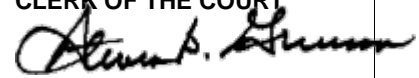


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Apr 29 2021 02:03 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

# **EXHIBIT 1**



**COMP**

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CASE NO: A-19-794864-C  
Department 1

*Attorneys for Plaintiffs*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

Case No:  
Dept. No.:

**ARBITRATION EXEMPTION:  
Declaratory Relief Requested**

**COMPLAINT**

COME NOW Plaintiffs 4520 Arville and McKinley Manor (collectively, the "Plaintiffs"),  
by and through their attorneys of record, the law firm of Holley Driggs Walch Fine Puze  
Stein & Thompson, and for their Complaint allege as follows:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction over this matter because the acts and omissions of the  
Defendants occurred in Clark County, Nevada.

2. Venue is proper in Clark County because a substantial part of the events or  
omissions giving rise to the claim occurred in Clark County, Nevada.

///

///

**PARTIES**

3. Plaintiff 4520 Arville is, and at all times relevant herein was, a general partnership existing under the laws of the State of California.

4. Plaintiff McKinley Manor is, and at all relevant times herein was, a general partnership existing under the laws of the State of Idaho.

5. On information and belief, Defendant Bour Enterprises, LLC (“Lessee”) is a Nevada limited liability company doing business in Clark County, Nevada.

6. On information and belief, Mulugeta Bour and Hilena Mengesha, (the “Guarantors” and collectively with Lessee, “Defendants”) are individuals residing in Clark County, Nevada.

7. Plaintiffs are unaware of the true names and capacities of the Defendants named herein by the fictitious names of DOES 1 through 100 and therefore sues each of said Defendants by fictitious names. Plaintiffs will amend this Complaint to allege the true names and capacities of such Defendants when they are ascertained. Plaintiffs are informed and believe, and on that basis allege, that each Defendant sued herein as a Doe is in some manner responsible for the damages suffered by Plaintiffs.

**GENERAL ALLEGATIONS**

8. On or about April 20, 2017, Lessee entered into agreements (the “Leases”) with Plaintiffs for the lease of certain commercial property commonly known as 4560 S. Arville St., C-10, 23, 24 and 29, Las Vegas, NV 89103 (the “Premises”).

9. At or about the same time, the Guarantors executed personal guaranties of the Leases (the “Guaranties”).

10. On one or more occasions, Defendants have failed or refused to make certain payments to Plaintiffs as and when due under the terms of the Leases and the Guaranties.

11. Defendants’ obligations under the Leases and Guaranties remain in full force and effect.

12. Defendants’ failure to make payments under the Leases and Guaranties is unexcused and amounts to a complete breach thereof.

///

13. Plaintiffs have placed all necessary demands upon Defendants for performance of their obligations under the Leases and Guaranties, but Defendants have failed or refused to cure their defaults.

**FIRST CLAIM FOR RELIEF**

**(Breach of Leases against Lessee)**

14. Plaintiffs repeat and reallege the preceding allegations and by this reference incorporate the same as though fully set forth herein.

15. The Leases constitute valid, binding and enforceable contracts between Plaintiffs and Lessee.

16. Through its actions described above, Lessee has materially breached its obligations under the Leases.

17. Plaintiffs have duly performed all conditions, covenants, obligations and promises on its part to be performed, except to the extent excused or waived by Lessee's breaches as described herein.

18. Plaintiffs have also placed demand upon Lessee for performance, but Lessee failed or refused to perform, and continues to fail or refuse to perform, its obligations under the Leases.

19. As a direct and proximate result of Lessee's breaches of the Leases, Plaintiffs have been damaged in a substantial sum, in excess of \$15,000.

20. Plaintiffs have, by reason of the foregoing, been required to utilize the services of an attorney and are entitled to recover their attorneys' fees and costs from Lessees.

**SECOND CLAIM FOR RELIEF**

**(Breach of Guaranties against the Guarantors)**

21. Plaintiffs repeat and reallege the preceding allegations and by this reference incorporate the same as though fully set forth herein.

22. The Guaranties constitute valid, binding and enforceable contracts between Plaintiffs and the Guarantors.

23. Through their actions described above, the Guarantors are in complete default of their obligations under the Guaranties.



24. Plaintiffs have duly performed all conditions, covenants, obligations and promises on its part to be performed, except to the extent excused or waived by the Guarantors' breaches as described herein.

25. Plaintiffs have also placed demand upon the Guarantors for performance, but the Guarantors failed or refused to perform, and continue to fail or refuse to perform, their obligations under the Guaranties.

26. As a direct and proximate result of the Guarantors' breaches of the Guaranties, Plaintiffs have been damaged in a substantial sum.

27. Plaintiffs have, by reason of the foregoing, been required to utilize the services of an attorney and are entitled to recover their attorneys' fees and costs from the Guarantors.

### **THIRD CLAIM FOR RELIEF**

#### **(Breach of Implied Covenant of Good Faith and Fair Dealing against Defendants)**

28. Plaintiffs repeat and reallege the preceding allegations and by this reference incorporate the same as though fully set forth herein.

29. In every contract, including the Leases and the Guaranties, each party thereto makes an implied covenant of good faith and fair dealing to the other.

30. Through their actions complained of herein, Defendants have wrongfully breached and continue to breach said covenant of good faith and fair dealing.

31. As a direct and proximate result of Defendants' breaches of the implied covenant of good faith and fair dealing, Plaintiffs have been damaged in a substantial sum, in excess of \$15,000.

32. Plaintiffs have, by reason of the foregoing, been required to obtain the services of an attorney and are entitled to recover their reasonable attorneys' fees and costs from Defendants.

### **FOURTH CLAIM FOR RELIEF**

#### **(Unjust Enrichment against Defendants)**

33. Plaintiffs repeat and reallege the preceding allegations and by this reference incorporate the same as though fully set forth herein.

34. Plaintiffs have conferred a benefit upon Defendants by performing under the Leases, including without limitation, by allowing Defendants to use and possess the Premises.

35. Defendants accepted said benefits by accepting and utilizing the Premises, but have failed and refused to make payments to Plaintiffs for the value thereof.

36. Defendants have appreciated and benefited from the Premises in a substantial amount, in excess of \$15,000, to the detriment of Plaintiffs.

37. Plaintiffs have, by reason of the foregoing, been required to obtain the services of an attorney and are entitled to recover their reasonable attorneys' fees and costs from Defendants.

### **FIFTH CLAIM FOR RELIEF**

#### **(Declaratory Relief against Defendants)**

38. Plaintiffs repeat and reallege the preceding allegations and by this reference incorporate the same as though fully set forth herein.

39. There exists between Plaintiffs and Defendants a justiciable controversy in which Plaintiffs have a legal interest which is ripe for judicial determination.

40. Plaintiffs seek to enforce Defendants' obligations under the Leases and Guaranties.

41. Therefore, Plaintiffs seek a declaration from the Court that: (1) the Leases are valid and enforceable; (2) Lessee's obligations under the Leases continue; (3) the Guaranties are valid and enforceable; and (4) The Guarantors' obligations under the Guaranties continue.

42. Plaintiffs have, by reason of the foregoing, been required to obtain the services of an attorney and are entitled to recover their reasonable attorneys' fees and costs from Defendants.

WHEREFORE, Plaintiffs pray for the following:

1. For all damages allowed by law as to each of Plaintiffs' Claims for Relief;

2. For a declaration by the Court that: (1) the Leases are valid and enforceable; (2) Lessee's obligations under the Leases continue; (3) the Guaranties are valid and enforceable; and (4) The Guarantors' obligations under the Guaranties continue;

3. For pre-judgment and post-judgment interest, at the highest rate permitted pursuant to the Leases, the Guaranties and/or applicable law;

///

1           4.     For all costs and expenses, including reasonable attorneys' fees, incurred by  
2 Plaintiffs in connection with the commencement and prosecution of this action; and

3           5.     For such other and further relief as the Court deems just and proper.

4           Dated this 15th day of May, 2019.

5                           **HOLLEY, DRIGGS, WALCH,**  
6                           **FINE, PUZEY, STEIN & THOMPSON**

7   /s/ F. Thomas Edwards

8   F. THOMAS EDWARDS, ESQ.

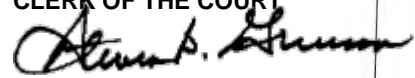
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11    400 South Fourth Street, Third Floor  
12    Las Vegas, Nevada 89101

13    *Attorneys for Plaintiffs*

# **EXHIBIT 2**



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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants

Case No.: A-19-794864-C  
Dept. No.: 8

**DEFENDANTS' ANSWER AND  
COUNTERCLAIM**

**[Exempt from Arbitration]**

**[Declaratory Relief Requested]**

1 v.

2 4520 ARVILLE, a California general partnership;  
3 MCKINLEY MANOR, an Idaho general  
4 partnership, DOES I-X; and ROE  
5 CORPORATIONS I-X;

6 Counter Defendants,

7 Defendants, BOUR ENTERPRISES, LLC, a Nevada limited liability company,  
8 MULUGETA BOUR, an individual, and HILENA MENGESHA, an individual, by and through  
9 their attorney of record, Rusty Graf, Esq. of Black & LoBello, hereby file their Answer and  
10 Counterclaim to Plaintiffs' Complaint as follows:

11 **JURISDICTION & VENUE**

12 1. Answering Paragraphs 1 and 2 of Plaintiffs' Complaint, Defendants are without  
13 knowledge as to the allegations contained in this paragraph and therefore denies same.

14 **PARTIES**

15 2. Answering Paragraphs 3, 4, and 7 of Plaintiffs' Complaint, Defendants are without  
16 knowledge as to the allegations contained in this paragraph and therefore deny same.

17 3. Defendants admit the allegations contained in Paragraph 5 of Plaintiffs' Complaint.

18 4. Answering Paragraph 6 of Plaintiffs' Complaint, Defendants deny that they are  
19 "Guarantors" as stated therein, and the Defendants admit the remainder of the allegations of  
20 Paragraph 6.

21 **GENERAL ALLEGATIONS**

22  
23 5. Defendants admit the allegations contained in Paragraphs 8 and 9 of Plaintiffs'  
24 Complaint.

25 6. Answering Paragraphs 10, 11, 12, and 13 of Plaintiffs' Complaint, Defendants deny  
26 each and every allegation contained therein.

27 **FIRST CLAIM FOR RELIEF**  
28 **(Breach of Leases Against Lessee)**



1           7.       Answering Paragraph 14 of Plaintiffs' Complaint, Defendants repeat and reallege  
2 the allegations previously set forth in this Answer and incorporate the same by reference as thought  
3 set forth herein, and otherwise deny this allegation.

4           8.       Answering Paragraphs 15, 16 and 17 of Plaintiffs' Complaint, Defendant denies  
5 each and every allegation contained therein.

6           9.       Answering Paragraph 18 of Plaintiffs' Complaint, Defendant admits that it received  
7 a letter dated April 24, 2018, but Defendant denies every allegation in the balance of the paragraph.

8           10.      Answering Paragraphs 19 and 20 of Plaintiffs' Complaint, Defendants are without  
9 knowledge as to the allegations contained in this paragraph and therefore deny same.

10                           **SECOND CLAIM FOR RELIEF**  
11                           **(Breach of Guaranties against the Guarantors)**

12           11.      Answering Paragraph 21 of Plaintiffs' Complaint, Defendants repeat and reallege  
13 the allegations previously set forth in this Answer and incorporate the same by reference as thought  
14 set forth herein, and otherwise deny the allegations.

15           12.      Answering Paragraphs 22, 23, and 24 of Plaintiffs' Complaint, Defendant denies  
16 each and every allegation contained therein.

17           13.      Answering Paragraph 25 of Plaintiffs' Complaint, Defendant admits that it received  
18 a letter dated April 24, 2018, but Defendants deny every allegation in the balance of the paragraph.

19           14.      Answering Paragraphs 26 and 27 of Plaintiffs' Complaint, Defendants are without  
20 knowledge as to the allegations contained in this paragraph and therefore deny same.

21                           **THIRD CLAIM FOR RELIEF**  
22                           **(Breach of Implied Covenant of Good Faith and Fair Dealing against Defendants)**

23           15.      Answering Paragraph 28 of Plaintiffs' Complaint, Defendants repeat and reallege  
24 the allegations previously set forth in this Answer and incorporate the same by reference as thought  
25 set forth herein, and otherwise deny the allegations.

26           16.      Answering Paragraph 29 of Plaintiffs' Complaint, Defendant is without knowledge  
27 as to the allegations contained in this paragraph and therefore deny same.  
28

17. Answering Paragraph 30 of Plaintiffs' Complaint, Defendant denies each and every allegation contained therein.

18. Answering Paragraphs 31 and 32 of Plaintiffs' Complaint, Defendants are without knowledge as to the allegations contained in this paragraph and therefore deny same.

**FOURTH CLAIM FOR RELIEF**

**(Unjust Enrichment against Defendants)**

19. Answering Paragraph 33 of Plaintiffs' Complaint, Defendants repeat and reallege the allegations previously set forth in this Answer and incorporate the same by reference as thought set forth herein, and otherwise deny the allegations.

20. Answering Paragraphs 34, 35, 36 and 37 of Plaintiffs' Complaint, Defendants are without knowledge as to the allegations contained in this paragraph and therefore deny same.

**FIFTH CLAIM FOR RELIEF**

**(Declaratory Relief against Defendants)**

21. Answering Paragraph 38 of Plaintiffs' Complaint, Defendants repeat and reallege the allegations previously set forth in this Answer and incorporate the same by reference as thought set forth herein, and otherwise deny the allegations

22. Answering Paragraphs 39, 40, 41, and 42 of Plaintiffs' Complaint, Defendants are without knowledge as to the allegations contained in this paragraph and therefore deny same.

**AFFIRMATIVE DEFENSES**

**First Affirmative Defense**

Plaintiff fails to state any cause of action upon which relief can be granted.

**Second Affirmative Defense**

The Plaintiff has acted in such a manner that the elements of constructive eviction are fulfilled and therefore Plaintiff is barred from any recovery.

**Third Affirmative Defense**

Plaintiffs' unclean hands bar Plaintiffs' recovery on any claim for relief or cause of action asserted in the Complaint.

**Fourth Affirmative Defense**



1 The damage sustained by Plaintiffs, if any, was caused by the acts of the Plaintiffs and are  
2 the proximate result of Plaintiffs' own conduct and not attributable to the Defendants.

3 **Fifth Affirmative Defense**

4 Plaintiffs, and each of them, breached any agreement between the parties.

5 **Sixth Affirmative Defense**

6 Plaintiffs failed to mitigate damages.

7 **Seventh Affirmative Defense**

8 To the extent that any contract between these parties is supported by adequate  
9 consideration, Plaintiffs failed to fulfill and perform their obligations and duties to Defendant  
10 under that contract and are therefore barred from enforcing the same against the Defendant.

11 **Eighth Affirmative Defense**

12 Plaintiffs, by and through their respective officers, employees and agents, used deception,  
13 lies and deceit in order to induce Defendant to enter into the Lease, including representing that  
14 parking arrangements would be made for Defendant's business.

15 **Ninth Affirmative Defense**

16 Plaintiffs intentionally acted in bad faith with regard to any agreement between the parties.

17 **Tenth Affirmative Defense**

18 Plaintiffs' claims are barred by the equitable doctrines of Waiver, Release, Laches,  
19 Unclean Hands, and Equitable Estoppel.

20 **Eleventh Affirmative Defense**

21 Defendant denies each and every allegation contained in Plaintiffs' Complaint not  
22 specifically admitted or otherwise pled to herein.

23 **Twelfth Affirmative Defense**

24 Plaintiffs damages were caused, in whole or in part, by Plaintiff's own negligence, breach  
25 of contract, or breach of the implied covenant of good faith and fair dealing, and as a result,  
26 Defendants should be excused from any liability, or in the alternative, are entitled to an offset.

27 **Thirteenth Affirmative Defense**

28 Defendants reserves the right to amend its affirmative defenses as more evidence and facts

1 are revealed.

2 **Fourteenth Affirmative Defense**

3 Defendants MULUGETA BOUR and HILENA MENGESHA are entitled to immunity  
4 under the corporate veil doctrine.

5 **Fifteenth Affirmative Defense**

6 Defendant hereby incorporates by reference those affirmative defenses enumerated in  
7 N.R.C.P. 8 as if fully set forth herein. In the event further investigation or discovery reveals the  
8 applicability of any such defenses, Defendant reserves the right to seek leave of Court to amend  
9 its answer to the Complaint to specifically to assert the same. Such defenses are incorporated by  
10 reference for the specific purpose of not waiving same.

11 **Sixteenth Affirmative Defense**

12 Defendants hereby assert that the claims being alleged in this Complaint are barred by  
13 application of the affirmative defenses as stated more fully in NRCP 8, and hereby incorporate  
14 by reference all of those affirmative defenses stated therein.

15 **Seventeenth Affirmative Defense**

16 Defendants allege that at all times they acted reasonably and in good faith with regard to  
17 the acts and transactions that are the subject of the First Amended Complaint.

18 **Eighteenth Affirmative Defense**

19 The complained of acts of these answering Defendants were justified under the  
20 circumstances.

21 **Nineteenth Affirmative Defense**

22 Plaintiffs ratified, consented to, acquiesced and confirmed in all respects the acts of the  
23 Defendants.

24 **Twentieth Affirmative Defense**

25 Defendant hereby asserts the doctrines of Novation, accord and satisfaction and  
26 recoupment; and hereby assert that the Plaintiff is barred from recovery or the any amount of  
27 damages is hereby reduced accordingly as a result of these defenses.

28 **Twenty-First Affirmative Defense**

1 It has been necessary for Defendant to retain the services of an attorney to defend this  
2 action, and a reasonable sum should be allowed as and for attorney's fees, together with the costs  
3 expended in this action.

4 **WHEREFORE**, Defendant prays for judgment as follows:

5 1 That Plaintiffs take nothing by virtue of their Complaint on file herein and that the same  
6 be dismissed with prejudice;

7 2 For the costs of suit herein;

8 3 For an award of reasonable attorney's fees incurred in this action; and

9 4 For such other relief as this court deems just and necessary.

10 **COUNTERCLAIM**

11 Defendants/Counterclaimants, BOUR ENTERPRISES, LLC, a Nevada limited liability  
12 company, MULUGETA BOUR, an individual, and HILENA MENGESHA, and individual, by and  
13 through their counsel of record, Rusty Graf, Esq. of the law firm of Black & LoBello, and for its  
14 Counterclaim against Plaintiffs/Counter-Defendants, 4520 ARVILLE, a California general  
15 partnership and MCKINLEY MANOR, an Idaho general partnership, alleges as follows:

16 **PARTIES**

17 1. Counterclaimant, BOUR ENTERPRISES, LLC, is a Nevada limited liability company  
18 (hereinafter, "Lessee" or "Bour Enterprises") with its principal place of business in Clark County,  
19 Nevada.

20 2. Counterclaimant, MULUGETA BOUR, (hereinafter, "MB") is an individual who, upon  
21 information and belief, resides in Clark County, Nevada.

22 3. Counterclaimant, HILENA MENGESHA, (hereinafter, "HM") is an individual who, upon  
23 information and belief, resides in Clark County, Nevada.

24 4. On information and belief, Counter-Defendant 4520 ARVILLE is and was a general  
25 partnership existing under the laws of the State of California that conducts business in Clark  
26 County, Nevada.

27 5. On information and belief, Counter-Defendant MCKINLEY MANOR is and was a general  
28 partnership existing under the laws of the State of Idaho that conducts business in Clark County,



1 Nevada.

2 6. Individual DOE COUNTER-DEFENDANTS I-X, and ROE CORPORATIONS Counter  
3 Defendants I-X, are fictitious names for unknown individuals, corporations, and/or their affiliates  
4 or subsidiaries whose names and identities are at this time unknown and who may have liability  
5 for some or all of the conduct alleged herein. At such time a discovery is made as to these  
6 individuals, corporations, and/or their affiliates, the same will be specifically named herein.

#### 7 JURISDICTION AND VENUE

8 7. This Court has jurisdiction over Counter-Defendant 4520 Arville, as upon information and  
9 belief, it conducts business in Clark County, Nevada.

10 8. This Court has jurisdiction over Counter-Defendant McKinley Manner, as upon  
11 information and belief, it conducts business in Clark County, Nevada.

12 9. Venue is proper in Clark County, Nevada, because a substantial part of the conduct at issue  
13 and the damages alleged were incurred in whole or in part in Clark County, Nevada.

#### 14 GENERAL ALLEGATIONS

15 10. On or about April 20, 2017, Lessee entered into agreements (the "Leases") with Plaintiffs  
16 for the lease of certain commercial property commonly known as 4560 S. Arville St., C-10, 23, 24  
17 and 29, Las Vegas, NV 89103 (the "Premises"). See Exhibits "1" and "2".

18 11. At or about the same time, MB and HM (the purported "Guarantors") executed personal  
19 guaranties of the Leases (the "Guaranties").

20 12. Bour Enterprises entered into the Lease to operate its business on the Premises, and  
21 Plaintiffs were informed, prior to entering into the Lease, that the Premises was fit for this intended  
22 use as a commercial business facility.

23 13. Tony Bour informed Defendants' representative that the Premises must be fit for the  
24 operation of Bour Enterprise's business and expressed concerns as to parking.

25 14. Prior to the execution of the Lease, Defendants assured Mr. Bour that parking arrangements  
26 would be made in order to provide Defendants' business vehicles sufficient parking spaces and  
27 room to safely maneuver through the parking lot.  
28

1       15. After entering into the Lease, Defendants declined and purposely failed to fulfill their  
2       promise to make the parking arrangements that were necessary for the successful operation of Mr.  
3       Bour's business at the Premises.

4       16. From the inception of Bour Enterprise's leasing of the Premises, the Premises were infested  
5       with rodents, rodent excrement and urine, mounds of particulate, dust and other debris. *See Exhibit*  
6       4, pictures of the Premises.

7       17. The issues relating to the fitness and habitability of the Premises created serious health  
8       hazards for customers and employees, and rendered the Premises unfit for Bour Enterprise's  
9       occupancy and the operation of its business.

10       18. The unsanitary conditions were unfit, uninhabitable, unhealthy and unsafe for customers  
11       and employees at the Premises.

12       19. Two (2) employees of Lessee have sought medical treatment as a result of these conditions.  
13       *See Exhibit "3"*. Tony Bour correspondence dated April 17, 2018.

14       20. On April 17, 2018, Tony Bour, on behalf of Lessee, delivered a letter of its notice to  
15       terminate the Lease, citing the unsanitary condition of the property, and lack of parking  
16       arrangements (as promised by Defendants or their principals) as the basis for the Lease  
17       termination. *See Exhibit "3"*.

18       21. On April 24, 2018, Plaintiffs/Counter-Defendants' legal counsel responded to Tony Bour's  
19       correspondence, unequivocally declined to address either the unsanitary/unhealthful conditions  
20       and the promised parking arrangements, when he rejected the Lessee's lease termination notice.  
21       *See Exhibit "4"*, correspondence dated April 24, 2018.

22       22. On May 3, 2018, Bour Enterprises sent David Burns a letter of Bour Enterprise's intent to  
23       vacate the Premises immediately, and of its intent to terminate the Lease, effective May 31, 2018,  
24       due to the ongoing health hazards at the Premises. *See Exhibit "5"*, Correspondence of Christopher  
25       S. Connell, Esq. dated May 3, 2018.

26       23. As of May 21, 2019, Counter-defendants assessed Bour Enterprise Sixty-Two Thousand  
27       Two Hundred Twenty-Three Dollars and Eight Cents (\$62,223.08) in rent, late fees, common area  
28       maintenance charges, and other charges under the Lease, all assessed while the Premises were



1 uninhabitable and unfit for the purpose asserted for the operation of the Bour Enterprises business.  
2 See Exhibit "6", Tenant Ledger dated May 14, 2019.

3 **FIRST CLAIM FOR RELIEF**

4 **(Constructive Eviction)**

5 24. Counterclaimants repeat and re-allege each of the foregoing paragraphs of this  
6 Counterclaim and incorporate the same herein by reference.

7 25. Counter-Defendants had a duty to lease premises that are habitable and fit for the intended  
8 use.

9 26. As alleged above and herein, Counterclaimants notified the Counter-Defendants, in  
10 writing, of their failure to act and to provide the Premises in a habitable condition that was fit for  
11 the intended use.

12 27. Counter-Defendants' failure to address the habitability issues and health hazards rendered  
13 the entire Premises unfit of occupancy for the operation of Bour Enterprise's business, the stated  
14 purpose for which the Lease Premises was leased.

15 28. Counterclaimants vacated the Premises after a reasonable time had elapsed after notifying  
16 the Counter-Defendants of the uninhabitability and fitness issues.

17 29. Counter-Defendants failed to cure the unsanitary conditions at the Premises within thirty  
18 (30) days of receiving notice of the habitability and fitness issues engulfing the Premises.

19 30. Counter-Defendants failure to cure the unsanitary conditions at the Premises rendered the  
20 Premises in whole or at least in substantial part unfit for the occupancy for the purpose for which  
21 it was leased.

22 31. As a result of their failure to act, Counter-Defendants constructively evicted Bour  
23 Enterprises from the Premises.

24 32. As a further result of the Counter-Defendants failure to act, Counterclaimants vacated the  
25 Premises in a reasonable time and according to the terms of the Lease.

26 33. As a direct and proximate result of the constructive eviction, Counterclaimants have been  
27 damaged in an amount in excess of Fifteen Thousand Dollars and No/100 (\$15,000.00), and  
28 otherwise according to proof at the time of trial.

1 34. Counterclaimant herein has been required to retain the services of Black & LoBello to  
2 prosecute this counterclaim, and counterclaimant is therefore entitled to an award of attorney's fees  
3 and costs pursuant to NRS 18.010, the contractual provisions of the agreements, and/or Nevada  
4 law.

5 **SECOND CLAIM FOR RELIEF**

6 **(Breach of Contract)**

7 35. Counterclaimants repeat and re-allege each of the foregoing paragraphs of this  
8 Counterclaim and incorporate the same herein by reference.

9 36. Notice was given to Counter-Defendants of their breach of the Lease.

10 37. Counter-Defendants failed and continue to fail to remedy the breaches in the Lease by  
11 them.

12 38. The Lease states that the Premises shall be habitable and fit for the intended purpose of  
13 occupying the Premises for the intended purpose of the Bour Enterprises business.

14 39. Counterclaimants demanded on at least two occasions, in writing, prior to vacating the  
15 hazardous Premises, that the Counter-Defendants and each of them repair, remediate or otherwise  
16 make the Premises habitable for its intended purpose.

17 40. Counter-Defendants and each of them have refused and continue to refuse to repair,  
18 remediate or otherwise make the Premises habitable for its intended purpose despite repeated  
19 demands.

20 41. As a direct and proximate result of the breach of contract Counter-Defendants,  
21 Counterclaimants have been damaged in an amount in excess of Fifteen Thousand Dollars and  
22 No/100 (\$15,000.00), and otherwise according to proof at the time of trial.

23 42. Counterclaimant herein has been required to retain the services of Black & LoBello to  
24 prosecute this counterclaim, and counterclaimant is therefore entitled to an award of attorney's fees  
25 and costs pursuant to NRS 18.010, the contractual provisions of the agreements, and/or Nevada  
26 law.

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28 ///



**THIRD CLAIM FOR RELIEF**

**(Breach of the Covenant of Good Faith and Fair Dealing)**

43. Counterclaimants repeat and re-allege each of the foregoing paragraphs of this Counterclaim and incorporate the same herein by reference.

44. There exists in law and all contracts an implied covenant of good faith and fair dealing.

45. Counter-Defendants breached the covenant of good faith and fair dealing by failing to perform its contractual obligations as were previously conducted and actively taking actions in derogation of the such agreement that affected the entirety of the contract, as set forth in the paragraphs above.

46. Counter-Defendants breached the covenant of good faith and fair dealing by failing to remediate the problems with the habitability and fitness of the Premises for its intended purpose upon Notice and demand.

47. Counter-Defendants breached the covenant of good faith and fair dealing by failing to inform the Counterclaimants of the issues with habitability and fitness of the Premises for its intended purpose prior to entering into the Lease.

48. Further there exists a special relationship between Landlord and tenant, such that there is an inequitable balance of power in favor of the Landlord.

49. In refusing to repair, remediate or otherwise make the Premises habitable for its intended purpose, the Counter-Defendants, and each of them, have used this inequitable balance of power to influence the Counterclaimants to endure the failure of the Counter-Defendants to repair, remediate or otherwise make the Premises habitable for its intended purpose.

50. As a direct and proximate result of the breach of the implied covenant of good faith and fair dealing by Counter-Defendants, Counterclaimants have been damaged in an amount in excess of Fifteen Thousand Dollars and No/100 (\$15,000.00), and otherwise according to proof at the time of trial.

51. Counterclaimant herein has been required to retain the services of Black & LoBello to prosecute this counterclaim, and counterclaimant is therefore entitled to an award of attorney's fees and costs pursuant to NRS 18.010, the contractual provisions of the agreements, and/or Nevada



1 law.

2 **FOURTH CLAIM FOR RELIEF**

3 **(Declaratory Relief)**

4 52. Counterclaimants repeat and re-allege each of the foregoing paragraphs of this  
5 Counterclaim and incorporate the same herein by reference.

6 53. There exists between Counterclaimants and Counter-Defendants a justiciable controversy  
7 in which Plaintiffs have a legal interest which is ripe for judicial determination.

8 54. Therefore, Counterclaimants seek a declaration that: (1) Lessee was constructively evicted;  
9 and (2) as a result of the constructive eviction, Lessee is not liable for any rent, charges, or other  
10 amounts due under the Lease from the inception of the habitability issues.

11 55. Counterclaimant herein has been required to retain the services of Black & LoBello to  
12 prosecute this counterclaim, and counterclaimant is therefore entitled to an award of attorney's fees  
13 and costs pursuant to NRS 18.010, the contractual provisions of the agreements, and/or Nevada  
14 law.

15 WHEREFORE, Counterclaimant prays for judgment against Counter-Defendant as  
16 follows:

- 17 1. For general damages against Counter-Defendant in an amount in excess of  
18 \$15,000.00;
- 19 2. For special damages in an amount in excess of \$15,000.00;
- 20 3. For reasonable attorney's fees;
- 21 4. For Injunctive Relief as set forth above;
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5. For costs incurred in the pursuit of this action; and
6. For such other further relief as the court deems proper.

Dated this 16 day of July 2019.

**BLACK & LOBELLO**

Rusty Graf, Esq.  
Nevada Bar No. 6322  
10777 West Twain Avenue, Suite 300  
Las Vegas, Nevada 89135  
Ph. (702) 869-8801  
Fax (702) 869-2669  
rgraf@blacklobello.law  
*Attorneys for Defendant/Counterclaimant*

**BLACK & LOBELLO**  
10777 W. Twain Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89135  
(702) 869-8801 FAX: (702) 869-2669

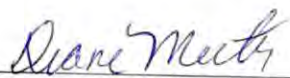
**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 16 day of July 2019, I caused the above and foregoing document entitled **ANSWER TO COMPLAINT AND COUNTERCLAIM** to be served as follows:

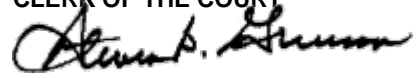
- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and
- ☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's electronic filing/service system;
- ☐ pursuant to EDCR 7.26, to be sent via facsimile;
- ☐ hand delivered to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

F. Thomas Edwards, Esq.  
HOLLEY DRIGGS WALCH FINE  
PUZEY STEIN & THOMPSON  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

  
An Employee of Black & LoBello

Electronically Filed  
7/16/2019 5:17 PM  
Steven D. Grierson  
CLERK OF THE COURT



# EXHIBIT 1



# STANDARD INDUSTRIAL/COMMERCIAL MULTI-TENANT LEASE - NET AIR COMMERCIAL REAL ESTATE ASSOCIATION

## 1. Basic Provisions ("Basic Provisions").

1.1 Parties: This Lease ("Lease"), dated for reference purposes only April 20, 2017,

is made by and between 4520 ARVILLE, a California general partnership and MCKINLEY MANOR, an Idaho general partnership, as tenants in common ("Lessor") and BOJR ENTERPRISES LLC, a Nevada limited liability company

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

1.2(a) Premises: That certain portion of the Project (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 4560 South Arville Street, C-10 & 29, located in the City of Las Vegas, County of Clark, State of Nevada, with zip code 89103, as outlined on Exhibit A attached hereto ("Premises") and generally described as (describe briefly the nature of the Premises): Approximately 4,560 square feet of industrial/warehouse space located in the Project known as "Arville Industrial Park"

In addition to Lessee's rights 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 Project. The Premises, the Building, the Common Areas, the land upon which they are located, along with all other buildings and improvements thereon, are herein collectively referred to as the "Project." (See also Paragraph 2)

1.2(b) Parking: Four (4) unreserved vehicle parking spaces ("Unreserved Parking Spaces"); and n/a reserved vehicle parking spaces ("Reserved Parking Spaces"). (See also Paragraph 2.6)

1.3 Term: Two (2) years and one (1) months ("Original Term") commencing May 1, 2017 ("Commencement Date") and ending May 31, 2019 ("Expiration Date"). (See also Paragraph 3)

1.4 Early Possession: Upon Lease execution ("Early Possession Date"). (See also Paragraphs 3.2 and 3.3)

1.5 Base Rent: \$ 1,824.00 per month ("Base Rent"), payable on the 1st day of each month commencing on the Commencement Date. (See also Paragraph 4)

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

1.6 Lessee's Share of Common Area Operating Expenses: Two and 86/100 percent (2.86 %) ("Lessee's Share").

### 1.7 Base Rent and Other Monies Paid Upon Execution:

- (a) Base Rent: \$ 1,824.00 for the period 05/01/2017-05/31/2017
- (b) Common Area Operating Expenses: \$ 912.00 for the period 05/01/2017-05/31/2017
- (c) Security Deposit: \$ 2,736.00 ("Security Deposit"). (See also Paragraph 5)
- (d) Other: \$ n/a for

(e) Total Due Upon Execution of this Lease: \$ 5,472.00

1.8 Agreed Use: Administrative operations and vehicle storage for a limousine service

1.9 Insuring Party. Lessor is the "Insuring Party". (See also Paragraph 8)

c. In the event the compilation and/or publication of the CPI shall be transferred to any other governmental department or bureau or agency or shall be discontinued, then the index most nearly the same as the CPI shall be used to make such calculation. In the event that the Parties cannot agree on such alternative index, then the matter shall be submitted for decision to the American Arbitration Association in accordance with the then rules of said Association and the decision of the arbitrators shall be binding upon the parties. The cost of said Arbitration shall be paid equally by the Parties.

☐ II. Market Rental Value Adjustment(s) (MRV)

a. On (Fill in MRV Adjustment Date(s): \_\_\_\_\_

the Base Rent shall be adjusted to the "Market Rental Value" of the property as follows:

1) Four months prior to each Market Rental Value Adjustment Date described above, the Parties shall attempt to agree upon what the new MRV will be on the adjustment date. If agreement cannot be reached within thirty days, then:

(a) Lessor and Lessee shall immediately appoint a mutually acceptable appraiser or broker to establish the new MRV within the next 30 days. Any associated costs will be split equally between the Parties, or

(b) Both Lessor and Lessee shall each immediately make a reasonable determination of the MRV and submit such determination, in writing, to arbitration in accordance with the following provisions:

(i) Within 15 days thereafter, Lessor and Lessee shall each select an ☐ appraiser or ☐ broker ("Consultant" - check one) of their choice to act as an arbitrator. The two arbitrators so appointed shall immediately select a third mutually acceptable Consultant to act as a third arbitrator.

(ii) The 3 arbitrators shall within 30 days of the appointment of the third arbitrator reach a decision as to what the actual MRV for the Premises is, and whether Lessor's or Lessee's submitted MRV is the closest thereto. The decision of a majority of the arbitrators shall be binding on the Parties. The submitted MRV which is determined to be the closest to the actual MRV shall thereafter be used by the Parties.

(iii) If either of the Parties fails to appoint an arbitrator within the specified 15 days, the arbitrator timely appointed by one of them shall reach a decision on his or her own, and said decision shall be binding on the Parties.

(iv) The entire cost of such arbitration shall be paid by the party whose submitted MRV is not selected, ie. the one that is NOT the closest to the actual MRV.

2) Notwithstanding the foregoing, the new MRV shall not be less than the rent payable for the month immediately preceding the rent adjustment.

b. Upon the establishment of each New Market Rental Value:

1) the new MRV will become the new "Base Rent" for the purpose of calculating any further Adjustments, and  
2) the first month of each Market Rental Value term shall become the new 'Base Month' for the purpose of calculating any further Adjustments.

☒ III. Fixed Rental Adjustment(s) (FRA)

The Base Rent shall be increased to the following amounts on the dates set forth below:

On (Fill in FRA Adjustment Date(s)):

May 1, 2018 and annually  
thereafter  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
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The New Base Rent shall be:

Base Rent to increase by \$.025  
per square foot, or \$114.00  
per month  
\_\_\_\_\_  
\_\_\_\_\_  
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B. NOTICE:

Unless specified otherwise herein, notice of any such adjustments, other than Fixed Rental Adjustments, shall be made as specified in paragraph 23 of the Lease.

C. BROKER'S FEE:

The Brokers shall be paid a Brokerage Fee for each adjustment specified above in accordance with paragraph 15 of the Lease.

NOTE: These forms are often modified to meet changing requirements of law and needs of the industry. Always write or call to make sure

  
INITIALS



1.10 Real Estate Brokers: ( also Paragraph 15)

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

- ☒ Commercial Specialists \_\_\_\_\_ represents Lessor exclusively ("Lessor's Broker");  
☐ n/a \_\_\_\_\_ represents Lessee exclusively ("Lessee's Broker"); or  
☐ n/a \_\_\_\_\_ 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 the brokerage fee agreed to in a separate written agreement (or if there is no such agreement, the sum of (per agreement) or ---- % of the total Base Rent for the brokerage services rendered by the Brokers).

1.11 Guarantor. The obligations of the Lessee under this Lease are to be guaranteed by MULUGETA BOUR, an individual, and HILENA K. MENGESHA, an individual ("Guarantor"). (See also Paragraph 37)

1.12 Addenda and Exhibits. Attached hereto is an Addendum or Addenda consisting of Paragraphs 1 through 5 and Exhibits A through B, all of which constitute a part of this Lease.

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. Unless otherwise provided herein, any statement of size set forth in this Lease, or that may have been used in calculating Rent, is an approximation which the Parties agree is reasonable and any payments based thereon are not subject to revision whether or not the actual size is more or less.

2.2 Condition. Lessor shall deliver that portion of the Premises contained within the Building ("Unit") to Lessee broom clean and free of debris on the Commencement Date or the Early Possession Date, whichever first occurs ("Start Date"), and, so long as the required service contracts described in Paragraph 7.1(b) below are obtained by Lessee and in effect within thirty days following the Start Date, warrants that the existing electrical, plumbing, fire sprinkler, lighting, heating, ventilating and air conditioning systems ("HVAC"), loading doors, if any, and all other such elements in the Unit, 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 Unit shall be free of material defects. 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, as 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 Unit. 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 - see Paragraph 7).

2.3 Compliance. Lessor warrants that the improvements on the Premises and the Common Areas comply with the building codes that were in effect at the time that each 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 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 Unit, Premises and/or Building, the remediation of any Hazardous Substance, or the reinforcement or other physical modification of the Unit, 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 and Lessee shall allocate the obligation to pay for the portion of such costs reasonably attributable to the Premises pursuant to the formula set out in Paragraph 7.1(d); provided, however, that if 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 an notice to Lessee unless Lessee notifies Lessor 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 be fully responsible for the cost thereof, and Lessee shall not have any right to terminate this Lease.

2.4 **Acknowledgements.** Lessee acknowledges that: (a) it has been advised by Lessor and/or Brokers to satisfy itself with respect to the 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, (b) 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, and (c) 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 be entitled to use the number of Unreserved Parking Spaces and Reserved Parking Spaces specified in Paragraph 1.2(b) on those portions of the Common Areas designated from time to time by Lessor for parking. Lessee shall not use more parking spaces than said number. Said parking spaces shall be used for parking by vehicles no larger than full-size passenger automobiles or pick-up trucks, herein called "Permitted Size Vehicles." 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.

(a) Lessee shall not permit or allow any vehicles that belong to or are controlled by Lessee or Lessee's employees, suppliers, shippers, customers, 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 Project and interior utility raceways and installations within the Unit 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 Project 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, 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 Project. 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. Any such storage shall be permitted only by the prior written consent of Lessor or Lessor's designated agent, which consent may be revoked at any time. In the event that any unauthorized storage 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 Project and their invitees. Lessee agrees to abide by and conform to all such Rules and Regulations, and 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 Project.

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

(a) To make changes 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, circulation of traffic, landscaped areas, walkways and utility raceways;

(b) To close temporarily any of the Common Areas for maintenance purposes so long as reasonable access to the Premises remains available;

(c) To designate other land outside the boundaries of the Project to be a part of the Common Areas;

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

(e) To use the Common Areas while engaged in making additional improvements, repairs or alterations to the Project, or any portion thereof; and

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

### 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.** If Lessee totally or partially occupies the Premises prior to the Commencement Date, the obligation to pay Base Rent shall be abated for the period of such early possession. All other terms of this Lease (including but not limited to the obligations to pay Lessee's Share of Common Area Operating Expenses, Real Property Taxes and insurance premiums and to maintain the Premises) shall, however, be in effect during such period. 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 as agreed, Lessor shall not be subject to any liability therefor, nor shall such failure affect the validity of this Lease. Lessee shall not, however, be obligated to pay Rent or perform its other obligations until it receives possession of the Premises. If possession is not delivered within 60 days after the Commencement Date, 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. Except as otherwise provided, if possession is not tendered to Lessee by the Start Date and Lessee does not terminate this Lease, as aforesaid, 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 of the Premises is not delivered within 4 months 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 8.5). 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, Lessee's Share (as specified in Paragraph 1.6) 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 Project, including, but not limited to, the following:

(i) The operation, repair and maintenance, in neat, clean, good order and condition 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, bumpers, irrigation systems, Common Area lighting facilities, fences and gates, elevators, roofs, and roof drainage systems.

(bb) Exterior signs and any tenant directories.

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

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

(iii) Trash disposal, pest control services, property management, security services, and the costs of any environmental inspections.

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

(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) The cost of any Capital Expenditure to the Building or the Unit not covered under the provisions of Paragraph 2.3 provided; however, that Lessor shall allocate the cost of any such Capital Expenditure 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 Expenditure in any given month.
- (ix) Any other services to be provided by Lessor that are stated elsewhere in this Lease to be a Common Area Operating Expense.

(b) Any Common Area Operating Expenses and Real Property Taxes that are specifically attributable to the Unit, the Building or to any other building in the Project or to the operation, repair and maintenance thereof, shall be allocated entirely to such Unit, Building, or other building. However, any Common Area Operating Expenses and Real Property Taxes that are not specifically attributable to the Building or to any other building or to the operation, repair and maintenance thereof, shall be equitably allocated by Lessor to all buildings in the Project.

(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 Project 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 shall be payable by Lessee within 10 days after a reasonably detailed statement of actual expenses is presented to Lessee. At Lessor's option, however, an amount may be estimated by Lessor from time to time of Lessee's Share of annual Common Area Operating Expenses and the same shall be payable monthly or quarterly, as Lessor shall designate, during each 12 month period of the Lease term, on the same day as the Base Rent is due hereunder. Lessor shall deliver to Lessee within 60 days after the expiration of each calendar year a reasonably detailed statement showing Lessee's Share of the actual Common Area Operating Expenses incurred during the preceding year. If Lessee's payments under this Paragraph 4.2(d) during the preceding year exceed Lessee's Share as indicated on such statement, Lessor shall credit the amount of such over-payment against Lessee's Share of Common Area Operating Expenses next becoming due. If Lessee's payments under this Paragraph 4.2(d) during the preceding year were less than Lessee's Share as indicated on such statement, Lessee shall pay to Lessor the amount of the deficiency within 10 days after delivery by Lessor to Lessee of the statement.

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. 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 charges which may be due.

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 due Lessor 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 14 days after the expiration or termination of this Lease, if Lessor elects to apply the Security Deposit only to unpaid Rent, and otherwise within 30 days after the Premises have been vacated pursuant to Paragraph 7.4(c) below, 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.** Lessee shall use and occupy the Premises only for the Agreed Use, or any other legal use which is reasonably comparable thereto, and for no other purpose. 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. 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 improvements on the Premises or the mechanical or electrical systems therein, and/or is not significantly more burdensome to the Premises. 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.

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 or 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, 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, 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' and consultants' 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 Project). 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 existed as a result of Hazardous Substances on the Premises prior to the Start Date 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 the Start Date, 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 case, this Lease shall continue in full force and effect, 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 the Premises, 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.

**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, 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 contamination 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.

**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.

(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, (iii) clarifiers, and (iv) any other equipment, if reasonably required by Lessor. However, Lessor reserves the right, upon notice to Lessee, to procure and maintain any or all of such service contracts, and if Lessor so elects, 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 reimburse Lessor for 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 (ie. 1/144th of the cost per month). Lessee shall pay interest on the unamortized balance at a rate that is commercially reasonable in the judgment of Lessor's accountants. Lessee may, however, 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, parkways, 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 ceiling coverings, air lines, power panels, electrical distribution, security and fire protection systems, communication systems, 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 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, and the cumulative cost thereof during this Lease as extended does not exceed a sum equal to 3 month's 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) **Indemnification.** 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 90 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 this 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 Project) 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. 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. Joint 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, an "Additional Insured-Managers or Lessors of Premises Endorsement" and contain the "Amendment of the Pollution Exclusion Endorsement" for damage caused by heat, smoke or fumes from a hostile fire. 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. All insurance carried by Lessee 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 therein.

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

(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 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 under Paragraph 8.4. 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 flood 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 \$1,000 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 Project 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.**

(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) **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 duly licensed or admitted to transact business in the state where the Premises are located, and maintaining during the policy term a "General Policyholders Rating" of at least B+, V, 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 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 30 days prior to the expiration of such policies, furnish Lessor with evidence of renewals 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 from Liability.** Lessor shall not be liable for 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, 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, or from other sources or places. Lessor shall not be liable for any damages arising from any act or neglect of any other tenant of Lessor nor from the failure of Lessor to enforce the provisions of any other lease in the Project. Notwithstanding Lessor's negligence or breach of this Lease, Lessor shall under no circumstances be liable for injury to Lessee's business or for any loss of income or profit therefrom.

**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 month's 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.

(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 month's 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 as defined in Paragraph 6.2(a), in, on, or under the Premises.

**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 Lessor's election, make the repair of any damage or destruction the total cost to repair of which is \$5,000 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 Insuring 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 fund. satisfactory assurance thereof within 30 days after ng 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 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 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.

**9.7 Termination; Advance Payments.** Upon termination of this Lease pursuant to Paragraph 6.2(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.

**9.8 Waive Statutes.** Lessor and Lessee agree that the terms of this Lease shall govern the effect of any damage to or destruction of the Premises with respect to the termination of this Lease and hereby waive the provisions of any present or future statute to the extent inconsistent herewith.

**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 Project, 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 Project 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 Project is located. The term "Real Property Taxes" shall also include any tax, fee, levy, assessment or charge, or any increase therein, imposed by reason of events occurring during the term of this Lease, including but not limited to, a change in the ownership of the Project or any portion thereof or a change in the improvements thereon. 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.** Lessor shall pay the Real Property Taxes applicable to the Project, and except as otherwise provided in Paragraph 10.3, any such amounts 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 Project 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.



10.4 **Joint Assessment.** If Building is not separately assessed, Real Property is 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.** 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. 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 dumpster and/or an increase in the number of times per month that the dumpster is emptied, then Lessor may increase Lessee's Base Rent by an amount equal to such increased costs.

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) A change in the control of Lessee shall constitute an assignment requiring consent. The transfer, on a cumulative basis, of 25% 51% 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 to 110% of the Base Rent 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 Lessor shall be limited to compensatory damages and/or injunctive relief.

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 Lessee'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 \$1,000 or 10% of the current monthly Base Rent applicable to the portion of the Premises which is the subject of the proposed assignment or sublease, whichever is greater, 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.

(f) Any assignee of, or sublessee under, this Lease shall, by reason of accepting such assignment or entering into such

sublease, be deemed to have assumed and agreed to conform and comply with each and every 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. 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 prepaid rents 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 abandonment of the Premises; or the vacating of the Premises without providing a commercially reasonable level of security, or where the coverage of the property insurance described in Paragraph 8.3 is jeopardized as a result thereof, or without providing reasonable assurances to minimize potential vandalism.

(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.

(c) 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, (v) a requested subordination, (vi) evidence concerning any guaranty and/or Guarantor, (vii) any document requested under Paragraph 41 (easements), or (viii) 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.

(d) A Default by Lessee as to the terms, covenants, conditions or provisions of this Lease, or of the rules adopted under Paragraph 2.9 hereof, other than those described in subparagraphs 13.1(a), (b) or (c), 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.

(e) 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 (e) is contrary to any applicable law, such provision shall be of no force or effect, and not affect the validity of the remaining provisions.

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

(g) 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 this 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. The costs and expenses of any such performance by Lessor shall be due and payable by Lessee upon receipt of invoice therefor. If any check given to Lessor by Lessee shall not be honored by the bank upon which it is drawn, Lessor, at its option, may require all future payments to be made by Lessee to be by cashier's check. 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 loss 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 loss 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 damages under Paragraph 12. 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 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. 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 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) 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 equal to the prime rate reported in the Wall Street Journal as published closest prior to the date when due plus 4%, 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 an amount equal to the greater of one month's Base Rent or the Security Deposit, and to pay an excess of such expense under protest, reserving Lessee's right to reimbursement from Lessor. 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 Unit, or more than 25% of Lessee's Reserved Parking Spaces, 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 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 and Utility 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.** In addition to the payments owed pursuant to Paragraph 1.10 above, and unless Lessor and the Brokers otherwise agree in writing, Lessor agrees that: (a) if Lessee exercises any Option, (b) if Lessee acquires from Lessor any rights to the Premises or other premises owned by Lessor and located within the Project, (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 of the Brokers in effect at the time of the execution of this Lease.

~~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 1.10, 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 finder (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. Protective purchasers and encumbrances may rely upon. Requesting Party's Estoppel Certificate, and the Responding Party shall be estopped from denying the truth of the facts contained in said Certificate.

(c) If Lessor desires to finance, refinance, or sell the Premises, or any part thereof, Lessee and all Guarantors shall 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 in 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. Except as provided in Paragraph 15, 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. Notwithstanding the above, and subject to the provisions of Paragraph 20 below, the original Lessor under this Lease, and all subsequent holders of the Lessor's interest in this Lease shall remain liable and responsible with regard to the potential duties and liabilities of Lessor pertaining to Hazardous Substances as outlined in Paragraph 6.2 above.

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.** Subject to the provisions of Paragraph 17 above, the obligations of Lessor under this Lease shall not constitute personal obligations of Lessor, the individual partners of Lessor or its or their individual partners, 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 the individual partners of Lessor, or its or their individual partners, 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. The liability (including court costs and attorneys' fees), of any Broker with respect to negotiation, execution, delivery or performance by either Lessor or Lessee under this Lease or any amendment or modification hereto shall be limited to an amount up to 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.

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 48 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 guarantee 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 or mail. If notice is received on a Saturday, Sunday or legal holiday, it shall be deemed received on the next business day.

24. **Waivers.** 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. 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, which 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.

**25. Disclosures Regarding The Nature of a Real Estate Agency Relationship.** (See attached Duties Owed by a Nevada Real Estate Licensee)

(a) ~~When entering into a discussion with a real estate agent regarding a real estate transaction, a Lessor or Lessee should from the outset 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 fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Lessor. To the Lessee and the Lessor: (a) Diligent exercise of reasonable skills and care in performance of the agent's duties. (b) A duty of honest and fair dealing and good faith. (c) 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 fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Lessee. To the Lessee and the Lessor: (a) Diligent exercise of reasonable skills and care in performance of the agent's duties. (b) A duty of honest and fair dealing and good faith. (c) 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 licenses, 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 liability (including court costs and attorneys' fees), of any Broker with respect to any breach of duty, error or omission relating to this Lease 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) Buyer and Seller 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 shall be increased to 150% of the Base Rent 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; Attornment; 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 recordation thereof.

**30.2 Attornment.** 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,

attorn 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 such new owner, this Lease shall automatically become a new Lease between Lessee and such new owner, upon all of the terms and conditions hereof, for the remainder of the term hereof, and (ii) Lessor shall thereafter be relieved of any further obligations hereunder and such new owner shall assume all of Lessor's obligations hereunder, except that such new owner shall not: (a) 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.

**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 attorns to the record owner of the Premises. Further, within 60 days after the execution of this Lease, Lessor shall 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, attornment 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 therewith, whether or not a legal action is subsequently commenced in connection with such Default or resulting 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 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. All such activities shall be without abatement of rent or liability to Lessee. Lessor may at any time place on the Premises any ordinary "For Sale" signs and Lessor may during the last 6 months of the term hereof place on the Premises any ordinary "For Lease" signs. Lessee may at any time place on the Premises any ordinary "For Sublease" sign.

**33. Auctions.** Lessee shall not conduct, nor permit to be conducted, any auction upon the Premises without Lessor's prior written consent. Lessor shall not be obligated to exercise any standard of reasonableness in determining whether to permit an auction.

**34. Signs.** Except for ordinary "For Sublease" signs which may be placed only on the Premises, Lessee shall not place any sign upon the Project without Lessor's prior written consent. All signs must comply with all Applicable Requirements.

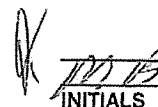
**35. Termination; Merger.** Unless specifically stated otherwise in writing by Lessor, the voluntary or other surrender of this Lease by Lessee, the mutual termination or cancellation hereof, or a termination hereof by Lessor for Breach by Lessee, shall automatically terminate any sublease or lesser 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. 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 or 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 to 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 \_\_\_\_\_, recently published by the AIR Commercial Real Estate Association, and each such Guarantor shall have the same obligations as Lessee under this Lease.
- 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, Lessee 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 the term of or renew this Lease or to extend 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 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, (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), (ii) Lessor gives to Lessee 3 or more notices of separate Default during any 12 month period, whether or not the Defaults are cured, or (iii) 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.
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, (ii) to cause the recordation of parcel maps and restrictions, and (iii) to create and/or install new utility raceways, so long as such easements, rights, dedications, maps, restrictions, and utility raceways 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. **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.
43. **Authority.** 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.
44. **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.
45. **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.
46. **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.
47. **Multiple Parties.** If more than one person or entity is named herein as either Lessor or Lessee, such multiple Parties shall have joint and several responsibility to comply with the terms of this Lease.
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.

  
INITIALS



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

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. SEEK 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.

Execute at: 7674 West Lake Mead Boulevard, 104

Executed at: \_\_\_\_\_

On: \_\_\_\_\_

on: \_\_\_\_\_

By LESSOR:

4520 ARVILLE  
MCKINLEY MANOR

By LESSEE:

BOUR ENTERPRISES LLC,  
a Nevada limited liability company

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

Name Printed: Kevin J. Donahoe

Title: Owner Agent

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

Name Printed: Mulugeta Bour

Title: Manager

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

Name Printed: \_\_\_\_\_

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

Address: 7674 W. Lake Mead Blvd., 104

Las Vegas, NV 89128

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

Name Printed: \_\_\_\_\_

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

Address: 4560 S. Arville Street, #23

Las Vegas, NV 89103

Telephone: (702) 364-0909

Facsimile: (702) 364-5885

Federal ID No. 95-4590150

Telephone: (702) 808-2047

Facsimile: ( )

Federal ID No. \_\_\_\_\_

These forms are often modified to meet changing requirements of law and needs of the industry. Always write or call to make sure you are utilizing the most current form: AIR Commercial Real Estate Association, 700 South Flower Street, Suite 600, Los Angeles, CA 90017. (213) 687-8777.

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*m 15*

*AK*  
*MM 15*  
INITIALS



## RENT ADJUSTMENT(S) STANDARD LEASE ADDENDUM

**Dated** April 20, 2017

**By and Between (Lessor)** 4520 ARVILLE, a California general partnership  
and MCKINLEY MANOR, an Idaho general  
partnership, as tenants in common

**(Lessee)** BOUR ENTERPRISES LLC, a Nevada limited  
liability company

**Address of Premises:** 4560 South Arville Street, C-10 & 29, Las Vegas,  
Nevada 89103

Paragraph 1.5

**A. RENT ADJUSTMENTS:**

The monthly rent for each month of the adjustment period(s) specified below shall be increased using the method(s) indicated below:  
 (Check Method(s) to be Used and Fill in Appropriately)

☐ **I. Cost of Living Adjustment(s) (COLA)**

a. On (Fill in COLA Dates): May 1, 2018, and annually thereafter

the Base Rent shall be adjusted by the change, if any, from the Base Month specified below, in the Consumer Price Index of the Bureau of Labor Statistics of the U.S. Department of Labor for (select one): ☐ CPI W (Urban Wage Earners and Clerical Workers) or ☒ CPI U (All Urban Consumers), for (Fill in Urban Area):

Los Angeles-Riverside-Orange County

\_\_\_\_\_, All Items  
 (1982-1984 = 100), herein referred to as "CPI".


b. The monthly rent payable in accordance with paragraph A.I.a. of this Addendum shall be calculated as follows: the Base Rent set forth in paragraph 1.5 of the attached Lease, shall be multiplied by a fraction the numerator of which shall be the CPI of the calendar month 2 months prior to the month(s) specified in paragraph A.I.a. above during which the adjustment is to take effect, and the denominator of which shall be the CPI of the calendar month which is 2 months prior to (select one): the ☒ first month of the term of this Lease as set forth in paragraph 1.3 ("Base Month") or ☐ (Fill in Other "Base Month"): \_\_\_\_\_. The sum so calculated shall constitute the new monthly rent hereunder, but in no event, shall any such new monthly rent be less than 110 percent (110%) of the rent payable for the month immediately preceding the rent adjustment.

you are utilizing the most current form: 90017

COMMERCIAL REAL ESTATE ASSOCIATION, 70

Flower Street, Suite 600, Los Angeles, Calif.

\_\_\_\_\_  
INITIALS

  
\_\_\_\_\_  
INITIALS

IN WITNESS WHEREOF, the parties hereto have executed this Lease Addendum  
as of this date.

**LESSOR:**

**4520 ARVILLE**, a California general  
partnership, and **MCKINLEY MANOR**,  
an Idaho general partnership,  
as tenants in common

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

Kevin J. Donahoe

Its: Owner Agent

**LESSEE:**

**BOUR ENTERPRISES LLC**,  
a Nevada limited liability company

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

Mulugeta Bour

Its: Manager



## AIR COMMERCIAL REAL ESTATE ASSOCIATION GUARANTY OF LEASE

WHEREAS, 4520 ARVILLE, a California general partnership and MCKINLEY MANOR, an Idaho general partnership, as tenants in common, hereinafter "Lessor", and BOUR ENTERPRISES LLC, a Nevada limited liability company

, hereinafter "Lessee", are about to execute a document entitled "Lease" dated April 20, 2017 concerning the premises commonly known as 4560 South Arville Street, C-10 & 29, Las Vegas, Nevada 89103 wherein Lessor will lease the premises to Lessee, and

WHEREAS, MULUGETA BOUR, an individual, and HILENA MENGESHA, an individual hereinafter "Guarantors" have a financial interest in Lessee, and

WHEREAS, Lessor would not execute the Lease if Guarantors did not execute and deliver to Lessor this Guarantee of Lease.

NOW THEREFORE, in consideration of the execution of the foregoing Lease by Lessor and as a material inducement to Lessor to execute said Lease, Guarantors hereby jointly, severally, unconditionally and irrevocably guarantee the prompt payment by Lessee of all rents and all other sums payable by Lessee under said Lease and the faithful and prompt performance by Lessee of each and every one of the terms, conditions and covenants of said Lease to be kept and performed by Lessee.

It is specifically agreed that the terms of the foregoing Lease may be modified by agreement between Lessor and Lessee, or by a course of conduct, and said Lease may be assigned by Lessor or any assignee of Lessor without consent or notice to Guarantors and that this Guaranty shall guarantee the performance of said Lease as so modified.

This Guaranty shall not be released, modified or affected by the failure or delay on the part of Lessor to enforce any of the rights or remedies of the Lessor under said Lease, whether pursuant to the terms thereof or at law or in equity.

No notice of default need be given to Guarantors, it being specifically agreed that the guarantee of the undersigned is a continuing guarantee under which Lessor may proceed immediately against Lessee and/or against Guarantors following any breach or default by Lessee or for the enforcement of any rights which Lessor may have as against Lessee under the terms of the Lease or at law or in equity.

Lessor shall have the right to proceed against Guarantors hereunder following any breach or default by Lessee without first proceeding against Lessee and without previous notice to or demand upon either Lessee or Guarantors.

Guarantors hereby waive (a) notice of acceptance of this Guaranty, (b) demand of payment, presentation and protest, (c) all right to assert or plead any statute of limitations relating to this Guaranty or the Lease, (d) any right to require the Lessor to proceed against the Lessee or any other Guarantor or any other person or entity liable to Lessor, (e) any right to require Lessor to apply to any default any security deposit or other security it may hold under the Lease, (f) any right to require Lessor to proceed under any other remedy Lessor may have before proceeding against Guarantors, (g) any right of subrogation.

Guarantors do hereby subrogate all existing or future indebtedness of Lessee to Guarantors to the obligations owed to Lessor under the Lease and this Guaranty.

If a Guarantor is married, such Guarantor expressly agrees that recourse may be had against his or her separate property for all of the obligations hereunder.

The obligations of Lessee under the Lease to execute and deliver estoppel statements and financial statements, as therein provided, shall be deemed to also require the Guarantors hereunder to do and provide the same.

The term "Lessor" refers to and means the Lessor named in the Lease and also Lessor's successors and assigns. So long as Lessor's interest in the Lease, the leased premises or the rents, issues and profits therefrom, are subject to any mortgage or deed of trust or assignment for security, no acquisition by Guarantors of the Lessor's interest shall affect the continuing obligation of Guarantors under this Guaranty which shall nevertheless continue in full force and effect for the benefit of the mortgagee, beneficiary, trustee or assignee under such mortgage, deed of trust or

assignment and their successors and assigns.

The term "Lessee" refers to and means the Lessee named in the Lease and also Lessee's successors and assigns.

In the event any action be brought by said Lessor against Guarantors hereunder to enforce the obligation of Guarantors hereunder, the unsuccessful party in such action shall pay to the prevailing party therein a reasonable attorney's fee which shall be fixed by the court.

If this Form has been filled in, it has been prepared for submission to your attorney for his approval. No representation or recommendation is made by the AIR Commercial Real Estate Association, the real estate broker or its agents or employees as to the legal sufficiency, legal effect, or tax consequences of this Form or the transaction relating thereto.

Executed at: \_\_\_\_\_

On: \_\_\_\_\_

Address: \_\_\_\_\_

*Hilens K. Meyer*  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
"GUARANTORS"

## DUTIES OWED BY A NEVADA REAL ESTATE LICENSEE

*This form does not constitute a contract for services nor an agreement to pay compensation.*

In Nevada, a real estate licensee is required to provide a form setting forth the duties owed by the licensee to:

- Each party for whom the licensee is acting as an agent in the real estate transaction, and
- Each unrepresented party to the real estate transaction, if any.

**Licensee:** The licensee in the real estate transaction is David Burns

whose license number is S.11034

The licensee is acting for [client's name(s)] \_\_\_\_\_

4520 Arville and McKinley Manor

who is/are the ☒ Seller/Landlord; ☐ Buyer/Tenant.

**Broker:** The broker is Kevin Donahoe

, whose company is Commercial Specialists

### Licensee's Duties Owed to All Parties:

A Nevada real estate licensee shall:

- Not deal with any party to a real estate transaction in a manner which is deceitful, fraudulent or dishonest.
- Exercise reasonable skill and care with respect to all parties to the real estate transaction.
- Disclose to each party to the real estate transaction as soon as practicable:
  - Any material and relevant facts, data or information which licensee knows, or with reasonable care and diligence the licensee should know, about the property.
  - Each source from which licensee will receive compensation.
- Abide by all other duties, responsibilities and obligations required of the licensee in law or regulations.

### Licensee's Duties Owed to the Client:

A Nevada real estate licensee shall:

- Exercise reasonable skill and care to carry out the terms of the brokerage agreement and the licensee's duties in the brokerage agreement;
- Not disclose, except to the licensee's broker, confidential information relating to a client for 1 year after the revocation or termination of the brokerage agreement, unless licensee is required to do so by court order or the client gives written permission;
- Seek a sale, purchase, option, rental or lease of real property at the price and terms stated in the brokerage agreement or at a price acceptable to the client;
- Present all offers made to, or by the client as soon as practicable, unless the client chooses to waive the duty of the licensee to present all offers and signs a waiver of the duty on a form prescribed by the Division;
- Disclose to the client material facts of which the licensee has knowledge concerning the real estate transaction;
- Advise the client to obtain advice from an expert relating to matters which are beyond the expertise of the licensee; and
- Account to the client for all money and property the licensee receives in which the client may have an interest.

### Duties Owed By a broker who assigns different licensees affiliated with the brokerage to separate parties.

Each licensee shall not disclose, except to the real estate broker, confidential information relating to client.

### Licensee Acting for Both Parties:

The Licensee

MAY [ ] OR MAY NOT [ ]

in the future act for two or more parties who have interests adverse to each other. In acting for these parties, the licensee has a conflict of interest. Before a licensee may act for two or more parties, the licensee must give you a "Consent to Act" form to sign.

**I/We acknowledge receipt of a copy of this list of licensee duties, and have read and understand this disclosure.**

Seller/Landlord: \_\_\_\_\_ Date: 4/24/17 Time: 12:10 PM

Seller/Landlord: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_

**OR**

Buyer/Tenant: \_\_\_\_\_ Date: 4/21/17 Time: \_\_\_\_\_

Buyer/Tenant: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_



HP LaserJet M1536dnf MFP

# Fax Confirmation

VLS  
7023659903  
May-1-2018 10:14AM

Job	Date	Time	Identification	Duration	Pages	Result
			7028295930	24:39	32	OK

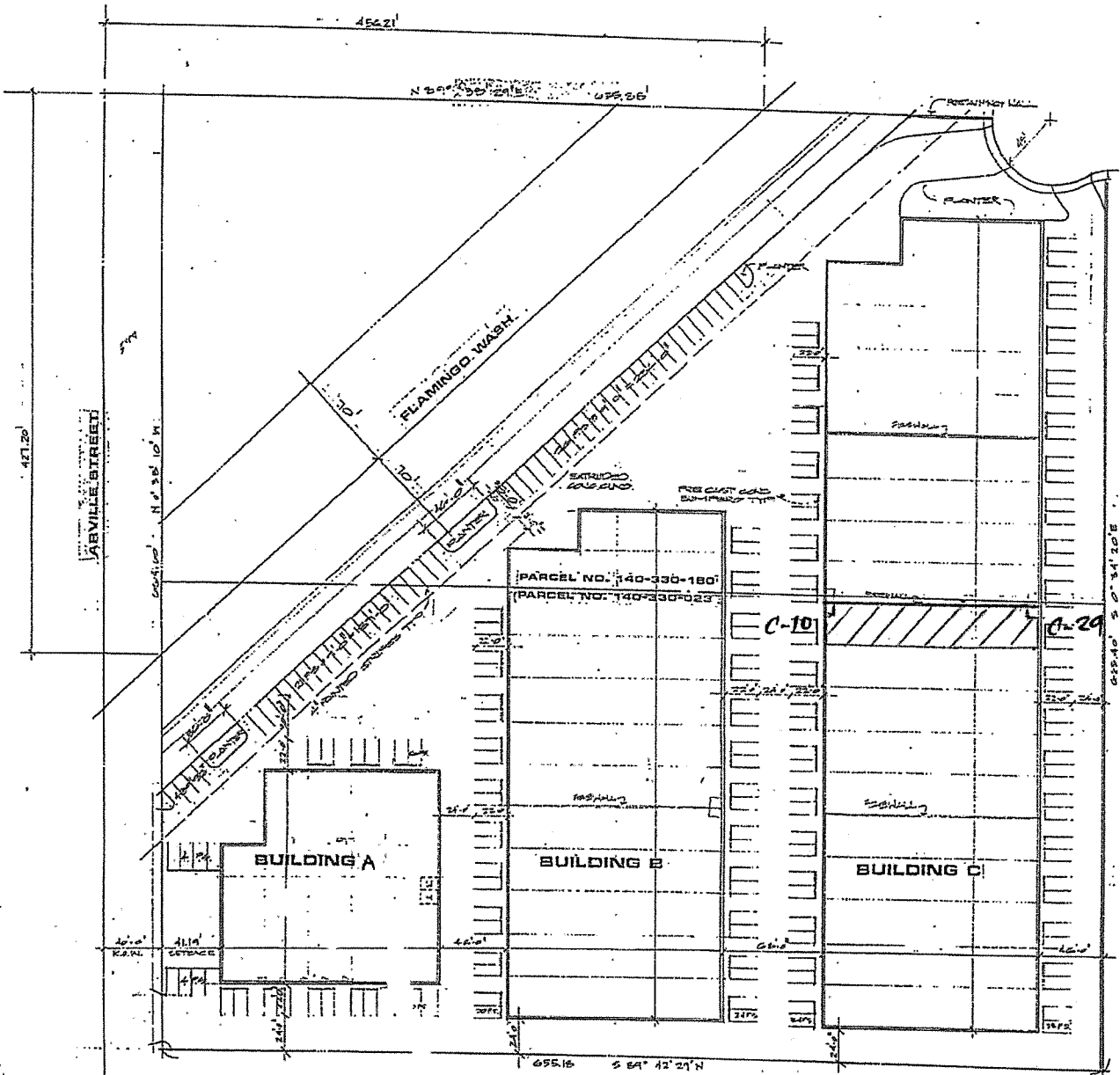
New Office Lease  
Bour Enterprises, LLC

To: Christopher Connell From: Bour Enterprises, LLC  
Fax: 702-829-6930 Pages: 33 (including cover)  
Phone: Date: May 1, 2018  
Re: Lease cc:  
Urgent For Review Please Comment Please Reply Please Recycle

Here is the lease agreement for you to check. If you need anything else just let us know

Thank You

## Exhibit A



## SITE PLAN

$$I = 40' - 0'$$

MB  
AK

## **Exhibit B**

### **SIGNAGE CRITERIA**

This criterion is being established to provide Lessee with signage specifications for signage conformity throughout the Project. This criterion shall be strictly enforced and any non-conforming or unapproved signage must be removed or brought into conformance within ten (10) days of Lessor's request, at the expense of the Lessee.

#### **General Specification**

1. Lessor shall determine approved signage location to Lessee upon request of Lessee.
2. Signage copy to be individual cut out letters, white in color, and affixed on the building without penetrating the surface of the building. Letters shall not to exceed three (3) feet in height.
3. Only established trade names shall be displayed.
4. Sign design, materials, copy and placement to be approved by Lessor in writing prior to installation. Lessee shall deliver to Lessor two (2) sets of plans for Lessor's approval.

#### **General Construction Requirements**

1. Lessee shall be responsible for contracting for the installation and maintenance of Lessee's signage.
2. Lessee shall be responsible for the actions of Lessee's sign contractor or vendor.
3. Lessee's sign contractor or vendor shall repair any damage to any portion of the Building structure or fascia caused by said contractor or vendor's work.
4. No signage of any type shall be directly painted on the exterior walls of the Building.
5. Sign contractor or vendor shall contact Lessor prior to commencement of any work so Lessor may inspect sign materials to insure conformance with approved drawings.
6. Lessee to pay for the cost of sign removal and building restoration at the time Lessee vacates the Premises.
7. Sign contractor or vendor shall carry Workmen's compensation and public liability insurance against all damage suffered or done to any and all persons and/or property while engaged in the installation of signage. Said insurance coverage shall be a minimum of \$1,000,000.00. A copy of the policy or certificate of insurance naming Lessor as additional insured shall be delivered to Lessor prior to signage installation.

*MIB*

*AK*

## LEASE ADDENDUM

This Lease Addendum is made and entered into on this 20<sup>th</sup> day of April, 2017, and is hereby attached to and becomes a part of the Lease dated April 20, 2017 by and between 4520 ARVILLE, a California general partnership, and MCKINLEY MANOR, an Idaho general partnership, as tenants in Common, hereinafter referred to as "Lessor", and BOUR ENTERPRISES LLC, a Nevada limited liability company, hereinafter referred to as "Lessee".

### RECITALS:

WHEREAS, Lessee and Lessor desire to amend the Lease between the parties for the Premises known as 4560 South Arville Street, C-10 & 29, Las Vegas, Nevada 89103.

### TERMS:

NOW, THEREFORE, in consideration of the mutual promises and covenants contained in the Lease, and this Lease Addendum, the parties agree as follows:

1. Condition of Premises. Lessor, at Lessor's cost, shall make sure that the overhead florescent light fixtures, electrical outlets, plumbing, and doors are in proper working order at the commencement of the Lease; otherwise, Lessee hereby accepts the Premises in "as-is" condition with any additional alterations and improvements to be completed at Lessee's expense and in accordance with Section 7 of Lease.

2. Trash Disposal. In the areas where garbage dumpsters are provided within the Project, Lessee may utilize the dumpsters for waste paper and incidental trash only. Packing skids, boxes, and construction materials are not to be placed in or around dumpsters. It is the sole responsibility of Lessee to dispose of excessive trash and packaging materials away from the Project or to obtain Lessee's own dumpster at Lessee's own expense. Trash or materials stored outside of the Premises by Lessee,

and not disposed of properly in a dumpster is prohibited, and Lessor shall have the right to charge Lessee for the cost of properly disposing of said trash or materials in addition to any fine that the Lessor may levy against Lessee for such offense.

3. Lessee's Share. Lessee's Share of Common Area Operating Expenses to be paid by Lessee to Lessor shall be no less than \$.20 per square foot, per month, or Nine Hundred Twelve and No/00 Dollars (\$912.00), for the duration of the Term of the Lease.

4. Lessee's Vehicles. Lessee, at Lessee's cost, shall take all necessary precautions to protect the concrete slab and walls of the Premises from automotive spills of any chemicals or petroleum products which may come into contact with the floor or walls as a result of the operation of Lessee's business, and Lessee shall not leave Lessee's vehicles parked outside of the Premises in the parking areas overnight.

5. Rent Abatement. As consideration for Lessee's performance of all obligations to be performed by Lessee under the Lease, and provided Lessee is not in default of the Lease, Lessor shall credit Lessee's rental account Two Thousand Seven Hundred Thirty-six and No/00 Dollars (\$2,736.00) for Month 1 of the Lease.

Except as amended by this Lease Addendum, all the provisions, terms and conditions of the Lease shall remain in full force and effect and the same is hereby ratified and confirmed.

*Signatures to follow*

m B  
OK

## **EXHIBIT 2**



# STANDARD INDUSTRIAL/COMMERCIAL MULTI-TENANT LEASE - NET AIR COMMERCIAL REAL ESTATE ASSOCIATION

## 1. Basic Provisions ("Basic Provisions").

1.1 Parties: This Lease ("Lease"), dated for reference purposes only April 20, 2017, is made by and between 4520 ARVILLE, a California general partnership and MCKINLEY MANOR, an Idaho general partnership, as tenants in common ("Lessor") and BOUR ENTERPRISES LLC, a Nevada limited liability company

\_\_\_\_ ("Lessee"), (collectively the "Parties", or individually a "Party").  
1.2(a) Premises: That certain portion of the Project (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 4560 South Arville Street, C-23 & 24, located in the City of Las Vegas, County of Clark, State of Nevada, with zip code 89103, as outlined on Exhibit A attached hereto ("Premises") and generally described as (describe briefly the nature of the Premises): Approximately 4,560 square feet of industrial/warehouse space located in the Project known as "Arville Industrial Park"

In addition to Lessee's rights 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 Project. The Premises, the Building, the Common Areas, the land upon which they are located, along with all other buildings and improvements thereon, are herein collectively referred to as the "Project." (See also Paragraph 2)

1.2(b) Parking: Four (4) unreserved vehicle parking spaces ("Unreserved Parking Spaces"); and n/a reserved vehicle parking spaces ("Reserved Parking Spaces"). (See also Paragraph 2.6)

1.3 Term: Two (2) years and one (1) months ("Original Term") commencing May 1, 2017 ("Commencement Date") and ending May 31, 2019 ("Expiration Date"). (See also Paragraph 3)

1.4 Early Possession: Upon Lease execution ("Early Possession Date"). (See also Paragraphs 3.2 and 3.3)

1.5 Base Rent: \$ 1,824.00 per month ("Base Rent"), payable on the 1st day of each month commencing on the Commencement Date. (See also Paragraph 4)

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

1.6 Lessee's Share of Common Area Operating Expenses: Two and 86/100 percent (2.86 %) ("Lessee's Share").

### 1.7 Base Rent and Other Monies Paid Upon Execution:

(a) Base Rent: \$ 1,824.00 for the period 05/01/2017-05/31/2017

(b) Common Area Operating Expenses: \$ 912.00 for the period 05/01/2017-05/31/2017

(c) Security Deposit: \$ 2,736.00 ("Security Deposit"). (See also Paragraph 5)

(d) Other: \$ n/a for \_\_\_\_\_

(e) Total Due Upon Execution of this Lease: \$ 5,472.00

1.8 Agreed Use: Administrative operations and vehicle storage for a limousine service

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



1.10 Real Estate Brokers: (See Paragraph 15)

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

☒ Commercial Specialists

☐ n/a represents Lessor exclusively ("Lessor's Broker");

☐ n/a represents Lessee exclusively ("Lessee's Broker"); or

☐ n/a 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 the brokerage fee agreed to in a separate written agreement (or if there is no such agreement, the sum of (per agreement) or ---- % of the total Base Rent for the brokerage services rendered by the Brokers).

1.11 Guarantor. The obligations of the Lessee under this Lease are to be guaranteed by MULUGETA BOUR, an individual, and HILENA K. MENGESHA, an individual ("Guarantor"). (See also Paragraph 37)

1.12 Addenda and Exhibits. Attached hereto is an Addendum or Addenda consisting of Paragraphs 1 through 5 and Exhibits A through B, all of which constitute a part of this Lease.

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. Unless otherwise provided herein, any statement of size set forth in this Lease, or that may have been used in calculating Rent, is an approximation which the Parties agree is reasonable and any payments based thereon are not subject to revision whether or not the actual size is more or less.

2.2 Condition. Lessor shall deliver that portion of the Premises contained within the Building ("Unit") to Lessee broom clean and free of debris on the Commencement Date or the Early Possession Date, whichever first occurs ("Start Date"), and, so long as the required service contracts described in Paragraph 7.1(b) below are obtained by Lessee and in effect within thirty days following the Start Date, warrants that the existing electrical, plumbing, fire sprinkler, lighting, heating, ventilating and air conditioning systems ("HVAC"), loading doors, if any, and all other such elements in the Unit, 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 Unit shall be free of material defects. 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, as 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 Unit. 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 - see Paragraph 7).

2.3 Compliance. Lessor warrants that the improvements on the Premises and the Common Areas comply with the building codes that were in effect at the time that each 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 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 Unit, Premises and/or Building, the remediation of any Hazardous Substance, or the reinforcement or other physical modification of the Unit, 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 and Lessee shall allocate the obligation to pay for the portion of such costs reasonably attributable to the Premises pursuant to the formula set out in Paragraph 7.1(d); provided, however, that if 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

 INITIALS



## RENT ADJUSTMENT(S) STANDARD LEASE ADDENDUM

Dated April 20, 2017

By and Between (Lessor) 4520 ARVILLE, a California general partnership  
and MCKINLEY MANOR, an Idaho general  
partnership, as tenants in common

(Lessee) BOUR ENTERPRISES LLC, a Nevada limited  
liability company

Address of Premises: 4560 South Arville Street, C-23 & 24, Las Vegas,  
Nevada 89103

Paragraph 1.5

A. RENT ADJUSTMENTS:

The monthly rent for each month of the adjustment period(s) specified below shall be increased using the method(s) indicated below:  
(Check Method(s) to be Used and Fill in Appropriately)

☐ I. Cost of Living Adjustment(s) (COLA)

a. On (Fill in COLA Dates): May 1, 2018, and annually thereafter

the Base Rent shall be adjusted by the change, if any, from the Base Month specified below, in the Consumer Price Index of the Bureau of Labor Statistics of the U.S. Department of Labor for (select one): ☐ CPI W (Urban Wage Earners and Clerical Workers) or ☒ CPI U (All Urban Consumers),  
for (Fill in Urban Area):

Los Angeles-Riverside-Orange County

\_\_\_\_\_, All Items  
(1982-1984 = 100), herein referred to as "CPI".

b. The monthly rent payable in accordance with paragraph A.I.a. of this Addendum shall be calculated as follows: the Base Rent set forth in paragraph 1.5 of the attached Lease, shall be multiplied by a fraction the numerator of which shall be the CPI of the calendar month 2 months prior to the month(s) specified in paragraph A.I.a. above during which the adjustment is to take effect, and the denominator of which shall be the CPI of the calendar month which is 2 months prior to (select one): the ☒ first month of the term of this Lease as set forth in paragraph 1.3 ("Base Month") or ☐ (Fill in Other "Base Month"): \_\_\_\_\_. The sum so calculated shall constitute the new monthly rent hereunder, but in no event, shall any such new monthly rent be less than 110 percent (110%) of the rent payable for the month immediately preceding the rent adjustment.

\_\_\_\_\_  
INITIALS

MB  
INITIALS

c. In the event the compilation and/or publication of the CPI shall be transferred to any other governmental department or bureau or agency or shall be discontinued, then the index most nearly the same as the CPI shall be used to make such calculation. In the event that the Parties cannot agree on such alternative index, then the matter shall be submitted for decision to the American Arbitration Association in accordance with the then rules of said Association and the decision of the arbitrators shall be binding upon the parties. The cost of said Arbitration shall be paid equally by the Parties.

☐ II. Market Rental Value Adjustment(s) (MRV)

a. On (Fill in MRV Adjustment Date(s): \_\_\_\_\_)

the Base Rent shall be adjusted to the "Market Rental Value" of the property as follows:

1) Four months prior to each Market Rental Value Adjustment Date described above, the Parties shall attempt to agree upon what the new MRV will be on the adjustment date. If agreement cannot be reached within thirty days, then:

(a) Lessor and Lessee shall immediately appoint a mutually acceptable appraiser or broker to establish the new MRV within the next 30 days. Any associated costs will be split equally between the Parties, or

(b) Both Lessor and Lessee shall each immediately make a reasonable determination of the MRV and submit such determination, in writing, to arbitration in accordance with the following provisions:

(i) Within 15 days thereafter, Lessor and Lessee shall each select an ☐ appraiser or ☐ broker ("Consultant" - check one) of their choice to act as an arbitrator. The two arbitrators so appointed shall immediately select a third mutually acceptable Consultant to act as a third arbitrator.

(ii) The 3 arbitrators shall within 30 days of the appointment of the third arbitrator reach a decision as to what the actual MRV for the Premises is, and whether Lessor's or Lessee's submitted MRV is the closest thereto. The decision of a majority of the arbitrators shall be binding on the Parties. The submitted MRV which is determined to be the closest to the actual MRV shall thereafter be used by the Parties.

(iii) If either of the Parties fails to appoint an arbitrator within the specified 15 days, the arbitrator timely appointed by one of them shall reach a decision on his or her own, and said decision shall be binding on the Parties.

(iv) The entire cost of such arbitration shall be paid by the party whose submitted MRV is not selected, ie. the one that is NOT the closest to the actual MRV.

2) Notwithstanding the foregoing, the new MRV shall not be less than the rent payable for the month immediately preceding the rent adjustment.

b. Upon the establishment of each New Market Rental Value:

1) the new MRV will become the new "Base Rent" for the purpose of calculating any further Adjustments, and

2) the first month of each Market Rental Value term shall become the new 'Base Month' for the purpose of calculating any further Adjustments.

☒ III. Fixed Rental Adjustment(s) (FRA)

The Base Rent shall be increased to the following amounts on the dates set forth below:

On (Fill in FRA Adjustment Date(s)):

May 1, 2018 and annually  
thereafter  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The New Base Rent shall be:

Base Rent to increase by \$.025  
per square foot, or \$114.00  
per month  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

B. NOTICE:

Unless specified otherwise herein, notice of any such adjustments, other than Fixed Rental Adjustments, shall be made as specified in paragraph 23 of the Lease.

C. BROKER'S FEE:

The Brokers shall be paid a Brokerage Fee for each adjustment specified above in accordance with paragraph 15 of the Lease.

NOTE: These forms are often modified to meet changing requirements of law and needs of the industry. Always write or call to make sure

  
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## LEASE ADDENDUM

This Lease Addendum is made and entered into on this 20<sup>th</sup> day of April, 2017, and is hereby attached to and becomes a part of the Lease dated April 20, 2017 by and between 4520 ARVILLE, a California general partnership, and MCKINLEY MANOR, an Idaho general partnership, as tenants in Common, hereinafter referred to as "Lessor", and BOUR ENTERPRISES LLC, a Nevada limited liability company, hereinafter referred to as "Lessee".

### RECITALS:

WHEREAS, Lessee and Lessor desire to amend the Lease between the parties for the Premises known as 4560 South Arville Street, C-23 & 24, Las Vegas, Nevada 89103.

### TERMS:

NOW, THEREFORE, in consideration of the mutual promises and covenants contained in the Lease, and this Lease Addendum, the parties agree as follows:

1. Condition of Premises. Lessee hereby accepts the Premises in "as-is" condition with any additional alterations and improvements to be completed at Lessee's expense and in accordance with Section 7 of Lease.

2. Trash Disposal. In the areas where garbage dumpsters are provided within the Project, Lessee may utilize the dumpsters for waste paper and incidental trash only. Packing skids, boxes, and construction materials are not to be placed in or around dumpsters. It is the sole responsibility of Lessee to dispose of excessive trash and packaging materials away from the Project or to obtain Lessee's own dumpster at Lessee's own expense. Trash or materials stored outside of the Premises by Lessee, and not disposed of properly in a dumpster is prohibited, and Lessor shall have the right to charge Lessee for the cost of properly disposing of said trash or materials in addition to

any fine that the Lessor may levy against Lessee for such offense.

3. Lessee's Share. Lessee's Share of Common Area Operating Expenses to be paid by Lessee to Lessor shall be no less than \$.20 per square foot, per month, or Nine Hundred Twelve and No/00 Dollars (\$912.00), for the duration of the Term of the Lease.

4. Lessee's Vehicles. Lessee, at Lessee's cost, shall take all necessary precautions to protect the concrete slab and walls of the Premises from automotive spills of any chemicals or petroleum products which may come into contact with the floor or walls as a result of the operation of Lessee's business, and Lessee shall not leave Lessee's vehicles parked outside of the Premises in the parking areas overnight.

5. Rent Abatement. As consideration for Lessee's performance of all obligations to be performed by Lessee under the Lease, and provided Lessee is not in default of the Lease, Lessor shall credit Lessee's rental account Three Hundred Fifteen and 78/00 Dollars (\$315.78) for Month 1 of the Lease.

Except as amended by this Lease Addendum, all the provisions, terms and conditions of the Lease shall remain in full force and effect and the same is hereby ratified and confirmed.

*Signatures to follow*

Handwritten initials 'MB' and a signature.



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 be fully responsible for the cost thereof, and Lessee shall not have any right to terminate this Lease.

**2.4 Acknowledgements.** Lessee acknowledges that: (a) it has been advised by Lessor and/or Brokers to satisfy itself with respect to the 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, (b) 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, and (c) 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 be entitled to use the number of Unreserved Parking Spaces and Reserved Parking Spaces specified in Paragraph 1.2(b) on those portions of the Common Areas designated from time to time by Lessor for parking. Lessee shall not use more parking spaces than said number. Said parking spaces shall be used for parking by vehicles no larger than full-size passenger automobiles or pick-up trucks, herein called "Permitted Size Vehicles." 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.

(a) Lessee shall not permit or allow any vehicles that belong to or are controlled by Lessee or Lessee's employees, suppliers, shippers, customers, 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 Project and interior utility raceways and installations within the Unit 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 Project 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, 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 Project. 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. Any such storage shall be permitted only by the prior written consent of Lessor or Lessor's designated agent, which consent may be revoked at any time. In the event that any unauthorized storage 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 Project and their invitees. Lessee agrees to abide by and conform to all such Rules and Regulations, and 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 Project.

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

(a) To make changes 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, landscaped areas, walkways and utility raceways;

- (b) To close temporarily any of the Common Areas for maintenance purposes so long as reasonable access to the Premises remains available;
- (c) To designate other land outside the boundaries of the Project to be a part of the Common Areas;
- (d) To add additional buildings and improvements to the Common Areas;
- (e) To use the Common Areas while engaged in making additional improvements, repairs or alterations to the Project, or any portion thereof; and
- (f) To do and perform such other acts and make such other changes in, to or with respect to the Common Areas and Project as Lessor may, in the exercise of sound business judgment, deem to be appropriate.

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.** If Lessee totally or partially occupies the Premises prior to the Commencement Date, the obligation to pay Base Rent shall be abated for the period of such early possession. All other terms of this Lease (including but not limited to the obligations to pay Lessee's Share of Common Area Operating Expenses, Real Property Taxes and insurance premiums and to maintain the Premises) shall, however, be in effect during such period. 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 as agreed, Lessor shall not be subject to any liability therefor, nor shall such failure affect the validity of this Lease. Lessee shall not, however, be obligated to pay Rent or perform its other obligations until it receives possession of the Premises. If possession is not delivered within 60 days after the Commencement Date, 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. Except as otherwise provided, if possession is not tendered to Lessee by the Start Date and Lessee does not terminate this Lease, as aforesaid, 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 of the Premises is not delivered within 4 months 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 8.5). 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, Lessee's Share (as specified in Paragraph 1.6) 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 Project, including, but not limited to, the following:

- (i) The operation, repair and maintenance, in neat, clean, good order and condition 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, bumpers, irrigation systems, Common Area lighting facilities, fences and gates, elevators, roofs, and roof drainage systems.
  - (bb) Exterior signs and any tenant directories.
  - (cc) Any fire detection and/or sprinkler systems.
- (ii) The cost of water, gas, electricity and telephone to service the Common Areas and any utilities not separately metered.
- (iii) Trash disposal, pest control services, property management, security services, and the costs of any environmental inspections.
- (iv) Reserves set aside for maintenance and repair of Common Areas.
- (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) The cost of any Capital Expenditure to the Building or the Project not covered under the provisions of Paragraph 2.3 provided; however, that Lessor shall allocate the cost of any such Capital Expenditure 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 Expenditure in any given month.
- (ix) Any other services to be provided by Lessor that are stated elsewhere in this Lease to be a Common Area Operating Expense.

(b) Any Common Area Operating Expenses and Real Property Taxes that are specifically attributable to the Unit, the Building or to any other building in the Project or to the operation, repair and maintenance thereof, shall be allocated entirely to such Unit, Building, or other building. However, any Common Area Operating Expenses and Real Property Taxes that are not specifically attributable to the Building or to any other building or to the operation, repair and maintenance thereof, shall be equitably allocated by Lessor to all buildings in the Project.

(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 Project 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 shall be payable by Lessee within 10 days after a reasonably detailed statement of actual expenses is presented to Lessee. At Lessor's option, however, an amount may be estimated by Lessor from time to time of Lessee's Share of annual Common Area Operating Expenses and the same shall be payable monthly or quarterly, as Lessor shall designate, during each 12 month period of the Lease term, on the same day as the Base Rent is due hereunder. Lessor shall deliver to Lessee within 60 days after the expiration of each calendar year a reasonably detailed statement showing Lessee's Share of the actual Common Area Operating Expenses incurred during the preceding year. If Lessee's payments under this Paragraph 4.2(d) during the preceding year exceed Lessee's Share as indicated on such statement, Lessor shall credit the amount of such over-payment against Lessee's Share of Common Area Operating Expenses next becoming due. If Lessee's payments under this Paragraph 4.2(d) during the preceding year were less than Lessee's Share as indicated on such statement, Lessee shall pay to Lessor the amount of the deficiency within 10 days after delivery by Lessor to Lessee of the statement.

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. 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 charges which may be due.

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 due Lessor 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 14 days after the expiration or termination of this Lease, if Lessor elects to apply the Security Deposit only to unpaid Rent, and otherwise within 30 days after the Premises have been vacated pursuant to Paragraph 7.4(c) below, 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.** Lessee shall use and occupy the Premises only for the Agreed Use, or any other legal use which is reasonably comparable thereto, and for no other purpose. 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. 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 improvements on the Premises or the mechanical or electrical systems therein, and/or is not significantly more burdensome to the Premises. 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.

6.2 **Hazardous Substances.**

(a) **Reportable Uses Require Consent.** The term "Hazardous Substance" as used in this Lease shall mean any product,

   
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substance, or waste whose presence, use, maintenance, structure, 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 or 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, 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, 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 Project). 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 existed as a result of Hazardous Substances on the Premises prior to the Start Date 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 the Start Date, 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 the Premises, 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.

**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, 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 contamination 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.

**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.

(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, (iii) clarifiers, and (iv) any other equipment, if reasonably required by Lessor. However, Lessor reserves the right, upon notice to Lessee, to procure and maintain any or all of such service contracts, and if Lessor so elects, 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 reimburse Lessor for 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 (ie. 1/144th of the cost per month). Lessee shall pay interest on the unamortized balance at a rate that is commercially reasonable in the judgment of Lessor's accountants. Lessee may, however, 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, parkways, 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 lines, power panels, electrical distribution, security and fire protection systems, communication systems, 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 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, and the cumulative cost thereof during this Lease as extended does not exceed a sum equal to 3 month's 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) **Indemnification.** 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 90 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 this 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 Project) 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. 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, an "Additional Insured-Managers or Lessors of Premises Endorsement" and contain the "Amendment of the Pollution Exclusion Endorsement" for damage caused by heat, smoke or fumes from a hostile fire. 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. All insurance carried by Lessee 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 therein.

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

(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 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 under Paragraph 8.4. 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 flood 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 \$1,000 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 Project 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.**

(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) **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 duly licensed or admitted to transact business in the state where the Premises are located, and maintaining during the policy term a "General Policyholders Rating" of at least B+, V, 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 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 30 days prior to the expiration of such policies, furnish Lessor with evidence of renewals 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

  
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companies may have against Lessor or Lessee, in any 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 from Liability.** Lessor shall not be liable for 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, 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, or from other sources or places. Lessor shall not be liable for any damages arising from any act or neglect of any other tenant of Lessor nor from the failure of Lessor to enforce the provisions of any other lease in the Project. Notwithstanding Lessor's negligence or breach of this Lease, Lessor shall under no circumstances be liable for injury to Lessee's business or for any loss of income or profit therefrom.

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 month's 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.

(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 month's 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 as defined in Paragraph 6.2(a), in, on, or under the Premises.

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 Lessor's election, make the repair of any damage or destruction the total cost to repair of which is \$5,000 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 Insuring 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.

  
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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 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 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.

**9.7 Termination; Advance Payments.** Upon termination of this Lease pursuant to Paragraph 6.2(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.

**9.8 Waive Statutes.** Lessor and Lessee agree that the terms of this Lease shall govern the effect of any damage to or destruction of the Premises with respect to the termination of this Lease and hereby waive the provisions of any present or future statute to the extent inconsistent herewith.

**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 Project, 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 Project 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 Project is located. The term "Real Property Taxes" shall also include any tax, fee, levy, assessment or charge, or any increase therein, imposed by reason of events occurring during the term of this Lease, including but not limited to, a change in the ownership of the Project or any portion thereof or a change in the improvements thereon. 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.** Lessor shall pay the Real Property Taxes applicable to the Project, and except as otherwise provided in Paragraph 10.3, any such amounts 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 Project 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.

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.** 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. 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 dumpster and/or an increase in the number of times per month that the dumpster is emptied, then Lessor may increase Lessee's Base Rent by an amount equal to such increased costs.

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, "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) A change in the control of Lessee shall constitute an assignment requiring consent. The transfer, on a cumulative basis, of 25% 51% 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 to 110% of the Base Rent 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 Lessor shall be limited to compensatory damages and/or injunctive relief.

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 Lessee'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 \$1,000 or 10% of the current monthly Base Rent applicable to the portion of the Premises which is the subject of the proposed assignment or sublease, whichever is greater, 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.

(f) Any assignee of, or sublessee under, this Lease shall, by reason of accepting such assignment or entering into such

sublease, 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. 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 prepaid rents 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 abandonment of the Premises; or the vacating of the Premises without providing a commercially reasonable level of security, or where the coverage of the property insurance described in Paragraph 8.3 is jeopardized as a result thereof, or without providing reasonable assurances to minimize potential vandalism.

(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.

(c) 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, (v) a requested subordination, (vi) evidence concerning any guaranty and/or Guarantor, (vii) any document requested under Paragraph 41 (easements), or (viii) 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.

(d) A Default by Lessee as to the terms, covenants, conditions or provisions of this Lease, or of the rules adopted under Paragraph 2.9 hereof, other than those described in subparagraphs 13.1(a), (b) or (c), 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.

(e) 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 (e) is contrary to any applicable law, such provision shall be of no force or effect, and not affect the validity of the remaining provisions.

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

(g) 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 this 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,

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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. The costs and expenses of any such performance by Lessor shall be due and payable by Lessee upon receipt of invoice therefor. If any check given to Lessor by Lessee shall not be honored by the bank upon which it is drawn, Lessor, at its option, may require all future payments to be made by Lessee to be by cashier's check. 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 loss 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 loss 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 damages under Paragraph 12. 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 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. 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 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) 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 equal to the prime rate reported in the Wall Street Journal as published closest prior to the date when due plus 4%, 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 an amount equal to the greater of one month's Base Rent or the Security Deposit, and to pay an excess of such expense under protest, reserving Lessee's right to reimbursement from Lessor. 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 Unit, or more than 25% of Lessee's Reserved Parking Spaces, 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 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 and Utility 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.** In addition to the payments owed pursuant to Paragraph 1.10 above, and unless Lessor and the Brokers otherwise agree in writing, Lessor agrees that: (a) if Lessee exercises any Option, (b) if Lessee acquires from Lessor any rights to the Premises or other premises owned by Lessor and located within the Project, (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 of the Brokers in effect at the time of the execution of this Lease.

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 1.10, 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 finder (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.

(c) If Lessor desires to finance, refinance, or sell the Premises, or any part thereof, Lessee and all Guarantors shall 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 in 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. Except as provided in Paragraph 15, 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. Notwithstanding the above, and subject to the provisions of Paragraph 20 below, the original Lessor under this Lease, and all subsequent holders of the Lessor's interest in this Lease shall remain liable and responsible with regard to the potential duties and liabilities of Lessor pertaining to Hazardous Substances as outlined in Paragraph 6.2 above.

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.** Subject to the provisions of Paragraph 17 above, the obligations of Lessor under this Lease shall not constitute personal obligations of Lessor, the individual partners of Lessor or its or their individual partners, 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 the individual partners of Lessor, or its or their individual partners, 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. The liability (including court costs and attorneys' fees), of any Broker with respect to negotiation, execution, delivery or performance by either Lessor or Lessee under this Lease or any amendment or modification hereto shall be limited to an amount up to 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.

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 48 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 guarantee 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 or mail. If notice is received on a Saturday, Sunday or legal holiday, it shall be deemed received on the next business day.

24. **Waivers.** 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. 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, which 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.

25. **Disclosures Regarding The Nature of a Real Estate Agency Relationship.** (See attached Duties Owed by a Nevada Real Estate Licensee)

(a) ~~When entering into a discussion with a real estate agent regarding a real estate transaction, a Lessor or Lessee should from the outset 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 fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Lessor. **To the Lessee and the Lessor:** (a) Diligent exercise of reasonable skills and care in performance of the agent's duties. (b) A duty of honest and fair dealing and good faith. (c) 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 fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Lessee. **To the Lessee and the Lessor:** (a) Diligent exercise of reasonable skills and care in performance of the agent's duties. (b) A duty of honest and fair dealing and good faith. (c) 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 licenses, 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 liability (including court costs and attorneys' fees), of any Broker with respect to any breach of duty, error or omission relating to this Lease 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) Buyer and Seller 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 shall be increased to 150% of the Base Rent 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; Attornment; 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 recordation thereof.

30.2 **Attornment.** 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,

attorn 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 such new owner, this Lease shall automatically become a new Lease between Lessee and such new owner, upon all of the terms and conditions hereof, for the remainder of the term hereof, and (ii) Lessor shall thereafter be relieved of any further obligations hereunder and such new owner shall assume all of Lessor's obligations hereunder, except that such new owner shall not: (a) 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.

**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 attorns to the record owner of the Premises. Further, within 60 days after the execution of this Lease, Lessor shall 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, attornment 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 therewith, whether or not a legal action is subsequently commenced in connection with such Default or resulting 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 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. All such activities shall be without abatement of rent or liability to Lessee. Lessor may at any time place on the Premises any ordinary "For Sale" signs and Lessor may during the last 6 months of the term hereof place on the Premises any ordinary "For Lease" signs. Lessee may at any time place on the Premises any ordinary "For Sublease" sign.

**33. Auctions.** Lessee shall not conduct, nor permit to be conducted, any auction upon the Premises without Lessor's prior written consent. Lessor shall not be obligated to exercise any standard of reasonableness in determining whether to permit an auction.

**34. Signs.** Except for ordinary "For Sublease" signs which may be placed only on the Premises, Lessee shall not place any sign upon the Project without Lessor's prior written consent. All signs must comply with all Applicable Requirements.

**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 or 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. 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 or 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 to 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, any, shall each execute a guaranty in the form most recently published by the AIR Commercial Real Estate Association, and each such Guarantor shall have the same obligations as Lessee under this Lease.

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, Lessee 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 the term of or renew this Lease or to extend 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 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, (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), (ii) Lessor gives to Lessee 3 or more notices of separate Default during any 12 month period, whether or not the Defaults are cured, or (iii) 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.

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, (ii) to cause the recordation of parcel maps and restrictions, and (iii) to create and/or install new utility raceways, so long as such easements, rights, dedications, maps, restrictions, and utility raceways 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. **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.

43. **Authority.** 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.

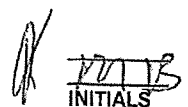
44. **Conflict.** Any conflict between the printed provisions of this Lease and the typewritten or handwritten provisions shall be controlled by the typewritten or handwritten provisions.

45. **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.

46. **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.

47. **Multiple Parties.** If more than one person or entity is named herein as either Lessor or Lessee, such multiple Parties shall have joint and several responsibility to comply with the terms of this Lease.

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.

  
INITIALS

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

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. SEEK 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.

Execute at: 7674 West Lake Mead Boulevard, 104

Executed at: \_\_\_\_\_

On: \_\_\_\_\_

on: \_\_\_\_\_

By LESSOR:

4520 ARVILLE  
MCKINLEY MANOR

By LESSEE:

BOUR ENTERPRISES LLC,  
a Nevada limited liability company

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

Name Printed: Kevin J. Donahoe

Title: Owner Agent

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

Name Printed: Mulgeta Bour

Title: Manager

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

Name Printed: \_\_\_\_\_

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

Address: 7674 W. Lake Mead Blvd., 104  
Las Vegas, NV 89128

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

Name Printed: \_\_\_\_\_

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

Address: 4560 S. Arville Street, #23  
Las Vegas, NV 89103

Telephone: (702) 364-0909

Facsimile: (702) 364-5885

Federal ID No. 95-4590150

Telephone: (702) 808-2047

Facsimile: ( )

Federal ID No. \_\_\_\_\_

These forms are often modified to meet changing requirements of law and needs of the industry. Always write or call to make sure you are utilizing the most current form: AIR Commercial Real Estate Association, 700 South Flower Street, Suite 600, Los Angeles, CA 90017. (213) 687-8777.

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\_\_\_\_\_  
INITIALS

PAGE 3 OF 3

 mb  
INITIALS  
FORM RA-3-8/00E

45621

N 89° 50' 20" E 055.66'

ARVILLE STREET

N 3rd St 10' W

FLAMINGO WASH.

PLANTER

PARCEL NO. 140-330-180

PARCEL NO. 140-330-023

BUILDING A

BUILDING B

BUILDING C

055.16' S 89° 42' 29" E

055.40' S 0° 34' 20" E



$\angle = 40^\circ 0'$

*g. m. B*

## **Exhibit B**

### **SIGNAGE CRITERIA**

This criterion is being established to provide Lessee with signage specifications for signage conformity throughout the Project. This criterion shall be strictly enforced and any non-conforming or unapproved signage must be removed or brought into conformance within ten (10) days of Lessor's request, at the expense of the Lessee.

#### **General Specification**

1. Lessor shall determine approved signage location to Lessee upon request of Lessee.
2. Signage copy to be individual cut out letters, white in color, and affixed on the building without penetrating the surface of the building. Letters shall not to exceed three (3) feet in height.
3. Only established trade names shall be displayed.
4. Sign design, materials, copy and placement to be approved by Lessor in writing prior to installation. Lessee shall deliver to Lessor two (2) sets of plans for Lessor's approval.

#### **General Construction Requirements**

1. Lessee shall be responsible for contracting for the installation and maintenance of Lessee's signage.
2. Lessee shall be responsible for the actions of Lessee's sign contractor or vendor.
3. Lessee's sign contractor or vendor shall repair any damage to any portion of the Building structure or fascia caused by said contractor or vendor's work.
4. No signage of any type shall be directly painted on the exterior walls of the Building.
5. Sign contractor or vendor shall contact Lessor prior to commencement of any work so Lessor may inspect sign materials to insure conformance with approved drawings.
6. Lessee to pay for the cost of sign removal and building restoration at the time Lessee vacates the Premises.
7. Sign contractor or vendor shall carry Workmen's compensation and public liability insurance against all damage suffered or done to any and all persons and/or property while engaged in the installation of signage. Said insurance coverage shall be a minimum of \$1,000,000.00. A copy of the policy or certificate of insurance naming Lessor as additional insured shall be delivered to Lessor prior to signage installation.

MB  
AK

IN WITNESS WHEREOF, the parties hereto have executed this Lease Addendum  
as of this date.

**LESSOR:**

**4520 ARVILLE, a California general  
partnership, and MCKINLEY MANOR,  
an Idaho general partnership,  
as tenants in common**

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

Kevin J. Donahoe

Its: Owner Agent

**LESSEE:**

**BOUR ENTERPRISES LLC,  
a Nevada limited liability company**

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

Mulugeta Bour

Its: Manager



## AIR COMMERCIAL REAL ESTATE ASSOCIATION GUARANTY OF LEASE

WHEREAS, 4520 ARVILLE, a California general partnership and MCKINLEY MANOR, an Idaho general partnership, as tenants in common, hereinafter "Lessor", and BOUR ENTERPRISES LLC, a Nevada limited liability company, hereinafter "Lessee", are about to execute a document entitled "Lease" dated April 20, 2017 concerning the premises commonly known as 4560 South Arville Street, C-23 & 24, Las Vegas, Nevada 89103 wherein Lessor will lease the premises to Lessee, and

WHEREAS, MULUGETA BOUR, an individual, and HILENA MENGESHA, an individual hereinafter "Guarantors" have a financial interest in Lessee, and

WHEREAS, Lessor would not execute the Lease if Guarantors did not execute and deliver to Lessor this Guarantee of Lease.

NOW THEREFORE, in consideration of the execution of the foregoing Lease by Lessor and as a material inducement to Lessor to execute said Lease, Guarantors hereby jointly, severally, unconditionally and irrevocably guarantee the prompt payment by Lessee of all rents and all other sums payable by Lessee under said Lease and the faithful and prompt performance by Lessee of each and every one of the terms, conditions and covenants of said Lease to be kept and performed by Lessee.

It is specifically agreed that the terms of the foregoing Lease may be modified by agreement between Lessor and Lessee, or by a course of conduct, and said Lease may be assigned by Lessor or any assignee of Lessor without consent or notice to Guarantors and that this Guaranty shall guarantee the performance of said Lease as so modified.

This Guaranty shall not be released, modified or affected by the failure or delay on the part of Lessor to enforce any of the rights or remedies of the Lessor under said Lease, whether pursuant to the terms thereof or at law or in equity.

No notice of default need be given to Guarantors, it being specifically agreed that the guarantee of the undersigned is a continuing guarantee under which Lessor may proceed immediately against Lessee and/or against Guarantors following any breach or default by Lessee or for the enforcement of any rights which Lessor may have as against Lessee under the terms of the Lease or at law or in equity.

Lessor shall have the right to proceed against Guarantors hereunder following any breach or default by Lessee without first proceeding against Lessee and without previous notice to or demand upon either Lessee or Guarantors.

Guarantors hereby waive (a) notice of acceptance of this Guaranty, (b) demand of payment, presentation and protest, (c) all right to assert or plead any statute of limitations relating to this Guaranty or the Lease, (d) any right to require the Lessor to proceed against the Lessee or any other Guarantor or any other person or entity liable to Lessor, (e) any right to require Lessor to apply to any default any security deposit or other security it may hold under the Lease, (f) any right to require Lessor to proceed under any other remedy Lessor may have before proceeding against Guarantors, (g) any right of subrogation.

Guarantors do hereby subrogate all existing or future indebtedness of Lessee to Guarantors to the obligations owed to Lessor under the Lease and this Guaranty.

If a Guarantor is married, such Guarantor expressly agrees that recourse may be had against his or her separate property for all of the obligations hereunder.

The obligations of Lessee under the Lease to execute and deliver estoppel statements and financial statements, as therein provided, shall be deemed to also require the Guarantors hereunder to do and provide the same.

The term "Lessor" refers to and means the Lessor named in the Lease and also Lessor's successors and assigns. So long as Lessor's interest in the Lease, the leased premises or the rents, issues and profits therefrom, are subject to any mortgage or deed of trust or assignment for security, no acquisition by Guarantors of the Lessor's interest shall affect the continuing obligation of Guarantors under this Guaranty which shall nevertheless continue in full force and effect for the benefit of the mortgagee, beneficiary, trustee or assignee under such mortgage, deed of trust or

*MJB*  
*JK*

assignment and their successors and assigns.

The term "Lessee" refers to and means the Lessee named in the Lease and also Lessee's successors and assigns.

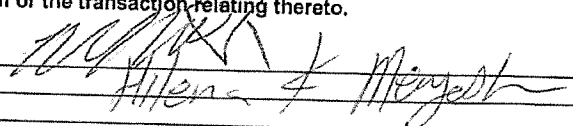
In the event any action be brought by said Lessor against Guarantors hereunder to enforce the obligation of Guarantors hereunder, the unsuccessful party in such action shall pay to the prevailing party therein a reasonable attorney's fee which shall be fixed by the court.

If this Form has been filled in, it has been prepared for submission to your attorney for his approval. No representation or recommendation is made by the AIR Commercial Real Estate Association, the real estate broker or its agents or employees as to the legal sufficiency, legal effect, or tax consequences of this Form or the transaction relating thereto.

Executed at: \_\_\_\_\_

On: \_\_\_\_\_

Address: \_\_\_\_\_

  
\_\_\_\_\_  
Hilena & Margaret

"GUARANTORS"



## DUTIES OWED BY A NEVADA REAL ESTATE LICENSEE

*This form does not constitute a contract for services nor an agreement to pay compensation.*

In Nevada, a real estate licensee is required to provide a form setting forth the duties owed by the licensee to:

- Each party for whom the licensee is acting as an agent in the real estate transaction, and
- Each unrepresented party to the real estate transaction, if any.

**Licensee:** The licensee in the real estate transaction is David Burns  
whose license number is S.11034. The licensee is acting for [client's name(s)] \_\_\_\_\_  
4520 Arville and McKinley Manor who is/are the ☒ Seller/Landlord; ☐ Buyer/Tenant.  
**Broker:** The broker is Kevin Donahoe, whose  
company is Commercial Specialists.

### Licensee's Duties Owed to All Parties:

A Nevada real estate licensee shall:

- Not deal with any party to a real estate transaction in a manner which is deceitful, fraudulent or dishonest.
- Exercise reasonable skill and care with respect to all parties to the real estate transaction.
- Disclose to each party to the real estate transaction as soon as practicable:
  - Any material and relevant facts, data or information which licensee knows, or with reasonable care and diligence the licensee should know, about the property.
  - Each source from which licensee will receive compensation.
- Abide by all other duties, responsibilities and obligations required of the licensee in law or regulations.

### Licensee's Duties Owed to the Client:

A Nevada real estate licensee shall:

- Exercise reasonable skill and care to carry out the terms of the brokerage agreement and the licensee's duties in the brokerage agreement;
- Not disclose, except to the licensee's broker, confidential information relating to a client for 1 year after the revocation or termination of the brokerage agreement, unless licensee is required to do so by court order or the client gives written permission;
- Seek a sale, purchase, option, rental or lease of real property at the price and terms stated in the brokerage agreement or at a price acceptable to the client;
- Present all offers made to, or by the client as soon as practicable, unless the client chooses to waive the duty of the licensee to present all offers and signs a waiver of the duty on a form prescribed by the Division;
- Disclose to the client material facts of which the licensee has knowledge concerning the real estate transaction;
- Advise the client to obtain advice from an expert relating to matters which are beyond the expertise of the licensee; and
- Account to the client for all money and property the licensee receives in which the client may have an interest.

**Duties Owed By a broker who assigns different licensees affiliated with the brokerage to separate parties.**  
Each licensee shall not disclose, except to the real estate broker, confidential information relating to client.

### Licensee Acting for Both Parties:

The Licensee

MAY [ ] **OR** MAY NOT [ ]  
in the future act for two or more parties who have interests adverse to each other. In acting for these parties, the licensee has a conflict of interest. Before a licensee may act for two or more parties, the licensee must give you a "Consent to Act" form to sign.

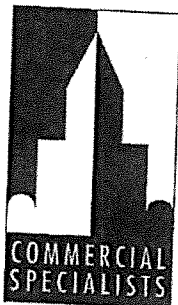
**I/We acknowledge receipt of a copy of this list of licensee duties, and have read and understand this disclosure.**

Seller/Landlord: \_\_\_\_\_ Date: 4/24/17 Time: 12:00 PM

Seller/Landlord: \_\_\_\_\_ **OR** \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_

Buyer/Tenant: \_\_\_\_\_ Date: 4-21-17 Time: \_\_\_\_\_

Buyer/Tenant: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_



# Application to Lease Space

## Confidential

PLEASE PRINT OR TYPE ALL INFORMATION REQUESTED

Address Of Property To Be Leased: 4560 S. Arville St., Suite C03 LV NV 89102

Company Name: BOUR Enterprise

Business Specialization: Transportation

Years In Business: 3 years

Business Address: \_\_\_\_\_

City: Las Vegas

State: NV

Zip Code: 89103

Contact Name: MUUGETA BOUR

E-mail: TonyBOUR2@gmail.com

Telephone: (702) 808-2047

Cellular: (702) 808-2047

Fax: \_\_\_\_\_

**Type of Business:**

☐ Sole Proprietor ☐ Partnership ☐ Corporation/State of: \_\_\_\_\_ ☐ Limited Liability Company/State of: \_\_\_\_\_

Business License #: 04302017

State License #: \_\_\_\_\_

State of Issuance: NV

**Current Landlord Information:**

Landlord Name: \_\_\_\_\_

Contact Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

**Principal(s) of Company:**

Name: MUUGETA BOUR

Title: Owner

Social Security #: \_\_\_\_\_

Home Address: \_\_\_\_\_

401 Via Salvon Dr. Henderson NV

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

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

Social Security #: \_\_\_\_\_

Home Address: \_\_\_\_\_

**Banking Information:**

Financial Institution: \_\_\_\_\_

CHASE

Branch Address: \_\_\_\_\_

10624 S. Eastern Ave. Henderson NV 89052

Branch Telephone: \_\_\_\_\_

(702) 914-1660

Contact Name: \_\_\_\_\_

Type of Account(s): \_\_\_\_\_

Checking

Account Number(s): \_\_\_\_\_

In compliance with the State and Federal laws, this is to inform you that an investigation involving the statements made on your application for tenancy at the above-mentioned property is being initiated. You have the right to dispute the information reported. All or part of the above information may be made available to other services unless this line \_\_\_\_\_ is checked. I/We certify that to the best of my/our knowledge all statements are true and complete. I/We further authorize and Commercial Specialists to obtain credit reports, character reports, verification of rental history and employment history as necessary to verify all information put forth in the above referenced application for tenancy. False, fraudulent or misleading information may be grounds for denial of tenancy, or subsequent eviction. I am aware that an incomplete application causes a delay in processing and may result in denial of tenancy.

Principal Signature

Date

Principal Signature

Date

## **EXHIBIT 3**

**BOUR ENTERPRISES LLC**  
4560 S. ARVILLE SUITE C 24-23/C-10-29  
LAS VEGAS, NEVADA 89103  
702-808-2047

RECEIVED APR 20 2018

April 17, 2018

Re: Termination of Lease  
4560 S. ARVILLE SUITE C 24-23/C 10-29


Dear Sir/Madam

Let this notice serve as our official notice of terminating the lease. As you are aware the facility is inhabitable. I have had two employees that have had to seek medical attention due the amount of dust and debris at the location. In addition to the air quality the facility is infested with rodents which are leaving rat and mice urine and excrement which again, is extremely unhealthy and sanitary. Per our previous conversations, I understand your position that I took the facility as is, however you have the obligation to perform as well. I pay a common area fee for the maintenance and upkeep of the surrounding areas however you have failed to do so.

In addition to the unsanitary condition of the property, I have nowhere to park my vehicles. When we took on the facility you verbally told me that my parking arrangements would be satisfied. Now that I require additional space you now indicate that is not an option. There are so many different companies located in the facility it is almost impossible for my vehicles to park and navigate through the parking lot in a safe manner, which is impeding my ability to generate income.

In closing, rather than spending money on attorneys I would propose that we come to an agreement whereas I will pay you one extra month's rent and I allow you to retain my security deposit. You verbally agreed and acknowledged that I can terminate my lease without any repercussions and I am disheartened by your actions. Should we not come to an agreement I will be forced to take legal actions to release me from the contract and to recover the loss of income as a direct result of your negligence.

Please contact me upon receipt

  
Tony Bour  
Bour Enterprises

## **EXHIBIT 4**



HOLLEY•DRIGGS•WALCH  
FINE•WRAY•PUZEY•THOMPSON

PLEASE REPLY TO LAS VEGAS OFFICE  
WRITER'S EMAIL: TEDWARDS@NEVADAFIRM.COM

April 24, 2018

***Via Email and U.S. Mail, Regular and Certified, Return Receipt Requested***

Bour Enterprises, LLC  
4560 S. Arville Suite C 23 & 24/C 10 & 29  
Las Vegas, Nevada 89103  
tonybour4@gmail.com

Mulugeta Bour  
Hilena Mengesha  
1401 Via Savona Drive  
Henderson, Nevada 89052

RE: Leases for 4560 S. Arville Suite C 23 & 24/C 10 & 29 (the "Premises") and related personal guaranties

To whom it may concern:

4520 Arville, a California general partnership, and McKinley Manor, an Idaho general partnership (the "Lessors") retained this law firm with respect to Bour Enterprises, LLC's (the "Lessee") leases of the Premises (the "Leases") and the personal guaranties of the Leases by Mulugeta Bour and Hilena Mengesha (the "Guarantors"). If you have retained legal counsel with regard to these issues, please advise so that I may communicate with him or her directly.

We received your April 17, 2018 letter purporting to terminate the Leases because of dust and debris, rodents and lack of sufficient parking for your expanding business. Your legal and factual assertions in the letter are simply false. You are bound to the terms of the Leases, and Lessors intend to hold Lessee and Guarantors strictly liable for their obligations under the Leases.

First, you do not have the legal right to unilaterally terminate the Leases. Section 4.3 of the Leases expressly states that you must comply with your payment obligations "without offset or deduction." If you wish to cease your payment obligations under the Leases, you are welcome to file a lawsuit asking a judge to relieve you of those payment obligations. Until a judge so rules, you must continue making payments under the Leases.

Second, pursuant to the Lease Addendums of the Leases, you accepted the Premises in an "as-is" condition. Accordingly, your complaints about the condition of the Premises are meaningless. Moreover, Section 7.1(a) of the Leases states that "Lessee shall, at lessee's sole expense, keep the Premises . . . in good order, condition and repair." Therefore, to the extent there are issues with the condition of the Premises, it is your responsibility to remedy those issues at your sole expense.

Third, the Leases expressly provide that you are only entitled to a total of eight (8) unreserved parking spaces. Section 2.6 of the Leases provides that "Lessee shall not use more parking spaces than said number." Therefore, the Lessors are entirely within their rights to deny your request for additional space and additional parking to accommodate your newly acquired taxi cab business.

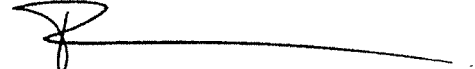
Fourth, your letter implies that statements by Lessors have, in some way, modified the obligations or rights under the Leases. However, Section 46 of the Leases states: "This Lease may be modified only in writing, signed by the Parties in interest at the time of the modification." Therefore, you are bound to the terms of the Leases and your allegations about verbal agreements are irrelevant.

Please note that because of your breach of the Leases, you will incur late charges of 10% of the overdue amount and interest at 8.75% pursuant to Sections 13.5 and 13.6 of the Leases. You will be required to repay all free rent provided under the Leases pursuant to Section 13.3 of the Leases. You will be required to pay all expenses incurred in reletting the Premises including, without limitation, renovation or alteration of the Premises and any leasing commissions pursuant to Section 13.2(a) of the Leases. Finally, you will be required to pay the Lessors' attorney fees and costs pursuant to Section 31 of the Leases. As you can see, the amount you owe to Lessors will grow quickly. The Lessors are prepared to hold Lessee and the Guarantors strictly liable for all of these obligations. Govern yourself accordingly.

This letter is not intended to be an exhaustive statement of all potential claims or defaults, and our investigation into this matter is continuing. Nothing herein is intended to waive any of our clients' rights, all of which are hereby expressly reserved.

Sincerely,

HOLLEY DRIGGS WALCH  
FINE WRAY PUZEY & THOMPSON



F. Thomas Edwards

FTE:fte



# **EXHIBIT 5**



May 3, 2018

David E. Burns  
Executive Vice-President

7674 West Lake-Mead Boulevard, Suite 104  
Las Vegas, Nevada 89128  
702.364.0909  
702.364.5885 Fax  
dburns@commercialspecialists.com

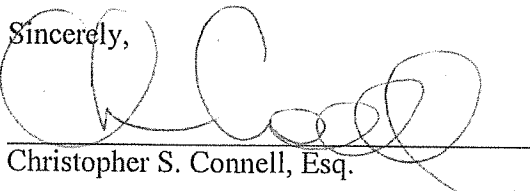
**Re: Stardust Limousine – 4560 S. Arville St., Units C-23 and C-24, Las Vegas NV**

Good afternoon, Mr. Burns:

This office represents Tony Bour. This letter is sent to address Mr. Bour's Commercial Rental Agreement relating to the leased premise located at 4560 S. Arville St., C-23 & C-24 89103 ("hereinafter the "Unit"). From the inception of my client's leasing of the Unit, there have been several issues relating to the fitness and habitability of the space. Prior to my client's leasing of the Unit, upon information and belief, there was a tile cutting business in the space. As you can see from the attached pictures, the space is covered in mounds of particulate and dust which has created, and continues to create, a serious health hazard to my client and his customers.

It is the intent of my client to vacate the Unit immediately due to safety concerns. Please send confirmation that the Lessor and its agents agree to these terms, and that Mr. Bour's lease term shall expire on May 31, 2018 as requested herein. My client is attempting to mitigate his damages, both physical and economic, relating to Unit. If you are unable to agree to these terms, my client will pursue all available legal actions against you. I look forward to your immediate and professional attention to this matter.

Sincerely,



Christopher S. Connell, Esq.

---

<sup>1</sup> Please see the attached pictures of the Unit, enclosed.





## **EXHIBIT 6**

# Tenant Ledger

**Bour Enterprises LLC**  
**1401 Via Savona Drive**  
**Henderson, NV 89052**

Date: 05/14/19  
 Tenant Code: zbour1  
 Property: arv  
 Unit: C23  
 Status: Past  
 Rent: 2,052.00  
 Deposit: 0.00  
 Move In Date: 05/01/17  
 Move Out Date: 05/31/19  
 Due Day: 1  
 Tel# (O)  
 Tel# (H)

Date	Description	Charges	Payments	Balance
	Balance Forward			0.00
04/24/17	Security Deposit	2,736.00		2,736.00
04/25/17	chk# 295		2,736.00	0.00
05/01/17	Rent	1,824.00		1,824.00
05/01/17	Common Area Maintenance	912.00		2,736.00
05/01/17	Rent Concession	-315.78		2,420.22
05/30/17	chk# 248		2,420.00	0.22
06/01/17	Rent	1,824.00		1,824.22
06/01/17	Common Area Maintenance	912.00		2,736.22
06/08/17	chk# 1570		2,736.22	0.00
07/01/17	Rent	1,824.00		1,824.00
07/01/17	Common Area Maintenance	912.00		2,736.00
07/12/17	chk# 629		2,736.00	0.00
08/01/17	Rent	1,824.00		1,824.00
08/01/17	Common Area Maintenance	912.00		2,736.00
08/08/17	chk# 655		2,736.00	0.00
09/01/17	Rent	1,824.00		1,824.00
09/01/17	Common Area Maintenance	912.00		2,736.00
09/14/17	Late Fee	273.60		3,009.60
09/14/17	chk# 103 Reversed by ctrl#8361		2,736.00	273.60
09/20/17	Returned check charge	55.00		328.60
09/20/17	chk# 103 NSF receipt Ctrl# 8345		-2,736.00	3,064.60
09/22/17	chk# 695		2,736.00	328.60
10/01/17	Rent	1,824.00		2,152.60
10/01/17	Common Area Maintenance	912.00		3,064.60
10/13/17	Late Fee	273.60		3,338.20
10/16/17	chk# 661		2,736.11	602.09
11/01/17	Rent	1,824.00		2,426.09
11/01/17	Common Area Maintenance	912.00		3,338.09
11/07/17	chk# 402		2,736.00	602.09
12/01/17	Rent	1,824.00		2,426.09
12/01/17	Common Area Maintenance	912.00		3,338.09
12/13/17	chk# 1696		2,736.00	602.09
01/01/18	Rent	1,824.00		2,426.09
01/01/18	Common Area Maintenance	912.00		3,338.09
01/11/18	chk# 1904		3,338.00	0.09

CONTINUED

# Tenant Ledger

**Bour Enterprises LLC**  
**1401 Via Savona Drive**  
**Henderson, NV 89052**

Date: 05/14/19  
 Tenant Code: zbour1  
 Property: arv  
 Unit: C23  
 Status: Past  
 Rent: 2,052.00  
 Deposit: 0.00  
 Move In Date: 05/01/17  
 Move Out Date: 05/31/19  
 Due Day: 1  
 Tel# (O)  
 Tel# (H)

Date	Description	Charges	Payments	Balance
	Balance Forward			0.09
02/01/18	January 2018 CAM Increase	91.20		91.29
02/01/18	Rent	1,824.00		1,915.29
02/01/18	Common Area Maintenance	1,003.20		2,918.49
02/08/18	chk# 1959		2,827.00	91.49
03/01/18	Rent	1,824.00		1,915.49
03/01/18	Common Area Maintenance	1,003.20		2,918.69
03/12/18	chk# 2015		2,918.69	0.00
04/01/18	Rent	1,824.00		1,824.00
04/01/18	Common Area Maintenance	1,003.20		2,827.20
04/17/18	chk# 3035		2,827.20	0.00
05/01/18	Annual Security Deposit Upgrade	205.20		205.20
05/01/18	Rent	1,938.00		2,143.20
05/01/18	Common Area Maintenance	1,003.20		3,146.40
05/11/18	Late Fee	314.64		3,461.04
06/01/18	Rent	1,938.00		5,399.04
06/01/18	Common Area Maintenance	1,003.20		6,402.24
06/12/18	Late Fee	640.22		7,042.46
07/01/18	Rent (07/2018)	1,938.00		8,980.46
07/01/18	Common Area Maintenance	1,003.20		9,983.66
07/12/18	Late Fee	998.37		10,982.03
08/01/18	Rent (08/2018)	1,938.00		12,920.03
08/01/18	Common Area Maintenance	1,003.20		13,923.23
08/10/18	Late Fee	1,392.32		15,315.55
09/01/18	Rent (09/2018)	1,938.00		17,253.55
09/01/18	Common Area Maintenance	1,003.20		18,256.75
09/07/18	chk# 2746 Paid by Mengeal		6,365.00	11,891.75
09/12/18	Late Fee	1,189.18		13,080.93
10/01/18	Rent (10/2018)	1,938.00		15,018.93
10/01/18	Common Area Maintenance	1,003.20		16,022.13
10/11/18	Late Fee	1,602.21		17,624.34
11/01/18	Rent (11/2018)	1,938.00		19,562.34
11/01/18	Common Area Maintenance	1,003.20		20,565.54
11/12/18	Late Fee	2,056.65		22,622.19
11/12/18	Correct Late Fee	-0.10		22,622.09
12/01/18	Rent (12/2018)	1,938.00		24,560.09

CONTINUED



# Tenant Ledger

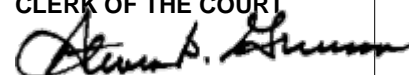
**Bour Enterprises LLC**  
**1401 Via Savona Drive**  
**Henderson, NV 89052**

Date: 05/14/19  
 Tenant Code: zbour1  
 Property: arv  
 Unit: C23  
 Status: Past  
 Rent: 2,052.00  
 Deposit: 0.00  
 Move In Date: 05/01/17  
 Move Out Date: 05/31/19  
 Due Day: 1  
 Tel# (O)  
 Tel# (H)

Date	Description	Charges	Payments	Balance
	Balance Forward			24,560.09
12/01/18	Common Area Maintenance	1,003.20		25,563.29
12/12/18	Late Fee	2,556.34		28,119.63
12/12/18	Correct Late Fee	-0.01		28,119.62
01/01/19	Rent (01/2019)	1,938.00		30,057.62
01/01/19	Common Area Maintenance	1,003.20		31,060.82
01/14/19	Late Fee	3,106.09		34,166.91
01/14/19	Correct Late Fee	-0.01		34,166.90
02/01/19	Rent (02/2019)	1,938.00		36,104.90
02/01/19	Common Area Maintenance	1,003.20		37,108.10
02/12/19	Late Fee	3,710.82		40,818.92
02/12/19	Correct Late Fee	-0.01		40,818.91
03/01/19	Rent (03/2019)	1,938.00		42,756.91
03/01/19	Common Area Maintenance	1,003.20		43,760.11
03/12/19	Late Fee	4,376.02		48,136.13
03/12/19	Correct Late Fee	-0.01		48,136.12
04/01/19	Rent (04/2019)	1,938.00		50,074.12
04/01/19	Common Area Maintenance	1,003.20		51,077.32
04/12/19	Late Fee	5,107.73		56,185.05
05/01/19	Rent (05/2019)	2,052.00		58,237.05
05/01/19	Common Area Maintenance	1,003.20		59,240.25
05/10/19	Late Fee	5,924.03		65,164.28
05/31/19	Apply Security Deposit	-2,941.20		62,223.08

Current	30 Days	60 Days	90 Days	Amount Due
8,979.23	8,048.93	7,317.22	37,877.70	62,223.08

# **EXHIBIT 3**



F. THOMAS EDWARDS, ESQ.  
 Nevada Bar No. 9549  
 E-mail: tedwards@nevadafirm.com  
 JESSICA M. LUJAN, ESQ.  
 Nevada Bar No. 14913  
 E-mail: jlujan@nevadafirm.com  
 HOLLEY DRIGGS  
 400 South Fourth Street, Third Floor  
 Las Vegas, Nevada 89101  
 Telephone: 702/791-0308  
 Facsimile: 702/791-1912

*Attorneys for Plaintiffs/Counterdefendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
 partnership; MCKINLEY MANOR, an Idaho  
 general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
 liability company; MULUGETA BOUR, an  
 individual; HILENA MENGESHA, an  
 individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
 liability company; MULUGETA BOUR, an  
 individual; HILENA MENGESHA, an  
 individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
 partnership; MCKINLEY MANOR, an Idaho  
 general partnership, DOES I-X; and ROE  
 CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
 Dept. No.: 8

**HEARING DATE REQUESTED**

**PLAINTIFFS' MOTION FOR  
 SUMMARY JUDGMENT  
 REGARDING COUNTERCLAIM  
 DAMAGES**

Plaintiffs/Counterdefendants, 4520 Arville, a California general partnership; and  
 McKinley Manor, an Idaho general partnership (collectively "Plaintiffs"), by and through their  
 attorneys of record, the law firm of Holley Driggs, move for summary judgment on the damages

alleged by Defendants/Counterclaimants Bour Enterprises, LLC, Mulugeta Bour and Hilena Mengesha (collectively “Defendants”). Despite asserting damages in their counterclaims, Defendants: (1) failed to provide a computation of damages; (2) failed to produce documents from which a computation of damages could be made; and (3) and testified under oath that there are no damages. Therefore, Plaintiffs are entitled to summary judgment that Defendants have no damages. This motion is made and based upon the papers and pleadings on file herein, the following points and authorities and any oral argument at the hearing on this matter.

Dated this 10th day of November, 2020.

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards  
F. THOMAS EDWARDS, ESQ.  
Nevada Bar No. 9549  
JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

*Attorneys for Plaintiffs/Counterdefendants*





4. Defendants testified under oath that Plaintiffs do not owe them any money.

**Q. Does my client own you any money?**

A. I didn't sue him. He don't -- why would he owe me money? Why do you say that?

See except of deposition transcript of Bour Enterprises, LLC, (page 55, lines 14-16) attached hereto as **Exhibit 9**.

5. Discovery closed on November 2, 2020. See Stipulation and Order to Continue Deadlines (Third Request), entered July 29, 2020.

**III. SUMMARY JUDGMENT STANDARD**

A party may move for summary judgment on “all or any part” of any claim, counterclaim, or declaratory relief. See NRCP 56(a). Summary judgment is appropriate under NRCP 56 and “shall be rendered forthwith” when the pleadings and other evidence properly before the court demonstrate that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029, 1031 (Nev. 2005) (quoting NRCP 56(c)); *Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349, 1353, 951 P.2d 1027, 1029 (1997). In *Wood*, the Nevada Supreme Court abrogated the “slightest doubt” standard and adopted the standard as employed by the United States Supreme Court in *Celotex Corp v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986).

**IV. LEGAL ARGUMENT**

Defendants failed to provide a damages computation as expressly required under NRCP 16.1(a)(1)(A)(iv), warranting the automatic sanction of being barred from presenting evidence of damages at trial. Additionally, Defendants failed to produce financial documents, from which a computation of damages could have been made, in violation of NRCP 16.1(a)(1)(A)(iv), warranting the automatic sanction of being barred from presenting evidence of damages at trial. Finally, Defendants testified under oath that Plaintiffs do not owe Defendants any money. Therefore, Plaintiffs are entitled to summary judgment that Defendants have no damages.

///



1           **A. Defendants Failed to Provide a Damages Computation, Preventing**  
2           **Them from Presenting Evidence of Damages at Trial**

3           With discovery now closed, the Defendants failed to provide a damages computation as  
4 expressly required pursuant to NRCP 16.1(a)(1)(A)(iv). Thus, the Defendants are subject to the  
5 self-executing and automatic sanction of being barred from presenting evidence of damages at  
6 trial. Accordingly, Plaintiffs are entitled to summary judgment that Defendants have no damages.

7           The Nevada Rules of Civil Procedure provide, in pertinent part, that a party must, without  
8 awaiting a discovery request, provide to the other parties “[a] computation of any category of  
9 damages claimed by the disclosing party.” NRCP 16.1(a)(1)(A)(iv); *see also Design Strategy, Inc.*  
10 *v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006) (analyzing the analogous requirement under Fed. R.  
11 Civ. P. 26(a) and holding that a party claiming damages must voluntarily disclose a computation  
12 of damages and supporting documents). The purpose of requiring a party to disclose a computation  
13 of damages is to “enable the defendants to understand the contours of their potential exposure and  
14 make informed decisions” regarding settlement, discovery, and case management.” *Pizarro-*  
15 *Ortega v. Cervantes-Lopez*, 133 Nev., Adv. Op. 37, 396 P.3d 783, 787 (2017) (*quoting Olaya*  
16 *v. Wal-Mart Stores, Inc.*, No. 2:11-cv-997-CJD-CWH, 2012 WL 3262875, at \*2-3 (D. Nev. Aug.  
17 7, 2012)). This rule “expressly require[s] an initial computation and disclosure of the evidence  
18 that will be relied on to the full extent the [] plaintiff could or should know of it in the exercise of  
19 the type of pre-suit diligence required by Rule 11.” *Brandywine Commc’ns Techs., LLC v. Cisco*  
20 *Sys., Inc.*, No. C 12-01669 WHA, 2012 WL 5504036, at \*2 (N.D. Cal. Nov. 12, 2012).<sup>1</sup>

21           Importantly, Rule 16.1 “requires more than merely setting forth the figure demanded.”  
22 *Max Impact, LLC v. Sherwood Group, Inc.*, No. 09 Civ. 902(JGK)(HBP), 2014 WL 902649, at \*5  
23 (S.D.N.Y. March 7, 2014) (quotation marks and citation omitted) (emphasis added). “[T]he word  
24 ‘computation’ contemplates some analysis beyond merely setting forth a lump sum amount for a  
25 claimed element of damages.” *CCR/AG Showcase Phase 1 Owner, L.L.C. v. United Artists*

26  
27 <sup>1</sup> “Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority,  
28 because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.” *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (*quoting Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)).

1 *Theatre Circuit, Inc.*, No. 2:08-cv-00984-RCJ-GWF, 2010 WL 1947016, at \*5 (D. Nev. May 13,  
2 2010)) (internal citation omitted). The party must also provide a calculation “computing the total  
3 damages claimed for each category of damages, as required by NRCP 16.1(a)(1)(C).” *Walters v.*  
4 *Meeks*, 127 Nev. 1184 (2011).

5 NRCP 37(c)(1) states that “[a] party that without substantial justification fails to disclose  
6 information required by Rule 16.1 . . . is not, unless such failure is harmless, permitted to use as  
7 evidence at a trial . . . any witness or information not so disclosed. When a party fails to provide  
8 a computation of damages, the appropriate remedy is exclusion of evidence of damages at trial.  
9 See *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev., Adv. Op. 37, 396 P.3d 783, 787 (2017); see  
10 also *Freemon v. Fischer*, 281 P.3d 1173 (Nev. 2009) (precluding a party from presenting evidence  
11 of damages after it failed to disclose an expert report with a damages calculation until after the  
12 close of discovery). Rule 37(c)(1) “gives teeth to [the disclosure requirements of Rule 26] by  
13 forbidding the use at trial of any information required to be disclosed under Rule 26(a) that is not  
14 properly disclosed.” *Wintice Group, Inc. v. Longleg*, 2011 U.S. Dist. LEXIS 14685, 2011 WL  
15 383039 (D. Nev.) (citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th  
16 Cir. 2001)).

17 This exclusion requirement is “**a self-executing, automatic sanction to provide a strong**  
18 **inducement for disclosure of material.**” *Hoffman v. Constr. Protective Servs.*, 541 F.3d 1175,  
19 1180 (9th Cir. 2008) (*emphasis added*) (*quoting Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259  
20 F.3d 1101, 1106 (9th Cir. 2001)). “The implementation of the sanction is appropriate ‘even when  
21 a litigant’s entire cause of action . . . [will be] precluded.’” *Hoffman*, 541 F.3d at 1180 (9th Cir.  
22 2008) (*alterations in original*) (*quoting Yeti*, 259 F.3d at 1106). Because the exclusion requirement  
23 under Rule 37(c) is a “self-executing” and “automatic” sanction, exclusion does not require a  
24 showing of bad faith or willfulness. *Yeti*, 259 F.3d at 1106 (“Thus, even though Deckers never  
25 violated an explicit court order to produce the Vuckovich report **and even absent a showing in**  
26 **the record of bad faith or willfulness**, exclusion is an appropriate remedy for failing to fulfill the  
27 required disclosure requirements of Rule 26(a).”) (*emphasis added*); *Design Strategy, Inc. v.*  
28 *Davis*, 469 F.3d 284, 296 (2d Cir. 2006) (“Since Rule 37(c)(1) by its terms does not require a

1 showing of bad faith, we now hold that such a requirement should not be read into the Rule.”).

2 The only exceptions to the “self-executing” and “automatic” exclusion requirement of  
3 NRCP 37(c) are if the failure to disclose was substantially justified or harmless. *Yeti*, 259 F.3d at  
4 1106. “[I]t is the obligation of the party facing sanctions for belated disclosure to show that its  
5 failure to comply with [Rule 26] was either justified or harmless and therefore deserving of some  
6 lesser sanction.” *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 21 (1st Cir. 2001) (*cited*  
7 *with approval in Yeti*, 259 F.3d at 1107); *see also Liguori v. Hansen*, 2012 U.S. Dist. LEXIS 30076,  
8 48, 2012 WL 760747 (D. Nev.) (“Neither inadvertent mistakes nor unintentional oversights are  
9 sufficient to show substantial justification for delay.”).

10 The Defendants’ failure to disclose a damages computation against Plaintiff is not harmless  
11 because discovery has already closed in this action. “Moreover, given the advanced stage of the  
12 litigation, permitting the new evidence would not have been harmless.” *CQ Inc. v. TXU Mining*  
13 *Co. LP*, 565 F.3d 268, 280 (5th Cir. 2009). “Later disclosure of damages would have most likely  
14 required the court to create a new briefing schedule and perhaps re-open discovery, rather than  
15 simply set a trial date.” *Hoffman v. Constr. Protective Servs.*, 541 F.3d 1175, 1180 (9th Cir. 2008).  
16 “Such modifications to the court’s and the parties’ schedules supports a finding that the failure to  
17 disclose was not harmless.” *Id.* “Disruption to the schedule of the court and other parties is not  
18 harmless.” *Baltodano v. Wal-Mart Stores, Inc.*, 2011 U.S. Dist. LEXIS 98306, 10, 2011 WL  
19 3859724 (D. Nev.). The Nevada Supreme Court has made clear that “trial by ambush will not be  
20 tolerated.” *Pierce Lathing Co. v. ISEC, Inc.*, 114 Nev. 291, 296, 956 P.2d 93, 96 (1998).

21 Here, the Defendants were obligated under NRCP 16.1 to disclose their damages  
22 computation without awaiting a discovery request. There is no justification for Defendants’ failure  
23 to provide its damages computation. Discovery has closed in this action, meaning that the addition  
24 of new evidence and likely requirement to re-open discovery to refute such evidence would not be  
25 harmless. Accordingly, pursuant to the self-executing and automatic sanction provided by NRCP  
26 37, the Defendants are prevented from presenting evidence of damages at trial. With no evidence  
27 of damages, the Plaintiffs are entitled to an order holding that Defendants have no damages.  
28

1           **B. Defendants Failed to Produce Documents to Support a Damages Computation**  
2           **Preventing Them from Presenting Evidence of Damages at Trial**

3           Not only does NRCP 16.1(a)(1)(A)(iv) require a computation of damages, it also requires  
4 Defendants to disclose “the documents or other evidentiary material, unless privileged or protected  
5 from disclosure, on which each computation is based, including materials bearing on the nature  
6 and extent of injuries suffered.” Defendants are required to provide these documents without  
7 waiting for a discovery request. NRCP 16.1(a)(1)(A)(iv). Nonetheless, when Defendants did not  
8 provide these documents with their initial disclosures (or supplemental disclosures), Plaintiffs sent  
9 discovery requests for Defendants’ financial information. However, Defendants refused to  
10 produce any of these documents. *See* Ex. 6 (Response Request Nos. 11, 12 and 13); Ex. 7  
11 (Response Request Nos. 3, 4 and 5); Ex. 8 (Response Request Nos. 3, 4 and 5). Without producing  
12 these financial records there is no way Defendants can establish any damages.

13           Just like Defendants failed to provide a computation of damages, Defendants failed to  
14 produce any financial records from which a computation could be made. Based upon the same  
15 rules and case law cited above, the failure to produce documents from which a computation could  
16 be made has the same result as failing to provide a computation: Defendants cannot present any  
17 evidence of damages at trial. *See* NRCP 37(c)(1). Without any evidence of damages, Plaintiffs  
18 are entitled to summary judgment that Defendants have no damages.

19           **C. Defendants Testified, Under Oath, That They Do Not Have Any Damages**

20           At the NRCP 30(b)(6) deposition of Defendant Bour Enterprises, Defendant Mulugeta  
21 Bour testified under oath that the Defendants do not have any damages. In fact, it appears  
22 Defendants were not even aware that they brought counterclaims against Plaintiffs. This is a  
23 separate and independent basis for the Court to rule that Defendants have not damages.

24           Specifically, Defendants testified as follows:

25           **Q. Does my client own you any money?**

26           A. I didn't sue him. He don't -- why would he owe me money? Why  
27 do you say that?

28           *See* Ex. 9, page 55, lines 14-16.

Based upon this sworn testimony, there can be no factual dispute about Defendants' lack of damages. By their own admission, Plaintiffs do not owe any money to Defendants. Therefore, Plaintiffs are entitled to summary judgment that Defendants have no damages.

**V. CONCLUSION**

For these reasons, Plaintiffs respectfully request that this Court enter summary judgment that Defendants have no damages.

Dated this 10th day of November, 2020.

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards  
F. THOMAS EDWARDS, ESQ.  
Nevada Bar No. 9549  
JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

*Attorneys for Plaintiffs/Counterdefendants*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs and that on this 10th day of November, 2020, I did cause a true and correct copy of the foregoing **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT REGARDING COUNTERCLAIM DAMAGES** to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System:

Rusty Graf, Esq.  
BLACK & LOBELLO  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

Brent Carson, Esq.  
WINNER & CARSON  
7935 W. Sahara Ave., Suite 101  
Las Vegas, NV 89117

/s/ Sandy Sell  
An employee of HOLLEY DRIGGS

# EXHIBIT 1





1 **ECWD**  
2 **BLACK & LOBELLO**  
3 Rusty Graf, Esq. (Bar No. 6322)  
4 10777 West Twain Avenue, Third Floor  
5 Las Vegas, Nevada 89135  
6 Ph. (702) 869-8801  
7 Fax (702) 869-2669  
8 smack@blacklobello.law  
9 *Attorney for Defendants*

7 **DISTRICT COURT**  
8  
9 **CLARK COUNTY, NEVADA**

10 4520 ARVILLE, a California general  
11 partnership; MCKINLEY MANOR, an Idaho  
12 general partnership,  
13 Plaintiffs,

13 v.

14 BOUR ENTERPRISES, LLC, a Nevada limited  
15 liability company; MULUGETA BOUR, an  
16 individual; HILENA MENGESHA, an  
17 individual; DOES 1 through 100, inclusive,  
18 Defendants.

Case No.: A-19-794864-C  
Dept. No.: 8

**DEFENDANTS' INITIAL LIST OF  
WITNESSES AND PRODUCTION OF  
DOCUMENTS PURSUANT TO NRC  
16.1**

18  
19 Defendants, BOUR ENTERPRISES, LLC, a Nevada limited liability company,  
20 MULUGETA BOUR, an individual, and HILENA MENGESHA, an individual, by and through  
21 their attorney of record, Rusty Graf, Esq. of the law firm of Black & LoBello., hereby submits  
22 the Defendants' Initial List of Witnesses and Production of Documents pursuant to N.R.C.P.  
23 16.1.

24 These disclosures are based on information reasonably available to Defendants as of this  
25 date, recognizing that the investigation continues, and that discovery has just begun. Defendants  
26 reserve the right to supplement or modify this initial disclosure statement at any time as  
27 additional information becomes available during the course of discovery.

28 In making these disclosures, Defendants do not purport to identify every individual,

1 document, data compilation, or tangible thing possibly relevant to this lawsuit. Rather,  
2 Defendants' disclosure represents a good faith effort to identify discoverable information they  
3 currently and reasonably believe may be used to support their defenses and counterclaims as  
4 required by NRCP 16.1.

5 Defendants make these disclosures without waiving their right to object to the  
6 production of any document, data compilations, or tangible thing disclosed on the basis of any  
7 privilege, work product, relevancy, undue burden, or other valid objection. These disclosures do  
8 not include information that may be used solely for impeachment purposes. While making these  
9 disclosures, Defendants reserve among other rights, (1) the right to object on the grounds of  
10 competency, privilege, work product, relevancy and materiality, admissibility, hearsay, or any  
11 other proper grounds to the use of any disclosed information, for any purpose in whole or in part  
12 in this action or any other action, and (2) the right to object on any and all grounds, at any time,  
13 to any discovery request or motion relating to the subject matter of this disclosure.

14 The following disclosures are made subject to the above objections and qualifications:

15 **I. LIST OF WITNESSES**

- 16 1. Person Most Knowledgeable of 4520 Arville  
17 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
18 400 South Fourth Street, Third Floor  
19 Las Vegas, Nevada 89101  
(702) 791-0308

20 This witness is expected to have information regarding the facts and circumstances at  
21 issue in this action and any damages sustained therein.

- 22 2. Person Most Knowledgeable of McKinley Manor  
23 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
24 400 South Fourth Street, Third Floor  
25 Las Vegas, Nevada 89101  
(702) 791-0308

26 This witness is expected to have information regarding the facts and circumstances at  
27 issue in this action and any damages sustained therein.

- 28 3. David Burns

1 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
2 400 South Fourth Street, Third Floor  
3 Las Vegas, Nevada 89101  
(702) 791-0308

4 This witness is expected to have information regarding the facts and circumstances at  
5 issue in this action and any damages sustained therein.

6 4. Kevin Donahoe  
7 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
8 400 South Fourth Street, Third Floor  
9 Las Vegas, Nevada 89101  
(702) 791-0308

10 This witness is expected to have information regarding the facts and circumstances at  
11 issue in this action and any damages sustained therein.

12 5. Person Most Knowledgeable for Bour Enterprises, LLC  
13 c/o Black & LoBello  
14 10777 W. Twain Ave., Suite 300  
15 Las Vegas, Nevada 89135  
(702) 869-8801

16 This witness is expected to have information regarding the facts and circumstances at  
17 issue in this action and any damages sustained therein.

18 6. Mulugeta Bour  
19 c/o Black & LoBello  
20 10777 W. Twain Ave., Suite 300  
21 Las Vegas, Nevada 89135  
(702) 869-8801

22 This witness is expected to have information regarding the facts and circumstances at  
23 issue in this action and any damages sustained therein.

24 7. Hilena Mengesha  
25 c/o Black & LoBello  
26 10777 W. Twain Ave., Suite 300  
27 Las Vegas, Nevada 89135  
28 (702) 869-8801

This witness is expected to have information regarding the facts and circumstances at  
issue in this action and any damages sustained therein.

1           8.     Anthony Bour  
2                 c/o Black & LoBello  
3                 10777 W. Twain Ave., Suite 300  
4                 Las Vegas, Nevada 89135  
5                 (702) 869-8801

6           This witness is expected to have information regarding the facts and circumstances at  
7           issue in this action and any damages sustained therein.

8           Defendants herein reserve their right to supplement this witness list as allowed by the  
9           applicable Discovery Scheduling Order and/or applicable provisions of the Nevada Rules of  
10          Civil Procedure as the identity of additional witnesses becomes known during the course of  
11          discovery. Defendants incorporate by reference all documents produced by any other parties in  
12          this action.

## 13                                 II. LIST OF DOCUMENTS

14          Pursuant to NRCp 16.1(a)(1)(B), Defendants hereby produce the following documents:

15 <i>No.</i>	16 <i>Document</i>	17 <i>Bates Numbers</i>
18       1.	Arville Lease 1	DEFCC000001 - 000032
19       2.	Arville Lease 2	DEFCC000033 - 000064
20       3.	Tenant Ledgers	DEFCC000065 - 000070
21       4.	Emails regarding the leases	DEFCC000071 - 000089
22       5.	Termination of Lease Notice	DEFCC000090
23       6.	Email to David Burns With Attached Photographs (Note: DEFCC000092 and DEFCC000093, two 24       photographs, will be on the hand delivered disk 25       only)	DEFCC000091 - 000093
26       7.	Videos of property (on the hand delivered disk)	DEFCC000094

27          Defendants incorporate by reference all documents produced by any other parties in this  
28          action. Defendants reserve the right to amend/supplement this List of Documents throughout the  
discovery process as additional information becomes available, to designate as an exhibit any  
documents or other tangible evidence identified by any party and/or identified in any exhibits by

1 any party to this action, and to submit any documents or other tangible evidence for the purpose  
2 of rebuttal and/or impeachment.

3 In addition, neither inclusion of any documents or tangible items within this disclosure  
4 nor acceptance of documents provided by any other party hereto in a disclosure shall be deemed  
5 as a waiver by Defendants of any evidentiary rights Defendants may have with respect to those  
6 documents and/or tangible items, including, but not limited to, objection related to authenticity,  
7 materiality, relevance, foundation, hearsay, or any other rights as may be permitted pursuant to  
8 the Nevada Rules of Evidence.

9 **III. DEFENDANTS' COMPUTATION OF DAMAGES**

10 Defendants hereby offer the following computation of damages pursuant to NRCP 16.1  
11 (a)(1)(c). This list is not all-inclusive, as discovery is continuing, and Defendants, therefore,  
12 reserve the right to supplement as additional information becomes available.

13	1.	Constructive Eviction Damages	To be determined
14	2.	Breach of Contract Damages	To be determined
15	3.	Bad Faith Damages	To be determined

16  
17 Defendants reserve the right to seek other damages including, but not limited to, general  
18 and exemplary damages, in an amount to be proven at trial.

19 **IV. DEMONSTRATIVE EXHIBITS**

20 Plaintiff may offer at trial, certain Exhibits for demonstrative purposes including, but not  
21 limited to, the following:

- 22 1. Demonstrative and actual photographs and videos of the leased properties;
- 23 2. Diagrams, drawings, pictures, photos, film, models, video, DVD and CD ROM of  
24 various parts of the leased properties;
- 25 3. Medical treatment timeline for Defendants' employees who were injured by  
26 working at the properties;
- 27 4. Future medical timeline for those employees;
- 28 5. Photographs and videos of Defendants' witnesses and the premises;

1           6. Storyboards and computer digitized power point images;

2           7. Blow-ups/transparencies/digitized images of photographs and other exhibits;

3                                   **V. GENERAL OBJECTIONS**

4           1. General Objections Applicable to All Witnesses Disclosed by Defendants.

5           Defendants object to any witness identified by Plaintiffs which should be excluded on the  
6 basis that the witnesses are not relevant, or unfairly prejudicial, or not identified with  
7 particularity, or lack foundation, or would potentially violate the collateral source rule, or  
8 violate a stipulation of the parties and/or Orders of this Court. Additionally, Defendants reserve  
9 the right to object to any witness identified by any party in the instant matter. Furthermore,  
10 Defendants reserve the right to object or exclude any witness testimony, of any basis, at the time  
11 of trial.

12           2. General Objections Applicable to all Documents Disclosed by Plaintiffs.

13           Defendants object to any documents that Plaintiffs intend to use as exhibits at the trial of  
14 this matter, if any information violates the collateral source rule, hearsay rule, lacks foundation,  
15 is not relevant or which relevancy is outweighed by its prejudicial effect, or contains  
16 information that was/will be excluded by the Court or by stipulation of the parties. Defendants  
17 also object to these documents inasmuch as they have not been properly redacted according to  
18 the laws of the privacy, and the previous stated objections.

19           By disclosing witnesses and/or documents, Defendants do not waive the right to  
20 challenge and/or exclude any such witness or document or portions thereof on any basis.

21           Defendants reserve the right to object to any document identified by any party in the  
22 instant matter.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Defendants further reserve the right to use any and all of any other parties' exhibits at the  
2 time of trial of this matter.

3 DATED this 19th day of September 2019.

4 BLACK & LOBELLO

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

7 Rusty Graf, Esq.  
8 Nevada Bar No. 6322  
9 10777 W. Twain Ave., Suite 300  
10 Las Vegas, Nevada 89135  
11 Telephone: (702) 869-8801  
12 Facsimile: (702) 869-2669  
13 E-mail: rgraf@blacklobello.law  
14 Attorneys for Plaintiff

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that  
3 on the 19<sup>th</sup> day of September 2019, I caused the above and foregoing document entitled

4 **PLAINTIFF'S INITIAL LIST OF WITNESSES AND PRODUCTION OF DOCUMENTS**

5 **PURSUANT TO NRCP 16.1** to be served as follows:

6 [ ] by placing same to be deposited for mailing in the United States Mail, in a sealed  
7 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

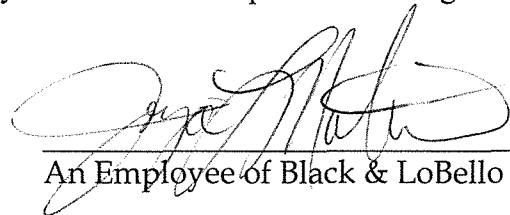
8 [X] by electronic service through Odyssey, Clark County Eighth Judicial District Court's  
9 electronic filing/service system; and via personal delivery (zip drive).

10 [ ] pursuant to EDCR 7.26, to be sent via facsimile;

11 to the party or their attorney(s) listed below at the address and/or facsimile number indicated  
12 below:

13 F. THOMAS EDWARDS, ESQ.  
14 E-mail: tedwards@nevadafirm.com  
15 SEAN E. STORY, ESQ.  
16 E-mail: sstory@nevadafirm.com  
17 HOLLEY DRIGGS WALCH  
18 FINE PUZEY STEIN & THOMPSON  
19 400 South Fourth Street, Third Floor  
20 Las Vegas, Nevada 89101  
21 Telephone: 702/791-0308  
22 Facsimile: 702/791-1912  
23 *Attorneys for Plaintiffs*

24 and that there is regular communication by mail between the place of mailing and the place(s) so  
25 addressed.

26  
27  
28  
  
An Employee of Black & LoBello



# EXHIBIT 2



**ECWD**  
**BLACK & LOBELLO**  
Rusty Graf, Esq. (Bar No. 6322)  
10777 West Twain Avenue, Third Floor  
Las Vegas, Nevada 89135  
Ph. (702) 869-8801  
Fax (702) 869-2669  
[smack@blacklobello.law](mailto:smack@blacklobello.law)  
*Attorney for Defendants*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,  
Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,  
Defendants.

Case No.: A-19-794864-C  
Dept. No.: 8

**DEFENDANTS' FIRST SUPPLEMENT  
TO NRCP 16.1 INITIAL LIST OF  
WITNESSES AND DOCUMENTS**

Defendants, BOUR ENTERPRISES, LLC, a Nevada limited liability company,  
MULUGETA BOUR, an individual, and HILENA MENGESHA, an individual, by and through  
their attorney of record, Rusty Graf, Esq. of the law firm of Black & LoBello., hereby provides  
their First Supplement to NRCP 16.1 Initial List of Witnesses and Documents as follows:

**I. LIST OF WITNESSES**

1. Person Most Knowledgeable of 4520 Arville  
c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
(702) 791-0308

1 This witness is expected to have information regarding the facts and circumstances at  
2 issue in this action and any damages sustained therein.

3 2. Person Most Knowledgeable of McKinley Manor  
4 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
5 400 South Fourth Street, Third Floor  
6 Las Vegas, Nevada 89101  
(702) 791-0308

7 This witness is expected to have information regarding the facts and circumstances at  
8 issue in this action and any damages sustained therein.

9 3. David Burns  
10 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
11 400 South Fourth Street, Third Floor  
12 Las Vegas, Nevada 89101  
(702) 791-0308

13 This witness is expected to have information regarding the facts and circumstances at  
14 issue in this action and any damages sustained therein.

15 4. Kevin Donahoe  
16 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
17 400 South Fourth Street, Third Floor  
18 Las Vegas, Nevada 89101  
(702) 791-0308

19 This witness is expected to have information regarding the facts and circumstances at  
20 issue in this action and any damages sustained therein.

21 5. Person Most Knowledgeable for Bour Enterprises, LLC  
22 c/o Black & LoBello  
23 10777 W. Twain Ave., Suite 300  
Las Vegas, Nevada 89135  
(702) 869-8801

24 This witness is expected to have information regarding the facts and circumstances at  
25 issue in this action and any damages sustained therein.

26 ///

27 ///

1           6.     Mulugeta Bour  
2                 c/o Black & LoBello  
3                 10777 W. Twain Ave., Suite 300  
               Las Vegas, Nevada 89135  
               (702) 869-8801

4           This witness is expected to have information regarding the facts and circumstances at  
5  
6 issue in this action and any damages sustained therein.

7           7.     Hilena Mengesha  
8                 c/o Black & LoBello  
               10777 W. Twain Ave., Suite 300  
9                 Las Vegas, Nevada 89135  
               (702) 869-8801

10          This witness is expected to have information regarding the facts and circumstances at  
11  
12 issue in this action and any damages sustained therein.

13          8.     Anthony Bour  
14                 c/o Black & LoBello  
               10777 W. Twain Ave., Suite 300  
15                 Las Vegas, Nevada 89135  
               (702) 869-8801

16          This witness is expected to have information regarding the facts and circumstances at  
17  
18 issue in this action and any damages sustained therein.

19          9.     Mahteme Zewdie  
20                 5414 W Harmon Ave  
               APT 2032  
21                 Las Vegas, NV 89103

22          This witness is expected to have information regarding the facts and circumstances at  
23 issue in this action and any damages sustained therein.

24          10.    Dejen Yfter  
25                 5055 W Hacienda Ave  
               Unit 1083  
26                 Las Vegas, NV 89118

27          This witness is expected to have information regarding the facts and circumstances at  
28 issue in this action and any damages sustained therein.

11. Tekeste Semagne  
5055 W Hacienda Ave  
Unit 2209  
Las Vegas, NV 89118

This witness is expected to have information regarding the facts and circumstances at issue in this action and any damages sustained therein.

Defendants herein reserve their right to supplement this witness list as allowed by the applicable Discovery Scheduling Order and/or applicable provisions of the Nevada Rules of Civil Procedure as the identity of additional witnesses becomes known during the course of discovery. Defendants incorporate by reference all documents produced by any other parties in this action.

## **II. LIST OF DOCUMENTS**

Pursuant to NRCP 16.1(a)(1)(B), Defendants hereby produce the following documents:

<b><i>No.</i></b>	<b><i>Document</i></b>	<b><i>Bates Numbers</i></b>
1.	Arville Lease 1	DEFCC000001 - 000032
2.	Arville Lease 2	DEFCC000033 - 000064
3.	Tenant Ledgers	DEFCC000065 - 000070
4.	Emails regarding the leases	DEFCC000071 - 000089
5.	Termination of Lease Notice	DEFCC000090
6.	Email to David Burns With Attached Photographs (Note: DEFCC000092 and DEFCC000093, two photographs, will be on the hand delivered disk only)	DEFCC000091 - 000093
7.	Videos of property (on the hand delivered disk)	DEFCC000094
8.	<b>4825 Quality Court Lease - Redacted</b>	<b>DEFCC000095 - 000114</b>
9.	<b>Bour Enterprises Notice of Termination of Lease – 4/17/2018</b>	<b>DEFCC000115</b>
10.	<b>Business Licenses</b>	<b>DEFCC000116 - 000119</b>
11.	<b>Employee File - Mahteme Zewdie</b>	<b>DEFCC000120 - 000169</b>

12.	<b>Employee File – Dejen Yfter</b>	<b>DEFCC000170 - 000204</b>
13.	<b>Employee File – Tekeste Semagne</b>	<b>DEFCC000205 - 000255</b>

Defendants incorporate by reference all documents produced by any other parties in this action. Defendants reserve the right to amend/supplement this List of Documents throughout the discovery process as additional information becomes available, to designate as an exhibit any documents or other tangible evidence identified by any party and/or identified in any exhibits by any party to this action, and to submit any documents or other tangible evidence for the purpose of rebuttal and/or impeachment.

In addition, neither inclusion of any documents or tangible items within this disclosure nor acceptance of documents provided by any other party hereto in a disclosure shall be deemed as a waiver by Defendants of any evidentiary rights Defendants may have with respect to those documents and/or tangible items, including, but not limited to, objection related to authenticity, materiality, relevance, foundation, hearsay, or any other rights as may be permitted pursuant to the Nevada Rules of Evidence.

### **III. DEFENDANTS' COMPUTATION OF DAMAGES**

Defendants hereby offer the following computation of damages pursuant to NRCP 16.1(a)(1)(c). This list is not all-inclusive, as discovery is continuing, and Defendants, therefore, reserve the right to supplement as additional information becomes available.

1.	Constructive Eviction Damages	To be determined
2.	Breach of Contract Damages	To be determined
3.	Bad Faith Damages	To be determined

Defendants reserve the right to seek other damages including, but not limited to, general and exemplary damages, in an amount to be proven at trial.

///

///

///

1 **IV. DEMONSTRATIVE EXHIBITS**

2 Plaintiff may offer at trial, certain Exhibits for demonstrative purposes including, but not  
3 limited to, the following:

- 4 1. Demonstrative and actual photographs and videos of the leased properties;  
5 2. Diagrams, drawings, pictures, photos, film, models, video, DVD and CD ROM of  
6 various parts of the leased properties;  
7 3. Medical treatment timeline for Defendants' employees who were injured by  
8 working at the properties;  
9 4. Future medical timeline for those employees;  
10 5. Photographs and videos of Defendants' witnesses and the premises;  
11 6. Storyboards and computer digitized power point images;  
12 7. Blow-ups/transparencies/digitized images of photographs and other exhibits;

13 **V. GENERAL OBJECTIONS**

14 1. General Objections Applicable to All Witnesses Disclosed by Defendants.

15 Defendants object to any witness identified by Plaintiffs which should be excluded on the  
16 basis that the witnesses are not relevant, or unfairly prejudicial, or not identified with  
17 particularity, or lack foundation, or would potentially violate the collateral source rule, or  
18 violate a stipulation of the parties and/or Orders of this Court. Additionally, Defendants reserve  
19 the right to object to any witness identified by any party in the instant matter. Furthermore,  
20 Defendants reserve the right to object or exclude any witness testimony, of any basis, at the time  
21 of trial.

22 2. General Objections Applicable to all Documents Disclosed by Plaintiffs.

23 Defendants object to any documents that Plaintiffs intend to use as exhibits at the trial of  
24 this matter, if any information violates the collateral source rule, hearsay rule, lacks foundation,  
25 is not relevant or which relevancy is outweighed by its prejudicial effect, or contains  
26 information that was/will be excluded by the Court or by stipulation of the parties. Defendants  
27 also object to these documents inasmuch as they have not been properly redacted according to  
28 the laws of the privacy, and the previous stated objections.

1 By disclosing witnesses and/or documents, Defendants do not waive the right to  
2 challenge and/or exclude any such witness or document or portions thereof on any basis.

3 Defendants reserve the right to object to any document identified by any party in the  
4 instant matter.

5 Defendants further reserve the right to use any and all of any other parties' exhibits at the  
6 time of trial of this matter.

7 DATED this 18<sup>th</sup> day of February 2020.

8 BLACK & LOBELLO

9  
10 By: \_\_\_\_\_

Rusty Graf, Esq.  
Nevada Bar No. 6322  
10777 W. Twain Ave., Suite 300  
Las Vegas, Nevada 89135  
Telephone: (702) 869-8801  
Facsimile: (702) 869-2669  
E-mail: rgraf@blacklobello.law  
Attorneys for Plaintiff



1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that  
3 on the 18 day of February 2020, I caused the above and foregoing document entitled  
4 **DEFENDANTS' FIRST SUPPLEMENT TO NRCP 16.1 INITIAL LIST OF WITNESSES**  
5 **AND DOCUMENTS** to be served as follows:

- 6 [ ] by placing same to be deposited for mailing in the United States Mail, in a sealed  
7 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and  
8 [X] by electronic service through Odyssey, Clark County Eighth Judicial District Court's  
9 electronic filing/service system; and via personal delivery (zip drive).  
10 [ ] pursuant to EDCR 7.26, to be sent via facsimile;

11 to the party or their attorney(s) listed below at the address and/or facsimile number indicated  
12 below:

13 F. THOMAS EDWARDS, ESQ.  
14 E-mail: [tedwards@nevadafirm.com](mailto:tedwards@nevadafirm.com)  
15 SEAN E. STORY, ESQ.  
16 E-mail: [sstory@nevadafirm.com](mailto:sstory@nevadafirm.com)  
17 HOLLEY DRIGGS WALCH  
18 FINE PUZEY STEIN & THOMPSON  
19 400 South Fourth Street, Third Floor  
20 Las Vegas, Nevada 89101  
21 Telephone: 702/791-0308  
22 Facsimile: 702/791-1912  
23 *Attorneys for Plaintiffs*

24 and that there is regular communication by mail between the place of mailing and the place(s) so  
25 addressed.

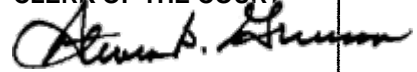
26   
27 \_\_\_\_\_  
28 An Employee of Black & LoBello

**4520 Arville, LLC v. Bour Enterprises LLC, Et Al**  
**8<sup>th</sup> Judicial District Court-Clark County Case No. : A-19-794864-C**  
**Log of Privileged Documents for Defendant's First Supplement To NRCp 16.1 Initial List Of Witnesses And Documents**

<b>BATES NO.</b>	<b>DOCUMENT DATE</b>	<b>GENERIC DOCUMENT TITLE</b>	<b>DOCUMENT AUTHOR/ RECIPIENT</b>	<b>DESCRIPTION</b>	<b>PRIVILEGE ASSERTED</b>
DEFCC000095 - 000114	2/26/2018	4825 Quality Court Lease	LTT LLC / Bour Enterprises LLC	Lease signed by Bour Enterprises for 4825 Quality Court, Las Vegas, NV 89103.	Redacted as to personal, privileged and confidential information pursuant to NRCp 26(b) and NRS 49.015, and not subject to subpoena or discovery and per 1/30/2020 Discovery Commissioner's Report and Recommendations.
DEFCC000120 - 000169		Employee File and Records for Mahteme Zewdie.	Bour Enterprises LLC	Employee File for Mahteme Zewdie.	Redacted as to "employees' pay, medical, and confidential information" per 1/30/2020 Discovery Commissioner's Report and Recommendations.
DEFCC000170 - 000204		Employee Files and Records for Dejen Yyfer.	Bour Enterprises LLC	Employee File and Records for Dejen Yyfer.	Redacted as to "employees' pay, medical, and confidential information" per 1/30/2020 Discovery Commissioner's Report and Recommendations.
DEFCC000205 - 000255		Employee File and Records – Tekeste Semagne	Bour Enterprises LLC	Employee File for Tekeste Semagne	Redacted as to "employees' pay, medical, and confidential information" per 1/30/2020 Discovery Commissioner's Report and Recommendations.

# EXHIBIT 3





**ECWD**  
**BLACK & LOBELLO**  
Rusty Graf, Esq. (Bar No. 6322)  
10777 West Twain Avenue, Third Floor  
Las Vegas, Nevada 89135  
Ph. (702) 869-8801  
Fax (702) 869-2669  
[smack@blacklobello.law](mailto:smack@blacklobello.law)  
*Attorney for Defendants*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,  
Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,  
Defendants.

Case No.: A-19-794864-C  
Dept. No.: 8

**DEFENDANTS' SECOND  
SUPPLEMENT TO NRCP 16.1 INITIAL  
LIST OF WITNESSES AND  
DOCUMENTS**

Defendants, BOUR ENTERPRISES, LLC, a Nevada limited liability company,  
MULUGETA BOUR, an individual, and HILENA MENGESHA, an individual, by and through  
their attorney of record, Rusty Graf, Esq. of the law firm of Black & LoBello., hereby provides  
their Second Supplement to NRCP 16.1 Initial List of Witnesses and Documents as follows:

**I. LIST OF WITNESSES**

1. Person Most Knowledgeable of 4520 Arville  
c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
(702) 791-0308

1 This witness is expected to have information regarding the facts and circumstances at  
2 issue in this action and any damages sustained therein.

3 2. Person Most Knowledgeable of McKinley Manor  
4 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
5 400 South Fourth Street, Third Floor  
6 Las Vegas, Nevada 89101  
(702) 791-0308

7 This witness is expected to have information regarding the facts and circumstances at  
8 issue in this action and any damages sustained therein.

9 3. David Burns  
10 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
11 400 South Fourth Street, Third Floor  
12 Las Vegas, Nevada 89101  
(702) 791-0308

13 This witness is expected to have information regarding the facts and circumstances at  
14 issue in this action and any damages sustained therein.

15 4. Kevin Donahoe  
16 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
17 400 South Fourth Street, Third Floor  
18 Las Vegas, Nevada 89101  
(702) 791-0308

19 This witness is expected to have information regarding the facts and circumstances at  
20 issue in this action and any damages sustained therein.

21 5. Person Most Knowledgeable for Bour Enterprises, LLC  
22 c/o Black & LoBello  
23 10777 W. Twain Ave., Suite 300  
24 Las Vegas, Nevada 89135  
(702) 869-8801

25 This witness is expected to have information regarding the facts and circumstances at  
26 issue in this action and any damages sustained therein.

27 ///

28 ///

1           6.     Mulugeta Bour  
2                 c/o Black & LoBello  
3                 10777 W. Twain Ave., Suite 300  
4                 Las Vegas, Nevada 89135  
5                 (702) 869-8801

6           This witness is expected to have information regarding the facts and circumstances at  
7           issue in this action and any damages sustained therein.

8           7.     Hilena Mengesha  
9                 c/o Black & LoBello  
10                10777 W. Twain Ave., Suite 300  
11                Las Vegas, Nevada 89135  
12                (702) 869-8801

13          This witness is expected to have information regarding the facts and circumstances at  
14          issue in this action and any damages sustained therein.

15          8.     Anthony Bour  
16                 c/o Black & LoBello  
17                 10777 W. Twain Ave., Suite 300  
18                 Las Vegas, Nevada 89135  
19                 (702) 869-8801

20          This witness is expected to have information regarding the facts and circumstances at  
21          issue in this action and any damages sustained therein.

22          9.     Mahteme Zewdie  
23                 5414 W Harmon Ave  
24                 APT 2032  
25                 Las Vegas, NV 89103

26          This witness is expected to have information regarding the facts and circumstances at  
27          issue in this action and any damages sustained therein.

28          10.    Dejen Yfter  
                5055 W Hacienda Ave  
                Unit 1083  
                Las Vegas, NV 89118

            This witness is expected to have information regarding the facts and circumstances at  
            issue in this action and any damages sustained therein.

11. Tekeste Semagne  
5055 W Hacienda Ave  
Unit 2209  
Las Vegas, NV 89118

This witness is expected to have information regarding the facts and circumstances at issue in this action and any damages sustained therein.

12. Dale Walsh  
C/O Walsh Certified Consultants Inc.  
3333 Calle Del Torre Phone/Cell: (702) 468-4782  
Las Vegas, Nevada 89102

This witness is expected to have information regarding the facts and circumstances at issue in this action and any damages sustained therein.

Defendants herein reserve their right to supplement this witness list as allowed by the applicable Discovery Scheduling Order and/or applicable provisions of the Nevada Rules of Civil Procedure as the identity of additional witnesses becomes known during the course of discovery. Defendants incorporate by reference all documents produced by any other parties in this action.

## **II. LIST OF DOCUMENTS**

Pursuant to NRCP 16.1(a)(1)(B), Defendants hereby produce the following documents:

<b><i>No.</i></b>	<b><i>Document</i></b>	<b><i>Bates Numbers</i></b>
1.	Arville Lease 1	DEFCC000001 - 000032
2.	Arville Lease 2	DEFCC000033 - 000064
3.	Tenant Ledgers	DEFCC000065 - 000070
4.	Emails regarding the leases	DEFCC000071 - 000089
5.	Termination of Lease Notice	DEFCC000090
6.	Email to David Burns With Attached Photographs (Note: DEFCC000092 and DEFCC000093, two photographs, will be on the hand delivered disk only)	DEFCC000091 - 000093

7.	Videos of property (on the hand delivered disk)	DEFCC000094
8.	4825 Quality Court Lease - Redacted	DEFCC000095 - 000114
9.	Bour Enterprises Notice of Termination of Lease – 4/17/2018	DEFCC000115
10.	Business Licenses	DEFCC000116 - 000119
11.	Employee File - Mahteme Zewdie	DEFCC000120 - 000169
12.	Employee File – Dejen Yfter	DEFCC000170 - 000204
13.	Employee File – Tekeste Semagne	DEFCC000205 - 000255
14.	<b>Walsh Report for Subject Property</b>	<b>DEFCC000256 - 000276</b>

Defendants incorporate by reference all documents produced by any other parties in this action. Defendants reserve the right to amend/supplement this List of Documents throughout the discovery process as additional information becomes available, to designate as an exhibit any documents or other tangible evidence identified by any party and/or identified in any exhibits by any party to this action, and to submit any documents or other tangible evidence for the purpose of rebuttal and/or impeachment.

In addition, neither inclusion of any documents or tangible items within this disclosure nor acceptance of documents provided by any other party hereto in a disclosure shall be deemed as a waiver by Defendants of any evidentiary rights Defendants may have with respect to those documents and/or tangible items, including, but not limited to, objection related to authenticity, materiality, relevance, foundation, hearsay, or any other rights as may be permitted pursuant to the Nevada Rules of Evidence.

### **III. DEFENDANTS' COMPUTATION OF DAMAGES**

Defendants hereby offer the following computation of damages pursuant to NRCP 16.1(a)(1)(c). This list is not all-inclusive, as discovery is continuing, and Defendants, therefore, reserve the right to supplement as additional information becomes available.

1.	Constructive Eviction Damages	To be determined
2.	Breach of Contract Damages	To be determined



3.	Bad Faith Damages	To be determined
----	-------------------	------------------

Defendants reserve the right to seek other damages including, but not limited to, general and exemplary damages, in an amount to be proven at trial.

#### **IV. DEMONSTRATIVE EXHIBITS**

Plaintiff may offer at trial, certain Exhibits for demonstrative purposes including, but not limited to, the following:

1. Demonstrative and actual photographs and videos of the leased properties;
2. Diagrams, drawings, pictures, photos, film, models, video, DVD and CD ROM of various parts of the leased properties;
3. Medical treatment timeline for Defendants' employees who were injured by working at the properties;
4. Future medical timeline for those employees;
5. Photographs and videos of Defendants' witnesses and the premises;
6. Storyboards and computer digitized power point images;
7. Blow-ups/transparencies/digitized images of photographs and other exhibits;

#### **V. GENERAL OBJECTIONS**

##### **1. General Objections Applicable to All Witnesses Disclosed by Defendants.**

Defendants object to any witness identified by Plaintiffs which should be excluded on the basis that the witnesses are not relevant, or unfairly prejudicial, or not identified with particularity, or lack foundation, or would potentially violate the collateral source rule, or violate a stipulation of the parties and/or Orders of this Court. Additionally, Defendants reserve the right to object to any witness identified by any party in the instant matter. Furthermore, Defendants reserve the right to object or exclude any witness testimony, of any basis, at the time of trial.

##### **2. General Objections Applicable to all Documents Disclosed by Plaintiffs.**

Defendants object to any documents that Plaintiffs intend to use as exhibits at the trial of this matter, if any information violates the collateral source rule, hearsay rule, lacks foundation,

1 is not relevant or which relevancy is outweighed by its prejudicial effect, or contains  
2 information that was/will be excluded by the Court or by stipulation of the parties. Defendants  
3 also object to these documents inasmuch as they have not been properly redacted according to  
4 the laws of the privacy, and the previous stated objections.

5 By disclosing witnesses and/or documents, Defendants do not waive the right to  
6 challenge and/or exclude any such witness or document or portions thereof on any basis.

7 Defendants reserve the right to object to any document identified by any party in the  
8 instant matter.

9 Defendants further reserve the right to use any and all of any other parties' exhibits at the  
10 time of trial of this matter.

11 DATED this 21 day of February 2020.

12 BLACK & LOBELLO

13  
14 By:  #15271

15 Rusty Graf, Esq.  
16 Nevada Bar No. 6322  
17 10777 W. Twain Ave., Suite 300  
18 Las Vegas, Nevada 89135  
19 Telephone: (702) 869-8801  
20 Facsimile: (702) 869-2669  
21 E-mail: rgraf@blacklobello.law  
22 Attorneys for Plaintiff  
23  
24  
25  
26  
27  
28

1 **CERTIFICATE OF SERVICE**

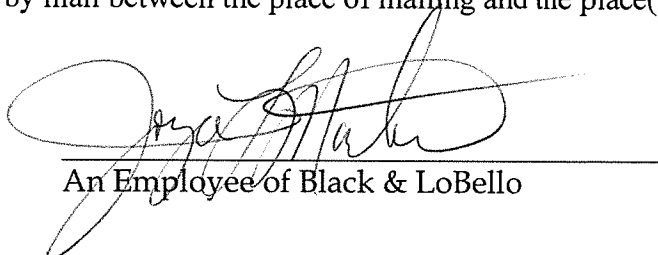
2 Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that  
3 on the 24<sup>th</sup> day of February 2020, I caused the above and foregoing document entitled  
4 **DEFENDANTS' SECOND SUPPLEMENT TO NRCP 16.1 INITIAL LIST OF**  
5 **WITNESSES AND DOCUMENTS** to be served as follows:

- 6 [ ] by placing same to be deposited for mailing in the United States Mail, in a sealed  
7 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and  
8 [X] by electronic service through Odyssey, Clark County Eighth Judicial District Court's  
9 electronic filing/service system; and via personal delivery (zip drive).  
10 [ ] pursuant to EDCR 7.26, to be sent via facsimile;

11 to the party or their attorney(s) listed below at the address and/or facsimile number indicated  
12 below:

13 F. THOMAS EDWARDS, ESQ.  
14 E-mail: [tedwards@nevadafirm.com](mailto:tedwards@nevadafirm.com)  
15 SEAN E. STORY, ESQ.  
16 E-mail: [ssstory@nevadafirm.com](mailto:ssstory@nevadafirm.com)  
17 HOLLEY DRIGGS WALCH  
18 FINE PUZEY STEIN & THOMPSON  
19 400 South Fourth Street, Third Floor  
20 Las Vegas, Nevada 89101  
21 Telephone: 702/791-0308  
22 Facsimile: 702/791-1912  
23 *Attorneys for Plaintiffs*

24 and that there is regular communication by mail between the place of mailing and the place(s) so  
25 addressed.

26  
27  
28  
  
An Employee of Black & LoBello

# EXHIBIT 4



1 **ECWD**  
2 **BLACK & LOBELLO**  
3 Rusty Graf, Esq. (Bar No. 6322)  
4 10777 West Twain Avenue, Third Floor  
5 Las Vegas, Nevada 89135  
6 Ph. (702) 869-8801  
7 Fax (702) 869-2669  
8 [smack@blacklobello.law](mailto:smack@blacklobello.law)  
9 *Attorney for Defendants*

7 **DISTRICT COURT**  
8  
9 **CLARK COUNTY, NEVADA**

10 4520 ARVILLE, a California general  
11 partnership; MCKINLEY MANOR, an Idaho  
12 general partnership,  
13 Plaintiffs,

13 v.

14 BOUR ENTERPRISES, LLC, a Nevada limited  
15 liability company; MULUGETA BOUR, an  
16 individual; HILENA MENGESHA, an  
17 individual; DOES 1 through 100, inclusive,  
18 Defendants.

Case No.: A-19-794864-C  
Dépt. No.: 8

**DEFENDANTS' THIRD SUPPLEMENT  
TO NRCP 16.1 INITIAL LIST OF  
WITNESSES AND DOCUMENTS**

18  
19 Defendants, BOUR ENTERPRISES, LLC, a Nevada limited liability company,  
20 MULUGETA BOUR, an individual, and HILENA MENGESHA, an individual, by and through  
21 their attorney of record, Rusty Graf, Esq. of the law firm of Black & LoBello., hereby provides  
22 their Third Supplement to NRCP 16.1 Initial List of Witnesses and Documents as follows:

23 **I. LIST OF WITNESSES**

- 24 1. Person Most Knowledgeable of 4520 Arville  
25 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
26 400 South Fourth Street, Third Floor  
27 Las Vegas, Nevada 89101  
28 (702) 791-0308

1 This witness is expected to have information regarding the facts and circumstances at  
2 issue in this action and any damages sustained therein.

- 3 2. Person Most Knowledgeable of McKinley Manor  
4 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
5 400 South Fourth Street, Third Floor  
6 Las Vegas, Nevada 89101  
(702) 791-0308

7 This witness is expected to have information regarding the facts and circumstances at  
8 issue in this action and any damages sustained therein.

- 9 3. David Burns  
10 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
11 400 South Fourth Street, Third Floor  
12 Las Vegas, Nevada 89101  
(702) 791-0308

13 This witness is expected to have information regarding the facts and circumstances at  
14 issue in this action and any damages sustained therein.

- 15 4. Kevin Donahoe  
16 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
17 400 South Fourth Street, Third Floor  
18 Las Vegas, Nevada 89101  
(702) 791-0308

19 This witness is expected to have information regarding the facts and circumstances at  
20 issue in this action and any damages sustained therein.

- 21 5. Person Most Knowledgeable for Bour Enterprises, LLC  
22 c/o Black & LoBello  
23 10777 W. Twain Ave., Suite 300  
24 Las Vegas, Nevada 89135  
(702) 869-8801

25 This witness is expected to have information regarding the facts and circumstances at  
26 issue in this action and any damages sustained therein.

27 ///

28 ///

1           6.     Mulugeta Bour  
2                 c/o Black & LoBello  
3                 10777 W. Twain Ave., Suite 300  
4                 Las Vegas, Nevada 89135  
5                 (702) 869-8801

6           This witness is expected to have information regarding the facts and circumstances at  
7           issue in this action and any damages sustained therein.

8           7.     Hilena Mengesha  
9                 c/o Black & LoBello  
10                10777 W. Twain Ave., Suite 300  
11                Las Vegas, Nevada 89135  
12                (702) 869-8801

13          This witness is expected to have information regarding the facts and circumstances at  
14          issue in this action and any damages sustained therein.

15          8.     Anthony Bour  
16                 c/o Black & LoBello  
17                 10777 W. Twain Ave., Suite 300  
18                 Las Vegas, Nevada 89135  
19                 (702) 869-8801

20          This witness is expected to have information regarding the facts and circumstances at  
21          issue in this action and any damages sustained therein.

22          9.     Mahteme Zewdie  
23                 5414 W Harmon Ave  
24                 APT 2032  
25                 Las Vegas, NV 89103

26          This witness is expected to have information regarding the facts and circumstances at  
27          issue in this action and any damages sustained therein.

28          10.    Dejen Yfter  
                5055 W Hacienda Ave  
                Unit 1083  
                Las Vegas, NV 89118

            This witness is expected to have information regarding the facts and circumstances at  
            issue in this action and any damages sustained therein.

11. Tekeste Semagne  
5055 W Hacienda Ave  
Unit 2209  
Las Vegas, NV 89118

This witness is expected to have information regarding the facts and circumstances at issue in this action and any damages sustained therein.

12. Dale Walsh  
C/O Walsh Certified Consultants Inc.  
3333 Calle Del Torre Phone/Cell: (702) 468-4782  
Las Vegas, Nevada 89102

This witness is expected to have information regarding the facts and circumstances at issue in this action and any damages sustained therein.

Defendants herein reserve their right to supplement this witness list as allowed by the applicable Discovery Scheduling Order and/or applicable provisions of the Nevada Rules of Civil Procedure as the identity of additional witnesses becomes known during the course of discovery. Defendants incorporate by reference all documents produced by any other parties in this action.

## **II. LIST OF DOCUMENTS**

Pursuant to NRCP 16.1(a)(1)(B), Defendants hereby produce the following documents:

<i>No.</i>	<i>Document</i>	<i>Bates Numbers</i>
1.	Arville Lease 1	DEFCC000001 - 000032
2.	Arville Lease 2	DEFCC000033 - 000064
3.	Tenant Ledgers	DEFCC000065 - 000070
4.	Emails regarding the leases	DEFCC000071 - 000089
5.	Termination of Lease Notice	DEFCC000090
6.	Email to David Burns With Attached Photographs (Note: DEFCC000092 and DEFCC000093, two photographs, will be on the hand delivered disk only)	DEFCC000091 - 000093



7.	Videos of property (on the hand delivered disk)	DEFCC000094
8.	4825 Quality Court Lease - Redacted	DEFCC000095 - 000114
9.	Bour Enterprises Notice of Termination of Lease – 4/17/2018	DEFCC000115
10.	Business Licenses	DEFCC000116 - 000119
11.	Employee File - Mahteme Zewdie	DEFCC000120 - 000169
12.	Employee File – Dejen Yfter	DEFCC000170 - 000204
13.	Employee File – Tekeste Semagne	DEFCC000205 - 000255
14.	Walsh Report for Subject Property	DEFCC000256 - 000276
15.	<b>Walsh Addendum to February 20, 2020 Report – Dust Assessment for Silica</b>	<b>DEFCC000277 - 000285</b>

Defendants incorporate by reference all documents produced by any other parties in this action. Defendants reserve the right to amend/supplement this List of Documents throughout the discovery process as additional information becomes available, to designate as an exhibit any documents or other tangible evidence identified by any party and/or identified in any exhibits by any party to this action, and to submit any documents or other tangible evidence for the purpose of rebuttal and/or impeachment.

In addition, neither inclusion of any documents or tangible items within this disclosure nor acceptance of documents provided by any other party hereto in a disclosure shall be deemed as a waiver by Defendants of any evidentiary rights Defendants may have with respect to those documents and/or tangible items, including, but not limited to, objection related to authenticity, materiality, relevance, foundation, hearsay, or any other rights as may be permitted pursuant to the Nevada Rules of Evidence.

### **III. DEFENDANTS' COMPUTATION OF DAMAGES**

Defendants hereby offer the following computation of damages pursuant to NRCP 16.1(a)(1)(c). This list is not all-inclusive, as discovery is continuing, and Defendants, therefore, reserve the right to supplement as additional information becomes available.

1.	Constructive Eviction Damages	To be determined
----	-------------------------------	------------------

2.	Breach of Contract Damages	To be determined
3.	Bad Faith Damages	To be determined

Defendants reserve the right to seek other damages including, but not limited to, general and exemplary damages, in an amount to be proven at trial.

#### IV. DEMONSTRATIVE EXHIBITS

Plaintiff may offer at trial, certain Exhibits for demonstrative purposes including, but not limited to, the following:

1. Demonstrative and actual photographs and videos of the leased properties;
2. Diagrams, drawings, pictures, photos, film, models, video, DVD and CD ROM of various parts of the leased properties;
3. Medical treatment timeline for Defendants' employees who were injured by working at the properties;
4. Future medical timeline for those employees;
5. Photographs and videos of Defendants' witnesses and the premises;
6. Storyboards and computer digitized power point images;
7. Blow-ups/transparencies/digitized images of photographs and other exhibits;

#### V. GENERAL OBJECTIONS

1. General Objections Applicable to All Witnesses Disclosed by Defendants.

Defendants object to any witness identified by Plaintiffs which should be excluded on the basis that the witnesses are not relevant, or unfairly prejudicial, or not identified with particularity, or lack foundation, or would potentially violate the collateral source rule, or violate a stipulation of the parties and/or Orders of this Court. Additionally, Defendants reserve the right to object to any witness identified by any party in the instant matter. Furthermore, Defendants reserve the right to object or exclude any witness testimony, of any basis, at the time of trial.

2. General Objections Applicable to all Documents Disclosed by Plaintiffs.

1 Defendants object to any documents that Plaintiffs intend to use as exhibits at the trial of  
2 this matter, if any information violates the collateral source rule, hearsay rule, lacks foundation,  
3 is not relevant or which relevancy is outweighed by its prejudicial effect, or contains  
4 information that was/will be excluded by the Court or by stipulation of the parties. Defendants  
5 also object to these documents inasmuch as they have not been properly redacted according to  
6 the laws of the privacy, and the previous stated objections.

7 By disclosing witnesses and/or documents, Defendants do not waive the right to  
8 challenge and/or exclude any such witness or document or portions thereof on any basis.

9 Defendants reserve the right to object to any document identified by any party in the  
10 instant matter.

11 Defendants further reserve the right to use any and all of any other parties' exhibits at the  
12 time of trial of this matter.

13 DATED this 16<sup>th</sup> day of March 2020.

14 BLACK & LOBELLO

15  
16 By: 

17 Rusty Graf, Esq.  
18 Nevada Bar No. 6322  
19 10777 W. Twain Ave., Suite 300  
20 Las Vegas, Nevada 89135  
21 Telephone: (702) 869-8801  
22 Facsimile: (702) 869-2669  
23 E-mail: rgraf@blacklobello.law  
24 Attorneys for Plaintiff  
25  
26  
27  
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that  
3 on the 16<sup>th</sup> day of March 2020, I caused the above and foregoing document entitled  
4 **DEFENDANTS' THIRD SUPPLEMENT TO NRCP 16.1 INITIAL LIST OF WITNESSES**  
5 **AND DOCUMENTS** to be served as follows:

- 6 [ ] by placing same to be deposited for mailing in the United States Mail, in a sealed  
7 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and  
8 [X] by electronic service through Odyssey, Clark County Eighth Judicial District Court's  
9 electronic filing/service system; and via personal delivery (zip drive).  
10 [ ] pursuant to EDCR 7.26, to be sent via facsimile;

11 to the party or their attorney(s) listed below at the address and/or facsimile number indicated  
12 below:

13 F. THOMAS EDWARDS, ESQ.  
14 E-mail: [tedwards@nevadafirm.com](mailto:tedwards@nevadafirm.com)  
15 SEAN E. STORY, ESQ.  
16 E-mail: [ssstory@nevadafirm.com](mailto:ssstory@nevadafirm.com)  
17 HOLLEY DRIGGS WALCH  
18 FINE PUZEY STEIN & THOMPSON  
19 400 South Fourth Street, Third Floor  
20 Las Vegas, Nevada 89101  
21 Telephone: 702/791-0308  
22 Facsimile: 702/791-1912  
23 *Attorneys for Plaintiffs*

24 and that there is regular communication by mail between the place of mailing and the place(s) so  
25 addressed.

26   
27 \_\_\_\_\_  
28 An Employee of Black & LoBello

# EXHIBIT 5



1 **ECWD**  
2 **BLACK & LOBELLO**  
3 Rusty Graf, Esq. (Bar No. 6322)  
4 10777 West Twain Avenue, Third Floor  
5 Las Vegas, Nevada 89135  
6 Ph. (702) 869-8801  
7 Fax (702) 869-2669  
8 [smack@blacklobello.law](mailto:smack@blacklobello.law)  
9 *Attorney for Defendants*

7 **DISTRICT COURT**  
8  
9 **CLARK COUNTY, NEVADA**

10 4520 ARVILLE, a California general  
11 partnership; MCKINLEY MANOR, an Idaho  
12 general partnership,  
13 Plaintiffs,

13 v.

14 BOUR ENTERPRISES, LLC, a Nevada limited  
15 liability company; MULUGETA BOUR, an  
16 individual; HILENA MENGESHA, an  
17 individual; DOES 1 through 100, inclusive,  
18 Defendants.

Case No.: A-19-794864-C  
Dept. No.: 8

**DEFENDANTS' THIRD SUPPLEMENT  
TO NRCP 16.1 INITIAL LIST OF  
WITNESSES AND DOCUMENTS**

19 Defendants, BOUR ENTERPRISES, LLC, a Nevada limited liability company,  
20 MULUGETA BOUR, an individual, and HILENA MENGESHA, an individual, by and through  
21 their attorney of record, Rusty Graf, Esq. of the law firm of Black & LoBello., hereby provides  
22 their Third Supplement to NRCP 16.1 Initial List of Witnesses and Documents as follows:

23 **I. LIST OF WITNESSES**

- 24 1. Person Most Knowledgeable of 4520 Arville  
25 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
26 400 South Fourth Street, Third Floor  
27 Las Vegas, Nevada 89101  
28 (702) 791-0308

1 This witness is expected to have information regarding the facts and circumstances at  
2 issue in this action and any damages sustained therein.

3 2. Person Most Knowledgeable of McKinley Manor  
4 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
5 400 South Fourth Street, Third Floor  
6 Las Vegas, Nevada 89101  
(702) 791-0308

7 This witness is expected to have information regarding the facts and circumstances at  
8 issue in this action and any damages sustained therein.

9 3. David Burns  
10 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
11 400 South Fourth Street, Third Floor  
12 Las Vegas, Nevada 89101  
(702) 791-0308

13 This witness is expected to have information regarding the facts and circumstances at  
14 issue in this action and any damages sustained therein.

15 4. Kevin Donahoe  
16 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
17 400 South Fourth Street, Third Floor  
18 Las Vegas, Nevada 89101  
(702) 791-0308

19 This witness is expected to have information regarding the facts and circumstances at  
20 issue in this action and any damages sustained therein.

21 5. Person Most Knowledgeable for Bour Enterprises, LLC  
22 c/o Black & LoBello  
23 10777 W. Twain Ave., Suite 300  
24 Las Vegas, Nevada 89135  
(702) 869-8801

25 This witness is expected to have information regarding the facts and circumstances at  
issue in this action and any damages sustained therein.

26 ///

27 ///

28

1           6.     Mulugeta Bour  
2                 c/o Black & LoBello  
3                 10777 W. Twain Ave., Suite 300  
4                 Las Vegas, Nevada 89135  
5                 (702) 869-8801

6           This witness is expected to have information regarding the facts and circumstances at  
7           issue in this action and any damages sustained therein.

8           7.     Hilena Mengesha  
9                 c/o Black & LoBello  
10                10777 W. Twain Ave., Suite 300  
11                Las Vegas, Nevada 89135  
12                (702) 869-8801

13          This witness is expected to have information regarding the facts and circumstances at  
14          issue in this action and any damages sustained therein.

15          8.     Anthony Bour  
16                 c/o Black & LoBello  
17                 10777 W. Twain Ave., Suite 300  
18                 Las Vegas, Nevada 89135  
19                 (702) 869-8801

20          This witness is expected to have information regarding the facts and circumstances at  
21          issue in this action and any damages sustained therein.

22          9.     Mahteme Zewdie  
23                 5414 W Harmon Ave  
24                 APT 2032  
25                 Las Vegas, NV 89103

26          This witness is expected to have information regarding the facts and circumstances at  
27          issue in this action and any damages sustained therein.

28          10.    Dejen Yfter  
                5055 W Hacienda Ave  
                Unit 1083  
                Las Vegas, NV 89118

            This witness is expected to have information regarding the facts and circumstances at  
            issue in this action and any damages sustained therein.



11. Tekeste Semagne  
5055 W Hacienda Ave  
Unit 2209  
Las Vegas, NV 89118

This witness is expected to have information regarding the facts and circumstances at issue in this action and any damages sustained therein.

12. Dale Walsh  
C/O Walsh Certified Consultants Inc.  
3333 Calle Del Torre Phone/Cell: (702) 468-4782  
Las Vegas, Nevada 89102

This witness is expected to have information regarding the facts and circumstances at issue in this action and any damages sustained therein.

Defendants herein reserve their right to supplement this witness list as allowed by the applicable Discovery Scheduling Order and/or applicable provisions of the Nevada Rules of Civil Procedure as the identity of additional witnesses becomes known during the course of discovery. Defendants incorporate by reference all documents produced by any other parties in this action.

## **II. LIST OF DOCUMENTS**

Pursuant to NRCP 16.1(a)(1)(B), Defendants hereby produce the following documents:

<i>No.</i>	<i>Document</i>	<i>Bates Numbers</i>
1.	Arville Lease 1	DEFCC000001 - 000032
2.	Arville Lease 2	DEFCC000033 - 000064
3.	Tenant Ledgers	DEFCC000065 - 000070
4.	Emails regarding the leases	DEFCC000071 - 000089
5.	Termination of Lease Notice	DEFCC000090
6.	Email to David Burns With Attached Photographs (Note: DEFCC000092 and DEFCC000093, two photographs, will be on the hand delivered disk only)	DEFCC000091 - 000093

7.	Videos of property (on the hand delivered disk)	DEFCC000094
8.	4825 Quality Court Lease - Redacted	DEFCC000095 - 000114
9.	Bour Enterprises Notice of Termination of Lease – 4/17/2018	DEFCC000115
10.	Business Licenses	DEFCC000116 - 000119
11.	Employee File - Mahteme Zewdie	DEFCC000120 - 000169
12.	Employee File – Dejen Yfter	DEFCC000170 - 000204
13.	Employee File – Tekeste Semagne	DEFCC000205 - 000255
14.	Walsh Report for Subject Property	DEFCC000256 - 000276
15.	<b>Walsh Addendum to February 20, 2020 Report – Dust Assessment for Silica</b>	<b>DEFCC000277 - 000285</b>

Defendants incorporate by reference all documents produced by any other parties in this action. Defendants reserve the right to amend/supplement this List of Documents throughout the discovery process as additional information becomes available, to designate as an exhibit any documents or other tangible evidence identified by any party and/or identified in any exhibits by any party to this action, and to submit any documents or other tangible evidence for the purpose of rebuttal and/or impeachment.

In addition, neither inclusion of any documents or tangible items within this disclosure nor acceptance of documents provided by any other party hereto in a disclosure shall be deemed as a waiver by Defendants of any evidentiary rights Defendants may have with respect to those documents and/or tangible items, including, but not limited to, objection related to authenticity, materiality, relevance, foundation, hearsay, or any other rights as may be permitted pursuant to the Nevada Rules of Evidence.

### **III. DEFENDANTS' COMPUTATION OF DAMAGES**

Defendants hereby offer the following computation of damages pursuant to NRCP 16.1(a)(1)(c). This list is not all-inclusive, as discovery is continuing, and Defendants, therefore, reserve the right to supplement as additional information becomes available.

1.	Constructive Eviction Damages	To be determined
----	-------------------------------	------------------

2.	Breach of Contract Damages	To be determined
3.	Bad Faith Damages	To be determined

Defendants reserve the right to seek other damages including, but not limited to, general and exemplary damages, in an amount to be proven at trial.

#### **IV. DEMONSTRATIVE EXHIBITS**

Plaintiff may offer at trial, certain Exhibits for demonstrative purposes including, but not limited to, the following:

1. Demonstrative and actual photographs and videos of the leased properties;
2. Diagrams, drawings, pictures, photos, film, models, video, DVD and CD ROM of various parts of the leased properties;
3. Medical treatment timeline for Defendants' employees who were injured by working at the properties;
4. Future medical timeline for those employees;
5. Photographs and videos of Defendants' witnesses and the premises;
6. Storyboards and computer digitized power point images;
7. Blow-ups/transparencies/digitized images of photographs and other exhibits;

#### **V. GENERAL OBJECTIONS**

##### **1. General Objections Applicable to All Witnesses Disclosed by Defendants.**

Defendants object to any witness identified by Plaintiffs which should be excluded on the basis that the witnesses are not relevant, or unfairly prejudicial, or not identified with particularity, or lack foundation, or would potentially violate the collateral source rule, or violate a stipulation of the parties and/or Orders of this Court. Additionally, Defendants reserve the right to object to any witness identified by any party in the instant matter. Furthermore, Defendants reserve the right to object or exclude any witness testimony, of any basis, at the time of trial.

##### **2. General Objections Applicable to all Documents Disclosed by Plaintiffs.**

1 Defendants object to any documents that Plaintiffs intend to use as exhibits at the trial of  
2 this matter, if any information violates the collateral source rule, hearsay rule, lacks foundation,  
3 is not relevant or which relevancy is outweighed by its prejudicial effect, or contains  
4 information that was/will be excluded by the Court or by stipulation of the parties. Defendants  
5 also object to these documents inasmuch as they have not been properly redacted according to  
6 the laws of the privacy, and the previous stated objections.

7 By disclosing witnesses and/or documents, Defendants do not waive the right to  
8 challenge and/or exclude any such witness or document or portions thereof on any basis.

9 Defendants reserve the right to object to any document identified by any party in the  
10 instant matter.

11 Defendants further reserve the right to use any and all of any other parties' exhibits at the  
12 time of trial of this matter.

13 DATED this 19<sup>th</sup> day of March 2020.

14 **BLACK & LOBELLO**

15  
16 By: 

17 Rusty Graf, Esq.  
18 Nevada Bar No. 6322  
19 10777 W Twain Ave., Suite 300  
20 Las Vegas, Nevada 89135  
21 Telephone: (702) 869-8801  
22 Facsimile: (702) 869-2669  
23 E-mail: [rgraf@blacklobello.law](mailto:rgraf@blacklobello.law)  
24 Attorney for Defendants  
25  
26  
27  
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that  
3 on the 19<sup>th</sup> day of March 2020, I caused the above and foregoing document entitled  
4 **DEFENDANTS' THIRD SUPPLEMENT TO NRCP 16.1 INITIAL LIST OF WITNESSES**  
5 **AND DOCUMENTS** to be served as follows:

6 [ ] by placing same to be deposited for mailing in the United States Mail, in a sealed  
7 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

8 [X] by electronic service through Odyssey, Clark County Eighth Judicial District Court's  
9 electronic filing/service system; and via personal delivery (zip drive).

10 [ ] pursuant to EDCR 7.26, to be sent via facsimile;

11 to the party or their attorney(s) listed below at the address and/or facsimile number indicated  
12 below:

13 F. THOMAS EDWARDS, ESQ.  
14 E-mail: [tedwards@nevadafirm.com](mailto:tedwards@nevadafirm.com)  
15 SEAN E. STORY, ESQ.  
16 E-mail: [ssstory@nevadafirm.com](mailto:ssstory@nevadafirm.com)  
17 HOLLEY DRIGGS WALCH  
18 FINE PUZEY STEIN & THOMPSON  
19 400 South Fourth Street, Third Floor  
20 Las Vegas, Nevada 89101  
21 Telephone: 702/791-0308  
22 Facsimile: 702/791-1912  
23 *Attorneys for Plaintiffs*

24 and that there is regular communication by mail between the place of mailing and the place(s) so  
25 addressed.

26   
27 \_\_\_\_\_  
28 An Employee of Black & LoBello

# EXHIBIT 6



**BLACK & LOBELLO**  
10777 W. Twain Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89135  
(702) 869-8801 FAX: (702) 869-2669

**RESP**  
**BLACK & LOBELLO**  
Rusty Graf, Esq.  
Nevada Bar No. 6322  
10777 West Twain Avenue, Suite 300  
Las Vegas, Nevada 89135  
Ph. (702) 869-8801  
Fax (702) 869-2669  
rgraf@blacklobello.law  
*Attorneys for Defendants/Counterclaimants*  
*Bour Enterprises, LLC, Mulugeta Bour and*  
*Hilena Mengesha*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants

v.

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership, DOES I-X; and ROE  
CORPORATIONS I-X;

Counter Defendants,

Case No.: A-19-794864-C  
Dept. No.: 8

**RESPONSE OF  
DEFENDANT/COUNTERCLAIMANT  
BOUR ENTERPRISES, LLC TO  
PLAINTIFFS FIRST SET OF REQUESTS  
FOR PRODUCTION OF DOCUMENTS**

Defendant/Counterclaimant, BOUR ENTERPRISES, LLC, a Nevada limited liability company, hereby responds to Plaintiffs 4220 Arville and McKinley Manor, First Set of Requests for Production of Documents as follows:

#### **DEFINITIONS**

(A) “Nondiscoverable/Irrelevant” – The request in question concerns a matter that is not relevant to the subject matter of this litigation and is not reasonably calculated to lead to the discovery of admissible evidence.

(B) “Unduly burdensome” – The request in question seeks discovery which is unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

(C) “Vague” – The request in question contain a word or phrase which is not adequately defined, or the overall request is confusing, and the information or documents being sought is not reasonably ascertainable by the request.

(D) “Overly broad” – The request seeks information or documents beyond the scope of, or beyond the time period relevant to, the subject matter of this litigation and, accordingly, seeks information or documents which are nondiscoverable/irrelevant and is unduly burdensome.

#### **GENERAL OBJECTIONS**

Defendant/Counterclaimant objects to Plaintiffs' Requests for Production to the extent that they request any information that is protected by any absolute or qualified privilege or exemption including, but not limited to, the attorney-client privilege, the attorney work-product exemption, and the consulting-expert exemption. Further, Defendant specifically objects to Plaintiffs' Requests for Production on the following grounds.

1. Defendant objects to the Requests for Production to the extent they seek documents or disclosure of information that is protected from disclosure by the attorney-client privilege in accordance with Rule 26(b)(1), Rule 26(b)(3), and Rule 26(b)(1)(5) of the Nevada Rules of Civil Procedure, NRS 89.095, applicable case law.

2. Defendant objects to the Requests for Production to the extent they seek documents or disclosure of information that is protected from disclosure by the work-product exemption in accordance with Rule 26(b)(1), Rule 26(b)(3), and Rule 26(b)(1)(5) of the Nevada Rules of Civil



1 Procedure and applicable case law.

2 3. Defendant objects to the Requests for Production to the extent they seek documents  
3 or information protected from disclosure pursuant to the consultant/expert exemption in  
4 accordance with Rule 26(b)(3), Rule 26(b)(4), and Rule 26(b)(1)(5) of the Nevada Rules of Civil  
5 Procedure and applicable case law.

6 4. Defendant objects to the Requests for Production to the extent they seek trade  
7 secrets, commercially sensitive information, or confidential proprietary data entitled to protection  
8 under Rule 26(c)(7) of the Nevada Rules of Civil Procedure and NRS 49.325.

9 5. Defendant objects to the Requests for Production as the documents have already  
10 been identified and produced in this litigation.

11 6. This response will be made on the basis of information and writings available to  
12 and located by Defendant upon reasonable investigation of its records, and if applicable, an inquiry  
13 of present officers and employees. There may be other and further information respecting the  
14 Requests for Production propounded by Plaintiff of which Defendant is presently unaware of  
15 despite its reasonable investigation and inquiry. Defendant reserves the right to modify or enlarge  
16 any response with such pertinent additional information as it may subsequently discover.

17 7. No incidental or implied admissions will be made by the responses to the Requests  
18 for Production. The fact that Defendant may respond or object to a request, or any part thereof,  
19 shall not be deemed an admission that Defendant accepts or admits the existence of any fact set  
20 forth or assumed by such request, or that such response constitutes admissible evidence. The fact  
21 that Defendant responds to part of any request is not to be deemed a waiver by Defendant of its  
22 objections including privilege, to other parts of such request.

23 8. Defendant objects to any instruction or Interrogatory to the extent that it would  
24 impose upon Defendant greater duties than are set forth under the Nevada Rules of Civil Procedure.  
25 Defendant will supplement its response to those Requests for Production as required by Rule 26(e)  
26 of the Nevada Rules of Civil Procedure.

27 9. All responses will be made solely for the purpose of this action. Each response will  
28 be subject to all objections as to competence, relevance, materiality, propriety, and admissibility,  
and to any and all other objections on any ground which would require the exclusion from evidence

1 of any statement herein if any such statements were made by a witness present and testifying at  
2 trial, all of which objections and grounds are expressly reserved and may be interposed at such  
3 hearings.

4 10. Defendant adopts by reference the above objections and incorporates each  
5 objection as if it was fully set forth below in each of Defendant's responses.

6 **RESPONSES TO REQUEST FOR PRODUCTION**

7 **REQUEST 1:**

8 Produce any documents reflecting Your occupancy of the premises (e.g., lease, purchase  
9 agreement, assumption, assignment, etc.) that You occupied after vacating the Premises ("New  
10 Location").

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

12 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
13 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
14 to this request due to vagueness, as Plaintiffs have not provided a clear definition or address for  
15 the "New Location" they reference. Additionally, Defendant objects to the request as it lacks  
16 foundation. Defendant submits that it is not in custody and control of documents originated and  
17 generated by third-party entities. Defendant further objects to this Request on the grounds that it  
18 may require the production of confidential and privileged information. Subject to and without  
19 waiving the foregoing objections, Defendant responds as follows:  
20

21  
22 Defendant is not in possession of any non-confidential and non-privileged documents  
23 responsive to this request.

24 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
25 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
26 right to further supplement this response upon obtaining any additional documents that are  
27 responsive to the request.  
28

**REQUEST 2:**

Produce all communications regarding the New Location, including the negotiation of any related documents, that preceded your occupancy of the New Location.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

Objection. This request is overly broad, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this request due to vagueness, as Plaintiffs have not provided a definition or address for the "New Location" they reference. This request is also vague as to time. Additionally, Defendant objects to the request as it lacks foundation. Defendant submits that it is not in custody and control of documents originated and generated by third-party entities. Defendant further objects to this Request on the grounds that it may require the production of confidential and privileged information. Subject to and without waiving the foregoing objections, Defendant responds as follows:

Defendant is not in possession of any non-confidential and non-privileged documents responsive to this request.

Discovery is ongoing. To the extent they exist, additional documents responsive to this request, will be produced in the ordinary course pursuant to NRCp 16.1. Defendant reserves the right to further supplement this response upon obtaining any additional documents that are responsive to the request.

**REQUEST 3:**

Produce each notice You sent to Plaintiffs, or their agents, specifying any obligation of Plaintiffs that had not been performed.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not

1 reasonably calculated to lead to the discovery of admissible evidence. Defendant objects to this  
2 Request on the grounds that it may require the production of confidential and privileged  
3 information. Defendant further objects to this Request on the grounds that it may require the  
4 production of confidential and privileged information. Subject to and without waiving the  
5 foregoing objections, Defendant responds as follows:

6  
7 Any and all non-confidential and non-privileged documents responsive to this request have  
8 been produced by the Defendant in this matter. See Defendants' 16.1 Initial Disclosure of  
9 Witnesses and Production of Documents: **Bates No. DEFC000071 - DEFC000093.**

10 In addition, as discovery is ongoing, Defendant reserves the right to timely further  
11 supplement this response with any records or documents obtained after the production of these  
12 responses.

13  
14 **REQUEST 4:**

15 As for the "two employees that have had to seek medical attention due the amount of dust  
16 and debris at the location" as stated in the letter Bates stamped ARV000067, produce their  
17 employment file, all pay records, all medical records related to the referenced "medical attention,"  
18 and all medical records regarding any other medical providers seen by the employees within three  
19 (3) years of the referenced "medical attention."

20  
21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

22 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
23 reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant  
24 objects to the request as it lacks foundation. Defendant further submits that it is not in custody and  
25 control of documents originated and generated by third-party entities. Defendant further objects to  
26 this Request on the grounds that it may require the production of confidential and privileged  
27 information of third parties. Defendant cannot violate HIPPA regulations and this request, without  
28

1 the consent of the employees, will likely do so. Subject to and without waiving the foregoing  
2 objections, Defendant responds as follows:

3 Defendant is not in possession of any non-confidential and non-privileged documents  
4 responsive to this request. Defendant further submits that it does not have access to any medical  
5 records generated by third parties.  
6

7 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
8 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
9 right to further supplement this response upon obtaining any additional documents that are  
10 responsive to the request.

11 **REQUEST 5:**

12 Produce all documents evidencing the “amount of dust and debris” at the Premises as  
13 referenced in the letter Bates stamped ARV000067.  
14

15 **RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

16 Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not  
17 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
18 to this request as it lacks foundation. Defendant submits that it is not in custody and control of  
19 documents originated and generated by third-party entities. Defendant further submits that such  
20 documents may be in the possession of the requesting Plaintiffs. Defendant also objects to this  
21 Request on the grounds that it may require the production of confidential and privileged  
22 information. Subject to and without waiving the foregoing objections, Defendant responds as  
23 follows:  
24

25 Any and all non-privileged and non-confidential documents in Defendant’s possession  
26 evidencing the “amount of dust and debris” at the Premises have been produced. See Defendants’  
27 16.1 Initial Disclosure of Witnesses and Production of Documents: **Bates No. DEFC000091** -  
28

1 **DEFC000094.**

2       Discovery is ongoing. To the extent they exist, additional documents responsive to this  
3 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
4 right to further supplement this response upon obtaining any additional documents that are  
5 responsive to the request.  
6

7 **REQUEST 6:**

8       Produce all contracts You had with any person or entity to clean or otherwise provide  
9 janitorial services at the Premises.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

11       Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not  
12 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
13 to this request as it lacks foundation. Defendant submits that it is not in custody and control of  
14 documents originated and generated by third-party entities. Defendant also objects to this Request  
15 on the grounds that it may require the production of confidential and privileged information.  
16 Subject to and without waiving the foregoing objections, Defendant responds as follows:  
17

18       Defendant is not in possession of any non-confidential and non-privileged documents  
19 responsive to this request.  
20

21       Discovery is ongoing. To the extent they exist, additional documents responsive to this  
22 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
23 right to further supplement this response upon obtaining any additional documents that are  
24 responsive to the request.

25 **REQUESTS 7:**

26       Produce all documents evidencing the “air quality” at the Premises as referenced in the  
27 letter Bates stamped ARV 000067.  
28

**RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this request as it lacks foundation. Defendant submits that it is not in custody and control of documents originated and generated by third-party entities. Defendant further objects to this Request on the grounds that it may require the production of confidential and privileged information. Subject to and without waiving the foregoing objections, Defendant responds as follows:

Any and all non-privileged and non-confidential documents in Defendant's possession evidencing the "air quality" at the Premises have been produced by the Defendant in this matter. See Defendants' 16.1 Initial Disclosure of Witnesses and Production of Documents: **Bates No. DEFC000071 - DEFC000094.**

Discovery is ongoing. To the extent they exist, additional documents responsive to this request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the right to further supplement this response.

**REQUESTS 8:**

Produce all documents evidencing the infestation of rodents at the Premises as referenced in the letter Bates stamped ARV 000067.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant objects to this request as it lacks foundation. Defendant submits that it is not in custody and control of documents originated and generated by third-party entities. Defendant further objects to this Request on the grounds that it may require the production of confidential and privileged information. Subject to

1 and without waiving the foregoing objections, Defendant responds as follows:

2 Any and all non-privileged and non-confidential documents in Defendant's possession  
3 evidencing the infestation of rodents at the Premises have been produced. See Defendants' 16.1  
4 Initial Disclosure of Witnesses and Production of Documents: **Bates No. DEFC000071 -**  
5 **DEFC000094.**  
6

7 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
8 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
9 right to further supplement this response.

10 **REQUESTS 9:**

11 Produce all documents evidencing the mice urine and excrement at the Premises as  
12 referenced in the letter Bates stamped AVR000067.

13 **RESPONSE TO REQUEST FOR PRODUCTION NO. 9:**

14 Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not  
15 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
16 to this request as it lacks foundation. Defendant submits that it is not in custody and control of  
17 documents originated and generated by third-party entities. Defendant further objects to this  
18 Request on the grounds that it may require the production of confidential and privileged  
19 information. Subject to and without waiving the foregoing objections, Defendant responds as  
20 follows:  
21

22 Any and all non-confidential and non-privileged documents Defendant's possession  
23 evidencing the mice urine and excrement at the Premises have been produced. See Defendants'  
24 16.1 Initial Disclosure of Witnesses and Production of Documents: **Bates No. DEFC000071 -**  
25 **DEFC000094.**  
26

27 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
28



1 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
2 right to further supplement this response.

3 **REQUESTS 10:**

4 Produce all contracts You had with any person or entity for pest control services at the  
5 Premises.

6 **RESPONSE TO REQUEST FOR PRODUCTION NO. 10:**

7  
8 Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not  
9 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
10 to this request as it lacks foundation. Defendant further submits that it is not in custody and control  
11 of documents originated and generated by third-party entities. Defendant objects to this Request  
12 on the grounds that it may require the production of confidential and privileged information.  
13 Subject to and without waiving the foregoing objections, Defendant responds as follows:

14  
15 Defendant is not currently in possession of any non-confidential and non-privileged  
16 documents responsive to this request.

17 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
18 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
19 right to further supplement this response.

20 **REQUESTS 11:**

21  
22 Produce Your federal and state tax returns, including all schedules and attachments, from  
23 2012 to the present.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 11:**

25 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
26 reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant  
27 objects to the request as it lacks foundation. Defendant further objects to this Request on the  
28

1 grounds that it may require the production of confidential and privileged information. Subject to  
2 and without waiving the foregoing objections, Defendant responds as follows:

3 Defendant asserts that the requested documents are privileged, confidential, lacking  
4 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
5 therefore, nondiscoverable/irrelevant.  
6

7 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
8 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
9 right to further supplement this response upon obtaining any additional documents that are  
10 responsive to the request.

11 **REQUESTS 12:**

12 Produce Your financial statements, including without limitation income statements,  
13 balance sheets, statements of retained earnings and statements of cash flows, from 2012 to the  
14 present.  
15

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 12:**

17 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
18 reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant  
19 objects to the request as it lacks foundation. Defendant further objects to this Request on the  
20 grounds that it may require the production of Confidential and Privileged information. Subject to  
21 and without waiving the foregoing objections, Defendant responds as follows:  
22

23 Defendant asserts that the requested documents are privileged, confidential, lacking  
24 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
25 therefore, nondiscoverable/irrelevant. This is not a judgment debtor's exam and you do not have a  
26 judgment upon which to assert this type of request.

27 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
28

1 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
2 right to further supplement this response upon obtaining any additional documents that are  
3 responsive to the request.

4 **REQUESTS 13:**

5 Produce Your bank statements and supporting documents (e.g., checks, front and back,  
6 deposit slips, etc.) from 2012 to the present.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 13:**

8 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
9 reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant  
10 objects to the request as it lacks foundation. Defendant further objects to this Request on the  
11 grounds that it may require the production of confidential and privileged information. Subject to  
12 and without waiving the foregoing objections, Defendant responds as follows:

13 Defendant asserts that the requested documents are privileged, confidential, lacking  
14 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
15 therefore, nondiscoverable/irrelevant. This is not a judgment debtor's exam and you do not have a  
16 judgment upon which to assert this type of request.

17 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
18 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
19 right to further supplement this response upon obtaining any additional documents that are  
20 responsive to the request.

21 **REQUESTS 14:**

22 Produce all communications with Plaintiffs, or their agents, in which You referenced the  
23 parking that You allegedly desired at the Premises.

24 ///  
25  
26  
27  
28

**RESPONSE TO REQUEST FOR PRODUCTION NO. 14:**

Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this request as it lacks foundation. Defendant submits that it is not in custody and control of documents originated and generated by third-party entities. Defendant further objects to this Request on the grounds that it may require the production of confidential and privileged information. Subject to and without waiving the foregoing objections, Defendant responds as follows:

Any and all non-privileged and non-confidential documents currently in Defendant's possession which are related to communications with Plaintiffs, or their agents, referencing parking at the Premises have been produced. See Defendants' 16.1 Initial Disclosure of Witnesses and Production of Documents: **Bates No. DEFC000071 - DEFC000090.**

Discovery is ongoing. To the extent they exist, additional documents responsive to this request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the right to further supplement this response.

**REQUESTS 15:**

Produce all documents evidencing any workers compensation claims made as a result of the issues at the Premises raised in the in the letter Bates stamped AVR000067.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 15:**

Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this request as it lacks foundation. Defendant submits that it is not in custody and control of documents originated and generated by third-party entities. Defendant further objects to this Request on the grounds that it may require the production of confidential and privileged

1 information. Subject to and without waiving the foregoing objections, Defendant responds as  
2 follows:

3 Defendant is not currently in possession of any non-confidential and non-privileged  
4 documents responsive to this request.

5  
6 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
7 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
8 right to further supplement this response.

9 **REQUESTS 16:**

10 Produce all documents reflecting Your acquisition or potential acquisition, directly or  
11 indirectly, of any business during from April 20, 2017 through May 31, 2019.

12 **RESPONSE TO REQUEST FOR PRODUCTION NO. 16:**

13 Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not  
14 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
15 to this request as it lacks foundation. Defendant submits that it is not in custody and control of  
16 documents originated and generated by third-party entities. Defendant further objects to this  
17 Request on the grounds that it may require the production of confidential and privileged  
18 information. Subject to and without waiving the foregoing objections, Defendant responds as  
19 follows:  
20

21  
22 Defendant asserts that the requested documents are privileged, confidential, lacking  
23 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
24 therefore, nondiscoverable/irrelevant. The requested documents are not relevant to the landlord  
25 tenant relationship being sued upon here.

26 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
27 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
28

1 right to further supplement this response.

2 **REQUESTS 17:**

3 Produce all business licenses You held from April 20, 2017 through May 31, 2019.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 17:**

5 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
6 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
7 to this request due to vagueness, as Plaintiffs have not provided a definition for the "Business  
8 License" they reference. Additionally, Defendant objects to the request as it lacks foundation.  
9 Defendant further submits that it is not in custody and control of documents originated and  
10 generated by third-party entities. Defendant further objects to this Request on the grounds that it  
11 may require the production of confidential and privileged information. Subject to and without  
12 waiving the foregoing objections, Defendant responds as follows:

13 Defendant asserts that the requested documents are privileged, confidential, lacking  
14 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
15 therefore, nondiscoverable/irrelevant. The requested documents are not relevant to the landlord  
16 tenant relationship being sued upon here.

17 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
18 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
19 right to further supplement this response upon obtaining any additional documents that are  
20 responsive to the request.

21 **REQUESTS 18:**

22 Produce all documents evidencing Your efforts to keep the premises in good order,  
23 condition and repair.

24 ///

**RESPONSE TO REQUEST FOR PRODUCTION NO. 18:**

Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this request as it lacks foundation. Defendant submits that it is not in custody and control of documents originated and generated by third-party entities. Defendant further objects to this Request on the grounds that it may require the production of confidential and privileged information. Subject to and without waiving the foregoing objections, Defendant responds as follows:

Defendant is not currently in possession of any non-confidential and non-privileged documents responsive to this request.

Discovery is ongoing. To the extent they exist, additional documents responsive to this request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the right to further supplement this response.

**REQUESTS 19:**

Produce all documents or correspondence evidencing Your relationship, formal or informal, with Stardust Limousine, Inc. from 2015 to the present.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 19:**

Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this request as it lacks foundation. Defendant submits that it is not in custody and control of documents originated and generated by third-party entities. Defendant further objects to this Request on the grounds that it may require the production of confidential and privileged information. Subject to and without waiving the foregoing objections, Defendant responds as follows:

1 Defendant asserts that the requested documents are privileged, confidential, lacking  
2 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
3 therefore, nondiscoverable/irrelevant. Stardust Limousine is the dba for Bour Enterprises.

4 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
5 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
6 right to further supplement this response.  
7

8 **REQUESTS 20:**

9 Produce all documents or correspondence evidencing Your relationship, formal or  
10 informal, with Joseph D'Angelo, Jr. from 2015 to present.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 20:**

12 Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not  
13 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
14 to this request as it lacks foundation. Defendant submits that it is not in custody and control of  
15 documents originated and generated by third-party entities. Defendant further objects to this  
16 Request on the grounds that it may require the production of confidential and privileged  
17 information. Subject to and without waiving the foregoing objections, Defendant responds as  
18 follows:  
19

20 Defendant asserts that the requested documents are privileged, confidential, lacking  
21 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
22 therefore, nondiscoverable/irrelevant. Mr. D'Angelo was the prior owner of Stardust Limousine.  
23 If this request is seeking the sale documents then those are Privileged, Confidential, and not  
24 relevant to the landlord/tenant dispute here.  
25

26 ///

27 ///

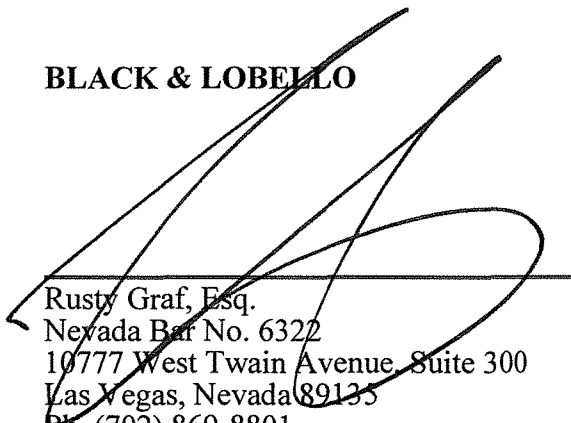
28



1           Discovery is ongoing. To the extent they exist, additional documents responsive to this  
2 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
3 right to further supplement this response.

4  
5 Dated this 28<sup>th</sup> day of October 2019.

**BLACK & LOBELLO**

  
Rusty Graf, Esq.  
Nevada Bar No. 6322  
10777 West Twain Avenue, Suite 300  
Las Vegas, Nevada 89135  
Ph. (702) 869-8801  
Fax (702) 869-2669  
rgraf@blacklobello.law  
*Attorneys for Defendant/Counterclaimant*

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 28<sup>th</sup> day of October 2019, I caused the above and foregoing document entitled **RESPONSE OF DEFENDANT/COUNTERCLAIMANT BOUR ENTERPRISES, LLC TO PLAINTIFFS FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

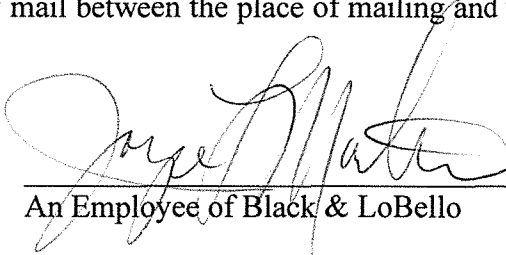
☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

F. Thomas Edwards, Esq.  
HOLLEY DRIGGS WALCH FINE  
PUZEY STEIN & THOMPSON  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

  
\_\_\_\_\_  
An Employee of Black & LoBello

# EXHIBIT 7



**BLACK & LOBELLO**  
10777 W. Twain Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89135  
(702) 869-8801 FAX: (702) 869-2669

**RESP**  
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Nevada Bar No. 6322  
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rgraf@blacklobello.law  
*Attorneys for Defendants/Counterclaimants*  
*Bour Enterprises, LLC, Mulugeta Bour and*  
*Hilena Mengesha*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants

v.

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership, DOES I-X; and ROE  
CORPORATIONS I-X;

Counter Defendants,

Case No.: A-19-794864-C  
Dept. No.: 8

**RESPONSE OF  
DEFENDANT/COUNTERCLAIMANT  
MULUGETA BOUR TO PLAINTIFFS'  
FIRST SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS**

Defendant/Counterclaimant, MULUGETA BOUR, an individual, hereby responds to Plaintiffs 4220 Arville and McKinley Manor, First Set of Requests for Production of Documents as follows:

#### **DEFINITIONS**

(A) “Nondiscoverable/Irrelevant” – The request in question concerns a matter that is not relevant to the subject matter of this litigation and is not reasonably calculated to lead to the discovery of admissible evidence.

(B) “Unduly burdensome” – The request in question seeks discovery which is unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

(C) “Vague” – The request in question contain a word or phrase which is not adequately defined, or the overall request is confusing, and the information or documents being sought is not reasonably ascertainable by the request.

(D) “Overly broad” – The request seeks information or documents beyond the scope of, or beyond the time period relevant to, the subject matter of this litigation and, accordingly, seeks information or documents which are nondiscoverable/irrelevant and is unduly burdensome.

#### **GENERAL OBJECTIONS**

Defendant/Counterclaimant objects to Plaintiffs' Requests for Production to the extent that they request any information that is protected by any absolute or qualified privilege or exemption including, but not limited to, the attorney-client privilege, the attorney work-product exemption, and the consulting-expert exemption. Further, Defendant specifically objects to Plaintiffs' Requests for Production on the following grounds.

1. Defendant objects to the Requests for Production to the extent they seek documents or disclosure of information that is protected from disclosure by the attorney-client privilege in accordance with Rule 26(b)(1), Rule 26(b)(3), and Rule 26(b)(1)(5) of the Nevada Rules of Civil Procedure, NRS 89.095, applicable case law.

2. Defendant objects to the Requests for Production to the extent they seek documents or disclosure of information that is protected from disclosure by the work-product exemption in accordance with Rule 26(b)(1), Rule 26(b)(3), and Rule 26(b)(1)(5) of the Nevada Rules of Civil

1 Procedure and applicable case law.

2 3. Defendant objects to the Requests for Production to the extent they seek documents  
3 or information protected from disclosure pursuant to the consultant/expert exemption in  
4 accordance with Rule 26(b)(3), Rule 26(b)(4), and Rule 26(b)(1)(5) of the Nevada Rules of Civil  
5 Procedure and applicable case law.

6 4. Defendant objects to the Requests for Production to the extent they seek trade  
7 secrets, commercially sensitive information, or confidential proprietary data entitled to protection  
8 under Rule 26(c)(7) of the Nevada Rules of Civil Procedure and NRS 49.325.

9 5. Defendant objects to the Requests for Production as the documents have already  
10 been identified and produced in this litigation.

11 6. This response will be made on the basis of information and writings available to  
12 and located by Defendant upon reasonable investigation of her records, and if applicable, an  
13 inquiry of her present officers and employees. There may be other and further information  
14 respecting the Requests for Production propounded by Plaintiff of which Defendant is presently  
15 unaware of despite her reasonable investigation and inquiry. Defendant reserves the right to  
16 modify or enlarge any response with such pertinent additional information as she may  
17 subsequently discover.

18 7. No incidental or implied admissions will be made by the responses to the Requests  
19 for Production. The fact that Defendant may respond or object to a request, or any part thereof,  
20 shall not be deemed an admission that Defendant accepts or admits the existence of any fact set  
21 forth or assumed by such request, or that such response constitutes admissible evidence. The fact  
22 that Defendant responds to part of any request is not to be deemed a waiver by Defendant of her  
23 objections including privilege, to other parts of such request.

24 8. Defendant objects to any instruction or Interrogatory to the extent that it would  
25 impose upon Defendant greater duties than are set forth under the Nevada Rules of Civil Procedure.  
26 Defendant will supplement her response to those Requests for Production as required by Rule 26(e)  
27 of the Nevada Rules of Civil Procedure.

28 9. All responses will be made solely for the purpose of this action. Each response will  
be subject to all objections as to competence, relevance, materiality, propriety, and admissibility,

1 and to any and all other objections on any ground which would require the exclusion from evidence  
2 of any statement herein if any such statements were made by a witness present and testifying at  
3 trial, all of which objections and grounds are expressly reserved and may be interposed at such  
4 hearings.

5 10. Defendant adopts by reference the above objections and incorporates each  
6 objection as if it was fully set forth below in each of Defendant's responses.

7  
8 **RESPONSES TO REQUEST FOR PRODUCTION**

9 **REQUESTS 1:**

10 Produce any contracts entered into between You, individually, and Plaintiffs.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

12 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
13 reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant  
14 objects to the request as it lacks foundation. Defendant submits that it is not in custody and control  
15 of all such documents originated and generated by third-party entities. Defendant further objects  
16 to this Request on the grounds that it may require the production of confidential and privileged  
17 information. Subject to and without waiving the foregoing objections, Defendant responds as  
18 follows:  
19

20 Defendant is not currently in possession of any non-confidential and non-privileged  
21 documents responsive to this request.  
22

23 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
24 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
25 right to further supplement this response upon obtaining any additional documents that are  
26 responsive to the request.

27 ///  
28

**REQUESTS 2:**

Produce any documents evidencing that Plaintiffs did not perform any obligations owed to You, individually.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

Objection. This request is overly broad, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant objects to the request as it lacks foundation. Defendant further submits that it is not in custody and control of all such documents originated and generated by third-party entities. Defendant objects to this Request on the grounds that it may require the production of confidential and privileged information. Subject to and without waiving the foregoing objections, Defendant responds as follows:

Any and all non-privileged and non-confidential documents in Defendant's possession evidencing Plaintiff's failure to perform their obligations have been produced. See Defendants' 16.1 Initial Disclosure of Witnesses and Production of Documents: **Bates No. DEFC000071 - DEFC000094.**

Discovery is ongoing. To the extent they exist, additional documents responsive to this request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the right to further supplement this response upon obtaining any additional documents that are responsive to the request.

**REQUESTS 3:**

Produce Your federal and state tax returns, including all schedules and attachments, from 2012 to the present.

///

///



**RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

Objection. This request is overly broad, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant objects to the request as it lacks foundation. Defendant further objects to this Request on the grounds that it may require the production of confidential and privileged information. Subject to and without waiving the foregoing objections, Defendant responds as follows:

Defendant asserts that the requested documents are privileged, confidential, lacking foundation, not reasonably calculated to lead to the discovery of admissible evidence and, therefore, nondiscoverable/irrelevant. This is not a judgment debtor's exam and you do not have a judgment upon which to assert this type of request. The requested documents are also not relevant to the landlord tenant relationship being sued upon here.

Discovery is ongoing. To the extent they exist, additional documents responsive to this request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the right to further supplement this response upon obtaining any additional documents that are responsive to the request.

**REQUESTS 4:**

Produce Your financial statements, including without limitation income statements, balance sheets, statements of retained earnings and statements of cash flows, from 2012 to the present.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

Objection. This request is overly broad, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this request due to vagueness, as Plaintiffs request "Your" documents, yet reference "financial statements, including without limitation income statements, balance sheets, statements of retained

1 earnings and statements of cash flows” which would not belong to this individual defendant,  
2 Mulugeta Bour, but rather the business Bour Enterprises. Additionally, Defendant objects to the  
3 request as it lacks foundation. Defendant submits that it is not in custody and control of all such  
4 documents originated and generated by third-party entities. Defendant objects to this Request on  
5 the grounds that it may require the production of confidential and privileged information. Subject  
6 to and without waiving the foregoing objections, Defendant responds as follows:

7  
8 Defendant asserts that the requested documents are either not in her possession and control  
9 or are privileged and confidential and nondiscoverable/irrelevant. This is not a judgment debtor’s  
10 exam and you do not have a judgment upon which to assert this type of request. The requested  
11 documents are also not relevant to the landlord tenant relationship being sued upon here.

12  
13 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
14 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
15 right to further supplement this response upon obtaining any additional documents that are  
16 responsive to the request.

17 **REQUESTS 5:**

18 Produce Your bank statements and supporting documents (e.g., checks, front and back,  
19 deposit slips, etc.) from 2012 to the present.

20 **RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

21  
22 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
23 reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant  
24 objects to the request as it lacks foundation. Defendant submits that it is not in custody and control  
25 of all such documents originated and generated by third-party entities. Defendant further objects  
26 to this Request on the grounds that it may require the production of confidential and privileged  
27 information. Subject to and without waiving the foregoing objections, Defendant responds as  
28

1 follows:

2 Defendant asserts that the requested documents are privileged and confidential and  
3 nondiscoverable/irrelevant. This is not a judgment debtor's exam and you do not have a judgment  
4 upon which to assert this type of request. The requested documents are also not relevant to the  
5 landlord tenant relationship being sued upon here.

6  
7 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
8 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
9 right to further supplement this response upon obtaining any additional documents that are  
10 responsive to the request.

11 **REQUESTS 6:**

12 Produce all documents reflecting Your acquisition or potential acquisition, directly or  
13 indirectly, of any business during from April 20, 2017 through May 31, 2019.

14 **RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

15 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
16 reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant  
17 objects to the request as it lacks foundation. Defendant submits that it is not in custody and control  
18 of all such documents originated and generated by third-party entities. Defendant further objects  
19 to this Request on the grounds that it may require the production of confidential and privileged  
20 information. Subject to and without waiving the foregoing objections, Defendant responds as  
21 follows:  
22

23  
24 Defendant asserts that the requested documents are privileged, confidential, lacking  
25 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
26 therefore, nondiscoverable/irrelevant. This is not a judgment debtor's exam and you do not have a  
27 judgment upon which to assert this type of request. The requested documents are also not relevant  
28

1 to the landlord tenant relationship being sued upon here.

2 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
3 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
4 right to further supplement this response upon obtaining any additional documents that are  
5 responsive to the request.  
6

7 **REQUESTS 7:**

8 All business licenses You held from April 20, 2017 through May 31, 2019.

9 **RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

10 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
11 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
12 to this request due to vagueness, as Plaintiffs have not provided a definition for the "Business  
13 License" they reference. Additionally, Defendant objects to the request as it lacks foundation.  
14 Defendant further submits that it is not in custody and control of all such documents originated  
15 and generated by third-party entities. Defendant further objects to this Request on the grounds that  
16 it may require the production of confidential and privileged information. Subject to and without  
17 waiving the foregoing objections, Defendant responds as follows:  
18

19 Defendant is not currently in possession of any non-confidential and non-privileged  
20 documents responsive to this request. The requested documents are not relevant to the landlord  
21 tenant relationship being sued upon here.  
22

23 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
24 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
25 right to further supplement this response upon obtaining any additional documents that are  
26 responsive to the request.  
27

28 ///

**REQUESTS 8:**

Produce all notices or correspondence from You to Plaintiffs, or their agents.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant objects to this Request on the grounds that it may require the production of confidential and privileged information. Defendant further objects to this Request on the grounds that it may require the production of confidential and privileged information. Subject to and without waiving the foregoing objections, Defendant responds as follows:

Defendant is not currently in possession of any non-confidential and non-privileged documents responsive to this request.

Defendant is not currently in possession of any non-confidential and non-privileged documents responsive to this request. In addition, as discovery is ongoing, Defendant reserves the right to timely further supplement this response with any records or documents obtained after the production of these responses.

**REQUESTS 9:**

Produce all documents or correspondence evidencing Your relationship, formal or informal, with Stardust Limousine, Inc. from 2015 to the present.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 9:**

Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this request as it lacks foundation. Defendant submits that it is not in custody and control of such documents originated and generated by third-party entities. Defendant further objects to this Request on the grounds that it may require the production of confidential and privileged

1 information. Subject to and without waiving the foregoing objections, Defendant responds as  
2 follows:

3 Defendant asserts that the requested documents are privileged, confidential, lacking  
4 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
5 therefore, nondiscoverable/irrelevant. The requested documents are not relevant to the landlord  
6 tenant relationship being sued upon here. Stardust Limousine is the dba for Bour Enterprises.  
7

8 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
9 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
10 right to further supplement this response.

11 **REQUESTS 10:**

12 Produce all documents or correspondence evidencing Your relationship, formal or  
13 informal, with Joseph D'Angelo, Jr. from 2015 to present.  
14

15 **RESPONSE TO REQUEST FOR PRODUCTION NO. 10:**

16 Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not  
17 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
18 to this request as it lacks foundation. Defendant submits that it is not in custody and control of  
19 such documents originated and generated by third-party entities. Defendant further objects to this  
20 Request on the grounds that it may require the production of confidential and privileged  
21 information. Subject to and without waiving the foregoing objections, Defendant responds as  
22 follows:  
23

24 Defendant asserts that the requested documents are privileged, confidential, lacking  
25 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
26 therefore, nondiscoverable/irrelevant. Mr. D'Angelo was the prior owner of Stardust Limousine.  
27 If this request is seeking the sale documents then those are Privileged, Confidential, and not  
28

1 relevant to the landlord/tenant dispute here.

2 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
3 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
4 right to further supplement this response.

5 Dated this 29<sup>th</sup> day of October 2019.

6  
7 **BLACK & LOBELLO**

8  
9  
10 Rusty Graf, Esq.  
11 Nevada Bar No. 6322  
12 10777 West Twain Avenue, Suite 300  
13 Las Vegas, Nevada 89135  
14 Ph. (702) 869-8801  
15 Fax (702) 869-2669  
16 rgraf@blacklobello.law  
17 *Attorneys for Defendant/Counterclaimant*  
18  
19  
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28

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 10<sup>th</sup> day of October 2019, I caused the above and foregoing document entitled **RESPONSE OF DEFENDANT MULUGETA BOUR TO PLAINTIFFS FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

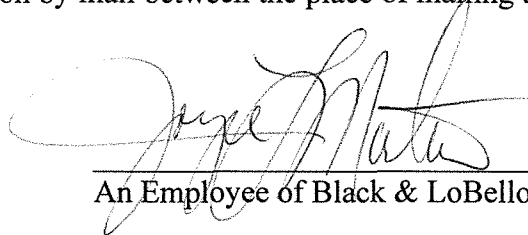
☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

F. Thomas Edwards, Esq.  
HOLLEY DRIGGS WALCH FINE  
PUZEY STEIN & THOMPSON  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

  
\_\_\_\_\_  
An Employee of Black & LoBello



# EXHIBIT 8



**BLACK & LOBELLO**  
10777 W. Twain Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89135  
(702) 869-8801 FAX: (702) 869-2669

**RESP**  
**BLACK & LOBELLO**  
Rusty Graf, Esq.  
Nevada Bar No. 6322  
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Ph. (702) 869-8801  
Fax (702) 869-2669  
rgraf@blacklobello.law  
*Attorneys for Defendants/Counterclaimants*  
*Bour Enterprises, LLC, Mulugeta Bour and*  
*Hilena Mengesha*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants

v.

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership, DOES I-X; and ROE  
CORPORATIONS I-X;

Counter Defendants,

Case No.: A-19-794864-C  
Dept. No.: 8

**RESPONSE OF  
DEFENDANT/COUNTERCLAIMANT  
HILENA MENGESHA TO PLAINTIFFS'  
FIRST SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS**

Defendant/Counterclaimant, HILENA MENGESHA, an individual, hereby responds to Plaintiffs 4220 Arville and McKinley Manor, First Set of Requests for Production of Documents as follows:

#### **DEFINITIONS**

(A) “Nondiscoverable/Irrelevant” – The request in question concerns a matter that is not relevant to the subject matter of this litigation and is not reasonably calculated to lead to the discovery of admissible evidence.

(B) “Unduly burdensome” – The request in question seeks discovery which is unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

(C) “Vague” – The request in question contain a word or phrase which is not adequately defined, or the overall request is confusing, and the information or documents being sought is not reasonably ascertainable by the request.

(D) “Overly broad” – The request seeks information or documents beyond the scope of, or beyond the time period relevant to, the subject matter of this litigation and, accordingly, seeks information or documents which are nondiscoverable/irrelevant and is unduly burdensome.

#### **GENERAL OBJECTIONS**

Defendant/Counterclaimant objects to Plaintiffs' Requests for Production to the extent that they request any information that is protected by any absolute or qualified privilege or exemption including, but not limited to, the attorney-client privilege, the attorney work-product exemption, and the consulting-expert exemption. Further, Defendant specifically objects to Plaintiffs' Requests for Production on the following grounds.

1. Defendant objects to the Requests for Production to the extent they seek documents or disclosure of information that is protected from disclosure by the attorney-client privilege in accordance with Rule 26(b)(1), Rule 26(b)(3), and Rule 26(b)(1)(5) of the Nevada Rules of Civil Procedure, NRS 89.095, applicable case law.

2. Defendant objects to the Requests for Production to the extent they seek documents or disclosure of information that is protected from disclosure by the work-product exemption in accordance with Rule 26(b)(1), Rule 26(b)(3), and Rule 26(b)(1)(5) of the Nevada Rules of Civil

1 Procedure and applicable case law.

2 3. Defendant objects to the Requests for Production to the extent they seek documents  
3 or information protected from disclosure pursuant to the consultant/expert exemption in  
4 accordance with Rule 26(b)(3), Rule 26(b)(4), and Rule 26(b)(1)(5) of the Nevada Rules of Civil  
5 Procedure and applicable case law.

6 4. Defendant objects to the Requests for Production to the extent they seek trade  
7 secrets, commercially sensitive information, or confidential proprietary data entitled to protection  
8 under Rule 26(c)(7) of the Nevada Rules of Civil Procedure and NRS 49.325.

9 5. Defendant objects to the Requests for Production as the documents have already  
10 been identified and produced in this litigation.

11 6. This response will be made on the basis of information and writings available to  
12 and located by Defendant upon reasonable investigation of her records, and if applicable, an  
13 inquiry of her present officers and employees. There may be other and further information  
14 respecting the Requests for Production propounded by Plaintiff of which Defendant is presently  
15 unaware of despite her reasonable investigation and inquiry. Defendant reserves the right to  
16 modify or enlarge any response with such pertinent additional information as she may  
17 subsequently discover.

18 7. No incidental or implied admissions will be made by the responses to the Requests  
19 for Production. The fact that Defendant may respond or object to a request, or any part thereof,  
20 shall not be deemed an admission that Defendant accepts or admits the existence of any fact set  
21 forth or assumed by such request, or that such response constitutes admissible evidence. The fact  
22 that Defendant responds to part of any request is not to be deemed a waiver by Defendant of her  
23 objections including privilege, to other parts of such request.

24 8. Defendant objects to any instruction or Interrogatory to the extent that it would  
25 impose upon Defendant greater duties than are set forth under the Nevada Rules of Civil Procedure.  
26 Defendant will supplement her response to those Requests for Production as required by Rule 26(e)  
27 of the Nevada Rules of Civil Procedure.

28 9. All responses will be made solely for the purpose of this action. Each response will  
be subject to all objections as to competence, relevance, materiality, propriety, and admissibility,

1 and to any and all other objections on any ground which would require the exclusion from evidence  
2 of any statement herein if any such statements were made by a witness present and testifying at  
3 trial, all of which objections and grounds are expressly reserved and may be interposed at such  
4 hearings.

5 10. Defendant adopts by reference the above objections and incorporates each  
6 objection as if it was fully set forth below in each of Defendant's responses.

7 **RESPONSES TO REQUEST FOR PRODUCTION**

8 **REQUEST 1:**

9 Produce any contracts entered into between You, individually, and Plaintiffs.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

11 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
12 reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant  
13 objects to the request as it lacks foundation. Defendant submits that it is not in custody and control  
14 of documents originated and generated by third-party entities. Defendant further objects to this  
15 Request on the grounds that it may require the production of confidential and privileged  
16 information. Subject to and without waiving the foregoing objections, Defendant responds as  
17 follows:  
18

19 Defendant is not currently in possession of any non-confidential and non-privileged  
20 documents responsive to this request.

21  
22 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
23 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
24 right to further supplement this response upon obtaining any additional documents that are  
25 responsive to the request.

26 **REQUEST 2:**

27 Produce any documents evidencing that Plaintiffs did not perform any obligations owed to  
28

1 You, individually.

2 **RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

3 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
4 reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant  
5 objects to the request as it lacks foundation. Defendant further submits that it is not in custody and  
6 control of documents originated and generated by third-party entities. Defendant objects to this  
7 Request on the grounds that it may require the production of confidential and privileged  
8 information. Subject to and without waiving the foregoing objections, Defendant responds as  
9 follows:  
10

11 Any and all non-privileged and non-confidential documents in Defendant's possession  
12 evidencing Plaintiff's failure to perform their obligations have been produced. See Defendants'  
13 16.1 Initial Disclosure of Witnesses and Production of Documents: **Bates No. DEFC000071 -**  
14 **DEFC000094.**  
15

16 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
17 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
18 right to further supplement this response upon obtaining any additional documents that are  
19 responsive to the request.  
20

21 **REQUEST 3:**

22 Produce Your federal and state tax returns, including all schedules and attachments, from  
23 2012 to the present.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

25 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
26 reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant  
27 objects to the request as it lacks foundation. Defendant further objects to this Request on the  
28

1 grounds that it may require the production of confidential and privileged information. Subject to  
2 and without waiving the foregoing objections, Defendant responds as follows:

3 Defendant asserts that the requested documents are privileged, confidential, lacking  
4 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
5 therefore, nondiscoverable/irrelevant. This is not a judgment debtor's exam and you do not have a  
6 judgment upon which to assert this type of request. The requested documents are also not relevant  
7 to the landlord tenant relationship being sued upon here.  
8

9 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
10 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
11 right to further supplement this response upon obtaining any additional documents that are  
12 responsive to the request.

13 **REQUEST 4:**

14 Produce Your financial statements, including without limitation income statements,  
15 balance sheets, statements of retained earnings and statements of cash flows, from 2012 to the  
16 present.  
17

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

19 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
20 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
21 to this request due to vagueness, as Plaintiffs request "Your" documents, yet reference "financial  
22 statements, including without limitation income statements, balance sheets, statements of retained  
23 earnings and statements of cash flows" which would not belong to this individual defendant,  
24 Mangesha Bour, but rather the business Bour Enterprises. Additionally, Defendant objects to the  
25 request as it lacks foundation. Defendant submits that it is not in custody and control of documents  
26 originated and generated by third-party entities. Defendant objects to this Request on the grounds  
27  
28

1 that it may require the production of confidential and privileged information. Subject to and  
2 without waiving the foregoing objections, Defendant responds as follows:

3 Defendant asserts that the requested documents are either not in her possession and control  
4 or are privileged and confidential and nondiscoverable/irrelevant. This is not a judgment debtor's  
5 exam and you do not have a judgment upon which to assert this type of request. The requested  
6 documents are also not relevant to the landlord tenant relationship being sued upon here.

7  
8 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
9 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
10 right to further supplement this response upon obtaining any additional documents that are  
11 responsive to the request.

12 **REQUEST 5:**

13 Produce Your bank statements and supporting documents (e.g., checks, front and back,  
14 deposit slips, etc.) from 2012 to the present.

15 **RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

16 Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
17 reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant  
18 objects to the request as it lacks foundation. Defendant submits that it is not in custody and control  
19 of documents originated and generated by third-party entities. Defendant further objects to this  
20 Request on the grounds that it may require the production of confidential and privileged  
21 information. Subject to and without waiving the foregoing objections, Defendant responds as  
22 follows:

23  
24 Defendant asserts that the requested documents are privileged and confidential and,  
25 therefore, nondiscoverable/irrelevant. This is not a judgment debtor's exam and you do not have a  
26 judgment upon which to assert this type of request. The requested documents are also not relevant  
27  
28



1 to the landlord tenant relationship being sued upon here.

2           Discovery is ongoing. To the extent they exist, additional documents responsive to this  
3 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
4 right to further supplement this response upon obtaining any additional documents that are  
5 responsive to the request.  
6

7 **REQUEST 6:**

8           Produce all documents reflecting Your acquisition or potential acquisition, directly or  
9 indirectly, of any business during from April 20, 2017 through May 31, 2019.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

11           Objection. This request is overly broad, ambiguous, unduly burdensome, and not  
12 reasonably calculated to lead to the discovery of admissible evidence. Additionally, Defendant  
13 objects to the request as it lacks foundation. Defendant submits that it is not in custody and control  
14 of documents originated and generated by third-party entities. Defendant further objects to this  
15 Request on the grounds that it may require the production of confidential and privileged  
16 information. Subject to and without waiving the foregoing objections, Defendant responds as  
17 follows:  
18

19           Defendant asserts that the requested documents are privileged, confidential, lacking  
20 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
21 therefore, nondiscoverable/irrelevant. This is not a judgment debtor's exam and you do not have a  
22 judgment upon which to assert this type of request. The requested documents are also not relevant  
23 to the landlord tenant relationship being sued upon here.  
24

25           Discovery is ongoing. To the extent they exist, additional documents responsive to this  
26 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
27 right to further supplement this response upon obtaining any additional documents that are  
28

responsive to the request.

**REQUEST 7:**

All business licenses You held from April 20, 2017 through May 31, 2019.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

Objection. This request is overly broad, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this request due to vagueness, as Plaintiffs have not provided a clear definition for the “Business License” they reference. Additionally, Defendant objects to the request as it lacks foundation. Defendant further submits that it is not in custody and control of documents originated and generated by third-party entities. Defendant further objects to this Request on the grounds that it may require the production of confidential and privileged information. Subject to and without waiving the foregoing objections, Defendant responds as follows:

Defendant is not currently in possession of any non-confidential and non-privileged documents responsive to this request. The requested documents are not relevant to the landlord tenant relationship being sued upon here.

Discovery is ongoing. To the extent they exist, additional documents responsive to this request, will be produced in the ordinary course pursuant to NRCp 16.1. Defendant reserves the right to further supplement this response upon obtaining any additional documents that are responsive to the request.

**REQUEST 8:**

Produce all notices or correspondence from You to Plaintiffs, or their agents.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant objects to this

1 Request on the grounds that it may require the production of confidential and privileged  
2 information. Defendant further objects to this Request on the grounds that it may require the  
3 production of confidential and privileged information. Subject to and without waiving the  
4 foregoing objections, Defendant responds as follows:

5 Defendant is not currently in possession of any non-confidential and non-privileged  
6 documents responsive to this request.

7  
8 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
9 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
10 right to further supplement this response upon obtaining any additional documents that are  
11 responsive to the request.

12 **REQUEST 9:**

13 Produce all documents or correspondence evidencing Your relationship, formal or  
14 informal, with Stardust Limousine, Inc. from 2015 to the present.

15 **RESPONSE TO REQUEST FOR PRODUCTION NO. 9:**

16 Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not  
17 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
18 to this request as it lacks foundation. Defendant submits that it is not in custody and control of  
19 such documents originated and generated by third-party entities. Defendant further objects to this  
20 Request on the grounds that it may require the production of confidential and privileged  
21 information. Subject to and without waiving the foregoing objections, Defendant responds as  
22 follows:

23 Defendant asserts that the requested documents are privileged, confidential, lacking  
24 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
25 therefore, nondiscoverable/irrelevant. The requested documents are not relevant to the landlord  
26  
27  
28

1 tenant relationship being sued upon here. Stardust Limousine is the dba for Bour Enterprises.

2 Discovery is ongoing. To the extent they exist, additional documents responsive to this  
3 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
4 right to further supplement this response.

5 **REQUEST 10:**

6  
7 Produce all documents or correspondence evidencing Your relationship, formal or  
8 informal, with Joseph D'Angelo, Jr. from 2015 to present.

9 **RESPONSE TO REQUEST FOR PRODUCTION NO. 10:**

10 Objection. This request is overly broad, vague, ambiguous, unduly burdensome, and not  
11 reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects  
12 to this request as it lacks foundation. Defendant submits that it is not in custody and control of  
13 such documents originated and generated by third-party entities. Defendant further objects to this  
14 Request on the grounds that it may require the production of confidential and privileged  
15 information. Subject to and without waiving the foregoing objections, Defendant responds as  
16 follows:  
17

18 Defendant asserts that the requested documents are privileged, confidential, lacking  
19 foundation, not reasonably calculated to lead to the discovery of admissible evidence and,  
20 therefore, nondiscoverable/irrelevant. Mr. D'Angelo was the prior owner of Stardust Limousine.  
21 If this request is seeking the sale documents then those are Privileged, Confidential, and not  
22 relevant to the landlord/tenant dispute here.  
23

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1           Discovery is ongoing. To the extent they exist, additional documents responsive to this  
2 request, will be produced in the ordinary course pursuant to NRCP 16.1. Defendant reserves the  
3 right to further supplement this response.

4           Dated this 28<sup>th</sup> day of October 2019.

**BLACK & LOBELLO**

Rusty Graf, Esq.  
Nevada Bar No. 6322  
10777 West Twain Avenue, Suite 300  
Las Vegas, Nevada 89135  
Ph. (702) 869-8801  
Fax (702) 869-2669  
rgraf@blacklobello.law  
*Attorneys for Defendant/Counterclaimant*

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 10<sup>th</sup> day of October 2019, I caused the above and foregoing document entitled **RESPONSE OF DEFENDANT/COUNTERCLAIMANT HILENA MENGESHA TO PLAINTIFFS FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

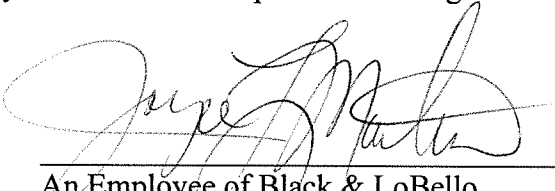
☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

F. Thomas Edwards, Esq.  
HOLLEY DRIGGS WALCH FINE  
PUZEY STEIN & THOMPSON  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

  
\_\_\_\_\_  
An Employee of Black & LoBello

# EXHIBIT 9



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DISTRICT COURT  
CLARK COUNTY, NEVADA

4520 ARVILLE, a California ) CASE NO.:  
general partnership; ) A-19-794864-C  
MCKINLEY MANOR, an Idaho )  
general partnership, ) DEPT NO.: 8

Plaintiffs, )

v. )

BOUR ENTERPRISES, LLC, a )  
Nevada limited liability )  
company; MULUGETA BOUR, an )  
individual; HILENA MENGESHA, ) DEPOSITION  
an individual; DOES 1 )  
through 100, inclusive, ) OF

Defendants. ) NRCP 30(B)(6) DESIGNEE

BOUR ENTERPRISES, LLC, a ) OF BOUR ENTERPRISES, LLC  
Nevada limited liability )  
company; MULUGETA BOUR, an ) MULUGETA BOUR  
individual; HILENA MENGESHA, )  
an individual; DOES 1 ) LAS VEGAS, NEVADA  
through 100, inclusive, )

Counterclaimants, ) MONDAY,  
NOVEMBER 2, 2020

vs. )

4520 ARVILLE, a California )  
general partnership; )  
MCKINLEY MANOR, an Idaho )  
general partnership, DOES )  
I-X; and ROE CORPORATION )  
I-X, )

Counterdefendants. )

REPORTED BY: JEWEL WILLIAMS, CCR NO. 941



1 DEPOSITION OF NRCP 30(B)(6) DESIGNEE OF  
2 BOUR ENTERPRISES, LLC, MULUGETA BOUR, held at Holley  
3 Driggs Walch Fine Puzev Stein & Thompson, located at  
4 400 South Fourth Street, Third Floor, Las Vegas,  
5 Nevada, 89101, on Monday, November 2, 2020, at  
6 10:52 a.m., before Jewel Williams, Certified Court  
7 Reporter, in and for the State of Nevada.

8  
9 APPEARANCES:

10 For the Plaintiffs 4520 Arville and McKinley Manor:

11 HOLLEY DRIGGS WALCH FINE PUZEY STEIN &  
12 THOMPSON

13 BY: F. THOMAS EDWARDS, ESQ.

400 South Fourth Street, Third Floor

14 Las Vegas, Nevada 89101

702.791.0308

15 tedwards@nevadafirm.com

For the Defendants Bour Enterprises, LLC, Mulugeta  
16 Bour, and Hilena Mengesha:

17 BLACK & WADHAMS

18 BY: RUSTY GRAF, ESQ.

10777 West Twain Avenue, Suite 300

19 Las Vegas, Nevada 89135

702.869.8801

20 rgraf@blackwadhams.law

21 Also Present:

22 Kevin Donahoe, Commercial Specialists

23 ENVISION LEGAL SOLUTIONS

24 BY: JEWEL WILLIAMS

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I N D E X

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E X H I B I T S

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Exhibit 1	Notice of Deposition of NRCP 30(b)(6) witness	10
Exhibit 2	Standard Industrial/Commercial Multi-Tenant Lease-Net ARV000001 - 000028	43
Exhibit 3	Guaranty of Lease ARV000029 - 000030	50
Exhibit 4	Tenant Ledger ARV000031 - 000033	52
Exhibit 5	Standard Industrial/Commercial Multi-Tenant Lease-Net ARV000034 - 000061	55
Exhibit 6	Guaranty of Lease ARV000062 - 000063	59
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EXHIBITS (CONTINUED)

Exhibit 8	Email Chain DEFCC000081 - 000083	70
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Exhibit 11	Photographs DEFCC000092 - 000093	90
Exhibit 12	DVD containing three videos	94
Exhibit 13	Industrial/Office Building and Property Lease DEFCC000095 - 000114	102

1 LAS VEGAS, NEVADA; MONDAY, NOVEMBER 2, 2020;  
2 10:52 a.m.

3  
4 \* \* \* \* \*

5  
6 MULUGETA BOUR,  
7 having been first duly sworn to testify to the  
8 truth, was examined and testified as follows:

9  
10 EXAMINATION

11 BY MR. EDWARDS:

12 Q. Sir, can you please state and spell your  
13 name for the record.

14 A. M-U-L-U-G-E-T-A B-O-U-R, my last name.  
15 Mulugeta Bour.

16 Q. And is it true that you go by Tony?

17 A. Yes. Yes, Tony is my name, I short it.

18 Q. I'm sorry. What's that?

19 A. I short it. Everybody calls me Tony.

20 Q. Everybody calls you Tony. But your formal  
21 name is Mulugeta Bour?

22 A. Yes.

23 Q. My name is Tom Edwards and I represent the  
24 Plaintiffs in this matter, 4520 Arville and  
25 McKinley Manor and I will be taking your deposition

Page 5

1           A.    If you're asking me to read the number,  
2   yeah, I can read it, \$62,223.08. I don't know what  
3   that means.

4           Q.    You don't know what that means?

5           A.    Yes. I don't know I owe that much, and I  
6   don't think I owe that much. That's not the  
7   conversation that I had with Dave. I don't know  
8   where this come from.

9           Q.    Do you think you owe my client any money?

10          A.    I owe him for three months, that's the  
11   conversation I got. If you're going to tell me you  
12   cannot move out, that you are responsible for the  
13   whole lease, I would never done that.

14          Q.    Does my client own you any money?

15          A.    I didn't sue him. He don't -- why would he  
16   owe me money? Why do you say that?

17          Q.    Let's go to the next set.

18                (Exhibit 5 was marked for identification.)

19   BY MR. EDWARDS:

20          Q.    Sir, I'm showing you what's been marked as  
21   Exhibit 5. Do you recognize this document?

22          A.    It look like the same as the other one, as  
23   Exhibit 2. It looks like the same as Exhibit 2.

24          Q.    Yeah. If you look under -- you see 1.2(a)  
25   here on the first page on both documents, Exhibit 2

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CERTIFICATE OF REPORTER

STATE OF NEVADA    )  
                                  )     ss:  
COUNTY OF CLARK    )

I, Jewel Williams, a Certified Court Reporter  
licensed by the State of Nevada, do hereby certify:  
That I reported the deposition of MULUGETA BOUR on  
Monday, November 2, 2020, at 10:52 a.m.

That prior to being deposed, the witness was  
duly sworn by me to testify to the truth. That I  
thereafter transcribed my said stenographic notes via  
computer-aided transcription into written form, and  
that the typewritten transcript is a complete, true,  
and accurate transcription of said shorthand notes;  
that review of the transcript was not requested.

I further certify that I am not a relative,  
employee, or independent contractor of counsel or of  
any of the parties involved in the proceeding; nor a  
person financially interested in the proceeding; nor  
do I have any other relationship that may reasonably  
cause my impartiality to be questioned.

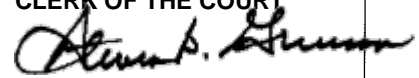
IN WITNESS HEREOF, I have set my hand in my  
office in the County of Clark, State of Nevada.

Dated: 11/9/20



JEWEL WILLIAMS, CCR NO. 941

# **EXHIBIT 4**



**OPPO**  
**BLACK & WADHAMS**  
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*Attorneys for Defendants/Counterclaimants*  
*Bour Enterprises, LLC, Mulugeta Bour and*  
*Hilena Mengesha*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants

v.

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership, DOES I-X; and ROE  
CORPORATIONS I-X;

Counter-Defendants,

Case No.: A-19-794864-C  
Dept. No.: 8

**OPPOSITION TO PLAINTIFFS'  
MOTION FOR  
SUMMARY JUDGMENT  
REGARDING COUNTERCLAIM  
DAMAGES**

///



1 Defendants/Counterclaimants BOUR ENTERPRISES, LLC, MULUGETA BOUR and  
2 HILENA MENGESHA (hereinafter collectively the “Defendants”), by and through their attorney  
3 of record, Rusty Graf, Esq., of the law firm of Black & Wadhams, hereby file their Opposition to  
4 Plaintiffs/Counter-Defendants’ Motion for Summary Judgment Regarding Counterclaim Damages.  
5 This Opposition is based upon the following Memorandum of Points and Authorities, the pleadings  
6 and papers on file herein, and any argument entertained by the Court at the hearing of this matter.  
7

8 Dated this \_\_\_\_ day of November 2020.

9 **BLACK & WADHAMS**

10 

11 RUSTY GRAF, ESQ.  
12 Nevada Bar No. 6322  
13 10777 West Twain Avenue, Suite 300  
14 Las Vegas, Nevada 89135  
15 *Attorney for Defendants*

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I.**

18 **INTRODUCTION**

19 As the Court is already aware, this dispute stems from the Defendants’ lease of 4560 S.  
20 Arville St., C-10, 23, 24, and 29, Las Vegas, NV 89103 (hereinafter the “Premises”) from Plaintiff  
21 4520 Arville (hereinafter “Arville”) and Plaintiff McKinley Manor (hereinafter “McKinley”) (hereinafter collectively the “Plaintiffs”). Defendants were unable to continue operations at the  
22 premises due to the presence of hazardous conditions and ultimately were forced to terminate their  
23 lease. Plaintiffs subsequently filed a Complaint against Defendants regarding their termination of  
24 the lease on May 15, 2019. Defendants subsequently filed their answer and counterclaims against  
25 Plaintiffs on July 16, 2019, wherein they asserted counterclaims for (1) Constructive Eviction; (2)  
26  
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1 Breach of Contract; (3) Breach of the Covenant of Good Faith and Fair Dealing; and (4)  
2 Declaratory Relief.

3 Plaintiffs' have now brought the instant Motion for Summary Judgment as to the damages  
4 from Defendants' asserted counterclaims. Plaintiffs argue that they are entitled to such summary  
5 judgment because (1) Plaintiffs assert Defendants' have no damages; and (2) Plaintiffs assert that  
6 Defendants have not complied with NRCP 16.1(a)(1)(A)(iv). *See Plaintiffs' Motion, Pg. 3.* As  
7 detailed below, these arguments by Plaintiffs are invalid and, as a result, their instant Motion  
8 should be denied.  
9

## 10 II.

### 11 LEGAL ARGUMENT

#### 12 A. STANDARD FOR ANALYZING A MOTION FOR SUMMARY JUDGMENT

13 In Nevada, Motions for Summary Judgment are brought pursuant to NRCP 56, which states  
14 that summary judgment shall only be granted "if the movant shows that there is **no genuine**  
15 **dispute as to any material fact**" and that they are "entitled to judgment as a matter of law."  
16 (*Emphasis added*) *See NRCP 56(a).* Additionally, "[i]f the moving party will bear the burden of  
17 persuasion, **that party must present evidence that would entitle it to a judgment as a matter**  
18 **of law** in the absence of contrary evidence." *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada, 123*  
19 *Nev. 598, 602, 172 P.3d 131, 134 (2007).* Further, "[e]vidence introduced in support of or  
20 opposition to a motion for summary judgment must be admissible evidence" and "[a] party may  
21 object that the material cited to support or dispute a fact cannot be presented in a form that would  
22 be admissible in evidence." *See Collins v. Union Fed. Sav. & Loan Ass'n, 99 Nev. 284, 302, 662*  
23 *P.2d 610, 621 (1983); see also NRCP 56(c)(2).*  
24

25 Here, Plaintiffs are the moving party requesting summary judgment and therefore bear the  
26 burden of proof. As described above, meeting this burden requires: (1) Plaintiffs show that there  
27  
28

1 is no genuine dispute as to any material fact; (2) Plaintiffs show they are entitled to judgment as a  
2 matter of law; and (3) Plaintiffs provide admissible evidence in support of the Instant Motion.  
3 However, as detailed below, Plaintiffs cannot meet this burden and their Motion for Summary  
4 Judgment must therefore be denied.

5  
6 **B. PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS CONTAINS**  
7 **THREE (3) MATERIAL FACTS THAT DEFENDANTS' DISPUTE**

8 In support of their Motion for Summary Judgment, Plaintiffs offer five (5) "undisputed  
9 material facts" which they allege entitle them to judgment as a matter of law. Of these five (5)  
10 "undisputed material facts", Defendants do dispute the following three (3):

11 1. **NRCP 16.1(a)(1)(A)(iv):**

12 Plaintiffs begin by asserting that "Defendants failed to provide a computation of  
13 damages as required by NRCP 16.1(a)(1)(A)(iv)". *See Plaintiffs' Motion, Pg. 3.*  
14 NRCP 16.1(a)(1)(A)(iv) states that "a party must, without awaiting a discovery  
15 request, provide to the other parties:... a computation of each category of damages  
16 claimed by the disclosing party — who must make available for inspection and  
17 copying as under Rule 34 the documents or other evidentiary material, unless  
18 privileged or protected from disclosure, on which each computation is based,  
19 including materials bearing on the nature and extent of injuries suffered". *See*  
20 *NRCP 16.1(a)(1)(A)(iv)*. Plaintiffs' cite to Defendants' NRCP 16.1 disclosures  
21 which state that the Construction Eviction, Breach of Contract, and Bad Faith  
22 Damages asserted are "[t]o be determined". *See Plaintiffs' Motion, Pg. 4.*

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1           **2. Defendants' Production of Documents and Records:**

2           Plaintiffs subsequently state that they "requested that Defendants produce their  
3           financial records, from which a computation of damages could be made. However,  
4           Defendants refused to produce any documents." *Id.*

5           **3. Defendants' Testimony:**

6           Finally, as an "undisputed material fact", Plaintiffs cite to deposition testimony  
7           given on behalf of Defendant Bour Enterprises. *Id. at 5.* Plaintiffs incorrectly argue  
8           that the testimony to which they cite is an admission to the undisputed material fact  
9           that Defendants have no damages. *Id.*

10           **C. PLAINTIFFS ARE INCORRECT IN ASSERTING THAT IT IS AN UNDISPUTED**  
11           **MATERIAL FACT THAT DEFENDANTS VIOLATED NRCP 16.1(a)(1)(A)(iv) AND**  
12           **THEIR DOCUMENT AND RECORD PRODUCTION REQUIREMENTS**

13           **i. Plaintiffs' Citations to Persuasive Authority Cannot Support the Instant**  
14           **Motion.**

15           Plaintiffs begin their legal argument by stating that the above described material facts are  
16           undisputed and that they meet the burden of proof required for summary judgment because they  
17           establish that there is no dispute over Defendants' failure to comply with the requirement of NRCP  
18           16.1(a)(1)(A)(iv) to disclose a computation of damages. *Id. at 6.* Plaintiffs conclude that, as a result  
19           of this failure, Defendants are now precluded from introducing evidence of those damages at trial.  
20           *Id.*

21           Preliminarily, Defendants would like to emphasize that nearly all of the cases to which  
22           Plaintiffs cite in the Legal Argument section of their instant Motion are either federal cases or  
23           cases from other jurisdictions. *Id. at 6-9.* Plaintiffs attempt to address this problem through a  
24           footnote, which states that "Federal cases interpreting the Federal Rules of Civil Procedure are  
25

1 strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part  
2 upon their federal counterparts.” *Id. at 6*. This is true but fails to consider the context in which  
3 these cases are cited. Specifically, because this is a Motion for Summary Judgment, the standard  
4 of review requires that the Motion only be granted if “the movant **is entitled to judgment** as a  
5 matter of law.” (*Emphasis added*) See *NRCP 56(a)*.

6  
7 Thus, cases providing only persuasive authority have no relevance to a Motion for  
8 Summary Judgment because, if the legal foundation for such a motion is at all unclear, or case law  
9 has not yet been established on an issue, then determination through summary judgment would be  
10 improper. Summary Judgment is not meant to be applied where the law is unclear and there is  
11 merely persuasive authority in the movant’s favor, and that is clear from the plain language of the  
12 statute which states it must be demonstrated that the movant “is entitled” to judgment as a matter  
13 of law. See *NRCP 56(a)*. It does not state that a movant must show through a preponderance of  
14 evidence they are entitled to judgment, or that a movant must show that it is more likely than not  
15 they are entitled to judgment, but that it must be shown the movant “**is entitled**” to summary  
16 judgment. (*Emphasis added*) *Id.* Persuasive authority is insufficient to establish as much and must  
17 therefore be disregarded for the purposes of the instant motion.  
18

19  
20 ii. **The Cases Plaintiffs Cite, which are from this Jurisdiction, Do Not Support**  
21 **the Motion for Summary Judgment.**

22 In particular, Plaintiffs cite to the case *Walters v. Meeks*, in support of their assertion that  
23 a “party must also provide a calculation computing the total damages claimed for each category of  
24 damages, as required by NRCP 16.1(a)(1)(C). (Internal quotation omitted) See *Plaintiffs’ Motion*,  
25 *Pg. 7*. Plaintiffs conveniently omit the section of this same case’s holding wherein the Court more  
26 specifically discusses the requirement imposed by NRCP 16.1 to disclose a “computation of any  
27 category of damages claimed by the disclosing party, making available for inspection and copying  
28

1 as under Rule 34 the documents or other evidentiary matter, not privileged or protected from  
2 disclosure, on which such computation is based”. See *Walters v. Meeks*, 127 Nev. 1184, 373 P.3d  
3 972 (2011). When discussing that requirement, the Nevada Supreme Court directly and  
4 unambiguously stated “[t]his **computation of damages requirement applies only to special**  
5 **damages**, not general or other intangible damages.” (Emphasis added) *Id.* Further, the Court  
6 continued on by stating “[s]pecial damages are those damages that **can be assigned an exact**  
7 **dollar amount** or **can be established with reasonable mathematical certainty**, which in the  
8 context of a tort action, such as the one presently before us, generally includes medical expenses  
9 and/or lost wages.” (Emphasis added) *Id.* Here, the damages in question are not special damages.

11 The only other cases cited by Plaintiffs which are not either from another state or from  
12 federal court, are *Pizarro-Ortega v. Cervantes-Lopez* and *Freemon v. Fischer*. See Plaintiffs’  
13 Motion, Pg. 7. In that case, the Nevada Supreme Court considered whether an appellant was correct  
14 in contending they were entitled to a new trial regarding “**future medical expenses** because  
15 respondents did not provide a computation of those expenses”. (Emphasis added) See *Pizarro-*  
16 *Ortega v. Cervantes-Lopez*, 133 Nev. 261, 264, 396 P.3d 783, 786 (2017). The Court ultimately  
17 held that the failure to include future medical expenses was improper but did not address any of  
18 the categories of damages specifically excluded from the NRCP 16.1 disclosure requirements by  
19 the holding of *Walters v. Meeks*. See *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 263–67,  
20 396 P.3d 783, 786–88 (2017). In *Freemon v. Fishcer* (which is also merely persuasive despite  
21 being a Nevada Supreme Court case, as it was unpublished), the Court considered the failure of a  
22 party to disclose expert witness testimony that was the almost exclusive evidence of damages in  
23 the case and the Discovery Commissioner’s decision to exclude that witness. See *Freemon v.*  
24 *Fischer*, 281 P.3d 1173 (Nev. 2009). The Court held that the exclusion of this witness was an  
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1 “extreme sanction” but was required to avoid the other party being “forced to suffer significant  
2 prejudice”. *Id.*

3 Here, what distinguishes the instant Motion from Freemon v. Fischer, is the fact that (1)  
4 the Court granting summary judgment in Plaintiffs’ favor is fundamentally different than a  
5 discovery commissioner simply granting a motion in limine to exclude evidence (even if the result  
6 is similar) and requires a higher burden of proof which Plaintiffs cannot meet; and (2) failure to  
7 disclose the testimony of an expert witness is significantly different than simply not providing an  
8 exact calculation of certain categories of damages, which are excluded from such disclosure under  
9 the holding of Walters v. Meeks as discussed above, because the failure to disclose an expert  
10 witness is prejudicial to the opposing party’s defense. Here, Defendants’ failure to provide more a  
11 more specific computation of damages for the asserted counterclaims did not in prejudice the  
12 Plaintiffs in defending against those claims.

13  
14  
15 **iii. Even if NRCP 16.1(a) Does Apply to Defendants’ Computations, Exclusion of**  
16 **All Evidence of Damages is Not the Appropriate Sanction Under NRCP 37**

17 The Plaintiffs proceed to argue that the computations provided by Defendants should now  
18 result in sanctions under NRCP 37(c), and states that the only exception to those sanctions is “if  
19 the failure to disclose was substantially justified or harmless.” *See Plaintiffs’ Motion, Pg. 8.*  
20 What NRCP 37 specifically states is “[i]f a party fails to provide information or identify a witness  
21 as required by Rule 16.1... the party **is not allowed to use that information or witness to supply**  
22 **evidence** on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is  
23 harmless. (*Emphasis added*) *See NRCP 37(c).* Here, what examination of the plain language of the  
24 statute reveals, is that the sanction imposed by NRCP 37(c), even if appropriate, is not meant to  
25 result in the exclusion of all evidence of all kinds (including that which was properly disclosed)  
26 related to a category of damages.  
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1 The excluded information or witness is directly stated as not being allowed to “supply  
2 evidence”. The computation of damages is not itself evidence, it is merely a party’s calculation of  
3 the damages it has suffered within that specific category of damages based on witness testimony  
4 and/or other information that will actually be presented as evidence. Therefore, it is clear that  
5 NRCP 37(c) is not meant to be applied as Plaintiffs now request. Further, this position is not  
6 contrary to the holding of Freemon v. Fischer discussed above. In that case, all evidence of  
7 damages was excluded because nearly the entirety of that evidence was the testimony of an  
8 improperly disclosed expert witness, not because it was proper to exclude all evidence of any kind  
9 related to a category of damages. See Freemon v. Fischer, 281 P.3d 1173 (Nev. 2009).

11 Additionally, as noted above, it would not be proper to exclude all evidence of damages  
12 under NRCP 37(c) if that failure was “substantially justified or is harmless.” See NRCP 37(c).  
13 Arguendo, though Defendants maintain that application of NRCP 37(c) is already improper for the  
14 above cited reasons, even if NRCP 37(c) was applicable the failure was still substantially justified  
15 or harmless and should thus not result in the exclusion of all evidence related to damages.  
16 Defendants’ failure to provide more a more specific computation of damages for the asserted  
17 counterclaims did not in prejudice the Plaintiffs in defending against those claims. This is not like  
18 a case where important evidence or a key witness was not disclosed, and a party was thus  
19 unprepared to defend itself. Here, all Plaintiffs are missing is a rough calculation by Defendants,  
20 not important evidence or testimony, and the failure was therefore harmless. Further, in light of  
21 Defendants’ reliance on the above cited holding of Walters v. Meeks, the failure was also  
22 justifiable.

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**D. PLAINTIFFS ARE INCORRECT IN ASSERTING THAT IT IS AN UNDISPUTED MATERIAL FACT THAT DEFENDANTS' HAVE TESTIFIED THEY HAVE NO DAMAGES**

Finally, it is essential to discuss the fact that Plaintiffs' have severely mischaracterized Defendants' testimony as amounting to the Defendants stating under oath that they "do not have any damages". *See Plaintiffs' Motion, Pg. 9-10.* Defendants' emphasize this mischaracterization of testimony because it is actually determinative as to the fact that Plaintiffs' Motion for Summary Judgment must be denied. This is because, to grant summary judgment, there must be "no genuine dispute as to any material fact" and Plaintiffs directly state in the instant Motion that one (1) of the five (5) "undisputed material facts" which their Motion relies upon is the asserted fact that "Defendants testified under oath that Plaintiffs do not owe them any money" *Id. at 5.* The testimony cited by Plaintiffs as establishing this allegedly undisputed material fact is the following:

**Q. Does my client own you any money?**

A. I didn't sue him. He don't – why would he owe me money? Why do you say that?

*Id.*

Plaintiffs' assertion that this amounts to testimony that there are no damages is simply facially invalid. Mere examination of the cited material demonstrates: (1) Plaintiffs' counsel caused confusion by using the incorrect word (own rather than presumably owe) when questioning a witness that doesn't speak English as his first language; and (2) that Defendant clearly was confused by the question as evidenced by the fact that he didn't understand who the client was that Plaintiffs' counsel was referring to (as both of Plaintiffs in this matter are entities, not individuals) and, instead of making any affirmative statement as to money being owed, responded with two (2) follow-up questions. This was clearly a request for more clarity but, seemingly believing

1 Defendant had been tricked into an admission, Plaintiffs counsel did not make any attempt to  
2 clarify the question or response. Instead his reply was “[l]ets go on to the next set.” *See Plaintiffs’*  
3 *Motion, Exhibit 9, page 55, line 17.*

4 At trial, Plaintiffs can make whatever argument they choose as to the significance or  
5 meaning of the response provided to this question but, for the purposes of the instant Motion, it is  
6 clearly not an undisputed material fact that this statement amounts to Defendants admitting they  
7 have no damages. Further, it would be very generous to even go as far as to say that such would  
8 be the most reasonable or likely interpretation of Defendant’s response. Regardless, there is clearly  
9 a reasonable basis for disputing the meaning of this response based solely on a plain reading of the  
10 deposition transcript. If something this unclear was accepted as an undisputed fact, it would turn  
11 every deposition into a game of attempting to get the deponent to make a vague or unclear  
12 statement that could be twisted into an admission.

13 Therefore, based on the above discussion, it is clear that the instant Motion must be denied.  
14 NRCP explicitly states that a motion for summary judgment can only be granted if the movant  
15 “shows that there is **no genuine dispute as to any material fact**”. *See NRCP 56(a)*. Here,  
16 Plaintiffs’ themselves have deemed the alleged admission by Defendant as an undisputed material  
17 fact, yet careful examination of that supposed admission demonstrates that there clearly remains a  
18 genuine dispute between the parties. Therefore, based on this consideration alone, Plaintiffs’  
19 Motion for Summary Judgment as to Defendants’ Counter-Claim Damages must be denied.  
20  
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22

### 23 III.

### 24 CONCLUSION

25 Based on the above discussion, it is clear that Plaintiffs are unable to meet the burden of  
26 proof required for their Motion for Summary Judgment, as they cannot show: (1) that there are  
27 actually no genuine disputes of material fact; and (2) that they are actually entitled to judgment as  
28

1 a matter of law. Further, Plaintiffs specifically make the granting of their Motion by the Court  
2 impossible, as they directly identify as one of their foundational, undisputed material facts, the  
3 interpretation of the testimony of the Defendant, which as has been demonstrated above, is clearly  
4 open to interpretation. Therefore, based on these considerations, Defendants respectfully request  
5 that the Court deny Plaintiffs' Motion for Summary Judgment.  
6

7 Dated this \_\_\_\_ day of November 2020.

8 **BLACK & WADHAMS**

9 

10 RUSTY GRAF, ESQ.

11 Nevada Bar No. 6322

12 10777 West Twain Avenue, Suite 300

13 Las Vegas, Nevada 89135

14 *Attorney for Defendants*

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & WADHAMS and that on the 25<sup>th</sup> day of November 2020, I caused the above and foregoing document entitled **OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

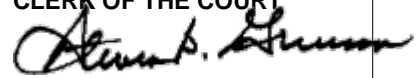
☐ hand delivered to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

F. Thomas Edwards, Esq.  
HOLLEY DRIGGS WALCH FINE  
PUZEY STEIN & THOMPSON  
400 South Fourth Street, Third Floor  
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and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

  
An Employee of Black & Wadhams

# **EXHIBIT 5**



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*Attorneys for Plaintiffs/Counterdefendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 8

**HEARING DATE REQUESTED**

**PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT  
REGARDING THEIR BREACH OF  
CONTRACT CLAIMS**

Plaintiffs/Counterdefendants, 4520 Arville, a California general partnership; and  
McKinley Manor, an Idaho general partnership (collectively "Plaintiffs"), by and through their  
attorneys of record, the law firm of Holley Driggs, move for summary judgment on their claims

for breach of contract against Defendants Bour Enterprises, LLC, Mulugeta Bour and Hilena Mengesha (collectively “Defendants”). Defendants breached their leases and personal guaranties without any legal justification, such that Plaintiffs are entitled to summary judgment on the Defendants’ breach of those agreements. This motion is made and based upon the papers and pleadings on file herein, the following points and authorities, any exhibits attached hereto, and any oral argument at the hearing on this matter.

Dated this 1st day of December, 2020.

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards  
 F. THOMAS EDWARDS, ESQ.  
 Nevada Bar No. 9549  
 JESSICA M. LUJAN, ESQ.  
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*Attorneys for Plaintiffs/Counterdefendants*

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiffs' straightforward breach of contract action arises out of Defendants' early, unauthorized abandonment of their lease of Plaintiffs' warehouse space located at 4560 S. Arville St., C-10, 23, 24, and 29, Las Vegas, NV 89103 (the "Premises"). In an attempt to avoid liability for their breaches of the leases and personal guaranties, Defendants asserted the amount of "dust and debris" at the Premises and the lack of sufficient parking justified their abandonment of the lease. However, Defendants' assertions are fundamentally flawed for a series of reasons.

First, Defendants' commercial lease expressly states that Defendants accepted the Premises in an "as-is" condition. Second, Defendants' commercial lease expressly states that Defendants were responsible for any maintenance of the interior of the Premises, such that if there was an issue with the "dust and debris," it was Defendants' contractual obligation to remedy that issue. Third, Defendants cannot claim they were unaware of the condition of the Premises because Defendants operated out of the premises pursuant to a sub-lease for almost two (2) years before they signed the leases that are at issue in this lawsuit. Fourth, the first page of the leases signed (and initialed) by Defendants clearly identify the number of parking spaces Defendants could use.

Defendants signed legally binding leases and personal guaranties. Defendants have no legal justification for abandoning the Premises and breaching those contracts. Plaintiffs are entitled to enforce those contracts. Therefore, Plaintiffs are entitled to summary judgment on their breach of contract claims against Defendants.

### II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. In July of 2015, Defendants started to manage Stardust Limousine, which was operating out of unit C-23/24 at the Premises. *See* excerpts of deposition transcript of NRCP 30(b)(6) Designee of Bour Enterprises, LLC, 15:20-25, 16:1-5, attached hereto as **Exhibit 1**.

2. Later in 2015, Defendants purchased Stardust Limousine and continued to operate the business out of Suite C-23/24 at the Premises under the existing Stardust Limousine lease. *See* Ex. 1, 15:2-5.



3. Because Defendants were operating the business out of unit C-23/24 at the Premises, Defendants were aware of the condition of the Premises. *See* Ex. 1, 23:1-12.

4. When Defendants complained about the condition of the Premises, the Plaintiffs explained that Stardust Limousine leased the Premises in an “as-is” condition. *See* Ex. 1, 23:14-23.

5. Defendants also complained that they wanted additional parking, despite the fact that Defendants understood that each warehouse unit was assigned only a few parking spaces. *See* Ex. 1, 26:6-19, 27:20-28:6.

6. In 2017, Plaintiffs requested that Defendants sign a new lease, as opposed to continuing to operate under the Stardust Limousine lease. *See* Ex. 1, 24:16-21.

7. On or about April 20, 2017, Defendants signed a new lease for unit C-23/24 at the Premises and a related personal guaranty. *See* Unit C-23/24 Lease, Addendum and Guaranty, attached hereto as **Exhibit 2**. *See also*, Ex. 1, 45:6-46:1; 50:25-51:5.

8. At or about the same time, to alleviate Defendants’ concern about parking, Plaintiffs recommended that Defendants lease an additional warehouse unit, which would provide an additional number of parking spaces and additional room to park vehicles inside the new warehouse unit. *See* Ex. 1, 27:20-28:6.

9. Defendants agreed and on or about April 20, 2017, signed an additional lease for unit C-10/29. *See* Unit C-10/29 Lease, Addendum and Guaranty, attached hereto as **Exhibit 3**. *See also*, Ex. 1, 57:14-58:11; 60:1-6.

10. The terms of the leases are nearly identical. *See* Exs. 2 and 3.

11. For example, the first pages of the leases provide that Defendants are entitled to four (4) unreserved parking spaces, for a total of eight (8) spaces between the leases:

**1.2(b) Parking:** Four (4) unreserved vehicle parking spaces (“Unreserved Parking Spaces”); and n/a reserved vehicle parking spaces (“Reserved Parking Spaces”).

*See* Exs. 2 at ARV000001 and 3 at ARV000034.

12. Section 7.1(a) of the leases expressly provide that Defendants are responsible for all maintenance of the Premises.

1                   **7. Maintenance; Repairs, Utility Installations; Trade Fixtures**  
2                   **and Alterations.**

3                   **7.1 Lessee's Obligations.**

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

27                  *See Exs. 2 at ARV000007 and 3 at ARV000040, Section 7.1(a) (emphasis added).*

28                  13.       Moreover, Defendants expressly accepted the Premises in an "as-is" condition.

                  1. Condition of Premises. **Lessee hereby accepts the Premises in**  
                  **"as-is" condition** with any additional alterations and improvements  
                  to be completed at Lessee's expense and in accordance with Section  
                  7 of Lease.

*See Exs. 2 at ARV000026 and 3 at ARV000059, Section 1 of the Addendum (emphasis added).*

                  14.       Defendants understand what it means to accept the Premises in an "as-is" condition.

                  Q. And in your mind what does it mean to accept the space as is?

**A. It means I will take it as it is, no problem, I'll take**  
                  **responsibility, that's what it means.**

*See Ex. 1, 47:20-24.*

15. Defendants acknowledged that that they conducted any necessary investigations as to the condition of the Premises and that Defendants were not relying upon any representations by Plaintiffs other than those set forth in the leases.

**2.4 Acknowledgements. Lessee acknowledges that: (a) it has been advised by Lessor and/or Brokers to satisfy itself with respect to the 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, **(b) 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, and **(c) 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.

*See* Exs. 2 at ARV000003 and 3 at ARV000036, Section 2.4 (emphasis added).

16. Abandoning the Premises and failing to pay rent are breaches of the leases. *See* Exs. 2 at ARV000015–16 and 3 at ARV000048–49 (Sections 13.6 and 23.1).

17. To the extent Defendants believed that Plaintiffs breached the leases, the leases require Defendants to mail formal notice of the alleged breach to Plaintiffs requesting that Plaintiffs cure the issue. *See* Exs. 2 at ARV000013 and 3 at ARV000046 (Sections 13.1(a) and (b)). However, Defendants never sent Plaintiffs a formal notice of any alleged breach requesting that Plaintiffs cure the issue. *See* Ex. 1, 36:9-11.

18. The leases “may be modified only in writing, signed by the Parties in interest at the time of the modification.” *See* Exs. 2 at ARV000019 and 3 at ARV000052 (Section 46).

19. Right above Defendants’ signature on the leases, in bold and capitalized text, the parties confirm that they:

**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.**

*See* Exs. 2 at ARV000020 and 3 at ARV000053 (emphasis in original).

20. Likewise, right above the Defendants’ signature on the leases, in bold and capitalized text, the leases provide that:

**THE PARTIES ARE URGED TO:**

**1. SEEK 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.**

*See* Exs. 2 at ARV000020 and 3 at ARV000053 (emphasis in original).

21. The Guaranties provide that “Guarantors hereby jointly, severally, unconditionally and irrevocably guarantee the prompt payment by Lessee of all rent and all other sums payable by Lessee under said Lease.” *See* Exs. 2 at ARV000029 and 3 at ARV000062.

22. Defendants utilized the Premises until on or about May 8, 2018, when they vacated the Premises. *See* Declaration of Kevin Donahoe, attached hereto as **Exhibit 4**.

23. Attached hereto as **Exhibits 5 and 6** are ledgers for the leases, reflecting all rent owed under the leases, all payments made by Defendants under the leases and the outstanding balance owed under the leases.

**III. SUMMARY JUDGMENT STANDARD**

A party may move for summary judgment on “all or any part” of any claim, counterclaim, or declaratory relief. *See* NRCP 56(a). Summary judgment is appropriate under NRCP 56 and “shall be rendered forthwith” when the pleadings and other evidence properly before the court demonstrate that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029, 1031 (Nev. 2005) (quoting NRCP 56(c)); *Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349, 1353, 951 P.2d 1027, 1029 (1997). In *Wood*, the Nevada Supreme Court abrogated the “slightest doubt” standard and adopted the standard as employed by the United States Supreme Court in *Celotex Corp v.*

1 *Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita*  
2 *Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986).

3 In opposing summary judgment, the non-moving party cannot “simply show that there is  
4 some metaphysical doubt” as to the operative facts in order to avoid summary judgment in the  
5 moving party’s favor. *Wood*, 121 P.3d at 1031 (*quoting Matsushita*, 475 U.S. at 586). The non-  
6 moving party “must, by affidavit or otherwise, set forth specific facts demonstrating the existence  
7 of a genuine issue for trial or have summary judgment entered against him.” *Wood*, 121 P.3d at  
8 1031 (*quoting Bulbman, Inc. v. Nevada Bell*, 109 Nev. 105, 110, 825 P.2d 588, 591 (1992)). The  
9 non-moving party is “not entitled to build a case on the gossamer threads of whimsy, speculation,  
10 and conjecture.” *Wood*, 121 P.3d at 1031 (*quoting Collins v. Union Fed. Sav. & Loan*, 99 Nev.  
11 284, 302, 662 P.2d 610, 621 (1983)).

#### 12 IV. LEGAL ARGUMENT

13 Plaintiffs established that the parties entered into binding contracts, in the form of the leases  
14 and guaranties. *See* Exs. 2 and 3. Plaintiffs performed under the contracts by providing  
15 Defendants access to the Premises in an “as is” condition. *See* Ex. 4. Defendants breached the  
16 contracts by abandoning the Premises and failing to pay rent and other charges required under the  
17 leases and guaranties. *See* Exs. 4, 5 and 6. Defendants have been damaged in the amount of the  
18 unpaid rent and other charges required under the leases and guaranties. *See* Exs. 5 and 6.  
19 Therefore, Plaintiffs have established their breach of contract claims against Defendants.

20 The question then becomes whether Defendants have any valid defenses to their breach of  
21 the contracts. As to Defendants’ position that the “dust and debris” at the Premises justified their  
22 abandonment of the lease, the argument fails as matter of law. The parties are bound by the terms  
23 of the leases and there is no implied warranty of habitability in commercial leases. Defendants  
24 accepted the commercial Premises in an “as-is” condition and agreed that Defendants were  
25 responsible for any maintenance of the interior of the Premises, such that if there was an issue with  
26 the “dust and debris,” it was Defendants’ contractual obligation to remedy that issue. Moreover,  
27 Defendants cannot claim they were unaware of the condition of the Premises because Defendants  
28

1 operated out of the Premises pursuant to a sub-lease for almost two (2) years before they signed  
2 the leases that are at issue in this lawsuit.

3 Defendants' complaints about parking at the Premises likewise do not justify their breach  
4 of the contracts as a matter of law. The first page of the leases signed (and initialed) by Defendants  
5 clearly identify the number of parking spaces Defendants could use. Defendants understood that  
6 they only had the use of a few parking spaces per lease. To increase the parking available to  
7 Defendants, Defendants leased an additional unit. Defendants never alleged that they did not have  
8 access to the contractually allotted parking spaces. Moreover, Defendants cannot claim they were  
9 unaware of the available parking at the Premises because Defendants operated out of the Premises  
10 pursuant to a sub-lease for almost two (2) years before they signed the leases that are at issue in  
11 this lawsuit.

12 Plaintiffs have shown that Defendants breached the contracts. Defendants do not have a  
13 valid defense to their breach of the contracts. Therefore, Plaintiffs are entitled to summary  
14 judgment on their breach of contract claims.

15 **A. DEFENDANTS ARE SOLELY RESPONSIBLE FOR THE**  
16 **CONDITION OF THE PREMISES BECAUSE THEY ACCEPTED**  
17 **THE PREMISES "AS IS" AND AGREED THAT ANY**  
18 **MAINTENANCE WITHIN THE PREMISES IS DEFENDANTS'**  
19 **OBLIGATION**

20 Defendants cannot honestly dispute the plain language of the leases. As provided in the  
21 Addendums, "Lessee hereby accepts the Premises in "as-is" condition. *See* Exs. 2 at ARV000026  
22 and 3 at ARV000059. Likewise, pursuant to Section 7.1(a) of the leases, "Lessee shall, at Lessee's  
23 sole expense, keep the Premises . . . in good order, condition and repair." *Id.* at ARV000007 and  
24 3 at ARV000040. Therefore, to the extent the Defendants had a concern about the condition of  
25 the Premises, it was Defendants' contractual duty to remedy that situation.

26 To prevail on their defense that Defendants could abandon the Premises based upon the  
27 "dust and debris" in the Premises, Defendants must convince the Court that Plaintiffs, as the  
28 landlords of this commercial property, have an implied duty to clean the Premises (a.k.a. an  
implied duty of habitability or fitness for a particular purpose) notwithstanding the express

language in the leases to the contrary. Commercial landlords have no such implied duty, such that Defendants’ argument fails as a matter of law.

**1. Nevada Statutes Show that the Implied Warranty of Habitability Does Not Apply to Commercial Leases.**

Nevada has one set of statutes addressing the Landlord/Tenant relationship for residential leases (NRS Chapter 118A) and another set of statutes addressing the Landlord/Tenant relationship for commercial leases (NRS Chapter 118C). NRS Chapter 118A, relating to residential leases, expressly states that “[t]he landlord shall at all times during the tenancy maintain the dwelling unit in a habitable condition.” NRS 118A.290. On the other hand, NRS Chapter 118C, relating to commercial leases, contains no mention of habitability or fitness for a particular purpose.

Because the Nevada Legislature applied the concept of habitability to residential leases, but not commercial leases, the Court must presume that the Nevada Legislature deliberately excluded the applicability of habitability to commercial leases. “We have previously recognized the fundamental rule of statutory construction that the mention of one thing implies the exclusion of another.” *In re Estate of Prestie*, 122 Nev. 807, 814, 138 P.3d 520, 524 (2006) (internal alterations and quotation marks omitted). “Therefore, where the Legislature has, for example, explicitly applied a rule to one type of proceeding, this court will presume it deliberately excluded the rule’s application to other types of proceedings. *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009). Under this fundamental rule of statutory construction, the Court must presume that the Nevada Legislature deliberately excluded the applicability of habitability to commercial leases. With no implied warranty of habitability in commercial leases, Defendants’ defense as to the condition of the premises fails as a matter of law.

**2. Caselaw Confirms that there is No Implied Duty of Habitability or Fitness for a Particular Purpose in Commercial Leases.**

Although the Nevada Supreme Court has not expressly addressed the issue, the majority of courts hold that the implied warranty of habitability and fitness for an intended purpose does not apply to commercial leases. “Our review of the authorities reveals that the majority view, which we adopt, does not extend an implied warranty of habitability or fitness to commercial leases.” *B.W.S. Investments v. Mid-Am Restaurants, Inc.*, 1990 WL 108794 (N.D. 1990) (citing 3A

1 *Thompson on Real Property*, § 1230 (1981) (the doctrine of warranty of fitness which is part of  
2 the law of sales does not generally extend to the landlord-tenant relationship in commercial leases;  
3 the implied warranty of habitability does not apply to commercial structures); 2 *Powell on Real*  
4 *Property*, § 233(2)(b) (1990) (implied warranty of habitability applies in almost all jurisdictions  
5 only to residential tenancies; commercial leases are excluded primarily on the rationale that the  
6 feature of unequal bargaining power justifying the imposition of the warranty in residential leases  
7 is not present in commercial transactions); 49 Am.Jur.2d *Landlord and Tenant* § 768 (1970), (the  
8 general rule that there is no implied warranty of fitness or as to the conditions of the premises  
9 applies to premises leased for business purposes); Annotation, *Modern Status of Rules as to*  
10 *Existence to Implied Warranty of Habitability or Fitness for use of Leased Premises*, 40 A.L.R. 3d  
11 646, 650 (1971) (it has been stated that the implied warranty of habitability is not a warranty  
12 against all inconvenience or discomfort). *See generally*, Restatement (Second) of Property,  
13 Landlord and Tenant, § 5.1 Caveat and Comment (1977) (implied warranty of habitability not  
14 extended to commercial leases). “Most jurisdictions have expressly or impliedly refused to extend  
15 the implied warranty of habitability into commercial leases.” *Teller v. McCoy*, 162 W. Va. 367,  
16 380 (1978).

17       However, even the minority of courts that recognize an implied warranty of habitability or  
18 suitability in commercial leases hold that those warranties do not apply if the commercial tenant  
19 accepts the property in an “as-is” condition. “With respect to the abatement of rent for breach of  
20 the implied warranty of habitability, the doctrine’s application may not be extended to the fact  
21 pattern at bar involving a corporate tenant taking the premises ‘as is’ under a commercial lease.”  
22 *Coulston v. Telescope Productions, Ltd.*, 378 N.Y.S.2d 553, 554 (App. Term 1975). “If, however,  
23 the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions  
24 of the lease will control.” *Davidow v. Inwood N. Prof'l Group--Phase I*, 747 S.W.2d 373, 376  
25 (Tex. 1988).

26               By agreeing to lease the building ‘as is,’ Gym–N–I agreed to make  
27 its own appraisal of the physical condition of the premises. Thus,  
28 the sole cause of Gym–N–I’s injury, by its own admission, is itself.  
We hold, therefore, that the “as is” clause negates Gym–N–I’s claim  
that Snider’s actions caused injury.



1 *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 914 (Tex. 2007).

2 Therefore, even if Nevada recognized these implied warranties in commercial tenancies,  
3 they are not applicable based upon the express language of the leases and addendums, which  
4 control. Not only did Defendants accept the property in an “as-is” condition, they separately  
5 agreed that “Lessee shall, at Lessee's sole expense, keep the Premises . . . in good order, condition  
6 and repair . . . .” *See* Exs. 2 at ARV000007 and 3 at ARV000040. With no implied warranty of  
7 habitability or suitability in commercial leases, Defendants’ defense as to the condition of the  
8 premises fails as a matter of law.

9 **3. The Doctrine of Constructive Eviction Does Not Create Any Implied**  
10 **Duties.**

11 Nevada caselaw recognizes constructive evictions in the context of commercial leases.  
12 However, the Nevada caselaw is consistent that the landlord must act or fail to act **in breach of**  
13 **the lease terms** before there can be a constructive eviction. The Nevada caselaw on constructive  
14 evictions in the context of commercial leases has never identified any implied duties of commercial  
15 landlords. Rather, the caselaw confirms that the relationship between commercial landlords and  
16 tenants is governed by the written agreements between them.

17 For example, in *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Development, LLC*, 130  
18 Nev. 834 (2014), the commercial tenant claimed a constructive eviction because the roof leaked.  
19 The landlord had a contractual duty to maintain the roof and protect the interior from water  
20 intrusion. *Id.* at 836. “Villa Fiore assumed the landlord’s duties **under the lease**, including the  
21 duty to maintain the roof and protect the interior from water intrusion.” *Id.* (emphasis added).  
22 The Court never discussed any implied duties of the landlord, but rather only the express duties  
23 owed under the lease. *Id.* Ultimately, the Court found that there was no constructive eviction  
24 because the tenant failed to provide notice and a reasonable opportunity to cure the roof leaks. *Id.*  
25 at 841.

26 In *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008), the tenant argued that  
27 because the landlord entered tenant’s storage unit to inspect it, the tenant had been constructively  
28 evicted and the landlord breached the covenant of quiet enjoyment. The Court rejected the tenants’

claim because the lease expressly provided that the landlord could inspect the storage unit. “Under the lease agreement, Schiff and her agents were permitted to enter Winchell's storage unit at any reasonable time for the purpose of inspection or maintenance.” *Winchell*, 124 Nev. at 947, 193 P.3d at 952. Therefore, “Winchell could not show that he was constructively evicted because he **voluntarily surrendered any right** to refuse Schiff’s reasonable entry under the terms of the lease.” *Id.* (emphasis added). The Court never discussed any implied duties of the landlord, but rather only the express duties and rights under the lease. *Id.* This is yet another example of how Courts allow the terms of the written agreement between commercial tenants and landlords to control.

In *Las Vegas Oriental, Inc. v. Sabella's of Nevada, Inc.*, 97 Nev. 311, 312, 630 P.2d 255 (1981), the Court considered whether the failure to provide adequate heating and air conditioning was a breach of the lease and, therefore, a constructive eviction. Specifically, the Court stated: “In this appeal we are required to determine if there is sufficient evidence to support the trial court’s determination that Las Vegas Oriental, Inc., a landlord, **breached the lease between it and Sabella’s** by virtue of its failure to provide adequate heating and air conditioning to a portion of the leased premises.” *Id.* The Court found that the trial court properly ruled that the landlord breached the lease and constructively evicted the tenant. *Las Vegas Oriental*, 97 Nev. at 313, 630 P.2d at 256 (1981). The Court never discussed any implied duties of the landlord, but rather only whether the landlord breached the lease. *Id.*

The cases make clear that the doctrine of constructive eviction in the context of commercial leases does not create any implied duties. Rather, the rights and duties of the commercial landlord and tenant are governed by the agreement between the parties, not any implied duties. Because Defendants accepted the property in an “as-is” condition and agreed that “Lessee shall, at Lessee's sole expense, keep the Premises . . . in good order, condition and repair,” Defendants’ defense as to the condition of the premises fails as a matter of law. *See* Exs. 2 at ARV000007 and 3 at ARV000040.

///

///

**B. DEFENDANTS' COMPLAINTS ABOUT PARKING AT THE PREMISES DO NOT JUSTIFY THEIR BREACH OF THE CONTRACTS**

The first page of each lease expressly identifies Defendants' right to parking at the Premises.

**1.2(b) Parking:** Four (4) unreserved vehicle parking spaces ("Unreserved Parking Spaces"); and n/a reserved vehicle parking spaces ("Reserved Parking Spaces").

*See* Exs. 2 at ARV000001 and 3 at ARV000034. Not only did Defendants sign the leases, but they also initialed each page, including the first page identifying the number of parking spaces to which they were entitled. Defendants never alleged that they did not have access to the contractually allotted parking spaces. Defendants cannot honestly dispute the plain language of the leases with regarding to parking.

Defendants were aware of the parking situation at the Premises since taking over for Stardust Limousine in 2015. *See* Ex. 1, 16:1-5. Defendants knew that they were only assigned a few parking spots per unit. *See* Ex. 1, 26:6-19 ("You know, you rent one suite, you have specifically have 2 or 3 car parking."). When it came time for Defendants to sign their own lease in 2017 (as opposed to continuing to operate under the Stardust Limousine lease), Plaintiffs suggested that Defendants lease another warehouse unit to alleviate Defendants parking concerns and Defendants agreed to do so. *See* Ex. 1, 27:20-28:6.

Q. I see. Okay. So prior to 2017, you were having an issue with parking?

**A. We always, always have. Everybody have issues on that property.**

Q. And Dave's<sup>1</sup> suggestion to you was you should lease an additional suite --

**A. Yes.**

Q. -- to help with you that parking issue?

---

<sup>1</sup> "Dave" is a reference to David Burns, of Commercial Specialists, the property manager for Plaintiffs.

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**A. Yeah.**

Q. And you agreed to do that, right?

**A. We agreed to do that.**

*See Ex. 1, 27:20-28:6.*

At some point after the execution of the leases in 2017, Defendants requested additional parking spaces from Plaintiffs. However, Plaintiffs advised that they could not provide additional parking spaces.

Q. You said you requested additional parking spaces?

**A. Yeah, he said he cannot provide that, there is not enough space.**

*See Ex. 1, 85:6-9.*

Plaintiff provided Defendants with the contractually allotted parking spaces and Defendants do not allege anything to the contrary. In fact, to help address Defendants' parking concern, Plaintiffs leased Defendants an additional warehouse unit to provide additional parking. The fact that Plaintiffs refused a subsequent request for even more parking is not a valid reason to abandon the Premises and breach the contracts. Therefore, Plaintiffs are entitled to summary judgment on their breach of contract claims against Defendants.

## **V. CONCLUSION**

For these reasons, Plaintiffs respectfully request that this Court enter summary judgment in favor of Plaintiffs on the breach of contract claims against Defendants.

Dated this 1st day of December, 2020.

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards  
F. THOMAS EDWARDS, ESQ.  
Nevada Bar No. 9549  
JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

*Attorneys for Plaintiffs/Counterdefendants*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs and that on this 1st day of December, 2020, I did cause a true and correct copy of the foregoing **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT REGARDING THEIR BREACH OF CONTRACT CLAIMS** to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System:

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Brent Carson, Esq.  
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Las Vegas, NV 89117

/s/ Sandy Sell  
An employee of HOLLEY DRIGGS

# EXHIBIT 1



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DISTRICT COURT  
CLARK COUNTY, NEVADA

4520 ARVILLE, a California	)	CASE NO.:
general partnership;	)	A-19-794864-C
MCKINLEY MANOR, an Idaho	)	
general partnership,	)	DEPT NO.: 8
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
BOUR ENTERPRISES, LLC, a	)	
Nevada limited liability	)	
company; MULUGETA BOUR, an	)	
individual; HILENA MENGESHA,	)	DEPOSITION
an individual; DOES 1	)	
through 100, inclusive,	)	OF
	)	
Defendants.	)	NRCP 30(B)(6) DESIGNEE
	)	
BOUR ENTERPRISES, LLC, a	)	OF BOUR ENTERPRISES, LLC
Nevada limited liability	)	
company; MULUGETA BOUR, an	)	MULUGETA BOUR
individual; HILENA MENGESHA,	)	
an individual; DOES 1	)	LAS VEGAS, NEVADA
through 100, inclusive,	)	
	)	MONDAY,
Counterclaimants,	)	
	)	NOVEMBER 2, 2020
vs.	)	
	)	
4520 ARVILLE, a California	)	
general partnership;	)	
MCKINLEY MANOR, an Idaho	)	
general partnership, DOES	)	
I-X; and ROE CORPORATION	)	
I-X,	)	
	)	
Counterdefendants.	)	
	)	

REPORTED BY: JEWEL WILLIAMS, CCR NO. 941

1 DEPOSITION OF NRCP 30(B)(6) DESIGNEE OF  
2 BOUR ENTERPRISES, LLC, MULUGETA BOUR, held at Holley  
3 Driggs Walch Fine Puzev Stein & Thompson, located at  
4 400 South Fourth Street, Third Floor, Las Vegas,  
5 Nevada, 89101, on Monday, November 2, 2020, at  
6 10:52 a.m., before Jewel Williams, Certified Court  
7 Reporter, in and for the State of Nevada.

8  
9 APPEARANCES:

10 For the Plaintiffs 4520 Arville and McKinley Manor:

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12 THOMPSON

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21 Also Present:

22 Kevin Donahoe, Commercial Specialists

23 ENVISION LEGAL SOLUTIONS

24 BY: JEWEL WILLIAMS



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I N D E X

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1 Enterprises, LLC. No, Stardust Limousine. Sorry.

2 Q. So at the end of 2015 you took over the  
3 management of Stardust Limousine and you bought  
4 Stardust Limousine, correct?

5 A. Yes.

6 Q. Also before the deposition, I let the court  
7 reporter know that because we are wearing masks  
8 sometimes we're going to be harder to hear, so she  
9 may interrupt us at certain times and ask you to  
10 repeat things.

11 A. Absolutely, no problem.

12 Q. I may do the same thing.

13 A. No problem.

14 Q. When you were with Bell Trans, what did you  
15 do for them?

16 A. I'm a driver.

17 Q. Driver, okay.

18 And same thing for 24/7 Limo?

19 A. Yes.

20 Q. So it's July of 2015 when you started to  
21 manage the business?

22 A. Yes, somewhere around end of summer.

23 Q. In July 2015, where did Stardust Limousine  
24 operate from?

25 A. At that time the Arville property.

1 Q. The Arville property?

2 A. Yes.

3 Q. That's the one we're here to talk about  
4 today?

5 A. Yes. Yes.

6 Q. Now, when we're talking about the Arville  
7 property, there is actually two different spaces,  
8 right?

9 A. No, it was only one at that time.

10 Q. Only one?

11 A. Yeah. I think it's 23.

12 Q. One more time?

13 A. 23.

14 Q. 23?

15 A. Yeah, Suite 23.

16 Q. Got you.

17 A. 23-24.

18 Q. 23-24. Okay.

19 And as a manager for Stardust Limousine,  
20 what were your duties?

21 A. Just managing drivers. Just timing the  
22 clock-in/clock-out on time. Just take care of the  
23 car. If any car is broke down, make sure they fix  
24 it. Any complaint customer have, managers. Just I  
25 was planning to take over so I was just involved

1 A. Pretty bad.

2 Q. How so?

3 A. Extremely bad. There's no lighting. It  
4 was very dusty. And Dave told us that time it used  
5 to be a tile cutting place. And it's a lot of dust  
6 just falling off from the sky and a lot of drivers  
7 and detailers and mechanics complaining.

8 Q. Back in 2015?

9 A. Yeah, 2015 or '16 or '17.

10 Q. 2015, '16.

11 A. Since I've been there, yeah, '17 until I  
12 leave, it's always like that.

13 Q. Got you.

14 A. We have no discretion, he said -- Dave told  
15 us it's nothing he can do, the previous owner of the  
16 company, he signed it as it is.

17 Q. Okay.

18 A. Not with me.

19 Q. So you're saying Stardust Limousine leased  
20 the property as is?

21 A. That's what he says, but I don't know the  
22 lease. I didn't read it. I don't know. It's not  
23 mine. I don't know.

24 Q. Got you.

25 A. I'm just saying verbally what he told me.

1 Q. Got you.

2 Did you ask him to clean it up?

3 A. Oh, yes, so many times. Impossible, yeah.

4 Q. And what did he tell you?

5 A. He said -- the owner, he doesn't want to  
6 spend money. He doesn't want to do it.

7 Q. And the time frame we're talking about now  
8 is 2015, 2016?

9 A. I'm talking since I've been there until I  
10 leave. We talk -- me and Dave, we talk almost every  
11 other month or every two months or every three  
12 months or every month. So many occasions we talk  
13 about this, yeah.

14 Q. And Dave's explanation to you was, I can't  
15 do anything because the Stardust has an as-is lease?

16 A. That's what he said. But I didn't have  
17 that kind of lease with Stardust and everything, but  
18 I was already there so he want me to sign a lease  
19 and one day just came in and he make us sign a lease  
20 although we already there established. We don't  
21 have nowhere to go.

22 Q. Okay. Okay.

23 A. Kind of you have to do it. You have to do  
24 it kind of thing. We didn't get a chance to sign --  
25 read it or nothing like that. It's not like he gave

1 Q. When was the first time you remember being  
2 inside Suite 10-29?

3 A. It said 2017, I don't know, remember.

4 Q. Sometime in 2017?

5 A. Yeah.

6 Q. I guess under what circumstances do you  
7 find yourself in Suite 10-29?

8 A. He told us we have to take another suite  
9 because it's too many cars parking outside and  
10 everything. So I said, okay. We cooperate and we  
11 took that one.

12 Q. Is that Dave?

13 A. Yeah, he kind of suggesting or kind of we  
14 have to do that. He doesn't want a lot of people --  
15 that it's not parking space permitted for business  
16 like us. You know, you rent one suite, you have  
17 specifically have 2 or 3 car parking. It's  
18 impossible for us, we got 10, 15, 20 cars. Employee  
19 and staff where they park it's impossible.

20 MR. GRAF: Did we get Dave's last name yet?

21 BY MR. EDWARDS:

22 Q. Are you referring to David Burns?

23 A. David Burns that's who I would be  
24 communicating with him, yeah, which I have  
25 communication until the last minute I move out.

1 Q. So in roughly 2017 when David was asking  
2 you to sign this new lease, he suggested that you  
3 should also lease an additional suite so you have  
4 additional parking?

5 A. Yeah, it's indoor parking instead of  
6 outside parking or we can't park outside.

7 Q. So this was for indoor parking, not outdoor  
8 parking?

9 A. Indoor and outdoor. We have to park indoor  
10 or outdoor.

11 Q. I'm sorry. What's that?

12 A. We have to park indoor or outdoor. The  
13 limousines are parked indoor that's where we're  
14 leasing them.

15 Q. Okay.

16 A. The drivers are parked outdoors.

17 Q. What's parked outside? The drivers for  
18 your business?

19 A. Yes, the drivers.

20 Q. I see. Okay.

21 So prior to 2017, you were having an issue  
22 with parking?

23 A. We always, always have. Everybody have  
24 issues on that property.

25 Q. And Dave's suggestion to you was you should



1     lease an additional suite --

2           A.     Yes.

3           Q.     -- to help with you that parking issue?

4           A.     Yeah.

5           Q.     And you agreed to do that, right?

6           A.     We agreed to do that. But, like I say,  
7     when everything come, we didn't have no chance, I  
8     didn't have no chance to show the attorney. I  
9     didn't think it was going to come to this. And I  
10    don't have no bad or negative or any kind of bad  
11    experience with Dave, so we always in good  
12    communication, we just go for.

13          Q.     What was the condition of Suite 10-29 in  
14    2017 when you were first there?

15          A.     A little better. Much better than 23.

16          Q.     Much better?

17          A.     Much better than 23. It wasn't the best  
18    but it was much better.

19          Q.     What wasn't the best about it?

20          A.     You have to understand, it's still this  
21    animals like rat and stuff running around with the  
22    properties. The suite, what did you say 29-10, I  
23    don't remember the exact number, that one is a  
24    different condition. But the suite next to it is  
25    very bad condition, it was an abandoned place, it

1 Mr. Burns about the condition of the property,  
2 right?

3 A. Yes, he's aware of it.

4 Q. He's aware of it. Did you ever send a  
5 formal notice to him?

6 A. I probably talked to him or Dave, I just  
7 couldn't find those emails and everything now. But,  
8 yes, he's aware of it, yeah.

9 Q. Did you ever send him a letter in the mail  
10 saying these are the problems that you need to fix?

11 A. No, I didn't.

12 Q. You did not?

13 A. Knowing now I wish.

14 Q. You wish you would have?

15 A. Yes, I wish I would have done it, knowing  
16 now.

17 Q. Do you remember when you signed your new  
18 lease for the new location?

19 A. No, I can't tell you exactly, but I can go  
20 look at it. 2018 sometime, but I can go look at it,  
21 yeah.

22 Q. Then after you signed the new lease, what  
23 did you tell my clients?

24 A. Before I signed the new lease, we already  
25 talk about I'm moving out and we already have

1 time because it was very hard to find commercial  
2 warehouse like that close to the strip to lease it.  
3 It was very easy, so that's what Dave said to me. I  
4 said, okay, I understand that, I'll take this one  
5 facility, and I moved out. That's what it is.

6 Q. On the first page of Exhibit 2, bottom  
7 right-hand corner, do you see your initials?

8 A. Yeah.

9 Q. And, in fact, you initialled every page,  
10 correct, of Exhibit 2?

11 A. Yeah, I see. I see only one place. Yeah,  
12 MB that's me. Yeah.

13 Q. And if we turn to page 20?

14 A. Page what?

15 Q. Page 20?

16 A. Yes.

17 Q. Do you see your signature on this page?

18 A. Yeah.

19 Q. And your initials in the bottom right-hand  
20 corner?

21 A. Yes.

22 Q. And if you could turn again to the very  
23 last page of Exhibit 2.

24 A. Yes.

25 Q. Do you see your signature here as well?

1           A.     Yes.

2           Q.     Do you understand that when you signed this  
3 lease you just like Stardust accepted the space as  
4 is?

5                   MR. GRAF:  Objection.  Calls for a legal  
6 conclusion.

7                   THE WITNESS:  No.  Absolutely no.

8 BY MR. EDWARDS:

9           Q.     You didn't understand that?

10          A.     No.

11          Q.     Just because you didn't read these paper?

12          A.     No, even verbally we talked about this.

13          Q.     What did you talk about?

14          A.     I don't like it.  I don't want this space.  
15 It's very bad.  It's not even on my list.  I  
16 discussed about it and we talked about it.

17          Q.     So did you have any conversations with Dave  
18 about whether you were going to sign this lease as  
19 is?

20          A.     No.

21          Q.     No conversations whatsoever?

22          A.     No conversation at all.

23          Q.     At any point did Dave's position change?

24          A.     No.  He told me he --

25                   MR. GRAF:  Hold on.  Objection.  Vague as

1 to time.

2 BY MR. EDWARDS:

3 Q. Did Dave's position as to whose  
4 responsibility it was to clean up this space ever  
5 change?

6 MR. GRAF: Same objection.

7 BY MR. EDWARDS:

8 Q. Go ahead.

9 A. Like I say earlier, Dave, he listed the  
10 previous owner as it is. The owner, they don't want  
11 to spend money, they don't want to clean it. That's  
12 his response all the time.

13 Q. And that never changed?

14 A. Never changed and never -- I never agreed  
15 with that too either, so...

16 Q. But you understand the concept of accepting  
17 space as is, right?

18 A. I do, but if I did not agree with that, I  
19 did not accept it.

20 Q. And in your mind what does it mean to  
21 accept the space as is?

22 A. It means I will take it as it is, no  
23 problem, I'll take responsibility, that's what it  
24 means. I never take that responsibility. I never  
25 agreed with it.

1 worry about it, which is he didn't say like, hey  
2 Tony, you need to sign this lease, you need to give  
3 it to your attorney, somebody need to read it, you  
4 need to read it, I'll come back next week, he didn't  
5 say it like that I know that for sure. He came in  
6 like, hey, you got to sign this and I got to go, in  
7 and out.

8 (Exhibit 3 was marked for identification.)

9 BY MR. EDWARDS:

10 Q. Because you haven't read the leases, it  
11 would be a waste of time to go through and talk  
12 about what your understanding of various terms were?

13 A. Yes.

14 Q. So in front of you I'm showing you what has  
15 been marked as Exhibit 3. Do you recognize this  
16 document?

17 A. No. I didn't know it was separate like  
18 this.

19 Q. What's that?

20 A. I didn't know it was like separate like  
21 this, out of this.

22 Q. You didn't know the guaranty was separate  
23 from the lease?

24 A. I have no idea.

25 Q. Do you recognize your initials on the

1 bottom right-hand corner?

2 A. Yes, I see that.

3 Q. And you see your signature on page 2 of  
4 Exhibit 3?

5 A. Yeah.

6 Q. But you didn't read this before you signed  
7 it?

8 A. Yeah, I don't know like this came in  
9 separate too. That's something like.

10 Q. This came in separate, what do you mean by  
11 that?

12 A. Well, he just give me a lease, right, this  
13 is a lease, right?

14 Q. Right.

15 A. Well, this should have been inside of here  
16 somewhere.

17 Q. You're saying when you were handed the  
18 lease, the guaranty was attached to it?

19 A. I would think so, yeah. Not separately  
20 come like that.

21 Q. Do you recognize --

22 A. If I get like this one page, I would have  
23 looked at it a little more carefully. It's only one  
24 page and I can read it five, ten times, probably I  
25 would get an idea.

1 have a property under somebody's name by Nevada  
2 Authority. I have to have something, kind of paper  
3 from him. I didn't know it was this. I can figure  
4 out something that I can look at. Yeah, I had been  
5 there for a year and a half, tell me I signed a  
6 lease at that time, I didn't know this. You see,  
7 that's how much I didn't look at it.

8 Q. So just like you did not review Exhibit 2  
9 before Mr. Burns asked you to signed, you did not  
10 review Exhibit 5 before you signed, right?

11 A. Like I said, he just walked in and told us  
12 to sign, we sign and he goes, I don't know. Now,  
13 looking at it today, it just don't make sense to me.

14 Q. Do you recognize your signatures on the  
15 bottom right-hand corner of the pages for  
16 Exhibit 5? I may have misspoke.

17 Do you recognize your initials on the  
18 bottom right-hand corner of the pages of Exhibit 5?

19 A. Yes.

20 Q. Yes?

21 A. Yes.

22 Q. And if you turn to ARV 53, bottom  
23 right-hand corner.

24 A. You say 53?

25 Q. 53, bottom right-hand corner. You see the



1 stamp says ARV?

2 A. Yes.

3 Q. Do you recognize your signature on this  
4 page?

5 A. Yes, sir.

6 Q. If you go back another few pages to the  
7 last page of the document, ARV 61. Do you recognize  
8 your signature --

9 A. Yes.

10 Q. -- on this page as well?

11 A. Yes, I do.

12 Q. Just like Exhibit 2, because you didn't  
13 read this lease before you signed it, having me go  
14 through it and talking to you about your  
15 understanding about the various provisions would be  
16 a waste of time, correct?

17 A. Yes. I didn't even -- I didn't even have a  
18 chance to read it or I didn't know. Yes, it was a  
19 waste of time now, yes.

20 Q. And when you were asked to sign this lease,  
21 did you ask for additional time to review it?

22 A. Like I said, I have a very good  
23 relationship with him verbally. I didn't think it  
24 was going to be issued. I didn't ask, he didn't  
25 offer me either. I didn't know if he was supposed

1 Q. And you see your signature on the next  
2 page?

3 A. Yes, sir.

4 Q. You see your wife's initials and signature  
5 as well?

6 A. Yeah, it look the same as before, yeah.

7 Q. But before you signed this document, you  
8 did not read it?

9 A. Yes, sir. I don't even know -- like I  
10 said, I don't even know this came separate until  
11 this day, I'm just surprised now.

12 Q. And just to make sure we're on the same  
13 page.

14 A. I understand.

15 Q. You did not review this document Exhibit 6  
16 before you signed it?

17 A. No, I didn't.

18 (Exhibit 7 was marked for identification.)

19 BY MR. EDWARDS:

20 Q. I'm showing you what's been marked as  
21 Exhibit 7 which is the ledger for suites 10 and 29.  
22 Just like last time, you see that there is a column  
23 of charges, payments, and balance?

24 A. It looks the same as the other one. But I  
25 don't know what to say about it. I don't know.

1 Mr. Burns?

2 A. It means additional parking space.

3 MR. GRAF: Objection. Misstates the  
4 testimony.

5 BY MR. EDWARDS:

6 Q. You said you requested additional parking  
7 spaces?

8 A. Yeah, he said he cannot provide that, there  
9 is not enough space.

10 (Exhibit 10 was marked for identification.)

11 BY MR. EDWARDS:

12 Q. Showing you what's been marked as  
13 Exhibit 10. Do you recognize this document?

14 A. No.

15 Q. Do you recognize the second page of  
16 Exhibit 10?

17 A. Yeah, they came from my picture on my  
18 phone, yeah.

19 Q. You took this picture?

20 A. Yeah.

21 Q. On your phone?

22 A. It looks like my finger.

23 Q. When did you take this picture?

24 A. When I was inside there. I don't know when  
25 it is.

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CERTIFICATE OF REPORTER

STATE OF NEVADA    )  
                                  )     ss:  
COUNTY OF CLARK    )

I, Jewel Williams, a Certified Court Reporter  
licensed by the State of Nevada, do hereby certify:  
That I reported the deposition of MULUGETA BOUR on  
Monday, November 2, 2020, at 10:52 a.m.

That prior to being deposed, the witness was  
duly sworn by me to testify to the truth. That I  
thereafter transcribed my said stenographic notes via  
computer-aided transcription into written form, and  
that the typewritten transcript is a complete, true,  
and accurate transcription of said shorthand notes;  
that review of the transcript was not requested.

I further certify that I am not a relative,  
employee, or independent contractor of counsel or of  
any of the parties involved in the proceeding; nor a  
person financially interested in the proceeding; nor  
do I have any other relationship that may reasonably  
cause my impartiality to be questioned.

IN WITNESS HEREOF, I have set my hand in my  
office in the County of Clark, State of Nevada.

Dated: 11/9/20



JEWEL WILLIAMS, CCR NO. 941

# EXHIBIT 2





# STANDARD INDUSTRIAL/COMMERCIAL MULTI-TENANT LEASE - NET AIR COMMERCIAL REAL ESTATE ASSOCIATION

## 1. Basic Provisions ("Basic Provisions").

1.1 **Parties:** This Lease ("Lease"), dated for reference purposes only April 20, 2017, is made by and between 4520 ARVILLE, a California general partnership and MCKINLEY MANOR, an Idaho general partnership, as tenants in common ("Lessor") and BOUR ENTERPRISES LLC, a Nevada limited liability company

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

1.2(a) **Premises:** That certain portion of the Project (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 4560 South Arville Street, C-23 & 24, located in the City of Las Vegas, County of Clark, State of Nevada, with zip code 89103, as outlined on Exhibit A attached hereto ("Premises") and generally described as (describe briefly the nature of the Premises): Approximately 4,560 square feet of industrial/warehouse space located in the Project known as "Arville Industrial Park"

In addition to Lessee's rights 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 Project. The Premises, the Building, the Common Areas, the land upon which they are located, along with all other buildings and improvements thereon, are herein collectively referred to as the "Project." (See also Paragraph 2)

1.2(b) **Parking:** Four (4) unreserved vehicle parking spaces ("Unreserved Parking Spaces"); and n/a reserved vehicle parking spaces ("Reserved Parking Spaces"). (See also Paragraph 2.6)

1.3 **Term:** Two (2) years and one (1) months ("Original Term") commencing May 1, 2017 ("Commencement Date") and ending May 31, 2019 ("Expiration Date"). (See also Paragraph 3)

1.4 **Early Possession:** Upon Lease execution ("Early Possession Date"). (See also Paragraphs 3.2 and 3.3)

1.5 **Base Rent:** \$ 1,824.00 per month ("Base Rent"), payable on the 1st day of each month commencing on the Commencement Date. (See also Paragraph 4)

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

1.6 **Lessee's Share of Common Area Operating Expenses:** Two and 86/100 percent (2.86 %) ("Lessee's Share").

### 1.7 Base Rent and Other Monies Paid Upon Execution:

- (a) **Base Rent:** \$ 1,824.00 for the period 05/01/2017-05/31/2017.
- (b) **Common Area Operating Expenses:** \$ 912.00 for the period 05/01/2017-05/31/2017.
- (c) **Security Deposit:** \$ 2,736.00 ("Security Deposit"). (See also Paragraph 5)
- (d) **Other:** \$ n/a for .

(e) **Total Due Upon Execution of this Lease:** \$ 5,472.00.

1.8 **Agreed Use:** Administrative operations and vehicle storage for a limousine service. (See also Paragraph 6)

1.9 **Insuring Party.** Lessor is the "Insuring Party". (See also Paragraph 8)

1.10 Real Estate Brokers: (See Paragraph 15)

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

- ☒ Commercial Specialists \_\_\_\_\_ represents Lessor exclusively ("Lessor's Broker");  
☐ n/a \_\_\_\_\_ represents Lessee exclusively ("Lessee's Broker"); or  
☐ n/a \_\_\_\_\_ 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 the brokerage fee agreed to in a separate written agreement (or if there is no such agreement, the sum of (per agreement) or ---- % of the total Base Rent for the brokerage services rendered by the Brokers).

1.11 **Guarantor.** The obligations of the Lessee under this Lease are to be guaranteed by MULUGETA BOUR, an individual, and HILENA K. MENGESHA, an individual ("Guarantor"). (See also Paragraph 37)

1.12 **Addenda and Exhibits.** Attached hereto is an Addendum or Addenda consisting of Paragraphs 1 through 5 and Exhibits A through B, all of which constitute a part of this Lease.

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. Unless otherwise provided herein, any statement of size set forth in this Lease, or that may have been used in calculating Rent, is an approximation which the Parties agree is reasonable and any payments based thereon are not subject to revision whether or not the actual size is more or less.

2.2 **Condition.** Lessor shall deliver that portion of the Premises contained within the Building ("Unit") to Lessee broom clean and free of debris on the Commencement Date or the Early Possession Date, whichever first occurs ("Start Date"), and, so long as the required service contracts described in Paragraph 7.1(b) below are obtained by Lessee and in effect within thirty days following the Start Date, warrants that the existing electrical, plumbing, fire sprinkler, lighting, heating, ventilating and air conditioning systems ("HVAC"), loading doors, if any, and all other such elements in the Unit, 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 Unit shall be free of material defects. 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, as 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 Unit. 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 - see Paragraph 7).

2.3 **Compliance.** Lessor warrants that the improvements on the Premises and the Common Areas comply with the building codes that were in effect at the time that each 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 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 Unit, Premises and/or Building, the remediation of any Hazardous Substance, or the reinforcement or other physical modification of the Unit, 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 and Lessee shall allocate the obligation to pay for the portion of such costs reasonably attributable to the Premises pursuant to the formula set out in Paragraph 7.1(d); provided, however, that if 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 be fully responsible for the cost thereof, and Lessee shall not have any right to terminate this Lease.

2.4 **Acknowledgements.** Lessee acknowledges that: (a) it has been advised by Lessor and/or Brokers to satisfy itself with respect to the 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, (b) 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, and (c) 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 be entitled to use the number of Unreserved Parking Spaces and Reserved Parking Spaces specified in Paragraph 1.2(b) on those portions of the Common Areas designated from time to time by Lessor for parking. Lessee shall not use more parking spaces than said number. Said parking spaces shall be used for parking by vehicles no larger than full-size passenger automobiles or pick-up trucks, herein called "**Permitted Size Vehicles.**" 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.

(a) Lessee shall not permit or allow any vehicles that belong to or are controlled by Lessee or Lessee's employees, suppliers, shippers, customers, 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 Project and interior utility raceways and installations within the Unit 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 Project 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, 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 Project. 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. Any such storage shall be permitted only by the prior written consent of Lessor or Lessor's designated agent, which consent may be revoked at any time. In the event that any unauthorized storage 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 Project and their invitees. Lessee agrees to abide by and conform to all such Rules and Regulations, and 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 Project.

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

(a) To make changes to the Common Areas, including, without limitation, changes in the location, size, shape and number of



driveways, entrances, parking spaces, parking aisles, loading and unloading areas, ingress, egress, direct flow of traffic, landscaped areas, walkways and utility raceways;

- (b) To close temporarily any of the Common Areas for maintenance purposes so long as reasonable access to the Premises remains available;
- (c) To designate other land outside the boundaries of the Project to be a part of the Common Areas;
- (d) To add additional buildings and improvements to the Common Areas;
- (e) To use the Common Areas while engaged in making additional improvements, repairs or alterations to the Project, or any portion thereof; and
- (f) To do and perform such other acts and make such other changes in, to or with respect to the Common Areas and Project as Lessor may, in the exercise of sound business judgment, deem to be appropriate.

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.** If Lessee totally or partially occupies the Premises prior to the Commencement Date, the obligation to pay Base Rent shall be abated for the period of such early possession. All other terms of this Lease (including but not limited to the obligations to pay Lessee's Share of Common Area Operating Expenses, Real Property Taxes and insurance premiums and to maintain the Premises) shall, however, be in effect during such period. 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 as agreed, Lessor shall not be subject to any liability therefor, nor shall such failure affect the validity of this Lease. Lessee shall not, however, be obligated to pay Rent or perform its other obligations until it receives possession of the Premises. If possession is not delivered within 60 days after the Commencement Date, 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. Except as otherwise provided, if possession is not tendered to Lessee by the Start Date and Lessee does not terminate this Lease, as aforesaid, 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 of the Premises is not delivered within 4 months 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 8.5). 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, Lessee's Share (as specified in Paragraph 1.6) 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 Project, including, but not limited to, the following:

- (i) The operation, repair and maintenance, in neat, clean, good order and condition 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, bumpers, irrigation systems, Common Area lighting facilities, fences and gates, elevators, roofs, and roof drainage systems.
  - (bb) Exterior signs and any tenant directories.
  - (cc) Any fire detection and/or sprinkler systems.
- (ii) The cost of water, gas, electricity and telephone to service the Common Areas and any utilities not separately metered.
- (iii) Trash disposal, pest control services, property management, security services, and the costs of any environmental inspections.
- (iv) Reserves set aside for maintenance and repair of Common Areas.
- (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) The cost of any Capital Expenditure to the Building or the Project covered under the provisions of Paragraph 2.3 provided; however, that Lessor shall allocate the cost of any such Capital Expenditure 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 Expenditure in any given month.
- (ix) Any other services to be provided by Lessor that are stated elsewhere in this Lease to be a Common Area Operating Expense.

(b) Any Common Area Operating Expenses and Real Property Taxes that are specifically attributable to the Unit, the Building or to any other building in the Project or to the operation, repair and maintenance thereof, shall be allocated entirely to such Unit, Building, or other building. However, any Common Area Operating Expenses and Real Property Taxes that are not specifically attributable to the Building or to any other building or to the operation, repair and maintenance thereof, shall be equitably allocated by Lessor to all buildings in the Project.

(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 Project 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 shall be payable by Lessee within 10 days after a reasonably detailed statement of actual expenses is presented to Lessee. At Lessor's option, however, an amount may be estimated by Lessor from time to time of Lessee's Share of annual Common Area Operating Expenses and the same shall be payable monthly or quarterly, as Lessor shall designate, during each 12 month period of the Lease term, on the same day as the Base Rent is due hereunder. Lessor shall deliver to Lessee within 60 days after the expiration of each calendar year a reasonably detailed statement showing Lessee's Share of the actual Common Area Operating Expenses incurred during the preceding year. If Lessee's payments under this Paragraph 4.2(d) during the preceding year exceed Lessee's Share as indicated on such statement, Lessor shall credit the amount of such over-payment against Lessee's Share of Common Area Operating Expenses next becoming due. If Lessee's payments under this Paragraph 4.2(d) during the preceding year were less than Lessee's Share as indicated on such statement, Lessee shall pay to Lessor the amount of the deficiency within 10 days after delivery by Lessor to Lessee of the statement.

**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. 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 charges which may be due.

**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 due Lessor 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 14 days after the expiration or termination of this Lease, if Lessor elects to apply the Security Deposit only to unpaid Rent, and otherwise within 30 days after the Premises have been vacated pursuant to Paragraph 7.4(c) below, 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.** Lessee shall use and occupy the Premises only for the Agreed Use, or any other legal use which is reasonably comparable thereto, and for no other purpose. 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. 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 improvements on the Premises or the mechanical or electrical systems therein, and/or is not significantly more burdensome to the Premises. 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.

**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 or 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, 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, 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' and consultants' 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 Project). 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 existed as a result of Hazardous Substances on the Premises prior to the Start Date 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 the Start Date, 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 the Premises, 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.

**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, 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 contamination 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.

**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.

(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, (iii) clarifiers, and (iv) any other equipment, if reasonably required by Lessor. However, Lessor reserves the right, upon notice to Lessee, to procure and maintain any or all of such service contracts, and if Lessor so elects, 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 reimburse Lessor for 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 (ie. 1/144th of the cost per month). Lessee shall pay interest on the unamortized balance at a rate that is commercially reasonable in the judgment of Lessor's accountants. Lessee may, however, 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, parkways, 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 lines, power panels, electrical distribution, security and fire protection systems, communication systems, 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 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, and the cumulative cost thereof during this Lease as extended does not exceed a sum equal to 3 month's 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) **Indemnification.** 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 90 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 this 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 Project) 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. 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, an "Additional Insured-Managers or Lessors of Premises Endorsement" and contain the "Amendment of the Pollution Exclusion Endorsement" for damage caused by heat, smoke or fumes from a hostile fire. 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. All insurance carried by Lessee 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 therein.

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

(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 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 under Paragraph 8.4. 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 flood 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 \$1,000 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 Project 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.**

(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) **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 duly licensed or admitted to transact business in the state where the Premises are located, and maintaining during the policy term a "General Policyholders Rating" of at least B+, V, 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 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 30 days prior to the expiration of such policies, furnish Lessor with evidence of renewals 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, 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 from Liability.** Lessor shall not be liable for 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, 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, or from other sources or places. Lessor shall not be liable for any damages arising from any act or neglect of any other tenant of Lessor nor from the failure of Lessor to enforce the provisions of any other lease in the Project. Notwithstanding Lessor's negligence or breach of this Lease, Lessor shall under no circumstances be liable for injury to Lessee's business or for any loss of income or profit therefrom.

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 month's 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.

(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 month's 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 as defined in Paragraph 6.2(a), in, on, or under the Premises.

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 Lessor's election, make the repair of any damage or destruction the total cost to repair of which is \$5,000 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 Insuring 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 **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 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.

9.7 **Termination; Advance Payments.** Upon termination of this Lease pursuant to Paragraph 6.2(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.

9.8 **Waive Statutes.** Lessor and Lessee agree that the terms of this Lease shall govern the effect of any damage to or destruction of the Premises with respect to the termination of this Lease and hereby waive the provisions of any present or future statute to the extent inconsistent herewith.

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 Project, 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 Project 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 Project is located. The term "Real Property Taxes" shall also include any tax, fee, levy, assessment or charge, or any increase therein, imposed by reason of events occurring during the term of this Lease, including but not limited to, a change in the ownership of the Project or any portion thereof or a change in the improvements thereon. 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.** Lessor shall pay the Real Property Taxes applicable to the Project, and except as otherwise provided in Paragraph 10.3, any such amounts 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 Project 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.



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.** 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. 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 dumpster and/or an increase in the number of times per month that the dumpster is emptied, then Lessor may increase Lessee's Base Rent by an amount equal to such increased costs.

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) A change in the control of Lessee shall constitute an assignment requiring consent. The transfer, on a cumulative basis, of 25% 51% 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 to 110% of the Base Rent 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 Lessor shall be limited to compensatory damages and/or injunctive relief.

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 Lessee'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 \$1,000 or 10% of the current monthly Base Rent applicable to the portion of the Premises which is the subject of the proposed assignment or sublease, whichever is greater, 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.

(f) Any assignee of, or sublessee under, this Lease shall, by reason of accepting such assignment or entering into such

sublease, 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. 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 prepaid rents 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 abandonment of the Premises; or the vacating of the Premises without providing a commercially reasonable level of security, or where the coverage of the property insurance described in Paragraph 8.3 is jeopardized as a result thereof, or without providing reasonable assurances to minimize potential vandalism.

(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.

(c) 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, (v) a requested subordination, (vi) evidence concerning any guaranty and/or Guarantor, (vii) any document requested under Paragraph 41 (easements), or (viii) 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.

(d) A Default by Lessee as to the terms, covenants, conditions or provisions of this Lease, or of the rules adopted under Paragraph 2.9 hereof, other than those described in subparagraphs 13.1(a), (b) or (c), 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.

(e) 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 (e) is contrary to any applicable law, such provision shall be of no force or effect, and not affect the validity of the remaining provisions.

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

(g) 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 this 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. The costs and expenses of any such performance by Lessor shall be due and payable by Lessee upon receipt of invoice therefor. If any check given to Lessor by Lessee shall not be honored by the bank upon which it is drawn, Lessor, at its option, may require all future payments to be made by Lessee to be by cashier's check. 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 loss 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 loss 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 damages under Paragraph 12. 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 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. 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 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) 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 equal to the prime rate reported in the Wall Street Journal as published closest prior to the date when due plus 4%, 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 an amount equal to the greater of one month's Base Rent or the Security Deposit, and to pay an excess of such expense under protest, reserving Lessee's right to reimbursement from Lessor. 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 Unit, or more than 25% of Lessee's Reserved Parking Spaces, 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 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 and Utility 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.** In addition to the payments owed pursuant to Paragraph 1.10 above, and unless Lessor and the Brokers otherwise agree in writing, Lessor agrees that: (a) if Lessee exercises any Option, (b) if Lessee acquires from Lessor any rights to the Premises or other premises owned by Lessor and located within the Project, (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 of the Brokers in effect at the time of the execution of this Lease.

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 1.10, 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 finder (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 Responding Party's Estoppel Certificate, and the Responding Party shall be estopped from denying the truth of the facts contained in said Certificate.

(c) If Lessor desires to finance, refinance, or sell the Premises, or any part thereof, Lessee and all Guarantors shall 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 in 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. Except as provided in Paragraph 15, 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. Notwithstanding the above, and subject to the provisions of Paragraph 20 below, the original Lessor under this Lease, and all subsequent holders of the Lessor's interest in this Lease shall remain liable and responsible with regard to the potential duties and liabilities of Lessor pertaining to Hazardous Substances as outlined in Paragraph 6.2 above.

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.** Subject to the provisions of Paragraph 17 above, the obligations of Lessor under this Lease shall not constitute personal obligations of Lessor, the individual partners of Lessor or its or their individual partners, 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 the individual partners of Lessor, or its or their individual partners, 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. The liability (including court costs and attorneys' fees), of any Broker with respect to negotiation, execution, delivery or performance by either Lessor or Lessee under this Lease or any amendment or modification hereto shall be limited to an amount up to 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.

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 48 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 guarantee 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 or mail. If notice is received on a Saturday, Sunday or legal holiday, it shall be deemed received on the next business day.

24. **Waivers.** 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. 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, which 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.

**25. Disclosures Regarding The Nature of a Real Estate Agency Relationship.** (See attached Duties Owed by a Nevada Real Estate Licensee)

(a) ~~When entering into a discussion with a real estate agent regarding a real estate transaction, a Lessor or Lessee should from the outset 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 fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Lessor. To the Lessee and the Lessor: (a) Diligent exercise of reasonable skills and care in performance of the agent's duties. (b) A duty of honest and fair dealing and good faith. (c) 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 fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Lessee. To the Lessee and the Lessor: (a) Diligent exercise of reasonable skills and care in performance of the agent's duties. (b) A duty of honest and fair dealing and good faith. (c) 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 licenses, 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 liability (including court costs and attorneys' fees), of any Broker with respect to any breach of duty, error or omission relating to this Lease 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) Buyer and Seller 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 shall be increased to 150% of the Base Rent 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; Attornment; 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 recordation thereof.

**30.2 Attornment.** 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,

attorn to such new owner, and upon request, el. 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 such new owner, this Lease shall automatically become a new Lease between Lessee and such new owner, upon all of the terms and conditions hereof, for the remainder of the term hereof, and (ii) Lessor shall thereafter be relieved of any further obligations hereunder and such new owner shall assume all of Lessor's obligations hereunder, except that such new owner shall not: (a) 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.

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 attorns to the record owner of the Premises. Further, within 60 days after the execution of this Lease, Lessor shall 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, attornment 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 therewith, whether or not a legal action is subsequently commenced in connection with such Default or resulting 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 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. All such activities shall be without abatement of rent or liability to Lessee. Lessor may at any time place on the Premises any ordinary "**For Sale**" signs and Lessor may during the last 6 months of the term hereof place on the Premises any ordinary "**For Lease**" signs. Lessee may at any time place on the Premises any ordinary "**For Sublease**" sign.

33. **Auctions.** Lessee shall not conduct, nor permit to be conducted, any auction upon the Premises without Lessor's prior written consent. Lessor shall not be obligated to exercise any standard of reasonableness in determining whether to permit an auction.

34. **Signs.** Except for ordinary "For Sublease" signs which may be placed only on the Premises, Lessee shall not place any sign upon the Project without Lessor's prior written consent. All signs must comply with all Applicable Requirements.

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 or 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. 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 or 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 to 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, any, shall each execute a guaranty in the form most recently published by the AIR Commercial Real Estate Association, and each such Guarantor shall have the same obligations as Lessee under this Lease.

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, Lessee 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 the term of or renew this Lease or to extend 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 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, (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), (ii) Lessor gives to Lessee 3 or more notices of separate Default during any 12 month period, whether or not the Defaults are cured, or (iii) 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.

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, (ii) to cause the recordation of parcel maps and restrictions, and (iii) to create and/or install new utility raceways, so long as such easements, rights, dedications, maps, restrictions, and utility raceways 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. **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.

43. **Authority.** 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.

44. **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.

45. **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.

46. **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.

47. **Multiple Parties.** If more than one person or entity is named herein as either Lessor or Lessee, such multiple Parties shall have joint and several responsibility to comply with the terms of this Lease.

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

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. SEEK 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.

Execute at: 7674 West Lake Mead Boulevard, 104 Executed at: \_\_\_\_\_  
On: \_\_\_\_\_ on: \_\_\_\_\_

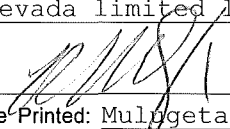
By LESSOR:

4520 ARVILLE  
MCKINLEY MANOR

By:   
Name Printed: Kevin J. Donahoe  
Title: Owner Agent

By LESSEE:

BOUR ENTERPRISES LLC,  
a Nevada limited liability company

By:   
Name Printed: Mulygeta Bour  
Title: Manager

By: \_\_\_\_\_  
Name Printed: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: 7674 W. Lake Mead Blvd., 104  
Las Vegas, NV 89128

By: \_\_\_\_\_  
Name Printed: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: 4560 S. Arville Street, #23  
Las Vegas, NV 89103

Telephone: (702) 364-0909  
Facsimile: (702) 364-5885  
Federal ID No. 95-4590150

Telephone: (702) 808-2047  
Facsimile: ( )  
Federal ID No. \_\_\_\_\_

These forms are often modified to meet changing requirements of law and needs of the industry. Always write or call to make sure you are utilizing the most current form: AIR Commercial Real Estate Association, 700 South Flower Street, Suite 600, Los Angeles, CA 90017. (213) 687-8777.

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c. In the event the compilation and/or publication of the CPI shall be transferred to any other governmental department or bureau or agency or shall be discontinued, then the index most nearly the same as the CPI shall be used to make such calculation. In the event that the Parties cannot agree on such alternative index, then the matter shall be submitted for decision to the American Arbitration Association in accordance with the then rules of said Association and the decision of the arbitrators shall be binding upon the parties. The cost of said Arbitration shall be paid equally by the Parties.

☐ II. Market Rental Value Adjustment(s) (MRV)

a. On (Fill in MRV Adjustment Date(s): \_\_\_\_\_

the Base Rent shall be adjusted to the "Market Rental Value" of the property as follows:

1) Four months prior to each Market Rental Value Adjustment Date described above, the Parties shall attempt to agree upon what the new MRV will be on the adjustment date. If agreement cannot be reached within thirty days, then:

(a) Lessor and Lessee shall immediately appoint a mutually acceptable appraiser or broker to establish the new MRV within the next 30 days. Any associated costs will be split equally between the Parties, or

(b) Both Lessor and Lessee shall each immediately make a reasonable determination of the MRV and submit such determination, in writing, to arbitration in accordance with the following provisions:

(i) Within 15 days thereafter, Lessor and Lessee shall each select an ☐ appraiser or ☐ broker ("Consultant" - check one) of their choice to act as an arbitrator. The two arbitrators so appointed shall immediately select a third mutually acceptable Consultant to act as a third arbitrator.

(ii) The 3 arbitrators shall within 30 days of the appointment of the third arbitrator reach a decision as to what the actual MRV for the Premises is, and whether Lessor's or Lessee's submitted MRV is the closest thereto. The decision of a majority of the arbitrators shall be binding on the Parties. The submitted MRV which is determined to be the closest to the actual MRV shall thereafter be used by the Parties.

(iii) If either of the Parties fails to appoint an arbitrator within the specified 15 days, the arbitrator timely appointed by one of them shall reach a decision on his or her own, and said decision shall be binding on the Parties.

(iv) The entire cost of such arbitration shall be paid by the party whose submitted MRV is not selected, ie. the one that is NOT the closest to the actual MRV.

2) Notwithstanding the foregoing, the new MRV shall not be less than the rent payable for the month immediately preceding the rent adjustment.

b. Upon the establishment of each New Market Rental Value:

1) the new MRV will become the new "Base Rent" for the purpose of calculating any further Adjustments, and

2) the first month of each Market Rental Value term shall become the new 'Base Month' for the purpose of calculating any further Adjustments.

☒ III. Fixed Rental Adjustment(s) (FRA)

The Base Rent shall be increased to the following amounts on the dates set forth below:

On (Fill in FRA Adjustment Date(s):

May 1, 2018 and annually  
thereafter

The New Base Rent shall be:

Base Rent to increase by \$.025  
per square foot, or \$114.00  
per month

B. NOTICE:

Unless specified otherwise herein, notice of any such adjustments, other than Fixed Rental Adjustments, shall be made as specified in paragraph 23 of the Lease.

C. BROKER'S FEE:

The Brokers shall be paid a Brokerage Fee for each adjustment specified above in accordance with paragraph 15 of the Lease.

NOTE: These forms are often modified to meet changing requirements of law and needs of the industry. Always write or call to make sure

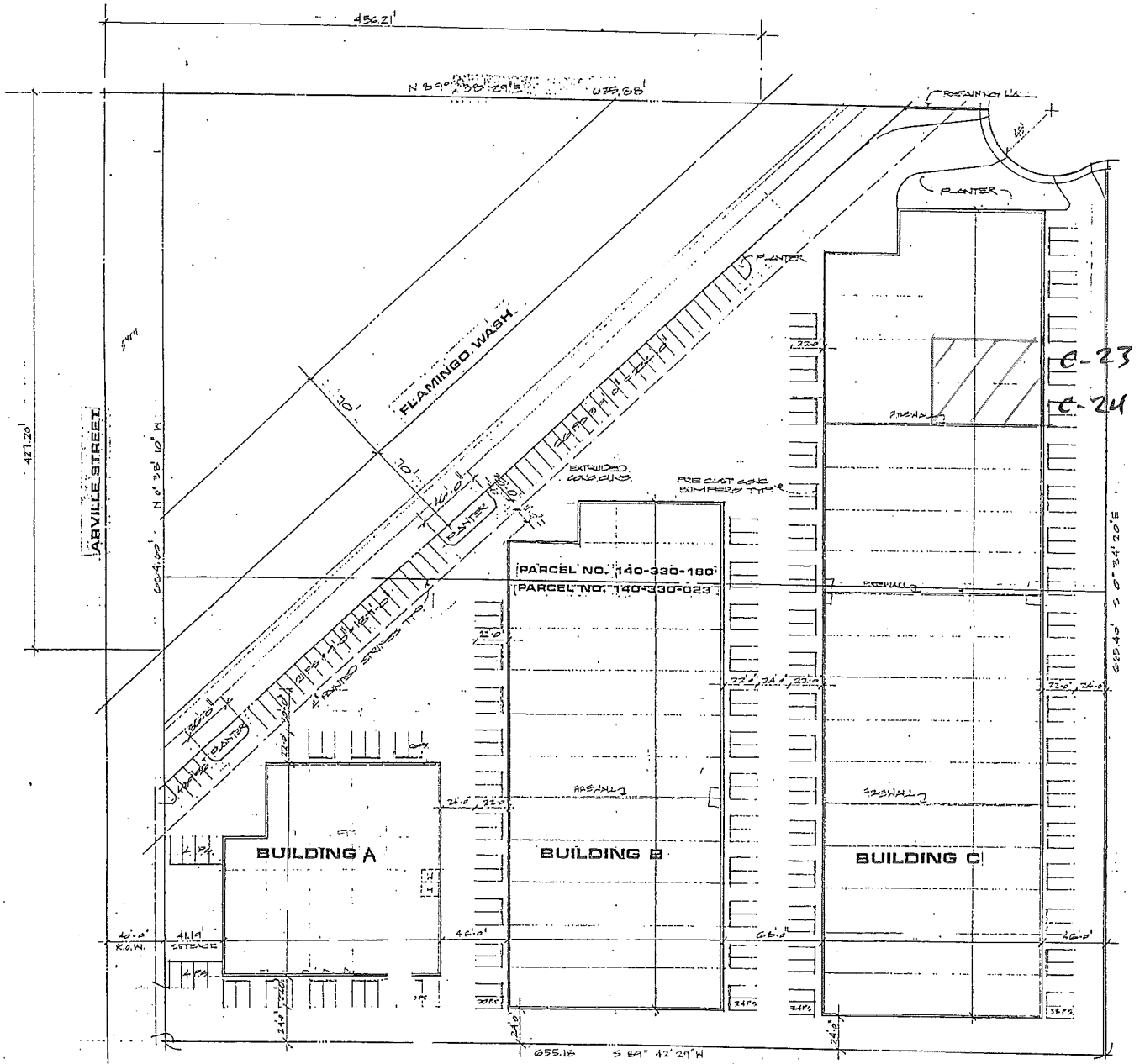
you are utilizing the most current form: AIR COMMERCIAL REAL ESTATE ASSOCIATION, 700 S. Flower Street, Suite 600, Los Angeles, Calif. 90017

\_\_\_\_\_  
INITIALS

PAGE 3 OF 3

 initials  
INITIALS

# Exhibit A



**SITE PLAN**

1" = 40'-0"

*M.B.*

## **Exhibit B**

### **SIGNAGE CRITERIA**

This criterion is being established to provide Lessee with signage specifications for signage conformity throughout the Project. This criterion shall be strictly enforced and any non-conforming or unapproved signage must be removed or brought into conformance within ten (10) days of Lessor's request, at the expense of the Lessee.

#### **General Specification**

1. Lessor shall determine approved signage location to Lessee upon request of Lessee.
2. Signage copy to be individual cut out letters, white in color, and affixed on the building without penetrating the surface of the building. Letters shall not to exceed three (3) feet in height.
3. Only established trade names shall be displayed.
4. Sign design, materials, copy and placement to be approved by Lessor in writing prior to installation. Lessee shall deliver to Lessor two (2) sets of plans for Lessor's approval.

#### **General Construction Requirements**

1. Lessee shall be responsible for contracting for the installation and maintenance of Lessee's signage.
2. Lessee shall be responsible for the actions of Lessee's sign contractor or vendor.
3. Lessee's sign contractor or vendor shall repair any damage to any portion of the Building structure or fascia caused by said contractor or vendor's work.
4. No signage of any type shall be directly painted on the exterior walls of the Building.
5. Sign contractor or vendor shall contact Lessor prior to commencement of any work so Lessor may inspect sign materials to insure conformance with approved drawings.
6. Lessee to pay for the cost of sign removal and building restoration at the time Lessee vacates the Premises.
7. Sign contractor or vendor shall carry Workmen's compensation and public liability insurance against all damage suffered or done to any and all persons and/or property while engaged in the installation of signage. Said insurance coverage shall be a minimum of \$1,000,000.00. A copy of the policy or certificate of insurance naming Lessor as additional insured shall be delivered to Lessor prior to signage installation.

*MB*  
*A*

## LEASE ADDENDUM

This Lease Addendum is made and entered into on this 20<sup>th</sup> day of April, 2017, and is hereby attached to and becomes a part of the Lease dated April 20, 2017 by and between 4520 ARVILLE, a California general partnership, and MCKINLEY MANOR, an Idaho general partnership, as tenants in Common, hereinafter referred to as "Lessor", and BOUR ENTERPRISES LLC, a Nevada limited liability company, hereinafter referred to as "Lessee".

### RECITALS:

WHEREAS, Lessee and Lessor desire to amend the Lease between the parties for the Premises known as 4560 South Arville Street, C-23 & 24, Las Vegas, Nevada 89103.

### TERMS:

NOW, THEREFORE, in consideration of the mutual promises and covenants contained in the Lease, and this Lease Addendum, the parties agree as follows:

1. Condition of Premises. Lessee hereby accepts the Premises in "as-is" condition with any additional alterations and improvements to be completed at Lessee's expense and in accordance with Section 7 of Lease.

2. Trash Disposal. In the areas where garbage dumpsters are provided within the Project, Lessee may utilize the dumpsters for waste paper and incidental trash only. Packing skids, boxes, and construction materials are not to be placed in or around dumpsters. It is the sole responsibility of Lessee to dispose of excessive trash and packaging materials away from the Project or to obtain Lessee's own dumpster at Lessee's own expense. Trash or materials stored outside of the Premises by Lessee, and not disposed of properly in a dumpster is prohibited, and Lessor shall have the right to charge Lessee for the cost of properly disposing of said trash or materials in addition to

any fine that the Lessor may levy against Lessee for such offense.

3. Lessee's Share. Lessee's Share of Common Area Operating Expenses to be paid by Lessee to Lessor shall be no less than \$.20 per square foot, per month, or Nine Hundred Twelve and No/00 Dollars (\$912.00), for the duration of the Term of the Lease.

4. Lessee's Vehicles. Lessee, at Lessee's cost, shall take all necessary precautions to protect the concrete slab and walls of the Premises from automotive spills of any chemicals or petroleum products which may come into contact with the floor or walls as a result of the operation of Lessee's business, and Lessee shall not leave Lessee's vehicles parked outside of the Premises in the parking areas overnight.

5. Rent Abatement. As consideration for Lessee's performance of all obligations to be performed by Lessee under the Lease, and provided Lessee is not in default of the Lease, Lessor shall credit Lessee's rental account Three Hundred Fifteen and 78/00 Dollars (\$315.78) for Month 1 of the Lease.

Except as amended by this Lease Addendum, all the provisions, terms and conditions of the Lease shall remain in full force and effect and the same is hereby ratified and confirmed.

*Signatures to follow*

Handwritten initials 'MB' and a signature.



IN WITNESS WHEREOF, the parties hereto have executed this Lease Addendum as of this date.

**LESSOR:**

**4520 ARVILLE, a California general partnership, and MCKINLEY MANOR, an Idaho general partnership, as tenants in common**

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

Kevin J. Donahoe

Its: Owner Agent

**LESSEE:**

**BOUR ENTERPRISES LLC, a Nevada limited liability company**

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

Mulugeta Bour

Its: Manager



## AIR COMMERCIAL REAL ESTATE ASSOCIATION GUARANTY OF LEASE

WHEREAS, 4520 ARVILLE, a California general partnership and MCKINLEY MANOR, an Idaho general partnership, as tenants in common, hereinafter "Lessor", and BOUR ENTERPRISES LLC, a Nevada limited liability company, hereinafter "Lessee", are about to execute a document entitled "Lease" dated April 20, 2017 concerning the premises commonly known as 4560 South Arville Street, C-23 & 24, Las Vegas, Nevada 89103 wherein Lessor will lease the premises to Lessee, and

WHEREAS, MULUGETA BOUR, an individual, and HILENA MENGESHA, an individual hereinafter "Guarantors" have a financial interest in Lessee, and

WHEREAS, Lessor would not execute the Lease if Guarantors did not execute and deliver to Lessor this Guarantee of Lease.

NOW THEREFORE, in consideration of the execution of the foregoing Lease by Lessor and as a material inducement to Lessor to execute said Lease, Guarantors hereby jointly, severally, unconditionally and irrevocably guarantee the prompt payment by Lessee of all rents and all other sums payable by Lessee under said Lease and the faithful and prompt performance by Lessee of each and every one of the terms, conditions and covenants of said Lease to be kept and performed by Lessee.

It is specifically agreed that the terms of the foregoing Lease may be modified by agreement between Lessor and Lessee, or by a course of conduct, and said Lease may be assigned by Lessor or any assignee of Lessor without consent or notice to Guarantors and that this Guaranty shall guarantee the performance of said Lease as so modified.

This Guaranty shall not be released, modified or affected by the failure or delay on the part of Lessor to enforce any of the rights or remedies of the Lessor under said Lease, whether pursuant to the terms thereof or at law or in equity.

No notice of default need be given to Guarantors, it being specifically agreed that the guarantee of the undersigned is a continuing guarantee under which Lessor may proceed immediately against Lessee and/or against Guarantors following any breach or default by Lessee or for the enforcement of any rights which Lessor may have as against Lessee under the terms of the Lease or at law or in equity.

Lessor shall have the right to proceed against Guarantors hereunder following any breach or default by Lessee without first proceeding against Lessee and without previous notice to or demand upon either Lessee or Guarantors.

Guarantors hereby waive (a) notice of acceptance of this Guaranty, (b) demand of payment, presentation and protest, (c) all right to assert or plead any statute of limitations relating to this Guaranty or the Lease, (d) any right to require the Lessor to proceed against the Lessee or any other Guarantor or any other person or entity liable to Lessor, (e) any right to require Lessor to apply to any default any security deposit or other security it may hold under the Lease, (f) any right to require Lessor to proceed under any other remedy Lessor may have before proceeding against Guarantors, (g) any right of subrogation.

Guarantors do hereby subrogate all existing or future indebtedness of Lessee to Guarantors to the obligations owed to Lessor under the Lease and this Guaranty.

If a Guarantor is married, such Guarantor expressly agrees that recourse may be had against his or her separate property for all of the obligations hereunder.

The obligations of Lessee under the Lease to execute and deliver estoppel statements and financial statements, as therein provided, shall be deemed to also require the Guarantors hereunder to do and provide the same.

The term "Lessor" refers to and means the Lessor named in the Lease and also Lessor's successors and assigns. So long as Lessor's interest in the Lease, the leased premises or the rents, issues and profits therefrom, are subject to any mortgage or deed of trust or assignment for security, no acquisition by Guarantors of the Lessor's interest shall affect the continuing obligation of Guarantors under this Guaranty which shall nevertheless continue in full force and effect for the benefit of the mortgagee, beneficiary, trustee or assignee under such mortgage, deed of trust or

assignment and their successors and assigns.

The term "Lessee" refers to and means the Lessee named in the Lease and also Lessee's successors and assigns.

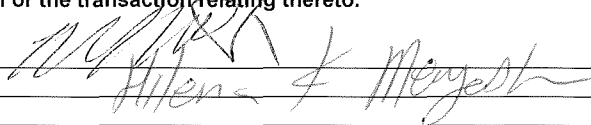
In the event any action be brought by said Lessor against Guarantors hereunder to enforce the obligation of Guarantors hereunder, the unsuccessful party in such action shall pay to the prevailing party therein a reasonable attorney's fee which shall be fixed by the court.

If this Form has been filled in, it has been prepared for submission to your attorney for his approval. No representation or recommendation is made by the AIR Commercial Real Estate Association, the real estate broker or its agents or employees as to the legal sufficiency, legal effect, or tax consequences of this Form or the transaction relating thereto.

Executed at: \_\_\_\_\_

On: \_\_\_\_\_

Address: \_\_\_\_\_

  
\_\_\_\_\_

"GUARANTORS"

# EXHIBIT 3





# STANDARD INDUSTRIAL/COMMERCIAL MULTI-TENANT LEASE - NET AIR COMMERCIAL REAL ESTATE ASSOCIATION

## 1. Basic Provisions ("Basic Provisions").

1.1 **Parties:** This Lease ("Lease"), dated for reference purposes only April 20, 2017, is made by and between 4520 ARVILLE, a California general partnership and MCKINLEY MANOR, an Idaho general partnership, as tenants in common ("Lessor") and BOUR ENTERPRISES LLC, a Nevada limited liability company

\_\_\_\_\_, ("Lessee"), (collectively the "Parties", or individually a "Party").

1.2(a) **Premises:** That certain portion of the Project (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 4560 South Arville Street, C-10 & 29, located in the City of Las Vegas, County of Clark, State of Nevada, with zip code 89103, as outlined on Exhibit A attached hereto ("Premises") and generally described as (describe briefly the nature of the Premises): Approximately 4,560 square feet of industrial/warehouse space located in the Project known as "Arville Industrial Park"

In addition to Lessee's rights 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 Project. The Premises, the Building, the Common Areas, the land upon which they are located, along with all other buildings and improvements thereon, are herein collectively referred to as the "Project." (See also Paragraph 2)

1.2(b) **Parking:** Four (4) unreserved vehicle parking spaces ("Unreserved Parking Spaces"); and n/a reserved vehicle parking spaces ("Reserved Parking Spaces"). (See also Paragraph 2.6)

1.3 **Term:** Two (2) years and one (1) months ("Original Term") commencing May 1, 2017 ("Commencement Date") and ending May 31, 2019 ("Expiration Date"). (See also Paragraph 3)

1.4 **Early Possession:** Upon Lease execution ("Early Possession Date"). (See also Paragraphs 3.2 and 3.3)

1.5 **Base Rent:** \$ 1,824.00 per month ("Base Rent"), payable on the 1st day of each month commencing on the Commencement Date. (See also Paragraph 4)

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

1.6 **Lessee's Share of Common Area Operating Expenses:** Two and 86/100 percent (2.86 %) ("Lessee's Share").

### 1.7 Base Rent and Other Monies Paid Upon Execution:

- (a) **Base Rent:** \$ 1,824.00 for the period 05/01/2017-05/31/2017.
- (b) **Common Area Operating Expenses:** \$ 912.00 for the period 05/01/2017-05/31/2017.
- (c) **Security Deposit:** \$ 2,736.00 ("Security Deposit"). (See also Paragraph 5)
- (d) **Other:** \$ n/a for \_\_\_\_\_.

(e) **Total Due Upon Execution of this Lease:** \$ 5,472.00.

1.8 **Agreed Use:** Administrative operations and vehicle storage for a limousine service. (See also Paragraph 6)

1.9 **Insuring Party.** Lessor is the "Insuring Party". (See also Paragraph 8)

1.10 **Real Estate Brokers:** (also Paragraph 15)

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

- ☒ Commercial Specialists represents Lessor exclusively ("Lessor's Broker");  
☐ n/a represents Lessee exclusively ("Lessee's Broker"); or  
☐ n/a 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 the brokerage fee agreed to in a separate written agreement (or if there is no such agreement, the sum of (per agreement) or ---- % of the total Base Rent for the brokerage services rendered by the Brokers).

1.11 **Guarantor.** The obligations of the Lessee under this Lease are to be guaranteed by MULUGETA BOUR, an individual, and HILENA K. MENGESHA, an individual ("Guarantor"). (See also Paragraph 37)

1.12 **Addenda and Exhibits.** Attached hereto is an Addendum or Addenda consisting of Paragraphs 1 through 5 and Exhibits A through B, all of which constitute a part of this Lease.

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. Unless otherwise provided herein, any statement of size set forth in this Lease, or that may have been used in calculating Rent, is an approximation which the Parties agree is reasonable and any payments based thereon are not subject to revision whether or not the actual size is more or less.

2.2 **Condition.** Lessor shall deliver that portion of the Premises contained within the Building ("Unit") to Lessee broom clean and free of debris on the Commencement Date or the Early Possession Date, whichever first occurs ("Start Date"), and, so long as the required service contracts described in Paragraph 7.1(b) below are obtained by Lessee and in effect within thirty days following the Start Date, warrants that the existing electrical, plumbing, fire sprinkler, lighting, heating, ventilating and air conditioning systems ("HVAC"), loading doors, if any, and all other such elements in the Unit, 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 Unit shall be free of material defects. 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, as 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 Unit. 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 - see Paragraph 7).

2.3 **Compliance.** Lessor warrants that the improvements on the Premises and the Common Areas comply with the building codes that were in effect at the time that each 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 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 Unit, Premises and/or Building, the remediation of any Hazardous Substance, or the reinforcement or other physical modification of the Unit, 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 and Lessee shall allocate the obligation to pay for the portion of such costs reasonably attributable to the Premises pursuant to the formula set out in Paragraph 7.1(d); provided, however, that if 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 \_\_\_\_\_ an notice to Lessee unless Lessee notifies Lessor \_\_\_\_\_ 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 be fully responsible for the cost thereof, and Lessee shall not have any right to terminate this Lease.

2.4 **Acknowledgements.** Lessee acknowledges that: (a) it has been advised by Lessor and/or Brokers to satisfy itself with respect to the 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, (b) 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, and (c) 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 be entitled to use the number of Unreserved Parking Spaces and Reserved Parking Spaces specified in Paragraph 1.2(b) on those portions of the Common Areas designated from time to time by Lessor for parking. Lessee shall not use more parking spaces than said number. Said parking spaces shall be used for parking by vehicles no larger than full-size passenger automobiles or pick-up trucks, herein called "**Permitted Size Vehicles.**" 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.

(a) Lessee shall not permit or allow any vehicles that belong to or are controlled by Lessee or Lessee's employees, suppliers, shippers, customers, 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 Project and interior utility raceways and installations within the Unit 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 Project 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, 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 Project. 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. Any such storage shall be permitted only by the prior written consent of Lessor or Lessor's designated agent, which consent may be revoked at any time. In the event that any unauthorized storage 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 Project and their invitees. Lessee agrees to abide by and conform to all such Rules and Regulations, and 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 Project.

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

(a) To make changes to the Common Areas, including, without limitation, changes in the location, size, shape and number of

\_\_\_\_\_  
INITIALS

  
\_\_\_\_\_  
INITIALS

driveways, entrances, parking spaces, parking areas, loading and unloading areas, ingress, egress, circulation of traffic, landscaped areas, walkways and utility raceways;

- (b) To close temporarily any of the Common Areas for maintenance purposes so long as reasonable access to the Premises remains available;
- (c) To designate other land outside the boundaries of the Project to be a part of the Common Areas;
- (d) To add additional buildings and improvements to the Common Areas;
- (e) To use the Common Areas while engaged in making additional improvements, repairs or alterations to the Project, or any portion thereof; and
- (f) To do and perform such other acts and make such other changes in, to or with respect to the Common Areas and Project as Lessor may, in the exercise of sound business judgment, deem to be appropriate.

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.** If Lessee totally or partially occupies the Premises prior to the Commencement Date, the obligation to pay Base Rent shall be abated for the period of such early possession. All other terms of this Lease (including but not limited to the obligations to pay Lessee's Share of Common Area Operating Expenses, Real Property Taxes and insurance premiums and to maintain the Premises) shall, however, be in effect during such period. 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 as agreed, Lessor shall not be subject to any liability therefor, nor shall such failure affect the validity of this Lease. Lessee shall not, however, be obligated to pay Rent or perform its other obligations until it receives possession of the Premises. If possession is not delivered within 60 days after the Commencement Date, 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. Except as otherwise provided, if possession is not tendered to Lessee by the Start Date and Lessee does not terminate this Lease, as aforesaid, 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 of the Premises is not delivered within 4 months 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 8.5). 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, Lessee's Share (as specified in Paragraph 1.6) 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 Project, including, but not limited to, the following:

- (i) The operation, repair and maintenance, in neat, clean, good order and condition 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, bumpers, irrigation systems, Common Area lighting facilities, fences and gates, elevators, roofs, and roof drainage systems.
  - (bb) Exterior signs and any tenant directories.
  - (cc) Any fire detection and/or sprinkler systems.
- (ii) The cost of water, gas, electricity and telephone to service the Common Areas and any utilities not separately metered.
- (iii) Trash disposal, pest control services, property management, security services, and the costs of any environmental inspections.
- (iv) Reserves set aside for maintenance and repair of Common Areas.
- (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) The cost of any Capital Expenditure to the Building or the Project not covered under the provisions of Paragraph 2.3 provided; however, that Lessor shall allocate the cost of any such Capital Expenditure 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 Expenditure in any given month.
- (ix) Any other services to be provided by Lessor that are stated elsewhere in this Lease to be a Common Area Operating Expense.

(b) Any Common Area Operating Expenses and Real Property Taxes that are specifically attributable to the Unit, the Building or to any other building in the Project or to the operation, repair and maintenance thereof, shall be allocated entirely to such Unit, Building, or other building. However, any Common Area Operating Expenses and Real Property Taxes that are not specifically attributable to the Building or to any other building or to the operation, repair and maintenance thereof, shall be equitably allocated by Lessor to all buildings in the Project.

(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 Project 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 shall be payable by Lessee within 10 days after a reasonably detailed statement of actual expenses is presented to Lessee. At Lessor's option, however, an amount may be estimated by Lessor from time to time of Lessee's Share of annual Common Area Operating Expenses and the same shall be payable monthly or quarterly, as Lessor shall designate, during each 12 month period of the Lease term, on the same day as the Base Rent is due hereunder. Lessor shall deliver to Lessee within 60 days after the expiration of each calendar year a reasonably detailed statement showing Lessee's Share of the actual Common Area Operating Expenses incurred during the preceding year. If Lessee's payments under this Paragraph 4.2(d) during the preceding year exceed Lessee's Share as indicated on such statement, Lessor shall credit the amount of such over-payment against Lessee's Share of Common Area Operating Expenses next becoming due. If Lessee's payments under this Paragraph 4.2(d) during the preceding year were less than Lessee's Share as indicated on such statement, Lessee shall pay to Lessor the amount of the deficiency within 10 days after delivery by Lessor to Lessee of the statement.

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. 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 charges which may be due.

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 due Lessor 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 14 days after the expiration or termination of this Lease, if Lessor elects to apply the Security Deposit only to unpaid Rent, and otherwise within 30 days after the Premises have been vacated pursuant to Paragraph 7.4(c) below, 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.** Lessee shall use and occupy the Premises only for the Agreed Use, or any other legal use which is reasonably comparable thereto, and for no other purpose. 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. 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 improvements on the Premises or the mechanical or electrical systems therein, and/or is not significantly more burdensome to the Premises. 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.

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, etc. 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 or 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, 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, 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' and consultants' 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 Project). 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 existed as a result of Hazardous Substances on the Premises prior to the Start Date 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 the Start Date, 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 case, 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 the Premises, 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.

**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, 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 contamination 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.

**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.

(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, (iii) clarifiers, and (iv) any other equipment, if reasonably required by Lessor. However, Lessor reserves the right, upon notice to Lessee, to procure and maintain any or all of such service contracts, and if Lessor so elects, 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 reimburse Lessor for 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 (ie. 1/144th of the cost per month). Lessee shall pay interest on the unamortized balance at a rate that is commercially reasonable in the judgment of Lessor's accountants. Lessee may, however, 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, parkways, 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 ceiling coverings, air lines, power panels, electrical distribution, security and fire protection systems, communication systems, 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 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, and the cumulative cost thereof during this Lease as extended does not exceed a sum equal to 3 month's 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) **Indemnification.** 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 90 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 this 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 Project) 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. 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, an "Additional Insured-Managers or Lessors of Premises Endorsement" and contain the "Amendment of the Pollution Exclusion Endorsement" for damage caused by heat, smoke or fumes from a hostile fire. 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. All insurance carried by Lessee 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 therein.

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

(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 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 under Paragraph 8.4. 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 flood 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 \$1,000 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 Project 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.**

(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) **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 duly licensed or admitted to transact business in the state where the Premises are located, and maintaining during the policy term a "General Policyholders Rating" of at least B+, V, 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 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 30 days prior to the expiration of such policies, furnish Lessor with evidence of renewals 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 from Liability.** Lessor shall not be liable for 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, 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, or from other sources or places. Lessor shall not be liable for any damages arising from any act or neglect of any other tenant of Lessor nor from the failure of Lessor to enforce the provisions of any other lease in the Project. Notwithstanding Lessor's negligence or breach of this Lease, Lessor shall under no circumstances be liable for injury to Lessee's business or for any loss of income or profit therefrom.

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 month's 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.

(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 month's 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 as defined in Paragraph 6.2(a), in, on, or under the Premises.

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 Lessor's election, make the repair of any damage or destruction the total cost to repair of which is \$5,000 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 Insuring 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 fund satisfactory assurance thereof within 30 days after ng 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 **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 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.

9.7 **Termination; Advance Payments.** Upon termination of this Lease pursuant to Paragraph 6.2(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.

9.8 **Waive Statutes.** Lessor and Lessee agree that the terms of this Lease shall govern the effect of any damage to or destruction of the Premises with respect to the termination of this Lease and hereby waive the provisions of any present or future statute to the extent inconsistent herewith.

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 Project, 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 Project 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 Project is located. The term "Real Property Taxes" shall also include any tax, fee, levy, assessment or charge, or any increase therein, imposed by reason of events occurring during the term of this Lease, including but not limited to, a change in the ownership of the Project or any portion thereof or a change in the improvements thereon. 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.** Lessor shall pay the Real Property Taxes applicable to the Project, and except as otherwise provided in Paragraph 10.3, any such amounts 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 Project 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.



10.4 **Joint Assessment.** If 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.** 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. 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 dumpster and/or an increase in the number of times per month that the dumpster is emptied, then Lessor may increase Lessee's Base Rent by an amount equal to such increased costs.

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) A change in the control of Lessee shall constitute an assignment requiring consent. The transfer, on a cumulative basis, of 25% 51% 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 to 110% of the Base Rent 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 Lessor shall be limited to compensatory damages and/or injunctive relief.

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 Lessee'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 \$1,000 or 10% of the current monthly Base Rent applicable to the portion of the Premises which is the subject of the proposed assignment or sublease, whichever is greater, 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.

(f) Any assignee of, or sublessee under, this Lease shall, by reason of accepting such assignment or entering into such



sublease, be deemed to have assumed and agreed to conform and comply with each and every 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. 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 prepaid rents 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 abandonment of the Premises; or the vacating of the Premises without providing a commercially reasonable level of security, or where the coverage of the property insurance described in Paragraph 8.3 is jeopardized as a result thereof, or without providing reasonable assurances to minimize potential vandalism.

(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.

(c) 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, (v) a requested subordination, (vi) evidence concerning any guaranty and/or Guarantor, (vii) any document requested under Paragraph 41 (easements), or (viii) 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.

(d) A Default by Lessee as to the terms, covenants, conditions or provisions of this Lease, or of the rules adopted under Paragraph 2.9 hereof, other than those described in subparagraphs 13.1(a), (b) or (c), 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.

(e) 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 (e) is contrary to any applicable law, such provision shall be of no force or effect, and not affect the validity of the remaining provisions.

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

(g) 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 this 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. The costs and expenses of any such performance by Lessor shall be due and payable by Lessee upon receipt of invoice therefor. If any check given to Lessor by Lessee shall not be honored by the bank upon which it is drawn, Lessor, at its option, may require all future payments to be made by Lessee to be by cashier's check. 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 loss 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 loss 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 damages under Paragraph 12. 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 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. 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 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) 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 equal to the prime rate reported in the Wall Street Journal as published closest prior to the date when due plus 4%, 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 an amount equal to the greater of one month's Base Rent or the Security Deposit, and to pay an excess of such expense under protest, reserving Lessee's right to reimbursement from Lessor. 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 Unit, or more than 25% of Lessee's Reserved Parking Spaces, 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 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 and Utility 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.** In addition to the payments owed pursuant to Paragraph 1.10 above, and unless Lessor and the Brokers otherwise agree in writing, Lessor agrees that: (a) if Lessee exercises any Option, (b) if Lessee acquires from Lessor any rights to the Premises or other premises owned by Lessor and located within the Project, (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 of the Brokers in effect at the time of the execution of this Lease.

**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 1.10, 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 finder (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. Protective 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.

(c) If Lessor desires to finance, refinance, or sell the Premises, or any part thereof, Lessee and all Guarantors shall 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 in 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. Except as provided in Paragraph 15, 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. Notwithstanding the above, and subject to the provisions of Paragraph 20 below, the original Lessor under this Lease, and all subsequent holders of the Lessor's interest in this Lease shall remain liable and responsible with regard to the potential duties and liabilities of Lessor pertaining to Hazardous Substances as outlined in Paragraph 6.2 above.

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.** Subject to the provisions of Paragraph 17 above, the obligations of Lessor under this Lease shall not constitute personal obligations of Lessor, the individual partners of Lessor or its or their individual partners, 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 the individual partners of Lessor, or its or their individual partners, 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. The liability (including court costs and attorneys' fees), of any Broker with respect to negotiation, execution, delivery or performance by either Lessor or Lessee under this Lease or any amendment or modification hereto shall be limited to an amount up to 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.

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 48 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 guarantee 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 or mail. If notice is received on a Saturday, Sunday or legal holiday, it shall be deemed received on the next business day.

24. **Waivers.** 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. 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, which 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.

**25. Disclosures Regarding The Nature of a Real Estate Agency Relationship.** (See attached Duties Owed by a Nevada Real Estate Licensee)

(a) When entering into a discussion with a real estate agent regarding a real estate transaction, a Lessor or Lessee should from the outset 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 fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Lessor. To the Lessee and the Lessor: (a) Diligent exercise of reasonable skills and care in performance of the agent's duties. (b) A duty of honest and fair dealing and good faith. (c) 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 fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Lessee. To the Lessee and the Lessor: (a) Diligent exercise of reasonable skills and care in performance of the agent's duties. (b) A duty of honest and fair dealing and good faith. (c) 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 licenses, 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 liability (including court costs and attorneys' fees), of any Broker with respect to any breach of duty, error or omission relating to this Lease 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) Buyer and Seller 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 shall be increased to 150% of the Base Rent 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; Attornment; 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 recordation thereof.

**30.2 Attornment.** 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,

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attorn 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 such new owner, this Lease shall automatically become a new Lease between Lessee and such new owner, upon all of the terms and conditions hereof, for the remainder of the term hereof, and (ii) Lessor shall thereafter be relieved of any further obligations hereunder and such new owner shall assume all of Lessor's obligations hereunder, except that such new owner shall not: (a) 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.

**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 attorns to the record owner of the Premises. Further, within 60 days after the execution of this Lease, Lessor shall 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, attornment 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 therewith, whether or not a legal action is subsequently commenced in connection with such Default or resulting 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 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. All such activities shall be without abatement of rent or liability to Lessee. Lessor may at any time place on the Premises any ordinary "**For Sale**" signs and Lessor may during the last 6 months of the term hereof place on the Premises any ordinary "**For Lease**" signs. Lessee may at any time place on the Premises any ordinary "**For Sublease**" sign.

**33. Auctions.** Lessee shall not conduct, nor permit to be conducted, any auction upon the Premises without Lessor's prior written consent. Lessor shall not be obligated to exercise any standard of reasonableness in determining whether to permit an auction.

**34. Signs.** Except for ordinary "For Sublease" signs which may be placed only on the Premises, Lessee shall not place any sign upon the Project without Lessor's prior written consent. All signs must comply with all Applicable Requirements.

**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 or 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. 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 or 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 to 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 \_\_\_\_\_, recently published by the AIR Commercial Real Estate Association, and each such Guarantor shall have the same obligations as Lessee under this Lease.

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, Lessee 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 the term of or renew this Lease or to extend 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 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, (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), (ii) Lessor gives to Lessee 3 or more notices of separate Default during any 12 month period, whether or not the Defaults are cured, or (iii) 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.

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, (ii) to cause the recordation of parcel maps and restrictions, and (iii) to create and/or install new utility raceways, so long as such easements, rights, dedications, maps, restrictions, and utility raceways 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. **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.

43. **Authority.** 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.

44. **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.

45. **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.

46. **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.

47. **Multiple Parties.** If more than one person or entity is named herein as either Lessor or Lessee, such multiple Parties shall have joint and several responsibility to comply with the terms of this Lease.

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.

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

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. SEEK 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.

Execute at: 7674 West Lake Mead Boulevard, 104 Executed at: \_\_\_\_\_  
On: \_\_\_\_\_ on: \_\_\_\_\_

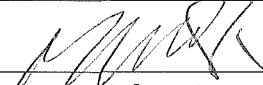
By LESSOR:

4520 ARVILLE  
MCKINLEY MANOR

By:   
Name Printed: Kevin J. Donahoe  
Title: Owner Agent

By LESSEE:

BOUR ENTERPRISES LLC,  
a Nevada limited liability company

By:   
Name Printed: Mulugeta Bour  
Title: Manager

By: \_\_\_\_\_  
Name Printed: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: 7674 W. Lake Mead Blvd., 104  
Las Vegas, NV 89128

By: \_\_\_\_\_  
Name Printed: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: 4560 S. Arville Street, #23  
Las Vegas, NV 89103

Telephone: (702) 364-0909  
Facsimile: (702) 364-5885  
Federal ID No. 95-4590150

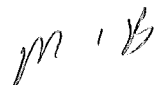
Telephone: (702) 808-2047  
Facsimile: ( )  
Federal ID No. \_\_\_\_\_

These forms are often modified to meet changing requirements of law and needs of the industry. Always write or call to make sure you are utilizing the most current form: AIR Commercial Real Estate Association, 700 South Flower Street, Suite 600, Los Angeles, CA 90017. (213) 687-8777.

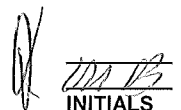
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**By and Between (Lessor)** 4520 ARVILLE, a California general partnership  
and MCKINLEY MANOR, an Idaho general  
partnership, as tenants in common

**Address of Premises:** 4560 South Arville Street, C-10 & 29, Las Vegas,  
Nevada 89103

c. In the event the compilation and/or publication of the CPI shall be transferred to any other governmental department or bureau or agency or shall be discontinued, then the index most nearly the same as the CPI shall be used to make such calculation. In the event that the Parties cannot agree on such alternative index, then the matter shall be submitted for decision to the American Arbitration Association in accordance with the then rules of said Association and the decision of the arbitrators shall be binding upon the parties. The cost of said Arbitration shall be paid equally by the Parties.

☐ II. Market Rental Value Adjustment(s) (MRV)

a. On (Fill in MRV Adjustment Date(s): \_\_\_\_\_

the Base Rent shall be adjusted to the "Market Rental Value" of the property as follows:

1) Four months prior to each Market Rental Value Adjustment Date described above, the Parties shall attempt to agree upon what the new MRV will be on the adjustment date. If agreement cannot be reached within thirty days, then:

(a) Lessor and Lessee shall immediately appoint a mutually acceptable appraiser or broker to establish the new MRV within the next 30 days. Any associated costs will be split equally between the Parties, or

(b) Both Lessor and Lessee shall each immediately make a reasonable determination of the MRV and submit such determination, in writing, to arbitration in accordance with the following provisions:

(i) Within 15 days thereafter, Lessor and Lessee shall each select an ☐ appraiser or ☐ broker ("Consultant" - check one) of their choice to act as an arbitrator. The two arbitrators so appointed shall immediately select a third mutually acceptable Consultant to act as a third arbitrator.

(ii) The 3 arbitrators shall within 30 days of the appointment of the third arbitrator reach a decision as to what the actual MRV for the Premises is, and whether Lessor's or Lessee's submitted MRV is the closest thereto. The decision of a majority of the arbitrators shall be binding on the Parties. The submitted MRV which is determined to be the closest to the actual MRV shall thereafter be used by the Parties.

(iii) If either of the Parties fails to appoint an arbitrator within the specified 15 days, the arbitrator timely appointed by one of them shall reach a decision on his or her own, and said decision shall be binding on the Parties.

(iv) The entire cost of such arbitration shall be paid by the party whose submitted MRV is not selected, ie. the one that is NOT the closest to the actual MRV.

2) Notwithstanding the foregoing, the new MRV shall not be less than the rent payable for the month immediately preceding the rent adjustment.

b. Upon the establishment of each New Market Rental Value:

1) the new MRV will become the new "Base Rent" for the purpose of calculating any further Adjustments, and

2) the first month of each Market Rental Value term shall become the new 'Base Month' for the purpose of calculating any further Adjustments.

☒ III. Fixed Rental Adjustment(s) (FRA)

The Base Rent shall be increased to the following amounts on the dates set forth below:

On (Fill in FRA Adjustment Date(s)):

May 1, 2018 and annually  
thereafter

The New Base Rent shall be:

Base Rent to increase by \$.025  
per square foot, or \$114.00  
per month

B. NOTICE:

Unless specified otherwise herein, notice of any such adjustments, other than Fixed Rental Adjustments, shall be made as specified in paragraph 23 of the Lease.

C. BROKER'S FEE:

The Brokers shall be paid a Brokerage Fee for each adjustment specified above in accordance with paragraph 15 of the Lease.

NOTE: These forms are often modified to meet changing requirements of law and needs of the industry. Always write or call to make sure

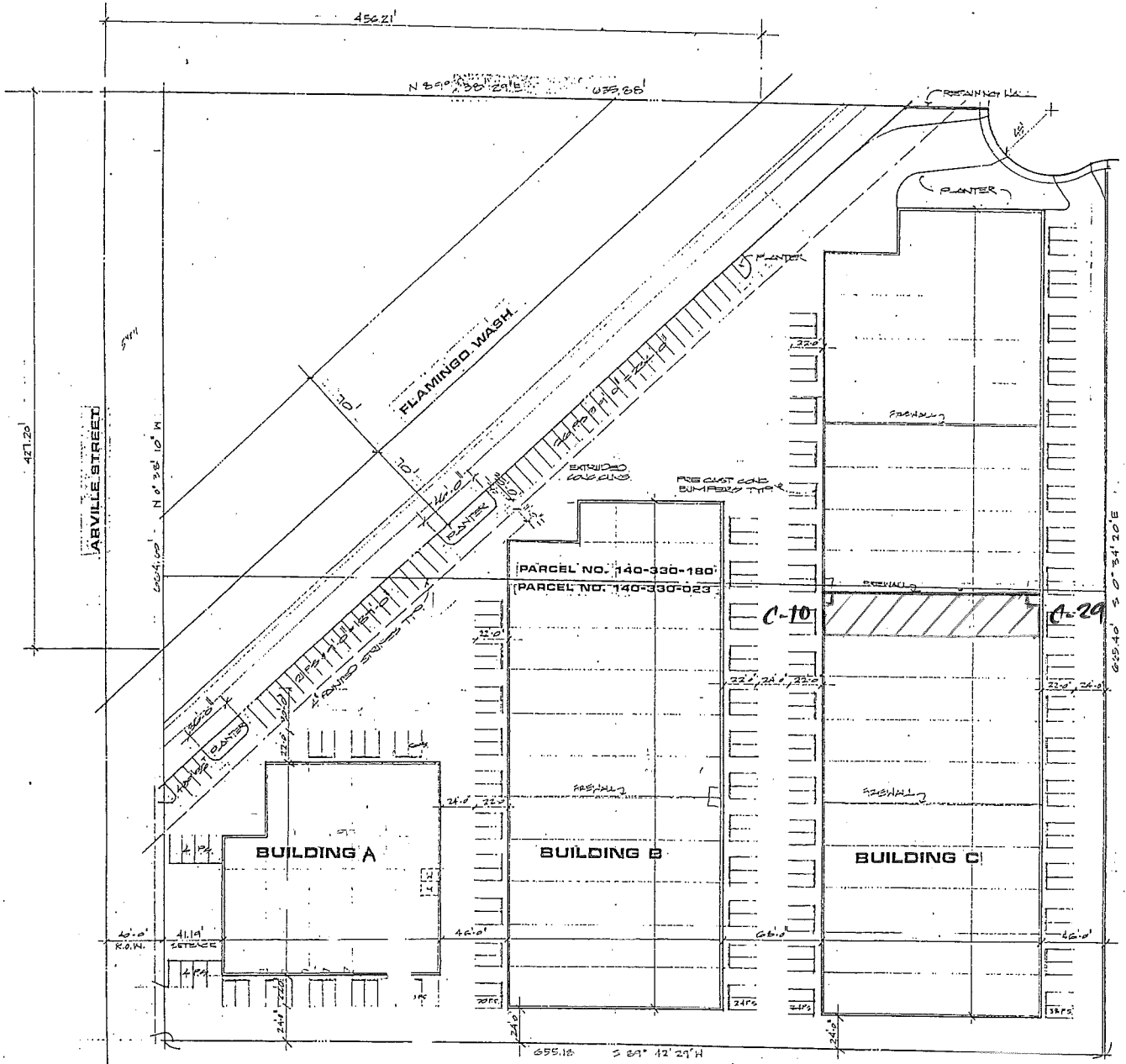
you are utilizing the most current form: AIR COMMERCIAL REAL ESTATE ASSOCIATION, 70 Flower Street, Suite 600, Los Angeles, Calif.  
90017

\_\_\_\_\_  
INITIALS

PAGE 3 OF 3

  
INITIALS

## Exhibit A



## SITE PLAN

1' x 40'-0"

MB  
A

ARV000057

## **Exhibit B**

### **SIGNAGE CRITERIA**

This criterion is being established to provide Lessee with signage specifications for signage conformity throughout the Project. This criterion shall be strictly enforced and any non-conforming or unapproved signage must be removed or brought into conformance within ten (10) days of Lessor's request, at the expense of the Lessee.

#### **General Specification**

1. Lessor shall determine approved signage location to Lessee upon request of Lessee.
2. Signage copy to be individual cut out letters, white in color, and affixed on the building without penetrating the surface of the building. Letters shall not to exceed three (3) feet in height.
3. Only established trade names shall be displayed.
4. Sign design, materials, copy and placement to be approved by Lessor in writing prior to installation. Lessee shall deliver to Lessor two (2) sets of plans for Lessor's approval.

#### **General Construction Requirements**

1. Lessee shall be responsible for contracting for the installation and maintenance of Lessee's signage.
2. Lessee shall be responsible for the actions of Lessee's sign contractor or vendor.
3. Lessee's sign contractor or vendor shall repair any damage to any portion of the Building structure or fascia caused by said contractor or vendor's work.
4. No signage of any type shall be directly painted on the exterior walls of the Building.
5. Sign contractor or vendor shall contact Lessor prior to commencement of any work so Lessor may inspect sign materials to insure conformance with approved drawings.
6. Lessee to pay for the cost of sign removal and building restoration at the time Lessee vacates the Premises.
7. Sign contractor or vendor shall carry Workmen's compensation and public liability insurance against all damage suffered or done to any and all persons and/or property while engaged in the installation of signage. Said insurance coverage shall be a minimum of \$1,000,000.00. A copy of the policy or certificate of insurance naming Lessor as additional insured shall be delivered to Lessor prior to signage installation.

*m. B*  
*AK*

## LEASE ADDENDUM

This Lease Addendum is made and entered into on this 20<sup>th</sup> day of April, 2017, and is hereby attached to and becomes a part of the Lease dated April 20, 2017 by and between 4520 ARVILLE, a California general partnership, and MCKINLEY MANOR, an Idaho general partnership, as tenants in Common, hereinafter referred to as "Lessor", and BOUR ENTERPRISES LLC, a Nevada limited liability company, hereinafter referred to as "Lessee".

### RECITALS:

WHEREAS, Lessee and Lessor desire to amend the Lease between the parties for the Premises known as 4560 South Arville Street, C-10 & 29, Las Vegas, Nevada 89103.

### TERMS:

NOW, THEREFORE, in consideration of the mutual promises and covenants contained in the Lease, and this Lease Addendum, the parties agree as follows:

1. Condition of Premises. Lessor, at Lessor's cost, shall make sure that the overhead florescent light fixtures, electrical outlets, plumbing, and doors are in proper working order at the commencement of the Lease; otherwise, Lessee hereby accepts the Premises in "as-is" condition with any additional alterations and improvements to be completed at Lessee's expense and in accordance with Section 7 of Lease.

2. Trash Disposal. In the areas where garbage dumpsters are provided within the Project, Lessee may utilize the dumpsters for waste paper and incidental trash only. Packing skids, boxes, and construction materials are not to be placed in or around dumpsters. It is the sole responsibility of Lessee to dispose of excessive trash and packaging materials away from the Project or to obtain Lessee's own dumpster at Lessee's own expense. Trash or materials stored outside of the Premises by Lessee,



and not disposed of properly in a dumpster is prohibited, and Lessor shall have the right to charge Lessee for the cost of properly disposing of said trash or materials in addition to any fine that the Lessor may levy against Lessee for such offense.

3. Lessee's Share. Lessee's Share of Common Area Operating Expenses to be paid by Lessee to Lessor shall be no less than \$.20 per square foot, per month, or Nine Hundred Twelve and No/00 Dollars (\$912.00), for the duration of the Term of the Lease.

4. Lessee's Vehicles. Lessee, at Lessee's cost, shall take all necessary precautions to protect the concrete slab and walls of the Premises from automotive spills of any chemicals or petroleum products which may come into contact with the floor or walls as a result of the operation of Lessee's business, and Lessee shall not leave Lessee's vehicles parked outside of the Premises in the parking areas overnight.

5. Rent Abatement. As consideration for Lessee's performance of all obligations to be performed by Lessee under the Lease, and provided Lessee is not in default of the Lease, Lessor shall credit Lessee's rental account Two Thousand Seven Hundred Thirty-six and No/00 Dollars (\$2,736.00) for Month 1 of the Lease.

Except as amended by this Lease Addendum, all the provisions, terms and conditions of the Lease shall remain in full force and effect and the same is hereby ratified and confirmed.

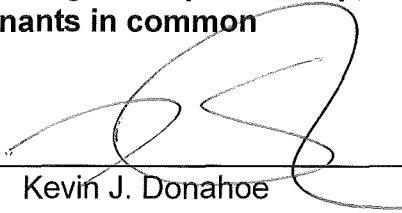
*Signatures to follow*



IN WITNESS WHEREOF, the parties hereto have executed this Lease Addendum as of this date.

**LESSOR:**

**4520 ARVILLE, a California general partnership, and MCKINLEY MANOR, an Idaho general partnership, as tenants in common**

By: \_\_\_\_\_  
Kevin J. Donahoe

Its: Owner Agent

**LESSEE:**

**BOUR ENTERPRISES LLC, a Nevada limited liability company**

By: \_\_\_\_\_  
Mulugeta Bour

Its: Manager





## AIR COMMERCIAL REAL ESTATE ASSOCIATION GUARANTY OF LEASE

WHEREAS, 4520 ARVILLE, a California general partnership and MCKINLEY MANOR, an Idaho general partnership, as tenants in common, hereinafter "Lessor", and BOUR ENTERPRISES LLC, a Nevada limited liability company

, hereinafter "Lessee", are about to execute a document entitled "Lease" dated April 20, 2017 concerning the premises commonly known as 4560 South Arville Street, C-10 & 29, Las Vegas, Nevada 89103 wherein Lessor will lease the premises to Lessee, and

WHEREAS, MULUGETA BOUR, an individual, and HILENA MENGESHA, an individual hereinafter "Guarantors" have a financial interest in Lessee, and

WHEREAS, Lessor would not execute the Lease if Guarantors did not execute and deliver to Lessor this Guarantee of Lease.

NOW THEREFORE, in consideration of the execution of the foregoing Lease by Lessor and as a material inducement to Lessor to execute said Lease, Guarantors hereby jointly, severally, unconditionally and irrevocably guarantee the prompt payment by Lessee of all rents and all other sums payable by Lessee under said Lease and the faithful and prompt performance by Lessee of each and every one of the terms, conditions and covenants of said Lease to be kept and performed by Lessee.

It is specifically agreed that the terms of the foregoing Lease may be modified by agreement between Lessor and Lessee, or by a course of conduct, and said Lease may be assigned by Lessor or any assignee of Lessor without consent or notice to Guarantors and that this Guaranty shall guarantee the performance of said Lease as so modified.

This Guaranty shall not be released, modified or affected by the failure or delay on the part of Lessor to enforce any of the rights or remedies of the Lessor under said Lease, whether pursuant to the terms thereof or at law or in equity.

No notice of default need be given to Guarantors, it being specifically agreed that the guarantee of the undersigned is a continuing guarantee under which Lessor may proceed immediately against Lessee and/or against Guarantors following any breach or default by Lessee or for the enforcement of any rights which Lessor may have as against Lessee under the terms of the Lease or at law or in equity.

Lessor shall have the right to proceed against Guarantors hereunder following any breach or default by Lessee without first proceeding against Lessee and without previous notice to or demand upon either Lessee or Guarantors.

Guarantors hereby waive (a) notice of acceptance of this Guaranty, (b) demand of payment, presentation and protest, (c) all right to assert or plead any statute of limitations relating to this Guaranty or the Lease, (d) any right to require the Lessor to proceed against the Lessee or any other Guarantor or any other person or entity liable to Lessor, (e) any right to require Lessor to apply to any default any security deposit or other security it may hold under the Lease, (f) any right to require Lessor to proceed under any other remedy Lessor may have before proceeding against Guarantors, (g) any right of subrogation.

Guarantors do hereby subrogate all existing or future indebtedness of Lessee to Guarantors to the obligations owed to Lessor under the Lease and this Guaranty.

If a Guarantor is married, such Guarantor expressly agrees that recourse may be had against his or her separate property for all of the obligations hereunder.

The obligations of Lessee under the Lease to execute and deliver estoppel statements and financial statements, as therein provided, shall be deemed to also require the Guarantors hereunder to do and provide the same.

The term "Lessor" refers to and means the Lessor named in the Lease and also Lessor's successors and assigns. So long as Lessor's interest in the Lease, the leased premises or the rents, issues and profits therefrom, are subject to any mortgage or deed of trust or assignment for security, no acquisition by Guarantors of the Lessor's interest shall affect the continuing obligation of Guarantors under this Guaranty which shall nevertheless continue in full force and effect for the benefit of the mortgagee, beneficiary, trustee or assignee under such mortgage, deed of trust or

assignment and their successors and assign

The term "Lessee" refers to and means the Lessee named in the Lease and also Lessee's successors and assigns.

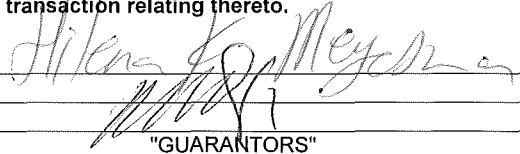
In the event any action be brought by said Lessor against Guarantors hereunder to enforce the obligation of Guarantors hereunder, the unsuccessful party in such action shall pay to the prevailing party therein a reasonable attorney's fee which shall be fixed by the court.

If this Form has been filled in, it has been prepared for submission to your attorney for his approval. No representation or recommendation is made by the AIR Commercial Real Estate Association, the real estate broker or its agents or employees as to the legal sufficiency, legal effect, or tax consequences of this Form or the transaction relating thereto.

Executed at: \_\_\_\_\_

On: \_\_\_\_\_

Address: \_\_\_\_\_

  
\_\_\_\_\_  
"GUARANTORS"

# EXHIBIT 4



F. THOMAS EDWARDS, ESQ.  
Nevada Bar No. 9549  
E-mail: tedwards@nevadafirm.com  
JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
E-mail: jlujan@nevadafirm.com  
HOLLEY DRIGGS  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
Facsimile: 702/791-1912

*Attorneys for Plaintiffs/Counterdefendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 8

**DECLARATION OF KEVIN DONAHOE**

I, Kevin Donahoe, do hereby voluntarily state under penalty of perjury as follows:

///

///

1. I am the President of Commercial Specialists, the property manager for Plaintiffs for the property at 4560 S. Arville St., Las Vegas, NV 89103, including units C-10, 23, 24, and 29 (the "Premises").

2. I have personal knowledge of the matters set forth herein, with the exception of those stated upon information and belief, and as to those I believe them to be true to the best of my knowledge. If called to do so, I could and would testify competently to the matters set forth herein.

3. I make this declaration in support of Plaintiffs' Motion for Summary Judgment Regarding Their Breach of Contract Claims (the "Motion").

4. Attached to the Motion as Exhibit 2 is a true and accurate copy of the Unit C-23/24 Lease, Addendum and Guaranty between Plaintiffs and Defendants.

5. Attached to the Motion as Exhibit 3 is a true and accurate copy of the Unit C-10/19 Lease, Addendum and Guaranty between Plaintiffs and Defendants.

6. Defendants utilized the Premises until on or about May 8, 2018, when they vacated the Premises.

7. Attached to the Motion as Exhibits 5 and 6 are ledgers for the leases, reflecting all rent owed under the leases, all payments made by Defendants under the leases and the outstanding balance owed under the leases.

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

DATED this 30<sup>th</sup> day of November 2020.

KEVIN DONAHOE

# EXHIBIT 5



# Tenant Ledger

**Bour Enterprises LLC**  
**1401 Via Savona Drive**  
**Henderson, NV 89052**

Date: 05/14/19  
 Tenant Code: zbour1  
 Property: arv  
 Unit: C23  
 Status: Past  
 Rent: 2,052.00  
 Deposit: 0.00  
 Move In Date: 05/01/17  
 Move Out Date: 05/31/19  
 Due Day: 1  
 Tel# (O)  
 Tel# (H)

Date	Description	Charges	Payments	Balance
	Balance Forward			0.00
04/24/17	Security Deposit	2,736.00		2,736.00
04/25/17	chk# 295		2,736.00	0.00
05/01/17	Rent	1,824.00		1,824.00
05/01/17	Common Area Maintenance	912.00		2,736.00
05/01/17	Rent Concession	-315.78		2,420.22
05/30/17	chk# 248		2,420.00	0.22
06/01/17	Rent	1,824.00		1,824.22
06/01/17	Common Area Maintenance	912.00		2,736.22
06/08/17	chk# 1570		2,736.22	0.00
07/01/17	Rent	1,824.00		1,824.00
07/01/17	Common Area Maintenance	912.00		2,736.00
07/12/17	chk# 629		2,736.00	0.00
08/01/17	Rent	1,824.00		1,824.00
08/01/17	Common Area Maintenance	912.00		2,736.00
08/08/17	chk# 655		2,736.00	0.00
09/01/17	Rent	1,824.00		1,824.00
09/01/17	Common Area Maintenance	912.00		2,736.00
09/14/17	Late Fee	273.60		3,009.60
09/14/17	chk# 103 Reversed by ctrl#8361		2,736.00	273.60
09/20/17	Returned check charge	55.00		328.60
09/20/17	chk# 103 NSF receipt Ctrl# 8345		-2,736.00	3,064.60
09/22/17	chk# 695		2,736.00	328.60
10/01/17	Rent	1,824.00		2,152.60
10/01/17	Common Area Maintenance	912.00		3,064.60
10/13/17	Late Fee	273.60		3,338.20
10/16/17	chk# 661		2,736.11	602.09
11/01/17	Rent	1,824.00		2,426.09
11/01/17	Common Area Maintenance	912.00		3,338.09
11/07/17	chk# 402		2,736.00	602.09
12/01/17	Rent	1,824.00		2,426.09
12/01/17	Common Area Maintenance	912.00		3,338.09
12/13/17	chk# 1696		2,736.00	602.09
01/01/18	Rent	1,824.00		2,426.09
01/01/18	Common Area Maintenance	912.00		3,338.09
01/11/18	chk# 1904		3,338.00	0.09

CONTINUED

# Tenant Ledger

**Bour Enterprises LLC**  
**1401 Via Savona Drive**  
**Henderson, NV 89052**

Date: 05/14/19  
 Tenant Code: zbour1  
 Property: arv  
 Unit: C23  
 Status: Past  
 Rent: 2,052.00  
 Deposit: 0.00  
 Move In Date: 05/01/17  
 Move Out Date: 05/31/19  
 Due Day: 1  
 Tel# (O)  
 Tel# (H)

Date	Description	Charges	Payments	Balance
	Balance Forward			0.09
02/01/18	January 2018 CAM Increase	91.20		91.29
02/01/18	Rent	1,824.00		1,915.29
02/01/18	Common Area Maintenance	1,003.20		2,918.49
02/08/18	chk# 1959		2,827.00	91.49
03/01/18	Rent	1,824.00		1,915.49
03/01/18	Common Area Maintenance	1,003.20		2,918.69
03/12/18	chk# 2015		2,918.69	0.00
04/01/18	Rent	1,824.00		1,824.00
04/01/18	Common Area Maintenance	1,003.20		2,827.20
04/17/18	chk# 3035		2,827.20	0.00
05/01/18	Annual Security Deposit Upgrade	205.20		205.20
05/01/18	Rent	1,938.00		2,143.20
05/01/18	Common Area Maintenance	1,003.20		3,146.40
05/11/18	Late Fee	314.64		3,461.04
06/01/18	Rent	1,938.00		5,399.04
06/01/18	Common Area Maintenance	1,003.20		6,402.24
06/12/18	Late Fee	640.22		7,042.46
07/01/18	Rent (07/2018)	1,938.00		8,980.46
07/01/18	Common Area Maintenance	1,003.20		9,983.66
07/12/18	Late Fee	998.37		10,982.03
08/01/18	Rent (08/2018)	1,938.00		12,920.03
08/01/18	Common Area Maintenance	1,003.20		13,923.23
08/10/18	Late Fee	1,392.32		15,315.55
09/01/18	Rent (09/2018)	1,938.00		17,253.55
09/01/18	Common Area Maintenance	1,003.20		18,256.75
09/07/18	chk# 2746 Paid by Mengeal		6,365.00	11,891.75
09/12/18	Late Fee	1,189.18		13,080.93
10/01/18	Rent (10/2018)	1,938.00		15,018.93
10/01/18	Common Area Maintenance	1,003.20		16,022.13
10/11/18	Late Fee	1,602.21		17,624.34
11/01/18	Rent (11/2018)	1,938.00		19,562.34
11/01/18	Common Area Maintenance	1,003.20		20,565.54
11/12/18	Late Fee	2,056.65		22,622.19
11/12/18	Correct Late Fee	-0.10		22,622.09
12/01/18	Rent (12/2018)	1,938.00		24,560.09

CONTINUED



# Tenant Ledger

**Bour Enterprises LLC**  
**1401 Via Savona Drive**  
**Henderson, NV 89052**

Date: 05/14/19  
 Tenant Code: zbour1  
 Property: arv  
 Unit: C23  
 Status: Past  
 Rent: 2,052.00  
 Deposit: 0.00  
 Move In Date: 05/01/17  
 Move Out Date: 05/31/19  
 Due Day: 1  
 Tel# (O)  
 Tel# (H)

Date	Description	Charges	Payments	Balance
	Balance Forward			24,560.09
12/01/18	Common Area Maintenance	1,003.20		25,563.29
12/12/18	Late Fee	2,556.34		28,119.63
12/12/18	Correct Late Fee	-0.01		28,119.62
01/01/19	Rent (01/2019)	1,938.00		30,057.62
01/01/19	Common Area Maintenance	1,003.20		31,060.82
01/14/19	Late Fee	3,106.09		34,166.91
01/14/19	Correct Late Fee	-0.01		34,166.90
02/01/19	Rent (02/2019)	1,938.00		36,104.90
02/01/19	Common Area Maintenance	1,003.20		37,108.10
02/12/19	Late Fee	3,710.82		40,818.92
02/12/19	Correct Late Fee	-0.01		40,818.91
03/01/19	Rent (03/2019)	1,938.00		42,756.91
03/01/19	Common Area Maintenance	1,003.20		43,760.11
03/12/19	Late Fee	4,376.02		48,136.13
03/12/19	Correct Late Fee	-0.01		48,136.12
04/01/19	Rent (04/2019)	1,938.00		50,074.12
04/01/19	Common Area Maintenance	1,003.20		51,077.32
04/12/19	Late Fee	5,107.73		56,185.05
05/01/19	Rent (05/2019)	2,052.00		58,237.05
05/01/19	Common Area Maintenance	1,003.20		59,240.25
05/10/19	Late Fee	5,924.03		65,164.28
05/31/19	Apply Security Deposit	-2,941.20		62,223.08

Current	30 Days	60 Days	90 Days	Amount Due
8,979.23	8,048.93	7,317.22	37,877.70	62,223.08

ARV000039

# EXHIBIT 6



# Tenant Ledger

**Bour Enterprises LLC**  
**1401 Via Savona Drive**  
**Henderson, NV 89052**

Date: 05/14/19  
 Tenant Code: zbour2  
 Property: arv  
 Unit: C10  
 Status: Past  
 Rent: 2,052.00  
 Deposit: 0.00  
 Move In Date: 05/01/17  
 Move Out Date: 05/31/19  
 Due Day: 1  
 Tel# (O)  
 Tel# (H)

Date	Description	Charges	Payments	Balance
	Balance Forward			0.00
04/24/17	Security Deposit	2,736.00		2,736.00
04/25/17	chk# 295		2,736.00	0.00
05/01/17	Rent	1,824.00		1,824.00
05/01/17	Common Area Maintenance	912.00		2,736.00
05/01/17	Rent Concession	-1,824.00		912.00
05/01/17	CAM Concession	-912.00		0.00
06/01/17	Rent	1,824.00		1,824.00
06/01/17	Common Area Maintenance	912.00		2,736.00
06/08/17	chk# 1570		2,735.78	0.22
07/01/17	Rent	1,824.00		1,824.22
07/01/17	Common Area Maintenance	912.00		2,736.22
07/12/17	chk# 629		2,736.22	0.00
08/01/17	Rent	1,824.00		1,824.00
08/01/17	Common Area Maintenance	912.00		2,736.00
08/08/17	chk# 655		2,736.00	0.00
09/01/17	Rent	1,824.00		1,824.00
09/01/17	Common Area Maintenance	912.00		2,736.00
09/14/17	Late Fee	273.60		3,009.60
09/14/17	chk# 103 Reversed by ctrl#8362		2,736.00	273.60
09/20/17	Returned check charge	55.00		328.60
09/20/17	chk# 103 NSF receipt Ctrl# 8346		-2,736.00	3,064.60
09/22/17	chk# 695		2,736.00	328.60
10/01/17	Rent	1,824.00		2,152.60
10/01/17	Common Area Maintenance	912.00		3,064.60
10/13/17	Late Fee	273.60		3,338.20
10/16/17	chk# 661		2,736.11	602.09
11/01/17	Rent	1,824.00		2,426.09
11/01/17	Common Area Maintenance	912.00		3,338.09
11/07/17	chk# 402		2,736.00	602.09
12/01/17	Rent	1,824.00		2,426.09
12/01/17	Common Area Maintenance	912.00		3,338.09
12/13/17	chk# 1696		2,736.00	602.09
01/01/18	Rent	1,824.00		2,426.09
01/01/18	Common Area Maintenance	912.00		3,338.09
01/11/18	chk# 1904		3,338.00	0.09

CONTINUED

# Tenant Ledger

**Bour Enterprises LLC**  
**1401 Via Savona Drive**  
**Henderson, NV 89052**

Date: 05/14/19  
 Tenant Code: zbour2  
 Property: arv  
 Unit: C10  
 Status: Past  
 Rent: 2,052.00  
 Deposit: 0.00  
 Move In Date: 05/01/17  
 Move Out Date: 05/31/19  
 Due Day: 1  
 Tel# (O)  
 Tel# (H)

Date	Description	Charges	Payments	Balance
	Balance Forward			0.00
02/01/18	January 2018 CAM Increase	91.20		91.29
02/01/18	Rent	1,824.00		1,915.29
02/01/18	Common Area Maintenance	1,003.20		2,918.49
02/08/18	chk# 1959		2,827.00	91.49
03/01/18	Rent	1,824.00		1,915.49
03/01/18	Common Area Maintenance	1,003.20		2,918.69
03/12/18	chk# 2015		2,918.69	0.00
04/01/18	Rent	1,824.00		1,824.00
04/01/18	Common Area Maintenance	1,003.20		2,827.20
04/17/18	chk# 3035		2,827.20	0.00
05/01/18	Annual Security Deposit Upgrade	205.20		205.20
05/01/18	Rent	1,938.00		2,143.20
05/01/18	Common Area Maintenance	1,003.20		3,146.40
05/11/18	Late Fee	314.64		3,461.04
06/01/18	Rent	1,938.00		5,399.04
06/01/18	Common Area Maintenance	1,003.20		6,402.24
06/12/18	Late Fee	640.22		7,042.46
07/01/18	Rent (07/2018)	1,938.00		8,980.46
07/01/18	Common Area Maintenance	1,003.20		9,983.66
07/12/18	Late Fee	998.37		10,982.03
08/01/18	Rent (08/2018)	1,938.00		12,920.03
08/01/18	Common Area Maintenance	1,003.20		13,923.23
08/10/18	Late Fee	1,392.32		15,315.55
09/01/18	Rent (09/2018)	1,938.00		17,253.55
09/01/18	Common Area Maintenance	1,003.20		18,256.75
09/12/18	Late Fee	1,825.68		20,082.43
10/01/18	Rent (10/2018)	1,938.00		22,020.43
10/01/18	Common Area Maintenance	1,003.20		23,023.63
10/11/18	Late Fee	2,302.36		25,325.99
11/01/18	Rent (11/2018)	1,938.00		27,263.99
11/01/18	Common Area Maintenance	1,003.20		28,267.19
11/12/18	Late Fee	2,826.72		31,093.91
12/01/18	Rent (12/2018)	1,938.00		33,031.91
12/01/18	Common Area Maintenance	1,003.20		34,035.11
12/12/18	Late Fee	3,403.51		37,438.62

CONTINUED

# Tenant Ledger

**Bour Enterprises LLC**  
**1401 Via Savona Drive**  
**Henderson, NV 89052**

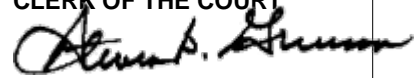
Date: 05/14/19  
 Tenant Code: zbour2  
 Property: arv  
 Unit: C10  
 Status: Past  
 Rent: 2,052.00  
 Deposit: 0.00  
 Move In Date: 05/01/17  
 Move Out Date: 05/31/19  
 Due Day: 1  
 Tel# (O)  
 Tel# (H)

Date	Description	Charges	Payments	Balance
	Balance Forward			37,438.62
01/01/19	Rent (01/2019)	1,938.00		39,376.62
01/01/19	Common Area Maintenance	1,003.20		40,379.82
01/14/19	Late Fee	4,037.98		44,417.80
02/01/19	Rent (02/2019)	1,938.00		46,355.80
02/01/19	Common Area Maintenance	1,003.20		47,359.00
02/12/19	Late Fee	4,735.90		52,094.90
03/01/19	Rent (03/2019)	1,938.00		54,032.90
03/01/19	Common Area Maintenance	1,003.20		55,036.10
03/12/19	Late Fee	5,503.61		60,539.71
04/01/19	Rent (04/2019)	1,938.00		62,477.71
04/01/19	Common Area Maintenance	1,003.20		63,480.91
04/12/19	Late Fee	6,348.09		69,829.00
05/01/19	Rent (05/2019)	2,052.00		71,881.00
05/01/19	Common Area Maintenance	1,003.20		72,884.20
05/10/19	Late Fee	7,288.42		80,172.62
05/31/19	Rev 05/01/18 Security Deposit Upgrade	-205.20		79,967.42
05/31/19	Apply Security Deposit	-2,736.00		77,231.42

Current	30 Days	60 Days	90 Days	Amount Due
10,343.62	9,289.29	8,444.81	49,153.70	77,231.42

ARV000066

# **EXHIBIT 6**



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*Attorneys for Plaintiffs/Counterdefendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 8

**PLAINTIFFS' REPLY IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT  
REGARDING COUNTERCLAIM  
DAMAGES**

**Date of Hearing: December 15, 2020  
Time of Hearing: 9:30 a.m.**

Plaintiffs/Counterdefendants, 4520 Arville, a California general partnership; and  
McKinley Manor, an Idaho general partnership (collectively "Plaintiffs"), by and through their

1 attorneys of record, the law firm of Holley Driggs, hereby submit this reply in support of their  
2 Motion for Summary Judgment Regarding Counterclaim Damages.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **INTRODUCTION**

5 Plaintiffs moved for summary judgment on the issue of Defendants' counterclaim for  
6 damages, setting forth both evidence and case law demonstrating that (1) Defendants have no  
7 evidence of their damages (none exists), and (2) even if Defendants did possess evidence of their  
8 damages, they have waived any opportunity to present that evidence at trial for their failure to  
9 provide a computation of damages in compliance with NRCP 16.1.

10 In response, Defendants set forth a series of failing arguments suggesting that a dispute of  
11 material fact does exist and that evidence of their damages should not be excluded from trial as a  
12 matter of law. Yet, despite Defendants' insistence that they have sustained damages as to their  
13 counterclaims and that they should be permitted to present such evidence at trial, Defendants failed  
14 to attach a *single* piece of evidence to their Opposition demonstrating the existence of a genuine  
15 dispute of material fact, as they are required to do to overcome Plaintiffs' Motion for Summary  
16 Judgment. Moreover, in addition to this fatal error, Defendants' legal arguments are equally  
17 unavailing to defeat Plaintiffs' request for summary judgment.

18 First, Plaintiffs' inclusion of persuasive authority in support of their Motion for Summary  
19 Judgment does not entitle Defendants to proceed to a jury trial, as it is the sole province of this  
20 Court—not the jury—to determine what the law requires and how that law applies to the facts of  
21 the case. Therefore, so long as no genuine dispute of material *fact* exists, this Court is free to decide  
22 how the pertinent law applies and issue summary judgment accordingly. Second, Defendants lodge  
23 a legal argument against the applicability of NRCP 37 sanctions to these proceedings. However,  
24 Defendants provide no authority in support of their position, and Plaintiffs have provided clear  
25 authority that the requested sanctions are appropriate. Finally, Defendants' argument that  
26 Defendant Bour Enterprises LLC's ("Bour LLC") 30(b)(6) witness misunderstood counsel's  
27 question regarding its damages is disingenuous, and moreover, cannot establish the existence of a  
28



1 genuine dispute of material fact for trial. Plaintiffs will address each of the foregoing arguments  
2 in turn.

3 **I. DEFENDANTS' FAILURE TO ATTACH ANY EVIDENCE TO THEIR**  
4 **SUMMARY JUDGMENT OPPOSITION SHOWING DEFENDANTS' DAMAGES**  
5 **REQUIRES ENTRY OF SUMMARY JUDGMENT IN PLAINTIFFS' FAVOR**

6 In support of Plaintiffs' Motion for Summary Judgment on the issue of Defendants'  
7 counterclaim damages, Plaintiffs attached and cited evidence that (1) Defendants failed to provide  
8 a computation of damages (or produce documents from which a computation could be made) as  
9 expressly required under NRCP 16.1(a)(1)(A)(iv), thereby requiring that Defendants be prohibited  
10 from presenting evidence of damages at trial, and (2) Bour LLC's 30(b)(6) witness actually  
11 confirmed via his deposition testimony that Defendants have no damages. *See* Motion for  
12 Summary Judgment at 6–9, dated November 10, 2020, on file herein (hereinafter, the "Motion for  
13 Summary Judgment"). This presentation satisfies Plaintiffs' initial burden under NRCP 56 to set  
14 forth evidence demonstrating that no genuine dispute of material fact exists for trial on the issue  
15 of Defendants' alleged damages. *See Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029, 1031 (Nev.  
16 2005) (*quoting* NRCP 56(c)).

17 "When a motion for summary judgment is made and supported as required by NRCP 56,  
18 the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit  
19 or otherwise, set forth *specific facts* demonstrating the existence of a genuine factual issue." *Wood*,  
20 121 Nev. at 731, 121 P.3d at 1030–31 (internal quotations and citations omitted) (emphasis added).  
21 If the nonmoving party fails to introduce admissible evidence showing a genuine issue of material  
22 fact, the entry of summary judgment is appropriate. *Choy v. Ameristar Casinos, Inc.*, 127 Nev.  
23 870, 872–73, 265 P.3d 698, 700 (2011) ("Choy did not present any specific facts or affidavits  
24 demonstrating the existence of a genuine issue supporting his claim that Ameristar owned or  
25 operated the Ameristar Casino Hotel Kansas City. The district court, therefore, properly granted  
26 Ameristar's motion for summary judgment."); *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657,  
27 671, 262 P.3d 705, 715 (2011) ("Francis submitted no affidavits or admissible evidence to rebut  
28 Wynn's motion for summary judgment. Accordingly, Francis provided no 'contrary evidence' that  
created genuine material issues of fact on Wynn's claims."); *Cuzze v. Univ. & Cmty. Coll. Sys. of*

1 *Nevada*, 123 Nev. 598, 604, 172 P.3d 131, 135 (2007) (Because the “opposition failed to introduce  
2 admissible evidence of specific facts showing that a genuine factual issue exists for trial,” the  
3 Nevada Supreme Court “affirm[ed] the district court’s order granting summary judgment.”).

4 Critically, in their summary judgment opposition, Defendants failed to attach or cite a  
5 single piece of evidence demonstrating the existence of Defendants’ counterclaim damages. *See*  
6 Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment Regarding Counterclaim  
7 Damages, dated November 25, 2020, on file herein (hereinafter, the “Opposition”). Defendants do  
8 not even *assert* in their Opposition that they have sustained damages related to their counterclaims  
9 and what those damages might be (with supporting evidence or not); instead, they simply proceed  
10 with a series of unavailing arguments in an attempt to attack the sufficiency of Plaintiffs’ evidence  
11 showing Defendants’ lack of damages. *See id.*

12 Defendants’ failure to direct the Court to *any* evidence demonstrating the existence of their  
13 counterclaim damages requires entry of summary judgment in Plaintiffs’ favor that Defendants  
14 have no damages. *See Wood*, 121 Nev. at 731, 121 P.3d at 1030–31.

15 **II. DEFENDANTS’ LEGAL ARGUMENT REGARDING WHETHER THE COURT**  
16 **MUST EXCLUDE DEFENDANTS’ EVIDENCE OF DAMAGES DOES NOT CREATE A**  
**GENUINE DISPUTE OF MATERIAL FACT**

17 Defendants lodge a legal argument regarding the applicability of NRCP 37 sanctions which  
18 they style as a “dispute of fact” entitling Defendants to proceed to trial. However, not only is  
19 Defendants’ *legal* argument not a dispute of the *facts* of the case (such that Defendants have  
20 established a genuine dispute of material fact for trial), but the legal argument set forth by  
21 Defendants is also meritless and should be disregarded.

22 *a. The Court is free to consider persuasive case law in addition to the authoritative NRCP*  
23 *provisions and case law cited in Plaintiffs’ Motion for Summary Judgment*

24 Defendants first suggest that Plaintiffs’ citation of persuasive case law regarding the  
25 applicability of Rule 37 sanctions cannot support the instant motion for summary judgment. *See*  
26 Opposition at 5–6. This argument is flawed for several reasons: First, Plaintiffs do not rely solely  
27 on persuasive authority in their Motion for Summary Judgment. Rather, the primary authority for  
28 Plaintiffs’ assertion that Defendants should be barred from presenting evidence of damages at trial

for their failure to provide a computation of damages (or documents in support thereof) comes directly from NRCP 16.1(a)(1)(A)(iv) and NRCP 37(c)(1), which this Court is bound to follow.<sup>1</sup> *See* NRCP 1 (“These rules govern the procedure in all civil actions and proceedings in the district courts. . . They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”). Thus, the requirement that non-disclosed computations of damages be excluded from trial stem directly from the controlling Nevada Rules of Civil Procedure. Nevertheless, Plaintiffs cited additional persuasive (and authoritative) case law to provide the Court with examples of how these rules are customarily applied, and further persuade the Court to rule in a similar fashion.

Second, Defendants’ suggestion that the Court is not free to consider persuasive authority in deciding a summary judgment motion ignores the reality that it is the exclusive province of the Court to interpret the law and apply it to the facts of the case. *See Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 211 (2001) (acknowledging that it is the district court’s function to perceive and apply the law); *Branda v. Sanford*, 97 Nev. 643, 646, 637 P.2d 1223, 1225 (1981) (questions of law are “within the province of the court”). Allowing Defendants to proceed to trial would not change the fact that the Court must ultimately determine how the law should be applied, as the jury is tasked with fact-finding, not making legal determinations. *See Zamora v. Price*, 125 Nev. 388, 394, 213 P.3d 490, 494 (2009) (discussing the jury’s duty as fact-finder). Importantly, Defendants cite *no* authority (authoritative or otherwise) in support of their position that the Court cannot consider persuasive case law at summary judgment, and Plaintiffs have been similarly unable to find such authority. *See* Opposition. Accordingly, Plaintiffs submit that the Court may consider both the authoritative and persuasive case law presented by Plaintiffs when ruling on the instant motion for Summary Judgment.

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<sup>1</sup> As stated in the Motion for Summary Judgment, NRCP 16.1 provides that a party must, without awaiting a discovery request, provide to the other parties “[a] computation of any category of damages claimed by the disclosing party.” NRCP 16.1(a)(1)(A)(iv). NRCP 37(c)(1) states that if “a party fails to provide information nor identify a witness as required by Rule 16.1(a)(1) . . . the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” NRCP 37(c)(1).

1           **b. *Walters, Pizarro-Ortega, and Freemon* all support Plaintiffs' request that Defendants**  
2           ***be barred from presenting evidence of their damages***

3           Defendants turn next to an attack of the Nevada case law cited by Plaintiffs, asserting that  
4           such cases are not analogous on their facts and therefore do not support Plaintiffs request that  
5           Defendants be barred from presenting evidence of their damages for their failure to comply with  
6           NRCPP 16.1. *See* Opposition at 6–8. Plaintiffs will address each of these cases in turn.

7           ***Walters v. Meeks*, 127 Nev. 1184, 373 P.3d 972 (2011).** Defendants take issue with  
8           Plaintiffs' citation to *Walters*, as that case held that the computation of damages requirement  
9           applies only to special damages, and the “damages in question are not special damages.”  
10          Opposition at 7. Tellingly, Defendants fail to state what type of damages they are seeking, if not  
11          special. *See* Opposition. In light of Defendants' failure to set forth the nature and amount of their  
12          damages at any point in the litigation, and their corresponding failure to attach any evidence of  
13          their damages to their summary judgment Opposition, Defendants' argument with respect to  
14          *Walters* is irrelevant.

15          ***Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 396 P.3d 783 (2017).** Again,  
16          Defendants attempt to distinguish between types of damages, pointing out that the damages that  
17          were excluded by the Court in *Pizarro-Ortega* were “future medical expenses”, which apparently  
18          are inapplicable here. Opposition at 7. As with *Walters*, Defendants' failure to provide any  
19          evidence of damages whatsoever, regardless of the nature thereof, renders this argument moot.

20          ***Freemon v. Fischer*, 281 P.3d 1173 (Nev. 2009).** Defendants attempt to distinguish  
21          *Freemon* on factual and procedural grounds. *See* Opposition at 7–8. In *Freemon*, the Nevada  
22          Supreme Court affirmed the district court's grant of the defendant's motion in limine to exclude  
23          evidence of damages under NRCPP 37 for the plaintiff's failure to timely disclose his damages  
24          expert's report as required by NRCPP 16.1. *Id.* at \*1. Defendants make the feeble argument (with  
25          no authority in support thereof) that the provisions of NRCPP 37 should be applied differently at  
26          summary judgment than they are applied to a motion in limine, requiring “a higher burden of  
27          proof” at summary judgment. Opposition at 8. There is simply no support for this assertion, as it  
28          is non-sensical. Indeed, a motion in limine is not fundamentally different than a validly supported

1 request to exclude certain evidence at summary judgment under NRCP 37(c)—in both scenarios,  
2 the Court limits the information available to the fact-finder (be it a jury at trial or the Court at  
3 summary judgment) in response to the violating party’s failure to comply with its disclosure  
4 requirements.

5 Defendants also assert that the failure to timely disclose an expert report (as occurred in  
6 *Freemon*) is “significantly different than simply not providing an exact calculation of certain  
7 categories of damages.” Opposition at 8. Plaintiffs agree. This is not a case where Defendants have  
8 gathered evidence of their damages and simply failed to timely disclose it. Rather, Defendants  
9 have *never* set forth any evidence of their damages whatsoever, presumably because no such  
10 evidence exists. Accordingly, Defendants’ assertion that their failure to “provide a *more specific*”<sup>2</sup>  
11 computation of damages for the asserted counterclaims did not prejudice the Plaintiffs in defending  
12 against those claims” is absurd. Opposition at 8 (emphasis added). Indeed, Defendants’ failure in  
13 this respect has rendered Plaintiffs unable to (1) estimate their potential exposure to liability, (2)  
14 obtain further discovery (as discovery has ended), and (3) develop any sort of defense or  
15 counterevidence against Defendants’ counterclaims. The Nevada Supreme Court has made clear  
16 that “trial by ambush will not be tolerated.” *Pierce Lathing Co. v. ISEC, Inc.*, 114 Nev. 291, 296,  
17 956 P.2d 93, 96 (1998).

18 Based on the foregoing, Defendants’ attack on Plaintiffs’ Nevada case law in support of  
19 their Motion for Summary Judgment is meritless and does not preclude an award of summary  
20 judgment in Plaintiffs’ favor.

21 *c. Defendants’ failure to provide a computation of their damages was neither*  
22 *substantially justified nor harmless, and therefore exclusion of such evidence is the*  
*appropriate sanction*

23 Defendants assert that their failure to provide a computation of their damages or documents  
24 in support thereof—at any point during this litigation, including at summary judgment—was  
25 substantially justified or harmless, and therefore does not warrant NRCP 37 sanctions. See  
26 Opposition at 8–9. Plaintiffs articulated in subsection *b.* (above) why Defendants’ failure to  
27

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28 <sup>2</sup> Defendants have not provided any computation of their damages, let alone a “specific” one.

1 disclose their damages prejudiced Plaintiffs. The prejudice Plaintiffs will suffer by going into trial  
2 blind as to Defendants' asserted damages is certainly not harmless. Moreover, after more than a  
3 year of discovery in this action, there is absolutely no justification for Defendants' failure to furnish  
4 any evidence of their damages, provide a computation of their damages, or even baldly assert in  
5 their motion papers the amount of such damages or how such damages were incurred. For their  
6 egregious failures, Defendants have no basis upon which to assert a genuine dispute of material  
7 fact for trial, thereby requiring entry of summary judgment in Plaintiffs' favor.

8 Additionally, Defendants argue that a computation of damages is not the type of evidence  
9 that NRCP 37 is meant to exclude. *See* Opposition at 8–9. This argument is meritless, based on the  
10 express language of the rules.

11 NRCP 37(c)(1) provides:

12 If a party fails to **provide information** nor identify a witness **as required by Rule**  
13 **16.1(a)(1)** . . . the party is not allowed to use that information or witness to supply  
14 evidence on a motion, at a hearing, or at a trial, unless the failure was substantially  
justified or is harmless.

15 NRCP 37(c)(1) (emphasis added).

16 In turn, NRCP 16.1(a)(1) provides, in pertinent part:

17 a party must, without awaiting a discovery request, provide to the other parties . . .  
18 **a computation of each category of damages claimed by the disclosing party —**  
19 **who must make available for inspection and copying as under Rule 34 the**  
20 **documents or other evidentiary material, unless privileged or protected from**  
disclosure, **on which each computation is based, including materials bearing on**  
21 **the nature and extent of injuries suffered.**

22 NRCP 16.1(a)(1)(A)(iv) (emphasis added).

23 Put simply, NRCP 37 explicitly requires that a party be barred from presenting information  
24 required to be disclosed under NRCP 16.1(a)(1) at trial if they have previously failed to timely  
25 disclose the same to the opposing party. And NRCP 16.1(a)(1) requires disclosure of a  
26 computation of damages, as well as documents supporting such computation. Because Defendants  
27 have failed to provide either, they must be precluded from presenting the same at trial. As a result,  
28 summary judgment should be entered in Plaintiffs' favor that Defendants have no damages.

However, regardless of Defendants’ failure to make required disclosures under Rule 16.1, it is clear that Defendants simply do not have any damages, as confirmed by Bour LLC’s 30(b)(6) deposition testimony.

**III. BOUR LLC’S 30(B)(6) WITNESS TESTIMONY CONFIRMS THAT DEFENDANTS HAVE SUFFERED NO COUNTERCLAIM DAMAGES, THEREBY REQUIRING ENTRY OF SUMMARY JUDGMENT IN PLAINTIFFS’ FAVOR**

Plaintiffs quoted Bour LLC’s NRCP 30(b)(6) witness deposition testimony as confirmation that Defendants do not have any damages against Plaintiffs. Specifically, Defendants testified as follows:

**Q. Does my client own you any money?**

A. I didn't sue him. He don't -- why would he owe me money? Why do you say that?

*See* Motion for Summary Judgment Ex. 9, page 55, lines 14-16, on file herein.

Defendants assert that the 30(b)(6) witness did not understand the question presented, and thus did not confirm Defendants’ lack of counterclaim damages. In support of this incredible assertion, Defendants argue that “Plaintiffs’ counsel caused confusion by using the incorrect word (own rather than presumably owe)” and that the witness’s “follow-up” questions in response demonstrate his lack of clear understanding. These arguments are a stretch at best (disingenuous, at worst). *See* Opposition at 10.

First, while the deposition transcript’s use of the word “own” was likely a typographical error and not a reflection of the actual word that was used by Plaintiffs’ counsel, even assuming that counsel had said “own” instead of “owe,” Defendants’ response (“why would he owe me money?”) confirms that Defendants’ *did* properly understand Plaintiffs’ counsel’s question.

Second, Defendants’ response was clearly not a “follow-up” question or a “request for more clarity,” as Defendants now suggest. *See* Opposition at 10. In fact, Defendants were so certain they did not have any damages against Plaintiffs, the 30(b)(6) witness apparently forgot that Defendants had even countersued (“I didn’t sue him.”). A plain, reasonable reading of Defendants’ deposition testimony suggests that Defendants’ response was rhetorical, and not a request for clarification. And counsel’s question was not intended to “trick” Defendants, as they allege—just

the opposite, as counsel took care not to use legal jargon such as “damages,” but instead asked in simple terms whether Defendants believed that Plaintiffs owed them any money. Clearly taken aback by such an absurd question (given that Plaintiffs violated no lease provisions and caused Defendants no harm), Defendants confirmed that no, Plaintiffs do not owe them any money, *i.e.*, damages.

Finally, if Defendants dispute that the foregoing testimony is unclear or indeterminate and assert that they did in fact sustain damages related to their counterclaims, it was Defendants’ burden to attach evidence to their Opposition in support of such assertion. As stated previously, their failure to do so requires entry of summary judgment in favor of Plaintiffs on the issue of Defendants’ counterclaim damages. *See Wood*, 121 Nev. at 731, 121 P.3d at 1030–31.

#### IV. CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court grant the instant motion and enter summary judgment that Defendants have no damages.

Dated this 8th day of December, 2020.

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards

F. THOMAS EDWARDS, ESQ.

Nevada Bar No. 9549

JESSICA M. LUJAN, ESQ.

Nevada Bar No. 14913

400 South Fourth Street, Third Floor

Las Vegas, Nevada 89101

*Attorneys for Plaintiffs/Counterdefendants*



HOLLEY DRIGGS

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs and that on this 8th day of December, 2020, I did cause a true and correct copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT REGARDING COUNTERCLAIM DAMAGES** to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System:

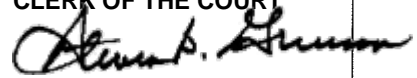
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# **EXHIBIT 7**



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Hilena Mengesha*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants

v.

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership, DOES I-X; and ROE  
CORPORATIONS I-X;

Counter-Defendants,

Case No.: A-19-794864-C  
Dept. No.: 8


**OPPOSITION TO PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT  
REGARDING BREACH OF CONTRACT  
CLAIMS**

Defendants/Counterclaimants BOUR ENTERPRISES, LLC, MULUGETA BOUR and HILENA MENGESHA (hereinafter collectively the “Defendants”), by and through their attorney of record, Rusty Graf, Esq., of the law firm of Black & Wadhams, hereby file their Opposition to Plaintiffs/Counter-Defendants’ Motion for Summary Judgment Regarding their Breach of Contract Claims. This Opposition is based upon the following Memorandum of Points and Authorities, the pleadings and papers on file herein, and any argument entertained by the Court at the hearing of this matter.

Dated this 17<sup>th</sup> day of December 2020.

**BLACK & WADHAMS**

#15271

  
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*Attorney for Defendants*

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**LEGAL ARGUMENT**

**A. INTRODUCTION**

On or about April 20, 2017, Defendants entered into two (2) lease agreements (hereinafter the “Leases”) with Plaintiffs 4520 Arville and McKinley Manor (hereinafter collectively the “Plaintiffs”) for the lease of certain commercial properties commonly known as 4560 S. Arville St., C10, 23, 24 and 29, Las Vegas, NV 89103 (hereinafter the “Subject Properties”). At or around the time the Leases were signed, Plaintiffs and Defendants also executed two (2) Lease Addendums (hereinafter the “Addendums”) and Defendants also executed personal guaranties of the Leases (hereinafter the “Guaranties”). The Addendums inconspicuously stated that the Subject

1 Properties were being leased to Defendants “as-is” but, as described further below, this clause was  
2 legally insufficient to waive certain duties and obligations of Plaintiffs’ towards the Subject  
3 Properties. *See Plaintiffs’ Motion for Summary Judgment, Exhibit 2.*

4 This became relevant when, on or about April 17, 2018, Defendants notified Plaintiffs that  
5 they were terminating the Leases because: (1) unsanitary conditions rendered the Subject  
6 Properties unfit, uninhabitable, unhealthy, and unsafe for both customers and employees; and (2)  
7 Plaintiffs had failed to live up to assurances made at the time the Leases were signed as to  
8 additional parking being provided for Defendants’ use. *See attached Exhibit 1, Declaration of*  
9 *Anthony Bour.* Plaintiffs subsequently filed a Complaint against Defendants asserting claims of  
10 Breach of Contract (as to the Leases), Breach of Contract (as to the Guaranties), Breach of the  
11 Implied Covenant of Good Faith and Fair Dealing, Unjust Enrichment and Declaratory Relief.  
12 Defendants answered Plaintiffs’ Complaint by asserting affirmative defenses including  
13 Constructive Eviction and Breach of Contract by Plaintiffs (through breach of the Implied  
14 Warranty of Habitability). Defendants also asserted both Constructive Eviction and Breach of  
15 Contract as counterclaims against Plaintiffs.

16 Despite the inadequacy of the “as-is” clause of the Addendums, Plaintiffs have  
17 subsequently used this clause to argue that they are not responsible for any of the issues present at  
18 the Subject Properties which breached the Implied Warranty of Habitability and ultimately resulted  
19 in the Defendants’ Constructive Eviction from the Subject Properties. *See Plaintiffs’ Motion for*  
20 *Summary Judgment, generally.* Plaintiffs have now brought the instant Motion for Summary  
21 Judgment as to their claims of Breach of Contract as to the Leases and Breach of Contract as to  
22 the Guaranties. However, Plaintiffs’ Motion fails to address the fact that Defendants have plead  
23 Constructive Eviction (as both a counterclaim and an affirmative defense) and the existence of a  
24 Constructive Eviction is a matter of fact. As will be argued below, the facts supporting the  
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1 affirmative defense and counterclaim for Constructive Eviction bar the rendering of the instant  
2 Motion for Summary Judgment, as it is a genuine issue of material fact.

3 **B. STANDARD FOR ANALYZING A MOTION FOR SUMMARY JUDGMENT**

4 Pursuant to NRCP 56, a Motion for Summary Judgment may only be granted if “the  
5 movant shows that there is **no genuine dispute as to any material fact**” and that they are “**entitled**  
6 **to judgment** as a **matter of law**.” (*Emphasis added*) See NRCP 56(a). In seeking to demonstrate  
7 these requirements have been met, “the moving party will bear the burden of persuasion” and  
8 “**must present evidence that would entitle it to a judgment as a matter of law** in the absence  
9 of contrary evidence.” See *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172  
10 P.3d 131, 134 (2007). Further, “[e]vidence introduced in support of or opposition to a motion for  
11 summary judgment must be admissible evidence” and “[a] party may object that the material cited  
12 to support or dispute a fact cannot be presented in a form that would be admissible in evidence.”  
13 See *Collins v. Union Fed. Sav. & Loan Ass’n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983); see  
14 also NRCP 56(c)(2).

15 **C. CONTROLLING CASE LAW FROM THE NEVADA SUPREME COURT**  
16 **REQUIRES DENIAL OF PLAINTIFFS’ MOTION**

17 Though there are a number of issues with Plaintiffs’ arguments, the instant Motion for  
18 Summary Judgment can, and should, be denied for based only on the failure of Plaintiffs to  
19 effectively address the fact that Defendants have plead Constructive Eviction, as both a  
20 counterclaim and an affirmative defense. In Nevada, the claim or defense of constructive eviction  
21 by the tenant of a commercial property requires: (1) “the landlord must either act or fail to act”;  
22 (2) “the landlord’s action or inaction must render the whole or a substantial part of the premises...  
23 unfit for occupancy for the purpose for which it was leased” (internal quotations omitted); (3) “the  
24 tenant must actually vacate the premises within a reasonable time”; and (4) the tenant must provide  
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“notice of and a reasonable opportunity to cure the defect.” *See Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. 834, 838–40, 335 P.3d 211, 214–15 (2014). Further, the Nevada Supreme Court has held that Summary Judgment is not appropriate for a claim or defense of Constructive Eviction, specifically stating “[w]hether **constructive eviction** has occurred **is a factual determination** to be **made by the trier of fact**.” (*Emphasis added*) *See Mason-McDuffie Real Estate Inc. v. Villa Fiore Development, LLC*, 130 Nev. 834, 335 P.3d 211 (2014).

**i. Plaintiffs’ Constructive Eviction Arguments Lack Legal Foundation or Support**

Despite this clear barrier to Summary Judgment, Plaintiffs proceed to argue that they did not engage in Constructive Eviction, and thus should be granted Summary Judgment, because only breach of express (rather than implied) duties or rights can give rise to a Constructive Eviction. *See Plaintiffs’ Motion for Summary Judgment*, Pg. 12-13. However, the three (3) cases which Plaintiffs cite in attempting to provide some legal foundation for this argument do not actually provide any support for their position and, in fact, actually support denial of the instant Motion. Plaintiffs’ state that a “landlord must act or fail to act in breach of the lease terms before there can be a constructive eviction”, which is purported to mean that a breach of implied warranties would be insufficient to sustain a claim or defense of Constructive Eviction. *See Plaintiffs’ Motion for Summary Judgment*, Pg. 12. This is incorrect, as described below, and means that Plaintiffs’ instant Motion must be denied under the Nevada Supreme Court holding that “[w]hether **constructive eviction** has occurred **is a factual determination** to be **made by the trier of fact**.” (*Emphasis added*) *See Mason-McDuffie Real Estate Inc. v. Villa Fiore Development, LLC*, 130 Nev. 834, 335 P.3d 211 (2014).

**ii. Case Law Cited by Plaintiffs Actually Supports Defendants’ Position**

1 Plaintiffs' instant Motion cites to three (3) cases in support of their argument against their  
2 Constructive Eviction of Plaintiffs: (1) Las Vegas Oriental, Inc. v. Sabella's of Nevada; (2) Mason-  
3 McDuffie Real Estate, Inc. v. Villa Fiore Development; and (3) Winchell v. Schiff. Id. at 12-13.  
4 Again, as outlined below, none of these cases actually support Plaintiffs' arguments. Further,  
5 Defendants would emphasize that the holding of the case Mason-McDuffie Real Estate, Inc. v.  
6 Villa Fiore Development, contains the above cited express statement by the Nevada Supreme Court  
7 that Constructive Eviction is "a factual determination".

9 In Mason-McDuffie Real Estate, Inc. v. Villa Fiore Development, the Nevada Supreme  
10 Court heard a case where a commercial landlord filed a complaint against a tenant for breach of  
11 lease, which resulted in the tenant bringing a counterclaim for Constructive Eviction (centered on  
12 allegations the landlord failed to maintain the property's roof). See Mason-McDuffie Real Estate,  
13 Inc. v. Villa Fiore Dev., LLC, 130 Nev. 834, 835-40, 335 P.3d 211, 212-15 (2014). Plaintiffs argue  
14 that this case supports their instant Motion because "[t]he Court never discussed any implied duties  
15 of the landlord, but rather only the express duties owed under the lease" and ultimately "found that  
16 there was no constructive eviction **because the tenant failed to provide notice and a reasonable**  
17 **opportunity to cure** the roof leaks. (Emphasis added) See Plaintiffs' Motion for Summary  
18 Judgment, Pg. 12.

20 Similarly, Plaintiffs cite to the case Winchell v. Schiff, in again seeking to provide support  
21 for their assertion that only the breach of express duties or rights, rather than implied, can result in  
22 Constructive Eviction. See Plaintiffs' Motion for Summary Judgment, Pg. 12-13. In Winchell v.  
23 Schiff, the Nevada Supreme Court considered, in pertinent part, whether a landlord's entry onto a  
24 leased property, as explicitly permitted by the lease, could amount to a Constructive Eviction for  
25 the purposes of bringing a claim of breach of the covenant of quiet enjoyment. See Winchell v.  
26 Schiff, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008).



1 To be clear, neither of these cases provide any support whatsoever for Plaintiffs' argument  
2 that Constructive Eviction can only result from a breach of express duties or rights. Neither case  
3 contains any mention of, nor do they even imply the existence of, such a requirement. Plaintiffs  
4 are essentially arguing that, because they have found two (2) cases that were decided based on the  
5 breach of express duties or rights, they have established that only express duties or rights can result  
6 in a Constructive Eviction. This is incorrect and is clearly unsupported by any of the case law to  
7 which Plaintiffs cite. Further, as stated below, the case Las Vegas Oriental, Inc. v. Sabella's of  
8 Nevada actually indicates the opposite, as the Court explicitly stated that a Constructive Eviction  
9 results from the action or inaction of a landlord rendering a leased property unfit for "the purpose  
10 for which it was demised". See *Las Vegas Oriental, Inc. v. Sabella's of Nevada, Inc.*, 97 Nev. 311,  
11 312, 630 P.2d 255, 255 (1981).

12  
13 In Las Vegas Oriental, Inc. v. Sabella's of Nevada, the Nevada Supreme Court considered  
14 whether a landlord had breached a commercial lease "by virtue of its failure to provide adequate  
15 heating and air conditioning to a portion of the leased premises." See *Las Vegas Oriental, Inc. v.*  
16 *Sabella's of Nevada, Inc.*, 97 Nev. 311, 312, 630 P.2d 255, 255 (1981). Plaintiffs argue that this  
17 case supports their position because "[t]he Court never discussed any implied duties of the  
18 landlord, but rather only whether the landlord breached the lease." See *Plaintiffs' Motion for*  
19 *Summary Judgment*, Pg. 13. However, closer examination of this case reveals that its holding is  
20 actually contrary to Plaintiffs' argument.

21  
22 In Las Vegas Oriental, Inc. v. Sabella's of Nevada, a landlord alleged that the tenant was  
23 the one who had breached the lease "by abandoning the premises nine months into a thirty-six  
24 month lease" while the lessee argued "the abandonment was justified because of Las Vegas  
25 Oriental's failure to provide adequate heating and air conditioning to the bar and lounge area of the  
26 supper club." *Id.* at 312-13. The Court held that "the failure to provide heating and cooling to the  
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lounge and bar area constituted a constructive eviction” and specifically stated that “a constructive eviction occurs when through the landlord's actions or inaction the whole, or a substantial part, of the premises is rendered unfit for occupancy for the purpose for which it was demised.”

(Internal quotations omitted) (Emphasis added) *Id.* Clearly, this doesn’t offer any support for Plaintiffs’ assertion that breach of express rights or duties is necessary for Constructive Eviction to occur. Further, here, the actions and inactions of Plaintiffs did defeat the purpose for which the Subject Properties were leased and Plaintiffs were fully informed of: (1) Defendants’ intended use of the Subject Properties; and (2) that their actions and inactions were rendering the Subject Properties unfit for that purpose. *See attached Exhibit 1, Declaration of Anthony Bour, Pg 2.*

**iii. There Exists a Genuine Dispute of Material Facts as to the Constructive Eviction and Summary Judgment Must be Denied.**

Here, Defendants’ assertion of Constructive Eviction as a counterclaim and affirmative defense is determinative for the instant Motion because, as described above, Constructive Eviction is a “factual determination” and there remains a genuine dispute of material facts as to whether the Constructive Eviction occurred. To reiterate, Constructive Eviction occurs when (1) a landlord acts or fails to act; (2) the action or inaction renders the whole, or a substantial part, of the property unfit for the purpose for which it was leased; (3) the tenant vacates within a reasonable time; and (4) the tenant provided the landlord with notice and a reasonable opportunity to cure the defect. Defendants’ have asserted that Plaintiffs’ actions and inactions, as landlords of the Subject Properties, rendered those Properties unfit for the purpose for which they were leased. *See attached Exhibit 1, Declaration of Anthony Bour, Pg. 2, #4-8.* Defendants’ have also maintained that Plaintiffs’ were fully informed and aware of the purpose for which the Subject Properties were leased. *Id. at #1-3.* Finally, Defendants assert that they provided reasonable notice of the defects, reasonable opportunity to cure, and vacated the property. *Id. at #9-12.*

1 As outlined above, all of the elements of Constructive Eviction have been met. Further,  
2 NRCF 56 requires that a Motion for Summary Judgment only be granted when no genuine issue  
3 as to any material fact exists. *See NRCF 56(a)*. Plaintiffs' Motion contains a statement of material  
4 facts which they assert are undisputed and form the basis (in conjunction with their argument as  
5 to being entitled to judgment as a matter of law) of the instant Motion for Summary Judgment. *See*  
6 *Plaintiffs' Motion for Summary Judgment, Pg. 3-7*. Therefore, Plaintiffs must demonstrate these  
7 supposedly undisputed material facts either refute, or otherwise overcome, the allegations by  
8 Defendants which establish the elements of Constructive Eviction. However, closer examination  
9 of these supposedly undisputed material facts reveals they do not refute, or otherwise overcome,  
10 Defendants' counterclaim and affirmative defense of Constructive Eviction. Below Defendants  
11 describe in further detail how the supposedly undisputed material facts in Plaintiffs' Motion fail  
12 to address each of the elements of Constructive Eviction.

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14  
15 Though Plaintiffs make numerous statements of supposedly undisputed facts as to who was  
16 responsible for the condition of the Subject Properties, these have no relevance as they are all legal  
17 arguments (which are disputed). *Id.* Further, Plaintiffs do not state anywhere that it is an undisputed  
18 fact that neither their actions nor inactions rendered the property unfit for the purpose for which it  
19 was leased. *Id.* Instead, Plaintiffs simply focus on arguing legal arguments as to the responsibility  
20 for those conditions, including stating the Subject Properties were accepted in "as-is" condition  
21 which waived any responsibility of Plaintiffs for those conditions. *Id.* Again, this is a legal  
22 argument rather than a factual statement. Therefore, Plaintiffs' statement of supposedly undisputed  
23 facts does nothing to refute, or otherwise overcome, Defendants' allegations that Constructive  
24 Eviction occurred. NRCF 56 requires that a Motion for Summary Judgment only be granted when  
25 no genuine issue as to any material fact exists. Thus, here, the Constructive Eviction remains a  
26 factual determination and the Motion for Summary Judgment must be denied.  
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1     **D.     PLAINTIFFS ARE ALSO NOT ENTITLED TO JUDGMENT AS A MATTER OF**  
2     **LAW**

3             Plaintiffs' Motion for Summary Judgment is premised on three (3) inaccurate assertions:  
4     (1) that "Plaintiffs performed under the contracts by providing Defendants access to the Premises  
5     in an "as is" condition"; (2) that "Defendants breached the contracts by abandoning the Premises  
6     and failing to pay rent and other charges required under the leases and guaranties"; and (3) "[a]s  
7     to Defendants' position that the dust and debris at the Premises justified their abandonment of the  
8     lease, the argument fails as matter of law." (*internal quotations omitted*) See *Plaintiffs' Motion for*  
9     *Summary Judgment, Pg. 8-9*. As described above, Plaintiffs are the moving party requesting  
10    summary judgment and, therefore, bear the burden of proof. As described above, meeting this  
11    burden requires that Plaintiffs show they are entitled to judgment as a matter of law. However,  
12    Plaintiffs cannot meet this burden and their Motion for Summary Judgment must be denied.

13             Ultimately, the Motion is premised upon the fundamentally flawed, and demonstrably  
14    false, argument that it is possible to demonstrate that Plaintiffs are entitled to judgment as a matter  
15    of law. See *Plaintiffs' Motion for Summary Judgment, Pg. 9-12*. This is impossible because it  
16    would require Plaintiffs to demonstrate: (1) that, as a matter of law, the Implied Warranty of  
17    Habitability does not apply to commercial properties and, thus, Defendants' asserted defense that  
18    Plaintiffs breached the Leases through their breach of this Warranty is legally invalid; and (2) that  
19    Plaintiffs' can meet their burden of proof by providing sufficient evidence that there is no genuine  
20    dispute of any material facts relating to Defendants' asserted defense of Constructive Eviction.  
21    However, Plaintiffs cannot demonstrate that as a matter of law the Implied Warranty of  
22    Habitability does not apply to commercial properties and, further, cannot meet the burden of proof  
23    necessary to overcome Defendants' defense of Constructive Eviction. Therefore, Plaintiffs  
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1 unambiguously cannot meet the requirements for summary judgment imposed by NRCP 56(a) and  
2 the instant Motion for Summary Judgment must be denied.

3 i. **Plaintiffs Cannot Demonstrate that the Implied Warranty of Habitability Does**  
4 **Not Apply to Commercial Properties as a Matter of Law**

5 As stated above, the lynchpin of Plaintiffs argument for Summary Judgment is their  
6 assertion that, as a matter of law, the Implied Warranty of Habitability does not apply to  
7 commercial properties in Nevada. Without being able to establish as much, Plaintiffs' argument  
8 necessarily fails, as they cannot meet the requirement of NRCP 56(a) that summary judgment only  
9 be granted to a party entitled to such "as a matter of law". *See NRCP 56(a)*. As described in more  
10 detail below, Plaintiffs make no valid arguments in the instant Motion as to the Implied Warranty  
11 of Habitability, instead merely relying upon: (1) statutes which make no mention of whether the  
12 implied warranty of habitability applies to commercial properties; (2) case law from other  
13 jurisdictions that is not controlling in Nevada. *See Plaintiffs' Motion for Summary Judgment, Pg.*  
14 *10-11*. Further, Plaintiffs directly admit that "**the Nevada Supreme Court has not expressly**  
15 **addressed the issue**" and that "NRS Chapter 118C, relating to commercial leases, **contains no**  
16 **mention of habitability** or fitness for a particular purpose." (*emphasis added*) *Id. at 10*.

17 These admissions by Plaintiffs alone unambiguously establish that the instant Motion must  
18 be denied, as NRCP 56 clearly states that Plaintiffs have the burden of establishing they are  
19 "**entitled** to judgment **as a matter of law**." (*Emphasis added*) *See NRCP 56(a)*. A party cannot be  
20 entitled to judgment as a matter of law regarding an issue which has not been established as a  
21 matter of law. Therefore, Plaintiffs' Motion for Summary Judgment must be denied.

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1           ii.     **The Statutes & Case Law Cited by Plaintiffs Fail to Establish that the Implied**  
2                   **Warranty of Habitability does not apply to Commercial Properties as a Matter**  
3                   **of Law.**

4           There are no Nevada statutes, nor any controlling case law, which limits the Implied  
5           Warranty of Habitability to commercial leases. Despite this clear barrier to Summary Judgment,  
6           Plaintiffs proceed to assert that the rules of statutory interpretation and remote case law, which is  
7           not controlling in Nevada, support their argument. *See Plaintiffs' Motion for Summary Judgment,*  
8           *Pg. 10.* However, both assertions fail to address the fact that a Motion for Summary Judgment can  
9           only be granted if the moving party is "entitled to judgment as a matter of law". *See NRCP 56(a).*

10                   a.     **The Rules of Statutory Interpretation Fail to Support Plaintiffs'**  
11                           **Argument**

12           Plaintiffs' Motion for Summary Judgment states that NRS Chapter 118A, which relates to  
13           residential leases, expressly states that there is an Implied Warranty of Habitability while NRS  
14           Chapter 118C, which relates to commercial leases, "contains no mention of habitability or fitness  
15           for a particular purpose." *See Plaintiffs' Motion for Summary Judgment, Pg. 10.* This is correct but  
16           provides no foundation for Plaintiffs' subsequent argument that "[b]ecause the Nevada Legislature  
17           applied the concept of habitability to residential leases, but not commercial leases, the Court must  
18           presume that the Nevada Legislature deliberately excluded the applicability of habitability to  
19           commercial leases." *Id.* In seeking to provide some support for this unfounded assertion, Plaintiffs  
20           proceed by stating that the rules of statutory interpretation used by Nevada Courts include: (1) that  
21           "the mention of one thing implies the exclusion of another"; and (2) that where the Legislature  
22           has, for example, explicitly applied a rule to one type of proceeding, this court will presume it  
23           deliberately excluded the rule's application to other types of proceedings." *Id.* Again, this is true,  
24           but it still provides no support for Plaintiffs' instant Motion.  
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1 In fact, Plaintiffs' argument is a misapplication of these rules of statutory interpretation.  
2 Plaintiffs cite to two (2) cases in support of their argument that the rules of statutory interpretation  
3 demonstrate that the Implied Warranty of Habitability does not apply to commercial leases, Sonia  
4 F. v. Eighth Judicial District Court and In re Estate of Prestie. *Id.* In Sonia F. v. Eighth Judicial  
5 District Court, the Court considered whether Nevada's rape shield law applied in civil cases. *See*  
6 *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009). In In re  
7 Estate of Prestie, the Court considered the potential impact of other statutes on the revocation of a  
8 will under NRS 133.110. *See In re Estate of Prestie*, 122 Nev. 807, 814, 138 P.3d 520, 524 (2006).  
9 In both cases, the Court stated that "the mention of one thing implies the exclusion of another" as  
10 a rule of statutory interpretation but, also in both cases, the Court only applied this rule to the  
11 interpretation of a single statute. *See Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499,  
12 215 P.3d 705, 708 (2009); *see also In re Estate of Prestie*, 122 Nev. 807, 814, 138 P.3d 520, 524  
13 (2006). What Plaintiffs now argue is an absurd interpretation and application of this rule, as they  
14 seek to apply it to multiple statutes simultaneously. NRS 118A and NRS 118C are separate and  
15 distinct statutes, meaning that the mention of something within NRS 118A clearly does not imply  
16 the exclusion of the same thing within NRS 118C.

17 To illustrate this point, NRS 78A governs the activities of close corporations within Nevada  
18 and states, in pertinent part, that "[n]o record which is written in a language other than English  
19 may be filed or submitted for filing in the Office of the Secretary of State pursuant to the provisions  
20 of this chapter unless it is accompanied by a verified translation of that record into the English  
21 language." *See NRS 78A.015*. Similarly, NRS 78B governs the activities of benefit corporations  
22 within Nevada but, unlike NRS 78A.015, contains no provisions regarding the language of records  
23 filed in the Office of the Secretary of State. *See NRS 78B*.

1 Plaintiffs assert that the rules of statutory interpretation require, even for completely  
2 separate statutes, that the Court interpret the mention of one thing as implying the exclusion of  
3 another. Therefore, under Plaintiffs' interpretation of the rules of statutory interpretation, the fact  
4 that NRS 78A.015 states that a verified translation of a record into the English may be filed with  
5 the Secretary of State means that the lack of such a provision in NRS 78B amounts to evidence of  
6 clear legislative intent to prohibit such filings by benefit corporations. Clearly this is incorrect,  
7 which demonstrates that the rule of statutory interpretation in question can only be rationally  
8 applied in analyzing a single statute. The mention of something with a single Nevada Revised  
9 Statute cannot logically or consistently be interpreted to imply that same thing's purposeful  
10 exclusion from each of the hundreds of other Nevada Revised Statutes. Any attempt to do so would  
11 lead to wildly chaotic and unpredictable results.  
12

13 **b. Case Law does not Support Plaintiffs' Argument**

14 To reiterate, when discussing the Implied Warranty of Habitability, Plaintiffs: (1) directly  
15 admit that "the Nevada Supreme Court has not expressly addressed the issue"; and (2) cite only to  
16 remote case law, which is not controlling in Nevada. *See Plaintiffs' Motion for Summary*  
17 *Judgment, Pg. 10-12.* This alone is determinative for the instant Motion, as Plaintiffs cannot make  
18 any logical and consistent argument that the Implied Warranty of Habitability does not apply to  
19 Nevada commercial properties as a matter of law, while unambiguously admitting the issue is not  
20 directly addressed in any Nevada Statute or any Nevada controlling case law.  
21

22 The cases to which Plaintiffs do cite have no relevance to the instant Motion, regardless of  
23 how persuasive they may or may not be, because it is impossible for a party to demonstrate that  
24 they are entitled to judgment as a matter of law when the only authority available in support of  
25 their position is persuasive case law. By arguing that the Implied Warranty of Habitability does  
26 not apply to commercial leases, Plaintiffs are asking the Court to engage in judicial activism by  
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unilaterally expanding the legal protections in place for landlords in a manner that is both anti-consumer and harmful to Nevada's business community.

iii. **The "as-is" Clause of the Addendums did not Waive the Implied Warranty of Habitability**

As there is no support for Plaintiffs' argument that the Implied Warranty of Habitability is not present for commercial properties, they are left to rely upon their assertion that the "as-is" clause of the Lease Addendums waived the warranty. *Id. at 8-9*. However, as described in detail below, the "as-is" clause was legally insufficient and failed to disclaim any implied warranties on the Subject Properties.

a. **Legal Standard for Exclusion or Modification of Warranty**

Implied warranties may only be modified or excluded by "appropriate **conspicuous** language". (*Emphasis added*) See *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev. 414, 416, 514 P.2d 654, 656 (1973). Further, NRS 104.1201 provides that the Court should determine whether a contractual term disclaiming an implied warranty is "conspicuous" by looking to see if the following specific requirements:

"Conspicuous terms **include the following**: (1) [a] **heading in capitals** equal to or greater in size than the surrounding text, or in contrasting type, font or color to the surrounding text of the same or lesser size; and (2) [l]anguage in the body of a record or display **in larger type than the surrounding text, or in contrasting type**, font or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks **that call attention to the language**."

(*Emphasis added*) See NRS 104.1201(j).

b.      **The “as-is” Clause did not Disclaim the Implied Warranty of Habitability**

In stark contrast to these explicit requirements for a contractual term to be considered “conspicuous”, and therefore capable of disclaiming an implied warranty, Plaintiffs’ included the following “as-is” clause in the Addendums:

**TERMS:**

NOW, THEREFORE, in consideration of the mutual promises and covenants contained in the Lease, and this Lease Addendum, the parties agree as follows:

1. Condition of Premises. Lessee hereby accepts the Premises in “as-is” condition with any additional alterations and improvements to be completed at Lessee’s expense and in accordance with Section 7 of Lease.

This is not conspicuous and did not disclaim any implied warranties for four (4) key reasons. First, it should be noted that the “as-is” clause it is not even in the actual body of the Lease contracts but rather in the Addendums. *See Plaintiffs’ Motion for Summary Judgment, Exhibit 2, Addendum.* This should weigh heavily against it being deemed a valid conspicuous disclaimer of the implied warranties. Second, this clause was included in the body of the Addendum, meaning it clearly was not set apart in the manner the Court requires. *Id.* Third, the clause is in the same font as the rest of the Addendum and is not emphasized or made explicitly noticeable in any way. *Id.* Fourth, the clause is not bolded or capitalized, making it very easy to overlook and therefore, by definition, not conspicuous. *Id.* Because of this lack of conspicuousness, the “as-is” provision cannot effectively disclaim an implied warranty and should be disregarded.

Additionally, the Defendants would note that the “as-is” clause also fails as a disclaimer of implied warranties in another respect, as Plaintiffs failed to include the statutorily required language. NRS 104.2316 states that “to exclude or modify the implied warranty of merchantability

1 or any part of it the language must mention merchantability and in case of a writing must be  
2 conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a  
3 writing and conspicuous.” See *NRS 104.2316(2)*. This was further emphasized by the Nevada  
4 Supreme Court, in the case *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, as a key requirement  
5 for effectively disclaiming either an express or implied warranty. See *Bill Stremmel Motors, Inc.*  
6 *v. IDS Leasing Corp.*, 89 Nev. 414 (1973).  
7

8 Here, the Court can see that there is no explicit mention of the warranties Plaintiffs’ assert  
9 they disclaimed, making the “as-is” clause insufficient and invalid. The clause does not specifically  
10 address or otherwise mention the implied warranties and, therefore, fails to disclaim them. As a  
11 result, the Plaintiffs were still bound by the implied warranties of fitness, merchantability, and  
12 habitability and breached the contracts with Defendants.  
13

14 **c. Case Law Supports Defendants’ Argument**

15 This requirement that the “as-is” clause be sufficiently conspicuous has been explicitly  
16 discussed by the Nevada Supreme Court in a number of cases. For example, in *Bill Stremmel*  
17 *Motors, Inc. v. IDS Leasing Corp.*, a business entered into a long-term lease for a communications  
18 system that subsequently failed to operate properly, causing the lessee to stop making the  
19 contractually agreed upon lease payments. See *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*,  
20 89 Nev. 414 (1973). The lessor then brought a complaint against the lessee, alleging breach of  
21 contract due to a warranty on the system. *Id.* The lessor argued that warranty had been waived by  
22 a provision of the lease contract, while the lessee argued that the waiver was not effective because  
23 the provision was not sufficiently obvious within the contract. *Id.*  
24

25 Ultimately, the Court found the waiver was sufficiently conspicuous, and therefore  
26 effective, because the waiver specifically stated, in large all capitalized letters, that the lessor was  
27 expressly disclaiming the warranties of fitness and merchantability and specifically identified that  
28

1 those warranties were being waived (it did not simply state the leased property was being accepted  
2 as-is. *Id.*

3 Similarly, in Sierra Diesel Injection Service, Inc. v. Burroughs Corp., the buyer of  
4 computer system brought an action against the seller of that system, alleging it failed to perform  
5 as represented in breach of implied warranties. *See Sierra Diesel Injection Service, Inc. v.*  
6 *Burroughs Corp., Inc.*, 890 F.2d 108 (1989). The seller asserted that the contract for the sale of  
7 the system included a valid and conspicuous disclaimer of warranties which excused the failure to  
8 perform as promised *Id.* In determining whether the disclaimer was conspicuous, the Court cited  
9 to the requirements provided by NRS 104.1201(10) (now NRS 104.1201(j)) and stated that a  
10 contractual term is conspicuous when included in the body of a form if “it is in larger or other  
11 contrasting type or color.” *Id.* Neither of which is true here.

12  
13  
14 **iii. Plaintiffs’ Argument as to Constructive Eviction Requiring Breach of Express**  
15 **Duties or Rights is Without Foundation or Support**

16 Plaintiffs also argue that they did not engage in Constructive Eviction and, in support of  
17 that argument, cite to three (3) cases which they purport means that a “landlord must act or fail to  
18 act in breach of the lease terms before there can be a constructive eviction”, meaning breach of  
19 implied warranties would be insufficient to sustain a claim or defense of Constructive Eviction.  
20 *See Plaintiffs’ Motion for Summary Judgment, Pg. 12.* However, as described below, the cases  
21 cited by Plaintiffs do not actually support their argument and should be disregarded.

22  
23 **a. Case Law Cited by Plaintiffs Actually Supports Defendants’ Position**

24 Plaintiffs’ instant Motion cites to three (3) cases in support of their argument against their  
25 Constructive Eviction of Plaintiffs: (1) Las Vegas Oriental, Inc. v. Sabella's of Nevada; (2) Mason-  
26 McDuffie Real Estate, Inc. v. Villa Fiore Development; and (3) Winchell v. Schiff. *Id.* at 12-13. As  
27 outlined below, none of these cases actually support Plaintiffs’ arguments.  
28

1 In *Las Vegas Oriental, Inc. v. Sabella's of Nevada*, the Nevada Supreme Court considered  
2 whether a landlord had breached a commercial lease “by virtue of its failure to provide adequate  
3 heating and air conditioning to a portion of the leased premises.” See *Las Vegas Oriental, Inc. v.*  
4 *Sabella's of Nevada, Inc.*, 97 Nev. 311, 312, 630 P.2d 255, 255 (1981). Plaintiffs argue that this  
5 case supports their position because “[t]he Court never discussed any implied duties of the  
6 landlord, but rather only whether the landlord breached the lease.” See *Plaintiffs’ Motion for*  
7 *Summary Judgment*, Pg. 13. However, closer examination of this case reveals that its holding is  
8 actually contrary to Plaintiffs’ argument.

10 In *Las Vegas Oriental, Inc. v. Sabella's of Nevada*, a landlord alleged that the tenant was  
11 the one who had breached the lease “by abandoning the premises nine months into a thirty-six  
12 month lease” while the lessee argued “the abandonment was justified because of Las Vegas  
13 Oriental's failure to provide adequate heating and air conditioning to the bar and lounge area of the  
14 supper club.” *Id. at 312–13*. The Court held that “the failure to provide heating and cooling to the  
15 lounge and bar area constituted a constructive eviction” and specifically stated that “a constructive  
16 eviction occurs when **through the landlord's actions or inaction** the whole, or a substantial part,  
17 of **the premises is rendered unfit for occupancy for the purpose for which it was demised.**”  
18 (Internal quotations omitted) (Emphasis added) *Id.*

21 In *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Development*, the Nevada Supreme  
22 Court heard a case where a commercial landlord filed a complaint against a tenant for breach of  
23 lease, which resulted in the tenant bringing a counterclaim for Constructive Eviction (centered on  
24 allegations the landlord failed to maintain the property’s roof). See *Mason-McDuffie Real Estate,*  
25 *Inc. v. Villa Fiore Dev., LLC*, 130 Nev. 834, 835–40, 335 P.3d 211, 212–15 (2014). Plaintiffs argue  
26 that this case supports their instant Motion because “[t]he Court never discussed any implied duties  
27 of the landlord, but rather only the express duties owed under the lease” and ultimately “found that  
28

there was no constructive eviction **because the tenant failed to provide notice and a reasonable opportunity to cure** the roof leaks. (*Emphasis added*) See *Plaintiffs' Motion for Summary Judgment*, Pg. 12. Plaintiffs similarly cite to the case *Winchell v. Schiff*, again in seeking to provide support for their assertion that only the breach of express duties or rights, rather than implied, can result in Constructive Eviction. See *Plaintiffs' Motion for Summary Judgment*, Pg. 12-13. In *Winchell v. Schiff*, the Nevada Supreme Court considered, in pertinent part, whether a landlord's entry onto a leased property, as explicitly permitted by the lease, could amount to a Constructive Eviction for the purposes of bringing a claim of breach of the covenant of quiet enjoyment. See *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008).

To be clear, neither of these cases provide any support whatsoever for Plaintiffs' argument that Constructive Eviction can only result from a breach of express duties or rights. Neither case contains any mention of, nor do they even imply the existence of, such a requirement. Plaintiffs are essentially arguing that, because they have found two (2) cases that were decided based on the breach of express duties or rights, they have established that only express duties or rights can result in a Constructive Eviction. This is incorrect and is clearly unsupported by any of the case law to which Plaintiffs cite. Further, as stated above, the case *Las Vegas Oriental, Inc. v. Sabella's of Nevada* actually indicates the opposite, as the Court explicitly stated that a Constructive Eviction results from the action or inaction of a landlord rendering a leased property unfit for "the purpose for which it was demised". See *Las Vegas Oriental, Inc. v. Sabella's of Nevada, Inc.*, 97 Nev. 311, 312, 630 P.2d 255, 255 (1981).

### III.

### CONCLUSION

Based on the above discussion, it is clear that Plaintiffs are unable to meet the burden of proof required for their Motion for Summary Judgment, as they cannot show: (1) that there are

1 actually no genuine disputes of material fact; and (2) that they are actually entitled to judgment as  
2 a matter of law. Further, Plaintiffs specifically make the granting of the instant Motion impossible,  
3 as they directly identify that one of the key issues on which they must be “entitled to judgment as  
4 a matter of law” in order to be granted summary judgment (whether the Implied Warranty of  
5 Habitability applies to commercial leases) is an issue for which there is no established law.  
6 Plaintiffs admit that this issue of whether the Implied Warranty of Habitability applies to  
7 commercial leases is something that is not directly addressed by any Nevada Revised Statute and  
8 which the Nevada Supreme Court has never directly ruled upon. As a result, this issue is not  
9 appropriate for summary judgment and Defendants’ respectfully request that the Court deny  
10 Plaintiffs’ Motion.  
11

12 Dated this 17<sup>th</sup> day of December 2020.

#15271

**BLACK & WADHAMS**

  
RUSTY GRAF, ESQ.

Nevada Bar No. 6322

10777 West Twain Avenue, Suite 300

Las Vegas, Nevada 89135

*Attorney for Defendants/Counterclaimants*

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & WADHAMS and that on the 17<sup>th</sup> day of December 2020, I caused the above and foregoing document entitled **OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT REGARDING THEIR BREACH OF CONTRACT CLAIMS** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and


☒ by electronic service through Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

F. Thomas Edwards, Esq.  
HOLLEY DRIGGS WALCH FINE  
PUZEY STEIN & THOMPSON  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

  
An Employee of Black & Wadham



# EXHIBIT 1

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*Attorneys for Defendants/Counterclaimants*  
*Bour Enterprises, LLC, Mulugeta Bour and*  
*Hilena Mengesha*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants

v.

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership, DOES I-X; and ROE  
CORPORATIONS I-X;

Counter Defendants,

Case No.: A-19-794864-C  
Dept. No.: 8

**DECLARATION OF ANTHONY BOUR  
IN SUPPORT OF DEFENDANTS AND  
COUNTERCLAIMANTS OPPOSITION  
TO MOTION TO DISMISS  
COUNTERCLAIMS AND DEFENDANTS  
AND COUNTERCLAIMANTS MOTION  
FOR SUMMARY JUDGMENT**

**[Exempt from Arbitration]**

**[Declaratory Relief Requested]**

1 Per NRCP 56, a party asserting that a fact is not genuinely disputed for a motion for summary  
2 judgment must support that assertion by "citing to particular parts of materials in the record,  
3 including depositions, documents, electronically stored information, affidavits or declarations,  
4 stipulations (including those made for purposes of the motion only), admissions, interrogatory  
5 answers, or other materials." *See NRCP 56(a)*. The following declaration of Anthony Bour is  
6 offered in support of Counterclaimants' motion for summary judgment.

7 **DECLARATION OF ANTHONY BOUR**

8 1. On or about April 20, 2017, Bour Enterprises, LLC entered into agreements with 4520  
9 Arville and McKinley Manor for the lease of certain commercial properties located at 4560 S.  
10 Arville St., C-10, 23, 24 and 29, Las Vegas, NV 89103.

11 2. Bour Enterprises entered into the leases for the purpose of operating its business on the  
12 leased properties, and 4520 Arville and McKinley Manor were informed, prior to signing the lease,  
13 of that intention and represented that the properties were fit for this intended use as a commercial  
14 business facility.

15 3. 4520 Arville and McKinley Manor representative was informed that the properties must  
16 be fit for the operation of Bour Enterprise's business and I expressed concerns as to parking.

17 4. Prior to the execution of the leases, 4520 Arville and McKinley Manor offered assurances  
18 that parking arrangements would be made in order to provide business vehicles sufficient parking  
19 spaces and room to safely maneuver through the parking lot.

20 5. After entering into the leases, 4520 Arville and McKinley Manor declined or purposely  
21 failed to fulfill their promise to make the parking arrangements that were necessary for the  
22 successful operation of Bour Enterprise on the properties.

23 6. From the inception of Bour Enterprise's leasing of the properties, they were infested with  
24 rodents, rodent excrement and urine, mounds of particulate, dust and other debris.

25 7. The unsanitary conditions were unfit, uninhabitable, unhealthy and unsafe for customers  
26 and employees and unfit for Bour Enterprise's occupancy and the operation of its business.

27 8. Two (2) employees of Bour Enterprises have sought medical treatment as a result of these  
28 conditions.

9. On or about April 17, 2018, I delivered a letter of notice to terminate the leases to 4520

1 Arville and McKinely Manor, citing the unsanitary condition of the property, and lack of promised  
2 parking arrangements as the basis for the termination.

3 10. On or about April 24, 2018, 4520 Arville and McKinely Manor's legal counsel responded  
4 and unequivocally declined to address either the unsanitary/unhealthful conditions and the  
5 promised parking arrangements, when he rejected the lease termination notice.

6 11. On or about May 3, 2018, Bour Enterprises sent David Burns a letter of Bour Enterprise's  
7 intent to vacate the properties immediately, and of its intent to terminate the leases, effective May  
8 31, 2018, due to the ongoing health hazards.

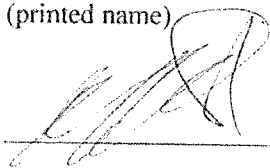
9 12. As of May 21, 2019, 4520 Arville and McKinely Manor assessed Bour Enterprise Sixty-  
10 Two Thousand Two Hundred Twenty-Three Dollars and Eight Cents (\$62,223.08) in rent, late  
11 fees, common area maintenance charges, and other charges under the leases, all assessed while the  
12 properties were uninhabitable and unfit for the purpose asserted for the operation of the Bour  
13 Enterprises business.

14  
15 I, Anthony Bour, declare under penalty of perjury that the foregoing is true and correct.  
16

17 Executed on the 15 day of August, 2019  
18

19 Mulligan Bour  
20

21 (printed name)

22   
23

24 (signature)  
25  
26  
27  
28

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the \_\_\_\_ day of August 2019, I caused the above and foregoing document entitled **DECLARATION OF ANTHONY BOUR IN SUPPORT OF DEFENDANTS AND COUNTERCLAIMANTS OPPOSITION TO MOTION TO DISMISS COUNTERCLAIMS AND DEFENDANTS AND COUNTERCLAIMANTS MOTION FOR SUMMARY JUDGMENT** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

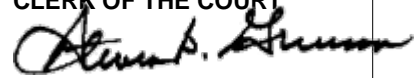
☐ hand delivered to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

F. Thomas Edwards, Esq.  
HOLLEY DRIGGS WALCH FINE  
PUZEY STEIN & THOMPSON  
400 South Fourth Street, Third Floor  
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and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

\_\_\_\_\_  
An Employee of Black & LoBello

# **EXHIBIT 8**



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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
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Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
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individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 8

**PLAINTIFFS' REPLY IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT  
REGARDING BREACH OF CONTRACT  
CLAIMS**

**Date of Hearing: January 12, 2021  
Time of Hearing: 9:30 a.m.**

Plaintiffs/Counterdefendants, 4520 Arville, a California general partnership; and  
McKinley Manor, an Idaho general partnership (collectively "Plaintiffs"), by and through their

1 attorneys of record, the law firm of Holley Driggs, hereby submit this reply in support of their  
2 Motion for Summary Judgment Regarding Contract Claims.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **INTRODUCTION**

5 Defendants do not dispute that they abandoned their leases (“Leases”) of Plaintiffs’  
6 commercial premises (the “Premises”) early and without authorization, causing Plaintiffs’  
7 damages. Absent any legal justification for doing so, Defendants are unquestionably liable for  
8 breaching the Leases. Thus, as their *only* argument in defense of Plaintiffs’ claims, Defendants  
9 have proffered the unsupportable argument that they were constructively evicted as a result of  
10 Plaintiffs’ alleged breach of implied warranty of habitability for failing to clean up the “dust and  
11 debris” at the Premises. *Id.* Defendants assert that this “constructive eviction” excused their  
12 performance under the Leases.

13 Because of the “as-is” provisions found in the Leases, however, the only way Defendants  
14 can show that they were constructively evicted based upon Plaintiffs’ alleged failure to clean up  
15 the Premises is to show that such action or inaction on the part of Plaintiffs breached an *implied*  
16 warranty of habitability that somehow overcame Defendants’ express agreement to accept the  
17 Premises in an “as-is” condition.<sup>1</sup> Despite Defendants’ hollow arguments to the contrary, Plaintiffs  
18 have demonstrated that there is no implied warranty of habitability in the commercial context  
19 under Nevada law.

20 Thus, with no implied warranty of habitability imposed in commercial leases under Nevada  
21 law, and signed Leases which expressly place the responsibility of custodial upkeep on the  
22 Defendants, Defendants are foreclosed from demonstrating—as a matter of fact or law—that a  
23 constructive eviction has occurred such that Defendants are relieved from liability for their  
24 unauthorized early abandonment of their Leases.

25  
26  
27 <sup>1</sup> Notably, Defendants were well aware of the condition of the Premises when they signed the  
28 Leases, as they had operated out of the Premises pursuant to a sub-lease for almost two (2) years  
before they signed the leases that are at issue in this lawsuit.



**Myth #1:** “[I]t is impossible for a party to demonstrate that they are entitled to judgment as a matter of law when the only authority available in support of their position is persuasive case law.” Opposition at 14, on file herein.

**Myth #3:** The “as-is” clauses of the leases are invalid pursuant to NRS 104—the UCC statute.

## I. LEGAL ARGUMENT

///

**A. DEFENDANTS' ENTIRE OPPOSITION TO SUMMARY JUDGMENT RESTS ON THREE EASILY REFUTABLE MYTHS, THUS REQUIRING ENTRY OF SUMMARY JUDGMENT IN PLAINTIFFS' FAVOR**

1. **Myth #1:** "[I]t is impossible for a party to demonstrate that they are entitled to judgment as a matter of law when the only authority available in support of their position is persuasive case law."

***Reality: This Court can—and must—rely on persuasive authority in the absence of controlling authority at summary judgment.***

Plaintiffs moved for summary judgment on the grounds that, *inter alia*, Defendants could not have been constructively evicted based on any breach of an implied warranty, as there is no implied warranty of habitability in commercial leases in Nevada (and thus Defendants have no viable defense to their clear breach thereof). At the crux of Defendants' Opposition is the false notion that the Court cannot rely on persuasive authority in ruling on issues of law at summary judgment. This argument is absurd, however, as it is axiomatic that it is the sole province of the Court to decide issues of law and of the fact-finder to decide issues of fact. *See Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 211 (2001) (acknowledging that it is the district court's function to perceive and apply the law); *Branda v. Sanford*, 97 Nev. 643, 646, 637 P.2d 1223, 1225 (1981) (questions of law are "within the province of the court").

Thus, when faced with a legal issue that has not already been decided by crystal clear statutory or case law (as here<sup>2</sup>), it is the exclusive function of the *Court* to say what the law is. Allowing Defendants to proceed to a costly trial on the grounds that certain legal issues remain undecided would therefore be pointless, as going to trial would not change the fact that the Court must ultimately determine how the law should be applied (because the jury is tasked only with fact-finding, not drawing legal conclusions). *See Zamora v. Price*, 125 Nev. 388, 394, 213 P.3d 490, 494 (2009) (discussing the jury's duty as fact-finder).

---

<sup>2</sup> As the parties have pointed out, despite the weight of statutory and persuasive authority in support, the Nevada Supreme Court has never explicitly held that there is no implied warranty of habitability in the commercial context in Nevada.

Moreover, it is the overwhelming consensus of courts across the country—including in Nevada—that a trial court may consider and rely upon persuasive authority in determining whether to grant summary judgment:

#### Nevada

- In the absence of controlling law, “the Court will look to Nevada law or persuasive authority from other jurisdictions to dispose of Bank of America's Motion for Summary Judgment.” *Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat. Tr. & Sav. Ass’n*, 23 F. Supp. 2d 1166, 1171–72 (D. Nev. 1998).

#### Louisiana

- “Based on the generally persuasive authority of two circuit courts and the highest court of a sister state . . . defendants’ motion for summary judgment solely on the survival claim should be granted. . .” *Carter v. R.J. Reynolds Tobacco Co.*, No. CIV.A. 03-330, 2004 WL 1497770, at \*4 (E.D. La. July 1, 2004).

#### Tennessee

- “Given that there are no disputes of material fact, the Court finds that, on the basis of persuasive authority, Trane has established that it is entitled to summary judgment.” *Trane U.S. Inc. v. Neblett*, 291 F. Supp. 3d 848, 855 (M.D. Tenn. 2018).

#### Mississippi

- “[B]ased on the foregoing persuasive authorities, the Court is of the view that Defendants are entitled to summary judgment . . .” *Lashley v. Pfizer, Inc.*, 877 F. Supp. 2d 466, 473 (S.D. Miss. 2012), *aff’d*, 750 F.3d 470 (5th Cir. 2014).

#### California

- “The court finds *White v. Cooper* [] a persuasive authority favoring summary judgment for defendants.” *Foqua v. Presley*, No. S 00-1319 LKK PAN P, 2005 WL 1865500, at \*5 (E.D. Cal. Aug. 4, 2005), *report and recommendation adopted sub nom. Fuqua v. Presely*, No. CVS001319 LKK PAN P, 2005 WL 2271925 (E.D. Cal. Sept. 16, 2005).

///

///

## Pennsylvania

- “These decisions provide persuasive authority for the trial court's decision in the present case to enter summary judgment against Appellant.” *Albert v. Sheeley's Drug Store, Inc.*, 2020 PA Super 154, 234 A.3d 820, 823–24 (2020).

## Oklahoma

- “In light of this persuasive authority on the same subject matter, the Court finds summary judgment appropriate on this narrow ground.” *Am. Fid. Assurance Co. v. Bank of New York Mellon*, No. CV-11-1284-D, 2018 WL 6582381, at \*5 (W.D. Okla. Oct. 31, 2018), *aff'd*, 820 F. App'x 684 (10th Cir. 2020).

## Connecticut

- “Both *Davis* and *McCarthy* are persuasive authority in evaluating the propriety of granting summary judgment in the case at hand.” *Lewis v. CIL Realty, Inc.*, No. CV166029825S, 2017 WL 3881040, at \*3 (Conn. Super. Ct. July 26, 2017).

## Fourth Circuit

- Entry of summary judgment affirmed where “the district court examined the law of North Carolina and persuasive authority from other States” in making its summary judgment ruling. *Dunlap v. Great-W. Life Assur. Co.*, 81 F.3d 149 (4th Cir. 1996).

## Fifth Circuit

- “[B]ased on persuasive authority, the district court’s decision to grant summary judgment was correct.” *Trumble Steel Erectors, Inc. v. Moss*, 304 F. App'x 236, 242 (5th Cir. 2008).

The overwhelming weight of the foregoing authority suggests not only that this Court *may* consider persuasive authority in the absence of controlling law at summary judgment, but that it *must* do so. Thus, in considering whether the implied warranty of habitability applies in the commercial lease context, the Court is free to consider *all* the authority presented by Plaintiffs in their Motion—authoritative and persuasive alike.

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1           2. ***Myth #2: Plaintiffs’ presentation of Nevada landlord/tenant statutes, Nevada***  
2           ***Supreme Court case law, and persuasive case law from various districts is insufficient***  
3           ***to support Plaintiffs’ argument that there is no implied warranty of habitability in the***  
4           ***commercial context in Nevada.***

5           ***Reality: The various authorities presented by Plaintiffs, when read together, confirm***  
6           ***that there is no implied warranty of habitability in the commercial context in Nevada,***  
7           ***and Defendants have presented no authority to the contrary.***

8           Defendants take issue with the Nevada case law presented by Plaintiffs’ in support of their  
9           Motion because the Court did not explicitly hold in any of those cases that the implied warranty  
10          of habitability does not apply in the commercial context. *See* Opposition at 6–8, 18–20. While this  
11          is true (as the Nevada Supreme Court has never addressed this issue one way or the other), this  
12          Court should not be misled by Defendants’ attempts to misconstrue these authorities.

13          The key point illustrated by the Nevada case law cited by Plaintiffs is the simple reality  
14          that the Nevada Supreme Court has *never* found a constructive eviction occurred in the commercial  
15          context based on a breach of the implied warranty of habitability where the commercial lease did  
16          not *expressly* require the action and/or inaction of the landlord. *See* Motion at 10–11 (collecting  
17          cases/authority). Rather, in all the Nevada cases discussing constructive eviction from a  
18          commercial property, the Nevada Supreme Court found that the constructive eviction occurred  
19          based on the landlord’s breach of a specific lease provision. *Id.* Defendants have not presented,  
20          and Plaintiffs are not aware of, any Nevada case in which a constructive eviction was found to  
21          have occurred based solely on the commercial landlord’s breach of any *implied* warranty of  
22          habitability. *See* Opposition. Thus, it stands to reason that the Nevada Supreme Court has  
23          purposely declined to apply the doctrine in the commercial context.

24          Contrary to Defendants’ position, then, this Court would not “expand[] the legal  
25          protections in place for landlords” by declining to apply the implied warranty of habitability  
26          doctrine to a scenario in which it has *never before been applied*. *See* Opposition at 14–15. Rather,  
27          the greater act of “judicial activism” would be for this Court to expand the applicability of the  
28          implied warranty of habitability to the commercial arena, where neither the Nevada statute (NRS  
118C) nor the Nevada case law supports such expansion.

Indeed, Plaintiffs cited various authorities that, when read together, confirm that there is no implied warranty of habitability in the commercial context in Nevada:

- **Nevada Statutes.** NRS 118A (residential landlord/tenant statute) contains a habitability provision<sup>3</sup>, whereas NRS 118C (commercial landlord/tenant statute) does not. Under the rules of statutory construction, the legislature’s failure to include a habitability provision from NRS 118C implies the *purposeful exclusion* of the same. *In re Estate of Prestie*, 122 Nev. 807, 814, 138 P.3d 520, 524 (2006) (“We have previously recognized the fundamental rule of statutory construction that the mention of one thing implies the exclusion of another.”) (internal alterations and quotation marks omitted). *See* Motion at 10.
- **Persuasive Authority.** Persuasive case law from various jurisdictions which confirm that the implied warranty of habitability is not typically applied in the commercial context. *See* Motion at 10–11 (citing *B.W.S. Investments v. Mid-Am Restaurants, Inc.*, 1990 WL 108794 (N.D. 1990) (citing 3A *Thompson on Real Property*, § 1230 (1981); 2 *Powell on Real Property*, § 233(2)(b) (1990); 49 *Am.Jur.2d Landlord and Tenant* § 768 (1970); Annotation, *Modern Status of Rules as to Existence to Implied Warranty of Habitability or Fitness for use of Leased Premises*, 40 *A.L.R. 3d* 646, 650 (1971); Restatement (Second) of Property, Landlord and Tenant, § 5.1 Caveat and Comment (1977); *Teller v. McCoy*, 162 W. Va. 367, 380 (1978)).<sup>4</sup>

<sup>3</sup> NRS 118A, relating to residential leases, expressly states that “[t]he landlord shall at all times during the tenancy maintain the dwelling unit in a habitable condition.” NRS 118A.290. There is no such provision in NRS 118C.

<sup>4</sup> Plaintiffs also cited persuasive case law holding that, even in districts where the implied warranty of habitability *does* apply in the commercial context, those implied warranties do not apply if the commercial tenant accepts the property in an “as-is” condition, as here. *See* Motion at 11–12 (citing *Coulston v. Telescope Productions, Ltd.*, 378 N.Y.S.2d 553, 554 (App. Term 1975); *Davidow v. Inwood N. Profl Group--Phase I*, 747 S.W.2d 373, 376 (Tex. 1988); *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 914 (Tex. 2007). The applicability of the “as-is” provisions in the Leases will be discussed in greater detail below.

- 1 ➤ **Nevada Case Law.** Nevada case law regarding constructive eviction, demonstrating that  
2 the Nevada Supreme Court follows the majority rule and does *not* apply the implied  
3 warranty of habitability in the commercial context. *See* Motion at 12–13.

4 Thus, while this Court may consider the ample persuasive authority presented by Plaintiffs,  
5 as demonstrated above, there is also considerable Nevada authority supporting Plaintiffs’ argument  
6 that the implied warranty of habitability does not apply in the commercial context, and thus cannot  
7 shield Defendants from liability for their breaches of the Leases under their constructive eviction  
8 theory.

9  
10 3. **Myth #3: The “as-is” clauses of the leases are invalid pursuant to NRS 104—the UCC statute.**

11 ***Reality: The Nevada statute governing UCC law is inapplicable to commercial leases***  
12 ***of real property, and therefore Defendants have presented no authority to suggest that***  
13 ***the “as-is” clauses are invalid.***

14 Defendants dedicate several pages of their summary judgment opposition to their failed  
15 argument that the “as-is” clauses in the Leases are invalid because they are allegedly not  
16 “conspicuous,” as defined under NRS 104.1201—the UCC statute. *See* Opposition at 15–18. First,  
17 NRS 104 (Uniform Commercial Code – Original Articles) unquestionably applies only to sale of  
18 goods transactions, and not to leases of real property. *See generally* NRS 104.1101 *et seq.*  
19 Therefore, the provisions of NRS 104 have no bearing on the validity of the “as-is” clauses in the  
20 Leases. “The U.C.C. thus not only clearly limits the application of implied warranties of  
21 merchantability and fitness for purpose to sales of goods, but it defines a sale of goods in a manner  
22 which precludes a residential lease agreement from being considered as such since the residential  
23 lease agreement contains neither a sale nor a good.” *Miley v. Harmony Mill Ltd. P’ship*, 803 F.  
24 Supp. 965, 969 (D. Del. 1992). *See also, Ritchey v. Patt*, 431 Pa. Super. 219, 222, 636 A.2d 208,  
25 210 (1994) (holding that Article 2 of the UCC did not apply to an action for the alleged breach of  
26 lease of real property).

27 Nonetheless, in this case, the “as-is” provisions are found on the very first page (as the very  
28 first term!) of the concurrently signed Lease Addendums that Defendants signed when they leased

the Premises. *See* Motion Ex. 2 at ARV000026; Ex. 3 at ARV000059. Just following the opening recitals on the first page of the Lease Addendums, the “as-is” provisions appear exactly as follows:

**TERMS:**

NOW, THEREFORE, in consideration of the mutual promises and covenants contained in the Lease, and this Lease Addendum, the parties agree as follows:

1. Condition of Premises. Lessee hereby accepts the Premises in “as-is” condition with any additional alterations and improvements to be completed at Lessee’s expense and in accordance with Section 7 of Lease.

*See* Motion Ex. 2 at ARV000026.

**TERMS:**

NOW, THEREFORE, in consideration of the mutual promises and covenants contained in the Lease, and this Lease Addendum, the parties agree as follows:

1. Condition of Premises. Lessor, at Lessor’s cost, shall make sure that the overhead florescent light fixtures, electrical outlets, plumbing, and doors are in proper working order at the commencement of the Lease; otherwise, Lessee hereby accepts the Premises in “as-is” condition with any additional alterations and improvements to be completed at Lessee’s expense and in accordance with Section 7 of Lease.

*See* Motion Ex. 3 at ARV000059.

As shown, the “as-is” clause is the very first term of the Lease Addendums, and attention is called to the clause by the underlined phrase reading “Condition of Premises.” Moreover, Defendants initialed the bottom of *every page* of the Lease Addendums, indicating their understanding and acceptance of the terms therein. *See* Motion Ex. 2 at ARV000026; Ex. 3 at ARV000059.

Additionally, just above Defendants’ signatures on the Leases, in bold and capitalized text, Defendants confirm that they:

**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.**

*See* Exs. 2 at ARV000020 and 3 at ARV000053 (emphasis in original).

There is simply no support for the notion that the “as-is” clauses are invalid for any reason. Even the two cases cited by Defendants in support of their argument, *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev. 414 (1973) and *Sierra Diesel Injection Service, Inc. v. Burroughs Corp.*, 890 F.2d 108 (9th Cir. 1989), relate to goods transactions—not real property transactions, as here. *See Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev. 414 (1973) (concerning a transaction relating to a “Centrum Communications system” that malfunctioned); *Sierra Diesel Injection Service, Inc. v. Burroughs Corp.*, 890 F.2d 108 (9th Cir. 1989) (concerning the purchase of a malfunctioned accounting hardware and software system).

Based on the foregoing, there are no grounds to invalidate the “as-is” clauses of the Leases. Nevertheless, even if the “as-is” clauses were found to be invalid (they are not), this would not change the fact that the Leases contain *zero* provisions that require Plaintiffs to maintain the cleanliness of the Premises. *See* Motion Exhs. 2–3. Thus, with no implied warranty of habitability and no lease terms requiring Plaintiffs to clean the “dust and debris” at the Premises, there can be no constructive eviction based thereon, as demonstrated above. Accordingly, Plaintiffs’ Motion must be granted and summary judgment entered in Plaintiffs’ favor.

***B. PUTTING ASIDE DEFENDANTS’ FAILED CONSTRUCTIVE EVICTION DEFENSE, PLAINTIFFS HAVE SET FORTH SUFFICIENT, UNDISPUTED EVIDENCE TO SHOW THAT DEFENDANTS ARE LIABLE FOR BREACH OF CONTRACT***

At the outset of this Motion, the central questions to be resolved by the Court were (1) have Plaintiffs set forth sufficient law and evidence to show that Defendants are liable for breach of contract?, and (2) have Defendants set forth sufficient law and/or evidence to support their only defense against Plaintiffs’ claims and create a genuine issue of material fact for trial? As demonstrated above, the second question can be answered in the negative by resolving three legal issues which Plaintiffs have discussed in detail *supra* (none of which create a genuine dispute of

1 material fact for trial). Now that Plaintiffs have debunked Defendants' constructive eviction  
2 defense as a matter of law (their *sole* defense to Plaintiffs' breach of contract claims), the only  
3 question remaining is whether Plaintiffs satisfied their burden at summary judgment to show that  
4 Defendants are liable for breach of the Leases. They unquestionably have.

5 In their Motion, Plaintiffs presented sufficient evidence to satisfy all the elements of a  
6 breach of contract claim based on Defendants' early, unauthorized abandonment of their Leases.  
7 Indeed, among other things, Plaintiffs presented (1) signed copies of the Leases (and the guaranties  
8 and addendums thereto), which explicitly state that abandoning the Premises and failing to pay  
9 rent are breaches thereof; (2) Plaintiffs' Declaration affirming that Defendants vacated the  
10 Premises on or about May 8, 2018 (prior to the end of the Leases' term); and (3) ledgers denoting  
11 the unpaid rent owed by Defendants under the Leases. *See* Motion at 3–7.

12 This presentation satisfies Plaintiffs' initial burden under NRCP 56 to set forth evidence  
13 demonstrating that no genuine dispute of material fact exists for trial on Plaintiffs' breach of  
14 contract claims. *See Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029, 1031 (Nev. 2005) (*quoting*  
15 NRCP 56(c)). "When a motion for summary judgment is made and supported as required by NRCP  
16 56, the non-moving party may not rest upon general allegations and conclusions, but must, by  
17 affidavit or otherwise, set forth *specific facts* demonstrating the existence of a genuine factual  
18 issue." *Wood*, 121 Nev. at 731, 121 P.3d at 1030–31 (internal quotations and citations omitted)  
19 (emphasis added). If the nonmoving party fails to introduce admissible evidence showing a  
20 genuine issue of material fact, the entry of summary judgment is appropriate. *Choy v. Ameristar*  
21 *Casinos, Inc.*, 127 Nev. 870, 872–73, 265 P.3d 698, 700 (2011) ("Choy did not present any specific  
22 facts or affidavits demonstrating the existence of a genuine issue supporting his claim that  
23 Ameristar owned or operated the Ameristar Casino Hotel Kansas City. The district court, therefore,  
24 properly granted Ameristar's motion for summary judgment."); *Francis v. Wynn Las Vegas, LLC*,  
25 127 Nev. 657, 671, 262 P.3d 705, 715 (2011) ("Francis submitted no affidavits or admissible  
26 evidence to rebut Wynn's motion for summary judgment. Accordingly, Francis provided no  
27 'contrary evidence' that created genuine material issues of fact on Wynn's claims."); *Cuzze v.*  
28 *Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 604, 172 P.3d 131, 135 (2007) (Because the

1 “opposition failed to introduce admissible evidence of specific facts showing that a genuine factual  
2 issue exists for trial,” the Nevada Supreme Court “affirm[ed] the district court’s order granting  
3 summary judgment.”).

4 Critically, in their Opposition, Defendants make *no* argument and cite *no* evidence  
5 disputing the fact that they abandoned their leases early and without authorization, and failed to  
6 pay rent payments due and owing under the Leases.<sup>5</sup> *See* Opposition. Defendants’ failure to direct  
7 the Court to *any* evidence demonstrating that they did not breach their Leases of the Premises  
8 means that Defendants have failed to create a genuine dispute of material fact for trial.<sup>6</sup>  
9 Accordingly, this Court must grant the instant Motion and enter summary judgment in Plaintiffs’  
10 favor on their breach of contract claims. *See Wood*, 121 Nev. at 731, 121 P.3d at 1030–31.

## 11 II. CONCLUSION

12 For these reasons, Plaintiffs respectfully request that this Court grant the instant motion  
13 and enter summary judgment in Plaintiffs’ favor on their breach of contract claims.

14 Dated this 5th day of January, 2021.

15 **HOLLEY DRIGGS**

16 /s/ F. Thomas Edwards

17 F. THOMAS EDWARDS, ESQ.

18 Nevada Bar No. 9549

19 JESSICA M. LUJAN, ESQ.

20 Nevada Bar No. 14913

21 400 South Fourth Street, Third Floor

22 Las Vegas, Nevada 89101

23 *Attorneys for Plaintiffs/Counterdefendants*

24 <sup>5</sup> Defendants also did not address Plaintiffs’ argument with respect to the additional parking spots  
25 Defendants requested prior to abandoning the Premises. *See* Opposition. Therefore, Defendants  
26 concede any points related to this argument. *See* NRCP 56(e)(2) (the Court may consider facts  
27 undisputed where a party fails to properly address an opposing party’s assertion of fact).

28 <sup>6</sup> Defendants cite one Nevada case for the proposition that “whether a constructive eviction has  
occurred is a factual determination to be made by the trier of fact.” *See* Opposition at 5 (emphasis  
omitted). However, Defendants’ constructive eviction defense relies on the implied warranty of  
habitability, which Plaintiffs have demonstrated does not apply in the commercial lease context.  
Therefore, Defendants cannot demonstrate that they have been constructively evicted as a matter  
of law, and thus there are no factual issues left to be determined by a jury.

HOLLEY DRIGGS

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs and that on this 5th day of January, 2021, I did cause a true and correct copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT REGARDING BREACH OF CONTRACT CLAIMS** to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System:

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/s/ Sandy Sell  
An employee of HOLLEY DRIGGS

# **EXHIBIT 9**

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counter-defendants,

Case No: A-19-794864-C  
Dept. No.: 5

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

**Date of Hearing: January 12, 2021**  
**Time of Hearing: 9:30 a.m.**

This matter came before the Court via telephonic hearing on January 12, 2021 at 9:30 a.m.  
upon Plaintiffs/Counter-defendants 4520 Arville, a California general partnership; and McKinley  
Manor, an Idaho general partnership's (collectively "Plaintiffs"), Motion for Summary Judgment

1 on their Breach of Contract Claims (the “Motion”), the Honorable Michael Cherry presiding. F.  
2 Thomas Edwards, Esq. appeared on behalf of Plaintiffs, and Rusty Graf, Esq. appeared on behalf  
3 of Defendants/Counterclaimants Bour Enterprises, LLC, a Nevada limited liability company;  
4 Mulugeta Bour; and Hilena Mengesha (collectively “Defendants”).

5 The Court, having heard the arguments of counsel and having considered the papers and  
6 pleadings on file herein, and good cause appearing therefor, hereby enters the following findings  
7 of fact and conclusions of law. To the extent any finding of fact should properly be designated a  
8 conclusion of law, it shall be deemed a conclusion of law. To the extent any conclusion of law  
9 should properly be designated a finding of fact, it shall be deemed a finding of fact.

10 **FINDINGS OF FACT**

11 1. This action arises out of Defendants’ early, unauthorized abandonment of their  
12 commercial leases of Plaintiffs’ warehouse space located at 4560 S. Arville St., C-10, 23, 24, and  
13 29, Las Vegas, NV 89103 (the “Premises”), which resulted in a breach of the Leases and the  
14 individual Defendants’ personal guaranties thereof (the “Guaranties”). *See* Complaint, dated May  
15 15, 2019, on file herein.

16 2. In July of 2015, Defendants started to manage Stardust Limousine, which was  
17 operating out of unit C-23/24 at the Premises. *See* Motion Ex. 1 (excerpts of deposition transcript  
18 of NRCP 30(b)(6) Designee of Bour Enterprises, LLC, 15:20-25, 16:1-5).

19 3. Later in 2015, Defendants purchased Stardust Limousine and continued to operate  
20 the business out of Suite C-23/24 at the Premises under the existing Stardust Limousine lease. *See*  
21 Motion Ex. 1, 15:2-5.

22 4. Because Defendants were operating the business out of unit C-23/24 at the  
23 Premises, Defendants were aware of the condition of the Premises. *See* Motion Ex. 1, 23:1-12.

24 5. When Defendants complained about the condition of the Premises, the Plaintiffs  
25 explained that Stardust Limousine leased the Premises in an “as-is” condition. *See* Motion Ex. 1,  
26 23:14-23.

6. Defendants also complained that they wanted additional parking, despite the fact that Defendants understood that each warehouse unit was assigned only a few parking spaces. *See* Motion Ex. 1, 26:6-19, 27:20-28:6.

7. In 2017, Plaintiffs requested that Defendants sign a new lease, as opposed to continuing to operate under the Stardust Limousine lease. *See* Motion Ex. 1, 24:16-21.

8. On or about April 20, 2017, Defendants signed a new lease for unit C-23/24 at the Premises and a related personal guaranty. *See* Motion Ex. 2 (Unit C-23/24 Lease, Addendum and Guaranty). *See also* Motion Ex. 1, 45:6-46:1; 50:25-51:5.

9. At or about the same time, to alleviate Defendants' concern about parking, Plaintiffs recommended that Defendants lease an additional warehouse unit, which would provide an additional number of parking spaces and additional room to park vehicles inside the new warehouse unit. *See* Motion Ex. 1, 27:20-28:6.

10. Defendants agreed and on or about April 20, 2017, signed an additional lease for unit C-10/29. *See* Motion Ex. 3 (Unit C-10/29 Lease, Addendum and Guaranty). *See also* Motion Ex. 1, 57:14-58:11; 60:1-6.

11. The terms of the leases are nearly identical. *See* Motion Exs. 2 and 3.

12. For example, the first pages of the leases provide that Defendants are entitled to four (4) unreserved parking spaces, for a total of eight (8) spaces between the leases:

**1.2(b) Parking:** Four (4) unreserved vehicle parking spaces ("Unreserved Parking Spaces"); and n/a reserved vehicle parking spaces ("Reserved Parking Spaces").

*See* Motion Exs. 2 at ARV000001 and 3 at ARV000034.

13. Section 7.1(a) of the leases expressly provides that Defendants are responsible for all maintenance of the Premises.

**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.

*See Motion Exs. 2 at ARV000007 and 3 at ARV000040, Section 7.1(a) (emphasis added).*

14. Moreover, Defendants expressly accepted the Premises in an "as-is" condition.

1. Condition of Premises. **Lessee hereby accepts the Premises in "as-is" condition** with any additional alterations and improvements to be completed at Lessee's expense and in accordance with Section 7 of Lease.

*See Motion Exs. 2 at ARV000026 and 3 at ARV000059, Section 1 of the Addendum (emphasis added).*

15. Defendants understand what it means to accept the Premises in an "as-is" condition.

Q. And in your mind what does it mean to accept the space as is?

**A. It means I will take it as it is, no problem, I'll take responsibility, that's what it means.**

*See Motion Ex. 1, 47:20-24.*

16. Defendants acknowledged that they conducted any necessary investigations as to the condition of the Premises and that Defendants were not relying upon any representations by Plaintiffs other than those set forth in the leases.

**2.4 Acknowledgements. Lessee acknowledges that: (a) it has been advised by Lessor and/or Brokers to satisfy itself with**

respect to the 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, (b) **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, and (c) **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.

*See* Motion Exs. 2 at ARV000003 and 3 at ARV000036, Section 2.4 (emphasis added).

17. Abandoning the Premises and failing to pay rent are breaches of the leases. *See* Motion Exs. 2 at ARV000015–16 and 3 at ARV000048–49 (Sections 13.6 and 23.1).

18. Right above Defendants' signature on the leases, in bold and capitalized text, the parties confirm that they:

**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.**

*See* Exs. 2 at ARV000020 and 3 at ARV000053 (emphasis in original).

19. Likewise, right above the Defendants' signature on the leases, in bold and capitalized text, the leases provide that:

**THE PARTIES ARE URGED TO:**

**1. SEEK 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.**

*See* Motion Exs. 2 at ARV000020 and 3 at ARV000053 (emphasis in original).

20. The Guaranties provide that “Guarantors hereby jointly, severally, unconditionally and irrevocably guarantee the prompt payment by Lessee of all rent and all other sums payable by Lessee under said Lease.” *See* Motion Exs. 2 at ARV000029 and 3 at ARV000062.

21. Defendants utilized the Premises until on or about May 8, 2018, when they vacated the Premises. *See* Motion Ex. 4 (Declaration of Kevin Donahoe). *See also* Motion Exs. 5 and 6 (ledgers for the Leases, reflecting all rent owed under the Leases, all payments made by Defendants under the Leases and the outstanding balance owed under the Leases).

#### **PROCEDURAL HISTORY**

22. On May 15, 2019, Plaintiffs commenced this breach of contract action by filing its Complaint against Defendants, seeking damages for Defendants’ early, unauthorized abandonment of Plaintiffs’ Premises, which resulted in a breach of the Leases and the Guaranties. *See* Complaint, dated May 15, 2019, on file herein.

23. On July 16, 2019, Defendants filed their Answer and Counterclaims, asserting that Plaintiffs had caused Defendants to be constructively evicted from the Premises based on Plaintiff’s alleged breach of the implied warranty of habitability (related to the purported “dust and debris” at the Premises and limited assigned parking spots), thereby excusing Defendants’ performance under the Leases. *See* Defendants’ Answer and Counterclaim, dated July 16, 2019, on file herein.

24. Following the close of discovery, Plaintiffs filed the underlying Motion for summary judgment on December 1, 2020. *See* Motion.

25. Defendants filed their Opposition to the Motion on December 17, 2020. *See* Opposition to Plaintiffs’ Motion for Summary Judgment Regarding Breach of Contract Claims, filed December 17, 2020, on file herein (the “Opposition”).

26. In their Opposition, Defendants cited no authority demonstrating that the implied warranty of habitability applies in the commercial lease context in Nevada, instead arguing that the Court could not decide this legal issue because there is no Nevada case law that squarely addresses that question. *Id.* Defendants also argued that the “as-is” clauses in the Leases were invalid. *Id.* at 15–18.

27. On January 5, 2021, Plaintiffs filed their Reply in support of their Motion for Summary Judgment. *See* Plaintiffs’ Reply in Support of Motion for Summary Judgment Regarding Breach of Contract Claims, filed January 5, 2021, on file herein.

**CONCLUSIONS OF LAW**

1. Summary judgment is appropriate under NRCP 56 and “shall be rendered forthwith” when the pleadings and other evidence properly before the court demonstrate that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029, 1031 (Nev. 2005) (quoting NRCP 56(c)); *Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349, 1353, 951 P.2d 1027, 1029 (1997).

2. “A breach-of-contract claim requires proof of a valid contract, performance or excuse of performance by the non-breaching party, breach by the defendant, and damages.” *Hosp. Int’l Grp. v. Gratitude Grp., LLC*, 387 P.3d 208 (Nev. 2016) (internal citations omitted).

3. In their Motion, Plaintiffs set forth adequate evidence and authority that Defendants breached the Leases and personal Guaranties:

- a. The Leases and Guaranties are valid, fully executed contracts. *See* Motion Ex. 2 (Unit C-23/24 Lease, Addendum and Guaranty); Motion Ex. 3 (Unit C-10/29 Lease, Addendum and Guaranty).
- b. Plaintiffs fully performed under the terms of the Leases and Guaranties. *See* Motion Ex. 4 (Declaration of Kevin Donahoe) (affirming that Defendants utilized the Premises pursuant to the Leases until May 8, 2018, when they vacated the Premises).
- c. Defendants breached the Leases and Guaranties by abandoning the Premises early, without authorization, and failing to pay all monthly rent payments due under the Leases. *Id.* *See also* Motion Exs. 2 at ARV000015–16 and 3 at ARV000048–49 (Sections 13.6 and 23.1 of the Leases); Motion Exs. 5 and 6 (ledgers reflecting all outstanding balances owed under the Leases).
- d. Plaintiffs incurred damages as a result of Defendants’ non-payment of rent

1 due and owing under the Leases and personal Guaranties. *Id.*

2 4. Defendants failed in their Opposition to cite evidence or authority demonstrating  
3 the existence of a genuine dispute of material fact for trial on the issue of whether Defendants  
4 breached the Leases and Guaranties, thereby relying solely on their constructive eviction theory to  
5 excuse their non-performance under the Leases and Guaranties. *See Wood*, 121 P.3d at 1030–31  
6 (“When a motion for summary judgment is made and supported as required by NRCP 56, the non-  
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9 quotations and citations omitted) (emphasis added).

10 5. In a summary judgment setting, the Court has the authority to rule on issues of law,  
11 such as whether the implied warranty of habitability applies in the commercial lease context in  
12 Nevada. *See Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 211 (2001) (acknowledging that  
13 it is the district court’s function to perceive and apply the law); *Branda v. Sanford*, 97 Nev. 643,  
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15 *Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat. Tr. & Sav. Ass’n*, 23 F. Supp. 2d  
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17 law or persuasive authority from other jurisdictions to dispose of Bank of America’s Motion for  
18 Summary Judgment.”). *See also* Reply at 5–6 (collecting cases).

19 6. Although the Nevada Supreme Court has not squarely addressed the issue, the  
20 weight of authority on the issue leads this Court to conclude that Nevada does not recognize an  
21 implied warranty of habitability in commercial leases. *Compare* NRS 118A (residential  
22 landlord/tenant statute, which contains an implied warranty of habitability provision, NRS  
23 118A.290) *with* NRS 118C (commercial landlord/tenant statute omitting any implied warranty of  
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Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009) (“Therefore, where the

1990) (citing 3A *Thompson on Real Property*, § 1230 (1981) (“Our review of the authorities reveals that the majority view, which we adopt, does not extend an implied warranty of habitability or fitness to commercial leases.”); 2 *Powell on Real Property*, § 233(2)(b) (1990) (implied warranty of habitability applies in almost all jurisdictions only to residential tenancies; commercial leases are excluded primarily on the rationale that the feature of unequal bargaining power justifying the imposition of the warranty in residential leases is not present in commercial transactions); 49 Am.Jur.2d *Landlord and Tenant* § 768 (1970) (no implied warranty of fitness for commercial premises); Annotation, *Modern Status of Rules as to Existence to Implied Warranty of Habitability or Fitness for use of Leased Premises*, 40 A.L.R. 3d 646, 650 (1971); Restatement (Second) of Property, Landlord and Tenant, § 5.1 Caveat and Comment (1977); *Teller v. McCoy*, 162 W. Va. 367, 380 (1978)) (“Most jurisdictions have expressly or impliedly refused to extend the implied warranty of habitability into commercial leases.”); *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Development, LLC*, 130 Nev. 834 (2014) (basing constructive eviction analysis on commercial landlord’s express duties under the lease, rather than any implied warranties); *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008) (same); *Las Vegas Oriental, Inc. v. Sabella's of Nevada, Inc.*, 97 Nev. 311, 312, 630 P.2d 255 (1981) (same).

7. Even if Nevada did recognize an implied warranty of habitability in commercial leases, any implied warranty of habitability was waived by the “as-is” clauses in the Leases.

8. Because the implied warranty of habitability is not recognized in commercial leases in Nevada, Defendants cannot prevail and Plaintiffs are entitled to judgment as a matter of law.

Based on the foregoing, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs’ Motion is GRANTED in its entirety;

IT IS FURTHER ORDERED that separate Judgment shall issue.

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Legislature has, for example, explicitly applied a rule to one type of proceeding, this court will presume it deliberately excluded the rule’s application to other types of proceedings.”).

HOLLEY DRIGGS

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IT IS SO ORDERED.

Dated this 28th day of January, 2021



7EA 642 F3CB C7CE  
Veronica M. Barisich  
District Court Judge

Respectfully submitted by:

Approved as to form and content by:

**HOLLEY DRIGGS**

**BLACK & WADHAMS**

/s/ F. Thomas Edwards  
F. THOMAS EDWARDS, ESQ. (NBN 9549)  
JESSICA M. LUJAN, ESQ. (NBN 14913)  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

Refused to sign  
RUSTY GRAF, ESQ. (NBN 6322)  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

*Attorneys for Plaintiffs/Counter-defendants*

*Attorneys for Defendants/Counterclaimants*

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 4520 Arville, Plaintiff(s)

CASE NO: A-19-794864-C

7 vs.

DEPT. NO. Department 5

8 Bour Enterprises LLC,  
9 Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District  
13 Court. The foregoing Order Granting Motion was served via the court's electronic eFile  
system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 1/28/2021

15 Tom Edwards, Esq.

tedwards@nevadafirm.com

16 BRENT CARSON

bac@winnercarson.com

17 Diane Meeter

dmeeter@blacklobello.law

18 J. Graf

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19 Sandra Sell

ssell@nevadafirm.com

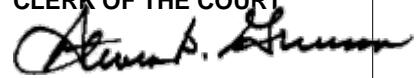
20 Jessica Lujan

jlujan@nevadafirm.com

21  
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# **EXHIBIT 10**



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Facsimile: 702/791-1912

*Attorneys for Plaintiffs/Counterdefendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 8

**NOTICE OF ENTRY OF ORDER**

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///

HOLLEY DRIGGS

YOU, and each of you, will please take notice that an Order Granting Plaintiffs' Motion for Summary Judgment in the above entitled matter was filed and entered by the Clerk of the above-entitled Court on the 28th day of January, 2021, a copy of which is attached hereto.

Dated this 28<sup>th</sup> day of January, 2021.

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards

F. Thomas Edwards, Esq. (NBN 9549)

Jessica M. Lujan, Esq. (NBN 14913)

400 S. Fourth Street, Third Floor

Las Vegas, NV 89101

*Attorney for Plaintiffs/Counter-defendants*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs and that on this 28th day of January, 2021, I did cause a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER**, to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System:

Rusty Graf, Esq.  
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10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

Brent Carson, Esq.  
WINNER & CARSON  
7935 W. Sahara Ave., Suite 101  
Las Vegas, NV 89117

/s/ Sandy Sell

An employee of HOLLEY DRIGGS

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*Attorneys for Plaintiffs/Counter-defendants*

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v.

4520 ARVILLE, a California general  
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Case No: A-19-794864-C  
Dept. No.: 5

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

**Date of Hearing: January 12, 2021**  
**Time of Hearing: 9:30 a.m.**

This matter came before the Court via telephonic hearing on January 12, 2021 at 9:30 a.m.  
upon Plaintiffs/Counter-defendants 4520 Arville, a California general partnership; and McKinley  
Manor, an Idaho general partnership's (collectively "Plaintiffs"), Motion for Summary Judgment

1 on their Breach of Contract Claims (the “Motion”), the Honorable Michael Cherry presiding. F.  
2 Thomas Edwards, Esq. appeared on behalf of Plaintiffs, and Rusty Graf, Esq. appeared on behalf  
3 of Defendants/Counterclaimants Bour Enterprises, LLC, a Nevada limited liability company;  
4 Mulugeta Bour; and Hilena Mengesha (collectively “Defendants”).

5 The Court, having heard the arguments of counsel and having considered the papers and  
6 pleadings on file herein, and good cause appearing therefor, hereby enters the following findings  
7 of fact and conclusions of law. To the extent any finding of fact should properly be designated a  
8 conclusion of law, it shall be deemed a conclusion of law. To the extent any conclusion of law  
9 should properly be designated a finding of fact, it shall be deemed a finding of fact.

10 **FINDINGS OF FACT**

11 1. This action arises out of Defendants’ early, unauthorized abandonment of their  
12 commercial leases of Plaintiffs’ warehouse space located at 4560 S. Arville St., C-10, 23, 24, and  
13 29, Las Vegas, NV 89103 (the “Premises”), which resulted in a breach of the Leases and the  
14 individual Defendants’ personal guaranties thereof (the “Guaranties”). *See* Complaint, dated May  
15 15, 2019, on file herein.

16 2. In July of 2015, Defendants started to manage Stardust Limousine, which was  
17 operating out of unit C-23/24 at the Premises. *See* Motion Ex. 1 (excerpts of deposition transcript  
18 of NRCP 30(b)(6) Designee of Bour Enterprises, LLC, 15:20-25, 16:1-5).

19 3. Later in 2015, Defendants purchased Stardust Limousine and continued to operate  
20 the business out of Suite C-23/24 at the Premises under the existing Stardust Limousine lease. *See*  
21 Motion Ex. 1, 15:2-5.

22 4. Because Defendants were operating the business out of unit C-23/24 at the  
23 Premises, Defendants were aware of the condition of the Premises. *See* Motion Ex. 1, 23:1-12.

24 5. When Defendants complained about the condition of the Premises, the Plaintiffs  
25 explained that Stardust Limousine leased the Premises in an “as-is” condition. *See* Motion Ex. 1,  
26 23:14-23.

6. Defendants also complained that they wanted additional parking, despite the fact that Defendants understood that each warehouse unit was assigned only a few parking spaces. *See* Motion Ex. 1, 26:6-19, 27:20-28:6.

7. In 2017, Plaintiffs requested that Defendants sign a new lease, as opposed to continuing to operate under the Stardust Limousine lease. *See* Motion Ex. 1, 24:16-21.

8. On or about April 20, 2017, Defendants signed a new lease for unit C-23/24 at the Premises and a related personal guaranty. *See* Motion Ex. 2 (Unit C-23/24 Lease, Addendum and Guaranty). *See also* Motion Ex. 1, 45:6-46:1; 50:25-51:5.

9. At or about the same time, to alleviate Defendants' concern about parking, Plaintiffs recommended that Defendants lease an additional warehouse unit, which would provide an additional number of parking spaces and additional room to park vehicles inside the new warehouse unit. *See* Motion Ex. 1, 27:20-28:6.

10. Defendants agreed and on or about April 20, 2017, signed an additional lease for unit C-10/29. *See* Motion Ex. 3 (Unit C-10/29 Lease, Addendum and Guaranty). *See also* Motion Ex. 1, 57:14-58:11; 60:1-6.

11. The terms of the leases are nearly identical. *See* Motion Exs. 2 and 3.

12. For example, the first pages of the leases provide that Defendants are entitled to four (4) unreserved parking spaces, for a total of eight (8) spaces between the leases:

**1.2(b) Parking:** Four (4) unreserved vehicle parking spaces ("Unreserved Parking Spaces"); and n/a reserved vehicle parking spaces ("Reserved Parking Spaces").

*See* Motion Exs. 2 at ARV000001 and 3 at ARV000034.

13. Section 7.1(a) of the leases expressly provides that Defendants are responsible for all maintenance of the Premises.

**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.

*See Motion Exs. 2 at ARV000007 and 3 at ARV000040, Section 7.1(a) (emphasis added).*

14. Moreover, Defendants expressly accepted the Premises in an "as-is" condition.

1. Condition of Premises. **Lessee hereby accepts the Premises in "as-is" condition** with any additional alterations and improvements to be completed at Lessee's expense and in accordance with Section 7 of Lease.

*See Motion Exs. 2 at ARV000026 and 3 at ARV000059, Section 1 of the Addendum (emphasis added).*

15. Defendants understand what it means to accept the Premises in an "as-is" condition.

Q. And in your mind what does it mean to accept the space as is?

**A. It means I will take it as it is, no problem, I'll take responsibility, that's what it means.**

*See Motion Ex. 1, 47:20-24.*

16. Defendants acknowledged that they conducted any necessary investigations as to the condition of the Premises and that Defendants were not relying upon any representations by Plaintiffs other than those set forth in the leases.

**2.4 Acknowledgements. Lessee acknowledges that: (a) it has been advised by Lessor and/or Brokers to satisfy itself with**

respect to the 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, (b) **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, and (c) **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.

*See* Motion Exs. 2 at ARV000003 and 3 at ARV000036, Section 2.4 (emphasis added).

17. Abandoning the Premises and failing to pay rent are breaches of the leases. *See* Motion Exs. 2 at ARV000015–16 and 3 at ARV000048–49 (Sections 13.6 and 23.1).

18. Right above Defendants' signature on the leases, in bold and capitalized text, the parties confirm that they:

**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.**

*See* Exs. 2 at ARV000020 and 3 at ARV000053 (emphasis in original).

19. Likewise, right above the Defendants' signature on the leases, in bold and capitalized text, the leases provide that:

**THE PARTIES ARE URGED TO:**

**1. SEEK 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.**

*See* Motion Exs. 2 at ARV000020 and 3 at ARV000053 (emphasis in original).



20. The Guaranties provide that “Guarantors hereby jointly, severally, unconditionally and irrevocably guarantee the prompt payment by Lessee of all rent and all other sums payable by Lessee under said Lease.” *See* Motion Exs. 2 at ARV000029 and 3 at ARV000062.

21. Defendants utilized the Premises until on or about May 8, 2018, when they vacated the Premises. *See* Motion Ex. 4 (Declaration of Kevin Donahoe). *See also* Motion Exs. 5 and 6 (ledgers for the Leases, reflecting all rent owed under the Leases, all payments made by Defendants under the Leases and the outstanding balance owed under the Leases).

#### **PROCEDURAL HISTORY**

22. On May 15, 2019, Plaintiffs commenced this breach of contract action by filing its Complaint against Defendants, seeking damages for Defendants’ early, unauthorized abandonment of Plaintiffs’ Premises, which resulted in a breach of the Leases and the Guaranties. *See* Complaint, dated May 15, 2019, on file herein.

23. On July 16, 2019, Defendants filed their Answer and Counterclaims, asserting that Plaintiffs had caused Defendants to be constructively evicted from the Premises based on Plaintiff’s alleged breach of the implied warranty of habitability (related to the purported “dust and debris” at the Premises and limited assigned parking spots), thereby excusing Defendants’ performance under the Leases. *See* Defendants’ Answer and Counterclaim, dated July 16, 2019, on file herein.

24. Following the close of discovery, Plaintiffs filed the underlying Motion for summary judgment on December 1, 2020. *See* Motion.

25. Defendants filed their Opposition to the Motion on December 17, 2020. *See* Opposition to Plaintiffs’ Motion for Summary Judgment Regarding Breach of Contract Claims, filed December 17, 2020, on file herein (the “Opposition”).

26. In their Opposition, Defendants cited no authority demonstrating that the implied warranty of habitability applies in the commercial lease context in Nevada, instead arguing that the Court could not decide this legal issue because there is no Nevada case law that squarely addresses that question. *Id.* Defendants also argued that the “as-is” clauses in the Leases were invalid. *Id.* at 15–18.

27. On January 5, 2021, Plaintiffs filed their Reply in support of their Motion for Summary Judgment. *See* Plaintiffs’ Reply in Support of Motion for Summary Judgment Regarding Breach of Contract Claims, filed January 5, 2021, on file herein.

**CONCLUSIONS OF LAW**

1. Summary judgment is appropriate under NRCP 56 and “shall be rendered forthwith” when the pleadings and other evidence properly before the court demonstrate that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029, 1031 (Nev. 2005) (quoting NRCP 56(c)); *Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349, 1353, 951 P.2d 1027, 1029 (1997).

2. “A breach-of-contract claim requires proof of a valid contract, performance or excuse of performance by the non-breaching party, breach by the defendant, and damages.” *Hosp. Int’l Grp. v. Gratitude Grp., LLC*, 387 P.3d 208 (Nev. 2016) (internal citations omitted).

3. In their Motion, Plaintiffs set forth adequate evidence and authority that Defendants breached the Leases and personal Guaranties:

- a. The Leases and Guaranties are valid, fully executed contracts. *See* Motion Ex. 2 (Unit C-23/24 Lease, Addendum and Guaranty); Motion Ex. 3 (Unit C-10/29 Lease, Addendum and Guaranty).
- b. Plaintiffs fully performed under the terms of the Leases and Guaranties. *See* Motion Ex. 4 (Declaration of Kevin Donahoe) (affirming that Defendants utilized the Premises pursuant to the Leases until May 8, 2018, when they vacated the Premises).
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- d. Plaintiffs incurred damages as a result of Defendants’ non-payment of rent

1 due and owing under the Leases and personal Guaranties. *Id.*

2 4. Defendants failed in their Opposition to cite evidence or authority demonstrating  
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10 5. In a summary judgment setting, the Court has the authority to rule on issues of law,  
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19 6. Although the Nevada Supreme Court has not squarely addressed the issue, the  
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exclusion of another.”) (internal alterations and quotation marks omitted); *Sonia F. v. Eighth  
Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009) (“Therefore, where the

1990) (citing 3A *Thompson on Real Property*, § 1230 (1981) (“Our review of the authorities reveals that the majority view, which we adopt, does not extend an implied warranty of habitability or fitness to commercial leases.”); 2 *Powell on Real Property*, § 233(2)(b) (1990) (implied warranty of habitability applies in almost all jurisdictions only to residential tenancies; commercial leases are excluded primarily on the rationale that the feature of unequal bargaining power justifying the imposition of the warranty in residential leases is not present in commercial transactions); 49 Am.Jur.2d *Landlord and Tenant* § 768 (1970) (no implied warranty of fitness for commercial premises); Annotation, *Modern Status of Rules as to Existence to Implied Warranty of Habitability or Fitness for use of Leased Premises*, 40 A.L.R. 3d 646, 650 (1971); Restatement (Second) of Property, Landlord and Tenant, § 5.1 Caveat and Comment (1977); *Teller v. McCoy*, 162 W. Va. 367, 380 (1978)) (“Most jurisdictions have expressly or impliedly refused to extend the implied warranty of habitability into commercial leases.”); *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Development, LLC*, 130 Nev. 834 (2014) (basing constructive eviction analysis on commercial landlord’s express duties under the lease, rather than any implied warranties); *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008) (same); *Las Vegas Oriental, Inc. v. Sabella's of Nevada, Inc.*, 97 Nev. 311, 312, 630 P.2d 255 (1981) (same).

7. Even if Nevada did recognize an implied warranty of habitability in commercial leases, any implied warranty of habitability was waived by the “as-is” clauses in the Leases.

8. Because the implied warranty of habitability is not recognized in commercial leases in Nevada, Defendants cannot prevail and Plaintiffs are entitled to judgment as a matter of law.

Based on the foregoing, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs’ Motion is GRANTED in its entirety;

IT IS FURTHER ORDERED that separate Judgment shall issue.

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Legislature has, for example, explicitly applied a rule to one type of proceeding, this court will presume it deliberately excluded the rule’s application to other types of proceedings.”).

HOLLEY DRIGGS

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IT IS SO ORDERED.

Dated this 28th day of January, 2021



7EA 642 F3CB C7CE  
Veronica M. Barisich  
District Court Judge

Respectfully submitted by:

Approved as to form and content by:

**HOLLEY DRIGGS**

**BLACK & WADHAMS**

/s/ F. Thomas Edwards  
F. THOMAS EDWARDS, ESQ. (NBN 9549)  
JESSICA M. LUJAN, ESQ. (NBN 14913)  
400 South Fourth Street, Third Floor  
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Refused to sign  
RUSTY GRAF, ESQ. (NBN 6322)  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

*Attorneys for Plaintiffs/Counter-defendants*

*Attorneys for Defendants/Counterclaimants*

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 4520 Arville, Plaintiff(s)

CASE NO: A-19-794864-C

7 vs.

DEPT. NO. Department 5

8 Bour Enterprises LLC,  
9 Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District  
13 Court. The foregoing Order Granting Motion was served via the court's electronic eFile  
system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 1/28/2021

15 Tom Edwards, Esq.

tedwards@nevadafirm.com

16 BRENT CARSON

bac@winnercarson.com

17 Diane Meeter

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18 J. Graf

Rgraf@blacklobello.law

19 Sandra Sell

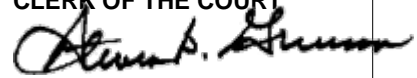
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20 Jessica Lujan

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# **EXHIBIT 11**



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*Attorneys for Plaintiffs/Counterdefendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 5

**HEARING REQUESTED**

**PLAINTIFFS' MOTION FOR ENTRY OF  
JUDGMENT**

Plaintiffs/Counterdefendants, 4520 Arville, a California general partnership; and  
McKinley Manor, an Idaho general partnership (collectively "Plaintiffs"), by and through their  
attorneys of record, the law firm of Holley Driggs, hereby submit this motion for entry of Judgment



in favor of Plaintiffs in accordance with the Court’s January 28, 2021 Order Granting Plaintiffs’ Motion for Summary Judgment. In its Order, the Court expressly held that Plaintiffs had proved the essential elements of their claims for breach of contract, including damages. Because Defendants failed to present any admissible evidence or viable legal arguments in opposition to Plaintiffs’ Motion for Summary Judgment, there are no procedural grounds upon which to proceed to a bench trial. Accordingly, all that is left to be done in this action is to enter Judgment in accordance with the evidence of Plaintiffs’ damages, which was submitted with Plaintiffs’ Motion for Summary Judgment, and which is accurately represented in the proposed Judgment attached hereto.

This Motion is made and based upon the papers and pleadings on file herein, the following points and authorities, the proposed Judgment attached hereto at **Exhibit 1**, and any oral argument at the hearing on this matter.

Dated this 10th day of February, 2021.

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards  
F. THOMAS EDWARDS, ESQ.  
Nevada Bar No. 9549  
JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

*Attorneys for Plaintiffs/Counterdefendants*

1                                    **MEMORANDUM OF POINTS AND AUTHORITIES**

2                                    **I.        INTRODUCTION AND BACKGROUND**

3                    On January 12, 2021, the parties came before the Court for a hearing on Plaintiffs' Motion  
4                    for Summary Judgment (the "SJ Motion") related to Defendants' early, unauthorized abandonment  
5                    of their leases of Plaintiffs' commercial warehouse space (the "Premises"), which resulted in a  
6                    breach of the leases ("Leases") and Defendants' individual guaranties thereof ("Guaranties"). *See*  
7                    Order Granting Plaintiffs' Motion for Summary Judgment at 1, dated January 28, 2021, on file  
8                    herein (the "Order Granting SJ"). The Honorable Justice Michael Cherry presided over the hearing.  
9                    *See id.* at 2.

10                  Having considered the briefing and evidence submitted by the parties and the oral argument  
11                  presented by counsel at the hearing, the Court held that "Plaintiffs set forth adequate evidence and  
12                  authority that Defendants breached the Leases and personal Guaranties[.]" *Id.* at 7, ¶ 3. Notably,  
13                  this holding included a finding that "*Plaintiffs incurred damages as a result of Defendants' non-*  
14                  *payment of rent due and owing under the Leases and personal Guaranties.*" *Id.* at 7–8, ¶ 3(d)  
15                  (emphasis added). The Court's Order Granting SJ also cites the various items of evidence Plaintiffs  
16                  attached to their SJ Motion to support their damages, including the Leases, Guaranties, and ledgers  
17                  reflecting all charges under the Leases, all payments made by Defendants under the Leases and  
18                  the outstanding balances owed thereunder (the "Tenant Ledgers"). *Id.* at 3–6 ¶¶ 8, 10 (the Leases  
19                  and Guaranties), ¶ 21 (the Tenant Ledgers). *See also* SJ Motion Exhs. 2–3, 5–6.

20                  Critically, the Court held that "Defendants failed in their Opposition to cite evidence or  
21                  authority demonstrating the existence of a genuine dispute of material fact for trial on the issue of  
22                  whether Defendants breached the Leases and Guaranties, thereby relying *solely* on their  
23                  constructive eviction theory to excuse their non-performance under the Leases and Guaranties."  
24                  Order Granting SJ at 8, ¶ 4 (emphasis added) (citation omitted). A review of Defendants' summary  
25                  judgment Opposition (the "SJ Opposition") confirms the same—no other affirmative defenses or  
26                  disputes were presented. *See* SJ Opposition, dated December 17, 2020, on file herein. "Because  
27                  the implied warranty of habitability is not recognized in commercial leases in Nevada," the Court  
28                  held that "Defendants cannot prevail and Plaintiffs are entitled to judgment as a matter of law."

1 Order Granting SJ at 9, ¶ 8. In other words, the Court held that Nevada law did not support  
2 Defendants' *only* defense raised in response to Plaintiffs' SJ Motion. Accordingly, the Court  
3 granted summary judgment in favor of Plaintiffs and directed that "separate Judgment shall issue."  
4 Order Granting SJ at 9.

5 Despite these clear mandates from the Court, Defendants have twice objected to Plaintiffs'  
6 submission of a proposed Judgment in this action on the grounds that "they have plead affirmative  
7 defenses *not addressed in the Motion for summary Judgment*, including and not limited to  
8 Plaintiffs' failure to mitigate or take reasonable steps to release the property" and have promised  
9 to address their objection in a motion to the Court, which has yet to be filed.<sup>1</sup> See Emails from R.  
10 Graf, Esq. to the Court, dated January 29 and February 2, 2021, attached hereto as **Exhibit 2**  
11 (emphasis added).

12 The parties appeared at a pre-trial conference before the Court on February 9, 2021, where  
13 the Court instructed that the parties shall proceed to a bench trial in April unless the dispute  
14 regarding the propriety of trial and issuance of Judgment can be resolved prior to the April trial  
15 date. Thus, Plaintiffs now move for entry of Judgment on the grounds that (1) Plaintiffs' SJ Motion  
16 attached/cited sufficient evidence to support their breach of contract claims, *including* the element  
17 of damages, as recognized by the Court's Order Granting SJ; (2) by failing to raise any arguments  
18 or objections related to damages in their SJ Opposition, Defendants have waived the same and are  
19 thus not entitled to proceed to trial; and (3) there is no practical or procedural reason to proceed to  
20 trial, as Plaintiffs have submitted all pertinent evidence and Defendants are procedurally barred  
21 from submitting any additional evidence.

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25  
26 <sup>1</sup> Plaintiffs' first proposed Judgment was rejected by the Court because it did not include an  
27 adequate explanation of where the damages calculation came from. See Email from the Court,  
28 dated February 2, 2021, attached hereto as **Exhibit 3**. Accordingly, Plaintiffs submitted their  
second proposed Judgment later that day, which was revised to include citations to the relevant SJ  
Motion exhibits supporting Plaintiffs' damages calculation. See Email submission of second  
proposed Judgment, dated February 2, 2021, attached hereto as **Exhibit 4**.

## II. LEGAL ARGUMENT

### A. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT WAS GRANTED BECAUSE IT PROVED ALL ESSENTIAL ELEMENTS OF THE BREACH OF CONTRACT CLAIM—INCLUDING DAMAGES

“A breach-of-contract claim requires proof of a valid contract, performance or excuse of performance by the non-breaching party, breach by the defendant, ***and damages***.” *Hosp. Int’l Grp. v. Gratitude Grp., LLC*, 387 P.3d 208 (Nev. 2016) (internal citations omitted) (emphasis added). The Court’s Order Granting SJ confirms that Plaintiffs’ SJ Motion “set forth adequate evidence and authority that Defendants breached the Leases and personal Guaranties”, which necessarily includes the element of damages. Order Granting SJ at 7–8, ¶ 3(a)-(d). The order even references the exhibits Plaintiffs attached to their SJ Motion in support of their damages:

- a. The Leases and Guaranties are valid, fully executed contracts. *See* Motion Ex. 2 (Unit C-23/24 Lease, Addendum and Guaranty); Motion Ex. 3 (Unit C-10/29 Lease, Addendum and Guaranty).
- b. Plaintiffs fully performed under the terms of the Leases and Guaranties. *See* Motion Ex. 4 (Declaration of Kevin Donahoe) (affirming that Defendants utilized the Premises pursuant to the Leases until May 8, 2018, when they vacated the Premises).
- c. Defendants breached the Leases and Guaranties by abandoning the Premises early, without authorization, and ***failing to pay all monthly rent payments due under the Leases***. *Id.* *See also* Motion Exs. 2 at ARV000015–16 and 3 at ARV000048–49 (Sections 13.6 and 23.1 of the Leases); **Motion Exs. 5 and 6 (ledgers reflecting all outstanding balances owed under the Leases)**.
- d. ***Plaintiffs incurred damages as a result of Defendants’ non-payment of rent due and owing under the Leases and personal Guaranties. Id.***

*Id.* (emphasis added).

Moreover, the Court held that “Defendants failed in their Opposition to cite evidence or authority demonstrating the existence of a genuine dispute of material fact for trial on the issue of whether Defendants breached the Leases and Guaranties, thereby relying solely on their constructive eviction theory to excuse their non-performance under the Leases and Guaranties.” Order Granting SJ at 8, ¶ 4 (emphasis added) (citation omitted). *See also* SJ Opposition. Therefore, because Plaintiffs set forth evidence to support every element of their claims for breach of contract,

1 and because Defendants did not counter this showing with evidence or authority negating any  
2 essential elements (including the element of damages), the Court granted summary judgment in  
3 favor of Plaintiffs and ordered that separate Judgment shall issue.

4 In accordance with the Court's Order, Plaintiffs have prepared a proposed Judgment that  
5 sets forth Plaintiffs' damages as supported by the evidence, which includes specific citations to  
6 the evidence attached to Plaintiffs' SJ Motion. *See* Ex. 1. The evidence Plaintiffs rely upon to  
7 support their damages calculation is as follows:

- 8 ➤ The Defendants' Leases of Units C-23/24 and Units C-10/29, which are attached to  
9 the SJ Motion as Exs. 2–3.
  - 10 ○ The provisions of Section 1 of the Leases set forth the term, base rent, and  
11 other monthly charges due under the Leases. *See* SJ Motion Exs. 2–3 at 1  
12 (Sections 1.3–1.7).
  - 13 ○ Section 13.4 of the Leases provide for late charges resulting from late  
14 payment (or non-payment) of rent. *Id.* at 14 (Section 13.4).
  - 15 ○ Section 13.5 of the Leases set forth the rate of interest to be imposed on any  
16 late payments under the Leases, which is based in part on the Wall Street  
17 Journal prime interest rate. *Id.* at 14–15 (Section 13.5).
- 18 ➤ The individual Defendants' personal Guaranties, which are attached at the end of  
19 SJ Motion Exs. 2–3 (ARV000029–30, ARV000062–63). The Guaranties confirm  
20 that the individual Defendants should be held jointly and severally liable for the  
21 Judgment.
- 22 ➤ The Tenant Ledgers, which are attached to the SJ Motion as Exs. 5–6. The Tenant  
23 Ledgers provide a detailed computation of all charges under the Leases, all  
24 payments made by Defendants and the outstanding balances due under the Leases  
25 and Guaranties.

26 Defendants have not challenged the accuracy or authenticity of this evidence and have  
27 therefore waived their right to do so. *See* SJ Opposition. *See also* Section B, *infra*. Thus, taking all  
28 the evidence together, Plaintiffs' damages can be easily and accurately calculated, including the

principal amounts owed by Defendants, as well as the contractually agreed upon interest that accrues on such principal amounts. These sums are broken down by category in the proposed Judgment attached hereto as Ex. 1. As will be discussed, Defendants have waived any right to object to Plaintiffs' damages by failing to do so at summary judgment. Therefore, there is no reason for the Court to delay entering Judgment in favor of Plaintiffs.

**B. DEFENDANTS HAVE WAIVED ANY ARGUMENTS WITH RESPECT TO THE SUM OF PLAINTIFFS' DAMAGES BY FAILING TO RAISE SUCH ARGUMENTS AT SUMMARY JUDGMENT**

Defendants have objected to entry of Judgment in this action on the grounds that they "have plead affirmative defenses not addressed in the Motion for summary Judgment, including and not limited to Plaintiffs' failure to mitigate or take reasonable steps to release the property". *See* Ex 2 (Emails from R. Graf, Esq. to the Court).<sup>2</sup> As the Court recognized in its Order Granting SJ, however, Defendants did not lodge any defenses or objections to Plaintiffs' request for summary judgment other than their failed argument regarding constructive eviction and the implied warranty of habitability. *See* Order Granting SJ at 8, ¶ 4; SJ Opposition. Having failed to dispute the straightforward documentary evidence supporting Plaintiffs' damages, all of which was attached to the SJ Motion, or otherwise raise their purported affirmative defenses in their SJ Opposition, Defendants have waived their right to proceed to trial in this matter. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1030–31 (Nev. 2005) ("When a motion for summary judgment is made and supported as required by NRCP 56, the nonmoving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth *specific facts* demonstrating the existence of a genuine factual issue.") (internal quotations and citations omitted) (emphasis added).

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<sup>2</sup> If Defendants wanted to assert that Plaintiffs failed to reasonably mitigate their damages, Defendants bear the burden of proof on the issue and were required to attach any such evidence to their SJ Opposition. *Conner v. S. Nevada Paving, Inc.*, 103 Nev. 353, 355, 741 P.2d 800, 801 (1987) ("the burden of proving failure to mitigate is on the breaching party") (citing *Cobb v. Osman*, 83 Nev. 415, 422, 433 P.2d 259, 263 (1967)).

1 Indeed, the Nevada Supreme Court has adopted the general rule that a point not raised at  
2 summary judgment “is deemed to have been waived and will not be considered . . .” *Schuck v.*  
3 *Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (internal  
4 quotations omitted) (citing *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983  
5 (1981)). For example, in *Schuck*, the district court granted summary judgment in favor of the  
6 defendant on Schuck’s property damage claims, finding that Schuck failed to attach and cite  
7 adequate evidence to defeat the defendant’s summary judgment motion. *Id.* at 435–36. On appeal,  
8 Schuck attempted to raise new arguments he had not previously presented in opposition to  
9 summary judgment. *Id.* at 437.

10 The Court rejected these new arguments, explaining:

11 The gist of a summary judgment motion is to require the adverse party to show that  
12 it has a claim or defense, *and has evidence sufficient to allow a jury to find in its*  
13 *favor on that claim or defense.* The opposition sets it out, and then the *movant has*  
14 *a fair chance in its reply papers to show why the respondent’s evidence fails to*  
15 *establish a genuine issue of material fact.*

16 *Id.* at 439 (citing *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir.  
17 2001)) (emphasis added). Thus, the Court found that the defendant had “filed a properly supported  
18 motion for summary judgment that showed why, both factually and legally, [the defendant] should  
19 prevail”, but “Schuck did not offer or identify competent evidence to contradict or cast doubt on  
20 the facts [the defendant] identified as undisputed.” *Id.* at 438. “On this record, summary judgment  
21 in favor of [the defendant] was appropriate”. *Id.*

22 Here, Defendants admit that they are objecting to entry of Judgment on grounds not raised  
23 at summary judgment. *See* Ex. 2. As in *Schuck*, Defendants have waived any such arguments or  
24 defenses. If Defendants had any viable affirmative defenses or objections to Plaintiffs’ evidence  
25 of damages (which they do not), it was Defendants’ responsibility to present those defenses or  
26 objections in their SJ Opposition. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1030–31 (Nev. 2005).  
27 Because they failed to do so, entry of Judgment in conformance with Plaintiffs’ evidence of  
28 damages is appropriate, as there are no issues of fact left for trial.

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**C. THERE IS NEITHER A PROCEDURAL BASIS NOR ANY PRACTICAL REASON TO PROCEED TO TRIAL IN THIS ACTION, AS ALL RELEVANT AND ADMISSIBLE EVIDENCE HAS ALREADY BEEN PRESENTED TO THE COURT**

Summary judgment is appropriate under NRCP 56 and “shall be rendered forthwith” when the pleadings and other evidence properly before the court demonstrate that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029, 1031 (Nev. 2005) (*quoting* NRCP 56(c)). Because Plaintiffs have already laid all their evidence of damages properly before the Court and Defendants failed in their SJ Opposition to create a genuine dispute of material fact for trial (and are now procedurally barred from submitting any new evidence or defenses) there is no procedural basis to proceed to trial.

Nor is there any practical reason to do so. At trial, Plaintiffs would only present the same evidence to support their damages that they attached to their SJ Motion. The single exhibit attached to Defendants’ SJ Opposition does nothing to counter Plaintiffs’ evidence of damages. Because Defendants have waived any arguments or objections not previously raised, and may not present new evidence not previously disclosed during discovery, there is nothing that Defendants could present at a bench trial that would negate the calculation of Plaintiffs’ damages as set forth in the attached proposed Judgment. *See* NRCP 37(c)(1) (“If a party fails to provide information or identify a witness as required by Rule 16.1(a)(1), 16.2(d) or (e), 16.205(d) or (e), or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”). The Nevada Supreme Court has made clear that “trial by ambush will not be tolerated.” *Pierce Lathing Co. v. ISEC, Inc.*, 114 Nev. 291, 296, 956 P.2d 93, 96 (1998). Plaintiffs therefore respectfully request that the Court act in the best interest of judicial economy (and the limited time and resources of the parties), enter the proposed Judgment attached hereto at Exhibit 1 and vacate the trial.

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### III. CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court grant the instant motion and enter Judgment in Plaintiffs' favor and against Defendants, jointly and severally, as enumerated in the proposed Judgment attached hereto.

Dated this 10th day of February, 2021.

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards

F. THOMAS EDWARDS, ESQ.

Nevada Bar No. 9549

JESSICA M. LUJAN, ESQ.

Nevada Bar No. 14913

400 South Fourth Street, Third Floor

Las Vegas, Nevada 89101

*Attorneys for Plaintiffs/Counterdefendants*

HOLLEY DRIGGS

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs and that on this 10th day of February, 2021, I did cause a true and correct copy of the foregoing **PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT** to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System:

Rusty Graf, Esq.  
BLACK & LOBELLO  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

Brent Carson, Esq.  
WINNER & CARSON  
7935 W. Sahara Ave., Suite 101  
Las Vegas, NV 89117

/s/ Sandy Sell  
An employee of HOLLEY DRIGGS

# EXHIBIT 1



F. THOMAS EDWARDS, ESQ.  
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JESSICA M. LUJAN, ESQ.  
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Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
Facsimile: 702/791-1912

*Attorneys for Plaintiffs/Counter-defendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counter-defendants,

Case No: A-19-794864-C  
Dept. No.: 5

**JUDGMENT AGAINST DEFENDANTS  
BOUR ENTERPRISES, LLC,  
MULUGETA BOUR, AND HILENA  
MENGESHA**

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment is entered in  
favor of Plaintiffs 4520 Arville, a California general partnership, and McKinley Manor, an Idaho  
general partnership (together, "Plaintiffs") and against Defendants Bour Enterprises, LLC, a

Nevada limited liability company, Mulugeta Bour, and Hilena Mengesha (together, “Defendants”), jointly and severally, as follows:

1. As to the Lease of Units C-23/24, the principal sum of \$62,223.08 in outstanding rent, CAM charges and late fees (*see* Tenant Ledger, attached as Exhibit 5 to Plaintiffs’ Motion for Summary Judgment, filed 12/1/20 (the “Motion”));
2. As to the Lease of Units C-10/29, the principal sum of \$77,231.42 in outstanding rent, CAM charges and late fees (*see* Tenant Ledger, attached as Exhibit 6 to the Motion);
3. Pre-judgment interest at 9.5% (Wall Street Journal prime rate plus 4%, per Section 13.5 of the Leases, attached as Exhibits 2 and 3 to the Motion) since the expiration of the Leases on May 31, 2019 through January 28, 2021 in the amount of \$22,070.40;
4. Post-judgment interest at 9.5% (Wall Street Journal prime rate plus 4%, per Section 13.5 of the Leases, attached as Exhibits 2 and 3 to the Motion) in the amount of \$36.30 per day from January 28, 2021, until satisfied in full;
5. **For a total amount of \$161,524.90, plus post-judgment interest at \$36.30 per day from January 28, 2021, until satisfied in full.**

IT IS SO ORDERED.

Respectfully submitted by:

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards  
F. THOMAS EDWARDS, ESQ. (NBN 9549)  
JESSICA M. LUJAN, ESQ. (NBN 14913)  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

*Attorneys for Plaintiffs/Counter-defendants*

Approved as to form and content by:

**BLACK & WADHAMS**

Refused To Sign  
RUSTY GRAF, ESQ. (NBN 6322)  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

*Attorneys for Defendants/Counterclaimants*

# EXHIBIT 2



**Sandy Sell**

---

**Subject:** FW: A-19-794864-C - Judgment - 4520 Arville et al vs Bour Enterprises, LLC et al

---

**From:** Rusty Graf <rgraf@blackwadhamslaw.com>

**Sent:** Friday, January 29, 2021 5:10 PM

**To:** Sandy Sell <:ssell@nevadafirm.com>; DC5Inbox@ClarkCountyCourts.us; mosert@clarkcountycourts.us; Dept05LC@clarkcountycourts.us

**Cc:** Tom Edwards <tedwards@nevadafirm.com>; Jessica M. Lujan <jlujan@nevadafirm.com>; Rusty Graf <Rgraf@blacklobello.law>; Diane Meeter <dmeeter@blackwadhamslaw.com>

**Subject:** RE: A-19-794864-C - Judgment - 4520 Arville et al vs Bour Enterprises, LLC et al

Defendants object to the entry of Judgment as they have plead affirmative defenses not addressed in the Motion for summary Judgment, including and not limited to Plaintiffs' failure to mitigate or take reasonable steps to release the property.

Thank you.

Sent from [Mail](#) for Windows 10

---

**From:** [Sandy Sell](#)

**Sent:** Friday, January 29, 2021 5:07 PM

**To:** [DC5Inbox@ClarkCountyCourts.us](#); [mosert@clarkcountycourts.us](#); [Dept05LC@clarkcountycourts.us](#)

**Cc:** [Tom Edwards](#); [Jessica M. Lujan](#); [Rusty Graf](#); [Diane Meeter](#)

**Subject:** A-19-794864-C - Judgment - 4520 Arville et al vs Bour Enterprises, LLC et al

Good afternoon:

Please see the attached proposed Judgment Against Defendants Bour Enterprises, LLC; Mulegeta Bour and Hilena Mengesha from Plaintiffs for the above referenced matter. Opposing counsel, cc'd on this email, has refused to sign. No competing Judgment is expected.

Thank you.

**Sandy Sell**

Legal Assistant

Las Vegas Office

HOLLEY DRIGGS

---

Tel: 702.791.0308 | Fax: 702.791.1912  
400 S. 4<sup>th</sup> Street, Suite 300, Las Vegas NV 89101

Tel: 775.851.8700 | Fax: 775.851.7681  
800 S. Meadows Parkway, Suite 800, Reno NV 89521

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## Sandy Sell

---

**Subject:** FW: A-19-794864-C - Judgment - 4520 Arville et al vs Bour Enterprises, LLC et al

---

**From:** Rusty Graf <rgraf@blackwadhams.law>

**Sent:** Tuesday, February 2, 2021 4:14 PM

**To:** Moser, Tara <mosert@clarkcountycourts.us>

**Cc:** Sandy Sell <ssell@nevadafirm.com>; DC5Inbox <DC5Inbox@clarkcountycourts.us>; Lee, Han <Dept05LC@clarkcountycourts.us>; Tom Edwards <tedwards@nevadafirm.com>; Jessica M. Lujan <jlujan@nevadafirm.com>; Rusty Graf <rgraf@blacklobello.law>; Diane Meeter <dmeeter@blackwadhams.law>; Mark Lounsbury <mlounsbury@blackwadhams.law>

**Subject:** Re: A-19-794864-C - Judgment - 4520 Arville et al vs Bour Enterprises, LLC et al

No competing judgment is expected from the Defense, because We object to the entry of any judgment at this juncture. We will address the issue in a motion to the Court.

Sent from Rusty Graf's iPhone.

Please note my new email is: [rgraf@blackwadhams.law](mailto:rgraf@blackwadhams.law).

On Feb 2, 2021, at 4:11 PM, Moser, Tara <[mosert@clarkcountycourts.us](mailto:mosert@clarkcountycourts.us)> wrote:

Thank you.

Sincerely,

*Tara Moser*

Judicial Executive Assistant to Judge Veronica Barisich

Eighth Judicial District Court, Department 5

Phone: 702-671-4360

Fax: 702-671-4359

Email: [Mosert@clarkcountycourts.us](mailto:Mosert@clarkcountycourts.us)

---

**From:** Sandy Sell [<mailto:ssell@nevadafirm.com>]

**Sent:** Tuesday, February 2, 2021 4:10 PM

**To:** DC5Inbox; Moser, Tara; Lee, Han

**Cc:** Tom Edwards; Jessica M. Lujan; Rusty Graf; Diane Meeter

**Subject:** A-19-794864-C - Judgment - 4520 Arville et al vs Bour Enterprises, LLC et al

[NOTICE: This message originated outside of Eighth Judicial District Court -- DO NOT CLICK on links or open attachments unless you are sure the content is safe.]

Good afternoon:

Pursuant to the email we received this morning, please see the attached revised proposed Judgment Against Defendants Bour Enterprises, LLC; Mulegeta Bour and Hilena Mengesha from Plaintiffs for the above referenced matter. Opposing counsel is cc'd on this email. No competing Judgment is expected.

Thank you.



**Sandy Sell**  
Legal Assistant  
Las Vegas Office

<image001.png>

---

Tel: 702.791.0308 | Fax: 702.791.1912  
400 S. 4<sup>th</sup> Street, Suite 300, Las Vegas NV 89101

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---

# EXHIBIT 3



## Sandy Sell

---

**From:** NoReply@clarkcountycourts.us  
**Sent:** Tuesday, February 2, 2021 11:22 AM  
**To:** Sandy Sell  
**Subject:** Eighth Judicial District Court - Proposed Order Returned

A-19-794864-C - Judgment - 4520 Arville et al vs Bour Enterprises, LLC et al

Your proposed order or document requiring a judge's signature to the court has been returned for the following reason(s): Although the January 29, 2021 order indeed stated that a separate judgment will be issued, there is no explanation as to where the calculation came from. Thus, the court cannot verify where the judgment amount ordered is correct and thus, cannot sign this judgment at this time. Thank you.

# EXHIBIT 4



## Sandy Sell

---

**From:** Sandy Sell  
**Sent:** Tuesday, February 2, 2021 4:10 PM  
**To:** DC5Inbox@ClarkCountyCourts.us; mosert@clarkcountycourts.us;  
Dept05LC@clarkcountycourts.us  
**Cc:** Tom Edwards; Jessica M. Lujan; Rusty Graf; Diane Meeter  
**Subject:** A-19-794864-C - Judgment - 4520 Arville et al vs Bour Enterprises, LLC et al  
**Attachments:** Judgment Against Defendants Bour Enterprises, LLC Mulegeta Bour and Hilena Mengesha.pdf; Judgment Against Defendants.docx

Good afternoon:

Pursuant to the email we received this morning, please see the attached revised proposed Judgment Against Defendants Bour Enterprises, LLC; Mulegeta Bour and Hilena Mengesha from Plaintiffs for the above referenced matter. Opposing counsel is cc'd on this email. No competing Judgment is expected.

Thank you.

**Sandy Sell**  
Legal Assistant  
Las Vegas Office

HOLLEY DRIGGS

---

Tel: 702.791.0308 | Fax: 702.791.1912  
400 S. 4<sup>th</sup> Street, Suite 300, Las Vegas NV 89101

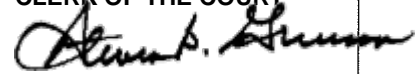
Tel: 775.851.8700 | Fax: 775.851.7681  
800 S. Meadows Parkway, Suite 800, Reno NV 89521

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---

# **EXHIBIT 12**



**OPPO**  
**BLACK & WADHAMS**  
Rusty Graf, Esq.  
Nevada Bar No. 6322  
10777 West Twain Avenue, Suite 300  
Las Vegas, Nevada 89135  
Ph. (702) 869-8801  
Fax (702) 869-2669  
[rgraf@blackwadhams.law](mailto:rgraf@blackwadhams.law)  
*Attorneys for Defendants/Counterclaimants*  
*Bour Enterprises, LLC, Mulugeta Bour and*  
*Hilena Mengesha*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants

v.

4520 ARVILLE, a California general partnership;  
MCKINLEY MANOR, an Idaho general  
partnership, DOES I-X; and ROE  
CORPORATIONS I-X;

Counter-Defendants,

Case No.: A-19-794864-C

Dept. No.: 8

**OPPOSITION TO PLAINTIFFS'  
MOTION FOR ENTRY OF JUDGMENT  
ON OST**

**Hearing Date: 03/02/21**

**Hearing Time: 9:00 AM**

COMES NOW Defendants/Counterclaimants Bour Enterprises, LLC (hereinafter “Bour”); Mulugeta Bour; and Hilena Mengesha (hereinafter collectively the “Defendants”), by and through their attorney of record, Rusty Graf, Esq., of the law firm of Black & Wadhams, and hereby file their Opposition to Plaintiffs/Counter-Defendants’ 4520 Arville and McKinley Manor (hereinafter collectively the “Plaintiffs”) Motion for Entry of Judgment on an Order Shortening Time. This Opposition is based upon the following Memorandum of Points and Authorities, the pleadings, and papers on file herein, and any argument entertained by the Court at the hearing of this matter.

Dated this 24<sup>th</sup> day of February 2021.

**BLACK & WADHAMS**

RUSTY GRAF, ESQ.  
Nevada Bar No. 6322  
10777 West Twain Avenue, Suite 300  
Las Vegas, Nevada 89135  
*Attorney for Defendants*

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**PERTINENT FACTUAL BACKGROUND**

As the Court is aware, this matter arises from two (2) lease agreements formed between Defendants and Plaintiffs for certain commercial properties commonly known as 4560 S. Arville St., C10, 23, 24 and 29, Las Vegas, NV 89103 (hereinafter the “Subject Properties”). Plaintiffs have alleged that Defendants breached those leases and subsequently brought their Complaint which asserted causes of action for: (1) breach of lease; (2) breach of guaranties; (3) breach of the implied covenant of good faith and fair dealing; (4) unjust enrichment; and (5) declaratory relief as to the validity and enforceability of the leases. *See Plaintiffs’ Complaint, Pg.3-5.* Defendants answered that Complaint and asserted both counterclaims and affirmative defenses to Defendants



1 causes of action. Those counterclaims included: (1) constructive eviction; (2) breach of lease; (3)  
2 breach of the implied covenant of good faith and fair dealing; (4) declaratory relief as to Plaintiffs'  
3 actions/inactions constituting constructive eviction and as to Defendants not being liable for rent  
4 or other additional charges under the leases. *See Defendants' Answer and Counterclaims, Pg. 10-*  
5 *13.* The affirmative defenses asserted by Defendants included: (1) that Plaintiffs' actions were the  
6 proximate cause of their damages; (2) that Plaintiffs failed to mitigate their damages; (3) that any  
7 damages Plaintiffs' incurred were caused, in part or in whole, by their own negligence and as a  
8 result they are either barred from recovery or, in the alternative, Defendants are entitled to an  
9 offset; and (4) that the doctrines of novation, accord and satisfaction, and recoupment either bar  
10 Plaintiffs from recovery or, in the alternative, require the amount of damages to be reduced  
11 accordingly. *Id. at 4-6.*

12  
13 On December 1, 2020, Plaintiffs' filed their Motion for Summary Judgment regarding their  
14 breach of contract claims. Therein, Plaintiffs' argued that Summary Judgment was appropriate  
15 because there was no dispute of material fact as to the existence of the leases and they were entitled  
16 to judgment as a matter of law because: (1) there is no implied warranty of habitability or fitness  
17 for a particular purpose in commercial leases; (2) issues with parking did not justify breach of the  
18 leases; and (3) the doctrine of constructive eviction does not create any implied duties. *See*  
19 *Plaintiffs' Motion for Summary Judgment, Pg. 8-14.* The Motion for Summary Judgment did not  
20 include any actual calculation of damages and merely attached as Exhibits 5 and 6 tenant ledgers  
21 which were not cited within the body of the motion or otherwise discussed at all. *See Plaintiffs'*  
22 *Motion for Summary Judgment generally; see also Plaintiffs' Motion for Summary Judgment*  
23 *Exhibits 5 & 6.*

24 The Court has since granted Defendants' Motion for Summary Judgment in an Order  
25 entered on January 28, 2021. Therein, it was stated as Conclusions of Law that: (1) "[t]he Leases  
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1 and Guaranties are valid, fully executed contracts”; (2) “Plaintiffs fully performed under the terms  
2 of the Leases and Guaranties”; (3) “Defendants breached the Leases and Guaranties by abandoning  
3 the Premises early, without authorization, and failing to pay all monthly rent payments due under  
4 the Leases”; and (4) “Plaintiffs incurred damages as a result of Defendants’ non-payment of rent  
5 due and owing under the Leases and personal Guaranties.” *See Order Granting Summary*  
6 *Judgment, Pg. 7-8.* There were no further Findings of Fact or Conclusions of Law which addressed  
7 the affirmative defenses asserted by Defendants or related to any calculation of damages by  
8 Plaintiffs. *Id.* There was no specific finding as to an amount of damage to be awarded either. Nor  
9 was there a finding as to the amount that should be entered. Thus, the Plaintiffs have filed this  
10 motion seeking a specific judgment amount.  
11

## 12 II.

### 13 LEGAL ARGUMENT

14 Plaintiffs have now brought their Motion for Entry of Judgment, arguing that it is  
15 appropriate because, following the Court granting the Motion for Summary Judgment, “all that is  
16 left to be done in this action is to enter Judgment in accordance with the evidence of Plaintiffs’  
17 damages, which was submitted with Plaintiffs’ Motion for Summary Judgment, and which is  
18 accurately represented in the proposed Judgment attached hereto.” *See Motion for Entry of*  
19 *Judgment, Pg. 2.* The fundamental flaw in this request is the fact that, as stated above, the Motion  
20 for Summary Judgment and resulting Order did not address either: (1) the validity and calculation  
21 of the amount of damages incurred; or (2) the validity of Defendants’ affirmative defenses and the  
22 impact of those defenses on the sum of damages. *See Order Granting Summary Judgment.* Without  
23 an actual adjudication of these issues, it would be improper for judgment to be entered against  
24 Defendants’ as requested by the instant Motion.  
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1 More specifically, Plaintiffs argue in the instant Motion that the Court has found that  
2 Defendants “failed in their Opposition to cite evidence or authority demonstrating the existence of  
3 a genuine dispute of material fact for trial on the issue of whether Defendants breached the Leases  
4 and Guaranties, thereby relying solely on their constructive eviction theory to excuse their non-  
5 performance under the Leases and Guaranties.” *See Motion for Entry of Judgment, Pg. 3.* Plaintiffs  
6 continue by stating that “[a] review of Defendants’ summary judgment Opposition (the “SJ  
7 Opposition”) confirms the same—no other affirmative defenses or disputes were presented” and,  
8 as the Court held that constructive eviction was not applicable and this was “the only defense  
9 raised in response” to Plaintiffs’ Motion for Summary Judgment, “Defendants have waived the  
10 same and are thus not entitled to proceed to trial”. *Id. at 3-4.* Plaintiffs attempt to support this  
11 argument by further asserting that their Motion for Summary Judgment “attached/cited sufficient  
12 evidence to support their breach of contract claims, including the element of damages.” *Id. at 4.*

13 **A. Proving the Element of Damages is Not Equivalent to Adjudication of the Calculation**  
14 **of Those Damages**

15 Plaintiffs’ are correct in citing case law which states that the elements of a breach-of-  
16 contract claim are proof of a valid contract, performance, or excuse of performance by the non-  
17 breaching party, breach by the defendant and damages, these are the elements of a breach of  
18 contract claim in Nevada. *Id. at 5.* However, Plaintiffs’ use these elements to make the argument  
19 that proving the existence of damages is equivalent to proving that the amount of damages  
20 calculated and asserted is valid. *Id.* This is completely without legal foundation and contrary to  
21 common sense.

22 To reiterate, the affirmative defenses asserted by Defendants in this matter included: (1)  
23 that Plaintiffs’ actions were the proximate cause of their own damages; (2) that Plaintiffs failed to  
24 mitigate their damages; (3) that any damages Plaintiffs’ incurred were caused, in part or in whole,  
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1 by their own negligence and as a result they are either barred from recovery or, in the alternative,  
2 Defendants are entitled to an offset; and (4) that the doctrines of novation, accord and satisfaction,  
3 and recoupment either bar Plaintiffs from recovery or, in the alternative, require the amount of  
4 damages to be reduced accordingly. *See Defendants' Answer and Counterclaims, Pg. 4-6.* What  
5 all these affirmative defenses have in common is that, if found to be valid at trial, they would result  
6 in an offset or reduction of the damages due to Plaintiffs.  
7

8 **B. Legal Standard for Mitigating Damages**

9 In Nevada, "a party cannot recover damages for loss that he could have avoided by  
10 reasonable efforts. *See Conner v. S. Nevada Paving, Inc., 103 Nev. 353, 355, 741 P.2d 800, 801*  
11 *(1987)*. The requirement that a party make those reasonable efforts to avoid damages through  
12 mitigation "begins when the breach is discovered." *Id.* The burden of proving failure to mitigate  
13 is on the breaching party, but "[i]t is impossible to determine which damages could have been  
14 mitigated without knowing when the breach occurred." *Id.* Here, Defendants' have argued that  
15 they had never breached the lease because they were constructively evicted by Plaintiffs and this  
16 was only adjudicated by the Plaintiffs' Motion for Summary Judgment. Thus, prior to that  
17 adjudication occurring, it was "impossible to determine which damages could have been  
18 mitigated" as it had not yet been established when the breach had occurred. *Id.* Therefore, though  
19 the burden of proof is on Defendants' to prove failure to mitigate damages, they did not have that  
20 burden in responding to a Motion for Summary Judgment that did not even address the Plaintiffs'  
21 asserted calculation of damages.  
22

24 **C. Defendants' Affirmative Defenses Have Not Been Waived and Must be Adjudicated**

25 Further, consideration of these affirmative defenses reveals the logical flaw in Plaintiffs'  
26 argument that because the affirmative defenses were not specifically discussed in Defendants'  
27 Opposition to Plaintiffs' Motion for Summary Judgment, they were waived. This is illogical  
28

1 because it assumes that all affirmative defenses have relevance to a Motion for Summary  
2 Judgment. They do not. For example, why would Defendants' have argued that Plaintiffs' failed  
3 to mitigate their damages in the Opposition to the Motion for Summary Judgment? Failure to  
4 mitigate damages is not an element of breach of contract, nor is it a defense to the validity of a  
5 claim of breach of contract, it is a defense to the amount of damages a party asserts they have  
6 incurred as a result of a breach if that breach is found to have occurred. This makes it clear that  
7 any discussion of Plaintiffs' failure to mitigate their damages in Defendants' Opposition to the  
8 Motion for Summary Judgment would have been irrelevant and failure to do so does not constitute  
9 a waiver of that defense. The same applies to the other defenses stated above. Any affirmative  
10 defense that asserts a reduction or offset of damages should occur, rather than asserting the defense  
11 completely invalidates the underlying claim, is not waived simply by failing to discuss it in a  
12 context where its validity has no impact on the outcome (like a Motion for Summary Judgment).

13  
14  
15 Thus, though Plaintiffs may have met the element of damages for their breach of contract  
16 claims, it is nonsensical to now argue that simply establishing damages exist for the purposes of  
17 Summary Judgment means that any asserted calculation of those damages should now be deemed  
18 valid (particularly when the sum of damages weren't even discussed, merely attached as uncited  
19 exhibits). Therefore, it would be improper to enter judgment in this matter without an adjudication  
20 of the affirmative defenses which Defendants have asserted offset or reduce the damages incurred  
21 by Plaintiffs.

22  
23 After briefly discussing the tenant ledgers attached as Exhibits to the Motion for Summary  
24 Judgment, which Plaintiffs' assert are the correct calculation of damages to be entered as a  
25 judgment, Plaintiffs again argue that "Defendants have not challenged the accuracy or authenticity  
26 of this evidence and have therefore waived their right to do so." *See Motion for Entry of Judgment,*  
27 *Pg. 6.* Again, even cursory consideration of the situation reveals fundamental flaws in this logic,  
28

1 the most important of which is the fact that do not have to challenge the accuracy or authenticity  
2 of this evidence to assert that it is not the correct calculation of damages. For example, if it were  
3 found at trial that Plaintiffs' failed to take any reasonable actions to mitigate their damages then  
4 the sum of those damages due to Plaintiffs' would be reduced or offset even if the numbers stated  
5 in those tenant ledgers were completely correct.

6  
7 **D. The Failure to Mitigate Damages Defense Does Not Require Defendants' to Have**  
8 **Disputed Documentary Evidence Supporting Plaintiffs' Damages.**

9 Finally, Defendants' would emphasize the irony of Plaintiffs' argument that "[h]aving  
10 failed to dispute the straightforward documentary evidence supporting Plaintiffs' damages, all of  
11 which was attached to the SJ Motion, or otherwise raise their purported affirmative defenses in  
12 their SJ Opposition, Defendants have waived their right to proceed to trial in this matter" when the  
13 affirmative defenses in question do not attempt to dispute the validity of this documentary evidence  
14 but rather its applicability to determining the amount of damages actually incurred. In their Motion  
15 for Summary Judgment, Plaintiffs' very brief discussion of damages simply stated, "Defendants  
16 have been damaged in the amount of the unpaid rent and other charges required under the leases  
17 and guaranties" and cited to tenant ledgers for the Subject Properties. *See Plaintiffs' Motion for*  
18 *Summary Judgment, Pg. 8.* Defendants' did not dispute this assertion in their Opposition because  
19 they were aware that, if the Court found that the other elements of breach of contract existed, there  
20 would not be a valid argument that at least some damages had not been incurred by Plaintiffs' due  
21 to lost rent. However, this does not in any way amount to waiver of any argument over the amount  
22 of those damages. Specifically, relevant here, again, is the affirmative defense of failure to mitigate  
23 damages. Even if Defendants' conceded that the damage element of breach of contract claim was  
24 met if the Court found Constructive Eviction was not applicable, that in no way mean that  
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1 Plaintiffs' fully complied with their duty to mitigate those damages and the impact of that failure  
2 on the amount of damages actually due from Defendants.

3 Finally, the last Conclusion of Law, does not make sense, let alone does it state a conclusion  
4 of law. Specifically, it provides:

5 "8. Because the implied warranty of habitability is not recognized in  
6 commercial leases in Nevada, Defendants cannot prevail and Plaintiffs are entitled to  
7 judgment as a matter of law."

8 *See Order Granting Summary Judgment.* Assuming that the Court concurs with the finding of  
9 Senior Justice Cherry, that the implied warranty of habitability is not recognized by the courts of  
10 Nevada, it does not inexplicably follow that judgment as a matter of law then follows. Defendants  
11 have the burden of proof for the affirmative defenses asserted, and they can and will prove those  
12 affirmative defenses at the bench trial currently set. The Plaintiffs failed to pray for a judgment  
13 amount, knowing that the affirmative defense could offset those amounts, if any. Further,  
14 Defendants' opposition included the Declaration of Defendant Bour, included as Exhibit 1 to the  
15 Opposition, clearly refutes the damages amount and the reasons for the same.

16 Proof of the Affirmative defenses is also present in the lack of responses to the  
17 interrogatories by the Plaintiffs. See Exhibit "A". Particularly, Plaintiffs responded as follows:

18 INTERROGATORY NO. 30: Please give step by step description of any actions  
19 taken to mitigate damages after Defendants informed you they would no longer be leasing  
20 the Subject Property.

21 RESPONSE TO INTERROGATORY NO. 30: This Request exceeds the total  
22 interrogatories allowed by NRCP 33(a)(1), such that no response is necessary. *Kendall v.*  
23 *GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

24 See Exhibit "A", p. 18. Further, the documents produced by the Plaintiffs and the Declaration of  
25 Bour attached to the Opposition to the Motion for Summary Judgment, substantiate the failure to  
26 mitigate. See Exhibit "B", 4520 Arville First Supplement to its NRCP 16.1 Production.

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III.

CONCLUSION

As discussed above, it is both legally incorrect and unsupported by this record for Plaintiffs' to argue that the failure to discuss affirmative defenses that were not relevant to the outcome of a Motion for Summary Judgment when the Plaintiff failed to pray for a judgment amount. Thus, those affirmative defenses must still be adjudicated before any judgment is entered. Therefore, Defendants' respectfully request that the Court deny Plaintiffs' Motion for Entry of Judgement and proceed with the Bench Trial currently set.

Dated this 24<sup>th</sup> day of February 2021.

**BLACK & WADHAMS**

  
\_\_\_\_\_  
RUSTY GRAF, ESQ.

Nevada Bar No. 6322

10777 West Twain Avenue, Suite 300

Las Vegas, Nevada 89135

*Attorney for Defendants/Counterclaimants*



**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & WADHAMS and that on the 24<sup>th</sup> day of February 2021, I caused the above and foregoing document entitled **OPPOSITION TO PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT ON AN ORDER SHORTENING TIME** to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and
- ☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's electronic filing/service system;
- ☐ pursuant to EDCR 7.26, to be sent via facsimile;
- ☐ hand delivered to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

F. Thomas Edwards, Esq.  
HOLLEY DRIGGS WALCH FINE  
PUZEY STEIN & THOMPSON  
400 South Fourth Street, Third Floor  
Las Vegas, NV 89101

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

  
An Employee of Black & Wadhams

# **EXHIBIT A**

HOLLEY DRIGGS

F. THOMAS EDWARDS, ESQ.  
Nevada Bar No. 9549  
E-mail: [tedwards@nevadafirm.com](mailto:tedwards@nevadafirm.com)  
JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
[jlujan@nevadafirm.com](mailto:jlujan@nevadafirm.com)  
HOLLEY DRIGGS  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
Facsimile: 702/791-1912

*Attorneys for Plaintiffs*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 8

**PLAINTIFF 4520 ARVILLE'S  
RESPONSES TO DEFENDANTS/  
COUNTERCLAIMANTS' FIRST SET OF  
INTERROGATORIES TO PLAINTIFF  
4520 ARVILLE**

Plaintiff 4520 Arville ("Plaintiff"), by and through its attorneys, of the law firm of Holley Driggs, and pursuant to Rules 26 and 33 of the Nevada Rules of Civil Procedure, hereby answers Defendant Bour Enterprises' First Set of Interrogatories as follows:

**GENERAL OBJECTIONS**

The objections set forth below are incorporated into Plaintiff's response to each interrogatory whether or not specific reference is made to such objection in the response to a particular interrogatory.

1. The following responses are made solely for this action. Each response is subject to all objections as to competence, relevance, privilege, materiality, propriety, admissibility, and any and all other objections and grounds that would require the exclusion of any statement contained herein if any questions were asked of, or if any statement contained herein were made by, or if any documents contained herein were offered by, a witness present and testifying in court, all of which objections are reserved and may be interposed at the time of any hearing on this action.

2. The following responses are based upon a reasonable and diligent search of the information and documents presently available to and within the custody, control or possession of Plaintiff. Plaintiff reserves the right to amend these responses, including objections, upon the discovery of additional information and documents. The fact that Plaintiff has responded to any interrogatory is not intended and shall not be construed as a waiver of all or any part of any objection to any interrogatory.

3. Plaintiff objects to each interrogatory to the extent that it seeks the disclosure of information protected by the attorney-client privilege and/or the attorney work product doctrine, or both, and its responses herein shall not be deemed to be any waiver of any such doctrine, privilege, or protection.

4. Plaintiff objects to each interrogatory to the extent that it seeks "all," "each," "any," or "every" document or information concerning various subjects or events, or pertaining to them in "any way," on the grounds that such interrogatories are overly broad, unduly burdensome, oppressive, vague, and ambiguous. Plaintiff construes such interrogatories to call for central facts currently known to it which directly support its contentions.

5. Plaintiff objects to each interrogatory to the extent that it seeks information not relevant to the subject matter of this action and/or is not reasonably calculated to lead to the discovery of admissible evidence.

1           6. Plaintiff objects to each interrogatory on the grounds that each is premature. Plaintiff  
2 anticipates that it will identify additional witnesses, documents, and facts surrounding its  
3 contentions after it has had an opportunity to conduct additional discovery in this action.

4                           **RESPONSES TO FIRST SET OF INTERROGATORIES**

5           **INTERROGATORY NO. 1:**

6           Please state when and where 4520 Arville, was formed, identify all individuals or entities  
7 who have possessed any ownership stake in 4520 Arville, from the formation of the entity to  
8 present, and identify all current and former managers and officers of the partnership.

9           **RESPONSE TO INTERROGATORY NO. 1:**

10           Objection. The formation, owners and managers of Plaintiff are not relevant or  
11 proportional to the needs of discovery in this case. These issues have no importance to resolving  
12 the issues at stake in the action. There is no benefit to this discovery to justify the burden or  
13 expense of the discovery. The request is overly broad as it has no limitation as to time. The request  
14 is overly broad as it is not limited to the persons that may have involvement in or knowledge of  
15 the issues regarding this litigation.

16           Without waiving these objections, Plaintiff was formed in California on or about August  
17 30, 1996. On October 13, 2016, Kevin Donahoe became the co-manager of Plaintiff along with  
18 Edwin Praver. On December 8, 2018, when Mr. Praver passed away, Mr. Donahoe became the  
19 sole manager. Plaintiff reserves the right to supplement or amend this response as discovery  
20 continues.

21           **INTERROGATORY NO. 2:**

22           Name all experts you intend to call as witnesses and for each describe the nature of their  
23 specialties, their experience, training and medical affiliations, all opinions which they have  
24 reached/rendered and intend to give at trial in this matter and the factual basis for each such  
25 opinion. Please also attach to your answers to these interrogatories, copies of all written reports  
26 made by each expert and the expert's CV and/or resume.

27           ///

28           ///

1 **RESPONSE TO INTERROGATORY NO. 2:**

2 Pursuant to NRCP 33(d), Plaintiff identifies Plaintiffs' Rebuttal Expert Disclosure  
3 Pursuant to NRCP 16.1(a)(2), which was electronically served upon Defendants on 3/23/2020 at  
4 7:55 pm. Plaintiff reserves the right to supplement or amend this response as discovery continues.

5 **INTERROGATORY NO. 3:**

6 Please state the name, address, and contact information of each person known to you, your  
7 attorneys, agents or any investigators employed by you or your attorneys or by anyone acting on  
8 your behalf, having knowledge of facts relevant to the subject matter of this action.

9 For each such person, please state:

10 (a) The subject matter allegedly known by each such person regarding this matter;

11 (b) Whether any such person has provided to anyone a written, recorded, transcribed or  
12 other graphic statement or representation concerning the subject matter of this action;  
13 and

14 (c) Whether you intend to call the individual as a witness at the time of the trial.

15 **RESPONSE TO INTERROGATORY NO. 3:**

16 Pursuant to NRCP 33(d), Plaintiff identifies Plaintiffs/Counterdefendants' Initial  
17 Disclosure of Witnesses and Documents Pursuant to NRCP 16.1, including all supplements  
18 thereto. Plaintiff has not obtained any statements from potential witnesses. This request is  
19 premature as to who Plaintiff expects to call as a witness at the time of trial. That information will  
20 be provided in accordance with NRCP 16.1(a)(3). Plaintiff reserves the right to supplement or  
21 amend this response as discovery continues.

22 **INTERROGATORY NO. 4:**

23 If you have obtained any written or recorded statements concerning the allegations  
24 contained in Plaintiffs' Compliant or in Defendants' Counterclaims, set forth the name and address  
25 of the person who gave the statement and wrote it, the date and content of the statement, and the  
26 present custodian of the statement.

27 ///

28 ///

**RESPONSE TO INTERROGATORY NO. 4:**

Plaintiff has not obtained any statements from potential witnesses. Plaintiff reserves the right to supplement or amend this response as discovery continues.

**INTERROGATORY NO. 5:**

If you know the existence of any picture, movies, audiotapes, videotapes, diagrams, x-rays, documents, reports, or other objects (real evidence) related to the allegations contained in Plaintiffs' Complaint or in Defendants' Counterclaims or related to the issue of damages, state the nature, subject matter, date produced or obtained, add the name and address of the present custodian of each.

**RESPONSE TO INTERROGATORY NO. 5:**

Pursuant to NRCP 33(d), Plaintiff identifies Plaintiffs/Counterdefendants' Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1, including all supplements thereto. Plaintiff reserves the right to supplement or amend this response as discovery continues.

**INTERROGATORY NO. 6:**

State whether you have ever named as a party in any administrative, civil, or criminal proceedings arising from a dispute with tenant over a building, structure, or other property you own, lease, or otherwise control. If yes, state the case name, case number, name of the complaining party, state, county and tribunal before whom the proceeding took place and the date you were first notified of the possibility of a claim and your insurance carrier at the time.

**RESPONSE TO INTERROGATORY NO. 6:**

Objection. Whether Plaintiff has been involved in any administrative, civil, or criminal proceedings with tenant regarding any building is not relevant or proportional to the needs of discovery in this case. These issues have no importance to resolving the issues at stake in the action. Any such information would be public and, therefore, is available to Defendants. There is no benefit to this discovery to justify the burden or expense of the discovery. The request is overly broad as it has no limitation as to time. The request is overly broad as it is not limited to the Subject Property.

1 Without waiving these objections, other than the instant action, Plaintiff has never been  
2 named as a party in any administrative, civil, or criminal proceedings arising from a dispute with  
3 tenant over the Subject Property. Plaintiff reserves the right to supplement or amend this response  
4 as discovery continues.

5 **INTERROGATORY NO. 7:**

6 Set forth in detail the following information pertaining to all policies or agreements of  
7 liability insurance covering or pertaining to acts or omissions committed by or on your behalf at  
8 the time of the occurrences referenced in Plaintiff's Complaint, designating which, if any, are  
9 primary coverage and which are excess coverage: name and address of the insurance carrier, all  
10 limits of liability coverage, name and address of the named insured and policy number full  
11 description of acts or omissions to which coverage extends, full description of any and all  
12 exclusions, the dates of coverage, and the present custodian of the policy.

13 **RESPONSE TO INTERROGATORY NO. 7:**

14 Pursuant to NRCP 33(d), Plaintiff identifies Plaintiffs/Counterdefendants' Initial  
15 Disclosure of Witnesses and Documents Pursuant to NRCP 16.1, including all supplements  
16 thereto. Plaintiff reserves the right to supplement or amend this response as discovery continues.

17 **INTERROGATORY NO. 8:**

18 Set forth in detail the following information pertaining to all policies or agreements of  
19 liability insurance covering or pertaining to acts or omissions committed by or on your behalf at  
20 the time of the occurrences referenced in Defendants' Counterclaims, designating which, if any,  
21 are primary coverage and which are excess coverage: name and address of the insurance carrier,  
22 all limits of liability coverage, name and address of the named insured and policy number, full  
23 description of acts or omissions to which coverage extends, full description of any and all  
24 exclusions, the dates of coverage, and the present custodian of the policy.

25 **RESPONSE TO INTERROGATORY NO. 8:**

26 Pursuant to NRCP 33(d), Plaintiff identifies Plaintiffs/Counterdefendants' Initial  
27 Disclosure of Witnesses and Documents Pursuant to NRCP 16.1, including all supplements  
28 thereto. Plaintiff reserves the right to supplement or amend this response as discovery continues.



**INTERROGATORY NO. 9:**

Please state any and all representations made by you to Defendants as to the fitness of the Subject Property for its intended use as a commercial business facility.

**RESPONSE TO INTERROGATORY NO. 9:**

Objection. This request is overly broad as it contains no limitation as to time.

Without waiving said objections, pursuant to NRCP 33(d), Plaintiff identifies the subject leases, which are Bates labeled as ARV00001-30 and ARV00034-63. Plaintiff reserves the right to supplement or amend this response as discovery continues.

**INTERROGATORY NO. 10:**

Please state any and all representations made by you to Defendants as to the availability of parking at the Subject Property.

**RESPONSE TO INTERROGATORY NO. 10:**

Objection. This request is overly broad as it contains no limitation as to time.

Without waiving said objections, pursuant to NRCP 33(d), Plaintiff identifies the subject leases, which are Bates labeled as ARV00001-30 and ARV00034-63. Plaintiff reserves the right to supplement or amend this response as discovery continues.

**INTERROGATORY NO. 11:**

Please state whether you have any training, policies, rules, regulations, procedures, protocols, guidelines, or standards concerning or referring to the maintenance of any building, structure, or other property which you own, lease, or otherwise control.

**RESPONSE TO INTERROGATORY NO. 11:**

Objection. As Defendants accepted the Subject Property in an "as is" condition and had the contractual obligation to maintain the Subject Property, whether Plaintiff has any training, policies, rules, regulations, procedures, protocols, guidelines, or standards concerning or referring to the maintenance regarding any building is not relevant or proportional to the needs of discovery in this case. These issues have no importance to resolving the issues at stake in the action. There is no benefit to this discovery to justify the burden or expense of the discovery. The request is

1     overly broad as it has no limitation as to time. The request is overly broad as it is not limited to  
2     the Subject Property.

3             Without waiving said objections, pursuant to NRCP 33(d), Plaintiffs identifies the subject  
4     leases, which are Bates labeled as ARV00001-30 and ARV00034-63. Plaintiff reserves the right  
5     to supplement or amend this response as discovery continues.

6     **INTERROGATORY NO. 12:**

7             State whether you have any training, policies, rules, regulations, procedures, protocols,  
8     guidelines, or standards concerning or referring to safety inspections, environmental hazard  
9     inspections, and/or determinations of habitability for any building, structure, or other property  
10    which you own, lease, or otherwise control.

11    **RESPONSE TO INTERROGATORY NO. 12:**

12            Objection. As Defendants accepted the Subject Property in an “as is” condition and had  
13    the contractual obligation to inspect the Subject Property, whether Plaintiff has any training,  
14    policies, rules, regulations, procedures, protocols, guidelines, or standards concerning or referring  
15    to safety inspections, environmental hazard inspections, and/or determinations of habitability for  
16    any building is not relevant or proportional to the needs of discovery in this case. These issues  
17    have no importance to resolving the issues at stake in the action. There is no benefit to this  
18    discovery to justify the burden or expense of the discovery. The request is overly broad as it has  
19    no limitation as to time. The request is overly broad as it is not limited to the Subject Property.  
20    The definition of environmental hazard, including any condition that presents any risk, is so overly  
21    broad that it is meaningless. A door presents a risk that it could be shut on someone’s hand. A  
22    stair presents a risk that someone could trip on it. A wall presents a risk that someone could run  
23    into it.

24            Without waiving said objections, pursuant to NRCP 33(d), Plaintiffs identifies the subject  
25    leases, which are Bates labeled as ARV00001-30 and ARV00034-63. Plaintiff reserves the right  
26    to supplement or amend this response as discovery continues.

27    ///

28    ///

1 **INTERROGATORY NO. 13:**

2 Set forth any and all policies, rules, regulations, procedures, protocols, guidelines, or  
3 standards you use to determine whether a building, structure, or other property which you own,  
4 lease, or otherwise control is safe to use and/or occupy before it is leased to a tenant.

5 **RESPONSE TO INTERROGATORY NO. 13:**

6 Objection. As Defendants accepted the Subject Property in an “as is” condition and had  
7 the contractual obligation to inspect and maintain the Subject Property, whether Plaintiff has any  
8 policies, rules, regulations, procedures, protocols, guidelines, or standards used to determine  
9 whether any building is safe to use and/or occupy before it is leased to a tenant for any building is  
10 not relevant or proportional to the needs of discovery in this case. These issues have no importance  
11 to resolving the issues at stake in the action. There is no benefit to this discovery to justify the  
12 burden or expense of the discovery. The request is overly broad as it has no limitation as to time.  
13 The request is overly broad as it is not limited to the Subject Property.

14 Without waiving said objections, pursuant to NRCP 33(d), Plaintiffs identifies the subject  
15 leases, which are Bates labeled as ARV00001-30 and ARV00034-63. Plaintiff reserves the right  
16 to supplement or amend this response as discovery continues.

17 **INTERROGATORY NO. 14:**

18 Set forth any and all policies, rules, regulations, procedures, protocols, guidelines, or  
19 standards you use to ensure a building, structure, or other property which you own, lease, or  
20 otherwise control is free of substances which are harmful to a person’s health, including but not  
21 limited to all potential environmental hazards.

22 **RESPONSE TO INTERROGATORY NO. 14:**

23 Objection. As Defendants accepted the Subject Property in an “as is” condition and had  
24 the contractual obligation to inspect and maintain the Subject Property, whether Plaintiff has any  
25 policies, rules, regulations, procedures, protocols, guidelines, or standards used to determine  
26 whether any building is free of substances is not relevant or proportional to the needs of discovery  
27 in this case. These issues have no importance to resolving the issues at stake in the action. There  
28 is no benefit to this discovery to justify the burden or expense of the discovery. The request is

1   overly broad as it has no limitation as to time. The request is overly broad as it is not limited to  
2   the Subject Property. The definition of environmental hazard, including any condition that  
3   presents any risk, is so overly broad that it is meaningless. A door presents a risk that it could be  
4   shut on someone's hand. A stair presents a risk that someone could trip on it. A wall presents a  
5   risk that someone could run into it.

6           Without waiving said objections, pursuant to NRCP 33(d), Plaintiffs identifies the subject  
7   leases, which are Bates labeled as ARV00001-30 and ARV00034-63. Plaintiff reserves the right  
8   to supplement or amend this response as discovery continues.

9   **INTERROGATORY NO. 15:**

10           Please give a step by step description of the method any employee, contractor, or other  
11   individual, uses to perform inspections of any building, structure, or other property which you  
12   own, lease, or otherwise control.

13   **RESPONSE TO INTERROGATORY NO. 15:**

14           Objection. As Defendants accepted the Subject Property in an "as is" condition and had  
15   the contractual obligation to inspect and maintain the Subject Property, Plaintiff's method of  
16   inspection for any building is not relevant or proportional to the needs of discovery in this case.  
17   These issues have no importance to resolving the issues at stake in the action. There is no benefit  
18   to this discovery to justify the burden or expense of the discovery. The request is overly broad as  
19   it has no limitation as to time. The request is overly broad as it is not limited to the Subject  
20   Property. The request is overly broad and unduly burdensome because any inspection will  
21   necessarily depend on the circumstances such that this request is not answerable. Plaintiff reserves  
22   the right to supplement or amend this response as discovery continues.

23   **INTERROGATORY NO. 16:**

24           Please give a step by step description of the training you provide employees, contractors,  
25   or any other individuals you use to conduct inspections of any building, structure, or other property  
26   which you own, lease, or otherwise control.

27   ///

28   ///

**RESPONSE TO INTERROGATORY NO. 16:**

Objection. As Defendants accepted the Subject Property in an “as is” condition and had the contractual obligation to inspect and maintain the Subject Property, Plaintiff’s training regarding inspections for any building is not relevant or proportional to the needs of discovery in this case. These issues have no importance to resolving the issues at stake in the action. There is no benefit to this discovery to justify the burden or expense of the discovery. The request is overly broad as it has no limitation as to time. The request is overly broad as it is not limited to the Subject Property.

Without waiving said objections, Plaintiff utilizes the services of an experienced commercial property manager, such that Plaintiff does not train the property manager in the performance of its duties. Plaintiff reserves the right to supplement or amend this response as discovery continues.

**INTERROGATORY NO. 17:**

Please give a step by step description of the method any employee, contractor, or other individual, uses to determine if any building, structure, or other property which you own, lease, or otherwise control is safe to occupy and free of any environmental hazards.

**RESPONSE TO INTERROGATORY NO. 17:**

Objection. As Defendants accepted the Subject Property in an “as is” condition and had the contractual obligation to inspect and maintain the Subject Property, Plaintiff’s method of inspection for any building is not relevant or proportional to the needs of discovery in this case. These issues have no importance to resolving the issues at stake in the action. There is no benefit to this discovery to justify the burden or expense of the discovery. The request is overly broad as it has no limitation as to time. The request is overly broad as it is not limited to the Subject Property. The definition of environmental hazard, including any condition that presents any risk, is so overly broad that it is meaningless. A door presents a risk that it could be shut on someone’s hand. A stair presents a risk that someone could trip on it. A wall presents a risk that someone could run into it. The request is overly broad and unduly burdensome because any inspection will

1 necessarily depend on the circumstances such that this request is not answerable. Plaintiff reserves  
2 the right to supplement or amend this response as discovery continues.

3 **INTERROGATORY NO. 18:**

4 Please state any risks you are aware of that are associated with presence of environmental  
5 hazards within commercial properties and identify when you became aware of those risks.

6 **RESPONSE TO INTERROGATORY NO. 18:**

7 Objection. As Defendants accepted the Subject Property in an "as is" condition and had  
8 the contractual obligation to inspect and maintain the Subject Property, any conceivable risks  
9 within any commercial property are not relevant or proportional to the needs of discovery in this  
10 case. These issues have no importance to resolving the issues at stake in the action. There is no  
11 benefit to this discovery to justify the burden or expense of the discovery. The request is overly  
12 broad as it has no limitation as to time. The request is overly broad as it is not limited to the  
13 Subject Property. The phrase "any risk" is so overly broad that it renders the request unanswerable.  
14 The definition of environmental hazard, including any condition that presents any risk, is so overly  
15 broad that it is meaningless. A door presents a risk that it could be shut on someone's hand. A  
16 stair presents a risk that someone could trip on it. A wall presents a risk that someone could run  
17 into it. This request is unintelligible. Plaintiff reserves the right to supplement or amend this  
18 response as discovery continues.

19 **INTERROGATORY NO. 19:**

20 Please state whether you inform the lessees of any building, structure, or other property  
21 which you own, lease, or otherwise control of any risks associated the presence of any type of  
22 environment hazards within the building, structure, or other property.

23 **RESPONSE TO INTERROGATORY NO. 19:**

24 Objection. As Defendants accepted the Subject Property in an "as is" condition and had  
25 the contractual obligation to inspect and maintain the Subject Property, any conceivable risks  
26 within any commercial property are not relevant or proportional to the needs of discovery in this  
27 case. These issues have no importance to resolving the issues at stake in the action. There is no  
28 benefit to this discovery to justify the burden or expense of the discovery. The request is overly

1 broad as it has no limitation as to time. The request is overly broad as it is not limited to the  
2 Subject Property or the subject Defendants. The definition of environmental hazard, including any  
3 condition that presents any risk, is so overly broad that it is meaningless. A door presents a risk  
4 that it could be shut on someone's hand. A stair presents a risk that someone could trip on it. A  
5 wall presents a risk that someone could run into it. Plaintiff reserves the right to supplement or  
6 amend this response as discovery continues.

7 **INTERROGATORY NO. 20:**

8 Identify in detail, each statement, action, or omission, or declaration against interest,  
9 whether oral or written, by conduct, silence, or otherwise, which you contend was made by or on  
10 behalf of Defendants and provide the place and date when each such statement was made and any  
11 witnesses thereto.

12 **RESPONSE TO INTERROGATORY NO. 20:**

13 Objection. This request asks Plaintiff to recite the precise time and place any Defendant  
14 made any statement or took any action, at any time, to anybody, regarding any subject. This  
15 request is overly broad because it contains no subject matter limitation. The request is overly  
16 broad as it has no limitation as to time. The request is overly broad as it is not limited to the  
17 Subject Property or the subject Defendants. This discovery is not relevant or proportional to the  
18 needs of discovery in this case. These issues have no importance to resolving the issues at stake  
19 in the action. There is no benefit to this discovery to justify the burden or expense of the discovery.  
20 This request is so overly broad it is simply not answerable. Plaintiff reserves the right to  
21 supplement or amend this response as discovery continues.

22 **INTERROGATORY NO. 21:**

23 For each expert you intend to utilize for any aspect of this litigation, please identify each  
24 expert and list each time that expert has rendered a report for an insurance company or attorney  
25 regarding a medical malpractice claim, a personal injury claim, or worker's compensation claim  
26 within the last five years. For each such evaluation and/or report, indicate whether the evaluation  
27 and/or report was done on behalf of the plaintiff or defendant, and the compensation paid to the  
28 expert.

**RESPONSE TO INTERROGATORY NO. 21:**

Objection. As this case does not involve a medical malpractice claim, a personal injury claim or a worker's compensation claim, this discovery is not relevant or proportional to the needs of discovery in this case. Plaintiff reserves the right to supplement or amend this response as discovery continues.

**INTERROGATORY NO. 22:**

Please indicate the annual income reported on the income tax returns for the last five years for any expert you intend to utilize in this case for any reason, including the amounts of money reported on any W-2 and 1099 forms to specifically identify each entity that provided the 1099 form and the amount of compensation of each 1099 form.

**RESPONSE TO INTERROGATORY NO. 22:**

Objection. The personal financial information of Plaintiffs' expert is protected information that is not subject to discovery. The personal financial information of Plaintiffs' expert is not relevant or proportional to the needs of discovery in this case. Plaintiff reserves the right to supplement or amend this response as discovery continues.

**INTERROGATORY NO. 23:**

For each expert you intend to utilize for any aspect of this litigation, indicate each and every document any such expert reviewed prior to rendering his/her expert opinions, and identify the factual basis for such expert opinion.

**RESPONSE TO INTERROGATORY NO. 23:**

Pursuant to NRCP 33(d), Plaintiff identifies Plaintiffs' Rebuttal Expert Disclosure Pursuant to NRCP 16.1(a)(2), which was electronically served upon Defendants on 3/23/2020 at 7:55 pm. Plaintiff reserves the right to supplement or amend this response as discovery continues.

**INTERROGATORY NO. 24:**

If you contend that Defendants have made any false statement or claims with regard to any aspect of your Complaint or Defendant's Counterclaims, please identify any and all such statements you claim are false and the reason(s) you claim these statements are false.

///



1    **RESPONSE TO INTERROGATORY NO. 24:**

2            Objection. This request is overly broad as it is not focused on any particular statement.  
3    This request also includes discrete subparts that exceed the number of interrogatories permitted by  
4    NRCp 33(a)(1). Accordingly, Plaintiff will attempt to respond to the discrete subparts of this  
5    interrogatory until the limit is reached and will not provide any further response.

6            24.    Defendants falsely denied paragraph 1 of Plaintiff's Complaint because this Court  
7    has jurisdiction over this matter because the acts and omissions of the Defendants occurred in  
8    Clark County, Nevada.

9            25.    Defendants falsely denied paragraph 2 of Plaintiff's Complaint venue is proper in  
10   Clark County because a substantial part of the events or omissions giving rise to the claim occurred  
11   in Clark County, Nevada.

12           26.    Defendants falsely denied paragraph 3 of Plaintiff's Complaint because Plaintiff  
13   4520 Arville is, and at all times relevant herein was, a general partnership existing under the laws  
14   of the State of California.

15           27.    Defendants falsely denied paragraph 4 of Plaintiff's Complaint because Plaintiff  
16   McKinley Manor is, and at all relevant times herein was, a general partnership existing under the  
17   laws of the State of Idaho.

18           28.    Defendants falsely denied paragraph 6 of Plaintiff's Complaint because the  
19   Guarantors executed personal guaranties of the relevant leases.

20           29.    Defendants falsely denied paragraph 10 of Plaintiff's Complaint because on one or  
21   more occasions, Defendants have failed or refused to make certain payments to Plaintiffs as and  
22   when due under the terms of the Leases and the Guaranties.

23           30.    Defendants falsely denied paragraph 11 of Plaintiff's Complaint because  
24   Defendants' obligations under the Leases and Guaranties remain in full force and effect.

25           31.    Defendants falsely denied paragraph 12 of Plaintiff's Complaint because  
26   Defendants' failure to make payments under the Leases and Guaranties is unexcused and amounts  
27   to a complete breach thereof.

28

1           32. Defendants falsely denied paragraph 13 of Plaintiff's Complaint because Plaintiffs  
2 have placed all necessary demands upon Defendants for performance of their obligations under  
3 the Leases and Guaranties, but Defendants have failed or refused to cure their defaults.

4           33. Defendants falsely denied paragraph 15 of Plaintiff's Complaint because the Leases  
5 constitute valid, binding and enforceable contracts between Plaintiffs and Lessee.

6           34. Defendants falsely denied paragraph 16 of Plaintiff's Complaint because through  
7 its actions described in the Complaint, Lessee has materially breached its obligations under the  
8 Leases.

9           35. Defendants falsely denied paragraph 17 of Plaintiff's Complaint because Plaintiffs  
10 have duly performed all conditions, covenants, obligations and promises on its part to be  
11 performed, except to the extent excused or waived by Lessee's breaches as described herein.

12           36. Defendants falsely denied paragraph 18 of Plaintiff's Complaint because Plaintiffs  
13 have also placed demand upon Lessee for performance, but Lessee failed or refused to perform,  
14 and continues to fail or refuse to perform, its obligations under the Leases.

15           37. Defendants falsely denied paragraph 19 of Plaintiff's Complaint because as a direct  
16 and proximate result of Lessee's breaches of the Leases, Plaintiffs have been damaged in a  
17 substantial sum, in excess of \$15,000.

18           38. Defendants falsely denied paragraph 20 of Plaintiff's Complaint because Plaintiffs  
19 have, by reason of the foregoing, been required to utilize the services of an attorney and are entitled  
20 to recover their attorneys' fees and costs from Lessees.

21           39. Defendants falsely denied paragraph 22 of Plaintiff's Complaint because the  
22 Guaranties constitute valid, binding and enforceable contracts between Plaintiffs and the  
23 Guarantors.

24           40. Defendants falsely denied paragraph 23 of Plaintiff's Complaint because through  
25 their actions described in the Complaint, the Guarantors are in complete default of their obligations  
26 under the Guaranties.

27           Plaintiff reserves the right to supplement or amend this response as discovery continues.

28       ///

1 **INTERROGATORY NO. 25:**

2 Please state any financial or ownership interest you may now possess or have ever  
3 possessed in 4520 Arville.

4 **RESPONSE TO INTERROGATORY NO. 25:**

5 This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no  
6 response is necessary. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

7 **INTERROGATORY NO. 26:**

8 Please give a step by step description of the method you use to inspect the condition of a  
9 building, structure, or other property you own, lease, or control before it is leased to a tenant.

10 **RESPONSE TO INTERROGATORY NO. 26:**

11 This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no  
12 response is necessary. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

13 **INTERROGATORY NO. 27:**

14 If an inspection of the Subject Property was not conducted prior to Plaintiffs entering into  
15 a lease with Defendants, please state why.

16 **RESPONSE TO INTERROGATORY NO. 27:**

17 This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no  
18 response is necessary. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

19 **INTERROGATORY NO. 28:**

20 Please state how and when you became aware of the injuries Defendants allege were caused  
21 by environmental hazards within the Subject Property.

22 **RESPONSE TO INTERROGATORY NO. 28:**

23 This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no  
24 response is necessary. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

25 **INTERROGATORY NO. 29:**

26 Please state how and when you became aware that Defendants would no longer be leasing  
27 the Subject Property.

28 ///

1 **RESPONSE TO INTERROGATORY NO. 29:**

2 This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no  
3 response is necessary. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

4 **INTERROGATORY NO. 30:**

5 Please give step by step description of any actions taken to mitigate damages after  
6 Defendants informed you they would no longer be leasing the Subject Property.

7 **RESPONSE TO INTERROGATORY NO. 30:**

8 This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no  
9 response is necessary. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

10 **INTERROGATORY NO. 31:**

11 Please state whether you have any training, policies, rules, regulations, procedures,  
12 protocols, guidelines or standards concerning or referring to cleaning, repairing, or otherwise  
13 altering a building, structure, or other property after a lease with a tenant has ended and give a step  
14 by step description of any actions taken to clean, repair, and or alter the Subject Property after you  
15 became aware Defendants would no longer be leasing the Subject Property. If any individual or  
16 business was hired to assess, clean, repair, other otherwise alter the Subject Property in any way  
17 after you became aware Defendants would no longer be leasing the Subject Property, please state  
18 their name and contact information.

19 **RESPONSE TO INTERROGATORY NO. 31:**

20 This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no  
21 response is necessary. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

22 **INTERROGATORY NO. 32:**

23 Please state the name and contact information of any individual or business or other tenant  
24 who leased the Subject Property prior to Defendants and list the dates of those leases.

25 **RESPONSE TO INTERROGATORY NO. 32:**

26 This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no  
27 response is necessary. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

28 ///

**INTERROGATORY NO. 33:**

Please state the name and contact information of any individual or business or other tenant who has leased any building, structure, unit, or other property immediately adjacent or connected to the Subject Property and list the dates of those leases.

**RESPONSE TO INTERROGATORY NO. 33:**

This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no response is necessary. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

**INTERROGATORY NO. 34:**

Please state whether you have ever had another tenant complain of environmental hazards, the presence of harmful or foreign substances, the safety, and/or the habitability of any building, structure, or other property which you own, lease, or otherwise control and state with particularity the content of those complaints, the location of the property being complained of, any subsequent cleaning, repair, remediation, alteration, or other steps you took to address the complaint, and the name and contact information of that tenant.

**RESPONSE TO INTERROGATORY NO. 34:**

This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no response is necessary. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

**INTERROGATORY NO. 35:**

Please state whether the Subject Property has been leased and/or sold since May 2018, the name and contact information of any individual or business who has leased or purchased the Subject Property, and, if applicable, the date of the lease and/or sale.

**RESPONSE TO INTERROGATORY NO. 35:**

This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no response is necessary. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

**INTERROGATORY NO. 36:**

Please state the time, means, and content of any and all communications you had with Defendants prior to their entering into the lease for the Subject Property, while Defendants were leasing the subject property, and after Defendants left the Subject Property in May of 2018.

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**RESPONSE TO INTERROGATORY NO. 36:**

This Request exceeds the total interrogatories allowed by NRCP 33(a)(1), such that no response is necessary. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 686 (D. Nev. 1997).

Dated this 17th day of April, 2020.

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards  
F. THOMAS EDWARDS, ESQ.  
Nevada Bar No. 9549  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

*Attorneys for Plaintiffs*

VERIFICATION

STATE OF NEVADA        )  
                                      ) ss.  
COUNTY OF CLARK        )

I, Kevin Donahoe, am the manager of 4520 Arville's tenancy in common with regard to the subject property in this action. I have read PLAINTIFF 4520 ARVILLE'S RESPONSES TO DEFENDANTS/COUNTERCLAIMANTS' FIRST SET OF INTERROGATORIES TO PLAINTIFF 4520 ARVILLE, know the contents thereof, and the same is true of my own knowledge, except for those matters therein contained stated upon information and belief, and as to those matters I believe to be true.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 14<sup>th</sup> day of April, 2019.

Signature

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs and that on this 17th day of April, 2020, I did cause a true and correct copy of the foregoing **PLAINTIFF 4520 ARVILLE'S RESPONSES TO DEFENDANTS/COUNTERCLAIMANTS' FIRST SET OF INTERROGATORIES TO PLAINTIFF 4520 ARVILLE**, to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System:

Rusty Graf, Esq.  
BLACK & LOBELLO  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

Brent Carson, Esq.  
WINNER & CARSON  
7935 W. Sahara Ave., Suite 101  
Las Vegas, NV 89117

/s/ Sandy Sell  
An employee of HOLLEY DRIGGS



## **EXHIBIT B**

HOLLEY DRIGGS  
WALCH FINE PUZEY STEIN & THOMPSON

1 F. THOMAS EDWARDS, ESQ.  
2 Nevada Bar No. 9549  
E-mail: tedwards@nevadafirm.com  
3 JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
4 E-mail: jlujan@nevadafirm.com  
HOLLEY DRIGGS WALCH  
5 FINE PUZEY STEIN & THOMPSON  
400 South Fourth Street, Third Floor  
6 Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
7 Facsimile: 702/791-1912

8 *Attorneys for Plaintiffs*

9 **DISTRICT COURT**  
10 **CLARK COUNTY, NEVADA**

11 4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
12 general partnership,

13 Plaintiffs,

14 v.

15 BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
16 individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

17 Defendants.

18 BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
19 individual; HILENA MENGESHA, an  
20 individual; DOES 1 through 100, inclusive,

21 Counterclaimants.

22 v.

23 4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
24 general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

25 Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 8

**PLAINTIFFS/ COUNTERDEFENDANTS'  
FIRST SUPPLEMENTAL DISCLOSURE  
OF WITNESSES AND DOCUMENTS  
PURSUANT TO NRCP 16.1**

26 Plaintiffs 4520 ARVILLE, and MCKINLEY MANOR ("Plaintiffs"), by and through their  
27 attorneys of record, Holley Driggs Walch Fine PuzeY Stein & Thompson, hereby submit their First  
28

Supplemental Disclosures Pursuant to NRCP 16.1. These disclosures are based on information reasonably available to Plaintiffs as of this date, recognizing that the investigation continues and that discovery has just begun. Plaintiffs reserve the right to supplement or modify this initial disclosure statement at any time as additional information becomes available during the course of discovery. **New information in bold.**

In making these disclosures, Plaintiffs do not purport to identify every individual, document, data compilation, or tangible thing possibly relevant to this lawsuit. Rather, Plaintiffs' disclosure represents a good faith effort to identify discoverable information they currently and reasonably believe may be used to support their claims and defenses as required by NRCP 16.1. Furthermore, Plaintiffs make these disclosures without waiving their right to object to the production of any document, data compilations, or tangible thing disclosed on the basis of any privilege, work product, relevancy, undue burden, or other valid objection. These disclosures do not include information that may be used solely for impeachment purposes. While making these disclosures, Plaintiffs reserves among other rights, (1) the right to object on the grounds of competency, privilege, work product, relevancy and materiality, admissibility, hearsay, or any other proper grounds to the use of any disclosed information, for any purpose in whole or in part in this action or any other action, and (2) the right to object on any and all grounds, at any time, to any discovery request or motion relating to the subject matter of this disclosure.

The following disclosures are made subject to the above objections and qualifications.

**A. WITNESSES**

1. Person Most Knowledgeable of 4520 Arville  
c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
(702) 791-0308

The PMK of 4520 Arville, a California general partnership, is expected to have information regarding the facts and circumstances at issue in this action.

2. Person Most Knowledgeable of McKinley Manor  
c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

1 (702) 791-0308

2 The PMK of McKinley Manor, an Idaho general partnership, is expected to have  
3 information regarding the facts and circumstances at issue in this action.

4 3. David Burns  
5 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
6 400 South Fourth Street, Third Floor  
7 Las Vegas, Nevada 89101  
8 (702) 791-0308

9 David Burns is expected to have information regarding the facts and circumstances at issue  
10 in this action.

11 4. Kevin Donahoe  
12 c/o Holley Driggs Walch Fine Puzey Stein & Thompson  
13 400 South Fourth Street, Third Floor  
14 Las Vegas, Nevada 89101  
15 (702) 791-0308

16 Kevin Donahoe is expected to have information regarding the facts and circumstances at  
17 issue in this action.

18 5. Person Most Knowledgeable for Bour Enterprises, LLC  
19 c/o Black & LoBello  
20 10777 W. Twain Ave., Suite 300  
21 Las Vegas, Nevada 89135  
22 (702) 869-8801

23 The PMK of Bour Enterprises is expected to have information regarding the facts and  
24 circumstances at issue in this action.

25 6. Mulugeta Bour  
26 c/o Black & LoBello  
27 10777 W. Twain Ave., Suite 300  
28 Las Vegas, Nevada 89135  
(702) 869-8801

Mr. Bour is expected to have information regarding the facts and circumstances at issue in  
this action.

7. Hilena Mengesha  
c/o Black & LoBello  
10777 W. Twain Ave., Suite 300  
Las Vegas, Nevada 89135  
(702) 869-8801

Ms. Mengesha is expected to have information regarding the facts and circumstances at issue in this action.

Plaintiffs incorporate by reference all documents produced by any other parties in this action. Plaintiffs reserve the right to supplement their list of witnesses as the identity of additional witnesses becomes known during the course of discovery.

**B. DOCUMENTS**

Pursuant to NRCP 16.1(a)(1)(B), Plaintiff hereby produces the following documents:

Document Description	Bates Nos.
C-23 & 24 Lease, Addendum and Guaranty	ARV000001 – ARV000030
C-23 & 24 Ledger	ARV000031 – ARV000033
C-10 & 29 Lease, Addendum and Guaranty	ARV000034 – ARV000063
C-10 & 29 Ledger	ARV000064 – ARV000066
April 17, 2018 correspondent to Plaintiffs	ARV000067
April 24, 2018, correspondence to Defendants	ARV000068 – ARV000069
May 3, 2018 correspondence to Plaintiffs	ARV000070 – ARV000072
May 7, 2018 email exchange between counsel	ARV000073
<b>Costar Listing</b>	<b>ARV000074</b>
<b>Realnex Listing</b>	<b>ARV000075 – ARV000079</b>

Plaintiffs incorporate by reference all documents produced by any other parties in this action. Plaintiffs reserve the right to supplement their list of documents as the existence of additional documents becomes known during the course of discovery.

**C. DAMAGES**

Pursuant to the C-23 & 24 Lease, Addendum and Guaranty, Plaintiff is entitled to recover \$62,223.08, as detailed in the C-23 & 24 Ledger, plus interest equal to the prime rate reported in the Wall Street Journal plus 4% pursuant to Section 13.5 of the Lease, plus attorney fees and costs.

Pursuant to the C-10 & 29 Lease, Addendum and Guaranty, Plaintiff is entitled to recover \$77,231.42, as detailed in the C-10 & 29 Ledger, plus interest equal to the prime rate reported in the Wall Street Journal plus 4% pursuant to Section 13.5 of the Lease, plus attorney fees and costs.

Plaintiffs reserve their rights to supplement this disclosure as additional information becomes available through discovery or by other means.

///

1 **D. INSURANCE AGREEMENTS**

2 Not applicable to Plaintiffs.

3 Dated this 27th day of January, 2020.

4  
5 **HOLLEY, DRIGGS, WALCH,  
FINE, PUZEY, STEIN & THOMPSON**

6 */s/ F. Thomas Edwards*

7 F. THOMAS EDWARDS, ESQ.

Nevada Bar No. 9549

8 JESSICA M. LUJAN, ESQ.

Nevada Bar No. 14913

9 400 South Fourth Street, Third Floor

10 Las Vegas, Nevada 89101

11 *Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs Walch Fine Puze  
Stein & Thompson and that on this 27th day of January, 2020, I did cause a true and correct copy  
of the foregoing **PLAINTIFFS/COUNTERDEFENDANTS' FIRST SUPPLEMENTAL  
DISCLOSURE OF WITNESSES AND DOCUMENTS PURSUANT TO NRCP 16.1**, to be  
served upon each of the parties listed below via electronic service through the Court's Odyssey  
File and Service System:

Rusty Graf, Esq.  
BLACK & LOBELLO  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

Brent Carson, Esq.  
WINNER & CARSON  
7935 W. Sahara Ave., Suite 101  
Las Vegas, NV 89117

/s/ Sandy Sell

An employee of HOLLEY DRIGGS WALCH  
FINE PUZEY STEIN & THOMPSON

# Lease Availability Report

**4560 Arville St**

Las Vegas, NV 89103 - West Las Vegas Ind Submarket

★★★★★



## BUILDING

Type:	<b>Class C Industrial</b>
Subtype:	<b>Warehouse</b>
Tenancy:	<b>Multiple</b>
Year Built:	<b>1986</b>
RBA:	<b>85,080 SF</b>
Floors:	<b>1</b>
Typical Floor:	<b>85,080 SF</b>

## AVAILABILITY

Min Divisible:	<b>1,500 SF</b>
Max Contig:	<b>4,560 SF</b>
Total Available:	<b>10,620 SF</b>
Asking Rent:	<b>\$7.20 - \$8.40/NNN</b>

## EXPENSES PER SF

Taxes:	<b>\$0.47 (2012)</b>
Opex:	<b>\$1.68 (2012)</b>
Total Expenses:	<b>\$2.15 (2012)</b>

## SPACES

Floor	Suite	Use	Type	SF Avail	Fir Contig	Bldg Contig	Rent	Occupancy	Term
P 1st	C10	Industrial	Direct	4,560	4,560	4,560	\$7.20/NNN	Vacant	2 - 5 Yrs
P 1st	C23/C2	Industrial	Direct	4,560	4,560	4,560	\$7.20/NNN	Vacant	2 - 5 Yrs
P 1st	C1	Office	Direct	1,500	1,500	1,500	\$8.40/NNN	Vacant	Negotiable

## LOADING

Docks:	<b>None</b>	Drive Ins:	<b>38 tot./10'w x 12'h</b>
Cross Docks:	<b>None</b>	Rail Spots:	<b>None</b>

## FEATURES

Bus Line

## LAND

Land Area:	<b>4.73 AC</b>
Zoning:	<b>M-1</b>
Parcel	<b>162-19-701-008</b>

## TRANSPORTATION

Parking: **40 free Surface Spaces are available; Ratio of 0.70/1,000 SF**





# Arville Industrial Park

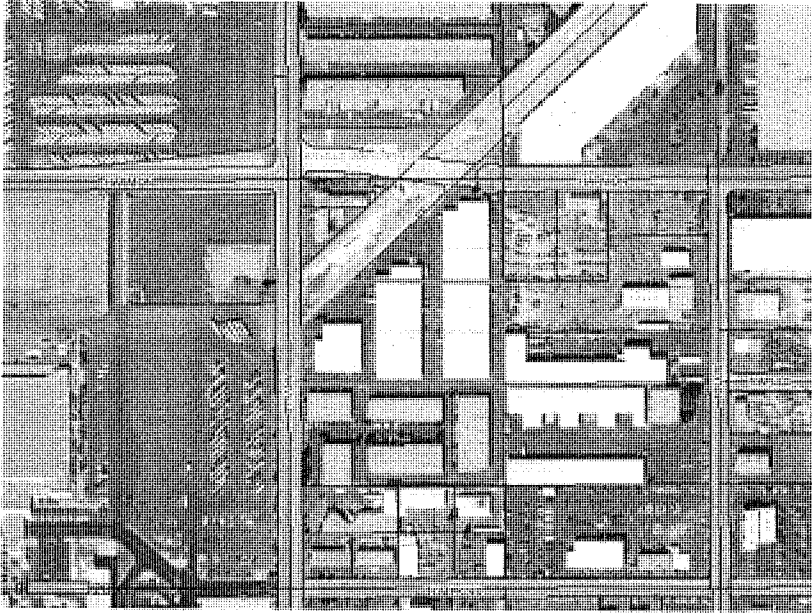
4560 S. Arville Street, Las Vegas, NV 89103  
INDUSTRIAL FOR LEASE

**LISTING ID: 117594**

Status: Active

Prepared By: Kevin Donahoe

Created On: September 16, 2019



## Offering Summary

<b>Co-op</b>	3.00 %
<b>Commission</b>	
<b>SF/Month</b>	\$0.60 - \$0.75
<b>SF/Year</b>	\$7.20 - \$9.00
<b>Available</b>	1,500 - 4,560 SF
<b>CAM</b>	.22
<b>Min Divis</b>	1,500 SF
<b>Max Contig</b>	4,560 SF
<b>Cross Streets</b>	Arville St & Tropicana Ave
<b>Building Size</b>	159,060 SF
<b>Year Built</b>	1985
<b>Zoning</b>	M-1
<b>Gas</b>	Yes
<b>Water</b>	Yes

## Property Type

Industrial, Industrial Business Park, Manufacturing, Warehouse

## Property Description

Great central location, competitive lease rates, with spaces from 2,280 square feet. Fully sprinklered buildings with skylights and 12' x 12' roll-up doors.

## Area Description

Located on South Arville Street between West Flamingo Road and West Tropicana Avenue with easy access to the Strip and I-15.

## Highlights

- Immediate occupancy
- Grade level loading with community well dock access
- Fire sprinklered
- Evaporative Cooling
- Additional access from Harmon Avenue



Kevin Donahoe  
President  
Commercial Specialists  
(702) 364-0909  
kdonahoe@commercialspecialists.com

Brought to you by

The information calculations presented are deemed to be accurate, but not guaranteed and we are not responsible for its correctness.

ARV000075

# Arville Industrial Park

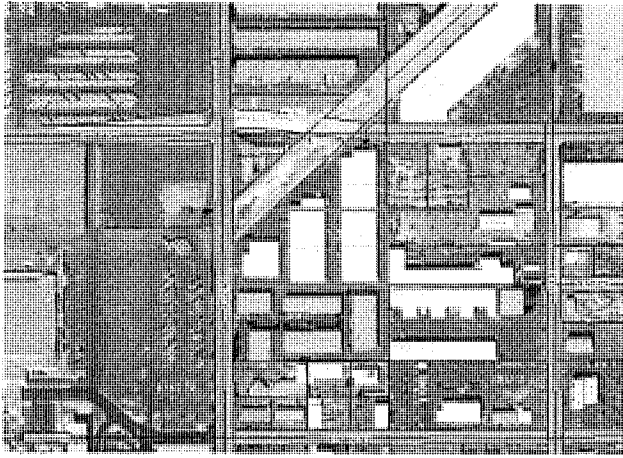
4560 S. Arville Street, Las Vegas, NV 89103  
INDUSTRIAL FOR LEASE

**LISTING ID: 117594**

Status: Active

Prepared By: Kevin Donahoe

Created On: September 16, 2019



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Brought to you by

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ARV000076

# Arville Industrial Park

4560 S. Arville Street, Las Vegas, NV 89103

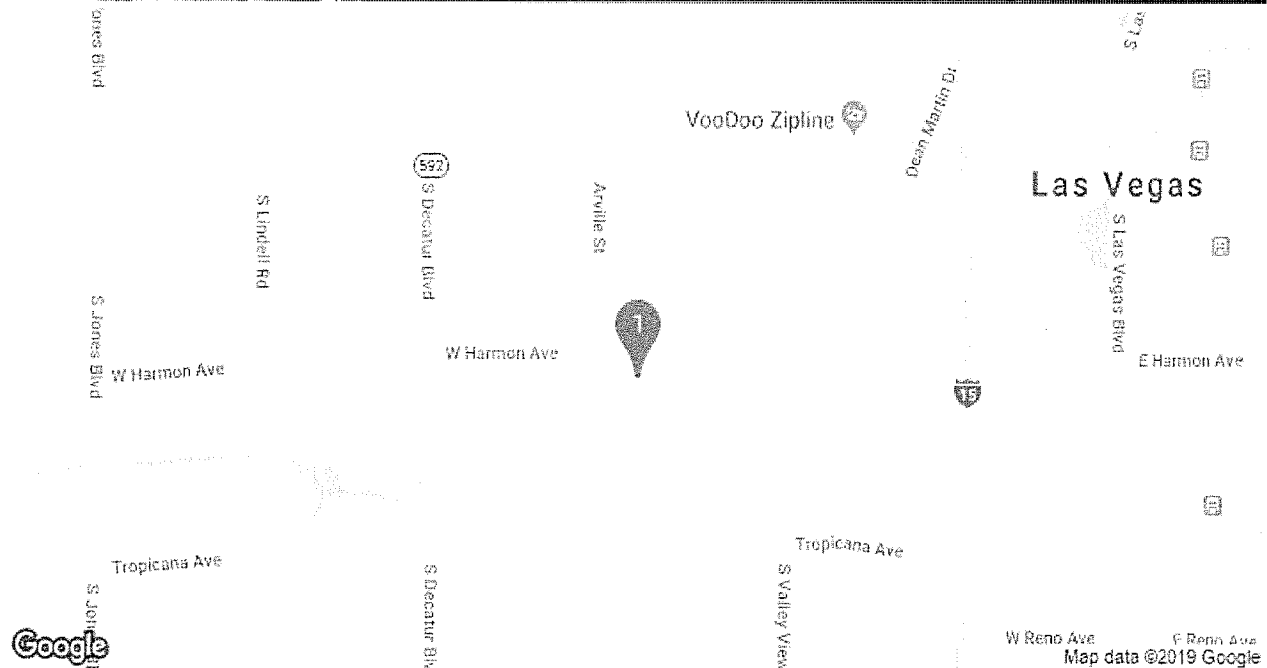
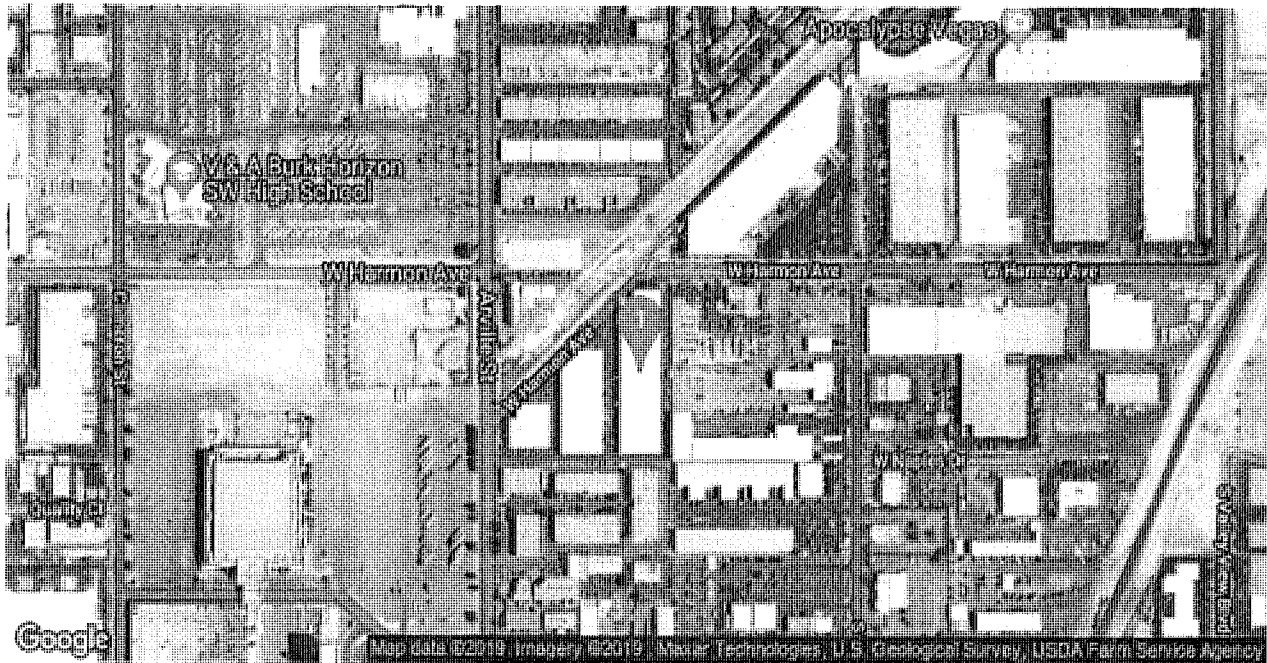
INDUSTRIAL FOR LEASE

**LISTING ID: 117594**

Status: Active

Prepared By: Kevin Donahoe

Created On: September 16, 2019



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Brought to you by

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ARV000077

# Arville Industrial Park

4560 S. Arville Street, Las Vegas, NV 89103

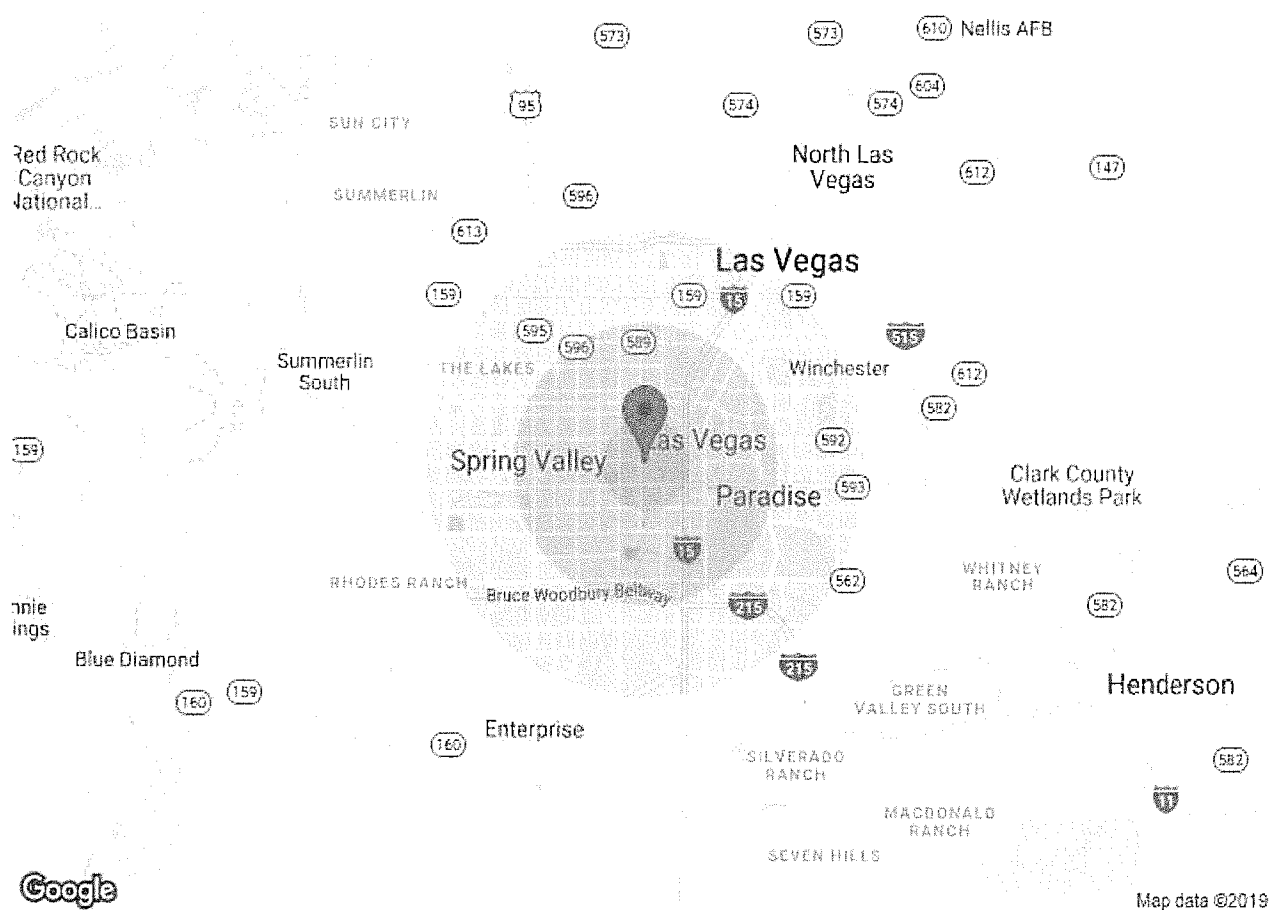
INDUSTRIAL FOR LEASE

**LISTING ID: 117594**

Status: Active

Prepared By: Kevin Donahoe

Created On: September 16, 2019



<b>POPULATION</b>	<b>1 MILE</b>	<b>3 MILES</b>	<b>5 MILES</b>
Total Population	19,633	133,035	373,626
Female Population	9,507	66,026	187,592
Male Population	10,126	67,009	186,034
<b>HOUSEHOLDS &amp; INCOME</b>	<b>1 MILE</b>	<b>3 MILES</b>	<b>5 MILES</b>
Housing Units	12,922	81,549	200,139
Median Income	44,210	42,552	48,535
Household Income < 100k	8,585	49,446	128,168
100k > Household Income < 200k	527	4,493	17,543
Household Income > 200k	63	952	3,739



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Brought to you by

The information calculations presented are deemed to be accurate, but not guaranteed and we are not responsible for its correctness.

ARV000078

# Arville Industrial Park

4560 S. Arville Street, Las Vegas, NV 89103

INDUSTRIAL FOR LEASE

**LISTING ID: 117594**

Status: Active

Prepared By: Kevin Donahoe

Created On: September 16, 2019

## Space Details

Floor/Suite	Space Available	Min Divisible	Max Contiguous	Lease Rate	Date Available	Sublease
C-1	1,500	1,500	1,500	\$0.75 /sf/m \$9.00 /sf/yr	-	No
<p>Space Description: Corner location with good visibility and access. Warehouse with office, restroom and grade level 12' x 12' roll up door. Space is 30' wide x 50' deep.</p> <p> <b>Lease Type</b> NNN Lease      <b>Warehouse %</b> 100      <b>Heating</b> -  <b>Lease Terms</b> 2-5 years      <b>Broadband</b> Yes      <b>Power</b> -  <b>CAM</b> .22      <b>Sprinklers</b> Yes      <b>Dock Doors</b> -  <b>Load Factor</b> -      <b>Clear Height</b> -      <b>Grade Doors</b> 1 </p>						

Floor/Suite	Space Available	Min Divisible	Max Contiguous	Lease Rate	Date Available	Sublease
C-23, 24	4,560	4,560	4,560	\$0.60 /sf/m \$7.20 /sf/yr	-	No
<p>Space Description: Unit is 60' wide and 76' deep with a single office. The unit ideal for shop use or storage.</p> <p> <b>Lease Type</b> NNN Lease      <b>Warehouse %</b> 90      <b>Heating</b> -  <b>Lease Terms</b> 2-5 Years      <b>Broadband</b> Yes      <b>Power</b> -  <b>CAM</b> .22      <b>Sprinklers</b> Yes      <b>Dock Doors</b> -  <b>Load Factor</b> -      <b>Clear Height</b> -      <b>Grade Doors</b> 2 </p>						

Floor/Suite	Space Available	Min Divisible	Max Contiguous	Lease Rate	Date Available	Sublease
C-10 & 29	4,560	4,560	4,560	\$0.60 /sf/m \$7.20 /sf/yr	-	No
<p>Space Description: Unit is 30' wide and 152' deep with a single office. There are (2) 12' x 12' roll-up doors are at each end of the warehouse for easy pull-in/pull-out.</p> <p> <b>Lease Type</b> NNN Lease      <b>Warehouse %</b> 95      <b>Heating</b> -  <b>Lease Terms</b> 2-5 Years      <b>Broadband</b> Yes      <b>Power</b> -  <b>CAM</b> .22      <b>Sprinklers</b> Yes      <b>Dock Doors</b> -  <b>Load Factor</b> -      <b>Clear Height</b> -      <b>Grade Doors</b> 2 </p>						



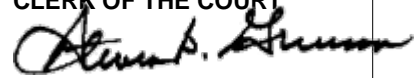
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Brought to you by

The information calculations presented are deemed to be accurate, but not guaranteed and we are not responsible for its correctness.

ARV000079

# **EXHIBIT 13**



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JESSICA M. LUJAN, ESQ.  
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E-mail: jlujan@nevadafirm.com  
HOLLEY DRIGGS  
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Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
Facsimile: 702/791-1912

*Attorneys for Plaintiffs/Counterdefendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
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individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 5

**PLAINTIFFS' REPLY IN SUPPORT OF  
MOTION FOR ENTRY OF JUDGMENT**

**Date of Hearing: March 2, 2021**  
**Time of Hearing: 9:00 a.m.**

Plaintiffs/Counterdefendants, 4520 Arville, a California general partnership; and  
McKinley Manor, an Idaho general partnership (collectively "Plaintiffs"), by and through their  
attorneys of record, the law firm of Holley Driggs, hereby submit this reply in support of their

1 motion for entry of Judgment in favor of Plaintiffs in accordance with the Court's January 28,  
2 2021 Order Granting Plaintiffs' Motion for Summary Judgment.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 ➤ In Paragraph 23 of the Statement of Undisputed Material Facts of Plaintiffs' Motion  
5 for Summary Judgment, Plaintiffs expressly explained that their detailed computations of the  
6 damages for the Leases were set forth in Exhibits 5 and 6 to the Motion for Summary Judgement.

7 23. Attached hereto as **Exhibits 5 and 6** are ledgers for the  
8 leases, reflecting all rent owed under the leases, all payments made  
9 by Defendants under the leases and the outstanding balance owed  
under the leases.

10 *See* Motion for Summary Judgment, 7:16-19 (emphasis in original).

11 ➤ Under the Legal Argument Section of Plaintiff's Motion for Summary Judgment,  
12 Plaintiffs walked through each element of the breach of contract claim, citing the specific evidence  
13 that supported each element – **including damages**.

14 Plaintiffs established that the parties entered into binding contracts,  
15 in the form of the leases and guaranties. *See* Exs. 2 and 3. Plaintiffs  
16 performed under the contracts by providing Defendants access to the  
17 Premises in an "as is" condition. *See* Ex. 4. Defendants breached  
18 the contracts by abandoning the Premises and failing to pay rent and  
19 other charges required under the leases and guaranties. *See* Exs. 4,  
20 5 and 6. **Defendants have been damaged in the amount of the  
unpaid rent and other charges required under the leases and  
guaranties. See Exs. 5 and 6.** Therefore, Plaintiffs have  
established their breach of contract claims against Defendants.

21 *See* Motion for Summary Judgment, 8:13-19 (emphasis added).

22 ➤ In the Declaration of Kevin Donahoe, attached to the Motion for Summary  
23 Judgment as Exhibit 4, Plaintiffs again articulated that their detailed computation of the damages  
for the two leases were set forth in Exhibits 5 and 6 to the Motion for Summary Judgement.

24 7. Attached to the Motion as Exhibits 5 and 6 are ledgers for  
25 the leases, reflecting all rent owed under the leases, all payments  
26 made by Defendants under the leases and the outstanding balance  
owed under the leases.

27 *See* Ex. 4 to Motion for Summary Judgment.



➤ The ledgers attached as Exhibits 5 and 6 to the Motion for Summary Judgment set forth six (6) pages of a detailed damages computation, identifying each charge under the Leases, each payment under the Leases and the total amount owed under the Leases, \$62,223.08 for Units C-23/24 (Ex. 5) and \$77,231.42 Units C-10/29 (Ex. 6).

➤ There is no law, in Nevada or elsewhere, that these detailed computations in Exhibits 5 and 6 needed to be copied-and-pasted into the Motion for Summary Judgment for the amounts to be valid.

➤ At no point in the Motion for Summary Judgment did Plaintiffs request *partial* summary judgment. Rather, Plaintiffs requested summary judgment on the entirety of their breach of contract claims against Defendants, which necessarily includes damages.

➤ To the extent that Defendants believed that they had evidence that Plaintiffs failed to reasonably mitigate their damages, Defendants were required to present that evidence in their opposition to the Motion for Summary Judgment. *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434-439, 436, 245 P.3d 542 (2010) (internal quotations omitted) (citing *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) and *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001)).

➤ Defendants' failure to present that evidence in opposition to the Motion for Summary Judgment means that the argument "is deemed to have been waived and will not be considered." *Schuck*, 126 Nev. at 436, 245 P.3d at 544.

➤ Without citing to any authority to support their position, Defendants attempt to argue that they were not required to raise their affirmative defenses in opposition to the Motion for Summary Judgment. However, this argument is undermined by the Nevada Supreme Court's decision in *Schuck* and caselaw from around the country holding that if an affirmative defense is not raised in opposition to summary judgment, it is waived.

- "And we believe the trial court correctly held that Ecolab's failure to raise its affirmative defense of estoppel in opposition to Diversey Lever's summary judgment motion constituted an abandonment of the defense." *Diversey Lever, Inc. v. Ecolab, Inc.*, 191 F.3d 1350, 1352 (Fed. Cir. 1999).

- “This Court finds that because Defendant failed to adequately develop and argue the affirmative defense of statute of limitations in her opposition to the motion for summary judgment, the statute of limitations defense is waived.” *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 305–06 (D.R.I. 2007), *aff’d*, 548 F.3d 50 (1st Cir. 2008).
- “Moreover, the defendants in their brief in opposition to UCB’s motion for summary judgment develop no cogent legal argument in support of that [affirmative] defense. Thus, I consider that defense waived.” *United Cent. Bank v. Wells St. Apartments, LLC*, 957 F. Supp. 2d 978, 988 (E.D. Wis. 2013), *aff’d sub nom. United Cent. Bank v. KMWC 845, LLC*, 800 F.3d 307 (7th Cir. 2015).
- “On the issue before us the law is well-settled and noncontroversial: an affirmative defense must be asserted in response to a motion for summary judgment. Otherwise the defense is waived.” *Reiswerg v. Statom*, 926 N.E.2d 26, 33 (Ind. 2010).
- “While the pro se defendants asserted certain affirmative defenses in their answers, their memorandum in opposition to the commission’s motion for summary judgment was not accompanied by any submissions or argument pursuant to Mass.R.Civ.P. 56, 365 Mass. 824 (1974), raising those defenses. We therefore consider them waived.” *Historic Dist. Comm’n of Chelmsford v. Kalos*, 48 Mass. App. Ct. 919, 920, 725 N.E.2d 245, 247 (2000).
- “Rawl has waived these affirmative defenses by not asserting them in its own motion for summary judgment and, more importantly, by not asserting them in its opposition to the Trusts’ motion for summary judgment.” *United Mine Workers of Am. 1974 Pension Tr. v. Pittston Co.*, 793 F. Supp. 339, 344 (D.D.C. 1992).
- “We conclude that Mr. Bugg waived any claim with regard to his affirmative defenses because he failed to properly assert them in his

opposition to the summary judgment motion.” *Estate of Downs v. Bugg*, 242 S.W.3d 729, 733 (Mo. Ct. App. 2007).

- “If a defendant in its pleadings raises an affirmative defense, but subsequently fails to address the issue in opposition to a summary judgment motion, the affirmative defense is waived.” *Abbott v. Bates*, 670 N.E.2d 916, 920 n.1 (Ind. Ct. App. 1996).
- “In addition, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and waived thus subject to dismissal.” *Wells Fargo Bank, N.A. v. Burke*, 52 Misc. 3d 944, 951, 34 N.Y.S.3d 865, 872 (N.Y. Sup. Ct. 2016), *aff’d*, 166 A.D.3d 1054, 88 N.Y.S.3d 449 (2018) (citations omitted).

### **CONCLUSION**

Plaintiffs adequately supported their claim for damages with admissible evidence in the form of the ledgers attached to the Motion for Summary Judgment as Exhibits 5 and 6. By failing to raise its affirmative defenses in response to this admissible evidence regarding damages, Defendants waived those affirmative defenses. Therefore, Plaintiffs are entitled to the entry of judgment against Defendants, jointly and severally, for the amounts due reflected in the ledgers, plus interest as provided in the Leases.

Dated this 26th day of February, 2021.

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards  
 F. THOMAS EDWARDS, ESQ.  
 Nevada Bar No. 9549  
 JESSICA M. LUJAN, ESQ.  
 Nevada Bar No. 14913  
 400 South Fourth Street, Third Floor  
 Las Vegas, Nevada 89101

*Attorneys for Plaintiffs/Counterdefendants*

HOLLEY DRIGGS

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs and that on this 26th day of February, 2021, I did cause a true and correct copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT** to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System:

Rusty Graf, Esq.  
BLACK & LOBELLO  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

Brent Carson, Esq.  
WINNER & CARSON  
7935 W. Sahara Ave., Suite 101  
Las Vegas, NV 89117

/s/ Sandy Sell  
An employee of HOLLEY DRIGGS

# **EXHIBIT 14**

**DISTRICT COURT  
CLARK COUNTY, NEVADA****Other Landlord Tenant****COURT MINUTES****March 03, 2021**

---

A-19-794864-C	4520 Arville, Plaintiff(s)
	vs.
	Bour Enterprises LLC, Defendant(s)

---

<b>March 03, 2021</b>	<b>3:00 AM</b>	<b>Minute Order</b>
-----------------------	----------------	---------------------

**HEARD BY:** Barisich, Veronica M.**COURT CLERK:** Jennifer Lott**JOURNAL ENTRIES**

- The Court notes that Plaintiff's Motion for Entry of Judgment was heard on March 2, 2021. After hearing the oral arguments, the Court took the matter UNDER ADVISEMENT. After carefully considering the evidence and arguments submitted, COURT ORDERS that Plaintiff's Motion shall be GRANTED.

Per January 28, 2021 order, the Court granted summary judgment on Plaintiff's breach of contract claims. Per this order, the Court concluded that there was sufficient evidence that Defendants breached the leases and personal guaranties. The Court rejected Defendant's argument as to constructive eviction as the implied warranty of habitability was deemed inapplicable in commercial leases and that even if such warranty is applicable, it was specifically waived by the Defendants in the lease.

The Court FINDS and CONCLUDES that the only remaining dispute is whether a trial is necessary to prove Plaintiff's damages. Plaintiff's damages sought were set forth in the exhibits 5 and 6 of the motion for summary judgment, wherein Plaintiff sought \$62,223.08 for lot C23 and \$77,231.42 for lot C10, for total of \$139,454.50. Defendants did not challenge the appropriateness of the amounts when the Plaintiff filed its motion for summary judgment and they did not raise the applicable affirmative defenses with regards to the damages sought. Under Shuck v. Signature Flight Support of Nevada, Inc., 126 Nev. 434, 245 P.3d 542 (2010), the argument that was not raised in the original motion must be deemed to have been waived and cannot be subsequently considered. Thus, the motion should be granted.

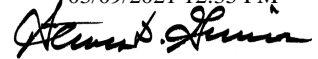
The Court ORDERS that Plaintiff's Motion shall be GRANTED. The Pre Trial Conference, Calendar Call and the Bench Trial shall be VACATED.

Counsel for Plaintiff is directed to submit a proposed Order and Judgment consistent with this Minute Order and the submitted briefing. Counsel may add language to further supplement the proposed Order in accordance with the Court's findings and any submitted arguments. Defendants' counsel is to review and countersign as to form and content. Counsel is directed to have the proposed Order submitted to chambers within 10 days consistent with AO 20-17.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Jennifer Lott, to all registered parties for Odyssey File & Serve. jl

# **EXHIBIT 15**





CLERK OF THE COURT

F. THOMAS EDWARDS, ESQ.  
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JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
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HOLLEY DRIGGS  
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Telephone: 702/791-0308  
Facsimile: 702/791-1912

*Attorneys for Plaintiffs/Counterdefendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 5

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR ENTRY OF JUDGMENT**

**Date of Hearing: March 2, 2021**  
**Time of Hearing: 9:00 a.m.**

///

///

This matter came before the Court upon Plaintiffs' Motion for Entry of Judgment on March 2, 2021 at 9:00 a.m. F. Thomas Edwards, Esq., appeared on behalf of Plaintiffs. Rusty Graf, Esq., appeared on behalf of Defendants. The Court carefully reviewed and considered the relevant briefs and documents on file in this case and considered the oral arguments of counsel. After taking the matter under advisement, the Court FINDS and CONCLUDES as follows:

Per the Court's order entered January 28, 2021, the Court granted Plaintiffs' Motion For Summary Judgment Regarding Their Breach of Contract Claims. Per that order, the Court concluded that the undisputed material facts established that Defendants breached the leases and personal guaranties. The Court rejected Defendant's argument as to constructive eviction as the implied warranty of habitability was deemed inapplicable in commercial leases and that even if such warranty is applicable, it was specifically waived by the Defendants in the subject leases.

Therefore, the only remaining issue is whether a trial is necessary to prove Plaintiffs' damages. The damages Plaintiffs sought were set forth in the Exhibits 5 and 6 of the Plaintiffs' Motion For Summary Judgment Regarding Their Breach of Contract Claims, wherein Plaintiffs sought \$62,223.08 for Units C-23/24 and \$77,231.42 for Units C-10/29, for a total of \$139,454.50. In response to Plaintiffs' Motion For Summary Judgment Regarding Their Breach of Contract Claims, Defendants did not challenge the appropriateness of the amounts and did not raise the applicable affirmative defenses with regard to the damages sought. Under *Shuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010), the arguments that were not raised in response to the original motion must be deemed to have been waived and cannot be subsequently considered. Thus, there are no issues of material fact with regard to Plaintiffs' damages and Plaintiffs' Motion for Entry of Judgment should be granted.

Good cause appearing, the Court ORDERS as follows:

1. IT IS HEREBY ORDERED that Plaintiffs' Motion for Entry of Judgment is hereby GRANTED in its entirety;

2. IT IS FURTHER ORDERED that a separate judgment shall issue in favor of Plaintiffs and against Defendants, jointly and severally, in the amount of \$139,454.50, plus pre- and post-judgment interest at the rate provided for in the subject leases; and

HOLLEY DRIGGS

3. IT IS FURTHER ORDERED that the Pre-Trial Conference, Calendar Call and Bench Trial shall be VACATED.

IT IS SO ORDERED.

Dated this 9th day of March, 2021



99B 7B4 1827 0BBB  
Veronica M. Barisich  
District Court Judge

Respectfully submitted by:

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards  
F. THOMAS EDWARDS, ESQ. (NBN 9549)  
JESSICA M. LUJAN, ESQ. (NBN 14913)  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

*Attorneys for Plaintiffs/Counter-defendants*

Approved as to form and content by:

**BLACK & WADHAMS**

/s/ Rusty Graf  
RUSTY GRAF, ESQ. (NBN 6322)  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

*Attorneys for Defendants/Counterclaimants*

## Sandy Sell

---

**Subject:** FW: Bour

**From:** Rusty Graf <[rgraf@blackwadhams.law](mailto:rgraf@blackwadhams.law)>

**Sent:** Monday, March 8, 2021 8:07:15 AM

**To:** Tom Edwards <[tedwards@nevadafirm.com](mailto:tedwards@nevadafirm.com)>

**Cc:** Jessica M. Lujan <[jlujan@nevadafirm.com](mailto:jlujan@nevadafirm.com)>; Diane Meeter <[dmeeter@blackwadhams.law](mailto:dmeeter@blackwadhams.law)>; Mark Lounsbury <[mlounsbury@blacklobello.law](mailto:mlounsbury@blacklobello.law)>

**Subject:** RE: Bour

No changes to either.

Thank you and Stay safe!

**Rusty Graf, Esq.**

Partner



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E: [rgraf@blackwadhams.law](mailto:rgraf@blackwadhams.law) (Effective August 1, 2020)



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**From:** Tom Edwards <[tedwards@nevadafirm.com](mailto:tedwards@nevadafirm.com)>

**Sent:** Friday, March 5, 2021 12:44 PM

**To:** Rusty Graf <[rgraf@blackwadhams.law](mailto:rgraf@blackwadhams.law)>

**Cc:** Jessica M. Lujan <[jlujan@nevadafirm.com](mailto:jlujan@nevadafirm.com)>

**Subject:** Bour

Rusty,

Attached for your review are the order and judgment. The only change to the judgement from the last one you saw is that we updated the prejudgment interest amount. Please let me know if we can affix your electronic signature and submit.

Thanks  
Tom

**F. Thomas Edwards**  
Shareholder  
Las Vegas Office

HOLLEY DRIGGS

---

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---

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 4520 Arville, Plaintiff(s)

CASE NO: A-19-794864-C

7 vs.

DEPT. NO. Department 5

8 Bour Enterprises LLC,  
9 Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District  
13 Court. The foregoing Order Granting Motion was served via the court's electronic eFile  
system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 3/9/2021

15 Tom Edwards, Esq.

tedwards@nevadafirm.com

16 BRENT CARSON

bac@winnercarson.com

17 Diane Meeter

dmeeter@blacklobello.law

18 J. Graf

Rgraf@blacklobello.law

19 Sandra Sell

ssell@nevadafirm.com

20 Jessica Lujan

jlujan@nevadafirm.com

21 Marsha Stallsworth

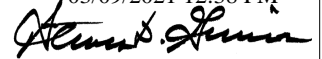
mstallsworth@blackwadhams.law

22 Marsha Stallsworth

mstallsworth@blackwadhams.law

23  
24  
25  
26  
27  
28

# **EXHIBIT 16**



CLERK OF THE COURT

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JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
E-mail: jlujan@nevadafirm.com  
HOLLEY DRIGGS  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
Facsimile: 702/791-1912

*Attorneys for Plaintiffs/Counter-defendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
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individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counter-defendants,

Case No: A-19-794864-C  
Dept. No.: 5

**JUDGMENT AGAINST DEFENDANTS  
BOUR ENTERPRISES, LLC,  
MULUGETA BOUR, AND HILENA  
MENGESHA**

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment is entered in  
favor of Plaintiffs 4520 Arville, a California general partnership, and McKinley Manor, an Idaho  
general partnership (together, "Plaintiffs") and against Defendants Bour Enterprises, LLC, a



Nevada limited liability company, Mulugeta Bour, and Hilena Mengesha (together, “Defendants”), jointly and severally, as follows:

1. As to the Lease of Units C-23/24, the principal sum of \$62,223.08 in outstanding rent, CAM charges and late fees (*see* Tenant Ledger, attached as Exhibit 5 to Plaintiffs’ Motion for Summary Judgment, filed 12/1/20 (the “Motion”));
2. As to the Lease of Units C-10/29, the principal sum of \$77,231.42 in outstanding rent, CAM charges and late fees (*see* Tenant Ledger, attached as Exhibit 6 to the Motion);
3. Pre-judgment interest at 9.5% (Wall Street Journal prime rate of 5.5% published on 12/20/18 plus 4%, per Section 13.5 of the Leases, attached as Exhibits 2 and 3 to the Motion) since the expiration of the Leases on May 31, 2019 through March 2, 2021 in the amount of \$23,302.27;
4. Post-judgment interest at 9.5% (Wall Street Journal prime rate of 5.5% published on 12/20/18 plus 4%, per Section 13.5 of the Leases, attached as Exhibits 2 and 3 to the Motion) in the amount of \$36.30 per day from March 3, 2021, until satisfied in full;
5. **For a total amount of \$162,756.77, plus post-judgment interest at \$36.30 per day from March 3, 2021, until satisfied in full.**

Dated this 9th day of March, 2021

IT IS SO ORDERED.



A0B B87 1ECA 45B5  
Veronica M. Barisich  
District Court Judge

Respectfully submitted by:

Approved as to form and content by:

**HOLLEY DRIGGS**

**BLACK & WADHAMS**

/s/ F. Thomas Edwards  
F. THOMAS EDWARDS, ESQ. (NBN 9549)  
JESSICA M. LUJAN, ESQ. (NBN 14913)  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

/s/ Rusty Graf  
RUSTY GRAF, ESQ. (NBN 6322)  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

*Attorneys for Plaintiffs/Counter-defendants*

*Attorneys for Defendants/Counterclaimants*

## Sandy Sell

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**Subject:** RE: Bour

No changes to either.

Thank you and Stay safe!

**Rusty Graf, Esq.**

Partner



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Las Vegas, NV 89135

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**Cc:** Jessica M. Lujan <[jlujan@nevadafirm.com](mailto:jlujan@nevadafirm.com)>

**Subject:** Bour

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Thanks  
Tom

**F. Thomas Edwards**  
Shareholder  
Las Vegas Office

HOLLEY DRIGGS

---

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---

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 4520 Arville, Plaintiff(s)

CASE NO: A-19-794864-C

7 vs.

DEPT. NO. Department 5

8 Bour Enterprises LLC,  
9 Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District  
13 Court. The foregoing Judgment was served via the court's electronic eFile system to all  
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 3/9/2021

15 Tom Edwards, Esq.

tedwards@nevadafirm.com

16 BRENT CARSON

bac@winnercarson.com

17 Diane Meeter

dmeeter@blacklobello.law

18 J. Graf

Rgraf@blacklobello.law

19 Sandra Sell

ssell@nevadafirm.com

20 Jessica Lujan

jlujan@nevadafirm.com

21 Marsha Stallsworth

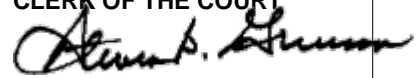
mstallsworth@blackwadhams.law

22 Marsha Stallsworth

mstallsworth@blackwadhams.law

23  
24  
25  
26  
27  
28

# **EXHIBIT 17**



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Nevada Bar No. 9549  
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JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
E-mail: jlujan@nevadafirm.com  
HOLLEY DRIGGS  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
Facsimile: 702/791-1912

*Attorneys for Plaintiffs/Counterdefendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Counterclaimants.

v.

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership, DOES I-X; and ROE  
CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 5

**NOTICE OF ENTRY OF ORDER**

YOU, and each of you, will please take notice that an Order Granting Plaintiffs' Motion  
for Entry of Judgment in the above-entitled matter was filed and entered by the Clerk of the above-

///

HOLLEY DRIGGS

entitled Court on the 9th day of March, 2021, a copy of which is attached hereto.

Dated this 9th<sup>th</sup> day of March, 2021.

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards

F. Thomas Edwards, Esq. (NBN 9549)

Jessica M. Lujan, Esq. (NBN 14913)

400 S. Fourth Street, Third Floor

Las Vegas, NV 89101

*Attorney for Plaintiffs/Counter-defendants*

**CERTIFICATE OF SERVICE**

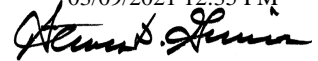
Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs and that on this 9th day of March, 2021, I did cause a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER**, to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System:

Rusty Graf, Esq.  
BLACK & LOBELLO  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

Brent Carson, Esq.  
WINNER & CARSON  
7935 W. Sahara Ave., Suite 101  
Las Vegas, NV 89117

/s/ Sandy Sell

An employee of HOLLEY DRIGGS



CLERK OF THE COURT

F. THOMAS EDWARDS, ESQ.  
Nevada Bar No. 9549  
E-mail: tedwards@nevadafirm.com  
JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
E-mail: jlujan@nevadafirm.com  
HOLLEY DRIGGS  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
Facsimile: 702/791-1912

*Attorneys for Plaintiffs/Counterdefendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
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individual; DOES 1 through 100, inclusive,

Defendants.

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v.

4520 ARVILLE, a California general  
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CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 5

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR ENTRY OF JUDGMENT**

**Date of Hearing: March 2, 2021**  
**Time of Hearing: 9:00 a.m.**

///

///



1 This matter came before the Court upon Plaintiffs' Motion for Entry of Judgment on March  
2 2, 2021 at 9:00 a.m. F. Thomas Edwards, Esq., appeared on behalf of Plaintiffs. Rusty Graf, Esq.,  
3 appeared on behalf of Defendants. The Court carefully reviewed and considered the relevant briefs  
4 and documents on file in this case and considered the oral arguments of counsel. After taking the  
5 matter under advisement, the Court FINDS and CONCLUDES as follows:

6 Per the Court's order entered January 28, 2021, the Court granted Plaintiffs' Motion For  
7 Summary Judgment Regarding Their Breach of Contract Claims. Per that order, the Court  
8 concluded that the undisputed material facts established that Defendants breached the leases and  
9 personal guaranties. The Court rejected Defendant's argument as to constructive eviction as the  
10 implied warranty of habitability was deemed inapplicable in commercial leases and that even if  
11 such warranty is applicable, it was specifically waived by the Defendants in the subject leases.

12 Therefore, the only remaining issue is whether a trial is necessary to prove Plaintiffs'  
13 damages. The damages Plaintiffs sought were set forth in the Exhibits 5 and 6 of the Plaintiffs'  
14 Motion For Summary Judgment Regarding Their Breach of Contract Claims, wherein Plaintiffs  
15 sought \$62,223.08 for Units C-23/24 and \$77,231.42 for Units C-10/29, for a total of \$139,454.50.  
16 In response to Plaintiffs' Motion For Summary Judgment Regarding Their Breach of Contract  
17 Claims, Defendants did not challenge the appropriateness of the amounts and did not raise the  
18 applicable affirmative defenses with regard to the damages sought. Under *Shuck v. Signature*  
19 *Flight Support of Nevada, Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010), the arguments that  
20 were not raised in response to the original motion must be deemed to have been waived and cannot  
21 be subsequently considered. Thus, there are no issues of material fact with regard to Plaintiffs'  
22 damages and Plaintiffs' Motion for Entry of Judgment should be granted.

23 Good cause appearing, the Court ORDERS as follows:

24 1. IT IS HEREBY ORDERED that Plaintiffs' Motion for Entry of Judgment is hereby  
25 GRANTED in its entirety;

26 2. IT IS FURTHER ORDERED that a separate judgment shall issue in favor of  
27 Plaintiffs and against Defendants, jointly and severally, in the amount of \$139,454.50, plus pre-  
28 and post-judgment interest at the rate provided for in the subject leases; and

HOLLEY DRIGGS

3. IT IS FURTHER ORDERED that the Pre-Trial Conference, Calendar Call and Bench Trial shall be VACATED.

IT IS SO ORDERED.

Dated this 9th day of March, 2021



99B 7B4 1827 0BBB  
Veronica M. Barisich  
District Court Judge

Respectfully submitted by:

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards  
F. THOMAS EDWARDS, ESQ. (NBN 9549)  
JESSICA M. LUJAN, ESQ. (NBN 14913)  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

*Attorneys for Plaintiffs/Counter-defendants*

Approved as to form and content by:

**BLACK & WADHAMS**

/s/ Rusty Graf  
RUSTY GRAF, ESQ. (NBN 6322)  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

*Attorneys for Defendants/Counterclaimants*

## Sandy Sell

---

**Subject:** FW: Bour

**From:** Rusty Graf <[rgraf@blackwadhams.law](mailto:rgraf@blackwadhams.law)>

**Sent:** Monday, March 8, 2021 8:07:15 AM

**To:** Tom Edwards <[tedwards@nevadafirm.com](mailto:tedwards@nevadafirm.com)>

**Cc:** Jessica M. Lujan <[jlujan@nevadafirm.com](mailto:jlujan@nevadafirm.com)>; Diane Meeter <[dmeeter@blackwadhams.law](mailto:dmeeter@blackwadhams.law)>; Mark Lounsbury <[mlounsbury@blacklobello.law](mailto:mlounsbury@blacklobello.law)>

**Subject:** RE: Bour

No changes to either.

Thank you and Stay safe!

**Rusty Graf, Esq.**

Partner



p: (702)869-8801

f: (702)869-2669

a: 10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

W: [www.blackwadhams.law](http://www.blackwadhams.law)

E: [rgraf@blacklobello.law](mailto:rgraf@blacklobello.law) (Effective until August 1, 2020)

E: [rgraf@blackwadhams.law](mailto:rgraf@blackwadhams.law) (Effective August 1, 2020)



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**From:** Tom Edwards <[tedwards@nevadafirm.com](mailto:tedwards@nevadafirm.com)>

**Sent:** Friday, March 5, 2021 12:44 PM

**To:** Rusty Graf <[rgraf@blackwadhams.law](mailto:rgraf@blackwadhams.law)>

**Cc:** Jessica M. Lujan <[jlujan@nevadafirm.com](mailto:jlujan@nevadafirm.com)>

**Subject:** Bour

Rusty,

Attached for your review are the order and judgment. The only change to the judgement from the last one you saw is that we updated the prejudgment interest amount. Please let me know if we can affix your electronic signature and submit.

Thanks  
Tom

**F. Thomas Edwards**  
Shareholder  
Las Vegas Office

HOLLEY DRIGGS

---

Tel: 702.791.0308 | Fax: 702.791.1912  
400 S. 4<sup>th</sup> Street, Suite 300, Las Vegas NV 89101

Tel: 775.851.8700 | Fax: 775.851.7681  
800 S. Meadows Parkway, Suite 800, Reno NV 89521

[www.nevadafirm.com](http://www.nevadafirm.com)

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---

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 4520 Arville, Plaintiff(s)

CASE NO: A-19-794864-C

7 vs.

DEPT. NO. Department 5

8 Bour Enterprises LLC,  
9 Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District  
13 Court. The foregoing Order Granting Motion was served via the court's electronic eFile  
system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 3/9/2021

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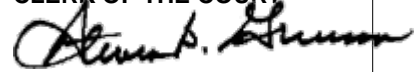
mstallsworth@blackwadhams.law

22 Marsha Stallsworth

mstallsworth@blackwadhams.law

23  
24  
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26  
27  
28

# **EXHIBIT 18**



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E-mail: tedwards@nevadafirm.com  
JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
E-mail: jlujan@nevadafirm.com  
HOLLEY DRIGGS  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
Facsimile: 702/791-1912

*Attorneys for Plaintiffs/Counterdefendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
individual; DOES 1 through 100, inclusive,

Defendants.

BOUR ENTERPRISES, LLC, a Nevada limited  
liability company; MULUGETA BOUR, an  
individual; HILENA MENGESHA, an  
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Counterclaimants.

v.

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CORPORATIONS I-X,

Counterdefendants,

Case No: A-19-794864-C  
Dept. No.: 5

**NOTICE OF ENTRY OF JUDGMENT**

YOU, and each of you, will please take notice that a Judgment Against Defendants Bour  
Enterprises, LLC, Mulugeta Bour and Hilena Mengesha in the above-entitled matter was filed and

///

entered by the Clerk of the above-entitled Court on the 9th day of March, 2021, a copy of which is attached hereto.

Dated this 9th<sup>th</sup> day of March, 2021.

**HOLLEY DRIGGS**

/s/ F. Thomas Edwards

F. Thomas Edwards, Esq. (NBN 9549)

Jessica M. Lujan, Esq. (NBN 14913)

400 S. Fourth Street, Third Floor

Las Vegas, NV 89101

*Attorney for Plaintiffs/Counter-defendants*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs and that on this 9th day of March, 2021, I did cause a true and correct copy of the foregoing **NOTICE OF ENTRY OF JUDGMENT**, to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System:

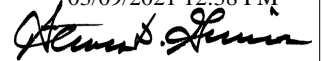
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BLACK & LOBELLO  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

Brent Carson, Esq.  
WINNER & CARSON  
7935 W. Sahara Ave., Suite 101  
Las Vegas, NV 89117

/s/ Sandy Sell

An employee of HOLLEY DRIGGS





CLERK OF THE COURT

F. THOMAS EDWARDS, ESQ.  
Nevada Bar No. 9549  
E-mail: tedwards@nevadafirm.com  
JESSICA M. LUJAN, ESQ.  
Nevada Bar No. 14913  
E-mail: jlujan@nevadafirm.com  
HOLLEY DRIGGS  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
Telephone: 702/791-0308  
Facsimile: 702/791-1912

*Attorneys for Plaintiffs/Counter-defendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

4520 ARVILLE, a California general  
partnership; MCKINLEY MANOR, an Idaho  
general partnership,

Plaintiffs,

v.

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v.

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CORPORATIONS I-X,

Counter-defendants,

Case No: A-19-794864-C  
Dept. No.: 5

**JUDGMENT AGAINST DEFENDANTS  
BOUR ENTERPRISES, LLC,  
MULUGETA BOUR, AND HILENA  
MENGESHA**

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment is entered in  
favor of Plaintiffs 4520 Arville, a California general partnership, and McKinley Manor, an Idaho  
general partnership (together, "Plaintiffs") and against Defendants Bour Enterprises, LLC, a

Nevada limited liability company, Mulugeta Bour, and Hilena Mengesha (together, “Defendants”), jointly and severally, as follows:

1. As to the Lease of Units C-23/24, the principal sum of \$62,223.08 in outstanding rent, CAM charges and late fees (*see* Tenant Ledger, attached as Exhibit 5 to Plaintiffs’ Motion for Summary Judgment, filed 12/1/20 (the “Motion”));
2. As to the Lease of Units C-10/29, the principal sum of \$77,231.42 in outstanding rent, CAM charges and late fees (*see* Tenant Ledger, attached as Exhibit 6 to the Motion);
3. Pre-judgment interest at 9.5% (Wall Street Journal prime rate of 5.5% published on 12/20/18 plus 4%, per Section 13.5 of the Leases, attached as Exhibits 2 and 3 to the Motion) since the expiration of the Leases on May 31, 2019 through March 2, 2021 in the amount of \$23,302.27;
4. Post-judgment interest at 9.5% (Wall Street Journal prime rate of 5.5% published on 12/20/18 plus 4%, per Section 13.5 of the Leases, attached as Exhibits 2 and 3 to the Motion) in the amount of \$36.30 per day from March 3, 2021, until satisfied in full;
5. **For a total amount of \$162,756.77, plus post-judgment interest at \$36.30 per day from March 3, 2021, until satisfied in full.**

Dated this 9th day of March, 2021

IT IS SO ORDERED.



A0B B87 1ECA 45B5  
Veronica M. Barisich  
District Court Judge

Respectfully submitted by:

Approved as to form and content by:

**HOLLEY DRIGGS**

**BLACK & WADHAMS**

/s/ F. Thomas Edwards  
F. THOMAS EDWARDS, ESQ. (NBN 9549)  
JESSICA M. LUJAN, ESQ. (NBN 14913)  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101

/s/ Rusty Graf  
RUSTY GRAF, ESQ. (NBN 6322)  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

*Attorneys for Plaintiffs/Counter-defendants*

*Attorneys for Defendants/Counterclaimants*

## Sandy Sell

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**Sent:** Monday, March 8, 2021 8:07:15 AM

**To:** Tom Edwards <[tedwards@nevadafirm.com](mailto:tedwards@nevadafirm.com)>

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**Subject:** RE: Bour

No changes to either.

Thank you and Stay safe!

***Rusty Graf, Esq.***

Partner



p: (702)869-8801

f: (702)869-2669

a: 10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135

W: [www.blackwadhams.law](http://www.blackwadhams.law)

E: [rgraf@blacklobello.law](mailto:rgraf@blacklobello.law) (Effective until August 1, 2020)

E: [rgraf@blackwadhams.law](mailto:rgraf@blackwadhams.law) (Effective August 1, 2020)



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**Cc:** Jessica M. Lujan <[jlujan@nevadafirm.com](mailto:jlujan@nevadafirm.com)>

**Subject:** Bour

Rusty,

Attached for your review are the order and judgment. The only change to the judgement from the last one you saw is that we updated the prejudgment interest amount. Please let me know if we can affix your electronic signature and submit.

Thanks  
Tom

**F. Thomas Edwards**  
Shareholder  
Las Vegas Office

HOLLEY DRIGGS

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400 S. 4<sup>th</sup> Street, Suite 300, Las Vegas NV 89101

Tel: 775.851.8700 | Fax: 775.851.7681  
800 S. Meadows Parkway, Suite 800, Reno NV 89521

[www.nevadafirm.com](http://www.nevadafirm.com)

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---

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 4520 Arville, Plaintiff(s)

CASE NO: A-19-794864-C

7 vs.

DEPT. NO. Department 5

8 Bour Enterprises LLC,  
9 Defendant(s)

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11 **AUTOMATED CERTIFICATE OF SERVICE**

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