Summary Judgment on October 18, 2017. (*See* Defendants’ Motion for
2 Sanctions, filed concurrently herewith). The only other time that Defendants had any indication
3 that Willard would seek such damages was in Willard’s August 30, 2016, Opposition to
4 Defendants’ Motion for Partial Summary Judgment, wherein Willard casually mentioned, in one
5 sentence, that he incurred diminution in value damages, “the amount of which is not relevant to
6 the instant motion.” (Opposition at 10, on file herein). As Defendants informed this Court at the
7 January 10, 2017, hearing, this was a brand new damage, and Willard’s one-sentence reference
8 was the only time that Defendants had ever even heard about this claimed damage. (January 10,
9 2017, Transcript pp. 60-61, on file herein).

10 Defendants have concurrently filed a Motion for Sanctions in which they address
11 Willard’s obligations to disclose his damages and his willful failure to do so, and incorporate it
12 by reference here. Per the arguments in that Motion, Willard’s failure to disclose this damage
13 request until the virtual end of this case, notwithstanding that it is based upon information that
14 has been available to Willard since 2014, requires that Willard be prohibited from seeking this
15 damage. *See* NRCP 16.1(e)(3); NRCP 37(c); (Defendants’ Motion for Sanctions, on file herein).

16 Even if Willard is permitted to seek this brand new damage, Willard cannot satisfy his
17 burden to prove the existence of the damage or the amount thereof. First, as with Wooley,
18 Willard’s claim for diminution in value damages rests exclusively upon the expert opinion of
19 Gluhaich and two appraisals. Specifically, as discussed, Willard claims that “[t]he fair market
20 value of the Virginia Property with the lease was determined to be \$19,700,000.00 through an
21 appraisal commissioned in 2008 by the Willard Plaintiffs,” and that “the Willard Plaintiffs’
22 designated expert Daniel Gluhaich found the fair market value of the Virginia Property
23 immediately prior to BHI’s breach of the Virginia Lease on June 1, 2013, to be \$19,700,000.00.”
24 (Willard Motion at 19-20, on file herein). Willard then claims that “[t]he fair market value of the
25 Virginia Property without the lease was determined to be \$4,720,000.00 through an appraisal
26 commissioned in 2014 by Longley Partners, LLC,” and that “the Willard Plaintiffs’ designated
27 expert Daniel Gluhaich found the fair market value of the Virginia Property without the lease
28

1 following BHI's breach of the Virginia Lease to be \$4,720,000.00." *Id.* Willard then purports to
2 subtract be \$4,720,000.00 from \$19,700,000.00 and add "interest applied at the Default Rate" to
3 reach his claimed damages amount. *Id.*

4 However, as explained in detail in Defendants' Motion to Strike, Gluhaich's testimony
5 concerning the fair market value of the property at issue should be stricken and/or is inadmissible
6 for all the reasons set forth in that Motion, which is incorporated herein by this reference.
7 Similarly, the appraisals are inadmissible for the reasons set forth in that Motion. In fact, neither
8 appraisal was ever disclosed prior to the filing of Willard's Motion in October of 2017. (Motion
9 for Sanctions, on file herein). Without Gluhaich's expert opinion or the bases upon which he
10 relies, Willard indisputably cannot satisfy his burden on this claim. *See* (Willard Motion at 19-
11 20). Therefore, Defendants are entitled to judgment in their favor on this claim.

12 Further, even if Gluhaich and the appraisals are somehow admitted in this case, Wooley
13 still cannot satisfy his burden to prove the amount of damages. *See Gibellini*, 110 Nev. at 1206,
14 885 P.2d at 543-44. For example, when calculating his purported damages, Willard apparently
15 completely ignores the fact that he sold the property in a short sale. As of the date of the sale,
16 Willard owed \$13,699,802.70 on the property. (Willard Response to Second Set of
17 Interrogatories at 6, **Exhibit 6**). Yet, by Willard's own admission, and as this Court is aware
18 from Defendants' Motion for Partial Summary Judgment, Willard's lenders forgave any
19 remaining debt owed on Willard's property after the short sale. (Deposition of L. Willard at 89,
20 **Exhibit 7**). Thus, regardless of the sale price, Willard had nearly \$14 million of debt forgiven,
21 which is not factored into Willard's equation at all. Given the debt forgiveness, Willard would
22 have been in the same position whether the property sold for \$1 or for \$13 million. Willard also
23 benefitted from Defendants paying, according to Willard's complaint, \$122,031.25 in rent per
24 month, increasing by two percent per annum, from January of 2006 to March of 2013. (FAC ¶¶
25 9, 12, on file herein). Willard also expressly withdrew his claim for his purported lost down
26 payment. (May 30, 2017, Order, on file herein). And Willard does not consider that during his
27 alleged time period, this country underwent a significant recession. It is clear from even a
28

1 cursory consideration of these factors that Willard's rudimentary subtraction of \$4,270,000 from
2 \$19,700,000 is a wholly inaccurate depiction of Willard's purported diminution in value
3 damages, if any.

4 Finally, as with Wooley, it is also clear that Willard cannot apply default interest, which,
5 at best, would apply to certain lease breaches, to consequential damages. Rather, this request for
6 interest merely serves as another example of Willard overreaching in an impermissible attempt to
7 profit well beyond his actual purported losses. *See 22 Am. Jur. 2d Damages* §48 ("As a general
8 rule, a non-breaching party is not entitled, through the award of damages, to achieve a better or
9 superior position to the one it would reasonably have occupied had the breach not occurred.").

10 **CONCLUSION**

11 Based on the foregoing, Defendants respectfully request that this Court enter judgment
12 in Defendants' favor on Plaintiffs' diminution in value claims.

13 **AFFIRMATION**

14 **Pursuant to NRS 239B.030**

15 The undersigned does hereby affirm that the preceding document does not contain the
16 social security number of any person.

17 DATED this 15th day of November, 2017.

18 DICKINSON WRIGHT

19 /s/ Brian Irvine

20 DICKINSON WRIGHT

21 JOHN P. DESMOND

22 Nevada Bar No. 5618

23 BRIAN R. IRVINE

24 Nevada Bar No. 7758

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*Attorney for Defendants Berry Hinckley
Industries, and Jerry Herbst*

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' MOTION FOR PARTIAL SUMMARY JUDGMENT** on the parties through the Second Judicial District Court's e-filing system to the following:

<p>Brian P. Moquin LAW OFFICES OF BRIAN P. MOQUIN 3287 Ruffino Lane San Jose, California 95148</p>	<p>David C. O'Mara THE O'MARA LAW FIRM 311 E. Liberty Street Reno, Nevada 89501</p>
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DATED this 15th day of November, 2017

/s/ Mina Reel
An employee of DICKINSON WRIGHT

EXHIBIT TABLE

Exhibit	Description	Pages³
1	Highway 50 Lease	43
2	Declaration of Chris Kemper	2
3	Wooley Deposition at 41	5
4	Virginia Lease	35
5	Little Caesar's Sublease	19
6	Willard Response to Defendants' Second Set of Interrogatories	8
7	Willard Deposition at 89	5

³ Exhibit Page counts are exclusive of exhibit slip sheets.

EXHIBIT 1

EXHIBIT 1

LEASE AGREEMENT

THIS LEASE AGREEMENT (this "Lease") is made as of December __, 2005 by and between [EDWARD C. WOOLEY and JUDITH A. WOOLEY], a _____, ("Lessor"), whose address is _____, and BERRY-HINCKLEY INDUSTRIES, a Nevada corporation ("Lessee"), whose address is 425 Maestro Drive, Reno, NV 89511

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

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

2. **Lease of Property; Use; Possession.** In consideration of the Rentals and other Monetary Obligations to be paid by Lessee and of the other terms, covenants and conditions on Lessee's part to be kept and performed, Lessor hereby leases to Lessee, and Lessee hereby takes and leases, the Property (as such term is defined in Exhibit A attached hereto and which Property is located at the address set forth in Exhibit B attached hereto and situated on the real property legally described in Exhibit B attached hereto), subject to the Permitted Encumbrances, all Legal Requirements (including any existing violation thereof), and the condition of the Property as of the Effective Date; *provided, however*, that the recital of the Permitted Encumbrances herein shall not be construed as a revival of any Permitted Encumbrance which may have expired or been terminated. During the Lease Term, the Property shall be used solely for the operation of a Permitted Facility, and related purposes such as ingress, egress and parking.

To the maximum extent permitted by law, Lessee waives the implied warranty of suitability of the Property and Lessee acknowledges that it has accepted the Property "as is," in its current condition, with no representations, warranties or covenants, express or implied, on the part of the Lessor with respect to condition of the same or the suitability of the Property for Lessee's intended use.

3. **Lease Term; Extension.** The initial term of this Lease ("Initial Term") shall commence May 1, 2006 ("Effective Date") and shall expire at midnight on April 30, 2006 ("Expiration Date"), unless terminated sooner as provided in this Lease and as may be extended as provided herein. The time period during which this Lease shall actually be in effect, including any Extension Term, is referred to herein as the "Lease Term." Lessee shall have the right and option (each, an "Extension Option") to extend the Initial Term for two (2) additional successive periods of five (5) years each (each, an "Extension Term"), pursuant to the terms and conditions of this Lease then in effect. Lessee may only exercise the Extension Options by giving written notice thereof to Lessor of its election to do so first, no later than two hundred forty (240) days prior to the Expiration Date and two hundred forty (240) days prior to the immediately preceding Extension Term, as the case may be. If written notice of the exercise of any Extension Option is not received by Lessor by the applicable dates described above, then this Lease shall terminate on the last day of the Initial Term or, if applicable, the last day of the Extension Term then in effect.

4. Rental and Other Monetary Obligations.

A. *Base Monthly Rental.* During the Initial Term, on or before the first day of each calendar month, Lessee shall pay in advance the Base Monthly Rental; *provided, however, if the Effective Date is a date other than the first day of the month, Lessee shall pay to Lessor (or any other party designated by Lessor) on the Effective Date the Base Monthly Rental prorated by multiplying the Base Monthly Rental by a fraction, the numerator of which is the number of days remaining in the month (including the Effective Date) for which Rental is being paid, and the denominator of which is the total number of days in such month.* During the Extension Terms, if any, Lessee shall pay the Rental (including the Base Monthly Rental) in the manner set forth in this Section 4. Unless otherwise specifically stated to the contrary herein, Lessee shall perform all its obligations under this Lease at its sole cost and expense and shall pay all Rental and any other Monetary Obligation due hereunder when due and payable, without notice or demand.

B. *Adjustments.* On the first Adjustment Date and on each Adjustment Date thereafter, the Base Annual Rental shall increase by an amount equal to the Rent Adjustment. The "Rent Adjustment" shall be an amount equal to two percent (2%) of the Base Annual Rental in effect immediately prior to the applicable Adjustment Date. The Adjustment Date shall be on the annual anniversary of the Effective Date.

C. *Additional Rental.* Lessee shall pay and discharge, as additional rental ("Additional Rental"), all sums of money required to be paid by Lessee under this Lease which are not specifically referred to as Base Annual Rental or Base Monthly Rental. Lessee shall pay and discharge any Additional Rental when the same shall become due, provided that amounts which are billed to Lessor or any third party, but not to Lessee, shall be paid within five (5) days after Lessor's demand for payment thereof or, if later, when the same are due. In no event shall Lessee be required to pay to Lessor any item of Additional Rental that Lessee is obligated to pay and has paid to any third party pursuant to any provision of this Lease.

D. *Payment of Rental and Other Monetary Obligations.* All Rental and other Monetary Obligations which Lessee is required to pay hereunder shall be the unconditional obligation of Lessee and shall be payable in full when due without any setoff, abatement, deferment, deduction or counterclaim whatsoever, except as set forth herein. All payments of Base Monthly Rental and any other Monetary Obligations payable to Lessor shall be remitted to Lessor at Lessor's address set forth in the first paragraph of this Lease or such other address as Lessor may designate pursuant to Section 24 hereof.

E. *Late Payment Charge.* Lessee acknowledges that late payment by Lessee to Lessor of Rental will cause Lessor to incur costs not contemplated by this Lease, the exact amount of such costs being extremely difficult and impracticable to fix in advance. Such costs include, without limitation, processing and accounting charges, and late charges that may be imposed on Lessor by the terms of any encumbrance and note secured by any encumbrance covering the Property. Therefore, if any payment which is

required to be made by Lessee to Lessor pursuant to the terms of this Lease is made more than ten (10) days after the due date thereof, then Lessee shall pay to Lessor, as a late payment charge, five percent (5%) of the amount of the delinquent payment. Additionally, if any payment which is required to be made by Lessee pursuant to the terms of this Lease is made more than ten (10) days after the due date thereof, such payment shall bear interest at the Default Rate until received by Lessor. The late payment charge and default interest shall be paid to Lessor at the time of payment of the delinquent amount. The late payment charge and the default interest charge shall compensate Lessor for the expenses incurred by Lessor in financing, collecting and processing the late payment. The parties agree that the late charge and the default interest charge represent a fair and reasonable estimate of the costs that Lessor will incur by reason of late payment by Lessee.

5. **Gaming.** Lessor hereby conditionally assigns to Lessee all leases, written or oral, and all agreements for use or occupancy of the Property together with any and all extensions and renewals thereof and any and all further leases, subleases, lettings or agreements (including subleases thereof and tenancies following attornment) upon or covering the use or occupancy of the Property all of which leases, agreements, subleases and tenancies are herein sometimes collectively referred to as the "Assigned Leases"; (ii) the immediate and continuing right to collect and receive all of the rents, income, receipts, revenues, issues and profits now due or which may become due or which may now or hereafter become due from or out of the Assigned Leases or any part thereof, including, but not limited to, security deposits, minimum rents, additional rents, parking rents, deficiency rents and liquidated damages following default, any premium payable by any tenant upon the exercise of a cancellation privilege contained in its Lease; all proceeds payable under any policy of insurance covering loss of rents resulting from untenability caused by destruction or damage to the Property; any and all rights and claims of any kind which Lessor has or hereafter may have against the tenants under the Assigned Leases and any subtenants and other occupants of the Property; any award granted Lessor after the date hereof in any court proceeding involving any tenant in any bankruptcy, insolvency or reorganization proceedings in any state or federal court and any and all payments made by any tenant in lieu of rent (any and all such moneys, rights and claims identified in this paragraph are herein sometimes referred to as the "Rents" and sometimes as the "Rent"); and (iii) all of the rights, powers and privileges of Lessor (A) to accept prepayment of more than one (1) monthly installment of the Rent thereunder, and (B) except with respect to the Assigned Lease, (I) to cancel, terminate or accept the surrender of any Assigned Lease, and (II) to amend, modify or abridge any of the terms, covenants or conditions of any Assigned Lease. The assignment contained in this Section 5 and Lessee's interest in the Assigned Leases shall become void and of no further force or effect upon the expiration or early termination of this Lease and upon such event, Lessor shall be the sole party with any interest as a landlord or lessor in the Assigned Leases. Furthermore, Lessee shall have no right to collect any amounts under the Assigned Leases upon the occurrence and continuance of an Event of Default and all such amounts shall be paid to Lessor during any such period.

6. **Nevada Gaming Control Board.** Lessor will follow all laws of the State of Nevada and cooperate with WGI in making application to the Nevada Gaming Control Board as may be required.

7. **Rentals To Be Net to Lessor.** The Base Annual Rental payable hereunder shall be net to Lessor, so that this Lease shall yield to Lessor the Rentals specified during the Lease Term, and all Costs and obligations of every kind and nature whatsoever relating to the Property shall be performed and paid by Lessee, including but not limited to all impositions, operating charges, maintenance charges, construction costs and any other charges, costs and expenses now existing or that arise or may be contemplated under the Permitted Encumbrances or otherwise, all maintenance and repair expenses, all utility expenses, all Taxes, all premiums for insurance required to be maintained by Lessee pursuant to the terms hereof and all other expenses, charges, assessments and costs associated with the Property or otherwise provided to be paid by Lessee pursuant to the terms of this Lease. All such charges, costs and expenses shall constitute Additional Rental and upon the failure of Lessee to pay any of such costs, charges or expenses, Lessor shall have the same rights and remedies as otherwise provided in this Lease for the failure of Lessee to pay Base Annual Rental. It is the intention of the parties except as expressly provided herein that this Lease shall not be terminable for any reason by Lessee, and that Lessee shall in no event be entitled to any abatement of, or reduction in, Rental payable under this Lease, except as otherwise expressly provided herein. Any present or future law to the contrary shall not alter this agreement of the parties.

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

Within thirty (30) days after each tax and assessment payment is required by this Section to be paid and upon request of Lessor, Lessee shall, upon prior written request of Lessor, provide Lessor with evidence reasonably satisfactory to Lessor that such payment was made in a timely fashion. Lessee may, at its own expense, contest or cause to be contested by appropriate legal proceedings conducted in good faith and with due diligence, any above-described item or lien with respect thereto, including, without limitation, the amount or validity or application, in whole or in part, of any such item, provided that (A) neither the Property nor any interest therein would be in any danger of being sold, forfeited or lost by reason of such proceedings, (B) no monetary Event of Default has occurred, (C) Lessee shall promptly provide Lessor with copies of all notices received or delivered by Lessee and filings made by Lessee in connection with such proceeding, and (D) Lessee shall indemnify and hold Lessor harmless against any loss, Costs or damages arising from or related to such contest.

If Lessee shall fail to pay any Taxes when due and before any delinquency, penalty or interest is imposed on such Taxes, Lessor shall have the right to pay the same after notice to

Lessee, in which case Lessee shall repay in full such amount to Lessor with Lessee's next Base Monthly Rental installment together with interest at the Default Rate.

9. **Utilities.** Lessee shall contract, in its own name, for and pay when due (and hold Lessor free and harmless from) all charges for the connection and use of water, gas, electricity, telephone, garbage collection, sewer use and other utility services supplied to the Property during the Lease Term. All utility charges, assessments and fees for the last year of the Lease shall be prorated as of the termination date of this Lease. No full or partial utility deprivation including, but not limited to, blackout, brownout, or rationing, nor any loss of or damage to improvements related to disruption or failure of any utility service shall give rise to any abatement of Rentals nor give rise to any right of Lessee to offset Rentals or to terminate the Lease, unless caused by the gross negligence or willful misconduct of Lessor or its agents, employees or contractors (but not of any other tenants or occupants of the Property). Lessor shall reasonably cooperate with Lessee, but without out-of-pocket expense to Lessor, in Lessee's efforts to restore utility service to the Property; provided, however, that if the utility service was disrupted due to Lessor's gross negligence or willful misconduct, then the cost of such restoration shall be borne by Lessor.

10. **Insurance.** Throughout the Lease Term, Lessee shall maintain, at its sole expense, the following types and amounts of insurance:

A. Insurance against loss or damage to the Property and all buildings and improvements thereon under an "all risk" insurance policy, which shall include coverage against all risks of direct physical loss, including loss by fire, lightning, and other risks normally included in the standard ISO special form (which shall include coverage for all risks commonly insured for properties similar to the Property in the Reno, Nevada area, including insurance coverage for damage caused by earthquake, flood, tornado, windstorm and other disasters for which insurance is customarily maintained for similar commercial properties). Such insurance shall be in amounts sufficient to prevent Lessor from becoming a co-insurer under the applicable policies, and in any event, after application of deductible, in amounts not less than 100% of the full insurable replacement cost. Such insurance shall contain an agreed valuation provision in lieu of any co-insurance clause, an increased cost of construction endorsement, debris removal coverage and a waiver of subrogation endorsement in favor of Lessor. While any portion of the improvements on the Property is being rebuilt on the Land, Lessee shall provide such property insurance in builder's risk completed value form, including coverage available on the so-called "all-risk" non-reporting form of policy in an amount equal to 100% of the full insurable replacement value of the improvements on the Property or such portion as is being rebuilt. The insurance policy shall insure Lessee as loss payee. No parties other than Lessor, Lessor's Lender and Lessee may be named as insureds or loss payees on such property insurance policy.

B. Commercial general liability insurance, including products and completed operation liability, covering Lessor and Lessee against bodily injury liability, property damage liability and personal and advertising injury, liquor liability coverage (to the extent liquor is sold or manufactured at the Property), garage liability coverage including without limitation any liability arising out of the ownership, maintenance, repair, condition or operation of the Property or adjoining ways, streets, parking lots or

sidewalks. Such insurance policy or policies shall contain a broad form contractual liability endorsement under which the insurer agrees to insure Lessee's obligations under Section 15 hereof to the extent insurable, and a "severability of interest" clause or endorsement which precludes the insurer from denying the claim of Lessee, Lessor or Lessor's Lender because of the negligence or other acts of the other, shall be in amounts of not less than \$2,000,000 per occurrence for bodily injury and property damage, and \$2,000,000 general aggregate per location, or such higher limits as Lessor may reasonably require from time to time or as may be required by the Permitted Encumbrances, and shall be of form and substance satisfactory to Lessor.

C. Workers' compensation insurance in the statutorily mandated limits covering all persons employed by Lessee on the Property or any persons employed by Lessee in connection with any work done on or about any Property for which claims for death or bodily injury could be asserted against Lessor, Lessee or the Property, together with Employers Liability Insurance with limits of not less than \$100,000 per accident or disease and \$500,000 aggregate by disease.

D. Rental value insurance, equal to 100% of the Base Annual Rental (as may adjusted hereunder) for a period of not less than twelve (12) months; which insurance shall be carved out of Lessee's business interruption coverage for a separate rental value insurance payable to Lessor, or if rental value insurance is included in Lessee's business interruption coverage, the insurer shall provide priority payment to any Rental obligations, and such obligations shall be paid directly to Lessor. Such insurance is to follow form of the real property "all risk" coverage and is not to contain a co-insurance clause.

E. Comprehensive Boiler & Machinery Insurance against loss or damage from explosion of any steam or pressure boilers or similar apparatus, if any, located in or about the Property in an amount not less than the actual replacement cost of the Property. Such insurance should be in an amount of the lesser of 25% of the 100% replacement cost or \$5,000,000.00.

All insurance policies shall:

(i) Provide (1) for a waiver of subrogation by the insurer as to claims against Lessor, Lessor's Lenders and their employees, officers and agents, (2) that the insurer shall not deny a claim and that such insurance cannot be unreasonably cancelled, invalidated or suspended on account of the conduct of Lessee, its officers, directors, employees or agents, or anyone acting for Lessee or any sublessee or other occupant of the Property, and (3) that any losses otherwise payable thereunder shall be payable notwithstanding any act or omission of Lessor, Lessor's Lenders or Lessee which might, absent such provision, result in a forfeiture of all or a part of such insurance payment;

(ii) Be primary and provide that any "other insurance" clause in the insurance policy shall exclude any policies of insurance maintained by Lessor and

the insurance policy shall not be brought into contribution with insurance maintained by Lessor;

- (iii) intentionally omitted
- (iv) Contain a standard non-contributory mortgagee clause or endorsement in favor of any Lessor's Lender designated by Lessor;
- (v) Provide that the policy of insurance shall not be terminated, cancelled or amended without at least thirty (30) days' prior written notice to Lessor and to any Lessor's Lender covered by any standard mortgagee clause or endorsement;
- (vi) Provide that the insurer shall not have the option to restore the Property if Lessor elects to terminate this Lease in accordance with the terms hereof;
- (vii) Be in amounts sufficient at all times to satisfy any coinsurance requirements thereof;
- (viii) Except for workers' compensation insurance referred to in Section 10.C above, name Lessor and any Lessor Affiliate requested by Lessor, as an "additional insured" (and, with respect to any Lessor's Lender designated by Lessor, as an "additional insured mortgagee") with respect to general liability insurance, and as a "named insured" with respect to real property and "loss payee" with respect to all real property and rent value insurance, as appropriate and as their interests may appear;
- (ix) Be evidenced by delivery to Lessor and any Lessor's Lender designated by Lessor of an Acord Form 28 for property coverage (or any other form requested by Lessor) and an Acord Form 25 for liability, workers' compensation and umbrella coverage (or any other form requested by Lessor); provided that in the event that either such form is no longer available, such evidence of insurance shall be in a form reasonably satisfactory to Lessor and any lender designated by Lessor; such certificates of insurance shall be delivered to Lessor prior to the Effective Date; and
- (x) Be issued by insurance companies licensed to do business in the states where the Property is located and which are rated A:VIII or better by Best's Insurance Guide or are otherwise approved by Lessor.

It is expressly understood and agreed that (I) if any insurance required hereunder, or any part thereof, shall expire, be withdrawn, become void by breach of any condition thereof by Lessee, or become void or in jeopardy by reason of the failure or impairment of the capital of any insurer, Lessee shall immediately obtain new or additional insurance reasonably satisfactory to Lessor and any lender designated by Lessor; (II) the foregoing minimum limits of insurance coverage shall not limit the liability of Lessee for its acts or omissions as provided in this Lease;

and (III) Lessee shall procure policies for all insurance for periods of not less than one year and shall provide to Lessor and any servicer or lender of Lessor certificates of insurance or, upon Lessor's request, duplicate originals of insurance policies evidencing that insurance satisfying the requirements of this Lease is in effect at all times.

Lessee shall pay as they become due all premiums for the insurance required by this Section 10. In the event that Lessee fails to comply with any of the foregoing requirements of this Section 10 within ten (10) days of the giving of written notice by Lessor to Lessee, Lessor shall be entitled to procure such insurance. Any sums expended by Lessor in procuring such insurance shall be Additional Rental and shall be repaid by Lessee, together with interest thereon at the Default Rate, from the time of payment by Lessor until fully paid by Lessee immediately upon written demand therefor by Lessor.

Anything in this Section 10 to the contrary notwithstanding, any insurance which Lessee is required to obtain pursuant to this Section 10 may be carried under a "blanket" policy or policies covering other properties or liabilities of Lessee provided that such "blanket" policy or policies that otherwise comply with the provisions of this Section 10 and specify the location of the Property.

11. **Intentionally Omitted**

12. **Compliance With Laws, Restrictions, Covenants, Encumbrances and Agreements.** It is expressly understood and agreed that the obligations of Lessee under this Section shall survive the expiration or earlier termination of this Lease for any reason.

A. *Legal and Gaming Law Compliance.* Lessee's use and occupation of the Property, the use and occupation of the Property by any other person (including but not limited to any subtenants and WGI) and the condition of the Property, shall, at Lessee's sole cost and expense, comply with all Legal Requirements (including without limitation the Americans with Disabilities Act and all Legal Requirements related to gaming operations and the sales of tobacco and liquor on the Property). Lessee shall promptly file, or cause to be filed, and provide to Lessor any notices, reports or other filings that Lessee or any other Person is required to file or provide to any Governmental Authorities regarding the business operations conducted on or from the Property, including but not limited to those described in Subsection D(iii) hereof and those required by Governmental Authorities with respect to gaming operations and the sales of tobacco and liquor on the Property, including any filings required to be made in connection with the change of ownership or control of Lessee and, within fifteen (15) days of Lessee's receipt of written notice from Lessor of any planned or actual change in the ownership or control of Lessor or any planned or actual change in the ownership of the Property.

B. *Acts Resulting in Increased Insurance Rates.* Lessee will use its commercially reasonable efforts to prevent any act or condition to exist on or about the Property which will materially increase any insurance rate thereon, except when such acts are required in the normal course of its business and Lessee shall pay for such increase. Lessee shall comply with all orders and directives of any insurance companies issuing liability, fire, or extended coverage insurance pursuant to Section 10 hereof, and Lessee

shall not do, bring, or keep anything in or about the Property that will cause a cancellation of any insurance covering the Property.

C. *Prevention of Nuisance.* Lessee shall not commit nor cause or permit to be committed any public or private nuisance on the Property.

D. *Environmental.*

(i) *Covenants.* All uses and operations on or of the Property, including the use and operation of UST's on the Property, whether by Lessee or any other Person, shall be in compliance with all Environmental Laws and permits issued pursuant thereto. Lessee shall keep the Property or cause the Property to be kept free and clear of all Environmental Liens, whether due to any act or omission of Lessee or any other Person. Lessee hereby represents and warrants that Lessee shall not install and shall not permit any person to install any asbestos containing materials ("ACM") or materials or equipment containing polychlorinated biphenyl ("PCBs") in the Property, and to the extent any ACM, PCBs or other Hazardous Materials are on or in the Property, the same shall be maintained, stored and used in accordance with all Legal Requirements.

(ii) *Notification Requirements.* Lessee shall immediately notify Lessor in writing upon Lessee obtaining actual knowledge of (1) any Releases or Threatened Releases in, on, under or from the Property other than in Permitted Amounts, or migrating towards any of the Property; (2) any non-compliance with any Environmental Laws related in any way to any of the Property; (3) any actual or potential Environmental Lien; (4) any required or proposed Remediation of environmental conditions relating to any of the Property required by applicable Governmental Authorities; and (5) any written or oral notice or other communication which Lessee becomes aware from any source whatsoever (including but not limited to a Governmental Authority) relating in any way to Hazardous Materials, Regulated Substances or USTs, or Remediation thereof at or on the Property, other than in Permitted Amounts, possible liability of any Person relating to the Property pursuant to any Environmental Law, other environmental conditions in connection with the Property, or any actual or potential administrative or judicial proceedings in connection with anything referred to in this Subsection D.

(iii) *Reports and Investigations.* Lessee shall promptly supply Lessor with copies of all reports of any testing of the Property conducted by or at the request of Lessor or any Governmental Authorities and all submissions by Lessee to any Governmental Authority concerning environmental matters, the USTs, or Hazardous Materials. Lessee shall furnish to Lessor certificates of enrollment issued by the State of Nevada, Division of Environmental 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 Correction Action shall include, without limitation, and whether foreseeable or unforeseeable, all cost of any investigation (including consultants and attorneys fees and testing) required or necessary repair, remediation, restoration clean up, detoxification or decontamination of the Property and the preparation and implementation of any closure, remedial action or other required plans in connection therewith, and shall survive the expiration or earlier termination of the Term of this Lease. This agreement to indemnify, defend, protect and hold harmless each of the Indemnified Parties shall be in addition to any other obligations or liabilities Lessee may have to Lessor or the Indemnified Parties, if any, at common law under all statutes and ordinances or otherwise and survive the termination of the Lease.

In the event that Lessee is required to perform Corrective Action to address any Contamination, Lessee shall perform such activities in a diligent manner. In the event that Lessee has not completed its Corrective Action (if necessary), as required herein, by the expiration of the Lease Term, Lessor shall grant Lessee, and its consultants, contractors and agents a revocable license, at no cost to Lessee except as set forth in the succeeding sentence, to enter upon the Property from and after the date of expiration of the Lease Term to conduct Corrective Action and to place and remove all necessary equipment and improvements on the Property sufficient to satisfy the requirements of all Governmental Authorities regarding the Contamination. If such post-expiration

Corrective Action will unreasonably interfere with a reasonably foreseeable intended commercial use of the Property (i.e., if Lessor cannot reasonably lease the Property for reasonable commercial uses at reasonable market rents), the Lease Term shall be extended until sixty (60) days after the Corrective Action has been performed such that post-expiration Corrective Action by Lessee no longer unreasonably interferes with a reasonably foreseeable commercial use of the Property, and Lessee agrees to keep Lessor apprised of the anticipated completion date of the Corrective Action.

E. *Intentionally Omitted..*

F. *Dealer Requirements.* In addition to the requirements set forth in this Lease, Lessee, in its use, occupancy and maintenance of the Property shall comply with all requirements of its Dealer Agreements with Dealer. Lessee hereby consents to Lessor providing information it obtains to Dealer and to Lessor obtaining from Dealer information which Dealer receives relating to Lessee's operation of its business on the Property.

G. *WGI Agreements.* Lessee represents that the WGI Agreement is in full force and effect, and that the WGI Agreement permits WGI to operate gaming machines on the Property. Lessee shall abide by all the terms and conditions of the WGI Agreement, and Lessee represents and warrants that WGI has approved this Lease, if WGI has such approval rights under the WGI Agreement.

H. *Winner's Corner.* Lessee shall at all times operate the gas station and convenience store on the Property under the trade name "Winner's Corner" and/or under a major oil brand (such as Chevron, BP, Amoco, Shell, Sun Oil, or the such).

13. **Maintenance; Repairs and Reconstruction.** Lessee shall, at its sole cost and expense, be responsible for keeping all of the buildings, structures, improvements and signs erected on the Property in good and substantial order, condition, and repair, including but not limited to replacement, maintenance and repair of all structural or load-bearing elements, roofs, walls, foundations, gutters and downspouts, heating, ventilating and air conditioning systems, any building security and monitoring system, windows, walls, doors, electrical and other utility systems and equipment, mechanical equipment, plumbing and all other components of the buildings, mowing of lawns and care, weeding and replacement of plantings; replacing, resurfacing and striping of walkways, driveways and parking areas, and adjacent public sidewalks; removal of snow and ice from the Property and adjacent public sidewalks, removal of trash, maintenance of utility lines and exterior lighting and signage on Property, and any maintenance, repairs or replacements (or fees or reserves therefor) as may be required by any Permitted Encumbrances. All such replacements, maintenance and repair shall keep the Property in good repair and in a clean, safe, and sanitary condition and in compliance with all Legal Requirements and insurance regulations. Lessee must make all repairs, corrections, replacements, improvements or alterations necessitated by age, Lessee's use, or natural elements or as required pursuant to Governmental Authorities or Legal Requirements. Lessee expressly waives the benefit of any statute now or hereinafter in effect which would otherwise afford

Lessee the right to make repairs, corrections, improvements or alterations at Lessor's expense or to terminate this Lease because of Lessor's failure to keep the Property in good order, condition or repair, or which would otherwise require Lessor to make repairs, corrections, improvements, replacements or alterations. If the buildings or any improvements on the Property violate any Permitted Encumbrances or Legal Requirements, then Lessee shall, upon the written demand of a Governmental Authority or the written demand of a party to or beneficiary of any Permitted Encumbrance, repair, restore, relocate and/or rebuild the same in accordance with Legal Requirements (including any special or conditional use permits or other variances granted specifically for the Property) and the Permitted Encumbrances.

Lessee shall, at its sole cost and expense, be responsible to repair or reconstruct damage or destruction to any buildings, structures or improvements erected on the Property from acts of God or any other catastrophes or causes. Any such repairs or reconstruction shall restore the buildings and all improvements on the Property to substantially the same condition immediately prior to such damages or destruction and this Lease shall remain in full force and effect, provided, however, that Lessee shall have the right to replace the improvements with different structures so long as (a) the value of the Property with such different structures is no less than the value of the Property immediately prior to the date of casualty and the different square footage of the new buildings is no less than the buildings existing as of the date hereof, and (b) the new structure can be built and occupied in compliance with Legal Requirements (including any special or conditional use permits or other variances granted specifically for the Property) and the Permitted Encumbrances. Such repair, restoration, relocation and rebuilding (all of which are herein called a "repair") shall be commenced within a reasonable time however no more than thirty (30) days after the later of (i) the date that such damage or destruction occurred, (ii) the date that all permits and other approvals necessary to authorize such rebuilding have been issued following reasonable pursuit of the same by Lessee, and (iii) the date that any insurance proceeds payable to Lessor or its lender in conjunction with such damage or destruction, if any, have been made available to Lessee as set forth herein; thereafter, the repair shall be diligently pursued to completion. Lessee shall give Lessor at least fifteen (15) days written notice prior to commencing the repair to permit the Lessor to post appropriate notices of non-responsibility, and all such repair work shall be subject to the provisions of Section 14 hereof related to alterations, improvements and additions to the Property.

The proceeds of any insurance maintained under Section 10 hereof shall be made available to Lessee for payment of costs and expense of repair.

14. Waste; Alterations and Improvements; Trade Fixtures and Equipment. Lessee shall not commit actual or constructive waste upon the Property. During the Lease Term, Lessee may construct any additions or improvements to the Property and make such structural or non-structural alterations to the Property as are reasonably necessary or desirable for Lessee's use of the Property for a Permitted Facility. All improvements, alterations, or additions shall be constructed by Lessee at Lessee's sole cost and expense. Prior to the commencement of construction of any additions, improvements, or alterations to the Property, Lessee shall give Lessor at least fifteen (15) days written notice to allow Lessor to post appropriate notices of non-responsibility. Notwithstanding anything herein to the contrary, without Lessor's prior written consent, Lessee shall not make any alterations that will decrease the value or function of the improvements located on the Property.

Lessee's right to make any alterations, improvements and additions shall be deemed conditioned upon Lessee acquiring a permit to do so from appropriate Governmental Authorities, the furnishing of a copy thereof to Lessor prior to the commencement of the work and the compliance by Lessee of all conditions of said permit in a prompt and expeditious manner. All alterations, improvements or other construction by Lessee shall be in compliance with all Legal Requirements, and all alterations and improvements shall be done and performed in good and workmanlike manner, using new and first quality materials. All costs of any such improvements shall be paid by Lessee.

Upon completion of any such work, Lessee shall submit to Lessor as-built plans of any structural, mechanical or interior utility improvements and alterations made, a sworn construction statement, lien waivers from all persons or entities providing materials, services or equipment for the work completed and, if available, an endorsement to Lessor's policy of title insurance or other evidence from a title company confirming the absence of any liens or other matters of record related to the work performed.

Unless expressly released by Lessor in writing, all improvements or alterations shall be and remain, at the time of expiration or other termination of this Lease, the property of Lessor without payment or offset unless such improvements are not attached to the Property. Notwithstanding anything herein to the contrary, all plumbing, electrical, HVAC equipment, doors, ceiling and floor tiles, and wall coverings shall become the property of Lessor and remain in place on the Property upon expiration or other termination of this Lease.

During the Lease Term, Lessee shall have the right to locate in the Property such personal property, furniture, trade fixtures, and equipment (hereafter referred to as "Fixtures and Equipment") as shall be considered by Lessee to be appropriate or necessary to Lessee's use and occupancy of the Property.

All Fixtures and Equipment shall be provided by Lessee at Lessee's own cost and expense. During the term of this Lease, Lessee may remove any Fixtures and Equipment installed by Lessee, and any and all such Fixtures and Equipment shall remain the sole property of Lessee. Lessee shall perform (and pay all costs associated with) any and all restoration necessitated by the removal of Lessee's Fixtures and Equipment, including but not limited to damage resulting from removal of any of Lessee's signs in or about the Property.

Lessee shall keep the Property free and clear of all mechanic's, materialmen or similar liens, including, but not limited to, those resulting from the construction of alterations, improvements, additions, trade fixtures, and equipment performed by or for Lessee.

Lessee shall have the right to contest the correctness or validity of any such lien if, Lessee first procures and records a lien release bond issued by a corporation authorized to issue surety bonds in the state in which the Property are located in an amount required by Legal Requirements to remove such lien. The bond or its equivalent shall meet all applicable requirements of the state in which the Property are located. In the event that any lien does so attach, and is not released within thirty (30) days after written notice to Lessee thereof, Lessor, in its sole discretion, may pay and discharge the same and relieve the Property therefrom, and Lessee agrees to repay and reimburse Lessor as Additional Rental upon demand for the amount

so paid by Lessor. On final determination of the lien or claim of lien Lessee will immediately pay any judgment rendered, and all costs and charges, and shall cause the lien to be released or satisfied. In addition, Lessor may require Lessee to pay Lessor's reasonable attorneys' fees and costs in participating in such action if Lessor shall decide it is in its best interest to do so.

15. Indemnification. Lessee agrees to use and occupy the Property at its own risk and hereby releases Lessor and Lessor's agents and employees from all claims for any damage or injury to the full extent permitted by law. Lessee agrees that Lessor shall not be responsible or liable to Lessee or Lessee's employees, agents, customers or invitees for bodily injury, personal injury or property damage occasioned by the acts or omissions of any other lessee or such lessee's employees, agents, contractors, customers or invitees. In addition to other specific indemnification provisions set forth in this Lease, Lessee shall indemnify, protect, defend and hold harmless each of the Indemnified Parties from and against any and all Losses caused by, incurred or resulting from Lessee's use and occupancy of the Property, whether relating to its original design or construction, latent defects, alteration, maintenance, use by Lessee or any Person thereon, with supervision or otherwise, or from any breach of, default under, or failure to perform, any term or provision of this Lease by Lessee, its officers, employees, agents or other Persons. It is expressly understood and agreed that Lessee's obligations under this Section shall survive the expiration or earlier termination of this Lease for any reason.

16. Quiet Enjoyment. So long as Lessee shall pay the Rental and other Monetary Obligations herein provided and shall keep and perform all of the terms, covenants and conditions on its part herein contained, Lessee shall have, subject and subordinate to Lessor's rights herein, the right to the peaceful and quiet occupancy of the Property, subject to the Permitted Encumbrances, Laws and the WGI Agreement and any use or occupancy agreements, leases or licenses now affecting the Property or hereinafter made by Lessee.

17. Inspection; Right of Entry. Lessor and its authorized representatives shall have the right, at all reasonable times and upon giving reasonable prior notice (except in the event of an emergency, in which case no prior notice shall be required), to enter the Property or any part thereof and to inspect the same; to serve, post, or keep posted any notices required or allowed under the provisions of this Lease or by law; to show the Property to prospective brokers, agents, buyers, or persons interested in an exchange, at any time; and to show the Property to prospective tenants within two hundred forty (240) days prior to the expiration of this Lease or any time during the option period and to place upon the Property any "to let" or "for lease" signs at any time within two hundred forty (240) days prior to the expiration of this Lease. Lessee hereby waives any claim for damages for any injury or inconvenience to or interference with Lessee's business, any loss of occupancy or quiet enjoyment of the Property and any other loss occasioned by such entry, but, subject to Section 37, excluding damages arising as a result of the negligence or intentional misconduct of Lessor.

18. Condemnation and Casualty.

A. *Damage or Destruction to the Property; No Abatement of Rent.* If the Property is damaged or destroyed as a result of fire or other casualty Lessee shall promptly restore the Property pursuant to the terms of Section 13 hereof. Notwithstanding the partial or total destruction of the Property and any part thereof, and

notwithstanding whether the casualty is insured or not, there shall be no abatement of Rentals or of any other obligation of Lessee hereunder including, without limitation, payment of operating expenses, insurance premiums and Taxes, by reason of such damage or destruction unless the Lease is terminated by virtue of another provision of this Lease.

B. *Option to Terminate.* If the Property is damaged or destroyed during the last one (1) year of the Lease Term to the extent that the Property is untenable, Lessee may terminate this Lease as of the date of such damage or destruction by giving written notice to Lessor of such election within thirty (30) days following the date of such fire or other casualty, in which case, all insurance proceeds related to the Property (other than attributable to Lessee's Fixtures and Equipment) will be paid over to Lessor, or if required by Lessor's Lender, to such lender.

C. *Termination Upon Taking.* If as a consequence of a Taking, (i) any part of the convenience store building on the Property; or (ii) twenty-five percent (25 %) or more of the parking area at the Property shall be taken and Lessee determines in its reasonable discretion that such Taking will have a material adverse impact on the ability of Lessee to conduct its normal business operations from the Property, then, within thirty (30) days after the date on which Lessee receives written notice of such Taking, Lessee may terminate this Lease by written notice to Lessor which termination shall be effective as of the date the condemning authority takes actual possession of the portion of the Property that is subject to the Taking. If Lessee terminates this Lease, Lessor shall promptly refund to Lessee all unearned Annual Base Rental and other amounts paid in advance by Lessee.

D. *Obligation to Restore.* If a Taking does not result in a termination of this Lease pursuant to Subsection C hereof, Lessee shall restore the Property to a condition similar in physical appearance to that which existed immediately prior to the Taking to the extent possible such that Lessee can conduct its normal business operations, Lessee shall commence such restoration within ninety (90) days after the occurrence of the taking and shall complete such restoration within six (6) months after the occurrence of the taking.

E. *Condemnation Award.* Any condemnation award payable during the term of this Lease shall belong to and be paid to Lessor, including but not limited to awards payable with respect to damage to either the fee or leasehold estates, except that Lessee shall receive from the award the following:

i. If Lessee exercises its rights to terminate this Lease, the portion of the award, if any, attributable to Lessee's Equipment or Fixtures that are taken in the Taking and the unamortized cost of any leasehold improvements made to the Property by Lessee after the date hereof that are taken in the Taking.

ii. The portion of the award, if any, attributable to severance damages for the repair or restoration of the Property (herein called "repair"), but only if Lessee does not exercise Lessee's right to terminate the Lease and further

provided, that such damages shall be deposited and disbursed in accordance with the provisions hereof related to the handling of insurance proceeds that are applied to a repair of the Property and Lessee shall promptly commence and diligently complete the repair so that upon completion the Property will have a character and commercial value as nearly as possible equal to the value of the Property immediately prior to the taking, and further provided that, in the event such damages are insufficient to cover the cost of repair, then any amounts required over the amount thereof that are required to complete said repair shall be promptly deposited with the disbursing entity by Lessee in advance of commencing the repair.

iii. Additionally, if this Lease is terminated as a result of any such taking, Lessee shall be permitted to recover its relocation expenses and the going concern value of Lessee's business from the condemning authority (but not from Lessor or the portion of the award otherwise payable to Lessor) as provided by law.

19. Intentionally Deleted.

20. **Default, Conditional Limitations, Remedies and Measure of Damages.**

A. *Event of Default.* Each of the following shall be an event of default by Lessee under this Lease (each, an "Event of Default"):

(i) If any Rental or other Monetary Obligation due under this Lease is not paid within five (5) Business Days of notice it is past due, provided, however, that if within the first twelve (12) months of the Lease Term, Lessor has given two (2) such notices to Lessee, then a default shall be deemed to have occurred when such failure has continued for three (3) business days after the same is due, without notice thereof by Lessor to Lessee; and further, provided, however, that after the first twelve (12) months of the Lease Term, if Lessor has given such notice to Lessee within the preceding twelve (12) months, then a default shall be deemed to have occurred when such failure has continued for three (3) Business Days after the same is due, without notice thereof by Lessor to Lessee;

(ii) if there is an Insolvency Event;

(iii) if Lessee fails to observe or perform any of the other covenants, conditions or obligations of Lessee in this Lease; *provided, however*, if any such failure does not involve the payment of any Monetary Obligation, does not place any rights or property of Lessor in immediate jeopardy, as determined by Lessor in its reasonable discretion, then such failure shall not constitute an Event of Default hereunder, unless otherwise expressly provided herein, unless and until Lessor shall have given Lessee notice thereof and a period of thirty (30) days shall have elapsed, during which period Lessee may correct or cure such failure, upon failure of which an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required. If such failure

cannot reasonably be cured within such thirty (30) day period, as determined by Lessor in its reasonable discretion, and Lessee is diligently pursuing a cure of such failure, then Lessee shall have a reasonable period to cure such failure beyond such thirty (30) day period. If Lessee shall fail to correct or cure such failure within such period and said period is not extended by the parties, an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required;

(iv) if Lessee shall be liquidated or dissolved or shall begin proceedings towards its liquidation or dissolution; or

B. *Remedies.* Upon the occurrence of an Event of Default, with or without notice or demand, except as otherwise expressly provided herein or such other notice as may be required by statute and cannot be waived by Lessee, Lessor shall be entitled to exercise, at its option, concurrently, successively, or in any combination, all remedies available at law or in equity, including without limitation, any one or more of the following:

(i) To terminate this Lease, whereupon Lessee's right to possession of the Property shall cease and this Lease, except as to Lessee's liability, shall be terminated. Upon such termination, Lessor shall be entitled to recover liquidated damages equal to the total of (i) the cost of recovering possession of the Property; (ii) the unpaid Rental earned at the time of termination, plus interest at the Default Rate thereon; (iii) late charges and interest at the Default Rate on the unpaid Rental; (iv) the present value of the balance of the Base Annual Rental for the remainder of the Lease Term using a discount rate of four percent (4%), less the present value of the reasonable rental value of the Property for the balance of the Term remaining after a one-year period following repossession using a discount rate of four percent (4%); (v) costs of operating the Property until relet and the reasonable costs of performing any obligations of Lessee under this Lease to be performed upon termination or expiration of this Lease (including but not limited to the Lessee's obligations under Sections 12.D and 27 hereof); and (vi) any other sum of money and damages reasonably necessary to compensate Lessor for the detriment caused by Lessee's default.

(ii) To the extent not prohibited by applicable law, to reenter and take possession of the Property (or any part thereof) without being deemed guilty in any manner of trespass or becoming liable for any loss or damage resulting therefrom, without resort to legal or judicial process, procedure or action. No notice from Lessor hereunder or under a forcible entry and detainer statute or similar law shall constitute an election by Lessor to terminate this Lease unless such notice specifically so states. If Lessee shall, after default, voluntarily give up possession of the Property to Lessor, deliver to Lessor or its agents the keys to the Property, or both, such actions shall be deemed to be in compliance with Lessor's rights and the acceptance thereof by Lessor or its agents shall not be deemed to constitute a termination of the Lease. Lessor reserves the right following any reentry and/or reletting to exercise its right to terminate this Lease by giving

Lessee written notice thereof, in which event this Lease will terminate, and Lessor may recover liquidated damages as set forth in Subsection (i) above.

(iii) To bring an action against Lessee for any damages sustained by Lessor or any equitable relief available to Lessor.

(iv) To relet the Property or any part thereof for such term or terms (including a term which extends beyond the original Lease Term), at such rentals and upon such other terms as Lessor, in its sole discretion, may determine, with all proceeds received from such reletting being applied to the Rental and other Monetary Obligations due from Lessee in such order as Lessor may, in 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.

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 withheld conditioned or delayed.

In the event of an assignment of Lessee's interest under this Lease to a third person or entity which has been approved by the Lessor, the original Lessee shall be relieved from any and all further obligations under the terms of this Lease upon delivery to Lessor of an originally executed assumption of all of Lessee's obligations under this Lease by the assignee, and upon cure of all then existing defaults of Lessee under the terms of this Lease.

Other than for the WGI Agreement and any Replacement WGI Agreement, and any other agreements pursuant to which experienced and reputable operators are permitted to occupy discreet portions of the convenience store building located on the site for uses that are complementary to or extensions of Lessee's gas station and convenience store operations (e.g., quick-service restaurants, deli and sandwich shops, coffee shops, juice shops, postal contract units and/or UPS/Federal Express services) when such uses are not in violation of Legal Requirements or the Permitted Encumbrances (such other agreements are referred to herein as "Permitted Subleases"), Lessee may not sublease all or any part of the Property without the prior written consent of the Lessor, which shall not be unreasonably withheld, conditioned or delayed. In no event will any Permitted Subleases, or any other subleases that Lessor consents to relieve Lessee of any liability hereunder during the period of any such subletting. Additionally, Lessee shall give Lessor at least thirty (30) days advance notice of any proposed Permitted Sublease, which notice shall be accompanied by a copy of the form of the Permitted Sublease.

Each Permitted Sublease, and any other sublease that Lessor may consent to pursuant to the foregoing paragraph shall provide that (i) the term thereof will not exceed the Initial Term hereof and any extensions of the Initial Term that are permitted hereunder; (ii) the sublease and subtenant shall be subject to and bound by all the terms and conditions of this Lease (except that the Lessee shall continue to pay all Rental and Monetary Obligations hereunder and Lessee shall collect any rents owed by the subtenant pursuant to the sublease); (iii) the sublease shall state that, at Lessor's election, the subtenant will attorn to Lessor and recognize Lessor as Lessee's successor under the sublease for the balance of the sublease term if this Lease is surrendered by Lessee or terminated by reason of Lessee's default.

24. **Notices.** All notices, demands, designations, certificates, requests, offers, consents, approvals, appointments and other instruments given pursuant to this Lease (collectively called "Notices") shall be in writing and given by any one of the following: (A) hand delivery, (B) express overnight delivery service, (C) certified or registered mail, return receipt requested or (D) facsimile, provided that a copy of such facsimile is also sent via certified or registered mail, return receipt requested, or by overnight delivery service, within one Business Day of the transmission of such facsimile, and shall be deemed to have been delivered upon (i) receipt, if hand delivered, (ii) the next Business Day, if delivered by a reputable express overnight delivery service, (iii) the third Business Day following the day of deposit of such notice with the United States Postal Service, if sent by certified or registered mail, return receipt requested, or (iv) transmission, if delivered by facsimile pursuant to the requirements of Section 24.D above. Notices shall be provided to the parties and addresses (or electronic mail addresses) specified below:

If to Lessee:

Berry-Hinckley Industries
Attn: Paul A. Morabito
425 Maestro Drive
Reno, NV 89511
Telephone: (775) 689-1222
Facsimile: (775) 689-1232

With a copy to:

Hodgson Russ LLP
Attn: Sujata Yalamanchili
One M&T Plaza, Suite 2000
Buffalo, NY 14023
Telephone: (716) 848-1657
Facsimile: (716) 849-0349

If to Lessor:

With a copy to

or to such other address or such other person as either party may from time to time hereafter specify to the other party in a notice delivered in the manner provided above.

25. Holdover. If Lessee remains in possession of the Property after the expiration of the term hereof, Lessee, at Lessor's option and within Lessor's sole discretion, may be deemed a Lessee on a month-to-month basis and shall continue to pay Rentals and other Monetary Obligations in the amounts herein provided, except that the Base Monthly Rental shall be automatically increased to one hundred fifty percent (150%) of the last Base Monthly Rental payable under this Lease.

26. Intentionally Omitted.

27. Surrender. At the expiration of the Lease Term, Lessee may remove from the Property all of Lessee's Fixtures and Equipment. Lessee shall repair any damage caused by such removal and shall leave the Property broom clean and in good and working condition and repair inside and out, and comply with all of the requirements of Section 12.D hereof. Lessor may, in its sole discretion, elect to retain or dispose of in any manner any Fixtures or Equipment, personal property and vehicles to which Lessee is entitled but which Lessee does not remove from the Property pursuant to this Section within ten (10) days after notice, provided, however, that upon demand, Lessee shall reimburse Lessor for all costs incurred by Lessor in removing any Fixtures and Equipment and any all personal property, vehicles and inventory, Hazardous

Materials, USTs and related equipment, located in or about the Property that are left therein by Lessee or in restoring the Property to the condition required by this Lease.

28. Financial Statements; Compliance Certificate. Once per calendar year, and within 120 days after the end of Lessee's fiscal year, Lessee shall furnish to Lessor audited financial statements of Lessee for the immediately preceding fiscal year. Lessor shall maintain such statements in confidence but may disclose any financial statements furnished by Lessee to Lessor's lawyers, any prospective purchaser of the Property who has entered into a signed purchase agreement with Lessor, prospective and existing lenders of Lessor, and to Lessor's consultants and accountants; Lessor shall advise such permitted recipients that the financial statements furnished to them are to be held in confidence. In no event shall Lessor knowingly disclose Lessee's financial statements to competitors of Lessee.

29. Force Majeure. Any prevention, delay or stoppage due to strikes, lockouts, acts of God, enemy or hostile governmental action, civil commotion, fire or other casualty beyond the control of the party obligated to perform (each, a "Force Majeure Event") shall excuse the performance by such party for a period equal to any such prevention, delay or stoppage, expressly excluding, however, the obligations imposed upon Lessee with respect to Rental and other Monetary Obligations to be paid hereunder.

30. No Merger. There shall be no merger of this Lease nor of the leasehold estate created by this Lease with the fee estate in or ownership of the Property by reason of the fact that the same person, corporation, firm or other entity may acquire or hold or own, directly or indirectly, (A) this Lease or the leasehold estate created by this Lease or any interest in this Lease or in such leasehold estate, and (B) the fee estate or ownership of the Property or any interest in such fee estate or ownership. No such merger shall occur unless and until all persons, corporations, firms and other entities having any interest in (i) this Lease or the leasehold estate created by this Lease, and (ii) the fee estate in or ownership of the Property or any part thereof sought to be merged shall join in a written instrument effecting such merger and shall duly record the same.

31. Characterization. Lessor and Lessee acknowledge and warrant to each other that each has been represented by independent counsel and has executed this Lease after being fully advised by said counsel as to its effect and significance. This Lease shall be interpreted and construed in a fair and impartial manner without regard to such factors as the party which prepared the instrument, the relative bargaining powers of the parties or the domicile of any party. Whenever in this Lease any words of obligation or duty are used, such words or expressions shall have the same force and effect as though made in the form of a covenant.

32. Easements. During the Lease Term, Lessor shall not have the right to grant easements on, over, under and above the Property without the prior consent of Lessee, which consent will not be unreasonably withheld, conditioned or delayed.

33. Bankruptcy. Intentionally Omitted.

34. Attorneys' Fees. In the event of any judicial or other adversarial proceeding concerning this Lease, to the extent permitted by Law, Lessor the prevailing party shall be

entitled to recover all of its reasonable attorneys' fees and other Costs in addition to any other relief to which it may be entitled. In addition, the prevailing party shall, upon demand, be entitled to all attorneys' fees and all other Costs incurred in the preparation and service of any notice or demand hereunder, whether or not a legal action is subsequently commenced.

35. **Memorandum of Lease.** Concurrently with the execution of this Lease, Lessor and Lessee are executing Lessor's standard form memorandum of lease in recordable form, indicating the names and addresses of Lessor and Lessee, a description of the Property, the Lease Term, but omitting Rentals and such other terms of this Lease as Lessor may not desire to disclose to the public. Further, upon Lessor's request, Lessee agrees to execute and acknowledge a termination of lease and/or quit claim deed in recordable form to be held by Lessor until the expiration or sooner termination of the Lease Term.

36. **No Broker.** Lessor and Lessee represent and warrant to each other that they have had no conversation or negotiations with any broker concerning the leasing of the Property. Each of Lessor and Lessee agrees to protect, indemnify, save and keep harmless the other, against and from all liabilities, claims, losses, Costs, damages and expenses, including attorneys' fees, arising out of, resulting from or in connection with their breach of the foregoing warranty and representation.

37. **Waiver of Jury Trial and Punitive, Consequential, Special and Indirect Damages.** Lessor and Lessee hereby knowingly, voluntarily and intentionally waive the right either may have to a trial by jury with respect to any and all issues presented in any action, proceeding, claim or counterclaim brought by either of the parties hereto against the other or its successors with respect to any matter arising out of or in connection with this Lease, the relationship of Lessor and Lessee, Lessee's use or occupancy of the Property, and/or any claim for injury or damage, or any emergency or statutory remedy. This waiver by the parties hereto of any right either may have to a trial by jury has been negotiated and is an essential aspect of their bargain. Furthermore, Lessee hereby knowingly, voluntarily and intentionally waives the right it may have to seek punitive, consequential, special and indirect damages from Lessor, Lessor's Lenders, and any of the Affiliates, officers, directors, members, managers or employees of Lessor, Lessor's Lenders, or any of their successors with respect to any and all issues presented in any action, proceeding, claim or counterclaim brought with respect to any matter arising out of or in connection with this Lease or any document contemplated herein or related hereto. The waiver by Lessee of any right it may have to seek punitive, consequential, special and indirect damages has been negotiated by the parties hereto and is an essential aspect of their bargain.

38. **Miscellaneous.**

A. *Time Is of the Essence.* Time is of the essence with respect to each and every provision of this Lease.

B. *Waiver and Amendment.* No provision of this Lease shall be deemed waived or amended except by a written instrument unambiguously setting forth the matter waived or amended and signed by the party against which enforcement of such waiver or amendment is sought. Waiver of any matter shall not be deemed a waiver of the same or any other matter on any future occasion. No acceptance by Lessor of an

amount less than the Rental and other Monetary Obligations stipulated to be due under this Lease shall be deemed to be other than a payment on account of the earliest such Rental or other Monetary Obligations then due or in arrears nor shall any endorsement or statement on any check or letter accompanying any such payment be deemed a waiver of Lessor's right to collect any unpaid amounts or an accord and satisfaction.

C. *Successors Bound.* Except as otherwise specifically provided herein, the terms, covenants and conditions contained in this Lease shall bind and inure to the benefit of the respective heirs, successors, executors, administrators and assigns of each of the parties hereto.

D. *Captions.* Captions are used throughout this Lease for convenience of reference only and shall not be considered in any manner in the construction or interpretation hereof.

E. *Severability.* The provisions of this Lease shall be deemed severable. If any part of this Lease shall be held unenforceable by any court of competent jurisdiction, the remainder shall remain in full force and effect, and such unenforceable provision shall be reformed by such court so as to give maximum legal effect to the intention of the parties as expressed therein.

F. *Other Documents.* Each of the parties agrees to sign such other and further documents as may be necessary or appropriate to carry out the intentions expressed in this Lease; provided such documents are reasonably acceptable to each parties' counsel.

G. *Entire Agreement.* This Lease and any other instruments or agreements referred to herein, constitute the entire agreement between the parties with respect to the subject matter hereof, and there are no other representations, warranties or agreements except as herein provided.

H. *Forum Selection; Jurisdiction; Venue; Choice of Law.* For purposes of any action or proceeding arising out of this Lease, the parties hereto expressly submit to the jurisdiction of all federal and state courts located in the State of Nevada. Lessee consents that it may be served with any process or paper by registered mail or by personal service within or without the State of Nevada in accordance with applicable law. Furthermore, Lessee waives and agrees not to assert in any such action, suit or proceeding that it is not personally subject to the jurisdiction of such courts, that the action, suit or proceeding is brought in an inconvenient forum or that venue of the action, suit or proceeding is improper. Nothing contained in this Section shall limit or restrict the right of Lessor to commence any proceeding in the federal or state courts located in the state where each Property is located to the extent Lessor deems such proceeding necessary or advisable to exercise remedies available under this Lease.

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

J. *Prohibited Persons and Transactions.* Lessee and Lessor (each a "Representing Party") represents to its current knowledge to the other that the Representing Party is not a person or entity, nor owns property or interests in property, which is blocked pursuant to Executive Order 13224 signed on September 24, 2001 and entitled "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support Terrorism" or under any rules and regulations related thereto.

39. **Intentionally Omitted.**

40. **Amendments to Accommodate Sale to Tenants In Common.** At the request of Lessor, Lessee shall execute any amendments to this Lease that Lessor deems reasonably necessary to accommodate Lessor's sale of the Property to tenants in common (and subsequent management of the Property by such tenants in common or a manager appointed by them), provided that such amendments do not materially and negatively impact Lessee's obligations hereunder.

[Remainder of page intentionally left blank; signatures follow]

JEFFREY LANGAN'S OFC Fax: 9494649261
JAN-03-06 11:45AM FROM-Intern Mail Date Service

Jan 3 2006 17:00 P.02
T-105 P 002/008 F-310

IN WITNESS WHEREOF, Lessor and Lessee have entered into this Lease as of the date first above written.

LESSOR:

Edward C. Wooley
EDWARD C. WOOLEY

Judith A. Wooley
JUDITH A. WOOLEY

Tax Identification No. [REDACTED]

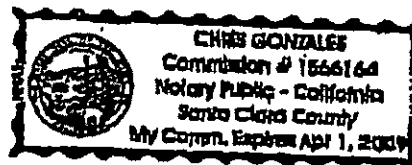
STATE OF California)
COUNTY OF San Jose) ss

The foregoing instrument was acknowledged before me on Dec 2, 2005 by Chris Gonzales, the Notary Public of Edward C. Wooley, on behalf of the limited liability company.

Judith A. Wooley

Chris Gonzales
Notary Public

My Commission Expires: Apr 1, 2009



JEFFREY LANGAN'S OFC Fax: 9494649261
 JAN-02-06 11:45AM FROM: Interco Rev tate Service

Jan 3 2006 17:00 P.03
 Y-105 P-004/005 F-510

LESSEE:

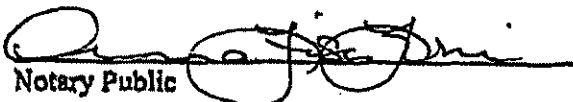
BERRY-HINCKLEY INDUSTRIES, a Nevada corporation

By: 

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 \$272,000.00.

"Base Monthly Rental" means an amount equal to 1/12 of the applicable Base Annual Rental.

"Business Day" means Monday through Friday, except those days on which the United States Postal Service does not deliver regular first-class mail.

"Casualty" means any loss of or damage to any property included within or related to any Property or arising from an adjoining property caused by fire, flood or other casualty.

"Condemnation" means a Taking and/or a Requisition.

"Costs" means all reasonable costs and expenses incurred by a Person, including without limitation, reasonable attorneys' fees and expenses, court costs, expert witness fees, costs of tests and analyses, repair and maintenance, travel and accommodation expenses, deposition and trial transcripts, copies and other similar costs and fees, brokerage fees, escrow fees, title insurance and other insurance premiums, appraisal fees, stamp taxes, recording fees and transfer taxes or fees, as the circumstances require.

"Dealer" means any Person that supplies gasoline and/or diesel fuel to Lessee at the Property for sale to third parties, or its successor or assigns.

"Dealer Agreement" means a written agreement or other document granting Lessee the right to operate a gas station operation under the flag, brand or trade name of a Dealer.

"Default Rate" means 18% per annum or the highest rate permitted by law, whichever is less.

"*Deed of Trust*" means any and all deeds of trust, mortgages or other liens to secure debts or other security instruments here and after placed by Lessor on the Property or any part thereof (except the Lessee's personal property or trade fixtures), and to any and all renewals, modifications, consolidations, replacements, extensions or substitutions of any such instruments.

"*Effective Date*" has the meaning set forth in Section 3 of this Lease.

"*Environmental Laws*" means federal, state and local laws, ordinances, common law requirements and regulations and standards, rules, policies and other governmental requirements, administrative rulings and court judgments and decrees having the effect of law in effect now or in the future and including all amendments, that relate to Hazardous Materials, Regulated Substances, USTs, and/or the protection of human health or the environment, or relating to liability for or Costs of Remediation or prevention of Releases, and apply to Lessee and/or the Property.

"*Environmental Liens*" means liens that may be imposed pursuant to Environmental Laws, including but not limited to Nevada Revised Statutes Chapters 459 and 618.

"*Event of Default*" has the meaning set forth in Section 20.A.

"*Expiration Date*" has the meaning set forth in Section 3.

"*Extension Option*" has the meaning set forth in Section 3.

"*Extension Term*" has the meaning set forth in Section 3.

"*Force Majeure Event*" has the meaning set forth in Section 29.

"*Governmental Authority*" means any governmental authority, agency, department, commission, bureau, board, instrumentality, court or quasi-governmental authority of the United States, any state or any political subdivision thereof (including but not limited to the Nevada Department of Environmental Protection, the Nevada Gaming Control Board and the Nevada Gaming Commission) with authority to adopt, modify, amend, interpret, give effect to or enforce any federal, state and local laws, statutes, ordinances, rules or regulations, including common law, or to issue court orders.

"*Hazardous Materials*" includes: (a) oil, petroleum products, flammable substances, explosives, radioactive materials, hazardous wastes or substances, toxic wastes or substances or any other materials, contaminants or pollutants which pose a hazard to the Property or to Persons on or about the Property, cause the Property to be in violation of any local, state or federal law or regulation, (including without limitation, any Environmental Law), or are defined as or included in the definition of "hazardous substances", "hazardous wastes", "hazardous materials", "toxic substances", "contaminants", "pollutants", or words of similar import under any applicable local, state or federal law or under the regulations adopted, orders issued, or publications promulgated pursuant thereto, including, but not limited to: (i) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §9601, et seq.; (ii) the Hazardous Materials Transportation Act, as amended, 49 U.S.C. §1801, et seq.; (iii) the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §6901, et seq.; and

Sample Lease
1/4/2006

(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 GBD0CS 477142v2

ECW002044

"Losses" means any and all claims, suits, liabilities (including, without limitation, strict liabilities), actions, proceedings, obligations, debts, damages, losses, Costs, diminutions in value, fines, penalties, interest, charges, fees, judgments, awards, amounts paid in settlement and damages of whatever kind or nature, inclusive of bodily injury and property damage to third parties (including, without limitation, attorneys' fees and other Costs of defense).

"Monetary Obligations" means all Rental and all other sums payable or reimbursable by Lessee under this Lease to Lessor, to any third party on behalf of Lessor, or to any Indemnified Party.

"Notices" has the meaning set forth in Section 24.

"Permitted Amounts" shall mean, with respect to any given level of Hazardous Materials or Regulated Substances, that level or quantity of Hazardous Materials or Regulated Substances in any form or combination of forms which does not constitute a violation of any Environmental Laws and is customarily employed in, or associated with, similar businesses located in the states where the Property is located.

"Permitted Encumbrances" shall mean those covenants, restrictions, reservations, liens, conditions, encroachments, easements, survey exceptions, parties in possession and other matters of title that affect the Property as of the date of Lessor's acquisition thereof and those items which hereafter affect title as permitted under this Lease, including but not limited to those identified in the owner's policy of title insurance issued to Lessor by First American Title Insurance Company or an agent thereof in conjunction with Lessor's acquisition of the Property.

"Permitted Facility" means a gas station with convenience store (and restaurant and postal unit operations within a convenience store), and uses incidental or related thereto including but not limited to a car wash, quick lube/oil change facility, the operation of gaming devices within the convenience store and offices for Lessee's operations, together with uses that are complementary to or extensions of Lessee's gas station and convenience store operations (e.g., quick-service restaurants, deli and sandwich shops, coffee shops, juice shops, postal contract units and/or UPS/Federal Express services) when such uses are not in violation of Legal Requirements or the Permitted Encumbrances.

"Permitted Sublease" has the meaning set forth in Section 23.

"Person" means any individual, partnership, corporation, limited liability company, trust, unincorporated organization, Governmental Authority or any other form of entity.

"Property" means, that parcel or parcels of real estate located at the address set forth in Exhibit B and legally described on Exhibit B attached hereto (which parcels may be fee estates or easement estates), together with all rights, privileges, and appurtenances associated therewith, all buildings, fixtures and other improvements now or hereafter located on such parcels of real estate (whether or not affixed to such real estate).

"Regulated Substances" means "petroleum" and "petroleum-based substances" or any similar terms described or defined in any of the Environmental Laws and any applicable federal, state, county or local laws applicable to or regulating USTs.

"Release" means any presence, release, deposit, discharge, emission, leaking, spilling, seeping, migrating, injecting, pumping, pouring, emptying, escaping, dumping, disposing or other movement of Hazardous Materials, Regulated Substances or USTs.

"Remediation" means any response, remedial, removal, or corrective action, any activity to cleanup, detoxify, decontaminate, contain or otherwise remediate any Hazardous Materials, Regulated Substances or USTs, any actions to prevent, cure or mitigate any Release, any action to comply with any Environmental Laws or with any permits issued pursuant thereto, any inspection, investigation, study, monitoring, assessment, audit, sampling and testing, laboratory or other analysis, or any evaluation relating to any Hazardous Materials, Regulated Substances or USTs.

"Rental" means, collectively, the Base Annual Rental and the Additional Rental.

"Rent Adjustment" has the meaning set forth in Section 4.B.

"Successor Lessor" has the meaning set forth in Section 21.

"Taking" means (a) any taking or damaging of all or a portion of the Property (i) in or by condemnation or other eminent domain proceedings pursuant to any Law, general or special, or (ii) by reason of any agreement with any condemnor in settlement of or under threat of any such condemnation or other eminent domain proceeding, or (iii) by any other means, or (b) any de facto condemnation that constitutes a compensable taking under applicable law. The Taking shall be considered to have taken place as of the later of the date actual physical possession is taken by the condemnor, or the date on which the right to compensation and damages accrues under the law applicable to the Property.

"Threatened Release" means a substantial likelihood of a Release which requires action to prevent or mitigate damage to the soil, surface waters, groundwaters, land, stream sediments, surface or subsurface strata, ambient air or any other environmental medium comprising or surrounding any Property which may result from such Release.

"USTs" means any one or combination of tanks and associated product piping systems used in connection with storage, dispensing and general use of Regulated Substances.

"WGI" means Winner's Gaming, Inc.

"WGI Agreement" means any and all agreements of Lessee with WGI pursuant to which WGI currently operates gaming machines or devices and related equipment (or the technological evolution thereof) on the Property and any Substitute WGI Agreement (as defined in Section 12.F.).

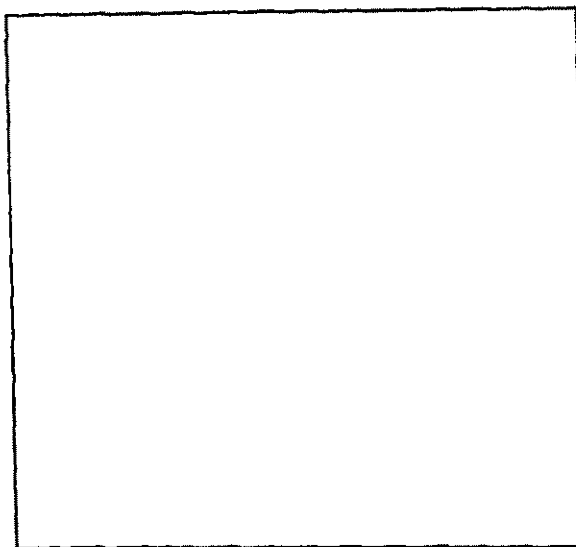
EXHIBIT B

ADDRESS AND LEGAL DESCRIPTION OF PROPERTY

PROPERTY ADDRESS:

PROPERTY LEGAL DESCRIPTION:

EXHIBIT C



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

THIS AGREEMENT, made effective as of _____, 2005, by and
 _____, having a mailing address of _____ ("Lessor"), and
 _____, having a mailing address of _____ ("Lessee") and
 _____ ("Lender"),
 having a mailing address of _____ of
 _____, and/or its participants,
 successors or assigns.

WITNESSETH:

A. WHEREAS, by Lease Agreement dated _____, 2005 (hereinafter referred to as the "Lease"), Lessor leased and rented to Lessee the real property having a street address of _____, in _____, Nevada, a legal description of which is attached as Exhibit A (the "Property"), which Lease is evidenced by a Memorandum of Lease dated _____, 2005 and filed of record in the records of the County of _____, State of Nevada (the "Official Records") in Book _____, Page _____ as Document No. _____; and

B. WHEREAS, Lessor has obtained a loan from Lender secured by, among other things, a Deed of Trust, Assignment of Rents and Leases, Security Agreement and Financing Statement encumbering, among other things, the Property dated _____, 2005 and filed of record in the Official Records in Book _____, Page _____ as Document No. _____ (the "Deed of Trust"), and as a condition to making such loan, it was agreed between Lessor and Lender that Lessor would obtain from Lessee certain written agreements; and

C. WHEREAS, Lessee and Lender desire hereby to establish certain rights, safeguards, obligations and priorities with respect to their respective interests by means of the following agreement.

NOW THEREFORE, for and in consideration of the Property and of the mutual covenants and promises herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Lessee and Lender agree as follows:

1. The Lease and the rights of Lessee thereunder are and shall be subject and subordinate to the lien of the Deed of Trust and to all of the terms, conditions and provisions thereof, to all advances made or to be made thereunder, to the full extent of the principal sum, interest thereon and other amounts from time to time secured thereby, and to any renewal, substitution, extension, modification or replacement thereof, including any increase in the indebtedness secured thereby or any supplements thereto. In the event that Lender or any other person (the Lender, any other such person and their successors and assigns being referred to herein as the "Purchaser") acquires title to the Property pursuant to the exercise of any remedy provided for in the Deed of Trust or by reason of the acceptance of a deed in lieu of foreclosure, Lessee covenants and agrees to attorn to and recognize and be bound to Purchaser as its new Lessor, and subject to the other terms, provisions and conditions of this Agreement, the Lease shall continue in full force and effect as a direct Lease between Lessee and Purchaser.

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

a. the right of possession of Lessee to the Property shall not be terminated or disturbed by any steps or proceedings taken by Lender in the exercise of any of its rights under the Deed of Trust; and

b. the Lease shall not be terminated or affected by said exercise of any remedy provided for in the Deed of Trust, and Lender hereby covenants that any sale by it of the Property pursuant to the exercise of any rights and remedies under the Deed of Trust or otherwise, shall be made subject to the Lease and the rights of Lessee thereunder; Lessee shall not be named in any foreclosure action unless necessary, in the

reasonable judgment of Lender, to complete such foreclosure action under the laws of the state in which the Property is located.

3. In no event shall Lender or any other Purchaser be:

- a. liable for any act or omission of any prior landlord;
- b. liable for the return of any security deposit which has not been delivered to the Purchaser;
- c. subject to any offsets or defenses which the Lessee might have against any prior landlord;
- d. bound by any payment of Base Annual Rental, Base Monthly Rental or Additional Rental which the Lessee might have paid to any prior landlord for more than the current month;
- e. bound by any provisions of the Lease regarding commencement or completion of construction of the Property; or
- f. bound by any warranties of construction provided by Lessor under the Lease.

4. Lessee agrees to give prompt written notice to Lender of any default by the Lessor under the Lease which would entitle Lessee to cancel the Lease or abate the Rental payable thereunder, and agrees that notwithstanding any provision of Lease, no notice of cancellation thereof shall be effective unless Lender has received the notice aforesaid and has failed within 30 days of the date of receipt thereof to cure, or if the default cannot be cured within 30 days, has failed to commence and to pursue diligently the cure of the Lessor's default which gave rise to such right of cancellation or abatement. Lessee further agrees to give such notices to any successor-in-interest of Lender, provided that such successor-in-interest shall have given written notice to Lessee of its acquisition of Lender's interest in the Deed of Trust and designated the address to which such notices are to be sent.

5. Lessee acknowledges that, under the terms of the Deed of Trust, Lessor has assigned to Lender the rentals under the Lease as additional security for said loan, and Lessee hereby expressly consents to and recognizes such Deed of Trust, and agrees to pay the Rental to Lender or its nominee whenever Lender claims or requests the Rental under the terms of said Assignment.

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

- a. make a prepayment in excess of one month of Base Monthly Rental thereunder;

b. subordinate or permit subordination of the Lease to any lien subordinate to the Deed of Trust; or

c. make or enter into any amendment or modification to or termination of the Lease.

7. Lessee agrees to certify in writing to Lender, upon request, whether or not any default on the part of the Lessor exists under the Lease and the nature of any such default. Lessee states that as of this date, the Lease is in full force and effect, without modification. Lessee further states as follows:

a. Lessee is the tenant under the Lease for the Property. The Base Monthly Rental presently is \$_____ per month.

b. The Lease term commenced or will commence on the Effective Date, as defined in the Lease. The termination date of the Lease term, excluding renewals and extensions, is March 31, 2026. Lessee has the right to extend or renew the Lease for four (4) consecutive five (5) year periods.

c. The Lease has not been assigned, modified, supplemented or amended in any way by Lessee, except as described on the attached sheet (if any). The Lease constitutes the entire agreement between the parties and there are no other agreements concerning the Property, and Lessee is not entitled to receive any concession or benefit (rental or otherwise) or other similar compensation in connection with renting the Property other than as set forth in the Lease.

d. The Lease is valid and in full force and effect, and, to the best of Lessee's knowledge, no party thereto, their successors or assigns is presently in default thereunder. Lessee has no defense, set-off or counterclaim against Lessor arising out of the Lease or in any way relating thereto, and no event has occurred and no condition exists, which with the giving of notice or the passage of time, or both, will constitute a default under the Lease.

e. No Base Monthly Rental or other sum payable under the Lease has been paid more than one month in advance.

f. No security deposit has been given to Lessor to secure Lessee's performance under the Lease.

8. The foregoing provisions shall be self-operative and effective without the execution of any further instruments on the part of either party hereto. However, Lessee agrees to execute and deliver to Lender or to any person to whom Lessee herein agrees to attorn such other instruments as either shall request in order to effect said provisions in form consistent with the terms hereof and reasonably acceptable to Lender, Lessee and such party to whom Lessee has agreed to attorn.

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

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

11. This agreement may be signed in counterparts.

12. If any term or provision of this Agreement shall to any extent be held invalid or unenforceable, the remaining terms and provisions hereof shall not be affected thereby, but each term and provision hereof shall be valid and enforceable to the fullest extent permitted by law.

13. All notices, statements and other communications to be given under the terms of this agreement shall be in writing and delivered by hand against written receipt or sent by certified or registered mail, return receipt requested, postage prepaid and addressed as provided in the first paragraph of this Agreement, or at such other address as from time to time designated by the party receiving the notice.

[Remainder of page intentionally left blank; signatures follow]

IN WITNESS WHEREOF, Lessee and Lender have caused this instrument to be executed as of the day and year first above written.

LESSEE:

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation

By: _____
Its: _____

STATE OF _____)
COUNTY OF _____) ss.

The foregoing instrument was acknowledged before me on _____, 2005,
by _____, the _____
of Berry-Hinckley Industries, a Nevada corporation, for and on behalf of the corporation.

Notary Public

LANDLORD:

By: _____

Its: _____

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me on _____, 2005,
by _____, the _____
of _____, for and on behalf of the limited liability company.

Notary Public

This instrument was prepared by:

EXHIBIT A TO SNDA

(Legal Description)

Sample Lease
1/4/2006

000160/09959 GBDOS 477142v2

ECW002056

EXHIBIT 2

EXHIBIT 2

1 DICKINSON WRIGHT
 2 JOHN P. DESMOND
 Nevada Bar No. 5618
 3 BRIAN R. IRVINE
 Nevada Bar No. 7758
 4 ANJALI D. WEBSTER
 Nevada Bar No. 12515
 100 West Liberty Street, Suite 940
 5 Reno, NV 89501
 Tel: (775) 343-7500
 6 Fax: (775) 786-0131
 Email: Jdesmond@dickinsonwright.com
 7 Email: Brvine@dickinsonwright.com
 8 Email: Awebster@dickinsonwright.com

9 *Attorney for Defendants*
Berry Hinckley Industries and Jerry Herbst

10 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
 11 **IN AND FOR THE COUNTY OF WASHOE**

12
 13 LARRY J. WILLARD, individually and as
 trustee of the Larry James Willard Trust Fund; CASE NO. CV14-01712
 14 OVERLAND DEVELOPMENT DEPT. 6
 CORPORATION, a California corporation;
 15 EDWARD E. WOOLEY AND JUDITH A.
 WOOLEY, individually and as trustees of the
 16 Edward C. Wooley and Judith A. Wooley
 Intervivos Revocable Trust 2000,

17
 18 Plaintiff,

19 vs.

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

21 Defendants.

22
 23 BERRY-HINCKLEY INDUSTRIES, a
 Nevada corporation; and JERRY HERBST,
 24 an individual;

25 Counterclaimants,

26 vs

27 LARRY J. WILLARD, individually and as
 trustee of the Larry James Willard Trust Fund;
 28 OVERLAND DEVELOPMENT

1 CORPORATION, a California corporation;

2 Counter-defendants.

3
4
5 **DECLARATION OF CHRIS KEMPER**

6
7 I, CHRIS KEMPER, pursuant to NRS 53.045, declare and state as follows:

8 1. I am an employee of Terrible Herbst, Inc. ("THI"). THI is part of the Herbst
9 family of companies, as was Berry-Hinckley Industries ("BHI"). As part of my work for THI, I
10 was involved in the management of BHI and have personal knowledge of its operations.

11 2. I have personal knowledge of each of the matters stated herein and could testify
12 competently to the same if called upon by this Court.

13 3. I make this Declaration in support of Defendants'/Counterclaimants' Opposition
14 to Edward E. Wooley And Judith A. Wooley' S Motion For Summary Judgment.

15 4. On or about December 2, 2005, BHI entered into a lease agreement (the
16 "Highway 50 Lease") for property owned by the Wooley Plaintiffs at 1820 Highway 50 East,
17 Carson City, Nevada (the "Highway 50 Property").

18 5. BHI never operated on the Highway 50 Property at any time after the parties
19 entered into the Highway 50 Lease, and Wooley never objected.

20 6. The only operations to ever occur on the Highway 50 Property were those by
21 BHI's subtenant, Little Caesar's Pizza.

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

23 DATED this 13 day of Nov., 2017.

24
25 
26 CHRIS KEMPER

27 RENO 65540-1 24801v1

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 13 OF 19

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	Exhibit 52: Sales brochure for the Virginia Property prepared by Daniel Gluhaich for marketing purposes in 2012		10	2273-2283
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	Exhibit 2: December 12, 2014, Plaintiffs Initial Disclosures		10	2335-2342
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	Exhibit 7: March 15, 2016 Letter		11	2459-2550
	Exhibit 8: April 20, 2016, Letter		11	2551-2577
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	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

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<u>ADDITIONAL DOCUMENTS</u>				
68.	Order Granting Defendants’ Motion for Partial Summary Judgment [Oral Argument Requested] ¹	01/04/18	19	4353-4357

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

EXHIBIT 3

EXHIBIT 3

1 IN THE SECOND JUDICIAL DISTRICT COURT
2 OF THE STATE OF NEVADA
3 IN AND FOR THE COUNTY OF WASHOE

4 -o0o-

5
6 LARRY J. WILLARD, individually
7 and as trustee of the Larry
8 James Willard Trust Fund;
9 OVERLAND DEVELOPMENT CORPORATION,
10 a California corporation; EDWARD
11 C. WOOLEY and JUDITH A. WOOLEY,
12 individually and as Trustees of
13 the EDWARD C. WOOLEY and JUDITH
14 A. WOOLEY INTERVIVOS REVOCABLE
15 TRUST 2000,

16 Plaintiffs,
17 vs.

Case No. CV14-01712
Dept. No. 6

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

21 Defendants.
22
23 _____/

24 Pages 1 to 138, inclusive.
25

26 DEPOSITION OF EDWARD C. WOOLEY

27 _____
28 Thursday, August 20, 2015
29 Reno, Nevada

30
31 REPORTED BY: CHRISTINA AMUNDSON
32 CCR #641 (Nevada)
33 CSR #11883 (California)

34 MOLEZZO REPORTERS - 775.322.3334

A P P E A R A N C E S

FOR PLAINTIFF:

LAW OFFICES OF BRIAN P. MOQUIN

BY: BRIAN P. MOQUIN, ATTORNEY AT LAW

3506 La Castellet Court

San Jose, CA 95148

408.300.0022, bmoquin@BrianMoquin.com

FOR DEFENDANTS:

DICKINSON WRIGHT PLLC

BY: ANJALI D. WEBSTER, ATTORNEY AT LAW

BRIAN IRVINE, ATTORNEY AT LAW

100 W. Liberty Street, Suite 940

Reno, NV 89501

775.343.7498, awebster@dickinsonwright.com

ALSO PRESENT: Larry Willard

-o0o-

1 A That's date she wanted to be paid off.

2 Q And was she?

3 A No.

4 Q Okay. Switch gears again talk to you about
5 the sublease with Little Caesars.

6 (Deposition Exhibit 6 marked for
7 identification.)

8 BY MS. WEBSTER:

9 Q Okay. Mr. Wooley, are you familiar with
10 this document?

11 A Yes.

12 Q Okay. What is it?

13 A It's an agreement between Little Caesars
14 Pizza and BHI.

15 Q Okay. And so you had said earlier that
16 Little Caesars Pizza still occupies a portion of the
17 property.

18 A Yes.

19 Q And approximately what portion of the
20 property? How much --

21 A One-third.

22 Q Have you received all monthly payments from
23 Little Caesars since March of 2013?

24 A Yes.

25 Q Okay. And what is Little Caesars currently

CERTIFICATE OF WITNESS

I hereby certify under penalty of perjury that I have read the foregoing deposition, made the changes and corrections that I deem necessary, and approve the same as now true and correct.

Dated this _____ day of _____,
2015.

EDWARD C. WOOLEY

-o0o-

1 STATE OF NEVADA)

2) ss.

3 COUNTY OF WASHOE)

4

5 I, CHRISTINA MARIE AMUNDSON, a Certified Court
6 Reporter in and for the States of Nevada and
7 California do hereby certify:

8 That I was personally present for the purpose
9 of acting as Certified Court Reporter in the matter
10 entitled herein; that the witness was by me duly
11 sworn;

12 That said transcript which appears hereinbefore
13 was taken in verbatim stenotype notes by me and
14 thereafter transcribed into typewriting as herein
15 appears to the best of my knowledge, skill, and
16 ability and is a true record thereof.

17

18

19 
Christina Amundson, CCR #641 (NV), CSR #11883 (CA)

20

-o0o-

21

22

23

24

25

EXHIBIT 4

EXHIBIT 4

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 Mestro 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 s 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
00016009959 GSDOCS 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 untenability 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.

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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 earthquakes, 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

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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 (1) 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.

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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

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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

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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

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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

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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.

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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 withheld 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

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requested, or (iv) transmission, if delivered by facsimile pursuant to the requirements of Section 24.D above. Notices shall be provided to the parties and addresses (or electronic mail addresses) specified below:

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

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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 (esch, a "Force Majeure Event") shall excuse the performance by such party for a period equal to any such prevention, delay or stoppage, expressly excluding, however, the obligations imposed upon Lessee with respect to Rental and other Monetary Obligations to be paid hereunder.

30. **No Merger.** There shall be no merger of this Lease nor of the leasehold estate created by this Lease with the fee estate in or ownership of the Property by reason of the fact that the same person, corporation, firm or other entity may acquire or hold or own, directly or indirectly, (A) this Lease or the leasehold estate created by this Lease or any interest in this Lease or in such leasehold estate, and (B) the fee estate or ownership of the Property or any interest in such fee estate or ownership. No such merger shall occur unless and until all persons, corporations, firms and other entities having any interest in (i) this Lease or the leasehold estate created by this Lease, and (ii) the fee estate in or ownership of the Property or any part thereof sought to be merged shall join in a written instrument effecting such merger and shall duly record the same.

31. **Characterization.** Lessor and Lessee acknowledge and warrant to each other that each has been represented by independent counsel and has executed this Lease after being fully advised by said counsel as to its effect and significance. This Lease shall be interpreted and construed in a fair and impartial manner without regard to such factors as the party which prepared the instrument, the relative bargaining powers of the parties or the domicile of any party. Whenever in this Lease any words of obligation or duty are used, such words or expressions shall have the same force and effect as though made in the form of a covenant.

32. **Easements.** During the Lease Term, Lessor shall not have the right to grant easements on, over, under and above the Property without the prior consent of Lessee, which consent will not be unreasonably withheld, conditioned or delayed.

33. **Bankruptcy. Intentionally Omitted.**

34. **Attorneys' Fees.** In the event of any judicial or other adversarial proceeding concerning this Lease, to the extent permitted by Law, Lessor the prevailing party shall be entitled to recover all of its reasonable attorneys' fees and other Costs in addition to any other relief to which it may be entitled. In addition, the prevailing party shall, upon demand, be entitled to all attorneys' fees and all other Costs incurred in the preparation and service of any notice or demand hereunder, whether or not a legal action is subsequently commenced.

35. **Memorandum of Lease.** Concurrently with the execution of this Lease, Lessor and Lessee are executing Lessor's standard form memorandum of lease in recordable form, indicating the names and addresses of Lessor and Lessee, s 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 converssion 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. **Wsaiver 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 negotisted 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 

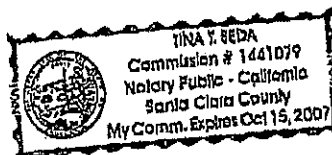
Tax Identification No. 

STATE OF California)
COUNTY OF Santa Clara) ss

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

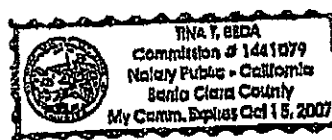
a Notary Public in and for said County and State, personally
appeared

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)

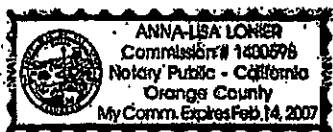
LESSEE:

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

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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.

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"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

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(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.

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"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 Law 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).

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"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).

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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.

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EXHIBIT 5

EXHIBIT 5



AIR COMMERCIAL REAL ESTATE ASSOCIATION

STANDARD MULTI-TENANT SHOPPING CENTER LEASE - NET

1. Basic Provisions ("Basic Provisions").

1.1 Parties: This Lease ("Lease"), dated for reference purposes only 10/12/2012
is made by and between Berry Hinkley Industries

and B&J Pizza Inc., a Nevada Corporation

("Lessor")

("Lessee")

(collectively the "Parties", or individually a "Party")

1.2 Premises: That certain portion of the Shopping Center (as defined below), including all improvements therein or to be provided by Lessor under the terms of this Lease, commonly known by the street address of 1820 Hwy 50 East, located in the City of Carson City, County of Carson City, State of Nevada, with zip code _____, as outlined on Exhibit A attached hereto ("Premises") and generally described as (describe briefly the nature of the Premises): 1301 sf of a 4104 sf strip center on 1820 Hwy 50 East, Carson City, NV.

In addition to Lessee's right to use and occupy the Premises as hereinafter specified, Lessee shall have non-exclusive rights to the Common Areas (as defined in Paragraph 2.7 below) as hereinafter specified, but shall not have any rights to the roof, exterior walls or utility raceways of the building containing the Premises ("Building") or to any other buildings in the Shopping Center. The Premises and the Building are situated within the Shopping Center known as _____ The Premises, the Building the Common Areas and all other buildings and improvements within said Shopping Center, together with the land upon which they are located, are herein collectively referred to as the "Shopping Center." (See also Paragraph 2)

1.3 Term: 5 years and _____ months ("Original Term") commencing November 1, 2012 ("Commencement Date") and ending October 31, 2017 ("Expiration Date") (See also Paragraph 3)

1.4 Early Possession: If the Premises are available Lessee may have non-exclusive possession of the Premises commencing upon full execution of this Lease ("Early Possession Date"). (See also Paragraphs 3.2 and 3.3)

1.5 Base Rent: \$2,485.80 per month ("Base Rent"), payable on the 1st day of each month commencing March 1, 2013. (See also Paragraph 4)

☐ If this box is checked, there are provisions in this Lease for the Base Rent to be adjusted. See Paragraph

1.6 Percentage Rent Rate: N/A percent (____%) of Gross Sales. Percentage Rent shall be due and payable in accordance with the provisions of the Percentage Rent Addendum, if any, attached hereto and made a part hereof, and Paragraph 4 hereof.

1.7 Lessee's Share of Common Area Operating Expenses: Thirty-Three and 7/10 percent (33.7 %) ("Lessee's Share"). In the event that that size of the Premises and/or the Shopping Center are modified during the term of this Lease, Lessor shall recalculate Lessee's Share to reflect such modification.

1.8 Merchants' Association Annual Dues: \$ 0 per year ("Merchants' Association Dues"). Lessee shall pay Merchants' Association Dues and/or become a member of the Merchants' Association in accordance with the provisions of the Merchants' Association Addendum, if any, attached hereto.

1.9 Base Rent and Other Monies Paid Upon Execution:

- (a) Base Rent: \$2,485.80 for the period March 1 to March 31, 2013
(b) Common Area Operating Expenses: \$ _____ for the period _____
(c) Security Deposit: \$ 2,485.80 ("Security Deposit"). (See also Paragraph 5)
(d) Merchants' Association Dues: N/A for the period _____
(e) Other: \$ _____ for _____
(f) Total Due Upon Execution of this Lease: \$4,971.60

1.10 Agreed Use: Pizza Restaurant

(See also Paragraph 6)

1.11 Agreed Trade Name: Little Caesars Pizza

(See also Paragraph 6)

1.12 Insuring Party. Lessor is the "Insuring Party". (See also Paragraph 6)

1.13 Real Estate Brokers: (See also Paragraph 15 and 25)

(a) Representation: The following real estate brokers (the "Brokers") and brokerage relationships exist in this transaction (check applicable boxes):

- ☐ _____ represents Lessor exclusively ("Lessor's Broker").
☐ _____ represents Lessee exclusively ("Lessee's Broker"), or
☒ Colliers International Las Vegas represents both Lessor and Lessee ("Dual Agency")

(b) Payment to Brokers: Upon execution and delivery of this Lease by both Parties, Lessor shall pay to the Brokers for the brokerage services rendered by the Brokers the fee agreed to in the attached separate written agreement or if no such agreement is attached, the sum of _____ or _____ % of the total Base Rent payable for the Original Term, the sum of \$8,448.00 or _____ of the total Base Rent payable during any period of time that the Lessee occupies the Premises subsequent to the Original Term, and/or the sum of _____ or _____ % of the purchase price in the event that the Lessee or anyone affiliated with Lessee acquires from Lessor any rights to the Premises.

1.14 Guarantor. The obligations of the Lessee under this Lease are to be guaranteed by John Gauthier

("Guarantor") (See also Paragraph 37)

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

- ☐ an addendum consisting of Paragraphs _____ through _____
☒ a site plan marked Exhibit A, depicting the Premises;

PAGE 1 OF 14

INITIALS

INITIALS

- ☒ a site plan marked Exhibit (i) _____, depicting the Shopping Center.
☐ a current set of Rules and Regulations for the Shopping Center.
☐ a current set of the Sign Criteria for the Shopping Center
☐ a work letter.
☒ other (specify) See Addendum "A"

2 Premises.

2.1 Letting. Lessor hereby leases to Lessee, and Lessee hereby leases from Lessor, the Premises, for the term, at the rental, and upon all of the terms, covenants and conditions set forth in this Lease. While the approximate square footage of the Premises may have been used in the marketing of the Premises for purposes of comparison, the Base Rent stated herein is NOT tied to square footage and is not subject to adjustment should the actual size be determined to be different. NOTE: Lessee is advised to verify the actual size prior to executing this Lease.

2.2 Condition. Lessor shall deliver the Premises to Lessee broom clean and free of debris on the Commencement Date or the Early Possession Date, whichever first occurs ("Start Date"), and, as long as the required service contracts described in Paragraph 7.1(b) below are obtained by Lessee and in effect within 30 days following the Start Date, warrants that the existing electrical, plumbing, fire sprinkler, lighting, heating, ventilating and air conditioning systems ("HVAC"), loading docks, if any, and all other such elements in the Premises, other than those constructed by Lessee, shall be in good operating condition on said date and that the structural elements of the roof, bearing walls and foundation of the Premises shall be free of material defects, and that the Premises do not contain hazardous levels of any mold or fungi defined as toxic under applicable state or federal law. If a non-compliance with such warranty exists as of the Start Date, or if one of such systems or elements should malfunction or fail within the appropriate warranty period, Lessor shall, at Lessor's sole obligation with respect to such matter, except as otherwise provided in this Lease, promptly after receipt of written notice from Lessee setting forth with specificity the nature and extent of such non-compliance, malfunction or failure, rectify same at Lessor's expense. The warranty periods shall be as follows: (i) 6 months as to the HVAC systems, and (ii) 30 days as to the remaining systems and other elements of the Premises. If Lessee does not give Lessor the required notice within the appropriate warranty period, correction of any such non-compliance, malfunction or failure shall be the obligation of Lessee at Lessee's sole cost and expense (except for the repairs to the fire sprinkler systems, roof, foundations, and/or bearing walls).

2.3 Compliance. Lessor warrants that to the best of its knowledge the improvements on the Premises and the Common Areas comply with the building codes that were in effect at the time that such such improvement, or portion thereof, was constructed, and also with all applicable laws, covenants or restrictions of record, regulations, and ordinances in effect on the Start Date ("Applicable Requirements"). Said warranty does not apply to the use to which Lessee will put the Premises, modifications which may be required by the Americans with Disabilities Act or any similar laws as a result of Lessee's use (see Paragraph 50), or to any Alterations or Utility Installations (as defined in Paragraph 7.3(a)) made or to be made by Lessee. NOTE: Lessee is responsible for determining whether or not the Applicable Requirements, and especially the zoning, are appropriate for Lessee's intended use, and acknowledges that past uses of the Premises may no longer be allowed. If the Premises do not comply with said warranty, Lessor shall, except as otherwise provided, promptly after receipt of written notice from Lessee setting forth with specificity the nature and extent of such non-compliance, rectify the same at Lessor's expense. If Lessee does not give Lessor written notice of a non-compliance with this warranty within 6 months following the Start Date, correction of that non-compliance shall be the obligation of Lessee at Lessee's sole cost and expense. If the Applicable Requirements are hereafter changed so as to require during the term of this Lease the construction of an addition to or an alteration of the Premises and/or Building, the remediation of any Hazardous Substance, or the reinforcement or other physical modification of the Premises and/or Building ("Capital Expenditure"), Lessor and Lessee shall allocate the cost of such work as follows:

(a) Subject to Paragraph 2.3(c) below, if such Capital Expenditures are required as a result of the specific and unique use of the Premises by Lessee as compared with uses by tenants in general, Lessee shall be fully responsible for the cost thereof, provided, however, that if such Capital Expenditure is required during the last 2 years of this Lease and the cost thereof exceeds 6 months' Base Rent, Lessee may instead terminate this Lease unless Lessor notifies Lessee, in writing, within 10 days after receipt of Lessee's termination notice that Lessor has elected to pay the difference between the actual cost thereof and the amount equal to 6 months' Base Rent. If Lessee elects termination, Lessee shall immediately cease the use of the Premises which requires such Capital Expenditure and deliver to Lessor written notice specifying a termination date at least 90 days thereafter. Such termination date shall, however, in no event be earlier than the last day that Lessee could legally utilize the Premises without commencing such Capital Expenditure.

(b) If such Capital Expenditure is not the result of the specific and unique use of the Premises by Lessee (such as, governmentally mandated seismic modifications), then Lessor shall pay for such Capital Expenditure and Lessee shall only be obligated to pay, each month during the remainder of the term of this Lease or any extension thereof, on the date that on which the Base Rent is due, an amount equal to 1/12th of the portion of such costs reasonably attributable to the Premises. Lessee shall pay interest on the balance but may prepay its obligation at any time. If, however, such Capital Expenditure is required during the last 2 years of this Lease or if Lessor reasonably determines that it is not economically feasible to pay its share thereof, Lessor shall have the option to terminate this Lease upon 90 days prior written notice to Lessee unless Lessee notifies Lessor, in writing, within 10 days after receipt of Lessor's termination notice that Lessee will pay for such Capital Expenditure. If Lessor does not elect to terminate, and fails to tender its share of any such Capital Expenditure, Lessee may advance such funds and deduct same, with interest, from Rent until Lessor's share of such costs have been fully paid. If Lessee is unable to finance Lessor's share, or if the balance of the Rent due and payable for the remainder of this Lease is not sufficient to fully reimburse Lessee on an offset basis, Lessee shall have the right to terminate this Lease upon 30 days written notice to Lessor.

(c) Notwithstanding the above, the provisions concerning Capital Expenditures are intended to apply only to non-voluntary, unexpected, and new Applicable Requirements. If the Capital Expenditures are instead triggered by Lessee as a result of an actual or proposed change in use, change in intensity of use, or modification to the Premises then, and in that event, Lessee shall either: (i) immediately cease such changed use or intensity of use and/or take such other steps as may be necessary to eliminate the requirement for such Capital Expenditure, or (a) complete such Capital Expenditure at its own expense. Lessee shall not have any right to terminate this Lease.

2.4 Acknowledgements. Lessee acknowledges that: (a) it has been given an opportunity to inspect and measure the Premises; (b) it has been advised by Lessor and/or Brokers to satisfy itself with respect to the size and condition of the Premises (including but not limited to the electrical, HVAC and fire sprinkler systems, security, environmental aspects, and compliance with Applicable Requirements and the Americans with Disabilities Act); and their suitability for Lessee's intended use; (c) Lessee has made such investigation as it deems necessary with reference to such matters and assumes all responsibility therefor as the same relate to its occupancy of the Premises; (d) it is not relying on any representation as to the size of the Premises made by Brokers or Lessor; (e) the square footage of the Premises was not material to Lessee's decision to lease the Premises and pay the Rent stated herein; and (f) neither Lessor, Lessor's agents, nor Brokers have made any oral or written representations or warranties with respect to said matters other than as set forth in this Lease. In addition, Lessor acknowledges that: (i) Brokers have made no representations, promises or warranties concerning Lessee's ability to honor the Lease or suitability to occupy the Premises; and (ii) it is Lessor's sole responsibility to investigate the financial capability and/or suitability of all proposed tenants.

2.5 Lessee as Prior Owner/Occupant. The warranties made by Lessor in Paragraph 2 shall be of no force or effect if immediately prior to the Start Date Lessee was the owner or occupant of the Premises. In such event, Lessee shall be responsible for any necessary corrective work.

2.6 Vehicle Parking. Lessee shall not use and shall not permit its employees to use any parking spaces in the Shopping Center except for parking by vehicles that are no larger than full-size passenger automobiles or pick-up trucks, herein called "Permitted Size Vehicles." Lessee shall permit its employees to only occupy those parking spaces, if any, as depicted as employee parking spaces on the Shopping Center site plan. Lessor may regulate the loading and unloading of vehicles by adopting Rules and Regulations as provided in Paragraph 2.9. No vehicles other than Permitted Size Vehicles may be parked in the Common Area without the prior written permission of Lessor. In addition:

- (a) Lessee shall not permit or allow any vehicles that belong to or are controlled by Lessee or Lessee's employees, suppliers, shippers, contractors or invitees to be loaded, unloaded, or parked in areas other than those designated by Lessor for such activities.
 (b) Lessee shall not service or store any vehicles in the Common Areas.
 (c) If Lessee permits or allows any of the prohibited activities described in this Paragraph 2.6, then Lessor shall have the right, without notice, in addition to such other rights and remedies that it may have, to remove or tow away the vehicle involved and charge the cost to Lessee, which cost shall be immediately payable upon demand by Lessor.

2.7 Common Areas - Definition. The term "Common Areas" is defined as all areas and facilities outside the Premises and within the exterior boundary line of the Shopping Center and interior utility roadways and installations within the Premises that are provided and designated by the Lessor from time to time for the general non-exclusive use of Lessor, Lessee and other tenants of the Shopping Center and their respective employees, suppliers, shippers, customers, contractors and invitees, including parking areas, loading and unloading areas, trash areas, roadways, walkways, driveways and landscaped areas.

2.8 Common Areas - Lessee's Rights. Lessor grants to Lessee, for the benefit of Lessee and its employees, suppliers, shippers, customers, contractors and invitees, the right to use the Common Areas for the purposes set forth in Paragraph 2.7.

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contractors, customers and invitees, during the term of this Lease, the non-exclusive right to use, in common with others entitled to such use, the Common Areas as they exist from time to time, subject to any rights, powers, and privileges reserved by Lessor under the terms hereof or under the terms of any rules and regulations or restrictions governing the use of the Shopping Center. Under no circumstances shall the right herein granted to use the Common Areas be deemed to include the right to store any property, temporarily or permanently, in the Common Areas, nor the right to display merchandise or conduct sales in the Common Areas. Any such storage, display or sales shall be permitted only by the prior written consent of Lessor or Lessor's designated agent, as exercised in Lessor's sole discretion, which consent may be revoked at any time. In the event that any unauthorized storage or displays shall occur then Lessor shall have the right, without notice, in addition to such other rights and remedies that it may have, to remove the property and charge the cost to Lessee, which cost shall be immediately payable upon demand by Lessor.

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

2.10 Common Areas - Changes. Lessor shall have the right, in Lessor's sole discretion, from time to time:

(a) To make changes or additions to the Common Areas, including, without limitation, changes in the location, size, shape and number of driveways, entrances, parking spaces, parking areas, loading and unloading areas, ingress, egress, direction of traffic, elevations, landscaped areas, signage, walkways and utility raceways;

(b) To use and close temporarily any of the Common Areas for the purpose of maintaining, repairing and altering the Shopping Center, so long as reasonable access to the Premises remains available, and to close temporarily any of the Common Areas to whatever extent is required in the opinion of Lessor's counsel to prevent a dedication of or the account of any rights of any persons or of the public to any of the Common Areas;

(c) To designate other land outside the boundaries of the Shopping Center to be a part of the Common Areas or to be entitled to use the Common Areas on a reciprocal basis;

(d) To add additional buildings and improvements to the Common Areas; and

(e) To do and perform such other acts and make such other changes in, to or with respect to the Common Areas and Shopping Center as Lessor may, in the exercise of sound business judgment, deem to be appropriate.

2.11 Common Areas - Promotional Events; Sidewalk Sales. Lessor reserves the right, from time to time, in Lessor's sole discretion, to utilize portions of the Common Areas for promotional events, which may include but shall not be limited to entertainment. Lessor further reserves the right, in Lessor's sole discretion, to permit any one or more tenants of the Shopping Center to conduct the display and/or sale of merchandise from the sidewalks immediately adjacent to such tenants' respective premises.

2.12 Common Areas - Remodeling. At any time during the Term, Lessor may remodel or expand, in any manner, the existing Shopping Center which work may include, without limitation, the addition of stops and/or new buildings to the Shopping Center (collectively, "Remodeled Center"). If Lessor deems it necessary for construction personnel to enter the Premises in order to construct the Remodeled Center, Lessor shall give Lessee no less than 60 days prior notice and Lessee shall allow such entry. Lessor shall use reasonable efforts to complete any work affecting the Premises in an efficient manner so as not to interfere unreasonably with Lessee's business. Lessee shall not be entitled to any damages for any inconvenience or any disruption to Lessee's business caused by such work; provided, however, the Base Rent paid by Lessee for the period of the inconvenience shall be abated in proportion to the degree that Lessee's use of the Premises is impaired. Lessor shall have the right to use portions of the Premises to accommodate any structures required for the Remodeled Center, provided that if as a result thereof there is a permanent decrease in the floor area of the Premises of 3% or more, there shall be a proportionate downward adjustment of Base Rent and Lessee's Share.

3. Term.

3.1 Term. The Commencement Date, Expiration Date and Original Term of this Lease are as specified in Paragraph 1.3.

3.2 Early Possession. Any provision herein granting Lessee Early Possession of the Premises is subject to and conditioned upon the Premises being available for such possession prior to the Commencement Date. Any grant of Early Possession only conveys a non-exclusive right to occupy the Premises. If an Early Possession Date has been specified in Paragraph 1.4, the Parties intend that Lessee shall have access to the Premises as of the Early Possession Date for purposes of preparing and furnishing the Premises for the conduct of Lessee's business. If Lessee totally or partially occupies the Premises prior to the Commencement Date for any reason (and for purposes hereof, "occupancy" shall include, without limitation, Lessee's entry onto the Premises for purposes of preparing and furnishing the Premises for business), the obligation to pay Base Rent and Percentage Rent shall be abated for the period of such early possession. All other terms of this Lease (including but not limited to Lessee's obligations to carry insurance and to maintain the Premises) shall be in effect during such period, except that Lessee's obligation to pay Lessee's Share of Common Area Operating Expenses, Real Property Taxes and insurance premiums shall only be in effect prior to the Commencement Date if Lessee has opened for business in the Premises prior to the Commencement Date. Any such Early Possession shall not affect the Expiration Date.

3.3 Delay In Possession. Lessor agrees to use its best commercially reasonable efforts to deliver possession of the Premises to Lessee by the Commencement Date. If, despite said efforts, Lessor is unable to deliver possession by such date, Lessor shall not be subject to any liability therefor, nor shall such failure affect the validity of this Lease or change the Expiration Date. Lessee shall not, however, be obligated to pay Rent or perform its other obligations until Lessor delivers possession of the Premises and any period of rent abatement that Lessee would otherwise have enjoyed shall run from the date of delivery of possession and continue for a period equal to what Lessee would otherwise have enjoyed under the terms hereof, but minus any days of delay caused by the acts or omissions of Lessee. If possession is not delivered within 60 days after the Commencement Date, as the same may be extended under the terms of any Work Letter executed by Parties, Lessee may, at its option, by notice in writing within 10 days after the end of such 60 day period, cancel this Lease, in which event the Parties shall be discharged from all obligations hereunder. If such written notice is not received by Lessor within said 10 day period, Lessee's right to cancel shall terminate. If possession of the Premises is not delivered within 120 days after the Commencement Date, this Lease shall terminate unless other agreements are reached between Lessor and Lessee, in writing.

3.4 Lessee Compliance. Lessor shall not be required to tender possession of the Premises to Lessee until Lessee complies with its obligation to provide evidence of insurance (Paragraph 8.6). Pending delivery of such evidence, Lessee shall be required to perform all of its obligations under this Lease from and after the Start Date, including the payment of Rent, notwithstanding Lessor's election to withhold possession pending receipt of such evidence of insurance. Further, if Lessee is required to perform any other conditions prior to or concurrent with the Start Date, the Start Date shall occur but Lessor may elect to withhold possession until such conditions are satisfied.

4. Rent.

4.1 Rent Defined. All monetary obligations of Lessee to Lessor under the terms of this Lease (except for the Security Deposit) are deemed to be rent ("Rent").

4.2 Common Area Operating Expenses. Lessee shall pay to Lessor during the term hereof, in addition to the Base Rent and, if applicable, Percentage Rent, Lessee's Share (as specified in Paragraph 1.7) of all Common Area Operating Expenses, as hereinafter defined, during each calendar year of the term of this Lease, in accordance with the following provisions:

(a) "Common Area Operating Expenses" are defined for purposes of this Lease, as all costs incurred by Lessor relating to the ownership and operation of the Shopping Center, including, but not limited to, the following:

(i) The operation, repair and maintenance, in neat, clean, good order and condition, and replacement as reasonably necessary, of the following:

(aa) The Common Areas and Common Area improvements, including parking areas, loading and unloading areas, trash areas, roadways, parkways, walkways, driveways, landscaped areas, parking lot striping, bumpers, irrigation systems, Common Area lighting facilities, fences and gates, elevators, roofs, exterior walls of the buildings, trucking systems and roof drainage systems.

(ab) Exterior signs and any tenant directories.

(ac) Any fire detection and/or sprinkler systems.

(ad) Common electrical, plumbing and other utilities servicing any building in the Shopping Center and/or the Common Areas.

(ae) All other areas and improvements that are within the exterior boundaries of the Project but outside of the Premises and/or any other space occupied by a tenant.

(f) The cost of water, gas, electricity and telephone to service the Common Areas and any utilities not separately metered.

(g) The cost of trash disposal, pest control services, property management (including, but not be limited to, a property management fee to Lessor equal to 5% of Base Rent and Percentage Rent), security services, and the costs of any environmental inspections.

(iv) Reserves set aside for equipment, maintenance, repair and replacement of Common Areas.

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- (v) Real Property Taxes (as defined in Paragraph 10)
- (vi) The cost of the premiums for the insurance maintained by Lessor pursuant to Paragraph 8.
- (vii) Any deductible portion of an insured loss concerning the Building or the Common Areas.
- (viii) Auditors', accountants' and attorneys' fees and costs related to the operation of the Shopping Center.
- (ix) The cost of any capital improvement to the Building or the Shopping Center not covered under the provisions of Paragraph 2.3; provided, however, that Lessor shall allocate the cost of any such capital improvement over a 12 year period and Lessee shall not be required to pay more than Lessee's Share of 1/144th of the cost of such capital improvement in any given month.
- (x) The cost of any other services to be provided by Lessor that are stated elsewhere in this Lease to be a Common Area Operating Expense.

Paragraph 2.3; provided, however, that Lessor shall allocate the cost of any such capital improvement over a 12 year period and Lessee shall not be required to pay more than Lessee's Share of 1/144th of the cost of such capital improvement in any given month.

(b) If Lessor determines that the method of proration of any item included within Common Area Operating Expenses is inequitable, Lessor may prorate such item on the basis of usage or other equitable considerations. Any Common Area Operating Expenses and Real Property Taxes that are specifically attributable to the Premises, the Building or to any other premises or building in the Shopping Center or to the operation, repair and maintenance thereof shall be allocated entirely to such premises or building. However, any Common Area Operating Expenses and Real Property Taxes that are not specifically attributable to any premises or building or to the operation, repair and maintenance thereof shall be equitably allocated by Lessor to all buildings in the Shopping Center.

(c) The inclusion of the improvements, facilities and services set forth in Subparagraph 4.2(a) shall not be deemed to impose an obligation upon Lessor to either have said improvements or facilities or to provide those services unless the Shopping Center already has the same. Lessor already provides the services, or Lessor has agreed elsewhere in this Lease to provide the same or some of them.

(d) Lessee's Share of Common Area Operating Expenses is payable monthly on the same day as the Base Rent is due hereunder. The amount of such payments shall be based on Lessor's estimate of the annual Common Area Operating Expenses. Within 60 days after written request (but not more than once each year) Lessor shall deliver to Lessee a reasonably detailed statement showing Lessee's Share of the actual Common Area Operating Expenses for the preceding year. If Lessee's payments during such year exceed Lessee's Share, Lessor shall credit the amount of such over-payment against Lessee's future payments. If Lessee's payments during such year were less than Lessee's Share, Lessee shall pay to Lessor the amount of the deficiency within 10 days after delivery by Lessor to Lessee of the statement.

(e) If there are one or more Major Tenants (as hereinafter defined) within the Shopping Center, then at Lessor's sole option, the amount to be reimbursed by such Major Tenants to Lessor for all or a portion of the Common Area Operating Expenses may be determined by alternative equitable methods (e.g., a Major Tenant may pay directly for its own security), and the actual amount paid by such Major Tenants shall be credited against the Common Area Operating Expenses allocated to other tenants of the Shopping Center; provided, however, that in such event the rentable area of the buildings leased to such Major Tenants shall be excluded from the rentable area of the Shopping Center for purposes of determining Lessee's Share of Common Area Operating Expenses for those specific items, notwithstanding the percentage set forth in Paragraph 1.7. As used herein, the term "Major Tenant" shall mean a tenant leasing at least 15,000 square feet of rentable area within the Shopping Center.

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

4.3 **Payment.** Lessee shall cause payment of Rent to be received by Lessor in lawful money of the United States, without offset or deduction (except as specifically permitted in this Lease), on or before the day on which it is due. All monetary amounts shall be rounded to the nearest whole dollar. In the event that any invoice prepared by Lessor is inaccurate such inaccuracy shall not constitute a waiver and Lessee shall be obligated to pay the amount set forth in this Lease. Rent for any period during the term hereof which is for less than one full calendar month shall be prorated based upon the actual number of days of said month. Payment of Rent shall be made to Lessor at its address stated herein or to such other persons or place as Lessor may from time to time designate in writing. Acceptance of a payment which is less than the amount then due shall not be a waiver of Lessor's rights to the balance of such Rent, regardless of Lessor's endorsement of any check so stating. In the event that any check, draft, or other instrument of payment given by Lessee to Lessor is dishonored for any reason, Lessee agrees to pay to Lessor the sum of \$25 in addition to any Late Charge and Lessor, at its option, may require all future Rent be paid by cashier's check. Payments will be applied first to accrued late charges and attorney's fees, second to accrued interest, then to Base Rent and Common Area Operating Expenses, and any remaining amount to any other outstanding charges or costs.

5. **Security Deposit.** Lessee shall deposit with Lessor upon execution hereof the Security Deposit as security for Lessee's faithful performance of its obligations under this Lease. If Lessee fails to pay Rent, or otherwise Defaults under this Lease, Lessor may use, apply or retain all or any portion of said Security Deposit for the payment of any amount already due Lessor for Rents which will be due in the future, and/or to reimburse or compensate Lessor for any liability, expense, loss or damage which Lessor may suffer or incur by reason thereof. If Lessor uses or applies all or any portion of the Security Deposit, Lessee shall within 10 days after written request therefor deposit monies with Lessor sufficient to restore said Security Deposit to the full amount required by this Lease. If the Base Rent increases during the term of this Lease, Lessee shall, upon written request from Lessor, deposit additional monies with Lessor so that the total amount of the Security Deposit shall at all times bear the same proportion to the increased Base Rent as the initial Security Deposit bore to the initial Base Rent. Should the Agreed Use be amended to accommodate a material change in the business of Lessee or to accommodate a sublessee or assignee, Lessor shall have the right to increase the Security Deposit to the extent necessary, in Lessor's reasonable judgment, to account for any increased wear and tear that the Premises may suffer as a result thereof. If a change in control of Lessee occurs during this Lease and following such change the financial condition of Lessee is, in Lessor's reasonable judgment, significantly reduced, Lessee shall deposit such additional monies with Lessor as shall be sufficient to cause the Security Deposit to be at a commercially reasonable level based on such change in financial condition. Lessor shall not be required to keep the Security Deposit separate from its general accounts. Within 90 days after the expiration or termination of this Lease, Lessor shall return that portion of the Security Deposit not used or applied by Lessor. No part of the Security Deposit shall be considered to be held in trust, to bear interest or to be prepayment for any monies to be paid by Lessee under this Lease.

6. Use.

6.1 Use:

(a) **Agreed Use; Agreed Trade Name.** Lessee shall use and occupy the Premises only for the Agreed Use, and for no other purpose, and Lessee shall operate at the Premises only under the Agreed Trade Name and under no other trade name. Lessee shall not use or permit the use of the Premises in a manner that is unlawful, creates damage, waste or a nuisance, or that disturbs occupants of or causes damage to neighboring premises or properties. Other than guide, signal and seeing eye dogs, Lessee shall not keep or allow in the Premises any pets, animals, birds, fish, or reptiles. Lessor shall not unreasonably withhold or delay its consent to any written request for a modification of the Agreed Use, so long as the same will not impair the structural integrity of the improvement on the Premises or the mechanical or electrical systems therein, and/or is not significantly more burdensome to the Premises, and/or is not in conflict with or incompatible with the existing or proposed uses (whether or not exclusive) of other occupants of the Shopping Center. Lessor shall not unreasonably withhold or delay its consent to any written request for a modification of the Agreed Trade Name, so long as the same is not in conflict with or incompatible with the nature and character of the Shopping Center or other existing or proposed uses of other occupants of the Shopping Center. If Lessor elects to withhold consent, Lessor shall within 7 days after such request give written notification of same, which notice shall include an explanation of Lessor's objections to the change in the Agreed Use and/or Agreed Trade Name.

(b) **Continuous Operation.** Lessee shall continuously (i) operate and conduct the Agreed Use under the Agreed Trade Name within the entire Premises in a reputable manner and in conformity with industry standards of practice prevailing in the field of business among merchants engaged in the same or similar business in the city in which the Premises are located, (ii) staff the Premises with sufficient sales personnel, stock the Premises with adequate merchandise and exercise sound business practices so as to maximize Gross Sales for the benefit of Lessee. At a minimum, Lessee shall keep the Premises continuously open for business Monday through Friday from 9:00 a.m. to 6:00 p.m., Saturday from 9:00 a.m. to 6:00 p.m. and Sunday from 10:00 a.m. to 6:00 p.m. If Lessee fails to comply with the requirements of this Paragraph 6.1(b), then in addition to any and all other rights and remedies of Lessor, Lessee shall pay to Lessor an amount equal to 1/15th of the Base Rent for each day or portion thereof that Lessee fails to so comply. Such sum shall be in addition to, and not a part of, the Base Rent otherwise due under this Lease.

(c) **Violations of Exclusive Use Rights.** Lessee acknowledges that Lessor may grant or may have previously granted, exclusive use rights to other tenants of the Shopping Center and agrees that a material consideration to Lessor in entering into this Lease is Lessee's covenant to limit its use of the Premises to the Agreed Use under the Agreed Trade Name as set forth above. Lessee's violation of exclusive use rights granted to other tenants of the Shopping Center will result in Lessor suffering irreparable harm and, therefore, in addition to all other rights and remedies available to Lessor, Lessor may seek to enjoin Lessee's breach of such covenant and Lessee shall be liable for any damages incurred or sustained by Lessor to such other tenants whose exclusive use rights are breached by Lessee. In no event shall Lessor be liable to Lessee for any failure of any other tenants of the Shopping Center to operate their businesses, or for any loss or damage that may be occasioned by or through the acts or omissions of other tenants or third parties.

(d) **Other Tenancies.** Lessor, at its sole discretion, reserves the absolute right to establish procedures to control other tenancies in the Shopping Center. Regardless of whether any specific tenants are shown on any site plan attached hereto, Lessee does not rely on that fact, nor does Lessor represent that any specific tenant or number or type of tenants shall or shall not during the Term occupy any portion of the Shopping Center, nor does Lessee rely on any other tenant operating its business in the Shopping Center at any particular time or times. Lessee, no

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constitute an eviction, constructive or otherwise, of Lessee from the Premises, and Lessee hereby waives any and all claims that it might otherwise have against Lessor by reason thereof.

6.2 Hazardous Substances.

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

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

(c) **Lessee Remediation.** Lessee shall not cause or permit any Hazardous Substance to be spilled or released in, on, under, or about the Premises (including through the plumbing or sanitary sewer system) and shall promptly, at Lessee's expense, comply with all Applicable Requirements and take all investigatory and/or remedial action reasonably recommended, whether or not formally ordered or required, for the cleanup of any contamination of, and for the maintenance, security and/or monitoring of the Premises or neighboring properties, that was caused or materially contributed to by Lessee, or pertaining to or involving any Hazardous Substance brought onto the Premises during the term of this Lease, by or for Lessee, or any third party.

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

(e) **Lessor Indemnification.** Lessor and its successors and assigns shall indemnify, defend, reimburse and hold Lessee, its employees and lenders, harmless from and against any and all environmental damages, including the cost of remediation, which are suffered as a direct result of Hazardous Substances on the Premises prior to Lessee taking possession or which are caused by the gross negligence or willful misconduct of Lessor, its agents or employees. Lessor's obligations, as and when required by the Applicable Requirements, shall include, but not be limited to, the cost of investigation, removal, remediation, restoration and/or abatement, and shall survive the expiration or termination of this Lease.

(f) **Investigations and Remediations.** Lessor shall retain the responsibility and pay for any investigations or remediation measures required by governmental entities having jurisdiction with respect to the existence of Hazardous Substances on the Premises prior to Lessee taking possession, unless such remediation measure is required as a result of Lessee's use (including "Alterations", as defined in paragraph 7.3(a) below) of the Premises, in which event Lessee shall be responsible for such payment. Lessee shall cooperate fully in any such activities at the request of Lessor, including allowing Lessor and Lessor's agents to have reasonable access to the Premises at reasonable times in order to carry out Lessor's investigative and remedial responsibilities.

(g) **Lessor Termination Option.** If a Hazardous Substance Condition (see Paragraph 9.1(e)) occurs during the term of this Lease, unless Lessee is legally responsible therefor (in which case Lessee shall make the investigation and remediation thereof required by the Applicable Requirements and this Lease shall continue in full force and effect, but subject to Lessor's rights under Paragraph 6.2(d) and Paragraph 13), Lessor may, at Lessor's option, either (i) investigate and remediate such Hazardous Substance Condition, if required, as soon as reasonably possible at Lessor's expense, in which event this Lease shall continue in full force and effect; or (ii) if the estimated cost to remediate such condition exceeds 12 times the then monthly Base Rent or \$100,000, whichever is greater, give written notice to Lessee, within 30 days after receipt by Lessor of knowledge of the occurrence of such Hazardous Substance Condition, of Lessor's desire to terminate this Lease as of the date 60 days following the date of such notice. In the event Lessor elects to give a termination notice, Lessee may, within 10 days thereafter, give written notice to Lessor of Lessee's commitment to pay the amount by which the cost of the remediation of such Hazardous Substance Condition exceeds an amount equal to 12 times the then monthly Base Rent or \$100,000, whichever is greater. Lessee shall provide Lessor with said funds or satisfactory assurance thereof within 30 days following such commitment. In such event, this Lease shall continue in full force and effect, and Lessor shall proceed to make such remediation as soon as reasonably possible after the required funds are available. If Lessee does not give such notice and provide the required funds or assurance thereof within the time provided, this Lease shall terminate as of the date specified in Lessor's notice of termination.

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

6.4 **Inspection; Compliance.** Lessor and Lessor's "Lender" (as defined in Paragraph 30) and consultants shall have the right to enter into Premises at any time, in the case of an emergency, and otherwise at reasonable times after reasonable notice, for the purpose of inspecting the condition of the Premises and for verifying compliance by Lessee with this Lease. The cost of any such inspections shall be paid by Lessor, unless a violation of Applicable Requirements, or a Hazardous Substance Condition (see Paragraph 9.1) is found to exist or be imminent, or the inspection is requested or ordered by a governmental authority. In such case, Lessee shall upon request reimburse Lessor for the cost of such inspection, so long as such inspection is reasonably related to the violation or contamination. In addition, Lessee shall provide copies of all relevant material safety data sheets (MSDS) to Lessor within 10 days of the receipt of written request therefor.

7 Maintenance; Repairs; Utility Installations; Trade Fixtures and Alterations.

7.1 Lessee's Obligations.

(a) **In General.** Subject to the provisions of Paragraph 2.2 (Condition), 2.3 (Compliance), 6.3 (Lessee's Compliance with Applicable Requirements), 7.2 (Lessor's Obligations), 9 (Damage or Destruction), and 14 (Condemnation), Lessee shall, at Lessee's sole expense, keep the Premises, Utility Installations (intended for Lessee's exclusive use, no matter where located), and Alterations in good order, condition and repair (whether or not the portion of the Premises requiring repairs, or the means of repairing the same, are reasonably or readily accessible to Lessee, and whether or not the need for such repairs occurs as a result of Lessee's use, any prior use, the elements or the age of such portion of the Premises), including, but not limited to, all equipment or facilities, such as plumbing, HVAC equipment, electrical, lighting facilities, boilers, pressure vessels, fixtures, interior walls, interior surfaces of exterior walls, ceilings, floors, windows, doors, plate glass, and skylights but excluding any items which are the responsibility of Lessor pursuant to Paragraph 7.2. Lessee, in keeping the Premises in good order, condition and repair, shall exercise and perform good maintenance practices, specifically including the procurement and maintenance of the service contracts required by Paragraph 7.1(b) below. Lessee's obligations shall include restorations, replacements or renewals when necessary to keep the Premises and all improvements thereon or a part thereof in good order, condition and state of repair.

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(b) **Service Contracts.** Lessee shall, at Lessee's sole expense, procure and maintain contracts, with copies to Lessor, in customary form and substance for, and with contractors specializing and experienced in the maintenance of the following equipment and improvements, if any, if and when installed on the Premises: (i) HVAC equipment, (ii) boiler and pressure vessels, and (iii) elevators. However, Lessor reserves the right, upon notice to Lessee, to procure and maintain any or all of such service contracts, and Lessee shall reimburse Lessor, upon demand, for the cost thereof.

(c) **Failure to Perform.** If Lessee fails to perform Lessee's obligations under this Paragraph 7.1, Lessor may enter upon the Premises after 10 days' prior written notice to Lessee (except in the case of an emergency, in which case no notice shall be required), perform such obligations on Lessee's behalf, and put the Premises in good order, condition and repair, and Lessee shall promptly pay to Lessor a sum equal to 115% of the cost thereof.

(d) **Replacement.** Subject to Lessee's indemnification of Lessor as set forth in Paragraph 8.7 below, and without relieving Lessee of liability resulting from Lessee's failure to exercise and perform good maintenance practices, if an item described in Paragraph 7.1(b) cannot be repaired other than at a cost which is in excess of 50% of the cost of replacing such item, then such item shall be replaced by Lessor, and the cost thereof shall be prorated between the Parties and Lessee shall only be obligated to pay, each month during the remainder of the term of this Lease, on the date on which Base Rent is due, an amount equal to the product of multiplying the cost of such replacement by a fraction, the numerator of which is one, and the denominator of which is 144 (i.e. 1/144th of the cost per month). Lessee shall pay interest on the unamortized balance but may prepay its obligation at any time.

7.2 **Lessor's Obligations.** Subject to the provisions of Paragraphs 2.2 (Condition), 2.3 (Compliance), 4.2 (Common Area Operating Expenses), 6 (Use), 7.1 (Lessee's Obligations), 9 (Damage or Destruction) and 14 (Condemnation), Lessor, subject to reimbursement pursuant to Paragraph 4.2, shall keep in good order, condition and repair the foundations, exterior walls, structural condition of interior bearing walls, exterior roof, fire sprinkler system, Common Area fire alarm and/or smoke detection systems, fire hydrants, parking lots, walkways, pathways, driveways, landscaping, fences, signs and utility systems serving the Common Areas and all parts thereof, as well as providing the services for which there is a Common Area Operating Expense pursuant to Paragraph 4.2. Lessor shall not be obligated to paint the exterior or interior surfaces of exterior walls nor shall Lessor be obligated to maintain, repair or replace windows, doors or plate glass of the Premises. Lessee expressly waives the benefit of any statute now or hereafter in effect to the extent it is inconsistent with the terms of this Lease.

7.3 **Utility Installations; Trade Fixtures; Alterations.**

(a) **Definitions.** The term "Utility Installations" refers to all floor and window coverings, air and/or vacuum lines, power panels, electrical distribution, security and fire protection systems, communication cabling, lighting fixtures, HVAC equipment, plumbing, and fencing in or on the Premises. The term "Trade Fixtures" shall mean Lessee's machinery and equipment that can be removed without doing material damage to the Premises. The term "Alterations" shall mean any modification of the improvements, other than Utility Installations or Trade Fixtures, whether by addition or deletion. "Lessee Owned Alterations and/or Utility Installations" are defined as Alterations and/or Utility Installations made by Lessee that are not yet owned by Lessor pursuant to Paragraph 7.4(a).

(b) **Consent.** Lessee shall not make any Alterations or Utility Installations to the Premises without Lessor's prior written consent. Lessee may, however, make non-structural Alterations or Utility Installations to the interior of the Premises (excluding the roof) without such consent but upon notice to Lessor, as long as they are not visible from the outside, do not involve puncturing, relocating or removing the roof or any existing walls, will not affect the electrical, plumbing, HVAC, and/or life safety systems, and the cumulative cost thereof during this Lease as extended does not exceed a sum equal to 3 months' Base Rent in the aggregate or a sum equal to one month's Base Rent in any one year. Notwithstanding the foregoing, Lessee shall not make or permit any roof penetrations and/or install anything on the roof without the prior written approval of Lessor. Lessor may, as a precondition to granting such approval, require Lessee to utilize a contractor chosen and/or approved by Lessor. Any Alterations or Utility Installations that Lessee shall desire to make and which require the consent of the Lessor shall be presented to Lessor in written form with detailed plans. Consent shall be deemed conditioned upon Lessee's: (i) acquiring all applicable governmental permits, (ii) furnishing Lessor with copies of both the permits and the plans and specifications prior to commencement of the work, and (iii) compliance with all conditions of said permits and other applicable Requirements in a prompt and expeditious manner. Any Alterations or Utility Installations shall be performed in a workmanlike manner with good and sufficient materials. Lessee shall promptly upon completion furnish Lessor with as-built plans and specifications. For work which costs an amount in excess of one month's Base Rent, Lessor may condition its consent upon Lessee providing a lien and completion bond in an amount equal to 150% of the estimated cost of such Alteration or Utility Installation and/or upon Lessee's posting an additional Security Deposit with Lessor.

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

7.4 **Ownership; Removal; Surrender; and Restoration.**

(a) **Ownership.** Subject to Lessor's right to require removal or elect ownership as hereinafter provided, all Alterations and Utility Installations made by Lessee shall be the property of Lessee, but considered a part of the Premises. Lessor may, at any time, elect in writing to be the owner of all or any specified part of the Lessee Owned Alterations and Utility Installations. Unless otherwise instructed per Paragraph 7.4(b) hereof, all Lessee Owned Alterations and Utility Installations shall, at the expiration or termination of this Lease, become the property of Lessor and be surrendered by Lessee with the Premises.

(b) **Removal.** By delivery to Lessee of written notice from Lessor not earlier than 60 and not later than 30 days prior to the end of the term of this Lease, Lessor may require that any or all Lessee Owned Alterations or Utility Installations be removed by the expiration or termination of this Lease. Lessor may require the removal at any time of all or any part of any Lessee Owned Alterations or Utility Installations made without the required consent.

(c) **Surrender; Restoration.** Lessee shall surrender the Premises by the Expiration Date or any earlier termination date, with all of the improvements, parts and surfaces thereof broom clean and free of debris, and in good operating order, condition and state of repair, ordinary wear and tear excepted. "Ordinary wear and tear" shall not include any damage or deterioration that would have been prevented by good maintenance practice. Notwithstanding the foregoing, if the Lease is for 12 months or less, then Lessee shall surrender the Premises in the same condition as delivered to Lessee on the Start Date with NO allowance for ordinary wear and tear. Lessee shall repair any damage occasioned by the installation, maintenance or removal of Trade Fixtures, Lessee Owned Alterations and/or Utility Installations, furnishings, and equipment as well as the removal of any storage tank installed by or for Lessee. Lessee shall also completely remove from the Premises any and all Hazardous Substances brought onto the Premises by or for Lessee, or any third party (except Hazardous Substances which were deposited via underground migration from areas outside of the Premises), even if such removal would require Lessee to perform or pay for work that exceeds statutory requirements. Trade Fixtures shall remain the property of Lessee and shall be removed by Lessee. Any personal property of Lessee not removed on or before the Expiration Date or any earlier termination date shall be deemed to have been abandoned by Lessee and may be disposed of or retained by Lessor as Lessor may desire. The failure by Lessee to timely vacate the Premises pursuant to this Paragraph 7.4(c) without the express written consent of Lessor shall constitute a holdover under the provisions of Paragraph 26 below.

8. **Insurance; Indemnity.**

8.1 **Payment of Premiums.** The cost of the premiums for the insurance policies required to be carried by Lessor, pursuant to Paragraphs 8.2(b), 8.3(a) and 8.3(b), shall be a Common Area Operating Expense. Premiums for policy periods commencing prior to, or extending beyond, the term of this Lease shall be prorated to coincide with the corresponding Start Date or Expiration Date.

8.2 **Liability Insurance.**

(a) **Carried by Lessee.** Lessee shall obtain and keep in force a Commercial General Liability policy of insurance protecting Lessee and Lessor as an additional insured against claims for bodily injury, personal injury and property damage based upon or arising out of the ownership, use, occupancy or maintenance of the Premises and all areas appurtenant thereto. Such insurance shall be on an occurrence basis providing single limit coverage in an amount not less than \$1,000,000 per occurrence with an annual aggregate of not less than \$2,000,000. Lessee shall add Lessor as an additional insured by means of an endorsement at least as broad as the Insurance Service Organization's "Additional Insured-Managers or Lessors of Premises" Endorsement. The policy shall not contain any intra-insured exclusions as between insured persons or organizations, but shall include coverage for liability assumed under this Lease as an "insured contract" for the performance of Lessee's indemnity obligations under this Lease. The limits of said insurance shall not, however, limit the liability of Lessee nor relieve Lessee of any obligation hereunder. Lessee shall provide an endorsement on its liability policy(ies) which provides that its insurance shall be primary to and not contributory with any similar insurance carried by Lessor, whose insurance shall be considered excess insurance only.

(b) **Carried by Lessor.** Lessor shall maintain liability insurance as described in Paragraph 8.2(a), in addition to, and not in lieu of, the insurance required to be maintained by Lessee. Lessee shall not be named as an additional insured thereon.

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

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(a) **Building and Improvements.** Lessor shall obtain and keep in force a policy or policies of insurance in the name of Lessor, with loss payable to Lessor, any ground-lessor, and to any Lender insuring loss or damage to the Premises. The amount of such insurance shall be equal to the full insurable replacement cost of the Premises, as the same shall exist from time to time, or the amount required by any Lender, but in no event more than the commercially reasonable and available insurable value thereof. Lessee Owned Alterations and Utility Installations, Trade Fixtures, and Lessee's personal property shall be insured by Lessee not by Lessor. If the coverage is available and commercially appropriate, such policy or policies shall insure against all risks of direct physical loss or damage (except the perils of food and/or earthquake unless required by a Lender), including coverage for debris removal and the enforcement of any Applicable Requirements requiring the upgrading, demolition, reconstruction or replacement of any portion of the Premises as the result of a covered loss. Said policy or policies shall also contain an agreed valuation provision in lieu of any coinsurance clause, waiver of subrogation, and inflation guard protection causing an increase in the annual property insurance coverage amount by a factor of not less than the adjusted U.S. Department of Labor Consumer Price Index for All Urban Consumers for the city nearest to where the Premises are located. If such insurance coverage has a deductible clause, the deductible amount shall not exceed \$5,000 per occurrence.

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

(c) **Adjacent Premises.** Lessee shall pay for any increase in the premiums for the property insurance of the Building and for the Common Areas or other buildings in the Shopping Center if said increase is caused by Lessee's acts, omissions, use or occupancy of the Premises.

(d) **Lessee's Improvements.** Since Lessor is the Insuring Party, Lessor shall not be required to insure Lessee Owned Alterations and Utility Installations unless the item in question has become the property of Lessor under the terms of this Lease.

8.4 Lessee's Property; Business Interruption Insurance; Worker's Compensation Insurance.

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

(b) **Business Interruption.** Lessee shall obtain and maintain loss of income and extra expense insurance in amounts as will reimburse Lessee for direct or indirect loss of earnings attributable to all perils commonly insured against by prudent lessees in the business of Lessee or attributable to prevention of access to the Premises as a result of such perils.

(c) **Worker's Compensation Insurance.** Lessee shall obtain and maintain Worker's Compensation Insurance in such amount as may be required by Applicable Requirements. Such policy shall include a "Waiver of Subrogation" endorsement. Lessee shall provide Lessor with a copy of such endorsement along with the certificate of insurance or copy of the policy required by paragraph 8.5.

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

8.5 **Insurance Policies.** Insurance required herein shall be by companies maintaining during the policy term a "General Policyholders Rating" of at least A- VII, as set forth in the most current issue of "Best's Insurance Guide", or such other rating as may be required by a Lender. Lessee shall not do or permit to be done anything which invalidates the required insurance policies. Lessee shall, prior to the Start Date, deliver to Lessor certified copies of policies of such insurance or certificates with copies of the required endorsements evidencing the existence and amounts of the required insurance. No such policy shall be cancelable or subject to modification except after 30 days prior written notice to Lessor. Lessee shall, at least 10 days prior to the expiration of such policies, furnish Lessor with evidence of renewal or "insurance binders" evidencing renewal thereof, or Lessor may order such insurance and charge the cost thereof to Lessee, which amount shall be payable by Lessee to Lessor upon demand. Such policies shall be for a term of at least one year, or the length of the remaining term of this Lease, whichever is less. If either Party shall fail to procure and maintain the insurance required to be carried by it, the other Party may, but shall not be required to, procure and maintain the same.

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

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

8.8 **Exemption of Lessor and its Agents from Liability.** Notwithstanding the negligence or breach of this Lease by Lessor or its agents, neither Lessor nor its agents shall be liable under any circumstances for: (i) injury or damage to the person or goods, wares, merchandise or other property of Lessee, Lessee's employees, contractors, invitees, customers, or any other person in or about the Premises, whether such damage or injury is caused by or results from fire, steam, electricity, gas, water or rain, indoor air quality, the presence of mold or from the breakage, leakage, obstruction or other defects of pipes, fire sprinklers, wires, appliances, plumbing, HVAC or lighting fixtures, or from any other cause, whether the said injury or damage results from conditions arising upon the Premises or upon other portions of the building of which the Premises are a part, or from other sources or places, (ii) any damages arising from any act or neglect of any other tenant of Lessor or from the failure of Lessor or its agents to enforce the provisions of any other lease in the Shopping Center, or (iii) injury to Lessee's business or for any loss of income or profit therefrom. Instead, it is intended that Lessee's sole recourse in the event of such damages or injury be to file a claim on the insurance policy(ies) that Lessee is required to maintain pursuant to the provisions of paragraph 8.

8.9 **Failure to Provide Insurance.** Lessee acknowledges that any failure on its part to obtain or maintain the insurance required herein will expose Lessor to risks and potentially cause Lessor to incur costs not contemplated by this Lease, the extent of which will be extremely difficult to ascertain. Accordingly, for any month or portion thereof that Lessee does not maintain the required insurance and/or does not provide Lessor with the required binders or certificates evidencing the existence of the required insurance, the Base Rent shall be automatically increased, without any requirement for notice to Lessee, by an amount equal to 10% of the then existing Base Rent or \$100, whichever is greater. The parties agree that such increase in Base Rent represents fair and reasonable compensation for the additional risk/costs that Lessor will incur by reason of Lessee's failure to maintain the required insurance. Such increase in Base Rent shall in no event constitute a waiver of Lessee's Default or Breach with respect to the failure to maintain such insurance, prevent the exercise of any of the other rights and remedies granted hereunder, nor relieve Lessee of its obligation to maintain the insurance specified in this Lease.

9 Damage or Destruction.

9.1 Definitions.

(a) **"Premises Partial Damage"** shall mean damage or destruction to the improvements on the Premises, other than Lessee Owned Alterations and Utility Installations, which can reasonably be repaired in 3 months or less from the date of the damage or destruction, and the cost thereof does not exceed a sum equal to 6 months' Base Rent. Lessor shall notify Lessee in writing within 30 days from the date of the damage or destruction as to whether or not the damage is Partial or Total. Notwithstanding the foregoing, Premises Partial Damage shall not include damage to windows, doors, and/or other similar items which Lessee has the responsibility to repair or replace pursuant to the provisions of Paragraph 7.1.

(b) **"Premises Total Destruction"** shall mean damage or destruction to the improvements on the Premises, other than Lessee Owned Alterations and Utility Installations and Trade Fixtures, which cannot reasonably be repaired in 3 months or less from the date of the damage or destruction and/or the cost thereof exceeds a sum equal to 6 months' Base Rent. Lessor shall notify Lessee in writing within 30 days from the date of the damage or destruction as to whether or not the damage is Partial or Total.

(c) **"Insured Loss"** shall mean damage or destruction to improvements on the Premises, other than Lessee Owned Alterations and Utility Installations and Trade Fixtures, which was caused by an event required to be covered by the insurance described in Paragraph 8.3(a), irrespective of any deductible amounts or coverage limits involved.

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

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

9.2 **Partial Damage - Insured Loss.** If a Premises Partial Damage that is an Insured Loss occurs, then Lessor shall, at Lessor's expense, repair such damage (but not Lessee's Trade Fixtures or Lessee Owned Alterations and Utility Installations) as soon as reasonably possible, and this Lease shall continue in full force and effect; provided, however, that Lessee shall, at Lessee's election, make the repair of any damage or

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destruction the total Replacement Cost of which is \$10,000 or less, and, in such event, Lessor shall make any applicable insurance proceeds available to Lessee on a reasonable basis for that purpose. Notwithstanding the foregoing, if the required insurance was not in force or the insurance proceeds are not sufficient to effect such repair, the Injuring Party shall promptly contribute the shortage in proceeds as and when required to complete said repairs. In the event, however, such shortage was due to the fact that, by reason of the unique nature of the improvements, full Replacement Cost insurance coverage was not commercially reasonable and available, Lessor shall have no obligation to pay for the shortage in insurance proceeds or to fully restore the unique aspects of the Premises unless Lessee provides Lessor with the funds to cover same, or adequate assurance thereof, within 10 days following receipt of written notice of such shortage and request therefor. If Lessor receives said funds or adequate assurance thereof within said 10 day period, the party responsible for making the repairs shall complete them as soon as reasonably possible and this Lease shall remain in full force and effect. If such funds or assurance are not received, Lessor may nevertheless elect by written notice to Lessee within 10 days thereafter to: (i) make such restoration and repair as is commercially reasonable with Lessor paying any shortage in proceeds, in which case this Lease shall remain in full force and effect; or (ii) have this Lease terminate 30 days thereafter. Lessee shall not be entitled to reimbursement of any funds contributed by Lessee to repair any such damage or destruction. Premises Partial Damage due to flood or earthquake shall be subject to Paragraph 9.3, notwithstanding that there may be some insurance coverage, but the net proceeds of any such insurance shall be made available for the repairs if made by either Party.

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

9.4 Total Destruction. Notwithstanding any other provision hereof, if a Premises Total Destruction occurs, this Lease shall terminate 60 days following such Destruction. If the damage or destruction was caused by the gross negligence or willful misconduct of Lessee, Lessor shall have the right to recover Lessor's damages from Lessee, except as provided in Paragraph 8.6.

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

9.6 Damage to Shopping Center. In the event of any damage or destruction to other portions of the Building or to any other buildings in the Shopping Center, whether insured or uninsured (and whether or not there is also damage or destruction to the Premises), which cannot reasonably be repaired in 6 months or less from the date of the damage or destruction, Lessor may either (i) repair such damage or destruction as soon as reasonably possible without expense to Lessee, in which event this Lease shall continue in full force and effect; or (ii) terminate this Lease by giving written notice to Lessee within 30 days after receipt by Lessor of knowledge of the occurrence of such damage or destruction. Such termination shall be effective 60 days following the date of such notice.

9.7 Abatement of Rent; Lessee's Remedies.

(a) Abatement. In the event of Premises Partial Damage or Premises Total Destruction or a Hazardous Substance Condition for which Lessee is not responsible under this Lease, the Base Rent payable by Lessee for the period required for the repair, remediation or restoration of such damage shall be abated in proportion to the degree to which Lessee's use of the Premises is impaired, but not to exceed the proceeds received from the Rental Value Insurance. All other obligations of Lessee hereunder shall be performed by Lessee, and Lessor shall have no liability for any such damage, destruction, remediation, repair or restoration except as provided herein.

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

9.8 Termination: Advance Payments. Upon termination of this Lease pursuant to Paragraph 5.2(g) or Paragraph 9, an equitable adjustment shall be made concerning advance Base Rent and any other advance payments made by Lessee to Lessor. Lessor shall, in addition, return to Lessee so much of Lessee's Security Deposit as has not been, or is not then required to be, used by Lessor.

10 Real Property Taxes.

10.1 Definition. As used herein, the term "Real Property Taxes" shall include any form of assessment, real estate, general, special, ordinary or extraordinary, or rental levy or tax (other than inheritance, personal income or estate taxes), improvement bond, and/or license fee imposed upon or levied against any legal or equitable interest of Lessor in the Shopping Center, Lessor's right to other income therefrom, and/or Lessor's business of leasing, by any authority having the direct or indirect power to tax and where the funds are generated with reference to the Shopping Center address and where the proceeds so generated are to be applied by the city, county or other local taxing authority of a jurisdiction within which the Shopping Center is located. The term "Real Property Taxes" shall also include any tax, fee, levy, assessment or charge, or any increase therein: (i) imposed by reason of events occurring during the term of this Lease, including but not limited to, a change in the ownership of the Shopping Center, (ii) a change in the improvements thereon; and/or (iii) levied or assessed on machinery or equipment provided by Lessor to Lessee pursuant to this Lease. In calculating Real Property Taxes for any calendar year, the Real Property Taxes for any real estate tax year shall be included in the calculation of Real Property Taxes for such calendar year based upon the number of days which such calendar year and tax year have in common.

10.2 Payment of Taxes. Except as otherwise provided in Paragraph 10.3, Lessor shall pay the Real Property Taxes applicable to the Shopping Center, and said payments shall be included in the calculation of Common Area Operating Expenses in accordance with the provisions of Paragraph 4.2.

10.3 Additional Improvements. Common Area Operating Expenses shall not include Real Property Taxes specified in the tax assessor's records and work sheets as being caused by additional improvements placed upon the Shopping Center by other lessees or by Lessor for the exclusive enjoyment of such other lessees. Notwithstanding Paragraph 10.2 hereof, Lessee shall, however, pay to Lessor at the time Common Area Operating Expenses are payable under Paragraph 4.2, the entirety of any increase in Real Property Taxes if assessed solely by reason of Alterations, Trade Fixtures or Utility Installations placed upon the Premises by Lessee or at Lessee's request, or by reason of any alterations or improvements to the Premises made by Lessor subsequent to the execution of this Lease by the Parties.

10.4 Joint Assessment. If the Building is not separately assessed, Real Property Taxes allocated to the Building shall be an equitable proportion of the Real Property Taxes for all of the land and improvements included within the tax parcel assessed, such proportion to be determined by Lessor from the respective valuations assigned in the assessor's work sheets or such other information as may be reasonably available. Lessor's reasonable determination thereof, in good faith, shall be conclusive.

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

11 Utilities and Services. Lessee shall pay for all water, gas, heat, light, power, telephone, trash disposal and other utilities and services supplied to the Premises, together with any taxes thereon. To the extent any such utilities and/or services are not separately metered, Lessee shall pay Lessee's Share thereof in accordance with Paragraph 4.2. Notwithstanding the provisions of Paragraph 4.2, if at any time in Lessor's sole judgment, Lessor determines that Lessee is using a disproportionate amount of water, electricity or other commonly metered utilities, or that Lessee is generating such a large volume of trash as to require an increase in the size of the trash receptacle and/or an increase in the number of times per month that it is emptied, then Lessor may increase Lessor's Base Rent by an amount equal to such increased costs. There shall be no abatement of Rent and Lessor

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shall not be liable in any respect whatsoever for the inadequacy, stoppage, interruption or discontinuance of any utility or service due to riot, strike, labor dispute, breakdown, accident, repair or other cause beyond Lessor's reasonable control or in cooperation with governmental request or directions.

12 Assignment and Subletting.

12.1 Lessor's Consent Required.

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

(b) Unless Lessee is a corporation and its stock is publicly traded on a national stock exchange, a change in the control of Lessee shall constitute an assignment requiring consent. The transfer, on a cumulative basis, of 25% or more of the voting control of Lessee shall constitute a change in control for this purpose.

(c) The involvement of Lessee or its assets in any transaction, or series of transactions (by way of merger, sale, acquisition, financing, transfer, leveraged buy-out or otherwise), whether or not a formal assignment or hypothecation of this Lease or Lessee's assets occurs, which results or will result in a reduction of the Net Worth of Lessee by an amount greater than 25% of such Net Worth as it was represented at the time of the execution of this Lease or at the time of the most recent assignment to which Lessor has consented, or as it exists immediately prior to said transaction or transactions constituting such reduction, whichever was or is greater, shall be considered an assignment of this Lease to which Lessor may withhold its consent. "Net Worth of Lessee" shall mean the net worth of Lessee (excluding any guarantors) established under generally accepted accounting principles.

(d) An assignment or subletting without consent shall, at Lessor's option, be a Default curable after notice per Paragraph 13.1(c), or a noncurable Breach without the necessity of any notice and grace period. If Lessor elects to treat such unapproved assignment or subletting as a noncurable Breach, Lessor may either: (i) terminate this Lease, or (ii) upon 30 days written notice, increase the monthly Base Rent and Percentage Rent Rate to 110% of the Base Rent and Percentage Rent Rate then in effect. Further, in the event of such Breach and rental adjustment, (i) the purchase price of any option to purchase the Premises held by Lessee shall be subject to similar adjustment to 110% of the price previously in effect, and (ii) all fixed and non-fixed rental adjustments scheduled during the remainder of the Lease term shall be increased to 110% of the scheduled adjusted rent.

(e) Lessee's remedy for any breach of Paragraph 12.1 by Lessee shall be limited to compensatory damages and/or injunctive relief.

(f) Lessor may reasonably withhold consent to a proposed assignment or subletting if Lessee is in Default at the time consent is requested.

(g) Notwithstanding the foregoing, allowing a de minimis portion of the Premises, i.e. 20 square feet or less, to be used by a third party vendor in connection with the installation of a vending machine or payphone shall not constitute a subletting.

12.2 Terms and Conditions Applicable to Assignment and Subletting.

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

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

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

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

(e) Each request for consent to an assignment or subletting shall be in writing, accompanied by information relevant to Lessor's determination as to the financial and operational responsibility and appropriateness of the proposed assignee or sublessee, including but not limited to the intended use and/or required modification of the Premises, if any, together with a fee of \$500 as consideration for Lessor's considering and processing said request. Lessee agrees to provide Lessor with such other or additional information and/or documentation as may be reasonably requested (See also Paragraph 36).

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

(g) Lessor's consent to any assignment or subletting shall not transfer to the assignee or sublessee any Option granted to the original Lessee by this Lease unless such transfer is specifically consented to by Lessor in writing. (See Paragraph 39.2.)

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

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

(b) In the event of a Breach by Lessee, Lessor may, at its option, require sublessee to attorn to Lessor, in which event Lessor shall undertake the obligations of the sublessor under such sublease from the time of the exercise of said option to the expiration of such sublease; provided, however, Lessor shall not be liable for any prepayment or security deposit paid by such sublessee to such sublessor or for any prior Defaults or Breaches of such sublessor.

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

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

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

13 Default; Breach; Remedies.

13.1 Default; Breach. A "Default" is defined as a failure by the Lessee to comply with or perform any of the terms, covenants, conditions or Rules and Regulations under this Lease. A "Breach" is defined as the occurrence of one or more of the following Defaults, and the failure of Lessee to cure such Default within any applicable grace period:

(a) The vacating or abandonment of the Premises. Lessee shall be deemed to have vacated the Premises if Lessee ceases to continuously operate its business in the Premises for a period of 5 consecutive days.

(b) The failure of Lessee to make any payment of Rent or any Security Deposit required to be made by Lessee hereunder, whether to Lessor or to a third party, when due, to provide reasonable evidence of insurance or surety bond, or to fulfill any obligation under this Lease which endangers or threatens life or property, where such failure continues for a period of 3 business days following written notice to Lessee. THE ACCEPTANCE BY LESSOR OF A PARTIAL PAYMENT OF RENT OR SECURITY DEPOSIT SHALL NOT CONSTITUTE A WAIVER OF ANY OF LESSOR'S RIGHTS, INCLUDING LESSOR'S RIGHT TO RECOVER POSSESSION OF THE PREMISES.

(c) The failure of Lessee to allow Lessor and/or its agents access to the Premises or the commission of waste, act or acts constituting public or private nuisance, and/or an illegal activity on the Premises by Lessee, where such actions continue for a period of 3 business days following written notice to Lessee.

(d) The failure by Lessee to provide (i) reasonable written evidence of compliance with Applicable Requirements, (ii) the service contracts, (iii) the rescission of an unauthorized assignment or subletting, (iv) an Estoppel Certificate or financial statements, (v) a requested subordination, (vi) evidence concerning any guaranty and/or Guarantors, (vii) any document requested under Paragraph 41, (viii) material data safety sheets (MSDS), or (ix) any other documentation or information which Lessor may reasonably require of Lessee under the terms of this Lease, where any such failure continues for a period of 10 days following written notice to Lessee.

(e) A Default by Lessee as to the terms, covenants, conditions or provisions of this Lease, or of the rules adopted by Lessor.

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Paragraph 2.9 hereof, other than those described in subparagraphs 13.1(a), (b), (c) or (d), above, where such Default continues for a period of 30 days after written notice, provided, however, that if the nature of Lessee's Default is such that more than 30 days are reasonably required for its cure, then it shall not be deemed to be a Breach if Lessee commences such cure within said 30 day period and thereafter diligently prosecutes such cure to completion.

(f) The occurrence of any of the following events: (i) the making of any general arrangement or assignment for the benefit of creditors; (ii) becoming a "debtor" as defined in 11 U.S.C. § 101 or any successor statute thereto (unless, in the case of a petition filed against Lessee, the same is dismissed within 60 days); (iii) the appointment of a trustee or receiver to take possession of substantially all of Lessee's assets located at the Premises or of Lessee's interest in this Lease, where possession is not restored to Lessee within 30 days; or (iv) the attachment, execution or other judicial seizure of substantially all of Lessee's assets located at the Premises or of Lessee's interest in this Lease, where such seizure is not discharged within 30 days; provided, however, in the event that any provision of this subparagraph is contrary to any applicable law, such provision shall be of no force or effect, and not affect the validity of the remaining provisions.

(g) The discovery that any financial statement of Lessee or of any Guarantor given to Lessor was materially false.

(h) If the performance of Lessee's obligations under this Lease is guaranteed: (i) the death of a Guarantor, (ii) the termination of a Guarantor's liability with respect to the Lease other than in accordance with the terms of such guaranty, (iii) a Guarantor's becoming insolvent or the subject of a bankruptcy filing, (iv) a Guarantor's refusal to honor the guaranty, or (v) a Guarantor's breach of its guaranty obligation on an anticipatory basis, and Lessee's failure, within 60 days following written notice of any such event, to provide written alternative assurance or security, which, when coupled with the then existing resources of Lessee, equals or exceeds the combined financial resources of Lessee and the Guarantors that existed at the time of execution of this Lease.

13.2 Remedies. If Lessee fails to perform any of its affirmative duties or obligations, within 10 days after written notice (or in case of an emergency, without notice), Lessor may, at its option, perform such duty or obligation on Lessee's behalf, including but not limited to the obtaining of reasonably required bonds, insurance policies, or governmental licenses, permits or approvals. Lessee shall pay to Lessor an amount equal to 115% of the costs and expenses incurred by Lessor in such performance upon receipt of an invoice therefor. In the event of a Breach, Lessor may, with or without further notice or demand, and without limiting Lessor in the exercise of any right or remedy which Lessor may have by reason of such Breach:

(a) Terminate Lessee's right to possession of the Premises by any lawful means. In which case this Lease shall terminate and Lessee shall immediately surrender possession to Lessor. In such event Lessor shall be entitled to recover from Lessee: (i) the unpaid Rent which had been earned at the time of termination; (ii) the worth at the time of award of the amount by which the unpaid Rent which would have been earned after termination until the time of award exceeds the amount of such rental less that the Lessee proves could have been reasonably avoided; (iii) the worth at the time of award of the amount by which the unpaid Rent for the balance of the term after the time of award exceeds the amount of such rental less that the Lessee proves could be reasonably avoided; and (iv) any other amount necessary to compensate Lessor for all the detriment proximately caused by the Lessee's failure to perform its obligations under this Lease or which in the ordinary course of things would be likely to result therefrom, including but not limited to the cost of recovering possession of the Premises, expenses of reletting, including necessary renovation and alteration of the Premises, reasonable attorneys' fees, and that portion of any leasing commission paid by Lessor in connection with this Lease applicable to the unexpired term of this Lease. The worth at the time of award of the amount referred to in provision (iii) of the immediately preceding sentence shall be computed by discounting such amount at the discount rate of the Federal Reserve Bank of the District within which the Premises are located at the time of award plus one percent. Efforts by Lessor to mitigate damages caused by Lessee's Breach of this Lease shall not waive Lessor's right to recover any damages to which Lessor is otherwise entitled. If termination of this Lease is obtained through the provisional remedy of unlawful detainer, Lessor shall have the right to recover in such proceeding any unpaid Rent and damages as are recoverable therein, or Lessor may reserve the right to recover all or any part thereof in a separate suit. If a notice and grace period required under Paragraph 13.1 was not previously given, a notice to pay rent or quit, or to perform or quit given to Lessee under the unlawful detainer statute shall also constitute the notice required by Paragraph 13.1. In such case, the applicable grace period required by Paragraph 13.1 and the unlawful detainer statute shall run concurrently, and the failure of Lessee to cure the Default within the greater of the two such grace periods shall constitute both an unlawful detainer and a Breach of this Lease entitling Lessor to the remedies provided for in this Lease and/or by said statute.

(b) Continue the Lease and Lessee's right to possession and recover the Rent as it becomes due, in which event Lessee may sublet or assign, subject only to reasonable limitations. Acts of maintenance, efforts to relet, and/or the appointment of a receiver to protect the Lessor's interests, shall not constitute a termination of the Lessee's right to possession.

(c) Pursue any other remedy now or hereafter available under the laws or judicial decisions of the state wherein the Premises are located. The expiration or termination of this Lease and/or the termination of Lessee's right to possession shall not relieve Lessee from liability under any indemnity provisions of this Lease as to matters occurring or accruing during the term hereof or by reason of Lessee's occupancy of the Premises.

13.3 Inducement Recapture. Any agreement for free or abated rent or other charges, or for the giving or paying by Lessor to or for Lessee of any cash or other bonus, inducement or consideration for Lessee's entering into this Lease, all of which concessions are hereinafter referred to as "Inducement Provisions", shall be deemed conditioned upon Lessee's full and faithful performance of all of the terms, covenants and conditions of this Lease. Upon Breach of this Lease by Lessee, any such Inducement Provision shall automatically be deemed deleted from this Lease and of no further force or effect, and any rent, other charge, bonus, inducement or consideration theretofore stated, given or paid by Lessor under such an Inducement Provision shall be immediately due and payable by Lessee to Lessor notwithstanding any subsequent cure of said Breach by Lessee. The acceptance by Lessor of rent or the cure of the Breach which initiated the operation of this paragraph shall not be deemed a waiver by Lessor of the provisions of this paragraph unless specifically so stated in writing by Lessor at the time of such acceptance.

13.4 Late Charges. Lessee hereby acknowledges that late payment by Lessee of Rent will cause Lessor to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges, and late charges which may be imposed upon Lessor by any Lender. Accordingly, if any Rent shall not be received by Lessor within 5 days after such amount shall be due, then, without any requirement for notice to Lessee, Lessee shall immediately pay to Lessor a one-time late charge equal to 10% of each such overdue amount or \$100, whichever is greater. The parties hereby agree that such late charge represents a fair and reasonable estimate of the costs Lessor will incur by reason of such late payment. Acceptance of such late charge by Lessor shall in no event constitute a waiver of Lessee's Default or Breach with respect to such overdue amount, nor prevent the exercise of any of the other rights and remedies granted hereunder. In the event that a late charge is payable hereunder, whether or not collected, for 3 consecutive installments of Base Rent, then notwithstanding any provision of this Lease to the contrary, Base Rent shall, at Lessor's option, become due and payable quarterly in advance.

13.5 Interest. Any monetary payment due Lessor hereunder, other than late charges, not received by Lessor, when due as to scheduled payments (such as Base Rent and Percentage Rent) or within 30 days following the date on which it was due for non-scheduled payment, shall bear interest from the date when due, as to scheduled payments, or the 31st day after it was due as to non-scheduled payments. The interest ("Interest") charged shall be computed at the rate of 10% per annum but shall not exceed the maximum rate allowed by law. Interest is payable in addition to the potential late charge provided for in Paragraph 13.4.

13.6 Breach by Lessor.

(a) **Notice of Breach.** Lessor shall not be deemed in breach of this Lease unless Lessor fails within a reasonable time to perform an obligation required to be performed by Lessor. For purposes of this Paragraph, a reasonable time shall in no event be less than 30 days after receipt by Lessor, and any Lender whose name and address shall have been furnished Lessee in writing for such purpose, of written notice specifying wherein such obligation of Lessor has not been performed, provided, however, that if the nature of Lessor's obligation is such that more than 30 days are reasonably required for its performance, then Lessor shall not be in breach if performance is commenced within such 30 day period and thereafter diligently pursued to completion.

(b) **Performance by Lessee on Behalf of Lessor.** In the event that neither Lessor nor Lender cures said breach within 30 days after receipt of said notice, or if having commenced said cure they do not diligently pursue it to completion, then Lessee may elect to cure said breach at Lessee's expense and offset from Rent the actual and reasonable cost to perform such cure, provided however, that such offset shall not exceed an amount equal to the greater of one month's Base Rent or the Security Deposit, reserving Lessee's right to reimbursement from Lessor for any such expense in excess of such offset. Lessee shall document the cost of said cure and supply said documentation to Lessor.

14 Condemnation. If the Premises or any portion thereof are taken under the power of eminent domain or sold under the threat of the exercise of said power (collectively "Condemnation"), this Lease shall terminate as to the part taken as of the date the condemning authority takes title or possession, whichever first occurs. If more than 10% of the floor area of the Premises, or more than 25% of the parking spaces situated within the parking area, is taken by Condemnation, Lessee may, at Lessee's option, to be exercised in writing within 10 days after Lessor shall have given Lessee written notice of such taking (or in the absence of such notice, within 10 days after the condemning authority shall have taken possession) terminate this Lease as of the date the condemning authority takes such possession. If Lessee does not terminate this Lease in accordance with the foregoing, this Lease shall remain in full force and effect as to the portion of the Premises remaining, except that the Base Rent shall be reduced in proportion to the reduction in utility of the Premises caused by such Condemnation. Condemnation awards and/or payments shall be the property of Lessor, whether such award shall be made as compensation for diminution in value of the leasehold, the value of the part taken, or for severance damages; provided, however, that Lessee shall be entitled to any compensation paid by the condemnor for Lessee's relocation expenses, loss of business goodwill, and/or Trade Fixtures, without regard to whether or not this Lease is terminated pursuant to the provisions of this Paragraph. All Alterations shall be

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installations made to the Premises by Lessee, for purposes of Condemnation only, shall be considered the property of the Lessee and Lessee shall be entitled to any and all compensation which is payable therefor. In the event that this Lease is not terminated by reason of the Condemnation, Lessor shall repair any damage to the Premises caused by such Condemnation.

15 Brokerage Fees.

15.1 **Additional Commission.** If a separate brokerage fee agreement is attached then in addition to the payments owed pursuant to Paragraph 1.13 above, and unless Lessor and the Brokers otherwise agree in writing, Lessor agrees that: (a) if Lessee exercises any Option, (b) if Lessee or anyone affiliated with Lessee acquires from Lessor any rights to the Premises or other premises owned by Lessor and located within the Shopping Center, (c) if Lessee remains in possession of the Premises, with the consent of Lessor, after the expiration of this Lease, or (d) if Base Rent is increased, whether by agreement or operation of an escalation clause herein, then Lessor shall pay Brokers a fee in accordance with the schedule attached to such brokerage fee agreement.

15.2 **Assumption of Obligations.** Any buyer or transferee of Lessor's interest in this Lease shall be deemed to have assumed Lessor's obligation hereunder. Brokers shall be third party beneficiaries of the provisions of Paragraphs 1.13, 15, 22 and 31. If Lessor fails to pay to Brokers any amounts due as and for brokerage fees pertaining to this Lease when due, then such amounts shall accrue interest. In addition, if Lessor fails to pay any amounts to Lessee's Broker when due, Lessee's Broker may send written notice to Lessor and Lessee of such failure and if Lessor fails to pay such amounts within 10 days after said notice, Lessee shall pay said monies to its Broker and offset such amounts against Rent. In addition, Lessee's Broker shall be deemed to be a third party beneficiary of any commission agreement entered into by and/or between Lessor and Lessor's Broker for the limited purpose of collecting any brokerage fee owed.

15.3 **Representations and Indemnities of Broker Relationships.** Lessee and Lessor each represent and warrant to the other that it has had no dealings with any person, firm, broker or lender (other than the Brokers, if any) in connection with this Lease, and that no one other than said named Brokers is entitled to any commission or finder's fee in connection herewith. Lessee and Lessor do each hereby agree to indemnify, protect, defend and hold the other harmless from and against liability for compensation or charges which may be claimed by any such unnamed broker, finder or other similar party by reason of any dealings or actions of the indemnifying Party, including any costs, expenses, attorneys' fees reasonably incurred with respect thereto.

16. Estoppel Certificates.

(a) Each Party (as "Responding Party") shall within 10 days after written notice from the other Party (the "Requesting Party") execute, acknowledge and deliver to the Requesting Party a statement in writing in form similar to the then most current "Estoppel Certificate" form published by the AIR Commercial Real Estate Association, plus such additional information, confirmation and/or statements as may be reasonably requested by the Requesting Party.

(b) If the Responding Party shall fail to execute or deliver the Estoppel Certificate within such 10 day period, the Requesting Party may execute an Estoppel Certificate stating that: (i) the Lease is in full force and effect without modification except as may be represented by the Requesting Party, (ii) there are no uncured defaults in the Requesting Party's performance, and (iii) if Lessor is the Requesting Party, not more than one month's rent has been paid in advance. Prospective purchasers and encumbrances may rely upon the Requesting Party's Estoppel Certificate, and the Responding Party shall be estopped from denying the truth of the facts contained in said Certificate. In addition, Lessee acknowledges that any failure of its part to provide such an Estoppel Certificate will expose Lessor to risk and potentially cause Lessor to incur costs not contemplated by this Lease, the extent of which will be extremely difficult to ascertain. Accordingly, should the Lessee fail to execute and/or deliver a requested Estoppel Certificate in a timely fashion the monthly Base Rent shall be automatically increased, without any requirement for notice to Lessee, by an amount equal to 10% of the then existing Base Rent or \$100, whichever is greater for remainder of the Lease. The Parties agree that such increase in Base Rent represents fair and reasonable compensation for the additional risks/costs that Lessor will incur by reason of Lessee's failure to provide the Estoppel Certificate. Such increase in Base Rent shall in no event constitute a waiver of Lessee's Default or Breach with respect to the failure to provide the Estoppel Certificate nor prevent the exercise of any of the other rights and remedies granted hereunder.

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

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

18. **Severability.** The invalidity of any provision of this Lease, as determined by a court of competent jurisdiction, shall in no way affect the validity of any other provision hereof.

19. **Days.** Unless otherwise specifically indicated to the contrary, the word "days" as used in this Lease shall mean and refer to calendar days.

20. **Limitation on Liability.** The obligations of Lessor under this Lease shall not constitute personal obligations of Lessor, or its partners, members, directors, officers or shareholders, and Lessee shall look to the Premises, and to no other assets of Lessor, for the satisfaction of any liability of Lessor with respect to this Lease, and shall not seek recourse against Lessor's partners, members, directors, officers or shareholders, or any of their personal assets for such satisfaction.

21. **Time of Essence.** Time is of the essence with respect to the performance of all obligations to be performed or observed by the Parties under this Lease.

22. **No Prior or Other Agreements; Broker Disclaimer.** This Lease contains all agreements between the Parties with respect to any matter mentioned herein, and no other prior or contemporaneous agreement or understanding shall be effective. Lessor and Lessee each represents and warrants to the Brokers that it has made, and is relying solely upon, its own investigation as to the nature, quality, character and financial responsibility of the other Party to this Lease and as to the use, nature, quality and character of the Premises. Brokers have no responsibility with respect thereto or with respect to any default or breach hereof by either Party.

23. Notices.

23.1 **Notice Requirements.** All notices required or permitted by this Lease or applicable law shall be in writing and may be delivered in person (by hand or by courier) or may be sent by regular, certified or registered mail or U.S. Postal Service Express Mail, with postage prepaid, or by facsimile transmission and shall be deemed sufficiently given if served in a manner specified in this Paragraph 23. The addresses noted adjacent to a Party's signature on this Lease shall be that Party's address for delivery or mailing of notices. Either Party may by written notice to the other specify a different address for notice, except that upon Lessee's taking possession of the Premises, the Premises shall constitute Lessee's address for notice. A copy of all notices to Lessor shall be concurrently transmitted to such party or parties at such addresses as Lessor may from time to time hereafter designate in writing.

23.2 **Date of Notice.** Any notice sent by registered or certified mail, return receipt requested, shall be deemed given on the date of delivery shown on the receipt card, or if no delivery date is shown, the postmark thereon. If sent by regular mail the notice shall be deemed given 72 hours after the same is addressed as required herein and mailed with postage prepaid. Notices delivered by United States Express Mail or overnight courier that guarantees next day delivery shall be deemed given 24 hours after delivery of the same to the Postal Service or courier. Notices transmitted by facsimile transmission or similar means shall be deemed delivered upon telephone confirmation of receipt (confirmation report from fax machine is sufficient), provided a copy is also delivered via delivery of mail. If notice is received on a Saturday, Sunday or legal holiday, it shall be deemed received on the next business day.

24. Waivers.

(a) No waiver by Lessor of the Default or Breach of any term, covenant or condition hereof by Lessee, shall be deemed a waiver of any other term, covenant or condition hereof, or of any subsequent Default or Breach by Lessee of the same or of any other term, covenant or condition hereof. Lessor's consent to, or approval of, any act shall not be deemed to render unnecessary the obtaining of Lessor's consent to, or approval of, any subsequent or similar act by Lessee, or be construed as the basis of an estoppel to enforce the provision or provisions of this Lease requiring such consent.

(b) The acceptance of Rent by Lessor shall not be a waiver of any Default or Breach by Lessee. Any payment by Lessee may be accepted by Lessor on account of moneys or damages due Lessor, notwithstanding any qualifying statements or conditions made by Lessee in connection therewith, when such statements and/or conditions shall be of no force or effect whatsoever unless specifically agreed to in writing by Lessor at or before the time of deposit of such payment.

(c) THE PARTIES AGREE THAT THE TERMS OF THIS LEASE SHALL GOVERN WITH REGARD TO ALL MATTERS RELATED THERETO AND HEREBY WAIVE THE PROVISIONS OF ANY PRESENT OR FUTURE STATUTE TO THE EXTENT THAT SUCH STATUTE IS INCONSISTENT WITH THIS LEASE.

Disclosures Regarding The Nature of a Real Estate Agency Relationship.

(a) When entering into a discussion with a real estate agent regarding a real estate transaction, a Lessor or Lessee should know the

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offset understand what type of agency relationship or representation it has with the agent or agents in the transaction. Lessor and Lessee acknowledge being advised by the Brokers in this transaction, as follows:

(i) **Lessor's Agent.** A Lessor's agent under a listing agreement with the Lessor acts as the agent for the Lessor only. A Lessor's agent or subagent has the following affirmative obligations: To the Lessor. (a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Lessor. To the Lessee and the Lessor. (b) Diligent exercise of reasonable skills and care in performance of the agent's duties. (c) A duty of honest and fair dealing and good faith. (d) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the Parties. An agent is not obligated to reveal to either Party any confidential information obtained from the other Party which does not involve the affirmative duties set forth above.

(ii) **Lessee's Agent.** An agent can agree to act as agent for the Lessee only. In these situations, the agent is not the Lessor's agent even if by agreement the agent may receive compensation for services rendered, either in full or in part from the Lessor. An agent acting only for a Lessee has the following affirmative obligations: To the Lessee. (a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Lessee. To the Lessee and the Lessor. (b) Diligent exercise of reasonable skills and care in performance of the agent's duties. (c) A duty of honest and fair dealing and good faith. (d) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the Parties. An agent is not obligated to reveal to either Party any confidential information obtained from the other Party which does not involve the affirmative duties set forth above.

(iii) **Agent Representing Both Lessor and Lessee.** A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Lessor and the Lessee in a transaction, but only with the knowledge and consent of both the Lessor and the Lessee. In a dual agency situation, the agent has the following affirmative obligations to both the Lessor and the Lessee: (a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in the dealings with either Lessor or the Lessee. (b) Other duties to the Lessor and the Lessee as stated above in subparagraphs (i) or (ii). In representing both Lessor and Lessee, the agent may not without the express permission of the respective Party, disclose to the other Party that the Lessor will accept rent in an amount less than that indicated in the listing or that the Lessee is willing to pay a higher rent than that offered. The above duties of the agent in a real estate transaction do not relieve a Lessor or Lessee from the responsibility to protect their own interests. Lessor and Lessee should carefully read all agreements to assure that they adequately express their understanding of the transaction. A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional.

(b) Brokers have no responsibility with respect to any default or breach hereof by either Party. The Parties agree that no lawsuit or other legal proceeding involving any breach of duty, error or omission relating to this Lease may be brought against Broker more than one year after the Start Date and that the liability (including court costs and attorneys' fees), of any Broker with respect to any such lawsuit and/or legal proceeding shall not exceed the fee received by such Broker pursuant to this Lease; provided, however, that the foregoing limitation on each Broker's liability shall not be applicable to any gross negligence or willful misconduct of such Broker.

(c) Lessor and Lessee agree to identify to Brokers as "Confidential" any communication or information given Brokers that is considered by such Party to be confidential.

26. **No Right To Holdover.** Lessee has no right to retain possession of the Premises or any part thereof beyond the expiration or termination of this Lease. In the event that Lessee holds over, then the Base Rent and Percentage Rent Rate shall be increased to 150% of the Base Rent and Percentage Rent Rate applicable immediately preceding the expiration or termination. Nothing contained herein shall be construed as consent by Lessor to any holding over by Lessee.

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

28. **Covenants and Conditions; Construction of Agreement.** All provisions of this Lease to be observed or performed by Lessee are both covenants and conditions. In construing this Lease, all headings and titles are for the convenience of the Parties only and shall not be considered a part of this Lease. Whenever required by the context, the singular shall include the plural and vice versa. This Lease shall not be construed as if prepared by one of the Parties, but rather according to its fair meaning as a whole, as if both Parties had prepared it.

29. **Binding Effect; Choice of Law.** This Lease shall be binding upon the parties, their personal representatives, successors and assigns and be governed by the laws of the State in which the Premises are located. Any litigation between the Parties hereto concerning this Lease shall be initiated in the county in which the Premises are located.

30. **Subordination; Assignment; Non-Disturbance.**

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

30.2 **Assignment.** In the event that Lessor transfers title to the Premises, or the Premises are acquired by another upon the foreclosure or termination of a Security Device to which this Lease is subordinated (i) Lessee shall, subject to the non-disturbance provisions of Paragraph 30.3, attach to such new owner, and upon request, enter into a new lease, containing all of the terms and provisions of this Lease, with such new owner for the remainder of the term hereof, or, at the election of the new owner, this Lease will automatically become a new lease between Lessee and such new owner, and (ii) Lessor shall thereafter be relieved of any further obligations hereunder and such new owner shall assume all of Lessor's obligations, except that such new owner shall not: (b) be liable for any act or omission of any prior lessor or with respect to events occurring prior to acquisition of ownership; (b) be subject to any offsets or defenses which Lessee might have against any prior lessor, (c) be bound by prepayment of more than one month's rent, or (d) be liable for the return of any security deposit paid to any prior lessor which was not paid or credited to such new owner.

30.3 **Non-Disturbance.** With respect to Security Devices entered into by Lessor after the execution of this Lease, Lessee's subordination of this Lease shall be subject to receiving a commercially reasonable non-disturbance agreement (a "Non-Disturbance Agreement") from the Lender which Non-Disturbance Agreement provides that Lessee's possession of the Premises, and this Lease, including any options to extend the term hereof, will not be disturbed so long as Lessee is not in Breach hereof and attains to the record owner of the Premises. Further, within 60 days after the execution of this Lease, Lessor shall, if requested by Lessee, use its commercially reasonable efforts to obtain a Non-Disturbance Agreement from the holder of any pre-existing Security Device which is secured by the Premises. In the event that Lessor is unable to provide the Non-Disturbance Agreement within said 60 days, then Lessee may, at Lessee's option, directly contact Lender and attempt to negotiate for the execution and delivery of a Non-Disturbance Agreement.

30.4 **Self-Executing.** The agreements contained in this Paragraph 30 shall be effective without the execution of any further documents; provided, however, that, upon written request from Lessor or a Lender in connection with a sale, financing or refinancing of the Premises, Lessee and Lessor shall execute such further writings as may be reasonably required to separately document any subordination, assignment and/or Non-Disturbance Agreement provided for herein.

31. **Attorneys' Fees.** If any Party or Broker brings an action or proceeding involving the Premises whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. Such fees may be awarded in the same suit or recovered in a separate suit, whether or not such action or proceeding is pursued to decision or judgment. The term, "Prevailing Party" shall include, without limitation, a Party or Broker who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense. The attorneys' fees award shall not be computed in accordance with any court fee schedule, but shall be such as to fully reimburse all attorneys' fees reasonably incurred. In addition, Lessor shall be entitled to attorneys' fees, costs and expenses incurred in the preparation and service of notices of Default and consultations in connection herewith, whether or not a legal action is subsequently commenced in connection with such Default or resuing breach (\$200 is a reasonable minimum per occurrence for such services and consultation).

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

33. **Auctions.** Lessee shall not conduct, nor permit to be conducted, any auction upon the Premises without Lessor's prior written consent, which consent shall be granted or denied at Lessor's sole discretion.

34. **Signs.** Lessor may place on the Premises ordinary "For Sale" signs at any time and ordinary "For Lease" signs during the last 6 months of the term hereof. All signs must comply with all Applicable Requirements. Lessee shall not place, construct, or maintain on the glass panes or supports of the show windows of the Premises, the doors, exterior walls or the roof of the Building, or anywhere else within the Shopping Center outside of the Premises, or on any interior portions of the Premises that are visible from the exterior of the Premises, any signs, advertisements, names, insignia, trademarks, descriptive material or any other items without Lessor's prior written consent, which consent shall be granted or denied at Lessor's sole discretion. Lessor shall designate the size, shape, color, design, and location of all exterior sign(s) to be installed by Lessee, and Lessor shall

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Lessee's sole cost and expense, fabricate, construct and install all such sign(s) in full compliance with Lessor's designation and in accordance with the Sign Criteria for the Shopping Center attached hereto. If any Lessee agrees to submit plans and specifications for Lessee's sign(s) for Lessor's written approval within 30 days after the full execution hereof and to install such sign(s) prior to opening for business at the Premises, Lessor, at Lessee's cost, may remove any item placed, constructed or maintained in, upon or about the Premises or Shopping Center which does not comply with this paragraph. In the event there is a pole, pylon or monument sign for the Shopping Center, Lessor shall have the right, but not the obligation, to install lettering designating Lessee's business on such sign, at Lessee's expense, with Lessor's approval of location, size, style and color. All signs that are permanently attached to the Premises or building shall become the property of Lessor at the expiration or earlier termination hereof, provided, however, that Lessee shall promptly remove all such signs if Lessor so elects, and Lessee shall promptly repair all damage caused by such removal. Lessee shall not place, construct or maintain in, upon or about the Premises any search lights, flashing lights, loudspeakers, phonographs or other visual or audio media.

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

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

37. Guarantor.

37.1 Execution. The Guarantors, if any, shall each execute a guaranty in the form most recently published by the AIR Commercial Real Estate Association.

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

38. Quiet Possession. Subject to payment by Lessee of the Rent and performance of all of the covenants, conditions and provisions on Lessee's part to be observed and performed under this Lease, Lessor shall have quiet possession and quiet enjoyment of the Premises during the term hereof.

39. Options. If Lessee is granted an option, as defined below, then the following provisions shall apply.

39.1 Definition. "Option" shall mean: (a) the right to extend or reduce the term of or renew this Lease or to extend or reduce the term of or renew any lease that Lessee has on other property of Lessor, (b) the right of first refusal or first offer to lease either the Premises or other property of Lessor, (c) the right to purchase, the right of first offer to purchase or the right of first refusal to purchase the Premises or other property of Lessor.

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

39.3 Multiple Options. In the event that Lessee has any multiple Options to extend or renew this Lease, a later Option cannot be exercised unless the prior Options have been validly exercised.

39.4 Effect of Default on Options.

(a) Lessee shall have no right to exercise an Option: (i) during the period commencing with the giving of any notice of Default and continuing until said Default is cured, (ii) during the period of time any Rent is unpaid (without regard to whether notice thereof is given Lessee), (iii) during the time Lessee is in Breach of this Lease, or (iv) in the event that Lessee has been given 3 or more notices of separate Default, whether or not the Defaults are cured, during the 12 month period immediately preceding the exercise of the Option.

(b) The period of time within which an Option may be exercised shall not be extended or enlarged by reason of Lessee's inability to exercise an Option because of the provisions of Paragraph 39.4(a).

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

40. Security Measures. Lessee hereby acknowledges that the Rent payable to Lessor hereunder does not include the cost of guard service or other security measures, and that Lessor shall have no obligation whatsoever to provide same. Lessee assumes all responsibility for the protection of the Premises, Lessee, its agents and invitees and their property from the acts of third parties. While Lessor does not assume any responsibility to provide any security measures or any liability for failure to provide security measures or for any inadequacy thereof, Lessor shall have the authority to institute or continue such security measures as Lessor in its sole discretion deems necessary or appropriate from time to time, the cost and expenses of which shall be considered Common Area Operating Expenses. To the degree directed by Lessor, Lessee shall coordinate its security measures at the Premises with the security measures instituted by Lessor, if any.

41. Reservations. Lessor reserves the right: (i) to grant, without the consent or joinder of Lessee, such easements, rights and dedications that Lessor deems necessary, (a) to cause the reconnection of parcel maps and restrictions, and (ii) to create and/or install new utility roadways, so long as such easements, rights, dedications, maps, restrictions, and utility roadways do not unreasonably interfere with the use of the Premises by Lessee. Lessee agrees to sign any documents reasonably requested by Lessor to effectuate such rights.

42. Building Planning. Lessor shall have the right at any time or times, upon giving Lessee not less than 60 days prior written notice, to provide and furnish Lessee with space of comparable usability located elsewhere within any of the buildings within the Shopping Center and to move Lessee into such new space, provided that the usable area of such new space is not less than the usable area of the Premises and provided that all of Lessee's reasonable out-of-pocket moving expenses (including but not limited to the cost of moving Lessee's personal property, the cost of reprinting Lessee's stationery or other business materials with the new address, and the cost to relocate and reinstall tenant improvements and Lessee's telecommunications and computer equipment) shall be paid by Lessor, and provided further that Lessor shall construct at Lessor's expense such improvements to such new space as shall be necessary to place it in a condition that is substantially comparable to the Premises. Except as provided in the immediately preceding sentence, Lessor shall have no obligation to improve such space or pay any other expenses incurred by Lessee as a result of such relocation. On such relocation, the terms and conditions of this Lease shall remain in full force and effect, including but not limited to the Base Rent payable hereunder and Lessee's Share (even if the usable area of such relocated Premises is in excess of the usable area of the Premises), except that the Premises shall be in such new location. Upon Lessor's request, the Parties shall execute an amendment to this Lease in form required by Lessor confirming the relocation of the Premises to such new location. If the new space does not meet with Lessee's approval, which approval Lessee shall give or withhold in accordance with Paragraph 36, Lessee shall have the right to cancel the Lease by giving Lessor written notice thereof within 15 days of receipt of Lessor's notification of its intent to relocate Lessee. Lessee's failure to give such notice within such 15 day period shall be deemed Lessee's approval of the new space. If timely notice is given by Lessee, then this Lease shall terminate unless Lessor rescinds Lessor's prior notice of its intent to relocate Lessee within 10 days after Lessor's receipt of Lessee's notice of cancellation.

43. Performance Under Protest. If at any time a dispute shall arise as to any amount or sum of money to be paid by one Party to the other under the provisions hereof, the Party against whom the obligation to pay the money is asserted shall have the right to make payment "under protest" and such payment shall not be regarded as a voluntary payment and there shall survive the right on the part of said Party to institute suit for recovery of such sum. If it shall be adjudged that there was no legal obligation on the part of said Party to pay such sum or any part thereof, said Party shall be entitled to recover such sum or so much thereof as it was not legally required to pay. A Party who does not initiate suit for the recovery of sums paid "under protest" within 6 months shall be deemed to have waived its right to protest such payment.

44. Authority; Multiple Parties; Execution

(a) If either Party hereto is a corporation, trust, limited liability company, partnership, or similar entity, each individual executing this Lease on behalf of such entity represents and warrants that he or she is duly authorized to execute and deliver this Lease on its behalf. Each Party shall, within 30 days after request, deliver to the other Party satisfactory evidence of such authority.

(b) If this Lease is executed by more than one person or entity as "Lessee", each such person or entity shall be bound by the terms and conditions of this Lease.

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severally liable hereunder. It is agreed that any one of the named Lessees shall be empowered to execute any amendment to this Lease, or other document ancillary thereto and bind all of the named Lessees, and Lessor may rely on the same as if all of the named Lessees had executed such document.

(c) This Lease may be executed by the Parties in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

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

46. **Offer.** Preparation of this Lease by either Party or their agent and submission of same to the other Party shall not be deemed an offer to lease to the other Party. This Lease is not intended to be binding until executed and delivered by all Parties hereto.

47. **Amendments.** This Lease may be modified only in writing, signed by the Parties in interest at the time of the modification. As long as they do not materially change Lessee's obligations hereunder, Lessee agrees to make such reasonable non-monetary modifications to this Lease as may be reasonably required by a Lender in connection with the obtaining of normal financing or refinancing of the Premises.

48. **Waiver of Jury Trial.** THE PARTIES HEREBY WAIVE THEIR RESPECTIVE RIGHTS TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING INVOLVING THE PROPERTY OR ARISING OUT OF THIS AGREEMENT.

49. **Arbitration of Disputes.** An Addendum requiring the Arbitration of all disputes between the Parties and/or Brokers arising out of this Lease ☐ is ☒ is not attached to this Lease.

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

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

ATTENTION: NO REPRESENTATION OR RECOMMENDATION IS MADE BY THE AIR COMMERCIAL REAL ESTATE ASSOCIATION OR BY ANY BROKER AS TO THE LEGAL SUFFICIENCY, LEGAL EFFECT, OR TAX CONSEQUENCES OF THIS LEASE OR THE TRANSACTION TO WHICH IT RELATES. THE PARTIES ARE URGED TO:

1. SEE ADVICE OF COUNSEL AS TO THE LEGAL AND TAX CONSEQUENCES OF THIS LEASE.

2. RETAIN APPROPRIATE CONSULTANTS TO REVIEW AND INVESTIGATE THE CONDITION OF THE PREMISES, SAID INVESTIGATION SHOULD INCLUDE BUT NOT BE LIMITED TO: THE POSSIBLE PRESENCE OF HAZARDOUS SUBSTANCES, THE ZONING OF THE PREMISES, THE STRUCTURAL INTEGRITY, THE CONDITION OF THE ROOF AND OPERATING SYSTEMS, COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT AND THE SUITABILITY OF THE PREMISES FOR LESSEE'S INTENDED USE.

WARNING: IF THE PREMISES ARE LOCATED IN A STATE OTHER THAN CALIFORNIA, CERTAIN PROVISIONS OF THE LEASE MAY NEED TO BE REVISED TO COMPLY WITH THE LAWS OF THE STATE IN WHICH THE PREMISES ARE LOCATED.

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

Executed at:

Executed at: Turlock, California

On:

On:

10-16-2012

By LESSOR:

By LESSEE:

Berry Hinkley Industries

B&B Pizza, Inc., a Nevada Corporation

By:

By:

Name Printed:

Name Printed: John Gauthier

Title:

Title: President

By:

By:

Name Printed:

Name Printed: John Gauthier

Title:

Title: Secretary

Address:

Address: 1601 Bessemer St., Turlock, CA 95380

Telephone: ()

Telephone: (209) 668-4830

Facsimile: ()

Facsimile: ()

Email:

Email: john@pizzapeople.net

Email:

Email:

Federal ID No.

Federal ID No. 26-2136674

BROKER:

BROKER:

Colliers Nevada, LLC

Colliers Nevada, LLC

Attn: Daniel Glubaich

Attn: Daniel Glubaich

Title: Vice President

Title: Vice President

Address:

Address:

Telephone: ()

Telephone: ()

Facsimile: ()

Facsimile: ()

Email:

Email:

Federal ID No.

Federal ID No.

Broker/Agent DRE License #:

Broker/Agent DRE License #:

1826 Hwy 50 East, Berry Hinkley, 983112.dg.bm

NOTICE: These forms are often modified to meet changing requirements of law and industry needs. Always write or call to make sure you are utilizing the most current form: AIR Commercial Real Estate Association, 800 W 6th Street, Suite 800, Los Angeles, CA 90017. Telephone No. (213) 687-8777. Fax No.: (213) 687-8616.

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INITIALS

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INITIALS

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FORM SCLN-S-4/12E

ADDENDUM "A"

This Addendum "A" is made part of that Multi-Tenant Shopping Center Lease - Net ("Lease") dated October 1, 2012 between B&J Pizza, Inc., a Nevada Corporation, Lessee ("Lessee") and Berry Hinkley Industries, Lessor ("Lessor") relating to 1820 Hwy 50 East, Carson City, NV ("Property").

1. Provided Lessee is not in default hereunder, Lessee shall have the option to extend the Base Term of the Lease for two (2) consecutive 5-Year option periods. Each option period shall have a rent increase of ten percent (10%) from the prior period rent. The Lessee shall notify Lessor of its intent to extend the Base Term in writing 90 days prior to the expiration of the Base term and 90 days prior to the end of each renewal option. In the event Lessee exercises any option to extend the Base Term of the Lease, all terms and conditions of the Lease shall remain in full force and effect.

DATE: 10-26-12

LESSEE:

Berry Hinkley Industries

By: Date: 10-16-2012

LESSOR:

B&J Pizza, Inc., a Nevada Corporation

By:  John Gauthier, PresidentBy:  Jill Gauthier, Secretary

(ver 10-12-2012)

Addendum "B" to Lease

The following provisions are hereby added to the Standard Multi-Lessee Shopping Center Lease – Net (hereinafter, "Lease") entered into by and between Berry Hinkley Industries (hereinafter "Lessor") and B&J Pizza, Inc., a Nevada Corporation, dba Little Caesars' (hereinafter "Lessee") of even date herewith for the premises located at 1820 Hwy 50 East, Carson City, Nevada, consisting of approximately 1381 square feet.

Notwithstanding anything in the Lease to the contrary, the following items shall govern the Lease as specifically changed below; otherwise, all other terms of the Lease will govern.

1. Subparagraph 4.2(a)(viii) of paragraph 4 (Rent) is modify to read in full as follows: Auditors, accountants, and attorneys' fees related to the operation of the Shopping Center, but not including anything related to litigation.
2. The last sentence in paragraph 8.6 (Waiver of Subrogation) is modified to read in full as follows: The Parties agree to have their respective property damage, liability, and workers' compensation insurance carriers waive any right to subrogation that such companies may have against Lessor or Lessee, as the case may be, so long as the insurance is not invalidated thereby.
3. The following sentence is added to the end of paragraph 8.6 (Waiver of Subrogation): Each party will give notice to the other party if a waiver of subrogation cannot be obtained from the insurance carrier; in which case, the party obtaining insurance will use reasonable efforts to find, if possible, other insurance that will contain a waiver of subrogation.
4. The first sentence in paragraph 8.7 (Indemnify) is modified to delete the word "gross" as follows: Except for Lessor's gross negligence or willful misconduct, ..."
5. Paragraph 8.8 (Exemption of Lessor and its Agents from Liability) is modified to read in full as follows: Notwithstanding the negligence or breach of this Lease by Lessor or its agents, neither Lessor nor its agents shall be liable under any circumstances beyond the policy limits of any insurance protecting Lessor for: (i) injury or damage to the person or goods, wares, merchandise or other property of Lessee, Lessee's employees, contractors, invitees, customers, or any other person in or about the Premises, whether such damage or injury is caused by or results from fire, steam, electricity, gas, water or rain, indoor air quality, the presence of mold or from the breakage, leakage, obstruction or other defects of pipes, fire sprinklers, wires, appliances, plumbing, HVAC or lighting fixtures, or from any other cause, and whether or not the said injury or damage results from conditions arising upon the Premises or upon other portions of the building of which the Premises are a part, or from other sources or places, (ii) any damages arising from any act or neglect of any other tenant of Lessor or from the failure of Lessor or its agents to enforce the provisions of any other lease in the Shopping Center, or (iii) injury to Lessee's business or for any loss of income or profit therefrom. Instead, it is intended that Lessee's sole recourse in the event of such damages or injury shall be to file a claim on the insurance policy(ies) that Lessee is required to be maintain pursuant to the provisions of paragraph 8. This provision shall not affect Landlord's duty, if any, to rebuild the Premises as required by the terms of this Lease.
6. The definition of "Premises Partial Damage" in subparagraph 9.1 (a) is modified to change the number "3" to "6" and to change the number "6" to "12".
7. The definition of "Premises Total Destruction" in subparagraph 9.1 (b) is modified to change the number "3" to "6" and to change the number "6" to "12".
8. The last sentence of paragraph 9.2 (Partial Damage – Insured Loss) is modified to read as follows: Premises Partial Damage of more than \$20,000 due to flood or earthquake shall be

subject to Paragraph 9.3, notwithstanding that there may be some insurance coverage, but the net proceeds of an such insurance shall be made available for the repairs if made by either Party.

9. Paragraph 9.5 (Damage Near End of Term) is modified to change the number 10 to 45 as follows: Notwithstanding the foregoing, if Lessee at the time has an exercisable option to extend this Lease or to Purchase the Premises, then Lessee may preserve this lease by, (a) exercising such option and (b) providing Lessor with any shortage in insurance proceeds (or adequate assurance thereof) needed to make the repairs on or before the earlier of (i) the date which is ~~40~~ 45 days after Lessee's receipt of Lessor's written notice purporting to terminate this Lease, or (ii) the day prior to the date upon which such option expires.
10. The definition of "Real Property Taxes" in paragraph 10.1 (Definition) shall exclude inheritance, personal income, business income, and estate taxes of Lessor. The term "Real Property Taxes" shall also exclude property transfer taxes associated with any transfer of ownership from Lessor to another entity or person.
11. The last sentence of paragraph 11 (Utilities and Services) is modified to read in full as follows: To the extent paragraph 9 (Damages or Destruction) would not apply to a particular situation, there shall be no abatement of Rent and Lessor shall not be liable in any respect whatsoever for the inadequacy, stoppage, interruption or discontinuance of any utility or service due to riot, strike, labor dispute, breakdown, accident, repair, or other cause beyond Lessor's reasonable control or in cooperation with governmental request or directions.
12. Subparagraph 12.1 (b) of paragraph 12 (Assignment and Subletting) is modified to change "25%" to "51%".
13. Subparagraph 12.1 (f) of paragraph 12 (Assignment and Subletting) is modified to read in full as follows: If Lessor has a replacement tenant that Lessor desires to substitute in place of Lessee, then Lessor may reasonably withhold consent to a proposed assignment or subletting if Lessee is in Default at the time consent is requested.
14. Subparagraph 13.1 (h) of paragraph 13 (Default; Breach; Remedies) is modified to delete "death of a Guarantor" as follows: ~~(i) the death of a Guarantor.~~
15. The second sentence of Paragraph 13.3 (Inducement Recapture) is modified to read in full as follows: Upon Breach of this Lease by Lessee, any such Inducement Provision shall automatically be deemed deleted from this Lease and of no further force or effect, and the prorated portion (meaning an amount equal to the Inducement divided by 60 multiplied by the months remaining in the term of the Lease after the breach) of any rent, other charge, bonus, inducement or consideration theretofore abated, given or paid by Lessor under such an Inducement Provision shall be immediately due and payable by Lessee to Lessor, notwithstanding any subsequent cure of said Breach by Lessee.
16. The last sentence of paragraph 34 (Signs) is modified to read in full as follows: Lessee shall not place, construct or maintain in, upon or about the Premises any search lights, flashing lights, loudspeakers, phonographs or other visual or audio media which can be seen or heard from the outside of the Premises.
17. The first sentence of paragraph 42 (Building Planning) is modified to read in full as follows: If needed in order to comply with any requirement of any government agency placed on Lessor to modify the configuration or use of the Premises, any building in the Shopping Center, or any Common Areas of the Shopping Center, Lessor shall have the right at any time or times, upon giving Lessee not less than 60 days prior written notice, to provide and furnish Lessee with space of comparable visibility located elsewhere within any of the buildings within the Shopping Center and to move Lessee into such new space, provided that the usable area of such new

space is not less than the usable area of the Premises and provided that all of Lessee's reasonable out-of-pocket moving expenses (including but not limited to the cost of moving Lessee's personal property, the cost of reprinting Lessee's stationery or other business materials with the new address, and the cost to relocate and reinstall tenant improvements and Lessee's telecommunications and computer equipment) shall be paid by Lessor, and provided further that Lessor shall construct at Lessor's expense such improvements to such new space as shall be necessary to place it in a condition that is substantially comparable to the Premises

18. Lease Conditional Upon Approval Of Little Caesar Enterprises, Inc. This Lease is expressly conditional upon final approval of this Lease and the Premises as a location for the operation of a Little Caesars restaurant from the Little Caesars franchisor. In the event such approval is not received by Lessee within thirty (30) days from the execution of this Lease, Lessor or Lessee may, upon ten (10) days notice, cancel this Lease, and such will be cancelled unless Lessee removes this condition within said 10 day period.
19. Use of Premises. Lessee shall be entitled to use and occupy the premises for the retail sales of food and beverages and related promotional items which shall include, but not be limited to, pizza, Italian specialties, bread products, chicken wings, salads, sandwiches and any other items generally sold by Little Caesars' restaurants.
20. Covenant Not to Lease to Other Pizza Restaurants. During the term (including extensions) of this Lease, Lessor shall not permit, in the Shopping Center or on any adjacent or contiguous property now owned or hereafter acquired by the Lessor, its successors and assigns or any entity with which Lessor is associated, the operation, other than by Lessee, of a facility which sells pizza or other Italian-related foods. Also, Lessor shall not grant any existing or future tenant any exclusive right to sell any food or beverage which would in any way prohibit Lessee from selling any item allowed in this Lease.
21. Covenant Not to Lease to Adult-Themed Store. Lessor shall not lease any property in the Shopping Center to an "adult" type bookstore or other type of business which would lower the reputation of the Shopping Center. However, nothing herein shall prohibit the Lessor from leasing to any business that is a tavern primarily selling alcoholic beverages and which does not sell pizza or food items sold by Lessee.
22. Lease Assignment And Subletting. Lessee shall have the right to assign this Lease without Lessor's consent to Lessee's Franchisor, Little Caesar Enterprises, Inc., or an affiliated corporation or subsidiary of Lessee's franchisor. Lessee will then be relieved of any and all liability under this Lease. Lessee shall also have the right to assign this Lease to another Little Caesar's authorized franchisee without permission of Lessor if Lessee gives Lessor at least 45 days prior notice and if Lessee and the current guarantors of this Lease continue to guarantee performance of this Lease until the current term of this Lease expires.
23. Permit Contingency. Lessee shall be entitled to terminate the Lease if it is unable, for reasons outside of Lessee's control, to obtain all permits needed for lawful construction and operation of its intended use of the Premises. This contingency shall be automatically removed if not exercised by Lessee within 30 days of Lessee's execution of this Lease.
24. Improvement Allowance. Lessor will provide Lessee with a Ten Thousand Dollar (\$10,000) Lessee improvement allowance. Said funds shall be paid to Lessee in full within 30 days of Lessor's receipt of all of the following: all construction and supply lien releases, "as-built" drawings, certificate of occupancy, and notification of Lessee opening for business.
25. Signs in Windows. Lessee shall have the right to display, without Lessor's prior consent, standard interior window signage and regional franchise advertising campaign signage that Lessee uses from time to time in Lessee's other stores.

26. Sign Holders. Lessee shall be able to use sign holders on the public sidewalks next to the Shopping Center to the extent allowed by law.
27. Rules and Regulations. Lessor shall not create any rule regarding the Common Areas or use of the Premises that conflict with the terms of this Lease. Lessee shall have the option to terminate this Lease within 30 day of receiving notice from Lessor of any new rule imposed by Lessor after this Lease is signed which would have a material negative effect on the volume of Lessee's business, materially change or interfere with Lessee's rights as contained in this Lease, or significantly increase Lessee's financial obligations to Lessor.
28. Common Area Expense Control. Lessor shall use good faith efforts to control the amount of Common Area expenses, including bidding jobs when reasonable, and shall only make those repairs and alterations which are commercially reasonable and appropriate for maintaining a clean, safe, and attractive appearance of the Shopping Center. In no year shall the Common Area expenses increase more than 10% over the prior year, excluding those non-discretionary spending costs, such as utilities, insurance, taxes, etc.
29. Lessor's Interference Due to Repairs. If Lessor's work in the Common Areas or in the Premises shall directly interfere with Lessee's use of the interior space of the Premises or prevent customers from accessing the Premises for a period of more than three (3) business days in any 60 day period, the Rent shall thereafter be abated on a daily basis for each day by the percentage of the portion of the Premises which cannot be used or accessed due to the construction work.
30. Indemnification of Lessor. So long as Lessee has maintained insurance coverage as required by this Lease at the time the events giving rise to a claim occurred, the indemnity of Lessor by Lessee shall not apply to the extent and for the amount that Lessor's insurance will cover the claim at issue while at the same time Lessee would have no insurance that would cover Lessee's indemnification of Lessor for the damages associated with the claim.
31. Equipment Subordination Acknowledgment. Within 10 days of any request by Lessee, Lessor shall execute and deliver to Lessee an equipment collateral subordination acknowledgment on a form requested by Lessee's lenders which subordinates to Lessee's purchase money lenders Lessor's rights in Lessee's equipment. Lessor shall not be obligated to sign any subordination agreement whose terms would cause Lessor to incur any cost or expense (outside attorney's fees to review the agreement, which Lessee shall pay) or take away or diminish any right Lessor has in the Premises.

LESSEE:

LESSOR:

EXHIBIT 6

EXHIBIT 6

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

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

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

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

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

Plaintiffs,

v.

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

Defendants.

AND RELATED COUNTERCLAIM

Case No. CV14-01712

Dept. No. 6

**PLAINTIFFS LARRY J. WILLARD AND
 OVERLAND DEVELOPMENT
 CORPORATION'S RESPONSES TO
 DEFENDANTS' SECOND SET OF
 INTERROGATORIES**

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

Please state the name, address, and telephone number of all of Your employees and/or agents who were or are involved in the transactions and events which are the subject of the pleadings.

RESPONSE TO INTERROGATORY NO. 1:

1. Samuel A. Chuck, Rossi, Hamerslough, Reischl & Chuck, 1960 The Alameda, Suite 200, San Jose, CA 95126. Tel. (408) 261-4252.

2. Daniel Gluhaich, Intero Real Estate Services, 175 E. Main Ave. #130, Morgan Hill, CA 95037. Tel. (408) 201-0120.

3. L. Steven Goldblatt, Goldblatt Law Firm, 22 Martin Street, Gilroy, CA 95020. Tel. (408) 500-6448.

INTERROGATORY NO. 2:

Please identify the provision in the Willard Lease which supports your contention in paragraph 9 of the First Amended Complaint that the rental rate in the Willard Lease increases by two percent per month.

RESPONSE TO INTERROGATORY NO. 2:

Respondent responds that paragraph 9 contains a typographical error and should have read that the Willard Lease increases by two percent per *year*.

INTERROGATORY NO. 3:

Please identify the most recent mortgage payment You have made on the Willard Property. Please state all facts with particularity, identify all witnesses by name, address, and telephone number, and documents by date, title, author, and custodian that support such allegations.

RESPONSE TO INTERROGATORY NO. 3:

The most recent mortgage payment made by Respondent on the Willard Property was made on or about February 11, 2013 in the amount of \$87,077.52.

Witnesses who can corroborate this Response are as follows:

1 1. Larry J. Willard, c/o Brian P. Moquin, Esq., Law Offices of Brian P. Moquin,
2 3287 Ruffino Lane, San Jose, CA 95148. Tel. (408) 300-0022.

3 2. Mitra Ehsanipour, CPA, 205 Park Road #207, Burlingame, CA 94010. Tel. (650)
4 348-9444.

5 3. Mike Burns, c/o Thomas Caudill, Esq., Law Office of Thomas Caudill, 1025
6 North Fourth Street, San Jose, CA 95112. Tel. (408) 298-4844.

7 **INTERROGATORY NO. 4:**

8 Please explain in detail the factual basis for Your contention in paragraph 11 of the First
9 Amended Complaint that the Willard Plaintiffs agreed to amend the Willard Lease through
10 shortening the lease term by 30 months in return for Herbst personally guaranteeing that BHI
11 would make all lease payments through the term of the lease.

12 **RESPONSE TO INTERROGATORY NO. 4:**

13 Respondent and his counsel, Samuel A. Chuck, engaged in lengthy negotiations with
14 Defendants at the time that Jerry Herbst was planning to acquire Berry-Hinckley Industries and
15 take over the Willard Lease. As part of those negotiations, Herbst offered to personally
16 guarantee timely payments and performance of the obligations of Berry-Hinckley Industries
17 under the Willard Lease in return for Respondent forgoing 30 months of the lease term.

18 **INTERROGATORY NO. 5:**

19 Please identify and explain in detail the factual basis for Your contention that Defendants
20 are responsible for the claimed accounting fees associated with Willard's Bankruptcy filing
21 referred to in Paragraph 17 of the First Amended Complaint, which was subsequently dismissed
22 voluntarily.

23 **RESPONSE TO INTERROGATORY NO. 5:**

24 Due to Defendants' default, Respondent was placed in an untenable financial position
25 where he was liable for \$87,077.52 per month in mortgage payments on the Willard Property but
26 had no income. As a direct and proximate result, on the advice of counsel, Willard filed for
27 bankruptcy protection, which required Willard to retain the services of an accountant, Mitra
28 Ehsanipour, to assist in preparing the bankruptcy schedules. Such expense was a foreseeable

consequence of Defendants' default, and are expressly recoverable under Section 20(B)(v) of the Willard Lease.

INTERROGATORY NO. 6:

Please identify the outstanding balance due and owing on any and all mortgage loans for the Willard Property as of the date of the short sale identified in paragraph 15 of the Amended Complaint.

RESPONSE TO INTERROGATORY NO. 6:

Respondent is informed and believes the total outstanding balance including interest and penalties was \$13,699,802.70.

INTERROGATORY NO. 7:

Please identify and describe in detail the claimed City of Reno fines referred to in paragraph 13 of the First Amended Complaint.

RESPONSE TO INTERROGATORY NO. 7:

Respondent responds that Propounding Party has already received copies of all notices of fines issued by the City of Reno, and in fact forwarded all such notices of fines to Respondent.

INTERROGATORY NO. 8:

Please identify the date that You contend that the Operation and Management Agreement terminated.

RESPONSE TO INTERROGATORY NO. 8:

June 1, 2013.

INTERROGATORY NO. 9:

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

RESPONSE TO INTERROGATORY NO. 9:

With respect to Request for Admission No. 1, the initial lease entered into by the Willard

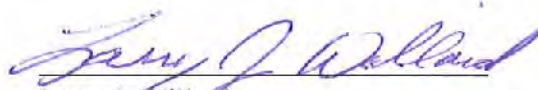
1 Plaintiffs on December 2, 2005 was for twenty years in duration, commencing January 2006 and
2 ending in January 2026.

3 With respect to Request for Admission No. 2, to the extent that the Request does not
4 account for the initial twenty-year lease duration, Respondent's explanation is the same as for
5 Request for Admission No. 1.

VERIFICATION

STATE OF CALIFORNIA)
) ss.
 COUNTY OF SAN DIEGO)

I, Larry J. Willard, being first duly sworn, under oath and under the penalties of perjury aver as follows: I am the Larry J. Willard in the above-entitled action. I am competent to testify as to the contents of the foregoing Responses to Defendants' Second Set of Interrogatories of my own knowledge. I have read the foregoing Responses and know the contents thereof. The foregoing Responses are true to the best of my own knowledge, save and except for those matters therein stated upon information and belief upon which, as to those matters, I believe same to be true.

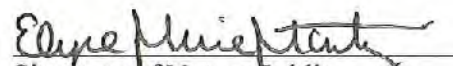

 Larry J. Willard

On August 14th, 2015, before me, Elyce Marie Martinez, ^{Notary Public}, personally appeared Larry J. Willard, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person(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 of Notary Public

AFFIRMATION

(Pursuant to NRS 239B.030)

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

LAW OFFICES OF BRIAN P. MOQUIN

DATED: August 18, 2015

By:  _____

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

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

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

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

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

DATED: August 18, 2015



BRIAN P. MOQUIN

EXHIBIT 7

EXHIBIT 7

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IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

---o0o---

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

Plaintiffs,

vs.

Case No. CV14-01712

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

Dept. No. 6

Defendants.

And Related Counterclaim.

_____/

DEPOSITION OF LARRY WILLARD

AUGUST 21, 2015

RENO, NEVADA

Reported by: JULIE ANN KERNAN, CCR #427, RPR
MOLEZZO REPORTERS (775) 322-3334

1 APPEARANCES

2 For the Plaintiffs: LAW OFFICES OF BRIAN P. MOQUIN
3 By: Brian P. Moquin, Esq.
3506 La Castellet Court
4 San Jose, California 95148

5 For the Defendants: DICKINSON WRIGHT PLLC
6 Attorneys at Law
By: Brian R. Irvine, Esq.
7 By: Katy Brady, Esq.
100 West Liberty Street
8 Suite 940
Reno, Nevada 89501

1 Q Okay.

2 A So that's kind of that scenario. So in answer
3 to your question, I think it was about three seven,
4 thereabouts, that went to the lender.

5 Q Okay.

6 A And that was --

7 Q You certainly didn't get any money out of this
8 formally.

9 A Not a penny. Not a red cent.

10 Q But as a result of this sale --

11 A Uh-hum.

12 Q -- the NCUA agreed to forgive the remaining
13 balance on your loan. Correct?

14 A That's right.

15 Q And --

16 A That's correct.

17 Q -- Ms. Khazen also agreed to get rid of that
18 mortgage.

19 A The hundred 50, yeah.

20 Q So you don't owe any more money to anybody for
21 debt on the South Virginia property, as you sit here today.
22 Correct?

23 A No. The only liability I'm going to have is the
24 debt forgiveness, according to my C.P.A.

25 Q Yeah. We'll get to that. And what was Mr.

1
2
3 ---o0o---

4 CERTIFICATE OF WITNESS

5
6 I hereby certify under penalty of perjury
7 that I have read the foregoing deposition, made the
8 changes and corrections that I deem necessary, and
9 approve the same as now true and correct.

10
11 Dated this day of ,
12 2015.

13
14
15 _____
16 LARRY WILLARD
17
18
19
20
21
22
23
24
25

1 STATE OF NEVADA)

2 COUNTY OF WASHOE)

3 I, JULIE ANN KERNAN, a notary public in and
4 for the County of Washoe, State of Nevada, do hereby
5 certify:

6 That on Friday, the 21st day of August, 2015,
7 at the hour of 9:28 a.m. of said day, at the Law Offices of
8 Dickinson Wright, 100 West Liberty Street, Suite 940, Reno,
9 Nevada, personally appeared LARRY WILLARD, who was duly
10 sworn by me to testify the truth, the whole truth, and
11 nothing but the truth, and thereupon was deposed in the
12 matter entitled herein;

13 That said deposition was taken in verbatim
14 stenotype notes by me, a Certified Court Reporter, and
15 thereafter transcribed into typewriting as herein appears;

16 That the foregoing transcript, consisting of
17 pages numbered 1 through 137, is a full, true and correct
18 transcript of my said stenotype notes of said deposition to
19 the best of my knowledge, skill and ability.

20
21 DATED: At Reno, Nevada, this 24th day of August, 2015.

22
23
24 
25 JULIE ANN KERNAN, CCR #427

1 **2185**

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9 *Attorney for Defendants*
10 *Berry Hinckley Industries and Jerry Herbst*

11 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

12 **IN AND FOR THE COUNTY OF WASHOE**

13 LARRY J. WILLARD, individually and as
14 trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT CASE NO. CV14-01712
15 CORPORATION, a California corporation;
EDWARD E. WOOLEY AND JUDITH A. DEPT. 6
16 WOOLEY, individually and as trustees of the
Edward C. Wooley and Judith A. Wooley
17 Intervivos Revocable Trust 2000,

18 Plaintiff,

19 vs.

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

22 Defendants.

23
24 BERRY-HINCKLEY INDUSTRIES, a
Nevada corporation; and JERRY HERBST,
25 an individual;

26 Counterclaimants,

27 vs

28 LARRY J. WILLARD, individually and as

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

Counter-defendants.

DEFENDANTS/ COUNTERCLAIMANTS' MOTION FOR SANCTIONS

[ORAL ARGUMENT REQUESTED]

Defendants/Counterclaimants Berry-Hinckley Industries (“BHI”) and Jerry Herbst (collectively, “Defendants”), by and through their counsel of record, Dickinson Wright PLLC, hereby file this Motion for Sanctions to be issued against Plaintiffs Larry Willard and Overland Corporation (“Willard”) and Plaintiffs Edward E. Wooley and Judith A. Wooley (“Wooley”). This Motion is supported by NRCP 16.1(e), NRCP 37, the attached memorandum of points and authorities, all papers and pleadings on file herein, and any information that this Court may choose to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs’ conduct throughout this case is an affront to this Court, Defendants, and the Nevada discovery rules. Indeed, as will be discussed herein, Plaintiffs have continually and repeatedly ignored Nevada law, this Court’s express orders, and Defendants’ many requests for threshold, mandatory information, only to ambush Defendants with a barrage of new alleged damages, expert opinions, and documents at the virtual close of discovery, meaning that it is too late for Defendants to meaningfully respond. Plaintiffs’ conduct has simply been so egregious that they should not be permitted to proceed with this case.

Specifically, first, Plaintiffs have never complied with their NRCP 16.1 obligation to provide damages disclosures, a fact to which the Plaintiffs have stipulated (although Wooley misrepresented his compliance to this Court). Plaintiffs have blatantly disregarded this Court’s express order directing them to serve their NRCP 16.1 damages computations, and have ignored Defendants’ many requests for compliance made throughout this litigation.

1 Additionally, in December of 2016, Plaintiffs disclosed an expert, but the disclosure
2 wholly failed to comply with Nevada law. Plaintiffs acknowledged this immediately after
3 serving the noncompliant disclosure, and have also admitted to this in a Stipulation and Court
4 Order, but have not even attempted to rectify this wrongdoing.

5 Yet less than one month before the close of discovery, Plaintiffs filed Motions for
6 Summary Judgment in which they requested judgment on a brand-new, never-disclosed, model
7 of damages. These damages are premised on brand new theories and foundations, and would
8 require Defendants to obtain both expert opinions and rebuttal expert opinions to properly
9 defend themselves, as well as additional fact discovery—an impossibility given the amount of
10 time remaining in this case. Willard is also seeking \$40 million more in damages; more than
11 triple the amount originally sought, and Wooley is also seeking nearly double the amount he
12 originally sought.

13 Further, this newly-requested relief is based solely upon the opinions of the expert
14 whom Plaintiffs never properly disclosed, and Defendants therefore never had a chance to rebut.
15 It is also based on never-disclosed appraisals, despite Defendants' discovery requests and
16 Plaintiffs' NRCP 16.1 and NRCP 26(e) obligations.

17 Plaintiffs deliberately chose to file their Motions at a time when it was too late for
18 Defendants to prepare a defense: in fact, Plaintiffs have expressly stipulated that one month
19 would be an inadequate amount of time for Defendants to rebut any expert opinions or new
20 damages. (February 9, 2017, Stipulation and Order, on file herein). There is no explanation as to
21 why Plaintiffs waited until the end of discovery to make untimely disclosures: indeed, the
22 declarations, improper expert opinions, and damages **all rely exclusively upon information**
23 **that has been in Plaintiffs' possession since the inception of this case.** In other words, all of
24 this information could have been timely disclosed years ago, yet Plaintiffs deliberately waited
25 until the close of discovery to disclose it, at a time when Defendants could not rebut it or
26 otherwise meaningfully respond.

1 There is no reason why Plaintiffs did not timely disclose their damages model, expert, or
2 appraisals except one: Plaintiffs intentionally waited until the eleventh hour, when it was too
3 late for Defendants to respond or otherwise prepare a defense, to change their respective
4 damages models and to untimely “disclose” an expert so late that Defendants cannot respond.
5 This appears to be a blatant effort to “sandbag” Defendants and prejudice their ability to prepare
6 the case for trial. Further, regardless of Plaintiffs’ motivations, it is undisputed that Defendants
7 are prejudiced as a result of Plaintiffs’ needless and repeated violations of Nevada law and this
8 Court’s Orders. Defendants would need to engage in significant new discovery and retain direct
9 and rebuttal experts to adequately respond. (February 9, 2017, Stipulation and Order, on file
10 herein). Throughout this case, Defendants gave Plaintiffs numerous opportunities to rectify their
11 noncompliance, yet Plaintiffs declined every invitation to do so. This Court issued multiple
12 orders that Plaintiffs ignored. Further, Plaintiffs’ specious conduct has led to three trial
13 continuances to give Plaintiffs time to comply, but to no avail whatsoever.¹

14 Based on the foregoing, Defendants respectfully request that this Court sanction
15 Plaintiffs for their continued and recalcitrant conduct and dismiss this case with prejudice, or, in
16 the alternative, preclude Plaintiffs from seeking their new damages or relying upon their never-
17 disclosed expert and appraisals.

18 **PERTINENT FACTS AND PROCEDURAL HISTORY**

19 **1. Plaintiffs’ Complaint.**

20 On August 8, 2014, Plaintiffs commenced this action against Defendants, wherein
21 Willard and Wooley filed a joint complaint against Defendants. (Complaint, on file herein). In
22 pertinent part, Willard sought the following damages against Defendants for an alleged breach

23
24 ¹This conduct is part of a larger pattern and practice of Plaintiffs to disregard discovery
25 obligations. Defendants have been forced to file two motions to compel and a motion for
26 contempt and sanctions, all of which have been granted, but Plaintiffs apparently remain
27 undeterred. Further, Defendants have propounded numerous requests on Plaintiffs throughout
28 this litigation to comply with his basic discovery obligations and adequately respond to
Defendants’ discovery requests, but Plaintiffs simply refused to meaningfully participate in the
discovery process required under the NRCp.

of the parties' lease: (1) "rental income" for \$19,443,836.94, discounted by 4% per the lease to \$15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. *Id.*; (First Amended Complaint ("FAC"), on file herein). Willard also sought several other categories of unforeseeable and overreaching damages which have since been dismissed or withdrawn. (May 30, 2017, Order, on file herein). In pertinent part, Wooley sought the following damages against Defendants: (1) "rental income in the amount of \$4,420,244.00 that [Wooley] otherwise would have received," discounted by a rate of 4% as specified in the Wooley Lease to \$3,323,543.90 as of March 1, 2013; (2) a "diminution in value in an amount to be proven at trial but which is at least \$2,000,000"; (3) property taxes in the amount of \$1,500; (4) insurance for \$3,840; (5) maintenance costs of \$4,000; (6) management costs of \$2,500; and (7) security deposit from subtenant for \$2,485.00.² *Id.*; (First Amended Complaint ("FAC"), on file herein). Wooley also sought several other categories of unforeseeable and overreaching damages which have since been withdrawn or dismissed. (May 30, 2017, Order, on file herein).

2. Plaintiffs' initial disclosures.

On December 12, 2014, Plaintiffs provided their initial disclosures. (**Exhibit 1**).³ However, while Plaintiffs disclosed expected witnesses and documents, they provided no computation of Plaintiffs' claimed damages, notwithstanding the express requirement in NRCP 16.1(a)(1)(C).

² Wooley attempted to sue BHI for breach of a second lease in the initial complaint, seeking nearly \$4 million in damages. (Complaint ¶¶ 34, 42-44, on file herein.) However, Defendants informed Wooley that BHI indisputably was not in breach of this second lease (in fact, the second lease was being fully-performed by another operator at the time the Complaint was filed) and were forced to threaten motion practice before Wooley finally agreed to amend his pleading to remove a claim for breach of the Baring Lease. (November 2014 email exchange, **Exhibit 2**; January 2015 email exchange, **Exhibit 3**). This is another example of Plaintiffs' over-reaching approach to this entire case.

³The Exhibits to this Motion have all been produced as Exhibits to Defendants' respective Oppositions to Willard and Wooley's Motions for Summary Judgment, and are authenticated in Brian Irvine's declarations in support of those Oppositions. The exhibits pertinent to this Motion have been reattached for ease of reference.

1 **3. Defendants' February 12, 2015, letter.**

2 On February 12, 2015, Defendants wrote to Plaintiffs regarding the deficiencies in their
3 initial disclosures, and informing them that the disclosures “do not include the damages
4 computations required under the Rule, or the documents upon which such computations are
5 based,” and that Plaintiffs have not produced “under Rule 34 the documents or other evidentiary
6 matter, not privileged or protected from disclosure, on which such computation is based,
7 including materials bearing on the nature and extent of injuries suffered.” (February 12, 2015,
8 Letter, **Exhibit 4**). Defendants further admonished Plaintiffs that should they fail to comply
9 with NRCP 16.1(a)(1)(C), “Defendants will avail themselves of all available legal remedies,
10 including filing motions seeking to exclude evidence of such categories of damages.” *Id.*
11 Wooley did not comply with his NRCP 16.1 obligations upon receipt of this letter or any time
12 thereafter. (Decl. of B. Irvine, Exhibit 1 to Defendants' Opposition to Willard's Motion for
13 Summary Judgment (“Willard Opposition”), Exhibit 1 to Defendants' Opposition to Wooley's
14 Motion for Summary Judgment (“Wooley Opposition”).

15 **4. Plaintiffs' interrogatory responses.**

16 In April of 2015, Defendants served Plaintiffs with written discovery. Defendants had
17 not received any NRCP 16.1 damages disclosures from Plaintiffs, and asked Willard and
18 Wooley in separate Interrogatories to “[p]lease explain in detail how the damages...alleged in
19 your Amended Complaint were calculated.” (Willard July 2015 Interrogatory Responses,
20 **Exhibit 5**; Wooley July 2015 Interrogatory Responses, **Exhibit 6**).

21 Plaintiffs did not respond, even after Defendants granted them multiple extensions,
22 which ultimately required Defendants to file a motion to compel. (June 23, 2015, Motion to
23 Compel, on file herein). Only then did Plaintiffs finally comply with their obligations to respond
24 to Defendants' Interrogatories (nearly three months after they were served), and responded, in
25 pertinent part, by simply repeating the allegations in the Complaint. Willard responded that the
26 rent damages were calculated by computing the Base Monthly Rental from March 1, 2013,
27 through August 23, 2023 and adding two percent per annum, which purportedly totaled
28

1 \$19,443,836.94, and were then discounted applying a 4% discount rate in the Apple Numbers
2 spreadsheet application, which purportedly yielded a net present value of \$15,741,360.75.
3 (Willard July 2015 Interrogatory Responses 7, **Exhibit 5**). Wooley responded that the rent
4 damages were calculated by computing the Base Monthly Rental from March 1, 2013, through
5 November 30, 2025 and adding two percent per annum, which purportedly totaled
6 \$4,420,244.00, and were then discounted applying a 4% discount rate using the Apple Numbers
7 spreadsheet application, which purportedly yielded a net present value of \$3,323,543.49.
8 (Wooley July 2015 Interrogatory Responses, **Exhibit 6**).

9 Notably, these Court-ordered responses from more than two years ago **were the last**
10 **time Plaintiffs provided anything that even came close to a damages disclosure until**
11 **October of 2017**, and even these did not comply with NRCP 16.1.

12 **5. The September 3, 2015, stipulation and order to continue trial date.**

13 On August 28, 2015, Defendants wrote to Plaintiffs, referencing Plaintiffs' continued
14 delay in complying with discovery obligations and resulting prejudice to Defendants, and noting
15 that Plaintiffs had also failed to comply with a promise they made during a status conference
16 before this Court. (August 28, 2015, letter, **Exhibit 7**). Plaintiffs' delay necessitated a
17 stipulation and order vacating the discovery deadlines in place and continuing the trial date.
18 (September 3, 2015, Stipulation and Order, on file herein).

19 **6. The parties' May 2, 2016, stipulation and order to continue the trial date.**

20 In March of 2016, Defendants wrote Plaintiffs twice, seeking documentation that
21 Plaintiffs failed to provide previously, and asking that Plaintiffs comply with their NRCP 26(e)
22 obligation to supplement their responses as necessary. (March 3, 2016, letter, **Exhibit 8**; March
23 15, 2016, letter, **Exhibit 9**).

24 On April 20, 2016, Defendants continued to request the information that they sought in
25 their March 2016 letters, noting that Plaintiffs had promised to provide such documents but had
26 not done so. (April 20, 2016, letter, **Exhibit 10**). Defendants again requested Plaintiffs' NRCP
27 16.1 damages calculations, noting that "this is an issue which we have raised on multiple
28

occasions” and detailing pertinent law and Willard’s noncompliance. *Id.* Further, Defendants again admonished that Plaintiffs’ failure to comply would result in Defendants seeking sanctions. *Id.* Yet again, Willard failed to comply with his NRCP 16.1 obligations. (Decl. of B. Irvine, Exhibit 1 to Willard Motion, Exhibit 1 Wooley Motion).

Defendants also stated that “[y]our clients’ failure to provide us with the discovery documents ha[s] prejudiced our ability to prepare a defense on behalf of our clients. Without such documents, we cannot depose several witnesses, and our experts are unable to complete their opinions. This also jeopardizes our ability to submit dispositive motions with complete information in time for the Court to fully consider those motions.” (April 20, 2016, letter, **Exhibit 10**).

Accordingly, the parties agreed to continue the trial, **for a second time**. The agreed-upon basis for a continuance was that Plaintiffs needed to provide Defendants with documents and information, and also needed to provide “Plaintiffs’ NRCP 16.1 damages calculations.” (May 2, 2016, Stipulation and Order, on file herein). This Court signed the Order, adding that “no further continuances will be granted.” *Id.* Trial was scheduled for May 2, 2017, and discovery was set to close on March 2, 2017.

7. Plaintiffs’ unsuccessful purported disclosure of Daniel Gluhaich.

On December 2, 2016, Plaintiffs purported to disclose Daniel Gluhaich as an un-retained expert. (December 2, 2016, Disclosure, **Exhibit 11**). However, while Plaintiffs’ disclosure generally referenced the categories to which Gluhaich was expected to testify, Plaintiffs did not provide “a summary of the facts and opinions to which the witness is expected to testify” as required by NRCP 16.1(a)(2)(B).⁴ *Id.*

⁴In contrast, Defendants disclosed Michelle Salazar as an expert and served Plaintiffs with Ms. Salazar’s report, which included, as required under NRCP 16.1(a)(2)(B) “a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.”

1 In fact, Plaintiffs immediately admitted to this, reiterating in an email to Defendants that
 2 Defendants had agreed to “allow Plaintiffs to provide an amended expert witness disclosure by
 3 mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr.
 4 Gluhaich will be testifying...” (December 5, 2016, email, **Exhibit 12**⁵). However, Plaintiffs did
 5 not provide an amended disclosure on December 8 or any time thereafter. (Decl. of B. Irvine,
 6 Exhibit 1 to Willard Motion, Exhibit 1 to Wooley Motion).

7 **8. The parties’ December 2016 correspondence.**

8 On December 9, 2016, Defendants’ counsel wrote that Defendants did not receive the
 9 amended disclosure, or dates pursuant to which Defendants could depose Gluhaich. (December
 10 9, 2016, email, **Exhibit 13**). Defendants admonished that “[o]bviously, we will be prejudiced by
 11 further delay in learning all of the expert opinion testimony that plaintiffs intent to present at
 12 trial. Please provide that information immediately.” *Id.*

13 Defendants also addressed Plaintiffs’ continual failure to provide their NRCP 16.1
 14 damages. *Id.* On December 5, 2016, Wooley had provided a spreadsheet of damages expressly
 15 “for use in the ongoing informal settlement negotiations between Tim Herbst and Ed Wooley,”
 16 and asked Defendants’ counsel to “forward...to Tim Herbst as [Defendants’ counsel saw] fit.”
 17 (December 5, 2016, email, **Exhibit 12**). Plaintiffs’ counsel also provided that he would “be
 18 tendering supplemental disclosures in the imminent future that will include the actual
 19 spreadsheet.” *Id.* Defendants responded to this settlement information expressing concern about
 20 Wooley’s continued refusal to provide NRCP 16.1 damages, and once again demanded NRCP
 21 16.1 damages computations for all plaintiffs, immediately. (December 9, 2016, email, **Exhibit**
 22 **13**).

23 On December 23, 2016, Defendants’ counsel discussed Plaintiffs’ continued failure to
 24 properly disclose an expert or even work with Defendants on expert deposition dates, even

26 ⁵Defendants have included the attachment for the purposes of this Motion but it cannot
 27 be used to prove the validity or amount of any claim, which is prohibited by Nevada law. NRS
 28 48.105.

1 though Defendants had provided Plaintiffs an extension. (December 23, 2016, email, **Exhibit**
2 **14**). Defendants also stated that this conduct was prejudicing Defendants and making it
3 impossible for Defendants to comply with discovery deadlines. *Id.* Next, Defendants expressed
4 their concerns to Wooley that the damages spreadsheet recently provided for settlement
5 purposes only, which Defendants could not share with their expert or use to prepare any
6 defenses, contained a “new damages model that Plaintiffs had never before utilized in the case,”
7 and prejudiced Defendants in that they were unable to conduct discovery about this new
8 computation of damages or the methodology used to arrive at the purported numbers in the
9 Wooley settlement-only spreadsheet. *Id.*

10 Defendants concluded that “[w]e still have never received an NRCP 16.1 damages
11 computation from either set of Plaintiffs, despite numerous demands. Please ensure that
12 Plaintiffs meet their obligations to provide such computations immediately, or we will seek to
13 preclude Plaintiffs from seeking any non-disclosed damages at trial, including those contained
14 in the Wooley spreadsheet you sent me on December 5.” *Id.* Defendants also added that they
15 reserved the right to provide Plaintiffs’ damages disclosure to their expert so that she could
16 provide new opinions about any new damages model. *Id.*

17 On December 27, 2016, Plaintiffs’ counsel responded. (December 27, 2016, email,
18 **Exhibit 15**⁶). Plaintiffs did not address their failure to provide their damages disclosures in any
19 way, nor did they provide a disclosure. *Id.* Plaintiffs stated that Defendants “are granted an open
20 extension for submitting any expert reports rebutting the opinions of Mr. Gluhaich until [they]
21 have received Plaintiffs’ amended disclosure, deposed Mr. Gluhaich, and provided any rebuttal
22 expert(s) with sufficient opportunity to review that material and prepare rebuttal report(s).” *Id.*
23 Plaintiffs also stated that the amended expert witness disclosure would be tendered that day. *Id.*
24 However, Plaintiffs did not provide any amended disclosure that day or at any time thereafter.
25 (Decl. of B. Irvine, Exhibit 1 to Willard Opposition; Exhibit 1 to Wooley Opposition, on file
26 herein).

27 ⁶The Wooley Tax Return attached to this email has been omitted.
28

1 **9. This Court's January 10, 2017, hearing.**

2 On January 10, 2017, this Court held a hearing on Defendants' motion for partial
3 summary judgment on Plaintiffs' overreaching consequential damages, which Messrs. Willard
4 and Wooley personally attended. (January 10, 2017, transcript, on file herein). At the hearing, in
5 pertinent part, Defendants' counsel informed this Court that Defendants had never received a
6 damages computation from the Plaintiffs pursuant to NRCP 16.1, despite Defendants' many
7 demands. *Id.* at 18. Plaintiffs' counsel attempted to claim that Plaintiffs' interrogatory responses
8 satisfied Plaintiffs' requirements. *Id.* at 42-43. But Plaintiffs' counsel **admitted**, in open court,
9 that "with respect to Willard, they do not" have an up-to-date, clear picture of Plaintiffs'
10 damages claims. *Id.*

11 Plaintiffs' counsel also represented to this Court that Wooley's damages disclosures to
12 Defendants were complete and up-to-date. *Id.* This was a misrepresentation: Wooley had never
13 provided Defendants with any NRCP 16.1 damages disclosures, and certainly had not provided
14 any updated disclosures since the court-ordered discovery response in July of 2015. (Decl. of B.
15 Irvine, Exhibit 1 to Willard Opposition; Exhibit 1 to Wooley Opposition, on file herein).
16 Further, the December 2016 damages spreadsheet was for use in **settlement negotiations** per
17 Wooley's counsel's own words, and therefore was not a disclosure in this litigation.
18 Defendants' counsel apprised this Court of this fact:

19 We have never in this case received a 16.1 disclosure with any
20 damages computation. We've had to pull damages from them
21 through interrogatories and depositions, but that shouldn't,
22 frankly, be our job. It's their affirmative obligation to do that and
to continue to do that as their damages claims change, which it
continues to do in this case.

23 I'm not going to say that we don't have some information about
24 damages, but we certainly have never received a 16.1 damages
disclosure.

25 And the Wooley damages computation that Mr. Moquin was
26 referring to, we received after the deadline for disclosing initial
27 expert witness reports. And the spreadsheet that I got with him, **he
gave me to use for settlement purposes only.**

1 I'm, obviously, not going to discuss the contents with the
2 Court because of that, but as of right now, I don't even have
authority to disclose that to my experts to do anything with.

3 So they have not done their job of getting us what their damages
4 are. And it's starting to become fairly critical with the deadlines
that are approaching in this case.

5 *Id.* at 62.

6 Upon orally granting Defendants' motion, this Court also ordered that "the Court enters
7 a case management order that directs the plaintiffs to serve, within 15 days after the entry of the
8 summary judgment, an updated 16.1 damages disclosure." *Id.* at 68.

9 **10. The February 9, 2017, stipulation and order.**

10 In spite of the rapidly impending trial date (at the time, May 2, 2017) and close of
11 discovery (at the time, March 2, 2017), Plaintiffs did not provide Defendants with any damages
12 disclosures or otherwise supplement or update their discovery responses in any way. (Decl. of
13 B. Irvine, Exhibit 1 to Willard Opposition; Exhibit 1 to Wooley Opposition, on file herein). Nor
14 did Plaintiffs ever supplement their improper disclosure of Mr. Gluhaich or properly disclose
15 any expert.

16 On February 3, 2017, Defendants wrote Plaintiffs, prefacing their letter by stating that
17 "as of the date of this letter, we have less than thirty (30) days to complete discovery, less than
18 sixty (60) days to fully-brief and submit dispositive motions to the Court for decision and less
19 than three months until the current trial date." (February 3, 2017, letter, **Exhibit 16**). Defendants
20 wrote this letter to inform Plaintiffs that because of their failure to comply with their
21 obligations, Defendants would not be able to timely complete discovery or submit dispositive
22 motions, all to Defendants' prejudice, and to inform Plaintiffs that their conduct necessitated yet
23 another continuance. *Id.*

24 In the letter, Defendants first addressed Plaintiffs' obstinate refusal to comply with
25 expert disclosure requirements. *Id.* Defendants reminded Plaintiffs that Plaintiffs "were
26 indisputably aware of the fact that Plaintiffs' disclosures did not comply with the Nevada Rules
27 of Civil Procedure at the time [they] served the deficient disclosure or immediately thereafter, as
28

1 demonstrated by [the parties'] December 5, 2016, telephonic conversation.” *Id.* However,
2 despite Defendants having granted Plaintiffs an extension, Plaintiffs had not even attempted to
3 comply with the Nevada Rules of Civil Procedure more than two months after the deadline,
4 “without any justification whatsoever.” *Id.*

5 Defendants further informed Plaintiffs that their “failure to comply with the Nevada
6 Rules of Civil Procedure in the first instance, or to rectify their failure by providing an amended
7 disclosure, is severely prejudicing Defendants.” *Id.* With the close of discovery being one
8 month away, “regardless of what Plaintiffs do at this point, this discovery deadline would need
9 to be extended to enable the Defendants to complete discovery and disclose rebuttal experts in
10 the time permitted by the rule, the parties’ joint case conference report, and the stipulation and
11 order on file with the Court.” *Id.*

12 Defendants also addressed Plaintiffs’ continued failure to provide Defendants with an
13 NRCP 16.1 disclosure. *Id.* Defendants stated that it would be “patently prejudicial to
14 Defendants to receive Plaintiffs’ damages model within mere days of the close of discovery,”
15 and it would be impossible for Defendants’ expert to opine on any new damages theories under
16 the current discovery deadlines if Plaintiffs were to seek any additional or different types of
17 damages. *Id.* Finally, Defendants requested that Plaintiffs also provide other outstanding
18 discovery, stating that Plaintiffs “have been promising to disclose these documents for more
19 than 10 months, but have yet to do so.” *Id.* Based on these issues, Defendants asked for a
20 continuance so that Plaintiffs could comply with their obligations such that Defendants could
21 receive time to prepare their defenses in the timeline entitled to them by the Nevada Rules of
22 Civil Procedure and the parties’ agreements. *Id.*

23 Plaintiffs agreed to a **third trial continuance**, and on February 9, 2017, the parties
24 signed a stipulation which contained several express stipulations that are critical to this
25 Opposition. First, Plaintiffs agreed that they never properly disclosed Gluhaich and that this
26 conduct had been prejudicial to Defendants:

1 4. On December 2, 2016, Plaintiffs disclosed Dan
2 Gluhaich as a non-retained expert. Plaintiffs' disclosure of Mr.
3 Gluhaich indicated that Mr. Gluhaich would offer testimony
4 regarding twelve separate subject matters and included Mr.
5 Gluhaich's resume, but did not include "a summary of the facts
6 and opinions to which the witness is expected to testify" as
7 required by NRCP 16.1(a)(2)(B).

8 5. Because Plaintiffs' disclosure of Mr. Gluhaich did
9 not include a summary of the facts and opinions to which the
10 witness is expected to testify as required by NRCP 16.1(a)(2)(B),
11 Defendants have been unable to conduct a meaningful deposition
12 of Mr. Gluhaich or to retain experts to rebut Mr. Gluhaich's
13 opinions, because those opinions remain unknown to Defendants.

14 6. Following receipt of Plaintiffs' supplemental
15 disclosure of Mr. Gluhaich, if any, which includes a summary of
16 the facts and opinions to which the witness is expected to testify
17 as required by NRCP 16.1(a)(2)(B), Defendants intend to depose
18 Mr. Gluhaich and retain experts to rebut his opinions.

19 10. ...[B]ecause Plaintiffs have not yet provided an
20 expert disclosure of Mr. Gluhaich that includes a summary of the
21 facts and opinions to which the witness is expected to testify as
22 required by NRCP 16.1(a)(2)(B), Defendants will be unable to
23 complete the deposition of Mr. Gluhaich or to retain and disclose
24 experts to rebut Mr. Gluhaich's opinions within the time currently
25 allowed for discovery.

26 (February 9, 2017, Stipulation and Order, on file herein).

27 Plaintiffs also stipulated that they had not properly provided their NRCP 16.1 damages
28 disclosures:

1 7. On January 10, 2017, the parties appeared in this
2 Court for a hearing on Defendants' Motion for Partial Summary
3 Judgment. At the hearing, the parties discussed with the Court
4 Plaintiffs' obligation to provide, pursuant to NRCP 16.1(a)(1)(C),
5 "[a] computation of any category of damages claimed by the
6 disclosing party, making available for inspection and copying as
7 under Rule 34 the documents or other evidentiary matter, not
8 privileged or protected from disclosure, on which such
9 computation is based, including materials bearing on the nature
10 and extent of injuries suffered." (January 10, 2017 Hearing
11 Transcript at 18, 42-43 and 61-62). Plaintiffs conceded at the
12 hearing that they have not yet provided Defendants with a
13 complete damages disclosure pursuant to NRCP 16.1(a)(1)(C),
14 and the Court ordered Plaintiffs "to serve, within 15 days after the
15 entry of the summary judgment, an updated 16.1 damage
16 disclosure." *Id.* at 68.

17 8. Upon receipt of Plaintiffs' NRCP 16.1 damages
18 disclosure, Defendants intend to have Michelle Salazar

1 supplement her initial expert report to include any opinions about
2 any new or revised damages claims or calculations submitted by
3 Plaintiffs, and Defendants may also need to conduct additional
4 fact discovery on any new or revised damages claims or
5 calculations submitted by Plaintiffs.

6 9. Discovery in this matter currently is scheduled to
7 close on March 2, 2017, and dispositive motions must be filed and
8 submitted for decision no later than March 31, 2017.

9 10. Because Plaintiffs have not yet provided a
10 complete NRCP 16.1 damages disclosure, Defendants will not be
11 able to complete necessary fact discovery on Plaintiffs' damages,
12 or to disclose an updated expert report of Michelle Salazar within
13 the time currently allowed for discovery....

14 *Id.*

15 Plaintiffs stipulated that this Court should enter an order which, in pertinent part,
16 requires "Plaintiffs to serve Defendants with an updated initial expert disclosure of Dan
17 Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26 within thirty (30) days of the
18 date of the Order approving this Stipulation." *Id.*

19 Plaintiffs also stipulated to other pertinent deadlines:

20 3. The deadline for Defendants to serve a
21 supplemental expert disclosure of Michelle Salazar providing any
22 opinions about any new or revised damages claims or calculations
23 submitted by Plaintiffs shall be extended until sixty (60) days
24 before the close of discovery....

25 5. The deadline for Defendants to serve any rebuttal
26 expert disclosures shall be extended until forty-five (45) days
27 after Plaintiffs serve Defendants with an updated initial expert
28 disclosure of Dan Gluhaich that is fully-compliant with NRCP
16.1 and NRCP 26.

29 *Id.*

30 This Court entered an Order consistent with the stipulation on February 9, 2017. *Id.*
31 However, the Plaintiffs have done **nothing** in this case since the entry of this Court's Order or
32 the stipulation of the parties. (Decl. of B. Irvine, Exhibit 1 to Willard Opposition; Exhibit 1 to
33 Wooley Opposition, on file herein).

34 The parties set a trial date of January 29, 2018, meaning that, per the Stipulation and
35 Order, discovery is set to close on November 15, 2017.

1 **11. This Court's May 30, 2017, order.**

2 On May 30, 2017, this Court entered an Order granting Defendants' motion for partial
3 summary judgment. (Order, on file herein). In pertinent part, this Court stated that "[i]t is
4 further ordered Plaintiffs shall serve, within fifteen (15) days of entry of this order, an updated
5 NRCP 16.1 damage disclosure." *Id.* Again, Plaintiffs completely ignored this order. They have
6 failed to both properly disclose Gluhaich or to provide damages computations, despite the
7 express requirements of the NRCP and this Court's Orders. Instead, the Plaintiffs chose to do
8 nothing in this case until filing their present motions for summary judgment. (Decl. of B. Irvine,
9 Exhibit 1 to Willard Opposition; Exhibit 1 to Wooley Opposition).

10 **12. Plaintiffs' motions for summary judgment.**

11 After three years of obstinate refusal to provide Defendants with NRCP 16.1 damages or
12 supplement any damages calculations, and after nearly one year of refusing to comply with the
13 requirements to properly disclose an expert, Plaintiffs filed motions for summary judgment in
14 which they request brand new, never-disclose types, categories, and amounts of damages.
15 Further, their calculations are based upon opinions of an expert who was never properly
16 disclosed, and who is primarily basing his opinions on appraisals that were also never disclosed.
17 (Willard Motion, on file herein; Wooley Motion, on file herein). These Motions were filed with
18 only four weeks remaining in discovery—putting Defendants in the exact same predicament
19 that they were placed in February of 2017. (February 3, 2017, letter, **Exhibit 16**). Perhaps most
20 egregiously, Plaintiffs' new damages and new expert opinions are all based upon information
21 that has been in Plaintiffs' possession throughout this case: in other words, there is no reason
22 that Plaintiffs could not have timely disclosed these damages.

23 With respect to Willard, a comparison amply demonstrates the difference between the
24 present damages being sought and those in the Interrogatory response from two years ago (the
25 last time Willard provided any indication of his damages):
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27
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<u>FAC/ Interrogatory Response</u> ⁷	<u>Present motion for summary judgment</u>
<u>Accelerated rent</u> : “rental income” in the amount of \$19,443,836.94, discounted by 4% per the lease to \$15,741,360.75 as of March 1, 2013.	<u>Liquidated damages (brand new) plus default interest (brand new)</u> : \$26,024,894.31
<u>Property-related damages</u> : \$20,881.50	<u>Diminution in value (brand new) plus default interest (brand new)</u> : \$27,589,685.48
<u>Total</u> : \$15,762,242.25	<u>Property-related damages plus interest (new amount)</u> : \$48,097.79
	<u>Unpaid rent and late payment charges (new)</u> : \$785,670.52.
	<u>Total</u> : \$54,448,348.10

This simple comparison demonstrates the following differences:

- Willard is seeking **more than triple** the amount of damages, nearly **\$40 million more** in damages than he sought in his complaint and ostensibly throughout this case.
- Willard has a brand new, different basis for his claimed “rent” damages: the liquidated damages provision in the lease. Unlike the damages sought in his Complaint, the liquidated damages clause has a variable—reasonable rental value—that would necessarily require Willard to introduce an expert opinion to meet his burden of proof.
- Willard has a brand new claim for diminution in value damages that would also require Willard to offer expert opinions to meet his burden of proof.
- Default interest is a brand new component of Willard’s claimed damages.
- The property-related damages now have a different purported value and amount.
- Willard’s damages are based upon the opinions of an undisclosed expert, and therefore Defendants did not have the chance to explore this expert’s opinions or rebut them as they are entitled to do.
- Willard and his purported expert rely upon appraisals from 2008 and 2014 which were never disclosed in this litigation, despite Willard’s NRCP 16.1 and NRCP 26(e) obligations. *See also* (Willard Responses to Defendants’ First Set of Requests for Production of Documents 17, **Exhibit 17** (“Please produce any and all appraisals for the Property from January 1, 2012 through present.”)).

⁷Willard also sought many millions in unforeseeable consequential damages, and this Court has granted summary judgment in Defendants’ favor on those claims. (May 30, 2017, Order, on file herein). Because these claims have since been dismissed, they are not included here.

Similarly, a comparison amply demonstrates the difference between the present damages being sought by Wooley and those in the Interrogatory response from two years ago (the last time Wooley provided his damages):

<u>Interrogatory Response</u> ⁸	<u>Present motion for summary judgment</u>
<u>Accelerated rent</u> : \$3,323,543.49	<u>Liquidated damages (brand new) plus default interest (brand new)</u> :
<u>Property-related damages</u> : \$33,920.27	\$5,091,579.88
<u>Diminution in value damages</u> : \$2,635,000	<u>Diminution in value (supported by never-disclosed expert or appraisal), plus default interest (brand new)</u> :
<u>Total: \$5,992,463.76</u>	\$4,886,076.71
	<u>Property-related damages plus interest (new amount)</u> : \$83,735.15
	<u>Total: \$10,061,391.74</u>

This simple comparison demonstrates the following differences:

- Wooley is seeking nearly **double** the amount of damages that he sought in his complaint and ostensibly throughout this case.
- Wooley is using different bases for his claimed “rent” damages. Unlike the damages sought in his Complaint, the liquidated damages clause has a variable—reasonable rental value—that would necessarily require Wooley to introduce an expert opinion to meet his burden of proof, which Defendants would be entitled to rebut.
- Wooley’s basis for these damages is also different because last Defendants heard, Wooley had claimed that he had not yet terminated the lease and that it was ongoing, yet termination is a prerequisite to seeking liquidated damages per the parties’ lease. (Wooley Deposition 59, **Exhibit 18**; Highway 50 Lease 20(B)(i), **Exhibit 19**). Thus, Wooley is proceeding on an entirely new theory.
- Default interest is a brand new component of Wooley’s claimed damages.

⁸Wooley also sought a significant amount of unforeseeable consequential damages, and this Court has granted summary judgment in Defendants’ favor on those claims. (May 30, 2017, Order, on file herein). Because these claims have since been dismissed, they are not included here.

- 1 • The property-related damages are based in part upon new damages and documents that were not disclosed to Defendants. (Decl. of B. Irvine, Exhibit 1 to Wooley Opposition).
- 2 • Wooley's damages are based upon the opinions of an undisclosed expert, and therefore
- 3 Defendants did not have the chance to explore this expert's opinions or rebut them as
- 4 they are entitled to do.
- 5 • Wooley and his purported expert rely upon an appraisal to establish "value" that was not
- 6 previously disclosed in this litigation. (Wooley Deposition 125 (wherein Wooley stated
- 7 that he had an appraisal performed when he bought the property, but had not produced
- 8 that to his lawyer), **Exhibit 18**).

9 At this point in discovery, Defendants have obviously only been able to prepare defenses
10 to the bases for damages that Plaintiffs asserted in the Complaint and Interrogatory responses,
11 not Plaintiffs' brand new bases for damages. And, Defendants now cannot engage in
12 appropriate fact discovery and retain appropriate expert opinions to prepare defenses to
13 Plaintiffs' new damages claims or new expert opinion. Defendants have been deliberately
14 ambushed by Plaintiffs, both with respect to the type and amount of his newly-requested
15 damages, which are supported by new documents and expert opinion testimony, with mere days
16 remaining in discovery. This timing of these Motions also undeniably deprives Defendants of
17 the process that the parties expressly agreed was necessary to rebut any properly-disclosed
18 expert opinions or properly-disclosed NRCP 16.1 damages calculations, as confirmed by order
19 of this Court. (February 9, 2017, Stipulation and Order, on file herein).

20 Indeed, Defendants must point out that the conduct discussed herein is part of a larger
21 pattern of Plaintiffs to ignore their discovery obligations. Defendants have been forced to file
22 two motions to compel and a motion for contempt and sanctions, simply to have Plaintiffs
23 comply with their discovery obligations. All were unopposed and granted, and for each such
24 Motion, this Court awarded Defendants their attorneys' fees. (Orders, on file herein). Further,
25 Defendants have had to undergo similar efforts with Plaintiffs throughout simply to have them
26 comply with their basic discovery obligations. (March 3, 2016, letter, **Exhibit 8** (seeking
27 requested documentation not previously provided and seeking supplemental responses); March
28 15, 2016, letter, **Exhibit 9** (same); April 1, 2016, email, **Exhibit 20** (seeking documents after

providing extensions); May 3, 2016, email exchange, **Exhibit 21** (seeking previously-requested documents); June 21, 2016, email exchange, **Exhibit 22** (seeking supplemental responses that Defendants had been requesting for several months); July 21, 2016, letter, **Exhibit 23** (seeking previously-requested responses, stating that “you have been promising to provide [Defendants] with Plaintiffs’ responses to Defendants’ discovery requests for many months (*see* attached emails), but we still have received no such responses.”)). Put simply, Defendants have been required repeatedly to go to extraordinary lengths to attempt to force Plaintiffs to comply with basic obligations and deadlines imposed by the NRCP. This Court has also issued several Orders requiring Plaintiffs to meet their discovery obligations, but Plaintiffs have flatly ignored those Orders.

Plaintiffs’ newly-requested relief and conduct throughout this case is patently improper, in bad faith, and deliberate, and Defendants respectfully submit that this entire case should be dismissed, or, at a minimum, Plaintiffs should be limited to seeking the damages they have sought throughout this case rather than their new model and amounts, and Gluhaich must not be permitted to testify as an expert.

ARGUMENT

As will be discussed in detail, Nevada law provides Courts with discretion to award sanctions for parties’ failure to comply with discovery requirements or court orders, including dismissal with prejudice. Defendants respectfully request that Plaintiffs’ conduct throughout this case, particularly with respect to their damages and expert disclosures, warrants dismissal with prejudice, or, at an absolute minimum, exclusion. When considering the sanctions to impose, Defendants request that this Court consider the following:

- Willard **never** complied with his mandatory NRCP 16.1 obligation to provide a damages computation (including supporting documentation), a fact to which he has stipulated and also admitted in open court. (May 2, 2016, Stipulation and Order, on file herein; February 9, 2017, Stipulation and Order, on file herein; January 10, 2017, Transcript, on file herein).
- Similarly, Wooley has **never** complied with his mandatory NRCP 16.1 obligations to provide a damages computation (including supporting documentation), a fact to which he has stipulated. (May 2, 2016, Stipulation and Order, on file herein; February 9, 2017, Stipulation and Order, on file herein). Yet, Wooley also misrepresented to this Court that

1 he had complied with his NRCP 16.1 obligations. (January 10, 2017, Transcript, on file
2 herein).

- 3 • Plaintiffs ignored this Court's Order directing them to serve updated NRCP 16.1
4 damages within 15 days of this Court's Order. In fact, Plaintiffs have done nothing in
5 response to this Court's Order, which was entered nearly six months ago. (May 30,
6 2017, Order, on file herein).
- 7 • Plaintiffs never properly disclosed an expert, a fact to which they have stipulated.
8 (February 9, 2017, Stipulation and Order, on file herein).
- 9 • Plaintiffs ignored this Court's Order directing them to serve compliant expert
10 disclosures, and affirming the parties' agreed-upon timeline that was to be triggered by
11 Plaintiffs submitting compliant expert and damages disclosures. (February 9, 2017,
12 Stipulation and Order, on file herein; see also May 2, 2016, Stipulation and Order, on
13 file herein). Again, Plaintiffs have never made any attempts to comply, including since
14 signing the February 9, 2017, Stipulation and Order.
- 15 • Defendants repeatedly and graciously provided Plaintiffs with extensions to comply with
16 their obligations. See (February 9, 2017, Stipulation and Order, on file herein);
17 December 2016 correspondence, *supra*.
- 18 • Plaintiffs acknowledged and agreed that, upon them finally providing compliant
19 disclosures, Defendants would obviously need time to respond to those disclosures
20 through additional fact discovery and retention of experts. *See id.*; *supra*. The parties
21 agreed to a timeline, which this Court confirmed. *Id.*
- 22 • Yet, Plaintiffs did absolutely nothing to provide Defendants with any of the court-
23 ordered, required disclosures. (Decl. of B. Irvine, Exhibit 1 to Willard Opposition;
24 Exhibit 1 to Wooley Opposition).
- 25 • Then, less than one month before the close of discovery, Plaintiffs sought summary
26 judgment on a brand-new, never-disclosed model of damages. (Wooley Motion, on file
27 herein; Willard Motion, on file herein). These damages were premised on brand-new
28 theories and bases, with new considerations (such as the fact that expert testimony
would be required to establish and rebut these), and amounted to almost double the
amount originally sought. *Id.*
- Further, this newly-requested relief was based exclusively upon information that has
been available to Plaintiffs since the inception of this case, without any justification for
the delay. *Id.*
- Additionally, this newly-requested relief was based upon the opinions of an expert who
was never properly disclosed (and whose opinions were also based solely upon
information that was available to Plaintiffs throughout this entire litigation), and
therefore Defendants never had the opportunity to rebut.
- It was also based upon appraisals that were never disclosed, notwithstanding Plaintiffs'
NRCP 16.1 and NRCP 26(e) obligations, and Defendants' direct requests for such
appraisals.
- And, Plaintiffs' new damages models were presented at a time when it is too late for
Defendants to be able to undertake the necessary additional discovery, including
depositions, and retain the appropriate experts to rebut the testimony. To that end, it also
deprived Defendants of the parties' agreed-upon timeline.

- This conduct is part of a larger pattern and practice of Plaintiffs to disregard discovery obligations. Defendants have been forced to file two motions to compel and a motion for contempt and sanctions, all of which have been granted, but Plaintiffs apparently remain undeterred. Further, Defendants have propounded numerous requests on Plaintiffs throughout this litigation to comply with his basic discovery obligations and adequately respond to Defendants' discovery requests, but to no avail. *Supra*. Indeed, Plaintiffs' disregard for discovery has already necessitated three continuances of the trial date. *Supra*.

The inexorable conclusion from this conduct is that Plaintiffs strategically violated the law and willfully ignored this Court's orders to unfairly ambush Defendants and deprive them of their ability to defend this case. Defendants respectfully submit that Plaintiffs' wanton disregard for clear Nevada law, this Court's orders, and Defendants' rights to prepare a defense necessitates dismissal of this case with prejudice.

1. Legal standard.

NRCP 16.1(a)(1)(A)(C) provides that "a party must, without awaiting a discovery request, provide to other parties...[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such a computation is based, including materials bearing on the nature and extent of injuries suffered...." "The use of the word 'must' means that the rule's requirements are mandatory." *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. ___, ___, 309 P.3d 1017, 1020 (2013) (discussing the NRCP 16.1(a)(1)(D) requirements).

Further, "the rule requires a computation supported by documents.... A plaintiff is required to provide its assessment of damages in its initial disclosure in light of the information currently available to it in sufficient detail so as to enable each defendant to understand the contours of its potential exposure and make informed decisions as to settlement and discovery." 10 Fed. Proc., L. Ed. § 26:44 (discussing FRCP 26); *see generally Vanguard Piping*, 129 Nev. at ___, 309 P.3d at 1020 ("Because of the similarity in the language, federal cases interpreting [the FRCP corollary to NRCP 16.1(A)(1)(D)] are strong persuasive authority."). Indeed, it is the plaintiff's burden to prove damages, *see generally Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543-44 (1994) ("The party seeking damages has the burden of proving the fact that he

1 was damaged and the amount thereof.”), and “the plaintiff cannot shift to the defendant the
 2 burden of attempting to determine the amount of the plaintiff’s damages.” 10 Fed. Proc., L. Ed.
 3 § 26:44.

4 Also pertinent, NRCP 16.1(a)(2)(B) requires that a non-retained expert must provide,
 5 *inter alia*, a summary of the facts and opinions to which the witness is expected to testify.
 6 References to broad categories as to what the expert will testify are insufficient. *See Jones v.*
 7 *Colorado Cas. Ins. Co.*, 2015 WL 6123125, at *3 (D. Ariz. 2015).

8 Further, NRCP 26(e) requires that:

9 A party who has made a disclosure under Rule 16.1 or 16.2 or
 10 responded to a request for discovery with a disclosure or response
 11 is under a duty to supplement or correct the disclosure or response
 to include information thereafter acquired, if ordered by the court
 or in the following circumstances:

12 (1) A party is under a duty to supplement at appropriate
 13 intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party
 14 learns that in some material respect the information disclosed is
 15 incomplete or incorrect and if the additional or corrective
 16 information has not otherwise been made known to the other
 17 parties during the discovery process or in writing. With respect to
 18 testimony of an expert from whom a report is required under Rule
 16.1(a)(2)(B) the duty extends both to information contained in
 the report and to information provided through a deposition of the
 expert, and any additions or other changes to this information
 shall be disclosed by the time the party's disclosures under Rule
 16.1(a)(3) are due.

19 (2) A party is under a duty seasonably to amend a prior
 20 response to an interrogatory, request for production or request for
 21 admission, if the party learns that the response is in some material
 22 respect incomplete or incorrect and if the additional or corrective
 23 information has not otherwise been made known to the other
 parties during the discovery process or in writing.

24 Failure to comply with NRCP 16.1’s requirements results in sanctions. Pursuant to
 25 NRCP 16.1(e)(3):

26 If an attorney fails to reasonably comply with **any** provision in
 27 [NRCP 16.1], or if an attorney or a party fails to comply with an
order entered pursuant to [NRCP 16.1(d)], the court, upon motion
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1 or upon its own initiative, **shall** impose upon a party or a party's
2 attorney, or both, appropriate sanctions in regard to the failure(s)
as are just, including the following:

3 (A) Any of the sanctions available pursuant to Rule 37(b)(2) and
4 Rule 37(f);

5 (B) An order prohibiting the use of any witness, document or
6 tangible thing which should have been disclosed, produced,
exhibited, or exchanged pursuant to Rule 16.1(a).

7 (Emphases added). In turn, NRCP 37(b)(2) provides that a court may make an order (B)
8 refusing to allow the disobedient party to support or oppose designated claims or defenses, or
9 prohibiting that party from introducing designated matters into evidence; or (C) striking out
10 pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or
11 rendering a judgment by default against the disobedient party.

12 Further, NRCP 37(c)(1) provides that “[a] party that without substantial justification
13 fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior
14 response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless,
15 permitted to use as evidence at a trial...any witness or information not so disclosed.” NRCP
16 37(c)(1) also provides that “[i]n addition to or in lieu of this sanction, the court, on motion and
17 after affording an opportunity to be heard, may impose other appropriate sanctions. In addition
18 to requiring payment of reasonable expenses, including attorney’s fees, caused by the failure,
19 these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C)
20 and may include informing the jury of the failure to make a disclosure.” *Id.* Thus, this Court
21 should dismiss the case, or, at an absolute minimum, should exclude the improperly-sought
22 damages, expert opinion, and appraisals, pursuant to NRCP 37.

23 Similarly, pursuant to NRCP 41(b), “[f]or failure of the plaintiff to comply with [the
24 Nevada Rules of Civil Procedure] or any order of court, a defendant may move for dismissal of
25 an action or of any claim against the defendant.” In addition to this rule-based authority, the
26 Nevada Supreme Court has also recognized that “the court has inherent power to enter defaults
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1 and dismiss actions for abusive litigation practices.” *Blanco v. Blanco*, 129 Nev. ___, ___, 311
2 P.3d 1170, 1174 (2013).

3 **2. Plaintiffs’ conduct demands dismissal of this case with prejudice.**

4 Defendants respectfully submit that Plaintiffs’ conduct demands dismissal with
5 prejudice. The Nevada Supreme Court has recognized that NRCP 37(b)(2)(C) provides a court
6 with authority to impose, among other things, case-concluding sanctions for noncompliance
7 with its orders, and the Nevada Supreme Court also has inherent power to dismiss actions for
8 abusive litigation practices. *Id.* “Procedural due process considerations require that such case-
9 concluding discovery sanctions be just and that they relate to the claims at issue in the violated
10 discovery order.” *Id.* Further, the Court must consider pertinent factors, including the extent of
11 the offending party’s willfulness, whether the non-offending party would be prejudiced by
12 imposition of a lesser sanction, whether dismissal is too severe for the particular discovery
13 abuse, the feasibility and fairness of less severe sanctions, the policy favoring adjudication of
14 cases on their merits, and the need for deterring similar abusive conduct. *Id.* Dismissal should
15 only occur in the most extreme of cases. *Id.*

16 Defendants respectfully submit that the factors require dismissal. Plaintiffs’ damages
17 disclosures are so central to this litigation, and to Defendants’ rights and ability to defend this
18 case, that dismissal of the entire case is necessary.

19 **a. Plaintiffs’ violations were willful.**

20 Plaintiffs’ violations were indisputably willful. In addition to the plain language of
21 NRCP 16.1, Plaintiffs have been on direct notice for three years that they have not complied
22 with NRCP 16.1(a)(1)(C), yet have not attempted to rectify their wrongdoing. *Supra* Facts
23 Section. This Court has ordered Plaintiffs to provide their damages disclosures, but Plaintiffs
24 blatantly disregarded these orders. (January 10, 2017, Transcript at 68, on file herein; May 30,
25 2017, Order, on file herein); *see also Perez v. Siragusa*, 2008 WL 2704402, at *4 (E.D.N.Y.
26 July 3, 2008) (dismissal pursuant to FRCP 37 and 41, noting that “[n]on-compliance with
27 discovery orders will be deemed willful when the court’s orders have been clear, when the party
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1 has understood them and when the party's noncompliance is not due to factors beyond the
2 party's control.""). Plaintiffs have acknowledged in two stipulations that he has not complied
3 with NRCP 16.1, yet have not even attempted to do so. *See, e.g.*, (January 10, 2017, Transcript,
4 on file herein; February 9, 2017, Stipulation, on file herein; May 2, 2016, Stipulation, on file
5 herein). Further, Wooley misrepresented to this Court that he had provided complete and up-to-
6 date disclosures to Defendants when he had not. (January 10, 2017, Transcript, on file herein).
7 If anything, Wooley had only provided a spreadsheet that was, per Wooley's own words, for use
8 in "settlement negotiations." *See* NRS 48.105(1). Defendants have informed Wooley repeatedly,
9 including in open court, that this document provided for settlement negotiations does not equate
10 to a disclosure, and Plaintiffs have never authorized Defendants to use that spreadsheet for
11 litigation purposes. *See, e.g.*, (January 10, 2017, Transcript at 62, on file herein; *see also* Decl.
12 of B. Irvine, Exhibit 1 to Wooley Opposition).

13 Plaintiffs' bad faith motives in waiting to ambush Defendants with these damages are
14 also plainly evidenced by their eleventh-hour Motions requesting brand-new, different, relief for
15 double and triple what was originally sought based upon information that has been in Plaintiffs'
16 possession for the entire pendency of this case.

17 Plaintiffs' failure to properly disclose an expert is similarly willful. Plaintiffs
18 acknowledged immediately after the initial purported "disclosure" that the disclosure did not
19 comply with Nevada law. *See* (December 5, 2016, email (three days after disclosures due)
20 (wherein Plaintiffs' counsel stated that "[Defendants] agreed to allow Plaintiffs to provide an
21 amended witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts
22 and conclusions to which Mr. Gluhaich will be testifying...."), **Exhibit 12**; (December 23,
23 2016, email, **Exhibit 14**; December 27, 2016, email, **Exhibit 15**). Plaintiffs agreed that they
24 failed to comply with NRCP 16.1(a)(2)(B) and agreed to the entry of a Court order requiring
25 them to properly disclose an expert by March 11, 2017. (February 9, 2017, Stipulation and
26 Order, on file herein). Yet, Plaintiffs did not even attempt to provide a proper disclosure of
27 Gluhaich any time in 2017. Then, on October 17 and 18, 2017, less than four weeks prior to the
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1 close of discovery, Plaintiffs filed Motions for Summary Judgment, referring to Gluhaich as
2 their “designated expert,” (Willard Motion at 19-20, on file herein; Wooley Motion at 12-13, on
3 file herein), without even acknowledging their noncompliance, much less providing justification
4 for it. Further, even a cursory review of Gluhaich’s Affidavits in support of the Motions
5 demonstrates that the purported facts and opinions that he provided could have been timely
6 disclosed in December of 2016, further demonstrating that there was no justification other than
7 willful noncompliance. (Gluhaich Affidavit re: Willard, on file herein (relying exclusively on
8 events that occurred in 2014 or earlier); Gluhaich Affidavit re: Wooley, on file herein (relying
9 exclusively on events that occurred in 2015 or earlier)). These Motions and Gluhaich’s
10 Affidavits were filed at a point in the case where it was too late for Defendants to properly
11 explore or rebut Gluhaich’s conclusions and the bases therefor, a fact that Plaintiffs
12 acknowledged in February with approximately four weeks left in discovery. (February 9, 2017,
13 Stipulation and Order, on file herein).

14 In addition, it is clear that Plaintiffs’ failure to disclose the appraisals upon which many
15 of their calculations were based was also willful. With respect to Willard, Willard relies upon an
16 appraisal from 2008 to determine the purported “original” fair market value of the property.
17 (Willard Motion at 19, on file herein). According to Willard, this appraisal was “commissioned
18 in 2008 by the Willard Plaintiffs.” *Id.* Indeed, Gluhaich avers that “in September 2008 Willard
19 commissioned an appraisal of the Virginia Property...from CB Richard Ellis..., a copy of which
20 was sent directly to me by Jason Buckholz of CBRE on October 17, 2008.” (Gluhaich Aff. re:
21 Willard ¶5, on file herein). Willard also relies upon, *inter alia*, an appraisal from 2014 to
22 establish the purported “fair rental value” of the property in 2014 for purposes of his newly-
23 sought liquidated damages relief, and the purported “post-breach” value of the property in 2014.
24 *Id.* at 19-20. Gluhaich averred that “The 2014 Appraisal was issued on February 11, 2014,” and
25 he “received [this appraisal] directly from Rob Cashell.” (Gluhaich Aff. re: Willard ¶15, on file
26 herein). Gluhaich’s purported opinions were heavily based on these appraisals. *Id.* ¶9 (“In my
27 opinion, the 2008 Appraisal presents a thorough, detailed, professional, and highly compelling
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1 analysis of the market value of the Virginia Property as leased.”); ¶16 (relying on the appraisal
2 to opine on the purported “as-is” fair market value); ¶17 (relying upon the appraisal to establish
3 the purported fair market rental value). However, these appraisals were never disclosed to
4 Defendants at any time before the present motion. (Decl. of B. Irvine, Exhibit 1 to Willard
5 Opposition). This is despite the fact that Defendants requested Willard to “produce any and all
6 appraisals for the Property from January 1, 2012, through present,” (Willard Responses to
7 Defendants’ First RFPs, **Exhibit 17**; March 3, 2016, letter, **Exhibit 8** (reminding Plaintiffs of
8 their obligations to supplement)), and that Willard had an obligation to disclose this material
9 pursuant to NRCP 16.1(a)(1)(C). Given that Willard freely admits that these appraisals were
10 commissioned prior to the commencement of the case, and were in his possession, this is clearly
11 willful omission.

12 With respect to Wooley, Wooley relies upon an appraisal that the Wooley Plaintiffs
13 commissioned in August 2006. (Wooley Motion at 2, on file herein). This appraisal is the basis
14 for Gluhaich’s opinion as to the “original” fair market value in Wooley’s diminution in value
15 claim. (Gluhaich Aff. Re: Wooley, on file herein (“In my opinion, the 2006 Appraisal presents a
16 thorough, detailed, professional, and highly compelling analysis of the market value of the
17 Highway 50 Property as leased.”)). Defendants even asked about the appraisal during Wooley’s
18 deposition. (Wooley Deposition 125, **Exhibit 18** (wherein Wooley stated that he had not given
19 this appraisal to his lawyer)). Yet, this appraisal was never disclosed to Defendants until
20 Wooley filed this Motion, which is a willful omission and is in complete derogation of
21 Wooley’s NRCP 16.1 obligations.

22 Finally, it should be noted that this is part of a larger pattern and practice by Plaintiffs:
23 as this Court is already aware, Defendants have been forced to file multiple motions to compel
24 responses to their written discovery. (Orders Granting Motions to Compel, on file herein).
25 Further, Defendants have had to continually request that Plaintiffs comply with their basic
26 discovery obligations in this case, as Plaintiffs have appeared to demonstrate doing no interest
27
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1 in doing this unprompted. *Supra*. There is no explanation for these repeated failures and
 2 omissions other than willful bad faith.

3 **b. Defendants have been prejudiced by Plaintiffs' conduct and would be**
 4 **prejudiced by the imposition of a lesser sanction.**

5 This factor should be presumed, based upon Plaintiffs' repeated and willful delay in
 6 providing necessary information to Defendants. *Cf. generally Foster v. Dingwall*, 126 Nev. 56,
 7 66, 227 P.3d 1042, 1049 (2010) (concluding that "appellants' continued discovery abuses and
 8 failure to comply with the district court's first sanction order evidences their willful and
 9 recalcitrant disregard of the judicial process, which presumably prejudiced [the non-offending
 10 party]"); *Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (cited in *Foster* as
 11 "upholding the district court's strike order where the defaulting party's 'constant failure to
 12 follow [the court's] orders was unexplained and unwarranted"); *In re Phenylpropanolamine*
 13 *(PPA) Products*, 460 F.3d 1217, 1236 (9th Cir.2006) (cited in *Foster* as "holding that, with
 14 respect to discovery abuses, '[p]rejudice from unreasonable delay is presumed' and failure to
 15 comply with court orders mandating discovery 'is sufficient prejudice'"); *Perez*, 2008 WL
 16 2704402 at *6 ("The behavior exhibited by plaintiffs has prejudiced defendants by delaying the
 17 resolution of the claims and increasing the costs of litigation. The parties have not made any
 18 progress with discovery or moved closer to trial readiness. This factor...weighs in favor of
 19 dismissing the action.").

20 In fact, this is Plaintiffs' **second** case against Defendants: as set forth in Defendants'
 21 Motion for Partial Summary Judgment, Plaintiffs already improperly attempted to prosecute this
 22 case against Defendants in California, which was ultimately dismissed for a lack of personal
 23 jurisdiction. Defendants are entitled to resolution, not to Plaintiffs languidly holding Defendants
 24 in litigation while simultaneously failing to meet their obligations under the NRCP to provide
 25 threshold information necessary to defend this case. Further, Plaintiffs' collective new requests
 26 and bases are not harmless additions: they would require Defendants to engage in additional fact
 27 discovery, retain direct and rebuttal experts, take depositions, re-open the briefing schedule, and
 28

1 again delay the trial for tasks that could, and should, have been accomplished during a
2 discovery period that has already had to be extended three times to account for Plaintiffs'
3 continued noncompliance.

4 **c. Dismissal is not too severe for these discovery abuses, and lesser sanctions**
5 **are not feasible or fair.**

6 Further, dismissal is not too severe for the particular discovery abuse: Plaintiffs'
7 damages disclosures are central to this case, and dismissal is not too severe for Plaintiffs'
8 repeated and willful noncompliance with Court orders and Nevada law. The feasibility and
9 fairness of less severe sanctions also favor dismissal. As discussed, Plaintiffs were sanctioned
10 for other discovery violations on three occasions and remain undeterred, demonstrating that less
11 severe sanctions have no effect on their recalcitrant conduct. (Orders Granting Motions to
12 Compel and Motion for Contempt and Sanctions, on file herein). Plaintiffs' conduct has also
13 already caused three continuances of the trial date, all to accommodate for Plaintiffs' continued
14 disregard for Nevada discovery procedure. (Stipulations and Orders, on file herein). As this has
15 happened three times, lesser sanctions clearly have no effect on Plaintiffs' conduct, and repeated
16 lesser sanctions would only serve to encourage Plaintiffs' deliberate misconduct. Nor would a
17 less severe sanction be fair to Defendants, who have been continually prejudiced by Plaintiffs'
18 willful disregard of their obligations despite their continued efforts to work with Plaintiffs and
19 provide extensions to Plaintiffs.

20 **d. The policy favoring adjudication on the merits does not militate against**
21 **dismissal.**

22 With respect to the policy favoring adjudication of cases on their merits, it is **Plaintiffs**
23 who frustrated this policy by refusing to provide Defendants with their damages calculations or
24 proper expert disclosure, not Defendants. **Defendants** have served multiple rounds of written
25 discovery upon Plaintiffs in an attempt to obtain information on Plaintiffs' damages;
26 **Defendants** have taken depositions; and **Defendants** have been requesting compliant
27 disclosures throughout this case so that they can address the merits. *Supra*; (Defendants' First
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Set of Interrogatories on Wooley, **Exhibit 24**; Second Set, **Exhibit 25**; Defendants' First RFPs on Wooley, **Exhibit 26**; Second Set, **Exhibit 27**; Third Set, **Exhibit 28**; Requests for Admission on Wooley, **Exhibit 29**; Defendants' First Set of Interrogatories on Willard, **Exhibit 30**; Second Set, **Exhibit 31**; Defendants' First RFPs on Willard, **Exhibit 32**; Second Set, **Exhibit 33**; Third Set, **Exhibit 34**; Requests for Admission on Willard, **Exhibit 35**). Plaintiffs should not be permitted to hide behind the policy of adjudicating cases on the merits when it is they who have frustrated this policy throughout the litigation. Defendants cannot reach the merits when they must spend the entire case asking Plaintiffs for threshold information and receiving no meaningful responses. Again, this is Plaintiffs' **second** time prosecuting this case against Defendants without undertaking the necessary conduct to reach the merits.

e. Dismissal is required to deter similar abusive conduct.

Finally, the need to deter similar abusive conduct also weighs heavily in favor of dismissal. Respectfully, this Court should be affronted by Plaintiffs' conduct in this litigation, particularly with respect to their blatant disregard of the NRCP and this Court's express orders. The discovery rules are in place for a reason, and are mandatory. Compliance with this Court's orders is also mandatory. If Plaintiffs are permitted to continue prosecuting his case without severe consequence, this type of abusive litigation practice will continue to the prejudice of defending parties and will make a mockery of the Nevada Rules of Civil Procedure and of court orders. *Cf. generally Foster*, 126 Nev. at 66, 227 P.3d at 1049 (noting that "[i]n light of appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders."); *see also Langermann v. Prop. & Cas. Ins. Co.*, 2015 WL 4714512 at *5 (D. Nev. 2015) (failing "to comply with a scheduling order is not harmless, and re-opening discovery after the expiration of the deadlines only encourages cavalier treatment of deadlines"). Plaintiffs' cavalier disregard for this Court's orders and docket, Nevada law, and Defendants' rights to prepare a defense necessitates dismissal.

1 Accordingly, based on the foregoing, Defendants respectfully request dismissal with
2 prejudice.

3 **3. Alternatively, at an absolute minimum, Plaintiffs' new relief, never-disclosed**
4 **expert, and never-disclosed documents should be excluded.**

5 If this Court is not inclined to dismiss this case with prejudice, Defendants respectfully
6 request that this Court enter an Order precluding Plaintiffs from seeking their newly-requested
7 damages, from offering any testimony from their never-properly-disclosed expert, and from
8 using the newly-disclosed appraisals. This would entail excluding the following for Willard: (1)
9 his claim for liquidated damages; (2) Willard's claim for diminution in value; (3) Willard's
10 claim for default interest; (4) Willard's new property-related damages; (5) Gluhaich's expert
11 opinion; and (6) the 2008 and 2014 appraisals. And, it would entail excluding the following for
12 Wooley: (1) Wooley's claim for liquidated damages; (2) Wooley's claim for default interest on
13 liquidated damages and diminution in value; (3) Wooley's new property-related damages; (4)
14 Gluhaich's expert opinion; and (5) the 2006 appraisal.

15 As noted, pursuant to NRCP 37(c)(1), a party is prohibited from using as evidence at
16 trial "any witness or information not so disclosed" unless the party can show there was
17 substantial justification for the failure, or unless such failure was harmless. Further, NRCP
18 16.1(e)(3)(B) provides for discretionary exclusion of evidence if an attorney "fails to reasonably
19 comply with any provision of [NRCP 16.1]." Here, exclusion is plainly warranted pursuant to
20 NRCP 37(c)(1) or NRCP 16.1(e)(3)(B). *Cf. generally Yeti by Molly, Ltd. v. Deckers Outdoor*
21 *Corp.*, 259 F.3d 1101, 1105–06 (9th Cir. 2001) (explaining that the Advisory Committee Notes
22 to FRCP 37(c)(1) describe it as a "self-executing," "automatic" sanction to "provide[] a strong
23 inducement for disclosure of material," and "Courts have upheld the use of the sanction even
24 when a litigant's entire cause of action or defense has been precluded.").

25 Further, Plaintiffs will not be able to satisfy their burden to show that their failures are
26 harmless or substantially justified. *Id.* (offending party's burden to prove exceptions). Plaintiffs
27 have provided no justification whatsoever; they have not even acknowledged their wrongdoing.

1 Further, it cannot be overemphasized that Plaintiffs could have easily complied at any time
2 during this litigation, as everything discussed and sought in Plaintiffs' Motions is based upon
3 information that has been available to Plaintiffs during this entire litigation. Clearly, this falls
4 short of a substantial justification.

5 With respect to harmlessness, courts have held that the concept of "harmless" is fairly
6 limited, *see, e.g., AVX Corp. v. Cabot Corp.*, 251 F.R.D. 70, 78 (D. Mass. 2008), and that a
7 failure is not harmless when it would disrupt the schedule of the parties and the court. *See Wong*
8 *v. Regents of Univ. of California*, 410 F.3d 1052, 1062 (9th Cir. 2005) ("If Wong had been
9 permitted to disregard the deadline for identifying expert witnesses, the rest of the schedule laid
10 out by the court months in advance, and understood by the parties, would have to have been
11 altered as well. Disruption to the schedule of the court and other parties in that manner is not
12 harmless. Courts set such schedules to permit the court and the parties to deal with cases in a
13 thorough and orderly manner, and they must be allowed to enforce them, unless there are good
14 reasons not to. The district court did not abuse its discretion here in refusing to permit Wong to
15 supplement his disclosure with the additional expert witnesses and in barring testimony by and
16 relying upon those witnesses."); *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1180
17 (9th Cir. 2008), *as amended* (Sept. 16, 2008) ("Later disclosure of damages would have most
18 likely required the court to create a new briefing schedule and perhaps re-open discovery, rather
19 than simply set a trial date. Such modifications to the court's and the parties' schedules supports
20 a finding that the failure to disclose was not harmless.").

21 Here, as the parties stipulated and this Court confirmed when faced with a similar
22 timeline in February, the timing of Defendants' newly-requested relief and purported expert
23 would necessitate the reopening of discovery, a new briefing schedule, and a fourth
24 continuance. (February 9, 2017, Stipulation and Order, on file herein). Indeed, Plaintiffs have
25 raised multiple brand new issues which Defendants would be required to address through
26 additional discovery, many of which would require expert testimony. For example, Defendants
27 were entitled to rebut (1) the fair market value of both properties as leased; (2) the fair market
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1 value of both properties as-is; and (3) the fair market rental value of both properties. Defendants
2 would also be required additional time to address new legal issues presented by the Motions,
3 such as whether the liquidated damages provision would be an unenforceable penalty (which
4 would require discovery on the amount of damages that Plaintiffs would otherwise purportedly
5 receive upon purported full performance of the lease), or the scope of applicability of default
6 interest. Defendants have been completely precluded from developing these critical defenses
7 due to Plaintiffs deliberate misconduct. This is not harmless, but rather would be patently
8 prejudicial to Defendants.

9 Accordingly, at an absolute minimum, Defendants request exclusion of Plaintiffs'
10 untimely-disclosed new requests for relief, purported expert, and appraisals. *See, e.g., Morrow*
11 *v. Las Vegas Metro. Police Dep't*, 2015 WL 4068419, at *2 (Nev. App. June 29, 2015) ("By
12 waiting until the final two days of discovery to divulge her treatment at the Surgical Arts Center
13 and the Pain Institute of Nevada, Morrow failed to comply with the provisions governing initial
14 disclosures in NRCP 16.1, provided incomplete responses to LVMPD's requests for production
15 and interrogatories, and failed to amend her disclosures and responses notwithstanding
16 continued visits to the providers during the pendency of her underlying action for a period of
17 nearly two years. We conclude that the district court did not abuse its discretion by striking
18 Morrow's fifth and sixth supplemental disclosures.").

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20 ///

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Based on the foregoing, Defendants respectfully request that this Court dismiss Plaintiffs' case with prejudice, or, in the alternative, exclude Plaintiffs' untimely-disclosed new requests for relief, purported expert, and appraisals.

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 15th day of November, 2017.

DICKINSON WRIGHT

/s/ Brian Irvine
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
Email: Jdesmond@dickinsonwright.com
Email: Brivine@dickinsonwright.com
Email: 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 **DEFENDANTS' MOTION FOR SANCTIONS** on the parties through the Second Judicial District Court's e-filing system to the following:

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 15th day of November, 2017

/s/ Mina Reel
An employee of DICKINSON WRIGHT

EXHIBIT TABLE

Exhibit	Description	Pages⁹
1	Plaintiff Initial Disclosures	7
2	November 2014 email exchange	9
3	January 2015 email exchange	5
4	February 12, 2015, Letter	2
5	Willard July 2015 Interrogatory Responses	11
6	Wooley July 2015 Interrogatory Responses	9
7	August 28, 2015, letter	11
8	March 3, 2016, letter	88
9	March 15, 2016, letter	91
10	April 20, 2016, letter	26
11	December 2, 2016, Expert Disclosure	8
12	December 5, 2016, email	6
13	December 9, 2016, email	1
14	December 23, 2016, email	3
15	December 27, 2016, email	3
16	February 3, 2017, letter	27
17	Willard Responses to Defendants' First Set of Requests for Production of Documents 17	9
18	Wooley Deposition Excerpts	5
19	Highway 50 Lease	43
20	April 1, 2016, email	2
21	May 3, 2016, email exchange	1

⁹ Exhibit Page counts are exclusive of exhibit slip sheets.

Exhibit	Description	Pages
22	June 21, 2016, email exchange	6
23	July 21, 2016, letter	16
24	Defendants' First Set of Interrogatories on Wooley	9
25	Defendants' Second Set of Interrogatories on Wooley	9
26	Defendants' First Request for Production of Documents on Wooley	7
27	Defendants' Second Request for Production of Documents on Wooley	7
28	Defendants' Third Request for Production of Documents on Wooley	5
29	Defendants' Requests for Admission on Wooley	5
30	Defendants' First Set of Interrogatories on Willard	9
31	Defendants' Second Set of Interrogatories on Willard	10
32	Defendants' First Request for Production of Documents on Willard	7
33	Defendants' Second Request for Production of Documents on Willard	7
34	Defendants' Third Request for Production of Documents on Willard	5
35	Defendants' Requests for Admission on Willard	5

EXHIBIT 1

EXHIBIT 1

1 THE O'MARA LAW FIRM, P.C.
 2 DAVID C. O'MARA, ESQ.
 3 NEVADA BAR NO. 8599
 4 311 East Liberty Street
 5 Reno, Nevada 89501
 6 Telephone: 775/323-1321
 7 Fax: 775/323-4082

8 BRIAN P. MOQUIN, ESQ.
 9 Admitted *Pro Hac Vice*
 10 CALIFORNIA BAR NO. 247583
 11 LAW OFFICES OF BRIAN P. MOQUIN
 12 3506 La Castellet Court
 13 San Jose, CA 95148
 14 Telephone: 408.300.0022
 15 Fax: 408.843.1678
 16 bmoquin@lawprism.com

17 *Attorneys for Plaintiffs*

18 *LARRY J. WILLARD, OVERLAND*
 19 *DEVELOPMENT CORPORATION,*
 20 *EDWARD C. WOOLEY, and JUDITH A. WOOLEY*

21 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
 22 **IN AND FOR THE COUNTY OF WASHOE**

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

Plaintiffs,

v.

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

Defendants.

Case No. CV14-01712

Dept. No. 6

PLAINTIFFS' INITIAL 16.1
PRODUCTION OF DOCUMENTS AND
LIST OF WITNESSES

1 COME NOW Plaintiffs, by and through undersigned counsel, and, pursuant to NRCP
2 16.1, herewith produce the following documents and list of witnesses:

3
4 **A. DOCUMENTS**

5 1. Virginia Avenue Lease Agreement dated December 2, 2005, Bates Stamp Nos.
6 LJW000001-LJW000035.

7 2. Virginia Avenue Lease Extension Option dated January 18, 2006, Bates Stamp
8 Nos. LJW000036-LJW000076.

9 3. Virginia Avenue Deed of Trust dated January 25, 2006, Bates Stamp
10 LJW000077-LJW000081.

11 4. Virginia Avenue Purchase Deed of Trust dated March 28, 2006, Bates Stamp
12 Nos. LJW000082-LJW000106.

13 5. Herbst Proposal dated February 17, 2007, Bates Stamp Nos. LJW000107-
14 LJW000121.

15 6. Virginia Avenue Amendment to Lease dated March 9, 2007, Bates Stamp Nos.
16 LJW000122-LJW000126.

17 7. Herbst Guaranty for Virginia Avenue Property dated March 9, 2007, Bates
18 Stamp Nos. LJW000127-LJW000130.

19 8. Letter from Sam Chuck to Yalamanchili dated March 19, 2007, Bates Stamp
20 Nos. LJW000131-LJW000179.

21 9. Deed of Trust dated June 29, 2007, Bates Stamp Nos. LJW000180-LJW000211.

22 10. Complaint in *Willard v. Morabito*, Bates Stamp Nos. LJW000212-LJW000225.

23 11. Deed of Trust dated March 28, 2008, Bates Stamp Nos. LJW000226-
24 LJW000250.

25 12. BHI Financials for FY2012, Bates Stamp Nos. LJW000251-LJW000253.

26 13. Business Partners March 2013 Statement, Bates Stamp No. LJW000254.

27 14. Letter from Gordon to Goldblatt dated March 18, 2013, Bates Stamp Nos.
28 LJW000255-LJW000256.

- 1 15. Letter from Gordon to Goldblatt dated March 28, 2013, Bates Stamp Nos.
2 LJW000257-LJW000258.
- 3 16. Letter from Gordon to Goldblatt dated April 12, 2013, Bates Stamp Nos.
4 LJW000259-LJW000260.
- 5 17. Interim Operating and Management Agreement, Bates Stamp Nos. LJW000261-
6 LJW000264.
- 7 18. Willard Notice of Chapter 11 Bankruptcy, Bates Stamp Nos. LJW000265-
8 LJW000267.
- 9 19. Declaration of REO Manager, Business Partners, Bates Stamp Nos.
10 LJW000268-LJW000278.
- 11 20. Motion by NCUAB, Bates Stamp Nos. LJW000279-LJW000284.
- 12 21. Declaration of Larry J. Willard to Dismiss Bankruptcy, Bates Stamp Nos.
13 LJW000285-LJW000288.
- 14 22. Letter from Desmond to Goldblatt, Bates Stamp Nos. LJW000289-LJW000293.
- 15 23. Notice of Intent to Foreclose, Bates Stamp Nos. LJW000294-LJW000296.
- 16 24. Real Estate Report for 7693 S. Virginia Avenue, Bates Stamp Nos. LJW000297-
17 LJW000331.
- 18 25. Purchase and Sale Agreement, Bates Stamp Nos. LJW000332-LJW000337.
- 19 26. Closing Statement, Bates Stamp No. LJW000338.
- 20 27. Nevada Energy Invoices Facimile, Bates Stamp Nos. LJW000339-LJW000352.
- 21 28. Nevada Energy Screenshots of Usage for BHI, Bates Stamp Nos. LJW000353-
22 LJW000355.
- 23 29. Letter from Desmond to Moquin dated July 16, 2004, Bates Stamp Nos.
24 LJW000356-LJW000389.
- 25 30. Baring Blvd. Purchase Agreement, Bates Stamp Nos. ECW000001-
26 ECW000022.
- 27 31. Baring Blvd. Lease Agreement, Bates Stamp Nos. ECW000023-ECW000057.
- 28 32. Baring Blvd. Note, Bates Stamp Nos. ECW000058-ECW000092.

- 1 32. Baring Blvd. Amendment to Lease, Bates Stamp Nos. ECW000093-
2 ECW000099.
- 3 33. Herbst Guaranty for Baring Blvd. Property, Bates Stamp Nos. ECW000100-
4 ECW000103.
- 5 34. Assignment of Baring Blvd. Lease to Jackson Foods, Bates Stamp Nos.
6 ECW000104-ECW110.
- 7 35. Letter from Jackson Foods dated April 2, 2013, Bates Stamp Nos. ECW000111-
8 ECW000112.
- 9 36. Letter from Jackson Foods dated May 20, 2013, Bates Stamp No. ECW000113.
- 10 37. Settlement Statement on Baring Blvd. Property, Bates Stamp Nos. ECW000114-
11 ECW000115.
- 12 38. Highway 50 Purchase Agreement, Bates Stamp Nos. ECW002001-ECW002013.
- 13 39. Highway 50 Lease Agreement, Bates Stamp Nos. ECW002014-ECW002056.
- 14 40. Highway 50 Amendment to Lease, Bates Stamp Nos. ECW002057-
15 ECW002063.
- 16 41. Herbst Guaranty for Highway 50 Property, Bates Stamp Nos. ECW002064-
17 ECW002067.
- 18 42. Highway 50 Memorandum of Lease, Bates Stamp Nos. ECW002068-
19 ECW002070.
- 20 43. Letter from Sam Chuck dated February 29, 2008, Bates Stamp nos.
21 ECW002071-ECW002075.
- 22 44. Highway 50 Second Amendment to Lease, Bates Stamp Nos. ECW002076-
23 ECW002077.
- 24 45. BHI Sublease to Little Caesars, Bates Stamp Nos. ECW002078-ECW002096.
- 25 46. Letter from McDade to Gluhaich dated October 17, 2012, Bates Stamp Nos.
26 ECW002097-ECW002101.
- 27 47. Letter from Desmond to Goldblatt dated June 3, 2013, Bates Stamp No.
28 ECW002102.

1 48. Letter from Desmond to Zlotoff, Bates Stamp Nos. ECW2103-ECW002104.

2 49. E-mail from Baron to Wooley dated January 21, 2014, Bates Stamp No.
3 ECW002105.

4 50. E-mail from Baron to Wooley dated April 17, 2014, Bates Stamp Nos.
5 ECW002106-ECW002107.

6 **B. LIST OF WITNESSES**

7
8 1. Plaintiff Larry J. Willard, c/o David C. O'Mara, Esq., The O'Mara Law Firm,
9 311 E. Liberty Street, Reno, NV 89501; tel. 775.323.1321.

10 2. Plaintiff Edward C. Wooley, c/o David C. O'Mara, Esq., The O'Mara Law
11 Firm, 311 E. Liberty Street, Reno, NV 89501; tel. 775.323.1321.

12 3. Plaintiff Judith A. Wooley, c/o David C. O'Mara, Esq., The O'Mara Law Firm,
13 311 E. Liberty Street, Reno, NV 89501; tel. 775.323.1321.

14 4. Defendant Jerry Herbst, c/o John P. Desmond, Esq., Gordon Silver, 100 W.
15 Liberty Street, Suite 940, Reno, NV 89501; tel. 775.343.7505.

16 5. Timothy P. Herbst, Berry-Hinckley Industries, 425 Maestro Drive, Suite 200,
17 Reno, NV 89511; tel. 775.689.1222.

18 6. Troy D. Herbst, Berry-Hinckley Industries, 425 Maestro Drive, Suite 200, Reno,
19 NV 89511; tel. 775.689.1222.

20 7. Daniel Gluhaich, 175 E. Main Ave., Suite 130, Morgan Hill, CA 95037; tel.
21 408.201.0120

22 8. Paul A. Morabito, 8581 Santa Monica Blvd., Suite 708, West Hollywood, CA
23 90069; telephone number unknown.

24 9. Terrilyn Baron, MUFJ Union Bank, N.A., 30343 Canwood Street, Suite 100,
25 Agoura Hills, CA 91301; tel. 818.865.3236.

26 10. Stephen J. Morse, Retail Petroleum Consultants, Inc., 4565 Costa De Oro,
27 Oxnard, CA 93035; tel. 805.815.4350.

28 11. Mike Burns, Business Partners, LLC, 20131 Prairie Street, 2nd Floor,

1 Chatsworth, CA 91311; tel. 818.836.6323.

2 12. John D. Jackson, Jackson Food Stores, Inc., 3450 E. Commercial Court,
3 Meridian, ID 83642; tel. 208.888.6061.

4 13. Gerald Gordon, Esq., Gordon Silver, 3960 Howard Hughes Parkway, Ninth
5 Floor, Las Vegas, NV 89169; tel. 702.796.5555.

6 14. Stanley A. Zlotoff, Esq., Bluer & Zlotoff Law Offices, 300 S. 1st Street # 215,
7 San Jose, CA 95113; tel. 408.287.5087.

8 15. L. Steven Goldblatt, Esq., 22 Martin Street, Gilroy, CA 95020; tel.
9 408.848.4396.

10 16. Samuel A. Chuck, Esq., Rossi, Hammerslough, Reischl & Chuck, 1960 The
11 Alameda, Suite 200, San Jose, CA 95126; tel. 408.261.4252.

12 17. Sujata Yalamanchili, Esq., Hodgson Russ LLP, One M&T Plaza, Suite 2000,
13 Buffalo, NY 14203; tel. 716.848.1657.

14 Plaintiff hereby reserves the right to supplement this 16.1 production and list of
15 witnesses as additional information becomes available through discovery.

16 **AFFIRMATION**

17 (Pursuant to NRS 239B.030)

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

20 THE O'MARA LAW FIRM, P.C.

21 DATED: December 12, 2014

22 
23 DAVID C. O'MARA, ESQ.

I hereby certify that I am an employee of The O'Mara Law Firm, P.C., 311 E. Liberty Street, Reno, Nevada 89501, and on this date I served a true and correct copy of the foregoing document on all parties to this action by personal delivery to the addressed as follows:

John Desmond, Esq.
100 W. Liberty St., Ste. 940
Reno, NV 89501
Telephone: 775.343.7500
Fax: 775.786.0131
DATED: December 12, 2014

Paul C. Mara

EXHIBIT 2

EXHIBIT 2

Mina Reel

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

Dear Brian and David-

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

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

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

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

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

Sincerely,

Brian Irvine

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

Brian,

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

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

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

David

David C. O'Mara, Esq.
The O'Mara Law Firm, P.C.
311 East Liberty Street
Reno, Nevada 89501
Telephone: (775) 323-1321
Facsimile: (775) 323-4082
david@omara1aw.net
www.omara1aw.net

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

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

ASSIGNMENT AND ASSUMPTION OF LEASE

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

RECITALS:

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

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

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

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

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

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BHI-WW000312

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

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

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

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

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

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

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

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

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

[Signatures Appear on Following Page]

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BHI-WW000313

ASSIGNOR:

BERRY-HINCKLEY INDUSTRIES,
a Nevada corporationBy: Jerry HerbstName: Jerry HerbstTitle: President

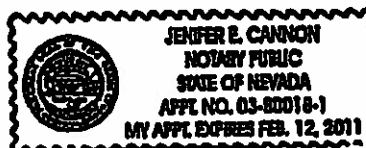
STATE OF NEVADA)

County of Clark) ss.

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

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

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



BHI-WW000314

ASSIGNEE:

JACKSONS FOOD STORES, INC.,
a Nevada corporationBy: 
John D. Jackson, CEO

STATE OF IDAHO)


) ss.

County of Ada)

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

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




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

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BHI-WW000315

STATE OF _____)
) ss.
County of _____)

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

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

Notary Public for the State of _____
Residing at _____
My commission expires _____

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BHI-WW000317

Exhibit A**LEGAL DESCRIPTION**
1365 Baring Blvd., Sparks, NV

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

PARCEL 1:

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

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

PARCEL 2:

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

APN: 030-041-08

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

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BHI-WW000318

EXHIBIT 3

EXHIBIT 3

Mina Reel

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

Dear Brian and David-

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

Thank you,

Brian Irvine

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

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

Brian

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

Dear Brian and David-

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

Please let me know where we are.

Thanks,

Brian Irvine

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

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

Brian-

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

Thanks,

Brian Irvine

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

Mr. Irvine--

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

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

Best,
 Brian

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

skype: brianmoquin
 408.300.0022
 408.460.7787 cell
 408.843.1678 fax

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

Dear Brian and David-

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

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

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

Thank you,

Brian Irvine

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

Dear Brian and David-

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

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

Sincerely,

Brian Irvine

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

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

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

David

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

4

BHI-WW000322

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

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Gordon Silver Standard Disclaimer

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

Tax Opinion Disclaimer

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

EXHIBIT 4

EXHIBIT 4

GORDON SILVER

February 12, 2015

VIA E-MAIL:

David C. O'Mara
311 East Liberty Street
Reno, Nevada 89501
david@omaralaw.net

Brian P. Moquin
3506 La Castellet Court
San Jose, CA 95148
bmoquin@lawprism.com

Re: *Larry J. Willard, et al. v. Berry Hinckley Industries, et al.*, Case No. CV14-01712

Dear David and Brian:

This letter will address deficiencies in Plaintiffs' initial disclosures pursuant to NRCP 16.1. Specifically, Plaintiffs' initial disclosures dated December 12, 2014 do not include the damages computations required under the Rule, or the documents upon which such computations are based.

NRCP 16.1(a)(1)(C) requires a party to provide "a computation of any category of damages claimed by disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered" Courts interpreting the federal counterpart to NRCP 16.1(a)(1)(C) have explained that "the 'category of damages' disclosure requires more than a list of the broad types of damages." *Olaya v. Wal-Mart Stores, Inc.*, 2:11-CV-997-KJD-CWH, 2012 WL 3262875 (D. Nev. Aug. 7, 2012) ; *see also Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) (recognizing that "federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when [the Nevada Supreme Court] examines its rules"). Indeed, the rule, "by its very terms," requires "a 'computation,' supported by documents." *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006).

Here, it is clear that the Willard Plaintiffs have been able to compute numerous categories of damages, including damages for fines from the City of Reno, deprivation of rental income, lost earnest money, closing costs and tax consequences from the sale of the Willard Property in March 2014, and other various expenses. *See, e.g.*, Verified First Amended Complaint at ¶¶13-18.

Gordon Silver

Attorneys and Counselors at Law

February 12, 2015

Page 2

The Wooley Plaintiffs have likewise been able to compute numerous categories of damages, including deprivation of rental income, diminution of value of the Highway 50 Property, and property taxes, insurance and other expenses for the Highway 50 property, a “loss” incurred as a result of the sale of the Sparks Property, and tax consequences resulting from the sale of the Sparks Property. *Id.* at ¶¶33-41. However, neither the Willard Plaintiffs nor the Wooley Plaintiffs have produced “under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered.” NRCP 16.1(a)(1)(C).

NRCP 37(c)(1) provides that “[a] party that without substantial justification fails to disclose information required by Rule 16.1 . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed,” and “[t]he burden is upon the disclosing party to show that the failure to disclose information or witnesses was justified or harmless.” *Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 594 (D. Nev. 2011). Please provide a supplemental disclosure with a mathematical computation of damages in each category, and produce the documents or other material upon which such computations are based. Should Plaintiffs fail to comply with the express terms of NRCP 16.1(a)(1)(C) in their computation of damages, including providing the supporting documents or other information upon which the computation is based, please be advised that Defendants will avail themselves of all available legal remedies, including filing motions seeking to exclude evidence of such categories of damages.

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

Very truly yours,

GORDON SILVER



BRIAN R. IRVINE

BRI/sjg