IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 05 2021 03:15 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

BOUR ENTERPRISES, LLC, a Nevada limited liability company; MULUGETA BOUR, an individual; HILENA MENGESHA, an individual; DOES 1 through 100, inclusive, Appellants vs. 4520 ARVILLE, a California general partnership; MCKINLEY MANOR, an Idaho general partnership, Respondents BOUR ENTERPRISES, LLC, a Nevada limited liability company; MULUGETA BOUR, an individual; HILENA MENGESHA, an individual; DOES 1 through 100, inclusive, Appellants vs. 4520 ARVILLE, a California general partnership; MCKINLEY MANOR, an Idaho general partnership, Respondents	**Supreme Court Case No.: 83099** District Court Case No.: A-19-794864-C **Consolidated with Appeal No. 82699**

APPELLANTS' APPENDIX OF RECORD VOLUMES I – XI

APPEAL
FROM THE EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE CYNTHIA CRUZ/CASE NO. A-19-794864-C

APPENDIX ON APPEAL
VOLUME I OF XI
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on this 5th day of October 5, 2021.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 5th day of October 2021.

BLACK & WADHAMS

/s/ Rusty Graf

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Attorneys for Plaintiffs

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

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 Puzey 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.

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Docket 83099 Document 2021-28552

Case Number: A-19-794864-C

HOLLEY DRIGGS WALCH | FINE | PUZEY | STEIN | THOMPSON

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.

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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.

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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.

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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;

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

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

Dated this 15th day of May, 2019.

HOLLEY, DRIGGS, WALCH,
FINE, PUZEY, STEIN & THOMPSON

/s/ F. Thomas Edwards

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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.	Case No.: A-19-794864-C Dept. No.: 8 **DEFENDANTS' ANSWER AND COUNTERCLAIM**
BOUR ENTERPRISES, LLC, a Nevada limited liability company; MULUGETA BOUR, an individual; HILENA MENGESHA, an individual; DOES 1 through 100, inclusive, Counterclaimants	**[Exempt from Arbitration]** **[Declaratory Relief Requested]**

Case Number: A-19-794864-C

v.

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

Counter Defendants,

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 Black & LoBello, hereby file their Answer and Counterclaim to Plaintiffs' Complaint as follows:

JURISDICTION & VENUE

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

PARTIES

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

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

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

GENERAL ALLEGATIONS

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

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

FIRST CLAIM FOR RELIEF
(Breach of Leases Against Lessee)

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7. Answering Paragraph 14 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 this allegation.

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

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

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

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

11. Answering Paragraph 21 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.

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

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

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

THIRD CLAIM FOR RELIEF

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

15. Answering Paragraph 28 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.

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

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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

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

Fifth Affirmative Defense

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

Sixth Affirmative Defense

Plaintiffs failed to mitigate damages.

Seventh Affirmative Defense

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

Eighth Affirmative Defense

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

Ninth Affirmative Defense

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

Tenth Affirmative Defense

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

Eleventh Affirmative Defense

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

Twelfth Affirmative Defense

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

Thirteenth Affirmative Defense

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

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are revealed.

Fourteenth Affirmative Defense

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

Fifteenth Affirmative Defense

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

Sixteenth Affirmative Defense

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

Seventeenth Affirmative Defense

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

Eighteenth Affirmative Defense

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

Nineteenth Affirmative Defense

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

Twentieth Affirmative Defense

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

Twenty-First Affirmative Defense

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

WHEREFORE, Defendant prays for judgment as follows:

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

2 For the costs of suit herein;

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

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

COUNTERCLAIM

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

PARTIES

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

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

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

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

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

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Nevada.

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

JURISDICTION AND VENUE

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

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

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

GENERAL ALLEGATIONS

10. 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"). See Exhibits "1" and "2".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FIRST CLAIM FOR RELIEF

(Constructive Eviction)

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

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

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

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

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

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

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

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

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

33. As a direct and proximate result of the constructive eviction, 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.

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34. 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 law.

SECOND CLAIM FOR RELIEF

(Breach of Contract)

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

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

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

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

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

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

41. As a direct and proximate result of the breach of contract 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.

42. 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 law.

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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

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law.

FOURTH CLAIM FOR RELIEF

(Declaratory Relief)

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

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

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

55. 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 law.

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

1. For general damages against Counter-Defendant in an amount in excess of $15,000.00;

2. For special damages in an amount in excess of $15,000.00;

3. For reasonable attorney's fees;

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 10 day of July 2019.

BLACK & LOBELLO

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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

[X] 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.

Diane Meeter
An Employee of Black & LoBello

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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: A-19-794864-C Dept. No.: 1 **HEARING REQUESTED** **PLAINTIFFS/COUNTERDEFENDANTS' MOTION TO DISMISS COUNTERCLAIMS**
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,	

Plaintiffs and Counterdefendants 4520 Arville and McKinley Manor (collectively "Plaintiffs"), by and through their attorneys, the law firm of Holley Driggs Walch Fine Puzey Stein

Case Number: A-19-794864-C

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& Thompson, hereby move to dismiss, pursuant to NRCP 12(b)(5), the counterclaims set forth in Defendants and Counterclaimants Bour Enterprises, LLC ("Lessee"), Mulugeta Bour, and Helena Mengesha's (collectively "Defendants") Answer and Counterclaim (the "Counterclaims"). The Counterclaims should be dismissed as they are premised upon a warranty of habitability that does not extend to commercial leases and are contradictory to the governing leases Defendants attached to their Counterclaims.

This Motion to Dismiss Counterclaims (the "Motion") is made and based on the papers and pleadings on file herein, the following Memorandum of Points and Authorities, any exhibits attached hereto, and any argument at hearing on this matter.

Dated this 1st day of August, 2019.

HOLLEY DRIGGS WALCH
FINE PUZEY STEIN & THOMPSON

/s/ F. Thomas Edwards
F. THOMAS EDWARDS, ESQ.
Nevada Bar No. 9549
SEAN E. STORY, ESQ.
Nevada Bar No. 13968
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101

Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On or around April 20, 2017, Lessee entered into two Standard Industrial/Commercial Multi-Tenant Leases – Net (the "Leases") for the lease commercial property warehouse space from Plaintiffs. *See* Counterclaims ¶ 10; *see also* Exhibit 1 to Counterclaims. The Leases expressly provide that Lessee is entitled to a total of eight (8) unreserved parking spaces (four (4) parking spaces for both Leases) and no reserved parking spacings. Leases Section 1.2(b). In conjunction with the Leases, the parties entered into Lease Addendums (the "Addendums") pursuant to which the parties expressly agreed that Lessee accepted the property in an "as-is" condition. *See* Lease Addendums, Exhibit 1 to Counterclaims. The Leases further provide that the Lessee shall, at

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Lessee's sole expense, keep the premises in good order, condition, and repair and shall be responsible for all maintenance of the interior of the property. Leases Section 7.1(a). Despite accepting the warehouse in an as-is condition and despite accepting the sole responsibility of maintaining the property, approximately one year after commencement of the Leases, Lessee notified Plaintiffs of its intent to terminate the lease, citing issue related to dust, debris, and related issues on the premises, as well as unspecified parking issues related to Lessee's business vehicles.

Defendants have asserted four (4) causes of action in their Counterclaims. Defendants' first claim for Construction Eviction, second claim for Breach of Contract, and third claim for Breach of the Implied Covenant are all premised upon an alleged failure by Plaintiffs to address purported habitability issues in the commercial property which is the subject of the Lease. *See* Counterclaims ¶¶ 25-29 & 36-40 & 46-49. Defendants' fourth claim for declaratory relief appears to be nothing more than a restatement of their constructive eviction claim which seeks to have the Court declare that Defendants were not obligated to satisfy their rental payment obligations.

Defendants attached to their Counterclaims the Lease, making it a part of the pleading for all purposes, including the evaluation of a motion to dismiss under NRCP 12(b)(5). As articulated in further detail below, all of Defendants' claims set forth in the Counterclaims are premised upon legal conclusions that are false and conflict with specific terms of the Leases and Addendums. Accordingly, these conclusory allegations need not be taken as true, leaving Defendants' Counterclaims devoid of any valid claims upon which relief may be granted.

II. LEGAL ARGUMENT

A. Legal Standard

Pursuant to NRCP 12(b)(5), "failure to state a claim upon which relief can be granted," is a basis to dismiss a complaint where a moving party can demonstrate beyond doubt that Plaintiff cannot provide a set of facts in support of its claim entitling it to relief. *Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). In considering a Motion to Dismiss, the Court generally takes allegations pled in the Complaint as true and views the same in the light most favorable to the non-moving party. *Buzz Stew LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

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However, the Court need not accept as true allegations that are conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Wayment v. Holmes*, 112 Nev. 232, 237, 912 P.2d 816, 819 (1996) (finding plaintiff's "version of facts is nothing more than conclusory allegations and general statements" and thus "it will not be accepted as true"). Similarly, the Court is also not obligated to accept as true allegations that are contradicted by documentary evidence. *See White v. Annucci*, 78 N.Y.S.3d 724, 725–26 (N.Y. App. Div. 2018) ("Notwithstanding the liberal standard applicable to motions to dismiss, we are not obliged to accept allegations consisting of bare legal conclusions or factual claims flatly contradicted by documentary evidence as the basis for a valid claim."); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ("The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit."); *Griffin v. Green Tree Servicing, LLC*, 166 F. Supp. 3d 1030, 1040 (C.D. Cal. 2015) ("The court is not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint or proper subjects of judicial notice.").[1]

The Nevada Supreme Court has noted that although factual assertions in a complaint are to be accepted as true, it has "never held that [] conclusory legal allegation[s] must be accepted as true." *Davenport v. GMAC Mortg.*, 56697, 2013 WL 5437119, at *3 (Nev. Sept. 25, 2013) (unpublished). Under the parol evidence rule, "all prior negotiations and agreements are deemed merged in the written contract, and parol evidence is not admissible to vary or contradict its terms." *Tallman v. First Nat. Bank of Nev.*, 66 Nev. 248, 256, 208 P.2d 302, 306 (1949). "The parol evidence rule forbids the reception of evidence which would vary or contradict the contract, since all prior negotiations and agreements are deemed to have been merged therein." *Daly v. Del E. Webb Corp.*, 96 Nev. 359, 361, 609 P.2d 319, 320 (1980).

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[1] When applying the Nevada Rules of Civil Procedure, the court may look to the corresponding Federal Rules for guidance. *See Am. Home Assurance Co. v. The Eighth Judicial Dist.*, 147 P.3d 1120, 1238 n. 28 (Nev.2006).

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B. The Lease is Part of the Counterclaims for All Purposes

"A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." NRCP 10(c). This includes the consideration of such exhibits in evaluating a motion to dismiss. *See Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927, 931 (2015). Here, Defendants attached to their Counterclaims the Lease, thus making it a part of their Counterclaims. It is therefore appropriate for the Court to consider the Lease in evaluating this Motion.

C. Defendants' Claims are Directly Contradicted by the Express Terms of the Lease

Each of Defendant's claims are premised upon an alleged legal duty by Plaintiffs to maintain the premises. However, the Leases make clear that the duty to maintain the property belonged solely to Lessee. Moreover, there is not an implied legal duty for the Plaintiff to maintain the premises in this case. Therefore, each of Defendants' Counterclaims fails as a matter of law.

In each of Defendants' Counterclaims, Defendants make conclusory legal allegations that Plaintiffs had an obligation to maintain the premises for Defendants, which is directly contradicted by the Leases and Addendums. The Court cannot accept as true these conclusory legal allegations that are contradicted by the express agreements between the parties. For example, Counterclaimants allege that:

1. Constructive Eviction – "Counter-Defendants had a duty to lease premises that are habitable and fit for the intended use." Counterclaims ¶ 25.
2. Breach of Contract – "The Lease states that the Premises shall be habitable and fit for the intended purpose of occupying the Premises for the intended purpose of the Bour Enterprises business." Counterclaim ¶ 46.
3. Breach of the Implied Covenant – "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." Counterclaim ¶ 38.
4. Declaratory Relief – "[A]s a result of the constructive eviction, Lessee is not liable for any rent, charges, or other amounts due under the Lease from the inception of the habitability issues." Counterclaim ¶ 54.

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These conclusory legal allegations are contradicted by the express terms of the Leases and Addendums. Section 7.1(a) of the Leases expressly provide that Lessee is responsible for all maintenance at the property.

> **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 Counterclaim, Exhibit 1, Section 7.1(a) (emphasis added).

Moreover, Lessee 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 Counterclaim, Exhibit 1 (emphasis added). For ease of reference and because the Counterclaim interspersed the pages of the Addendums with the Leases, attached hereto as **Exhibits 1 and 2** are the complete copies of the Addendums.

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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 *Thompson on Real Property,* § 1230 (1981) (the doctrine of warranty of fitness which is part of the law of sales does not generally extend to the landlord-tenant relationship in commercial leases; the implied warranty of habitability does not apply to commercial structures); 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), (the general rule that there is no implied warranty of fitness or as to the conditions of the premises applies to premises leased for business purposes); 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) (it has been stated that the implied warranty of habitability is not a warranty against all inconvenience or discomfort). *See generally,* Restatement (Second) of Property, Landlord and Tenant, § 5.1 Caveat and Comment (1977) (implied warranty of habitability not extended to commercial leases). "Most jurisdictions have expressly or impliedly refused to extend the implied warranty of habitability into commercial leases." *Teller v. McCoy*, 162 W. Va. 367, 380 (1978).

However, even the minority of courts that recognize an implied warranty of habitability or suitability in commercial leases hold that those warranties do not apply if the commercial tenant accepts the property in an "as-is" condition. "With respect to the abatement of rent for breach of the implied warranty of habitability, the doctrine's application may not be extended to the fact pattern at bar involving a corporate tenant taking the premises 'as is' under a commercial lease." *Coulston v. Teliscope Productions, Ltd.*, 378 N.Y.S.2d 553, 554 (App. Term 1975). "If, however, the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control." *Davidow v. Inwood N. Prof'l Group--Phase I*, 747 S.W.2d 373, 376

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(Tex. 1988). Therefore, even if Nevada recognized these implied warranties in commercial tenancies, they are not applicable based upon the express language of the Leases and Addendums, which control.

Each of Defendants' Counterclaims is premised upon conclusory legal allegations that are contradicted by the express agreements between the parties. Those allegations should not be accepted as true. Moreover, each of Defendants' counterclaims is premised upon the faulty legal theory that there is an express or implied warranty of habitability or fitness applicable to this commercial lease. Those warranties do not apply in the commercial context and, even if they did, those warranties are contradicted by the express terms of the Leases and Addendums, which control. Therefore, each of Defendants' counterclaims must be dismissed.

III. CONCLUSION

Defendants' conclusory legal allegations, which are directly contradicted by the express terms of the Leases and Addendums, cannot and should not be taken as true in considering a 12(b)(5) standard under these circumstances. The premise of each of Defendants' counterclaims that Plaintiff owes a warranty of habitability and fitness in this commercial context is wrong as a matter of law and contrary to the parties' agreement. Accordingly, Defendants' Counterclaims should be dismissed under NRCP 12(b)(5) for failure to state a claim.

Dated this 1st day of August, 2019.

HOLLEY DRIGGS WALCH
FINE PUZEY STEIN & THOMPSON

/s/ F. Thomas Edwards
F. THOMAS EDWARDS, ESQ.
Nevada Bar No. 9549
SEAN E. STORY, ESQ.
Nevada Bar No. 13968
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101

Attorneys for Plaintiffs

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WALCH | FINE | PUZEY | STEIN | THOMPSON

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs Walch Fine Puzey Stein & Thompson and that on this 1st day of August, 2019, I did cause a true and correct copy of the foregoing **PLAINTIFF/COUNTERDEFENDANTS' MOTION TO DISMISS COUNTERCLAIMS**, to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System:

Brent Carson, Esq.
7935 W. Sahara Ave., Suite 101
Las Vegas, NV 89117
Email: bac@winnercarson.com

/s/ Sandy Sell
An employee of HOLLEY DRIGGS WALCH FINE PUZEY STEIN & THOMPSON

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EXHIBIT 1

LEASE ADDENDUM

This Lease Addendum is made and entered into on this 20th 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

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

EXHIBIT 2

LEASE ADDENDUM

This Lease Addendum is made and entered into on this 20th 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,

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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

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Steven D. Grierson
CLERK OF THE COURT

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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.	Case No.: A-19-794864-C Dept. No.: 8 **DEFENDANTS AND COUNTERCLAIMANTS OPPOSITION TO MOTION TO DISMISS COUNTERCLAIMS AND DEFENDANTS AND COUNTERCLAIMANTS MOTION FOR SUMMARY JUDGMENT**
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,	**[Exempt from Arbitration]** **[Declaratory Relief Requested]**

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Case Number: A-19-794864-C

Defendants' and Counterclaimants, 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 Black & LoBello, hereby file their Opposition to Motion to Dismiss Counterclaims.

This Opposition to Motion to Dismiss Counterclaims is made and based on the papers and pleadings on file herein, the following Memorandum of Points and Authorities, any exhibits attached hereto, and any argument at hearing on this matter.

Dated this 12th day of August 2019.

BLACK & LOBELLO

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs entered into two commercial lease agreements for warehouse space with Defendants on or about April 20, 2017. When signing the two lease agreements ("Leases"), Plaintiffs and Defendants also executed Lease Addendums ("Addendums"), which added additional terms to the Leases. One of the additional terms added in an Addendum inconspicuously stated that the warehouse spaces being leased were to be accepted "as-is". *See Plaintiffs' Motion to Dismiss, Exhibit 1.* Plaintiffs subsequently used the "as-is" clause of the Addendum in this effort to substantiate its neglect of their duties as landlords and to ignore their obligations to adequately maintain the properties.

Because Plaintiffs failed to provide a habitable property, violated warranties, and were not willing to rectify the serious issues that were present, Defendants provided notice of intent to terminate the Leases approximately one year after the initial agreement. When providing this notice to Plaintiffs, Defendants again cited the warranty of habitability issues. Plaintiffs responded by bringing suit against Defendants improperly attempted to enforce the Leases.

Defendants have asserted four (4) Counterclaims, all revolving around the habitability and maintenance issues with the properties which Plaintiffs ignored. Plaintiffs now allege, again incorrectly, that Defendants' Counterclaims are conclusory, and therefore have filed this Motion to Dismiss the Counterclaims for failure to state a valid claim upon which relief may be granted. However, this is patently incorrect, and in fact merely another predatory attempt by this landlord to enforce Leases for properties, which they failed to maintain to any reasonable standard. Plaintiffs Motion to Dismiss should be denied.

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II. LEGAL ARGUMENT

A. Legal Standard

Plaintiffs have filed a Motion to Dismiss Defendants' Counterclaims pursuant to the provisions of NRCP 12(b)(5). The Court has held that there is a very high standard of proof that must be met by the moving party in order to grant a Motion to Dismiss for failure to state a claim upon which relief can be granted. *Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). For the Court to grant this Motion, Plaintiffs **must demonstrate beyond doubt** that the Defendants cannot provide a set of facts in support of their claims for relief. *Id.* (emphasis added).

In determining whether the moving party has met their burden of proof, the Court takes allegations pled in the Complaint as true and views these allegations in the light most favorable to the non-moving party. *Buzz Stew LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). The Court need not accept as true allegations that are conclusory, unwarranted deductions of fact, or unreasonable inferences. *Wayment v. Holmes*, 112 Nev. 232, 237, 912 P.2d 816, 819 (1996). The parol evidence rule prevents the introduction of evidence which would alter or contradict a contract, but this does not apply to the current matter, as this dispute revolves around Plaintiffs attempting to enforce a provision that is legally insufficient and therefore necessarily invalid. *Daly v. Del E. Webb Corp.*, 96 Nev. 359, 361, 609 P.2d 319, 320 (1980).

B. The Lease is Part of the Counterclaims For All Purposes

Defendants do not dispute Plaintiffs' argument that because Defendants attached a copy of the Leases to the Counterclaim and as such it is part of the Counterclaim and appropriate for the Court to use in evaluating this Motion.

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C. Defendants' Claims Are Not Controlled By The Express Terms Of The Lease Because the "As-Is" Clause Is A Legally Invalid Disclaimer Of Warranty

Plaintiffs argue that it would be proper for the Court to grant the Motion to Dismiss because Defendants' claims are premised upon the legal duty of Plaintiffs to provide a property that meets the implied warranties of merchantability, habitability, and fitness. Plaintiffs assert that these were disclaimed by the addition of a clause in an Addendum attached to the Leases stating that Defendants would occupy the properties "as-is". *See Plaintiffs' Motion to Dismiss, Exhibit 1.* Plaintiffs cite remote case law, which is not controlling in Nevada, and make an argument that essentially revolves around the assertion that either (1) commercial tenancies have no implied warranties, or (2) that even if Nevada does recognize implied warranties in commercial tenancies, they are not applicable based upon the language of the Addendum. Both of these arguments are demonstrably false based on both Nevada statutes and established Nevada case law.

A similar situation was considered by the Court in Bill Stremmel Motors, Inc. v. IDS Leasing Corp. A business entered into a long-term lease for a communications system that subsequently failed to operate properly, causing the lessee to stop making the contractually agreed upon lease payments. *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.,* 89 Nev. 414 (1973). Ultimately, the Court held that for the disclaimer of an express or implied warranty to be valid, the language of the disclaimer must be conspicuous and specifically mention that the warranties of fitness and merchantability are not being included in the agreement. *Id.* This is consistent with the requirements of N.R.S. 104.2316,[1] and makes it clear that an "as-is" clause in the Leases in question fails in two respects. *See N.R.S. 104.2316.*

[1] "To exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous." N.R.S. 104.2316

First, the "as-is" clause is not conspicuous enough to meet the Court's requirements for disclaiming a warranty. In Bill Stremmel Motors, Inc. v. IDS Leasing Corp., the warranty was found to be conspicuous because it stated, in large all capitalized letters, that it was expressly disclaiming the warranties of fitness and merchantability. *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.,* 89 Nev. 414 (1973).

In Sierra Diesel Injection Service, Inc. v. Burroughs Corp., a buyer of computer hardware and software brought action against seller when the computer system failed to perform as represented. *Sierra Diesel Injection Service, Inc. v. Burroughs Corp., Inc.,* 890 F.2d 108 (1989). The seller brought suit to hold the buyer to the contract, citing what the seller claimed to be a valid and conspicuous disclaimer of warranties, and stating that this excused the failure of the hardware and software to perform as promised. *Id.* In determining whether the warranty disclaimer was conspicuous, the Court cited to the requirements provided by NRS § 104.1201(10) and held that a term included in a contract is conspicuous when included in the body of a form if "it is in larger or other contrasting type or color."[2] *Id.* None of which is true here.

Here, the "as-is" clause is not conspicuous. First, it is not even in the body of the Leases but rather in an Addendum. Second, it was included in the body of the Addendum but was not set apart in the manner the Court requires. *See Plaintiffs' Motion to Dismiss, Exhibit 1.* Third, it is in the same font as the rest of the Addendum and is not emphasized or made explicitly noticeable in any way. *Id.* Fourth, it is not bolded or capitalized, making it very easy to overlook and therefore by definition not conspicuous, particularly to the degree the Court requires. *Id. See also Plaintiffs' Motion to Dismiss, Exhibit 1.* Because of this lack of conspicuousness, the "as-is"

[2] The Court also specifically stated that in determining conspicuousness, it would "consider type size and boldness as factors." *Sierra Diesel Injection Service, Inc. v. Burroughs Corp., Inc.*, 890 F.2d 108 (1989).

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provision would not effectively disclaim the implied warranties as required in Nevada, and Plaintiffs are in breach.

The attempted disclaimer of the implied warranties fails in another respect, as Plaintiffs failed to properly disclaim the warranties by not including the correct language. *Id.* Nevada requires that "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous." *N.R.S. 104.2316.* This was further emphasized in the case Bill Stremmel Motors, Inc. v. IDS Leasing Corp., discussed above, as a key requirement for effectively disclaiming either an express or implied warranty. *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.,* 89 Nev. 414 (1973).

Here, the Court can see that there is no explicit mention of the warranties Plaintiffs sought to disclaim. *See Plaintiffs' Motion to Dismiss, Exhibit 1.* The "as-is" clause is not sufficient. It does not address the implied warranties directly, and therefore fails to disclaim them. As a result, the Plaintiffs were still bound by the implied warranties of fitness, merchantability, and habitability, which they breached.

III. CONCLUSION

Under the 12(b)(5) standard, Plaintiffs have not met their burden of proof and the Motion to Dismiss the Counterclaims should be denied. When the pleadings are viewed in the light most favorable to the Defendants, it is clear that the allegations are not conclusory and there are viable stated claims for which relief can be granted. The premise of each the Defendants' counterclaims, that Plaintiffs owed a warranty of habitability and fitness, is not incorrect as a matter of law as Plaintiffs allege. Therefore, based on the pleadings, the evidentiary standard of

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12(b)(5), and the fact that case law and statute support the assertion that the implied warranties were not disclaimed, Plaintiffs' Motion to Dismiss should be denied.

IV. DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT

A. Statement of Undisputed Facts

1. On or about April 20, 2017, Defendants entered into agreements 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").[3]

2. Bour Enterprises entered into the Lease to operate its business on the Premises, and Plaintiffs were informed, prior to entering into the Lease, that the Premises was fit for this intended use as a commercial business facility.[4]

3. Tony Bour informed Plaintiffs' representative that the Premises must be fit for the operation of Bour Enterprise's business and expressed concerns as to parking.[5]

4. Prior to the execution of the Leases, Plaintiffs assured Mr. Bour that parking arrangements would be made in order to provide Defendants' business vehicles sufficient parking spaces and room to safely maneuver through the parking lot.[6]

5. After entering into the Lease, Plaintiffs declined or purposely failed to fulfill their promise to make the parking arrangements that were necessary for the successful operation of Mr. Bour's business at the Premises.[7]

6. From the inception of Bour Enterprise's leasing of the Premises, they were infested with rodents, rodent excrement and urine, mounds of particulate, dust and other debris.[8]

7. The unsanitary conditions were unfit, uninhabitable, unhealthy and unsafe for customers

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[3] See attached Exhibit 1, Declaration of Anthony Bour, at pg.1, #1.

[4] Id. at pg.1, #1.

[5] Id. at pg.1, #2.

[6] Id. at pg.1, #3.

[7] Id. at pg.1, #4.

[8] Id. at pg.1, #5.

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and employees at the Premises, and rendered the Premises unfit for Bour Enterprise's occupancy and the operation of its business.[9]

8. Two (2) employees of Defendant have sought medical treatment as a result of these conditions.[10]

9. On April 17, 2018, Tony Bour, on behalf of Defendants, delivered a letter of its notice to terminate the Lease, citing the unsanitary condition of the property, and lack of parking arrangements (as promised by Plaintiffs or their principals) as the basis for the Lease termination.

10. On April 24, 2018, Plaintiffs/Counter-Defendants' legal counsel responded to Tony Bour's correspondence, unequivocally declined to address either the unsanitary/unhealthful conditions and the promised parking arrangements, when he rejected the Lessee's lease termination notice.[11]

11. On May 3, 2018, Bour Enterprises sent David Burns a letter of Bour Enterprise's intent to vacate the Premises immediately, and of its intent to terminate the Lease, effective May 31, 2018, due to the ongoing health hazards at the Premises.[12]

12. As of May 21, 2019, Counter-defendants assessed Bour Enterprise Sixty-Two Thousand Two Hundred Twenty-Three Dollars and Eight Cents ($62,223.08) in rent, late fees, common area maintenance charges, and other charges under the Lease, all assessed while the Premises were uninhabitable and unfit for the purpose asserted for the operation of the Bour Enterprises business.[13]

B. Applicable Law – Standard of Review for Motions for Summary Judgment

Summary Judgment is appropriate when the moving party is entitled to judgment as a matter of law, and no genuine issues of material fact remain for trial. *Shepard v. Harrison*, 100

[9] Id. at pg.1, #6.

[10] Id. at pg.2, #7.

[11] Id. at pg.2, #8.

[12] Id. at pg.2, #9.

[13] Id. at pg.2, #10.

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Nev. 178, 678P.2d 670 (1984). "A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993). The Court must assess the pleadings and documentary evidence in the light most favorably to the non-moving party. *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 673 P.2d 490 (1983); *Posadas v. City of Reno*, 109 Nev. 448, 851 P.2d 438 (1993).

C. There is no genuine dispute of material facts between Plaintiffs and Defendants regarding the lease of the properties.

Plaintiffs herein contest only the issues of whether the implied warranties of habitability and suitability apply to commercial leases and, if they do apply, whether the inclusion of an "as-is" clause in the Addendum effectively disclaimed the warranties. Based on the pleadings, both of these issues can be decided as a matter of law, meaning that there is no genuine dispute of material fact between the parties. Therefore, based on the established undisputed facts, an entry of summary judgment in favor of Defendants, as to the inapplicability of the "as-is" clause of the Addendum due to the failures of Plaintiffs to properly disclaim the warranties, is appropriate.

D. Plaintiffs/Counter-Defendants' "As-Is" Clause Failed to Disclaim the Implied Warranty Of Habitability.

There is no Nevada case law or statutes which limit the implied warranty of habitability to commercial leases. This means the warranty was in place for Defendants' Leases and, as discussed above, the "as-is" clause of the Addendum was not a legally effective disclaimer of the warranty. Therefore, when Plaintiffs violated the implied warranty of habitability and refused to remedy the situation, they committed constructive eviction against Defendants. By arguing that the implied warranty of habitability does not apply to commercial leases, Plaintiffs are asking the Court to move into the realm of activism by greatly expanding existing law to extend protections to landlords that are both anti-consumer and bad for Nevada's business community.

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E. Conclusion

As there are no longer any genuine disputes of material fact, merely differing legal assertions, it is appropriate for the Court to decide this matter through summary judgment. As discussed above, there is an implied warranty of habitability for commercial leases in Nevada and Plaintiff's attempt to disclaim this warranty with an "as-is" clause was done improperly and therefore was invalid. Defendants respectfully request that the Court grant summary judgment against Plaintiffs.

Dated this 12th day of August 2019.

BLACK & LOBELLO

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 12 day of August 2019, I caused the above and foregoing document entitled **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

[X] 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

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EXHIBIT 1

OPPM
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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.	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**
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,	**[Exempt from Arbitration]** **[Declaratory Relief Requested]**

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Per NRCP 56, a party asserting that a fact is not genuinely disputed for a motion for summary judgment must support that assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." *See NRCP 56(a)*. The following declaration of Anthony Bour is offered in support of Counterclaimants' motion for summary judgment.

DECLARATION OF ANTHONY BOUR

1. On or about April 20, 2017, Bour Enterprises, LLC entered into agreements with 4520 Arville and McKinely Manor for the lease of certain commercial properties located at 4560 S. Arville St., C-10, 23, 24 and 29, Las Vegas, NV 89103.

2. Bour Enterprises entered into the leases for the purpose of operating its business on the leased properties, and 4520 Arville and McKinely Manor were informed, prior to signing the lease, of that intention and represented that the properties were fit for this intended use as a commercial business facility.

3. 4520 Arville and McKinely Manor representative was informed that the properties must be fit for the operation of Bour Enterprise's business and I expressed concerns as to parking.

4. Prior to the execution of the leases, 4520 Arville and McKinely Manor offered assurances that parking arrangements would be made in order to provide business vehicles sufficient parking spaces and room to safely maneuver through the parking lot.

5. After entering into the leases, 4520 Arville and McKinely Manor declined or purposely failed to fulfill their promise to make the parking arrangements that were necessary for the successful operation of Bour Enterprise on the properties.

6. From the inception of Bour Enterprise's leasing of the properties, they were infested with rodents, rodent excrement and urine, mounds of particulate, dust and other debris.

7. The unsanitary conditions were unfit, uninhabitable, unhealthy and unsafe for customers and employees and unfit for Bour Enterprise's occupancy and the operation of its business.

8. Two (2) employees of Bour Enterprises have sought medical treatment as a result of these conditions.

9. On or about April 17, 2018, I delivered a letter of notice to terminate the leases to 4520

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Arville and McKinely Manor, citing the unsanitary condition of the property, and lack of promised parking arrangements as the basis for the termination.

10. On or about April 24, 2018, 4520 Arville and McKinely Manor's legal counsel responded and unequivocally declined to address either the unsanitary/unhealthful conditions and the promised parking arrangements, when he rejected the lease termination notice.

11. On or about May 3, 2018, Bour Enterprises sent David Burns a letter of Bour Enterprise's intent to vacate the properties immediately, and of its intent to terminate the leases, effective May 31, 2018, due to the ongoing health hazards.

12. As of May 21, 2019, 4520 Arville and McKinely Manor assessed Bour Enterprise Sixty-Two Thousand Two Hundred Twenty-Three Dollars and Eight Cents ($62,223.08) in rent, late fees, common area maintenance charges, and other charges under the leases, all assessed while the properties were uninhabitable and unfit for the purpose asserted for the operation of the Bour Enterprises business.

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

Executed on the _____ day of August, 2019

_____

(printed name)

_____

(signature)

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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 ____ day of August 2019, I caused the above and foregoing document entitled **DECLARATION OF ANTHONY BOUR IN SUPPORT OF DFENDANTS 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

[X] 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.

_____
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ERR
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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.	Case No.: A-19-794864-C Dept. No.: 8 **NOTICE OF ERRATA RE DECLARATION OF ANTHONY BOUR** **[Exempt from Arbitration]** **[Declaratory Relief Requested]**
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,	

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Las Vegas, Nevada 89135
(702) 869-8801 FAX: (702) 869-2669

Case Number: A-19-794864-C

TO THE COURT AND ALL PARTIES TO THIS ACTION:

PLESE TAKE NOTICE that Defendants and Counterclaimants, Bour Enterprises, LLC, et al. hereby provide notice of errata and correction as follows:

On August 12, 2019, Defendants/Counterclaimants filed their "**Defendants and Counterclaimants Opposition to Motion to Dismiss Counterclaims and Defendants and Counterclaimants Motion for Summary Judgment**" with an unsigned Declaration of Anthony Bour. Attached hereto as **Exhibit** 1 is the executed Declaration of Anthony Bour in support of said Motion.

Dated this 10th day of August 2019.

BLACK & LOBELLO

Rusty Graf, Esq.
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AI000057

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 16th day of August 2019, I caused the above and foregoing document entitled **NOTICE OF ERRATA RE DECLARATION OF ANTHONY BOUR** 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

[X] 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:

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

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EXHIBIT 1

OPPM
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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.	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**
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,	**[Exempt from Arbitration]** **[Declaratory Relief Requested]**

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Per NRCP 56, a party asserting that a fact is not genuinely disputed for a motion for summary judgment must support that assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." *See NRCP 56(a)*. The following declaration of Anthony Bour is offered in support of Counterclaimants' motion for summary judgment.

DECLARATION OF ANTHONY BOUR

1. On or about April 20, 2017, Bour Enterprises, LLC entered into agreements with 4520 Arville and McKinely Manor for the lease of certain commercial properties located at 4560 S. Arville St., C-10, 23, 24 and 29, Las Vegas, NV 89103.

2. Bour Enterprises entered into the leases for the purpose of operating its business on the leased properties, and 4520 Arville and McKinely Manor were informed, prior to signing the lease, of that intention and represented that the properties were fit for this intended use as a commercial business facility.

3. 4520 Arville and McKinely Manor representative was informed that the properties must be fit for the operation of Bour Enterprise's business and I expressed concerns as to parking.

4. Prior to the execution of the leases, 4520 Arville and McKinely Manor offered assurances that parking arrangements would be made in order to provide business vehicles sufficient parking spaces and room to safely maneuver through the parking lot.

5. After entering into the leases, 4520 Arville and McKinely Manor declined or purposely failed to fulfill their promise to make the parking arrangements that were necessary for the successful operation of Bour Enterprise on the properties.

6. From the inception of Bour Enterprise's leasing of the properties, they were infested with rodents, rodent excrement and urine, mounds of particulate, dust and other debris.

7. The unsanitary conditions were unfit, uninhabitable, unhealthy and unsafe for customers and employees and unfit for Bour Enterprise's occupancy and the operation of its business.

8. Two (2) employees of Bour Enterprises have sought medical treatment as a result of these conditions.

9. On or about April 17, 2018, I delivered a letter of notice to terminate the leases to 4520

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Arville and McKinely Manor, citing the unsanitary condition of the property, and lack of promised parking arrangements as the basis for the termination.

10. On or about April 24, 2018, 4520 Arville and McKinely Manor's legal counsel responded and unequivocally declined to address either the unsanitary/unhealthful conditions and the promised parking arrangements, when he rejected the lease termination notice.

11. On or about May 3, 2018, Bour Enterprises sent David Burns a letter of Bour Enterprise's intent to vacate the properties immediately, and of its intent to terminate the leases, effective May 31, 2018, due to the ongoing health hazards.

12. As of May 21, 2019, 4520 Arville and McKinely Manor assessed Bour Enterprise Sixty-Two Thousand Two Hundred Twenty-Three Dollars and Eight Cents ($62,223.08) in rent, late fees, common area maintenance charges, and other charges under the leases, all assessed while the properties were uninhabitable and unfit for the purpose asserted for the operation of the Bour Enterprises business.

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

Executed on the 15 day of August, 2019

Mulugeta Bour

(printed name)

(signature)

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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 DFENDANTS AND COUNTERCLAIMANTS OPPOSITION TO MOTION TO DISMISS COUNTERCLAIMS AND DEFENDANTS AND COUNTERCLAIMANTS MOTION FOR SUMMARY JUDGMENT** to be served as follows:

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F. Thomas Edwards, Esq.
HOLLEY DRIGGS WALCH FINE
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Las Vegas, Nevada 89101
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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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' COUNTERMOTION FOR SUMMARY JUDGMENT

Date of Hearing: September 3, 2019
Time of Hearing: 9:30 a.m.

Plaintiffs and Counterdefendants 4520 Arville and McKinley Manor (collectively "Plaintiffs"), by and through their attorneys, the law firm of Holley Driggs Walch Fine Puzey Stein

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& Thompson, hereby oppose the countermotion for summary judgment filed by Defendants and Counterclaimants Bour Enterprises, LLC ("Lessee"), Mulugeta Bour, and Helena Mengesha (collectively "Defendants"). This opposition is made and based upon the papers and pleadings on file herein, the following points and authorities, and any oral argument entertained at the hearing on this matter.

Dated this 22nd day of August, 2019.

HOLLEY DRIGGS WALCH
FINE PUZEY STEIN & THOMPSON

/s/ F. Thomas Edwards
F. THOMAS EDWARDS, ESQ.
Nevada Bar No. 9549
SEAN E. STORY, ESQ.
Nevada Bar No. 13968
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101

Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs filed a motion to dismiss Defendants' counterclaims on the basis that the implied warranty of habitability does not apply to commercial real estate leases and, even if it did, it was waived by Defendants in the leases. In other words, in ruling upon Plaintiffs' motion to dismiss, the Court need not address the factual basis for Defendants' counterclaims because there is no legal basis for Defendants' counterclaim (no implied warranty of habitability).

However, in a confused conflation of the standards for a motion to dismiss and a motion for summary judgment, Defendants' countermotion for summary judgment takes an unwarranted leap of logic that Plaintiffs must not dispute any of the facts in this case. That is incorrect. Plaintiffs dispute the facts in this case. Again, for purposes of Plaintiffs' motion to dismiss, the Court need not address the facts in this case because there is no legal basis for Defendants'

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counterclaims. For purposes of Defendants' countermotion for summary judgment, however, Plaintiffs certainly dispute the facts asserted by Defendants.

Defendants' countermotion for summary judgment fails to cite to any legal authority to support their theory that an implied warranty of habitability applies to commercial real estate leases. Accordingly, this opposition need not refute Defendants' unsupported legal theory, which is more fully addressed in Plaintiffs' motion to dismiss Defendants' counterclaims. Instead, this opposition will focus on the other shortfalls in Defendants' countermotion for summary judgment.

First, any motion for summary judgement must be supported by admissible evidence. The only document attached to Defendants' countermotion for summary judgment is a declaration from Anthony Bour. It does not appear that Anthony Bour is even a party to this case and the declaration does not explain the foundation for the facts set forth therein. For these reasons, Defendants' countermotion for summary judgment is not supported by any admissible evidence and must be denied.

Second, even if the declaration of Anthony Bour was considered, the "undisputed" facts set forth in the countermotion for summary judgment are certainly disputed. These disputed facts are supported by the signed declaration of David Burns of Commercial Specialists, the property manager for the Plaintiffs, and the underlying leases. These disputed facts prevent the entry of summary judgment.[1]

I.

DEFENDANTS' COUNTERMOTION FOR SUMMARY JUDGMENT IS NOT SUPPORTED BY ANY ADMISSIBLE EVIDENCE

Defendants' countermotion for summary judgment is not supported by any admissible evidence. The only document attached to the countermotion is a declaration by a non-party that does not explain how this non-party is competent to testify to the alleged facts. Accordingly, the

[1] Notably, these disputed facts are irrelevant to Plaintiffs' pending motion to dismiss Defendants' counterclaims because the implied warranty of habitability does not apply to commercial real estate leases and, even if it did, it was waived by Defendants. In other words, in ruling upon Plaintiffs' motion to dismiss, the Court need not address the factual basis for Defendants' counterclaims because there is no legal basis for Defendants' counterclaim (no implied warranty of habitability).

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declaration is not admissible evidence and Defendants' countermotion for summary judgment must fail as a matter of law.

"If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." NRCP(c)(4). "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." NRCP 56(c)(2). "Evidence introduced in support of or opposition to a motion for summary judgment must be admissible evidence." *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983); *Catrone v. 105 Casino Corp.*, 82 Nev. 166, 171, 414 P.2d 106, 109 (1966) ("The affiant's statement would not be admissible evidence at trial and is equally ineffective for the purpose of defeating a motion for summary judgment."); *Schneider v. Cont'l Assur. Co.*, 110 Nev. 1270, 1274, 885 P.2d 572, 575 (1994) (reversing summary judgment based upon inadmissible evidence).

Defendants bear the burden of persuasion on their counterclaims. Therefore, in moving for summary judgment on those counterclaims, Defendants must present admissible evidence that would entitled them to judgment as a matter of law. A declaration in support of a motion for summary judgment must show that the declarant is competent to testify on the matters stated. The declaration attached to Defendants' countermotion for summary judgment does not show that the declarant is competent to testify on the matters stated. For these reasons, Plaintiffs object that the declaration is not admissible and may not be considered. As there is no admissible evidence attached to the countermotion for summary judgment, Defendants' countermotion for summary judgment fails as a matter of law.

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II.

THE "UNDISPUTED" FACTS SET FORTH IN THE COUNTERMOTION FOR SUMMARY JUDGMENT ARE DISPUTED

Although the analysis of Defendants' countermotion for summary judgment should end with the lack of any admissible evidence, in an abundance of caution, Plaintiffs will establish that there are disputes of material fact which prevent summary judgment in Defendants' favor. For ease of reference, below are the "undisputed" facts set forth by Defendants, followed by Plaintiffs' response thereto in **bold text**.

1. On or about April 20, 2017, Defendants entered into agreements 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").

Plaintiffs' Response: Objection. This statement is not supported by admissible evidence. Without waiving said objection, Plaintiffs do not dispute this statement.

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

Plaintiffs' Response: Objection. This statement contains hearsay, lacks foundation and is not supported by admissible evidence. Without waiving said objection, the leases expressly state:

> **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* Section 2.4 to leases, attached hereto as Exhibits 2 and 3. Therefore, Defendants expressly accepted the responsibility to conduct the due diligence necessary to confirm the**

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suitability for Defendants' use of the premises.

The leases further state:

> **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.**

***See* Exs. 2 and 3, Section 22. Therefore, Defendants confirmed that they are relying solely upon their own investigation regarding the lease and not any representations by Plaintiffs. Consistent with these provisions, Plaintiffs made no representations to Defendants as to the fitness of the premises for any particular use. *See* Declaration of David Burns, attached hereto as Exhibit 1. For these reasons, Plaintiffs dispute this alleged fact.**

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

Plaintiffs' Response: Objection. This statement is hearsay, lacks foundation and is not supported by admissible evidence. Without waiving said objection, Plaintiffs incorporate by reference their response to Paragraph 2 above. Additionally, the leases expressly state that Defendants shall only be entitled to four (4) unreserved vehicle parking spaces and no reserved vehicle parking spaces, for a total of eight (8) unreserved parking spaces between the two leases. *See* Exs. 2 and 3, Section 1.2(b). The leases further state that "Lessee shall not use more parking spaces than said number." *See* Exs. 2 and 3, Section 2.6. This alleged fact is refuted by the express terms of the leases. For these reasons, Plaintiffs dispute this alleged fact.

4. Prior to the execution of the Leases, Plaintiffs assured Mr. Bour that parking arrangements would be made in order to provide Defendants' business vehicles sufficient parking spaces and room to safely maneuver through the parking lot.

Plaintiffs' Response: Objection. This statement is hearsay, lacks foundation and is not supported by admissible evidence. Without waiving said objection, Plaintiffs incorporate

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by reference their response to Paragraph 3 above. Additionally, Plaintiffs never made any representations regarding parking that are inconsistent with the express terms of the leases. *See* Ex. 1. For these reasons, Plaintiffs dispute this alleged fact.

5. After entering into the Lease, Plaintiffs declined or purposely failed to fulfill their promise to make the parking arrangements that were necessary for the successful operation of Mr. Bour's business at the Premises.

Plaintiffs' Response: Objection. This statement lacks foundation and is not supported by admissible evidence. Without waiving said objection, Plaintiffs incorporate by reference their response to Paragraph 4 above. Additionally, Plaintiffs fully complied with the terms of the leases, including the provisions regarding parking. *See* Ex. 1. For these reasons, Plaintiffs dispute this alleged fact.

6. From the inception of Bour Enterprise's leasing of the Premises, they were infested with rodents, rodent excrement and urine, mounds of particulate, dust and other debris.

Plaintiffs' Response: Objection. This statement lacks foundation and is not supported by admissible evidence. Without waiving said objection, Defendants accepted the premises in an "as-is" condition. *See* Exs. 2 and 3, Addendums. Defendants separately agreed that "Lessee shall, at Lessee's sole expense, keep the Premises . . . in good order, condition and repair . . . ." *See* Exs. 2 and 3, Section 7.1(a). Therefore, the burden to correct these issues at the premises belongs to Defendants pursuant to the express terms of the leases. Moreover, approximately a year after the execution of the leases, Defendants requested to move into another larger space within the same commercial development. *See* Ex. 1. For various business reasons, Plaintiffs denied Defendants' request to move into the larger space. *Id.* As part of these discussions, Defendants expressed concerns about the condition of the existing premises – after operating in that premises without formal complaint for the preceding year. *Id.* It appears that Defendants only raised the alleged concerns about the condition of the existing premises as leverage to persuade Plaintiffs to approve Defendants' requested move. *Id.* Plaintiffs learned later that Defendants were purchasing a taxi business and planned to run the taxi business in the larger space they requested. *Id.* When Plaintiffs

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denied Defendants' request to move into the larger space, Defendants then tried to use the alleged concerns about the condition of the premises as leverage to get out of the leases altogether. *Id.* There is no condition at the premises that prevented Defendants from operating their existing business. *Id.* For these reasons, Plaintiffs dispute this alleged fact.

7. The unsanitary conditions were unfit, uninhabitable, unhealthy and unsafe for customers and employees at the Premises, and rendered the Premises unfit for Bour Enterprise's occupancy and the operation of its business.

Plaintiffs' Response: Objection. This statement lacks foundation and is not supported by admissible evidence. Without waiving said objection, Plaintiffs incorporate by reference their response to Paragraph 6 above. For these reasons, Plaintiffs dispute this alleged fact.

8. Two (2) employees of Defendant have sought medical treatment as a result of these conditions.

Plaintiffs' Response: Objection. This statement is hearsay, lacks foundation and is not supported by admissible evidence. Without waiving said objection, Plaintiffs have no knowledge whether any of Defendants' employees sought medical treatment or the reasons for the alleged treatment. *See* Ex. 1. Discovery on this issue is necessary pursuant to NRCP 56(d). *See* Declaration of F. Thomas Edwards, Esq., attached hereto as Exhibit 4.

9. On April 17, 2018, Tony Bour, on behalf of Defendants, delivered a letter of its notice to terminate the Lease, citing the unsanitary condition of the property, and lack of parking arrangements (as promised by Plaintiffs or their principals) as the basis for the Lease termination.

Plaintiffs' Response: Objection. This statement is hearsay and not supported by admissible evidence. Without waiving said objection, Plaintiffs incorporate by reference their responses to Paragraphs 4 and 6 above. Plaintiffs admit that Tony Bour sent a letter dated April 17, 2018 stating in part that: "Now that I require additional space [for his newly acquired taxi company] you now indicate that is not an option." *See* Ex. 1. For these reasons, Plaintiffs otherwise dispute the alleged basis for the Lease Termination.

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10. On April 24, 2018, Plaintiffs/Counter-Defendants' legal counsel responded to Tony Bour's correspondence, unequivocally declined to address either the unsanitary/unhealthful conditions and the promised parking arrangements, when he rejected the Lessee's lease termination notice.

Plaintiffs' Response: Objection. This statement is not supported by admissible evidence. Without waiving said objection, Plaintiffs incorporate by reference their responses to Paragraphs 4 and 6 above. Plaintiffs admit that their counsel sent a letter dated April 24, 2018, stating that: "Your legal and factual assertions in the letter are simply false." *See* Ex. 1. For these reasons, Plaintiffs otherwise dispute the Defendants' mischaracterization of this correspondence.

11. On May 3, 2018, Bour Enterprises sent David Burns a letter of Bour Enterprise's intent to vacate the Premises immediately, and of its intent to terminate the Lease, effective May 31, 2018, due to the ongoing health hazards at the Premises.

Plaintiffs' Response: Objection. This statement is not supported by admissible evidence. Without waiving said objection, Plaintiffs incorporate by reference their responses to Paragraphs 4 and 6 above. Plaintiffs admit that counsel for Defendants sent a letter dated May 3, 2018 asking that Plaintiffs consent to the termination of the leases, which Plaintiffs rejected. *See* Ex. 1. For these reasons, Plaintiffs otherwise dispute the alleged basis for the Lease Termination.

12. As of May 21, 2019, Counter-defendants assessed Bour Enterprise Sixty-Two Thousand Two Hundred Twenty-Three Dollars and Eight Cents ($62,223.08) in rent, late fees, common area maintenance charges, and other charges under the Lease, all assessed while the Premises were uninhabitable and unfit for the purpose asserted for the operation of the Bour Enterprises business.

Plaintiffs' Response: Objection. This statement is not supported by admissible evidence. Without waiving said objection, Plaintiffs incorporate by reference their responses to Paragraphs 4 and 6 above. Moreover, as of May 21, 2019, Defendants owed $139,454.50 under the leases. *See* Ex. 1. For these reasons, Plaintiffs dispute this alleged fact.

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As set forth above, the only undisputed facts are that the parties executed the leases and that the parties exchanged correspondence. The remainder of the "undisputed" facts identified by Defendants are, in fact, disputed and those disputes are supported by admissible evidence as required by NRCP 56. All of these disputed facts necessarily prevent the entry of summary judgment. Therefore, Defendants' countermotion for summary judgment in their counterclaims must be denied.

CONCLUSION

Defendants' countermotion for summary judgment fails to attach any admissible evidence. Instead, Defendants merely attached a declaration from Anthony Bour that does not explain the foundation for the facts set forth therein. Even if the declaration of Anthony Bour was considered, the "undisputed" facts set forth in the countermotion for summary judgment are certainly disputed and those disputes are supported by admissible evidence. For these reasons, the Court must deny Defendants' countermotion for summary judgment.

Dated this 22nd day of August, 2019.

HOLLEY DRIGGS WALCH
FINE PUZEY STEIN & THOMPSON

/s/ F. Thomas Edwards
F. THOMAS EDWARDS, ESQ.
Nevada Bar No. 9549
SEAN E. STORY, ESQ.
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Attorneys for Plaintiffs

HOLLEY DRIGGS
WALCH | FINE | PUZEY | STEIN | THOMPSON

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs Walch Fine Puzey Stein & Thompson and that on this 22nd day of August, 2019, I did cause a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' COUNTERMOTION FOR SUMMARY 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., Ste. 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

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EXHIBIT 1

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DECL
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Attorneys for Plaintiff United Insurance Company of America

DISTRICT COURT

CLARK COUNTY, NEVADA

4520 ARVILLE, a California general partnership; MCKINLEY MANOR, an Idaho general partnership, Plaintiff, 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 **DECLARATION OF DAVID BURNS IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' COUNTERMOTION FOR SUMMARY JUDGMENT**

I, David Burns, declare as follows:

1. I am the Executive Vice-President of Commercial Specialists, the property manager for 4520 Arville, a California general partnership and McKinley Manor, an Idaho general partnership (collectively "Plaintiffs") with regard to 4560 S. Arville St., C-10, 23, 24 and 29, Las Vegas, NV 89103 (the "Premises").

2. I am over the age of eighteen and, if called to do so, I could and would testify competently to the matters set forth herein.

3. I have personal knowledge of the matters set forth herein, with the exception of those stated to be made upon information and belief, and as to those matters I believe them to be

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true to the best of my knowledge.

4. I make this declaration in support of Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgment (the "Opposition").

5. Attached to Opposition as Exhibits 2 and 3 are true and correct copies of the leases for the Premises, including the addendums and guaranties thereof (collectively the "Leases").

6. Consistent with Sections 2.4 and 22 of the Leases, Plaintiffs made no representations to Defendants as to the fitness of the Premises for any particular use.

7. Consistent with Sections 1.2(b) and 2.6 of the Leases, Plaintiffs never made any representations regarding parking that are inconsistent with the express terms of the Leases.

8. Plaintiffs fully complied with the terms of the Leases, including the provisions regarding parking.

9. Moreover, approximately a year after the execution of the Leases, Defendants requested to move into another larger space within the same commercial development. For various business reasons, Plaintiffs denied Defendants' request to move into the larger space. As part of these discussions, Defendants expressed concerns about the condition of the existing Premises – after operating in that Premises without formal complaint for the preceding year. It appears that Defendants only raised the alleged concerns about the condition of the existing Premises as leverage to persuade Plaintiffs to approve Defendants' requested move. Plaintiffs learned later that Defendants were purchasing a taxi business and planned to run the taxi business in the larger space they requested. When Plaintiffs denied Defendants' request to move into the larger space, Defendants then tried to use the alleged concerns about the condition of the Premises as leverage to get out of the Leases altogether. There is no condition at the Premises that prevented Defendants from operating their existing business.

10. Plaintiffs have no knowledge whether any of Defendants' employees sought medical treatment or the reasons for the alleged treatment.

11. Tony Bour sent a letter dated April 17, 2018 stating in part that: "Now that I require additional space you now indicate that is not an option."

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12. Plaintiffs' counsel sent a letter dated April 24, 2018, stating that: "[Defendants'] legal and factual assertions in the letter are simply false."

13. Counsel for Defendants sent a letter dated May 3, 2018 asking that Plaintiffs' consent to the termination of the Leases, which Plaintiffs rejected.

14. As of May 21, 2019, Defendants owed $139,454.50 under the Leases.

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

Dated this 22nd day of August, 2019.

DAVID BURNS

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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)

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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

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to terminate this Lease upon 90 days prior writt[illegible]otice to Lessee unless Lessee notifies Lessor, in [illegible]g, 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

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driveways, entrances, parking spaces, parking a , loading and unloading areas, ingress, egress, direc 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.

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(viii) The cos[illegible]any Capital Expenditure to the Building or the Projec[illegible]t 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, 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

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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**.

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(a) **Definitions**. The "**Utility Installations**" refers to all floor and wind 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

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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, 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.

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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.

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10.4 **Joint Assessment**. If the B. .ng is not separately assessed, Real Property Taxes ..ocated 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

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sublease, be deemed to have assumed and agr to conform and comply with each and every term, c enant, 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

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be equal to the prime rate reported in the Wa. .eet Journal as published closest prior to the date ...en 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

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month's rent has been paid in advance. Prospe purchasers and encumbrances may rely upon the esting 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

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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**.

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37.1 **Execution**. The Guarantors, if any, shall each execute a guaranty in the form most recently published by the AIR Commercial Real Estate Association, 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 Dispu.** An Addendum requiring the Mediation and/or the ..bitration 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 COMMERCIALLY 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:	**By LESSEE:**
4520 ARVILLE	BOUR ENTERPRISES LLC,
MCKINLEY MANOR	a Nevada limited liability company
By:	By:
Name Printed: Kevin J. Donahoe	Name Printed: Mulugeta Bour
Title: Owner Agent	Title: Manager
By:	By:
Name Printed:	Name Printed:
Title:	Title:
Address: 7674 W. Lake Mead Blvd., 104	Address: 4560 S. Arville Street, #23
Las Vegas, NV 89128	Las Vegas, NV 89103
Telephone: (702) 364-0909	Telephone: (702) 808-2047
Facsimile: (702) 364-5885	Facsimile: ( )
Federal ID No. 95-4590150	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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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.

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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)):	The New Base Rent shall be:
May 1, 2018 and annually thereafter	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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you are utilizing the most current form: AIR C .MERCIAL REAL ESTATE ASSOCIATION, 700 S. F..wer Street, Suite 600, Los Angeles, Calif. 90017

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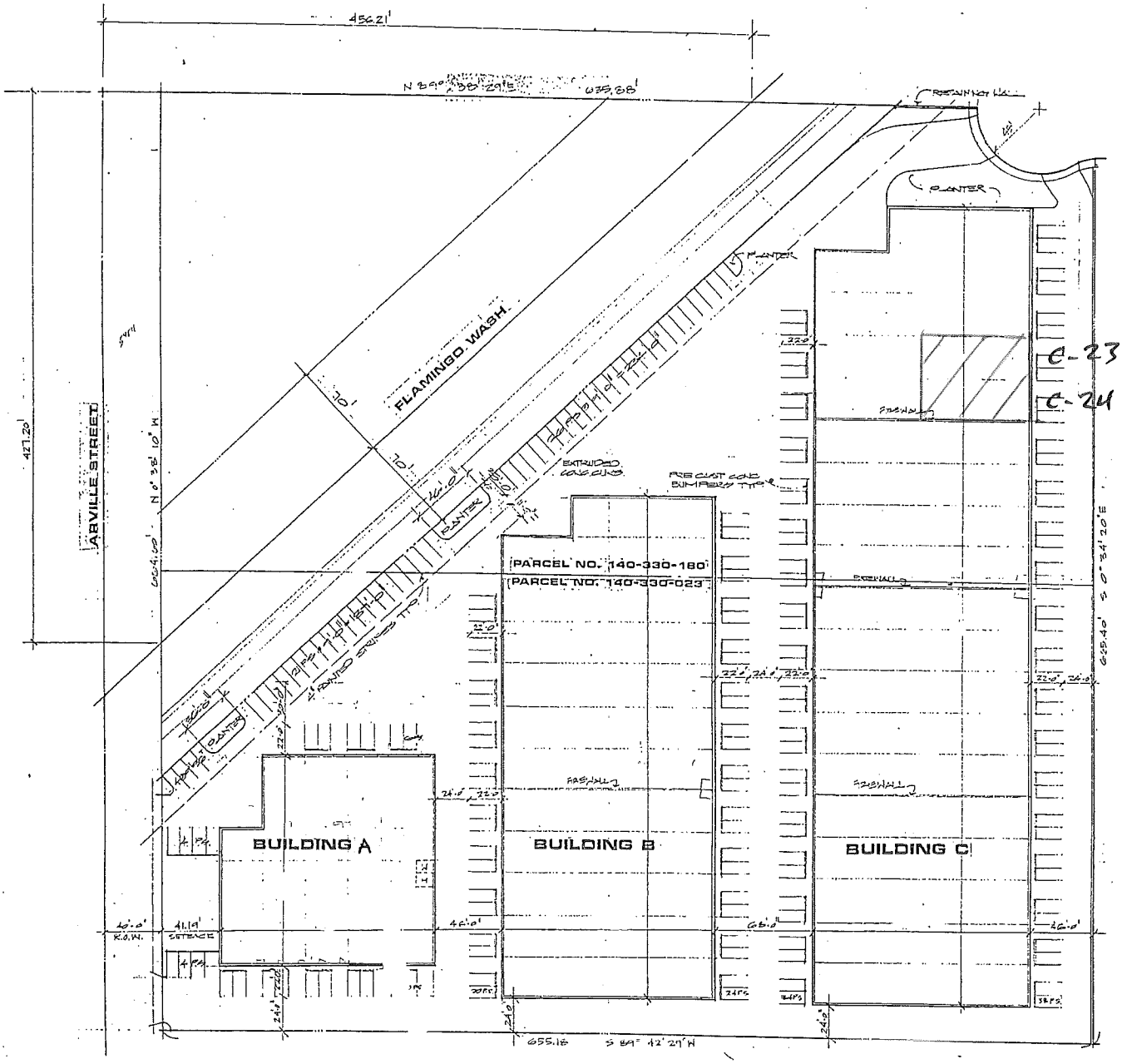
Exhibit A



N

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.

LEASE ADDENDUM

This Lease Addendum is made and entered into on this 20th 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

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

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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

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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"

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EXHIBIT 3

STANDARD INDUSTRIAL/COMMERCIAL MULTI-TENANT LEASE - NET
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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)

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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

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to terminate this Lease upon 90 days prior en notice to Lessee unless Lessee notifies Lesso 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

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driveways, entrances, parking spaces, parki :eas, loading and unloading areas, ingress, egress, :tion 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.

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(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, 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

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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**.

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(a) **Definitions.** As used herein, 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

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Lessee and Lessor as an additional insur[illegible]gainst claims for bodily injury, personal injury and [illegible]erty 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 Les , as the case may be, so long as the insurance is n alidated 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.

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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

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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 ources of Lessee, equals or exceeds the combine ncial 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

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be equal to the prime rate reported in the ll Street Journal as published closest prior to the 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

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month's rent has been paid in advance. Prospective 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

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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 reque[illegible]nter into a new lease, containing all of the terms a[illegible]ovisions 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**.

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37.1 **Execution**. The Guar s, 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 D tes.** An Addendum requiring the Mediation and/o 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 COMMERCIALLY 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:	**By LESSEE:**
4520 ARVILLE	BOUR ENTERPRISES LLC,
MCKINLEY MANOR	a Nevada limited liability company
By:	By:
Name Printed: Kevin J. Donahoe	Name Printed: Mulugeta Bour
Title: Owner Agent	Title: Manager
By:	By:
Name Printed:	Name Printed:
Title:	Title:
Address: 7674 W. Lake Mead Blvd., 104	Address: 4560 S. Arville Street, #23
Las Vegas, NV 89128	Las Vegas, NV 89103
Telephone: (702) 364-0909	Telephone: (702) 808-2047
Facsimile: (702) 364-5885	Facsimile: (___)
Federal ID No. 95-4590150	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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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.

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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)):	The New Base Rent shall be:
May 1, 2018 and annually thereafter	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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you are utilizing the most current form: COMMERCIAL REAL ESTATE ASSOCIATION, 70 Flower Street, Suite 600, Los Angeles, Calif. 90017

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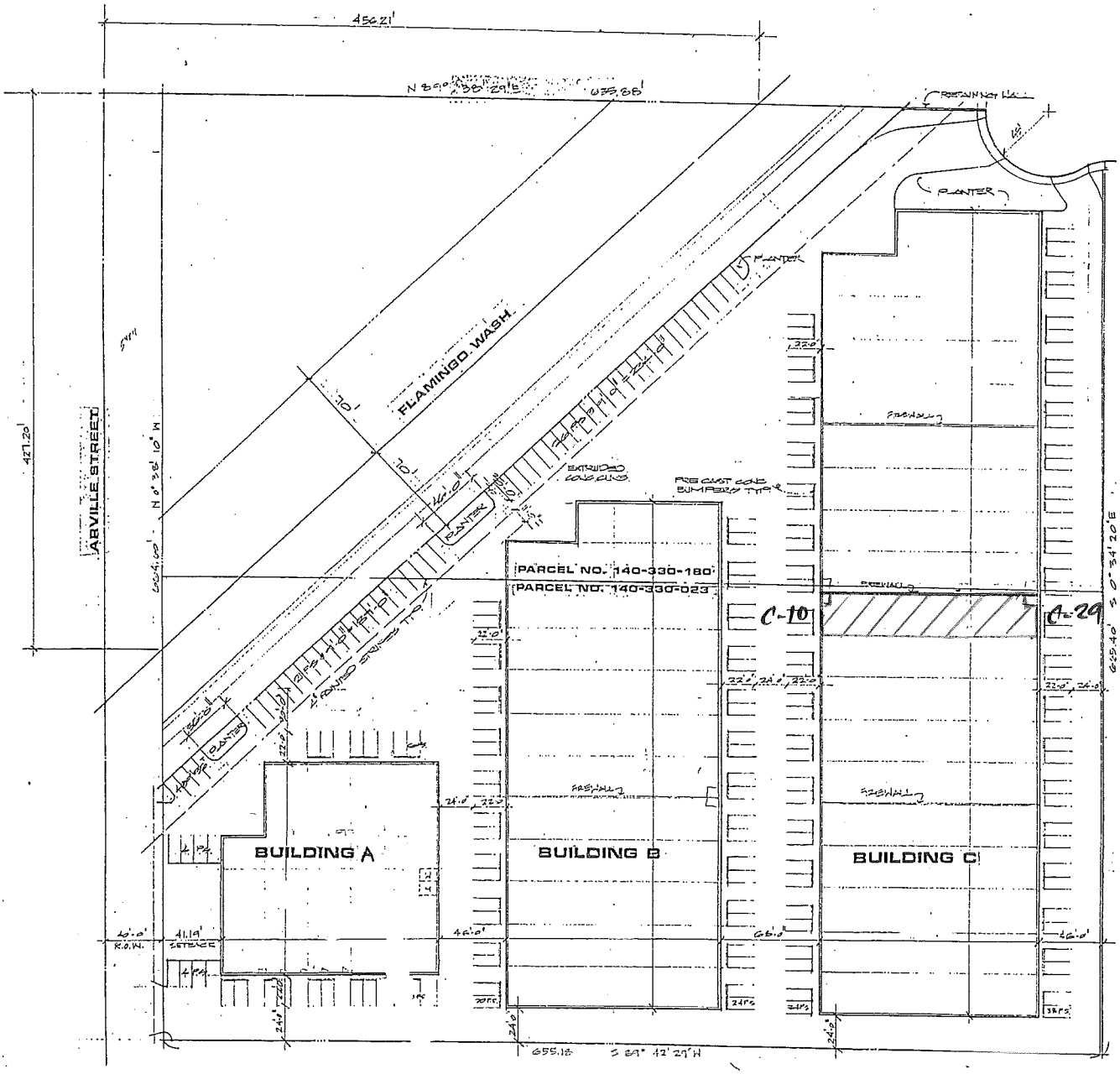
Exhibit A



SITE PLAN
1" = 40'-0"

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.

LEASE ADDENDUM

This Lease Addendum is made and entered into on this 20th 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

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assignment and their successors and assig

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"

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EXHIBIT 4

DECL
F. THOMAS EDWARDS, ESQ.
Nevada Bar No. 9549
E-mail: tedwards@nevadafirm.com
SEAN E. STORY, ESQ.
Nevada Bar No. 13968
E-mail: sstory@nevadafirm.com
HOLLEY DRIGGS WALCH
FINE PUZEY STEIN & THOMPSON
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Telephone: 702/791-0308
Facsimile: 702/791-1912

Attorneys for Plaintiff United Insurance Company of America

DISTRICT COURT

CLARK COUNTY, NEVADA

4520 ARVILLE, a California general partnership; MCKINLEY MANOR, an Idaho general partnership, Plaintiff, 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 **DECLARATION OF F. THOMAS EDWARDS IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' COUNTERMOTION FOR SUMMARY JUDGMENT**

I, F. Thomas Edwards, Esq., declare as follows:

1. I am the attorney for 4520 Arville, a California general partnership and McKinley Manor, an Idaho general partnership (collectively "Plaintiffs") with regard to 4560 S. Arville St., C-10, 23, 24 and 29, Las Vegas, NV 89103 (the "Premises").

2. I am over the age of eighteen and, if called to do so, I could and would testify competently to the matters set forth herein.

3. I have personal knowledge of the matters set forth herein, with the exception of those stated to be made upon information and belief, and as to those matters I believe them to be true to the best of my knowledge.

HOLLEY DRIGGS WALCH FINE PUZEY STEIN THOMPSON

4. I make this declaration in support of Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgment (the "Opposition").

5. As to Defendants' allegation that two (2) employees sought medical treatment as a result of the alleged conditions at the Premises, discovery on these issues is necessary pursuant to NRCP 56(d).

6. Plaintiffs would need to subpoena the medical records of these employees, depose the employees and potentially the employees' medical providers.

7. We expect this discovery would show that the employees did not seek medical treatment, that the condition of the Premises did not interfere with the operation of Defendants' business, that the condition of the Premises was not the cause of the alleged medical treatment, that the treatment was unrelated to the condition of the Premises and/or the treatment was based upon a pre-existing medical issue unrelated to the condition of the Premises. These issues would minimally create issues of fact mandating the denial of Defendants' Countermotion for Summary Judgment

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

Dated this 22nd day of August, 2019.

F. THOMAS EDWARDS, ESQ.

HOLLEY DRIGGS
WALCH FINE PUZEY STEIN THOMPSON

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8/27/2019 1:55 PM
Steven D. Grierson
CLERK OF THE COURT

RIS
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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

PLAINTIFFS/COUNTERDEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIMS

Date of Hearing: September 3, 2019
Time of Hearing: 9:30 a.m.

Plaintiffs and Counterdefendants 4520 Arville and McKinley Manor (collectively "Plaintiffs"), by and through their attorneys, the law firm of Holley Driggs Walch Fine Puzey Stein

Case Number: A-19-794864-C

HOLLEY DRIGGS
WALCH | FINE | PUZEY | STEIN | THOMPSON

& Thompson, hereby submit this reply in support of their motion to dismiss, pursuant to NRCP 12(b)(5), the counterclaims set forth in Defendants and Counterclaimants Bour Enterprises, LLC ("Lessee"), Mulugeta Bour, and Helena Mengesha's (collectively "Defendants") Answer and Counterclaim (the "Counterclaims").

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Defendants correctly identify the issues:

(1) Is there an implied warranty of habitability applicable to commercial real estate leases; and

(2) If that implied warranty exists, can it be waived in the commercial real estate lease?

As established in the Motion, "most jurisdictions have expressly or impliedly refused to extend the implied warranty of habitability into commercial leases." *Teller v. McCoy*, 162 W. Va. 367, 380, 253 S.E.2d 114, 123 (1978). For the minority of jurisdictions that recognize an implied warranty of habitability in commercial real estate leases, those jurisdictions hold that the warranty may be waived by an "as-is" clause in the lease. *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007) (the implied warranty of suitability is waived when the lease states that the tenant accepts the real property "as-is").

If there is no implied warranty of habitability applicable to commercial real estate leases, each of Defendants' Counterclaims, which are admittedly premised upon an implied warranty of habitability,[1] fail as a matter of law. Notably, Defendants failed to cite to a single statute or case stating that there is an implied warranty of habitability applicable to commercial real estate leases. Instead, Defendants rely exclusively on caselaw addressing UCC Article 2, which is only applicable to the sale of goods, not real estate leases. "Implied warranties of merchantability and fitness for purpose [under the UCC Art. 2] apply only to products; they do not apply to real estate

[1] As explained in their Opposition, "Defendants have asserted four (4) Counterclaims, **all revolving around the habitability and maintenance issues** with the properties which Plaintiffs ignored." *See* Opposition, filed 8/12/18, 3:18-20.

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lease agreements." *Miley v. Harmony Mill Ltd. P'ship*, 803 F. Supp. 965, 968 (D. Del. 1992). By failing to cite to any authority establishing an implied warranty of habitability applicable to commercial real estate leases, Defendants have conceded that the implied warranty does not apply in this case.

Likewise, even if Nevada were to recognize an implied warranty of habitability in commercial real estate leases, that warranty was waived by the fact that Defendant accepted the premises "as is" and agreed to maintain the premises in "good order, condition and repair." Defendants failed to cite to a single statute or case stating that any implied warranty of habitability cannot be waived by the parties in a commercial real estate lease. Again, Defendants rely exclusively on caselaw addressing UCC Article 2, which is only applicable to the sale of goods, not real estate leases. By failing to cite to any authority establishing that an implied warranty of habitability cannot be waived by the parties in a commercial real estate lease, Defendants have conceded that any implied warranty has been waived. For these reasons, Defendants' Counterclaims fail as a matter of law and must be dismissed.

I.

THE CASES CITED BY DEFENDANTS ARE INAPPLICABLE TO THE IMPLIED WARRANTY OF HABITABILITY AND COMMERCIAL REAL ESTATE LEASES

The two cases cited by Defendants to support an implied warranty of habitability in a commercial real estate lease do not discuss the implied warranty of habitability and do not discuss commercial real estate leases. *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev. 414, 514 P.2d 654 (1973); *Sierra Diesel Injection Serv., Inc. v. Burroughs Corp.*, 890 F.2d 108 (9th Cir. 1989). Instead, Defendants' cases merely address whether an implied warranty of merchantability or fitness for a particular purpose were waived in the context of Article 2 of the Uniform Commercial Code ("UCC"), specifically NRS 104.2316. *Id.* Article 2 of the UCC does not address implied warranties of habitability and does not apply to leases of commercial real estate, such that Defendants' cases are completely irrelevant to the issues pending before this court:

(1) Is there an implied warranty of habitability applicable to commercial real estate leases; and

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(2) If that implied warranty exists, can it be waived in the commercial real estate lease?

"Implied warranties of merchantability and fitness for purpose [under the UCC Art. 2] apply only to products; they do not apply to real estate lease agreements." *Miley v. Harmony Mill Ltd. P'ship*, 803 F. Supp. 965, 968 (D. Del. 1992). These implied warranties are codified in NRS 104.2314 and 104.2315, which is Nevada's adoption of Article 2 of the Uniform Commercial Code. NRS 104.2314 states that "a warranty that the **goods** shall be merchantable is implied in a **contract for their sale.**" (emphasis added). Likewise, NRS 104.2315 states under certain circumstances a contract for the sale of goods contains "an implied warranty that the **goods** shall be fit for such purpose." (emphasis added). More broadly, Article 2 of the UCC only controls contracts for the "transactions in **goods**." NRS 104.2102 (emphasis added). By its own terms the UCC excludes the leasing of a commercial real estate from being considered a sale of goods.

Goods are defined in Article 2 as follows:

> "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. . . .

NRS 107.2015(1).

Contract for sale and sale are defined as follows:

> In this article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (NRS 104.2401). A "present sale" means a sale which is accomplished by the making of the contract.

NRS 104.2106(1).

"The U.C.C. thus not only clearly limits the application of implied warranties of merchantability and fitness for purpose to sales of goods, but it defines a sale of goods in a manner which precludes a residential lease agreement from being considered as such since the residential lease agreement contains neither a sale nor a good." *Miley v. Harmony Mill Ltd. P'ship*, 803 F. Supp. 965, 969 (D. Del. 1992). *See also, Ritchey v. Patt*, 431 Pa. Super. 219, 222, 636 A.2d 208,

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210 (1994) (Holding that Article 2 of the UCC did not apply to an action for the alleged breach of lease of real property). Article 2 of the UCC does not address the implied warranty of habitability. Article 2 of the UCC does not apply to commercial real estate leases. For these reasons, the minimal caselaw cited by Defendants is completely irrelevant to the issues in this case. Defendants failed to provide this Court any authority to support an implied warranty of habitability in the context of a commercial real estate lease. Therefore, Defendant's Counterclaims, which are each based upon habitability, must be dismissed.

II.

NEVADA STATUTES SUGGEST THAT THE 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, each of Defendant's counterclaims fails as a matter of law and must be dismissed.

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III.

THE UNDISPUTED CASE LAW BEFORE THE COURT ESTABLISHES DEFENDANTS FAILED TO STATE A CLAIM

"Most jurisdictions have expressly or impliedly refused to extend the implied warranty of habitability into commercial leases." *Teller v. McCoy*, 162 W. Va. 367, 380, 253 S.E.2d 114, 123 (1978). "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.*, 459 N.W.2d 759, 763 (N.D. 1990). "This implied warranty of habitability has been held to apply only to residential property and not to commercial leases in Missouri." *Kootman v. Kaye*, 744 S.W.2d 898, 901 (Mo. Ct. App. 1988). Defendants have cited to no caselaw to the contrary and have, therefore, conceded that the implied warranty of habitability does not apply to commercial leases.

Even in the minority of jurisdictions that do recognize the implied warranty of habitability in commercial leases, that implied warranty is waived when the lease states that the tenant accepts the property "as-is." *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007). Here, not only did Defendants accept the property in an "as-is" condition, they separately agreed that "Lessee shall, at Lessee's sole expense, keep the Premises . . . in good order, condition and repair . . . ." *See* Counterclaim, Exhibit 1, Section 7.1(a).

> By agreeing to lease the building 'as is,' Gym–N–I agreed to make its own appraisal of the physical condition of the premises. Thus, 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.

Gym-N-I Playgrounds, Inc. v. Snider, 220 S.W.3d 905, 914 (Tex. 2007).[2] Defendant's have cited to no caselaw to the contrary and have, therefore, conceded that if the implied warranty of habitability applies to commercial leases, it was waived when Defendants accept the property in an "as-is" condition and separately agreed that "Lessee shall, at Lessee's sole expense, keep the Premises . . . in good order, condition and repair . . . ." *See* Counterclaim, Exhibit 1, Section 7.1(a).

[2] Notably, Defendants did not cite to any caselaw holding that an "as-is" clause in a commercial real estate lease must be capitalized or otherwise emphasized.

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CONCLUSION

The premise of each of Defendants' counterclaims that Plaintiffs owe a warranty of habitability in this commercial real estate lease is wrong as a matter of law and contrary to the parties' express agreement. Accordingly, Defendants' Counterclaims should be dismissed under NRCP 12(b)(5) for failure to state a claim.

Dated this 27th day of August, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs Walch Fine Puzey Stein & Thompson and that on this 27th day of August, 2019, I did cause a true and correct copy of the foregoing **PLAINTIFF/COUNTERDEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIMS**, to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System:

Brent Carson, Esq.
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/s/ Sandy Sell
An employee of HOLLEY DRIGGS WALCH FINE PUZEY STEIN & THOMPSON

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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.	Case No.: A-19-794864-C Dept. No.: 8 **DEFENDANTS/COUNTERCLAIMANT'S REPLY IN SUPPORT OF COUNTERMOTION FOR SUMMARY JUDGMENT**
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,	

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Case Number: A-19-794864-C

Defendants and Counterclaimants, 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 Black & LoBello, hereby file their Reply in support of their Countermotion for Summary Judgment.

This Reply is made and based on the papers and pleadings on file herein, the following Memorandum of Points and Authorities, any exhibits attached hereto, and any argument at hearing on this matter.

Dated this 29th day of August 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.
INTRODUCTION

Plaintiffs entered into two commercial lease agreements for warehouse space with Defendants on or about April 20, 2017. When signing the two lease agreements ("Leases"), Plaintiffs and Defendants also executed Lease Addendums ("Addendums"), which added additional terms to the Leases. One of the additional terms added in an Addendum inconspicuously stated that the warehouse spaces being leased were to be accepted "as-is". Plaintiffs subsequently used the "as-is" clause of the Addendum in this effort to substantiate its neglect of their duties as landlords and to ignore their obligations to adequately maintain the properties.

Because Plaintiffs failed to provide a habitable property and were not willing to rectify the serious issues that were present, Defendants provided notice of intent to terminate the Leases approximately one year after the initial agreement. When providing this notice to Plaintiffs, Defendants again cited the warranty of habitability issues. Plaintiffs responded by bringing suit against Defendants improperly attempted to enforce the Leases.

Defendants have asserted four (4) Counterclaims, all revolving around the habitability and maintenance issues with the properties which Plaintiffs ignored. Plaintiffs now allege, again incorrectly, that Defendants' Counterclaims are conclusory, and therefore have filed this Motion to Dismiss the Counterclaims for failure to state a valid claim upon which relief may be granted. However, this is patently incorrect, and in fact merely another predatory attempt by this landlord to enforce Leases for properties, which they failed to maintain to any reasonable standard. Plaintiffs Motion to Dismiss should be denied.

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II.
DEFENDANTS' COUNTERMOTION IS SUPPORTED BY ADMISSIBLE EVIDENCE

Plaintiffs incorrectly assert that Defendants' Countermotion for Summary Judgment is not supported by any admissible evidence. This is incorrect, as the Countermotion is based on admissible evidence in the form of (1) the declaration of Anthony Bour, (2) the Lease Agreement and Lease Addendums which are at the heart of this dispute, and (3) facts which Plaintiffs have stated themselves or conceded to in their pleadings.

Plaintiffs cite the correct NRS statute which states that "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." NRCP(c)(4). However, Plaintiffs then mischaracterize the declaration of Anthony Bour as being inadmissible.[1] Anthony Bour has been directly involved in the operations of Bour Enterprises, LLC, including the leasing of the property in question. He has personal knowledge of all the matters discussed in his declaration and is prepared to testify should this matter proceed to trial. Additionally, the Lease Agreement, attached to Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgment, and the Lease Addendums, attached to Plaintiffs' Motion to Dismiss Defendants' Counterclaims, are admissible evidence that provide the basis of undisputed facts which would allow the Court to rule on the Countermotion for Summary Judgment.

Though Plaintiffs attempt to characterize the Countermotion for Summary Judgment as lacking any admissible evidence in its support, reviewing their Opposition to the Countermotion makes it clear that they are merely offering up what amounts to a blanket denial as to the admissibility of any evidence. For example, in response to Defendants' assertion that it is an

[1] [1] See Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgment, Pg.3.

undisputed fact that "On or about April 20, 2017, Defendants entered into agreements 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" Plaintiffs objected and claimed that this statement is not supported by admissible evidence.[2] This fact clearly is not in dispute (it is in the Lease Agreement and Lease Addendums that Plaintiffs have attached to their own pleadings), and its denial is merely part of an obvious effort to extend the litigation and drive up expenses. If Plaintiffs' genuinely assert that there is no admissible evidence that the Lease Agreement and Lease Addendums were entered into by the parties, then they essentially argue that all of their own claims are baseless.

This is only one example. Reviewing Plaintiffs' other objections shows the same pattern of denying the admissibility of evidence to support factual assertions that are either not in dispute or can be clearly supported by evidence already cited. Plaintiffs' second objection is to Defendants' assertion that "Bour Enterprises entered into the Lease to operate its business on the Premises, and Plaintiffs were informed, prior to entering into the Lease, that the Premises was fit for this intended use as a commercial business facility."[3] Plaintiffs response to this was an objection in which they stated "This statement contains hearsay, lacks foundation and is not supported by admissible evidence." Plaintiffs further cite to sections of the Lease Agreement which they claim contradict Defendants' assertion.

However, this objection by Plaintiffs is again patently incorrect. Section 6.1 of the Lease Agreement, which was drafted by the Plaintiffs, provides that "Lessee shall use and occupy the Premises only for the Agreed Use, or any other legal use which is reasonably comparable thereto,

[2] See Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgment, Pg. 5.

[3] Id.

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and for no other purpose."[4] This language makes it clear that there was an agreed upon use for the properties and the Plaintiffs were aware of this. It is nonsensical for the Plaintiffs to claim there is no admissible evidence supporting Defendants' assertion when the Lease Agreement clearly references an "agreed use". Since there was an understanding between the parties as to the agreed use of the properties, then it logically follows that Plaintiffs were holding the properties out to Defendants as being fit for that use.

III.
EVEN IF DISPUTED FACTS REMAIN, THEY ARE NOT MATERIAL TO THE DISPUTE AND SUMMARY JUDGMENT IS THEREFORE STILL APPROPRIATE

The same problems persist throughout the objections in Plaintiffs' Opposition. They continually mischaracterize facts as in dispute when they are clearly established (often by Plaintiffs' own admission or documents they have attached to various pleadings as exhibits) and supported by admissible evidence. However, it is also important to note that even if the Court finds some of Plaintiffs' many objections are valid, it remains true that the material facts of the case are not in dispute and are supported by admissible evidence. If Plaintiffs have stumbled upon any valid objections, then it would only be in regard to non-material facts.

The material facts of this case, which are not in dispute, are that (1) there was a Lease Agreement and Lease Addendums signed by the parties, (2) the Lease Addendum contained an "as-is" clause, and (3) Defendants' notified Plaintiffs of issues with the property that Defendants' considered severe enough to prevent them from operating their business on the premises. These issues are not in dispute, as the Lease and Lease Addendums are admissible evidence and, in

[4] See Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgment, Exhibit 2 Lease Agreement, Section 6.

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their Reply, Plaintiffs admit that Defendants' expressed their concerns about the properties before they sought to break the lease.[5]

Though other facts may be in dispute, these are the undisputed material facts that are the foundation of the entire case. Based on these facts, it is clear that the fundamental disagreement between the parties is a matter of law (in regard to whether the as-is clause was sufficient to prevent Plaintiffs actions/lack of action from breaching of either the implied warranty of habitability or the covenant of quiet enjoyment through constructive eviction). Therefore, because this is a dispute of law, it is appropriate for summary judgment.

IV.
PLAINTIFFS' ASSERTION THAT THERE IS NO IMPLIED WARRANTY OF HABITABILITY IN NEVADA IS ONLY BASED ON CASE LAW FROM REMOTE JURISDICTIONS AND AN INCORRECT INTERPRETATIONS OF NEVADA STATUTES

In Plaintiffs' Opposition to Defendants Countermotion for Summary Judgment, they present the issue of the existence of an implied warranty of habitability as already being essentially established in Nevada, **despite only being able to cite to cases from remote jurisdictions**. These are not controlling in Nevada, and are frankly unpersuasive in making the argument that Nevada should adopt the approach of some states in removing this protection from commercial lessees. Plaintiffs further make the argument that Court must presume that the Nevada Legislature deliberately excluded the applicability of habitability to commercial leases. Plaintiffs base this on the holding from *In re Estate of Prestie*, were the Court held that "We have previously recognized the fundamental rule of statutory construction that the mention of one thing implies the exclusion

[5] See Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgment, Pg. 7 – 8.

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of another." *In re Estate of Prestie*, 122 Nev. 807, 814, 138 P.3d 520, 524 (2006). Plaintiffs' then cite another case where the Court held that 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).

However, what the Plaintiffs' failed to include is the next line from the Court's holding in *Sonia F. v. Eighth Judicial Dist. Court,* which stated that "If, on the other hand, a statute is ambiguous, this court will construe a statute by considering reason and public policy to determine the Legislature's intent." Id. Further, it is important to note that all of the above language from *Sonia F. v. Eighth Judicial Dist. Court*, was in regard to whether a rule of evidence from a criminal trial should be applied in a civil trial. Id. This situation is decidedly different, in particular because we are talking about an implied warranty rather than something explicitly stated. It is a huge leap for Plaintiffs to suggest that the mention of an implied warranty of habitability in NRS Chapter 118A definitively establishes that the warranty can exist nowhere else. Therefore, in ruling on this matter, the Court should disregard Plaintiffs' assertion that case law or statute has already decided the non-existence of an implied warranty of habitability for commercial leases in Nevada.

V.
EVEN IF THE COURT FINDS THAT THERE IS NO IMPLIED WARRANTY OF HABITABILITY FOR NEVADA COMMERCIAL LEASES, PLAINTIFFS STILL BREACHED THE COVENANT OF QUIET ENJOYMENT THROUGH CONSTRUCTIVE EVICTION

In Nevada, a tenant may bring a claim for breach of the covenant of quiet enjoyment by demonstrating that the landlord's actions (or failure to act) resulted in constructive eviction. *Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008). For a commercial tenant constructive eviction has four elements: (1) the landlord either acts or fails to act, (2) the landlord's action or inaction renders the whole or a substantial part of the premises **unfit for**

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occupancy for the purpose for which it was leased, (3) the tenant vacates the premises within a reasonable time, and (4) the tenant must provide the landlord with notice and a reasonable opportunity to cure the defect. *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. 834, 838–40, 335 P.3d 211, 214–15 (2014) (Emphasis Added).

In *Las Vegas Oriental v. Sabella's of Nev*, the Court found that failure to provide adequate heating and air conditioning to restaurant and lounge area was constructive eviction when those areas were an integral portion of the business. *Las Vegas Oriental v. Sabella's of Nev.*, 97 Nev. 311, 313, 630 P.2d 255, 256 (1981). Here, like *Las Vegas Oriental v. Sabella's of Nev,* Plaintiffs' failure to remedy the condition of the properties amounts to constructive eviction. Further, like the lack of air conditioning amounted to constructive eviction, here the lack of parking accommodation rendered the properties unfit for the purpose for which they were leased. This is true even if the Court finds that there is no implied warranty of habitability, and as stated above, the Lease Agreement specifically acknowledges that the parties had an understanding as to the "agreed use" for the properties.[6]

VI.
EVEN IF THE COURT FINDS THAT AN "AS-IS" CLAUSE CAN EFFECTIVELY DISCLAIM BOTH THE PLAINTIFFS' DUTY TO PROVIDE A HABITABLE PROPERTY AND THE COVENANT OF QUIET ENJOYMENT, THE CLAUSE IN THIS CASE IS AMBIGUOUS AND SHOULD BE CONSTRUED AGAINST THE DRAFTER

Contract interpretation is a question of law and in reviewing contracts the Court looks to the language of the agreement and the surrounding circumstances. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). The Court initially determines whether the language of the contract is clear and unambiguous, and if it is found unambiguous the contract will

[6] See Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgement, Exhibit 2, Pg.1.

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be enforced as written. Id. An ambiguous contract is susceptible to more than one reasonable interpretation, and any ambiguity should be construed against the drafter. Id.

Here, the "as-is" clause is contained in the Lease Addendums and reads 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.[7]

When read in context of the Lease Agreement and the rest of the Lease Addendum, it becomes clear that what the "as-is" clause disclaims is ambiguous and should therefore be construed against the Plaintiffs as they were the drafters. The clause states that Defendants' are accepting the property as-is and specifically cites the condition of various aspects of the building at that time.[8] Plaintiffs, in arguing that they have no duty to fix the issues with the properties so as to render them suitable for the intended purpose, rely heavily on the inclusion of this clause. However, the clause is ambiguous as to whether Defendants were accepting the parking conditions/availability (which later substantially contributed to the properties being unfit for their agreed upon use). Further, section 7.2 of the Lease Agreement outlines Plaintiffs' obligations as Lessor and states that they are responsible for the parking lots, parkways and driveways.[9]

In light of this ambiguity as to whether or not the Defendants were agreeing to accept the property "as-is" in terms of parking availability, this clause of the Addendums should be construed against the Plaintiffs. Because there was also an agreed upon use for the properties referenced in

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[7] See Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgement, Exhibit 2, Pg.1.

[8] See Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgement, Exhibit 2, Lease Addendum, Condition of Premises.

[9] Id.

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the contract[10] and parking availability was a key aspect of the use Defendants' intended for the properties, this was substantial part of Plaintiffs breach of the covenant of quiet enjoyment through constructive eviction.

VII.
PLAINTIFFS' ALSO BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING

In Nevada, the covenant of good faith and fair dealing is implied into every contract and this includes commercial contracts. *A.C. Shaw Constr. v. Washoe County*, 784 P.2d 9, 10 (Nev. 1989). The purpose of this implied covenant is to prevent a contracting party from "deliberately counterven[ing] the intention and spirit of the contract." *Morris v. Bank of America Nevada*, 110 Nev. 1274, 1278, 886 P.2d 454, 457 (1994).

Here, Plaintiffs' actions have clearly obstructed the intention and spirit of the contract. It is specifically stated in the Lease Agreement that the parties were aware of an agreed upon use for the properties.[11] Whether through failure to provide a habitable property, failure to provide adequate parking, or breach of covenant of quiet enjoyment through constructive eviction, Plaintiffs have breached the covenant of good faith and fair dealing. They were fully aware of the intended use of the property, and either purposefully or negligently failed to uphold the spirt and intention of the contract.

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[10] See Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgement, Exhibit 2, Lease Agreement, Pg.1.

[11] See Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgement, Exhibit 2, Pg.1.

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VIII.
EVEN IF THE COUNTERMOTION FOR SUMMARY JUDGMENT FAILS, PLAINTIFFS HAVE NOT MET THEIR BURDEN OF PROOF FOR THE MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS

Plaintiffs have filed a Motion to Dismiss Defendants' Counterclaims pursuant to the provisions of NRCP 12(b)(5). The Court has held that there is a very high standard of proof that must be met by the moving party in order to grant a Motion to Dismiss for failure to state a claim upon which relief can be granted. *Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). For the Court to grant this Motion, Plaintiffs **must demonstrate beyond doubt** that the Defendants cannot provide a set of facts in support of their claims for relief. *Id.* (emphasis added).

In determining whether the moving party has met their burden of proof, the Court takes allegations pled in the Complaint as true and views these allegations in the light most favorable to the non-moving party. *Buzz Stew LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). The Court need not accept as true allegations that are conclusory, unwarranted deductions of fact, or unreasonable inferences. *Wayment v. Holmes*, 112 Nev. 232, 237, 912 P.2d 816, 819 (1996).

Here, Plaintiffs have not demonstrated that Defendants are unable to provide a set of facts in support of their claim for relief. Under the 12(b)(5) standard, Plaintiffs have not met their burden of proof and the Motion to Dismiss should therefore be denied. When the pleadings are viewed in the light most favorable to the Defendants, it is clear that the allegations are not conclusory and there are viable stated claims for which relief can be granted. Even if the Court finds that the Nevada does not recognize the implied warranty of habitability for commercial leases, the other claims outlined above are still valid.

///

///

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IX.
CONCLUSION

Based on the facts and legal standards discussed above, Plaintiffs' Motion to Dismiss should be denied because they have been unable to meet their burden of proof and all facts should be construed in the light most favorable to Defendants. Further, because this dispute is fundamentally over a matter of law, Defendants' Motion for Summary Judgment should be granted in their favor.

Dated this 29th day of August 2019.

BLACK & LOBELLO

Rusty Graf, Esq.
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10777 West Twain Avenue, Suite 300
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Ph. (702) 869-8801
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Attorneys for Defendant/Counterclaimant

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 29th day of August 2019, I caused the above and foregoing document entitled **DEFENDANTS/COUNTERCLAIMANT'S REPLY IN SUPPORT OF COUNTERMOTION 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

[X] 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

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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: A-19-794864-C Dept. No.: 8 **NOTICE OF ENTRY OF ORDER**
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,	

YOU, and each of you, will please take notice that an Order Denying Without Prejudice Plaintiffs/Counterdefendants' Motion to Dismiss Counterclaims and Defendants/

Case Number: A-19-794864-C

HOLLEY DRIGGS
WALCH | FINE | PUZEY | STEIN | THOMPSON

Counterclaimants' Countermotion for Summary Judgment in the above entitled matter was filed and entered by the Clerk of the above-entitled Court on the 12th day of September, 2019, a copy of which is attached hereto

Dated this 13th day of September, 2019.

HOLLEY DRIGGS WALCH
FINE PUZEY STEIN & THOMPSON

/s/ F. Thomas Edwards, Esq.
F. THOMAS EDWARDS, ESQ.
Nevada Bar No. 9549
SEAN E. STORY, ESQ.
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Las Vegas, Nevada 89101

Attorneys for Plaintiffs

HOLLEY DRIGGS
WALCH | FINE | PUZEY | STEIN | THOMPSON

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs Walch Fine Puzey Stein & Thompson and that on this 13th day of September, 2019, 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
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Brent Carson, Esq.
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/s/ Sandy Sell
An employee of HOLLEY DRIGGS WALCH FINE PUZEY STEIN & THOMPSON

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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

ORDER DENYING WITHOUT PREJUDICE PLAINTIFFS/ COUNTERDEFENDANTS' MOTION TO DISMISS COUNTERCLAIMS AND DEFENDANTS/COUNTERCLAIMANTS COUNTERMOTION FOR SUMMARY JUDGMENT

This matter came before the Court on September 3, 2019 at 8:30 a.m. upon the Motion to Dismiss Counterclaims filed by Plaintiffs and Counterdefendants 4520 Arville and McKinley

Case Number: A-19-794864-C

Manor and upon the Countermotion for Summary Judgment filed by Defendants and Counterclaimants Bour Enterprises, LLC, Mulugeta Bour, and Helena Mengesha. The Court read and considered the moving papers and, good cause appearing, finds that it is premature to rule on either the Motion to Dismiss Counterclaims or the Countermotion for Summary Judgment.

Therefore, **IT IS HEREBY ORDERED** that the Motion to Dismiss Counterclaims and the Countermotion for Summary Judgment are denied without prejudice.

IT IS SO ORDERED.

Dated this 5th day of September, 2019.

DISTRICT COURT JUDGE
SENIOR JUDGE
JAMES BIXLER

Respectfully submitted by:

HOLLEY DRIGGS WALCH
FINE PUZEY STEIN & THOMPSON

F. THOMAS EDWARDS, ESQ.
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Attorneys for Plaintiffs

Approved as to form and content:

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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.	Case No: A-19-794864-C Dept. No.: 8 **ANSWER TO COUNTERCLAIM**
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,	

Plaintiffs/CounterDefendants, 4520 ARVILLE, a California general partnership; and MCKINLEY MANOR, an Idaho general partnership (collectively "Counterdefendants"), by and

Case Number: A-19-794864-C

HOLLEY DRIGGS
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through their attorneys of record, the law firm of Holley Driggs Walch Fine Puzey Stein & Thompson, hereby answer the counterclaims of Defendants/Counterclaimants BOUR ENTERPRISES, LLC, a Nevada limited liability company; MULUGETA BOUR, an individual; and HILENA MENGESHA ("Counterclaimants), as follows:

PARTIES

1. Counterdefendants are without information sufficient to admit or deny the allegations in paragraph 1 and they are therefore denied.

2. Counterdefendants are without information sufficient to admit or deny the allegations in paragraph 2 and they are therefore denied.

3. Counterdefendants are without information sufficient to admit or deny the allegations in paragraph 3 and they are therefore denied

4. Counterdefendants admit that 4520 Arville is and was a general partnership existing under the laws of the State of California. Counterdefendants deny all remaining allegations in paragraph 4.

5. Counterdefendants admit that McKinley Manor is and was a general partnership existing under the laws of the State of Idaho. Counterdefendants deny all remaining allegations in paragraph 5.

6. Counterdefendants are without information sufficient to admit or deny the allegations in paragraph 6 and they are therefore denied.

JURISDICTION AND VENUE

7. This paragraph calls for a legal conclusion, and no response is therefore required. To the extent a response is required, the allegations in paragraph 7 are denied.

8. This paragraph calls for a legal conclusion, and no response is therefore required. To the extent a response is required, the allegations in paragraph 8 are denied.

9. This paragraph calls for a legal conclusion, and no response is therefore required. To the extent a response is required, the allegations in paragraph 9 are denied.

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GENERAL ALLEGATIONS

10. Counterdefendants admit paragraph 10, but deny that Exhibits 1 & 2 are true and accurate copies of the Leases.

11. Counterdefendants admit the allegations in paragraph 11.

12. Counterdefendants deny each and every allegation in paragraph 12.

13. Counterdefendants deny each and every allegation in paragraph 13.

14. Counterdefendants deny each and every allegation in paragraph 14.

15. Counterdefendants deny each and every allegation in paragraph 15.

16. Counterdefendants deny each and every allegation in paragraph 16.

17. Counterdefendants deny each and every allegation in paragraph 17.

18. Counterdefendants deny each and every allegation in paragraph 18.

19. Counterdefendants deny each and every allegation in paragraph 19.

20. The document referenced in paragraph 20 speaks for itself and Counterdefendants deny any allegations inconsistent with the document.

21. The document referenced in paragraph 21 speaks for itself and Counterdefendants deny any allegations inconsistent with the document.

22. The document referenced in paragraph 22 speaks for itself and Counterdefendants deny any allegations inconsistent with the document.

23. Counterdefendants deny each and every allegation in paragraph 23.

FIRST CLAIM FOR RELIEF

(Constructive Eviction)

24. Counterdefendants repeat and reallege each of the answers in previous paragraphs as if each were fully set forth herein.

25. Counterdefendants deny each and every allegation in paragraph 25.

26. Counterdefendants deny each and every allegation in paragraph 26.

27. Counterdefendants deny each and every allegation in paragraph 27.

28. Counterdefendants deny each and every allegation in paragraph 28.

29. Counterdefendants deny each and every allegation in paragraph 29.

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30. Counterdefendants deny each and every allegation in paragraph 30.

31. Counterdefendants deny each and every allegation in paragraph 31.

32. Counterdefendants deny each and every allegation in paragraph 32.

33. Counterdefendants deny each and every allegation in paragraph 33.

34. Counterdefendants deny each and every allegation in paragraph 34.

SECOND CLAIM FOR RELIEF

(Breach of Contract)

35. Counterdefendants repeat and reallege each of the answers in previous paragraphs as if each were fully set forth herein.

36. Counterdefendants deny each and every allegation in paragraph 36.

37. Counterdefendants deny each and every allegation in paragraph 37.

38. Counterdefendants deny each and every allegation in paragraph 38.

39. Counterdefendants deny each and every allegation in paragraph 39.

40. Counterdefendants deny each and every allegation in paragraph 40.

41. Counterdefendants deny each and every allegation in paragraph 41.

42. Counterdefendants deny each and every allegation in paragraph 42.

THIRD CLAIM FOR RELIEF

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

43. Counterdefendants repeat and reallege each of the answers in previous paragraphs as if each were fully set forth herein.

44. This paragraph calls for a legal conclusion, and no response is therefore required. To the extent a response is required, the allegations in paragraph 44 are denied.

45. Counterdefendants deny each and every allegation in paragraph 45.

46. Counterdefendants deny each and every allegation in paragraph 46.

47. Counterdefendants deny each and every allegation in paragraph 47.

48. Counterdefendants deny each and every allegation in paragraph 48.

49. Counterdefendants deny each and every allegation in paragraph 49.

50. Counterdefendants deny each and every allegation in paragraph 50.

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51. Counterdefendants deny each and every allegation in paragraph 51.

FOURTH CLAIM FOR RELIEF

(Declaratory Relief)

52. Counterdefendants repeat and reallege each of the answers in previous paragraphs as if each were fully set forth herein.

53. This paragraph calls for a legal conclusion, and no response is therefore required. To the extent a response is required, the allegations in paragraph 53 are denied.

54. Counterdefendants deny each and every allegation in paragraph 54.

55. Counterdefendants deny each and every allegation in paragraph 55.

AFFIRMATIVE DEFENSES

As and for a separate defense, Counterdefendants allege the following affirmative defenses:

1. Counterdefendants deny each and every allegation of Counterclaimants' counterclaims not specifically admitted or otherwise pled to herein.

2. The counterclaims fail to state a claim against Counterdefendants upon which relief can be granted.

3. Counterclaimants are barred from obtaining relief for any claim by reason of the statute of limitations.

4. Pursuant to the Leases, Counterclaimants accepted the premises in an as-is condition.

5. By their own actions, representations and inaction, Counterclaimants are estopped from asserting any claim against Counterdefendants.

6. Counterclaimants have not suffered any damages.

7. Counterclaimants, by their own acts, conduct, representations and inaction, waived their right to assert any claim.

8. Damages and injuries, if any, suffered by Counterclaimants are not attributable to any act, conduct, or omission on the part of Counterdefendants.

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9. Counterclaimants' alleged damages, if any, are the direct result of their own conduct or the conduct of third parties.

10. Counterclaimants are barred from relief for any claim by operation of the doctrine of laches.

11. Counterclaimants are barred from obtaining relief for any claim by reason of their failure to mitigate their damages, if any.

12. Counterclaimants' claims are barred by Counterclaimants' own actions, representations and inaction.

13. Counterclaimants are barred from obtaining relief for any claim by reason of the doctrine of unclean hands.

14. Counterclaimants are barred from obtaining relief based on an alleged breach of a contract which Counterclaimants have materially breached.

15. Each and every action contained in the counterclaim is barred by Counterclaimants' prior breach of the implied covenant of good faith and fair dealing.

16. Counterclaimants should be barred from recovery in whole or in part, in proportion to the fault attributed to Counterclaimants or their agents.

17. Counterdefendants were excused from performing under the terms of the contract due to Counterclaimants' failure to perform.

18. Pursuant to the Leases, Counterclaimants accepted the sole responsibility of maintaining the premises.

19. Counterdefendants are not in default under the Leases.

20. Pursuant to the Leases, Counterclaimants were provided a total of eight (8) unreserved parking spaces (four (4) parking spaces for both Leases) and no reserved parking spacings.

21. Counterclaimants failed to provide timely, adequate or sufficient notice prior to vacating the premises.

22. Counterclaimants' remedies, if any, did not include vacating the premises and ceasing the payment of rent and other obligations under the Leases.

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23. It has been necessary for Counterdefendants to employ the services of an attorney to defend this counterclaim, and reasonable sums should be allowed as and for attorney fees, together with the costs expended in this action.

24. Pursuant to the provisions of Rule 11 of the Nevada Rules of Civil Procedure, at the time of the filing of this answer to the counterclaim, all possible affirmative defenses may not have been alleged inasmuch as insufficient facts and relevant information may not have been available after reasonable inquiry. Therefore, Counterdefendants reserve the right to amend this answer to allege additional affirmative defenses if subsequent investigation so warrants. Counterclaimants incorporate by reference each and every affirmative defense set forth in Nevada Rules of Civil Procedure, Rule 8(c), as if fully set forth herein. Such defenses are herein incorporated by reference for the specific purpose of not waiving any such defense.

WHEREFORE, Counterdefendants pray:

1. That Counterclaimants take nothing by way of their counterclaims, and that Counterdefendants have judgment against Counterclaimants dismissing the counterclaims on the merits with prejudice;

2. That Counterdefendants have judgment against Counterclaimants for reasonable attorney fees and costs of suit; and

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

Dated this 14th day of October, 2019.

HOLLEY DRIGGS WALCH
FINE PUZEY STEIN & THOMPSON

/s/ F. Thomas Edwards, Esq.
F. THOMAS EDWARDS, ESQ.
Nevada Bar No. 9549
SEAN E. STORY, ESQ.
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Attorneys for Plaintiffs/Counterdefendants

HOLLEY DRIGGS WALCH | FINE | PUZEY | STEIN | THOMPSON

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Holley Driggs Walch Fine Puzey Stein & Thompson and that on this 14th day of October, 2019, I did cause a true and correct copy of the foregoing **PLAINTIFFS/COUNTERDEFENDANTS' ANSWER TO COUNTERCLAIMS**, 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
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/s/ Sandy Sell
An employee of HOLLEY DRIGGS WALCH FINE PUZEY STEIN & THOMPSON

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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.	Case No.: A-19-794864-C Dept. No.: 8 **DEFENDANTS/COUNTERCLAIMANTS OFFER OF JUDGMENT**
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,	**[Exempt from Arbitration]** **[Declaratory Relief Requested]**

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Pursuant to Rule 68 of the Nevada Rules of Civil Procedure, Defendants/Counterclaimants BOUR ENTERPRISES, LLC, a Nevada limited liability company; MULUGETA BOUR, an individual; HILENA MENGESHA, an individual; ("Defendants/Counterclaimants") hereby offer to allow judgment to be taken against the Defendants/Counterclaimants, and in favor of the Plaintiffs/Counter Defendants, 4520 ARVILLE, a California general partnership; MCKINLEY MANOR, an Idaho general partnership ("Plaintiffs/Counter Defendants"), in the amount of Twenty-Five Thousand Dollars and No/Cents ($25,000.00), inclusive of costs, each and every party to bear their own attorney's fees.

This Offer of Judgment is made for the purposes specified in Rule 68(b) and or (c), and is not to be construed as an admission of any kind whatsoever. No partial acceptance may be made, and any acceptance of only part of this Offer will be construed as a rejection of the entire Offer.

You have fourteen (14) days from the date on which this offer is served in which to accept it in writing. If you fail to accept this Offer within the time allowed, it is considered rejected by Plaintiffs/Counter Defendants and deemed withdrawn by Defendants/Counterclaimants. This offer will not be filed with the Court unless (1) accepted; or (2) in a proceeding to determine costs and fees.

Upon the filing of the Offer of Judgment and notice of acceptance, together with proof service thereof, the clerk shall be authorized to enter judgment in accordance with the terms and conditions of this Offer of Judgment, only after the running of twenty-one (21) days from the service of the written acceptance of this Offer of Judgment.

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In the event that this offer is rejected, and a final judgment is obtained by Plaintiffs/Counter Defendants which is less favorable than the Offer of Judgment, Defendants/Counterclaimants will seek to recover all recoverable costs, attorney's fees, pre-judgment interest and all items recoverable from the time of the Offer of Judgment to the time of entry of judgement, under Nevada Rule of Civil Procedure Rule 68, and all applicable law.

Dated this 30 day of October 2019.

BLACK & LOBELLO

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Attorneys for Defendant/Counterclaimant

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 30th day of October 2019, I caused the above and foregoing document entitled **DEFENDANTS/COUNTERCLAIMANTS OFFER OF 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

[X] 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

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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' DESIGNATION OF EXPERT WITNESSES**

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendants, 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 submit the following Designation of Expert Witnesses pursuant to NRCP 16.1 and NRCP 26:

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AI000183
Case Number: A-19-794864-C Docket 83099 Document 2021-28552

I. LIST OF WITNESSES

1. Dale Walsh, MS, CIH, CSP, LEED-AP, CEM
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Las Vegas, Nevada 89102
Phone: (702) 468-4782

Mr. Walsh is certified industrial hygienist, has a B.S. in Biochemistry and an M.S. in Toxicology/Industrial Hygiene. He is certified by the American Board of Industrial Hygiene (ABIH) as a Certified Industrial Hygienist, certified by the Board of Certified Safety Professionals (BCSP) as a Certified Safety Professional (CSP), certified by the Green Building Certification Institute (GBCI) as a Leadership in Energy and Environmental Design LEED Accredited Professional (LEEDAP) certified by the State of Nevada as a Certified Environmental Manager (CEM), and is licensed by the State of Nevada as an Asbestos Abatement Consultant for Inspector, Management Planner, Project Designer, and Project Monitor. Mr. Walsh is expected to testify as to the presence of materials in the Subject Property, including silica, which could cause health effects and concerns. He will also testify as to the scientifically correct methods for obtaining, examining, and interpreting samples and microscopic inspection results, the need for any abatement and/or demolition at the Subject Property, the condition, repairs, cost of repair and causation of the conditions alleged at the Subject Property, and he will also offer rebuttal testimony to the opinions offered by any other expert. A copy of Mr. Walsh's Curriculum Vitae, List of Deposition Testimony/Trial Testimony are attached hereto as Exhibit "A". Mr. Walsh's Fee Schedule is attached hereto as Exhibit "B". A copy of Mr. Walsh's Report is attached hereto as Exhibit "C".

Defendants reserve the right to call any other expert witness designated by any other party in this matter as an expert witness at trial, and reserves the right to supplement this Expert Witness Designation and designate additional experts, if necessary.

DATED this 21st day of February, 2020.

BLACK & LOBELLO

By: _____ #15271

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 Defendants

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 24th day of February 2020, I caused the above and foregoing document entitled **DEFENDANTS' DESIGNATION OF EXPERT WITNESSES** 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

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

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

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

F. THOMAS EDWARDS, ESQ.
E-mail: tedwards@nevadafirm.com
SEAN E. STORY, ESQ.
E-mail: sstory@nevadafirm.com
HOLLEY DRIGGS WALCH
FINE PUZEY STEIN & THOMPSON
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Telephone: 702/791-0308
Facsimile: 702/791-1912
Attorneys for Plaintiffs

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 A

Curriculum Vitae

Walsh Certified Consultants, Inc.
3333 Calle Del Torre, Las Vegas, Nevada 89102
(702) 468-4782 (Phone/Cell); (702) 254-7210 (Fax/Off)
dwalsh@walshcih.com - www.walshcih.com

Dale W. Walsh, MS, CIH, CSP, LEED-AP, CEM

Summary of Expertise

- Indoor Environmental Quality Assessments – U.S. and International
- Fungal Growth (Mold), Asbestos, and Lead Containing Material Consulting
- Training in Asbestos, HAZWOPER, Mold, Industrial Hygiene, Safety, etc.
- Industrial Hygiene Exposure Monitoring Services
- Green Building Services and Training
- OSHA and EPA Compliance
- Expert Witness Services
- Risk Assessment and Management of Waters Systems to Control *Legionella*
- Fire Code Permitting and Compliance
- Cannabis Cultivation Odor Control Plans and Testing
- Tenant Environmental Impact Audits for Owner Risk Control
- Radiation Safety Officer
- Marketing Environmental, Health & Safety Services
- Past Instructor at UNLV and CSN
- Leadership in Professional Organizations

Education

- **M.S.-1986,** Toxicology/Industrial Hygiene, University of Arizona (Thesis titled *Preliminary Evaluation of the Environmental Concentration and Toxicity of 4-Phenylcyclohexene an Emission of New Carpeting*)
- **B.S.-1983,** Biochemistry, University of Arizona

Certifications and Licenses

- Certified by the American Board of Industrial Hygiene (ABIH) as a Certified Industrial Hygienist (**CIH**), December 14, 1990, Certificate Number 5077 (current).
- Certified by the Board of Certified Safety Professionals (BCSP) as a Certified Safety Professional (**CSP**), May 18, 1996, Certificate Number 14510 (current).
- Certified by the Green Building Certification Institute (GBCI) as a Leadership in Energy and Environmental Design LEED Accredited Professional (**LEED-AP**) (legacy)
- Certified by the State of Nevada as a Certified Environmental Manager (**CEM**), January 4, 1995, Certificate Number EM-1215 (current).
- **Licensed** by the State of Nevada as an **Asbestos Abatement Consultant** for Inspector, Management Planner, Project Designer, and Project Monitor, License No. IJPM0402 (current).
- Certificate of Accomplishment by Phigenics for *Sustainable Comprehensive Water Management Programs Course*, ANSI Accredited #1268 ASTM E2659, July 13, 2018, Certificate Number 000178.

AI000188

Work History

- ***Walsh Certified Consultants, Inc., Las Vegas, NV***

  President (November 2008-Present)

  Mr. Walsh is the President of Walsh Certified Consultants, Inc. He has provided occupational and environmental health and safety services to a wide range of client types from homeowners and other consultants to major corporations and the U.S. Government. His areas of practice include: 1) training, 2) industrial hygiene, 3) indoor environmental quality, 4) mold and asbestos inspections, management planning, project design, and remediation oversight, 5) safety consulting, 6) environmental health, 7) expert witness testimony, 8) lead risk assessment, 9) hazardous material (fire department) permitting, 10) *Green* building health and safety issues and indoor air quality testing, and 11) tenant environmental impact audits for building owners and managers.

- ***Converse Consultants, Las Vegas, NV***

  Certified Industrial Hygienist (July 1992-Present [part time since 2008])

  The services described below have been provided by Mr. Walsh to various **client types** including hospitals and medical clinics (VA), hotel/casinos, heavy manufacturing, R&D facilities, federal/state/county/city agencies, utilities, property managers, health care facilities, contractors, homeowners, banks, architects, waste disposal companies, lawyers, etc.

  Mr. Walsh has performed the functions of the **Corporate Health and Safety Officer** (CHSO) which included functioning as a resource for health and safety information for the ten office locations of Converse Consultants. His functions included development and maintenance of a comprehensive written **Health and Safety Program**. He has also prepared numerous **Health and Safety Plans** for the remediation of various petroleum and other hazardous material contaminated sites including Superfund sites.

  Mr. Walsh has provided **expert witness** services for numerous attorneys, insurance companies, and government agencies, involving mold, hazardous materials and indoor environmental quality (refer to Litigation and Expert Work section at end of CV).

  Mr. Walsh has conducted hundreds of **mold and asbestos** assessments and post abatement verifications including sampling, project design, and management programs. He has also conducted numerous **indoor environmental quality** assessments.

  Mr. Walsh has conducted various health and safety **training** courses to clients including 40-Hour Hazardous Waste Operations and Emergency Response (HAZWOPER), 8-Hour HAZWOPER Refresher, 8-Hour HAZWOPER Supervisor, 8-Hour EPA Model Accreditation Plan Compliant Asbestos Supervisor and Inspector (4-Hour) Refresher Courses, 16-Hour Asbestos

Operations & Maintenance, 2-Hour Asbestos Awareness, Indoor Air Quality, Mold Assessment and Abatement, Hazard Communication, Respiratory Protection, etc.

Mr. Walsh has performed confined space assessments, health and safety audits, industrial hygiene assessments, noise monitoring, electromagnetic and radio frequency radiation assessments, meth lab clearance sampling, risk assessments, Phase I Environmental Site Assessments, CSP project safety oversight at a State directed Hazardous Waste Cleanup Site in the Henderson, Nevada area, odor (sewer) assessments at hospitals and commercial properties, *Legionella* risk assessments and sampling around the U.S., etc.

- ***University of Nevada Las Vegas, Las Vegas, NV***

  Part Time Instructor (September 2005-December 2007)

  Mr. Walsh has been an instructor of the Industrial Hygiene course (HPS 480/680) in the Department of Health Physics.

- ***College of Southern Nevada, Las Vegas, NV***

  Part Time Instructor (2007-2009)

  Mr. Walsh is the instructor of various courses for CSN including 40 hour and 8-hour HAZWOPER classes, fungal assessment and control, etc.

- ***Dames & Moore, San Diego CA & Phoenix, AZ***

  Senior Industrial Hygienist (April 1990-June 1992)

  Mr. Walsh managed health and safety activities at an uncontrolled hazardous waste remediation site in Louisiana, prepared health and safety plans for various HAZWOPER projects, provided HAZWOPER training, and provided constant health and safety oversight for the removal of underground storage tanks inside an occupied high-rise building.

  Mr. Walsh was the Office Safety Coordinator and oversaw employee medical surveillance, training, respirator fit testing, maintaining IH equipment & PPE, conducting H&S audits & industrial hygiene monitoring.

  Mr. Walsh performed numerous asbestos, radon and indoor air quality assessments including the provision of expert witness testimony.

- ***Chemical Waste Management, Kettleman City, CA***

  Health and Safety Manager (August 1989 -April 1990)

  Mr. Walsh was responsible for the development and implementation of a comprehensive health and safety program at a 200+ employee treatment, storage and disposal facility. His duties included industrial hygiene air monitoring for various hazardous chemicals, noise surveys, accident investigations, emergency planning, employee training, medical surveillance, and workers' compensation.

- ***IT Corporation, Four Offices in CA***

  Health & Safety Coordinator (September 1986-August 1989)

  Mr. Walsh provided health and safety support for environmental service activities including emergency response to chemical spills, chemical packaging, chemical contamination remediation, asbestos abatement, worker training and hazardous waste disposal facility functions.

  Mr. Walsh performed a comprehensive health and safety audit of the Alyeska crude oil pipeline. He conducted various industrial hygiene air monitoring, noise, and ventilation surveys for the Ultramar refinery in Wilmington, CA and noise dosimetry and octave band sound analysis during a Port of Los Angeles construction project.

  Mr. Walsh conducted numerous indoor air quality investigations and managed numerous asbestos investigations and remediation activities.

Professional Development and Training

- ***OSHA and EPA Regulation Required Courses***
  - **40-Hr Hazardous Waste Operations and Emergency Response (HAZWOPER) 29 CFR 1910.120** Equivalency Training 1986-87; additional 8-Hour Supervisor, 1991, 24 Hour On-The-Job Training 1986-87 and 8-Hour Refresher Training Annual (current).
  - **24-Hr Safety & Health Decision-Making for Managers 29 CFR 1910.120,** EPA Course, Las Vegas, NV, 1993.
  - **24-Hr Lead-Based Paint Issues for Certified Industrial Hygienists 40 CFR 745.226**, UC Berkeley Extension, Richmond, CA, 2000
  - **40-Hr Asbestos Contractor/Supervisor Course**, UC Berkeley Extension, Richmond, CA, 1988; **24-Hr Asbestos Inspector Course and 16-Hr Asbestos Management Planner Course**, Environmental Sciences, Inc., Tucson, AZ 1987; **8-Hr Project Designer Refresher Course** (combined with Contractor/Supervisor gave initial course equivalency), American Environmental Training Institute, Inc., San Diego, CA, 1993; and associated annual Refresher Courses (current) EPA AHERA Regulation **40 CFR Part 763 Subpart E Appendix C**
  - **8-Hr Nuclear Gauge Operator Training**, Pacific Nuclear Technology Company St. George, UT, 1994 for Radiation Safety Officer requirements under Nevada Radiological Health Section requirements

- ***Professional Development Courses (PDCs) or Workshops***
  - **8-Hr Sustainable Comprehensive Water Management Programs Course (Legionella)**, ANSI Accredited #1268, Las Vegas, Nevada 2018
  - **40-Hr Safety for the Industrial Hygienist**, OSHA Course, Wilmington, CA, 1986.
  - **8-Hr Indoor Air Quality and Radon PDC,** AIHA Conference, St. Louis, MO, 1989.

- **24-Hr Indoor Air Quality PDC,** AIHA, San Diego, CA, 1991.
- **24-Hr Risk Assessment - Practical Techniques and Methods PDC,** University of Nevada-Las Vegas, Las Vegas, NV, 1994.
- **24-Hr Orientation to Indoor Air Quality PDC,** EPA, Las Vegas, NV, 1993.
- **8-Hr Cleaning for a Healthy Indoor Environment PDC**, University of Tulsa, Las Vegas, NV, 1998.
- **8-Hr Fungi in the Indoor Environment: Occurrence, Habitats, Physiology, Potential Health Effects, Investigation PDC,** AIHA Conference, Anaheim, CA, 2005
- **8-Hr Fines, Ultrafines, and Nano (FUN) Particles PDC,** AIHA Conference, Chicago, IL, 2006
- **8-Hr Sampling Considerations: Clandestine Methamphetamine "Labs" PDC** Professional Conference of Industrial Hygiene, San Jose, CA, 2006
- **8-Hr Noise Control Engineering PDC**, AIHA Conference, Portland, OR, 2011
- **8-Hr Workshop on Impact of Moisture in the Built Environment: Prevention, Evaluation, Response and Due Diligence**, Sponsored by ASTM Committees D22 and E50, April 30, 2015, Anaheim, CA
- **4-Hr Workshop on SVOC Emissions to Indoor Environments,** Sponsored by ASTM Committee D22.05 on Indoor Air Quality, October 12, 2017, Sheraton New Orleans New Orleans, LA
- **8-Hr Workshop on Sampling and Analytic Advances in Formaldehyde and Other Carbonyl Compounds' Determination in Air**, Sponsored by ASTM Committee D22.05 on Indoor Air Quality, April 12, 2018, San Diego, CA

Conferences

- Attend and Actively Participate in Semi-Annual ASTM International Committee Weeks (D22.08 Subcommittee *Assessment, Sampling and Analysis of Microorganisms*)
- Annually attended the American Industrial Hygiene Conference and Exposition (AIHCe) until 2014
- Periodically attend Indoor Air Quality Association Conference, USGBC Greenbuild Conference, and ASSE Annual PDC

Professional Organizations

- **American Society of Safety Professionals** – *Past President* for 2016-17, 2008-09 and 1997-98 Southern Nevada Chapter years and 2008-09 and 2017 *Chapter Safety Professional of the Year* recipient.
- **American Industrial Hygiene Association** - 2000-2004 President of Nevada Section, AIHA Clandestine Labs Working Group, AIHA IEQ Committee, Green Building Working Group, local Section Programs Chair (2014)
- **ASTM International** – Active Member of Committee D22 on Air Quality and Committee Participating in Subcommittee D22.08 Assessment, Sampling and Analysis of Microorganisms

*Co-Chair for writing ASTM E3026 - 15 *Standard Guide for Readily Observable Moisture Affected Materials and Conditions Conducive to Elevated Moisture in Commercial Buildings: Visual Moisture Assessment Process*
*Co-Chair of ASTM D22/E50 Workshop titled *Impacts of Moisture on the Built Environment: Prevention, Evaluation, Response, and Due Diligence* April 30, 2015; Anaheim, CA
*Technical Contact for ASTM WK67142 *New Practice for Standard Practice for the Collection of Microbial Material from Surfaces by Micro-vacuum*

- **Institute of Inspection Cleaning and Restoration Certification (IICRC)** – Revision Committee Advisor for the ANSI/IICRC S520 Standard for Professional Mold Remediation, 2017-18
- **Indoor Air Quality Association** – 2006–2009 Director of the Las Vegas Chapter
- **US Green Building Council** – National USGBC Corporate (past), Nevada Chapter member, and Past Director on the Chapter Board of Directors. Also, a member of the Programs Committee and Education Committee (past Chair).
- **Quarterly Half Day Industrial Hygiene Seminars** – Personally and Solely Plan, Coordinate, and Implement Seminars for the Local Industrial Hygiene Community

Awards

- **Safety Professional of the Year 2008/09** - ASSE Southern Nevada Chapter
- **Individual Winner for Advocacy of Sustainable Practices 2012** - USGBC Nevada Chapter
- **Safety Professional of the Year 2017** - ASSE Southern Nevada Chapter

Publications & Presentations

- **International Green Construction Code (IGCC) 2012** - Wrote Portions of Chapter 8 (IEQ & Comfort) and involved with 2015 air testing changes
- **Identification and Characterization of 4-Phenylcyclohexene-An Emission Product from New Carpeting**. Abstract #28 by Van Ert, M.D., J.W. Clayton, C.L. Crabb, and D.W. Walsh from the American Industrial Hygiene Conference and Exposition (AIHCe), Montreal, Quebec, Canada, May 1987.
- **IAQ in Green Building Systems and Codes – Full Day Professional Development Course (PDC 411).** 2013 AIHCe in Montreal, Quebec, Canada, May 19, 2013.
- **SH&E Aspects of Green Building** presentation at 2013 American Society of Safety Engineers Professional Development Conference in Las Vegas, NV
- **Only in Las Vegas: Applying Industrial Hygiene to the Unusual** at the 2006 Professional Conference for Industrial Hygiene (PCIH), San Jose, CA
- **LEED and the Industrial Hygienist: Another Approach to Protect Worker Health** in the *The Synergist* May 2007 - an American Industrial Hygiene Association publication
- **LEED NC and EB Basics and the Industrial Hygienist's Role- Full Day Professional Development Course** at the 2008 AIHCe in Minneapolis, MN
- **The Wrong Emphasis in Building "Green"** in the Indoor Environment Connections newspaper December 2008

- **Fungal Post-Remediation Verification: A Twenty-Five-Year-Old Approach** presentation at the 2010 AIHCe in Denver, CO.
- **Asbestos History and U.S. Regulations: Nobody Said They Had to Make Sense** at the 2010 AIHCe in Denver, CO.
- **Green Building Air Testing: Case Study Comparing TVOC Methods** at the 2010 AIHCe in Denver, CO.
- **Field Effectiveness of HEPA-Equipped Air Filtering (PHEAF) Devices Pilot Study** at the 2011 AIHCe in Portland, OR.
- **What's Normal: Considering Background When Assessing Risk** at the 2011 AIHCe in Portland, OR.
- **Twenty Reasons Your Green Building May Not Have Green Indoor Air** approved for 1.5 continuing education (CE) hours (Approval Number 0090005703) for LEED-AP and GA Credential Maintenance and published in Engineered Systems, January 2014
- **Addressing the Human Factors in Green Buildings** main author of tri-fold brochure for the American Industrial Hygiene Association Green Building Working Group
- **Odor Standard and Testing Protocol for Measuring Exterior Odors at Medical Marijuana Cultivation and/or Production Facilities** wrote this protocol for the City of Las Vegas, July 2015 – incorporated into City Ordinance 9.40.040 - Medical marijuana odor nuisances.
- **Moving-Related Moisture Damage to Household Goods: Causes, Consequences, Remediation, and Prevention** at Claims Prevention and Procedures Council, September 2016, Las Vegas, NV
- **Respirable Crystalline Silica Course for Competent Persons in Construction (4 hours)** for the American Society of Safety Engineers Southern Nevada Chapter and Nevada Contractors Association (monthly), 2017-18, Las Vegas, NV
- *Legionella:* **Water Inspections Sampling, and Risk Management-** Indoor Air Quality Association 2017 Annual Meeting, January 2017, Las Vegas, NV
- **Visual Moisture Assessment: ASTM Standard Guide-** Indoor Air Quality Association 2017 Annual Meeting, January 2017, Las Vegas, NV
- **Mold Sampling & Analysis Standards: Look Ma They Do Exist!-**Indoor Air Quality Association 2017 Annual Meeting, February 2017, Las Vegas, NV
- As Southern Nevada ASSP President, presented recommendations to the Clark County Commissioners for improving local construction safety at the *Second Southern Nevada Construction Worker Safety Roundtable* on January 28, 2009. Also testified at hearings on safety related bills to the Nevada State Legislature during the 2009 session.
- Various Courses, Seminars, and Presentations made to the local Chapters of ASSP, AIHA, RIMS, ACEC, AWMA, NPFMA, IFMA, USGBC, ICC, So and No CA AIHA, Florida AIHA, Craters of Moon ASSE, Alaska ASSE, Nevada State Contractors Board seminar, NFMT, IAQA, etc.

References

- Provided upon request and dependent on client type and services of interest. References may include Clark County Nevada Risk Management and Real Property Management; Southern Nevada Regional Housing Authority; State of Nevada Public Works; U.S. Veterans Administration Southern Nevada Healthcare System; City of Henderson Building and Fire Safety; The Sands Corporation (Venetian-Palazzo); Titanium Metals Corporation; NV Energy; McCarran International Airport; Merlin Entertainments; Law Firms
- Search the Internet with "Dale Walsh CIH" for additional information

Litigation and Expert Work

- 1988 - Carlsbad School District, California; percipient witness **deposition** on white powdery material on metal window frames in an elementary school
- Mid 1990s - expert **deposition** on employee exposure to acid vapors during acid cleaning of cinder block/concrete during MGM Grand construction
- Late 1990s – cleaning chemical exposure assessment for residual in home where sewage backup occurred - MGM lawyer was client
- Early 2000's - State of Nevada Department of Child & Family Services; fungal assessments and cleanup oversight over approximately one year; lawsuit filed against State of Nevada, but no testimony required from me.
- Early 2000's - Polo Towers *Legionella* percipient witness **deposition** on sampling and consulting provided during outbreak.
- 2003, July 14 – Northern California Court, Corrales v. Mackin, et al.; for California Rural Legal Assistance and Leach, McGreevy & Labrador LLP; **deposed** as expert regarding indoor air quality investigation, safety/environmental assessment, and fungal assessment/remediation for **Plaintiff**.
- 2003, November – Judd Balmer Esq., Ltd., oversight of destructive testing for fungal contamination in condo owned by Kathy Gordon: **Plaintiff**; no testimony required.
- 2004, August – Michael V. Cristalli, Ltd.; fungal and water intrusion assessment of residence owned by Evan Glusman regarding real estate disclosures
- 2004-2005 – Fungal Consulting Services – Campbell, Volk & Lauter – Kenneth A. Serrio v. The Adobe Hills L.P., et al, Claim No. 582-508823; involved site visits, review of previous reports, proposed work to be performed, and collection of samples
- 2005, May – Santoro, Driggs, Walch, Kearney, Johnson; fungal assessment at Smith's grocery store in Pahrump, Nevada
- 2005, May 31 – Sean K. Claggett & Associates - Divorce case; visited residence to identify contamination with photographs of asbestos, mold, swimming pool issues and EHS (other consulting company) report review
- 2005, September 8 – Clark County District Court, Morris Leonard vs. Darin Platte Case No. A481963; involving expert **courtroom testimony** regarding the findings and conclusion of a past fungal assessment.
- 2005, October 18 – Nevada Attorney for Injured Workers, Insurance Claim of Cheryl Spata and Madelyn Glunt Claim No. WCSMI2003276510; provision of all documents regarding a fungal contamination investigation.

- 2005, October 26 – Clark County District Court, Lynn Karol and Kenneth Karol vs. Country Club Towers, Inc. et al Case No. A466183; percipient witness **deposition** on findings of a fungal assessment conducted in the past.
- 2006, late – Jeffrey Shaner; for Christopher Booker owner of a flooded condo resulting in fungal contamination assessment and cleanup oversight; covered by American Family Insurance
- 2007, August 7 – Clark County District Court, Glenn Hayward et al vs. Del Webb Communities, Inc. et al Case No. A470159; **deposed as expert** on findings and conclusions of a fungal remediation site visit and review of other consultants' fungal related reports.
- 2007-2009 – Hurtick & Manke – provided fungal consulting services for Mr. Escoto; Escoto v Christopher Homes; taken over by Bremer, Whyte, Brown & O'Meara LLP; attended destructive testing event with numerous experts and lawyers for fungal contamination and wrote report of findings for **Plaintiff**.
- 2007 – Associated Risk Management – Workers Compensation Claim 5003-0255-2005-0454 - Ortiz v. Bill Heard Chevrolet; investigated relation between employee's dermatitis claim in relation to activities conducted at auto dealership painting operations.
- 2007, December - Jeffrey Ian Shaner; Nunez v. Dunn, et al, Case No. A536053; Review of various documents and photos pertaining to a residential fungal contamination.
- 2010, November - Merritt Chapman, Ltd.; Clark County, Nevada District Court Department VII; Case Number A571855; Dawn Rivait vs Regency Towers et al; prepared **Plaintiff's** expert report for mold and asbestos case.
- 2011, April – Fireman's Fund Insurance Company c/o Wood, Smith, Henning and Berman LLP; Kilar v. Casa Alicia Apartments LLC; Case Number A-11-633119-C; Collected fungal air and surface samples and conducted a methamphetamine surface assessment in a breach of lease case for **Defendant**.
- 2012, September – Ramzy Ladah, Esq.; Lighting assessment in wrongful death case for a real estate agent in home under construction; no testimony.
- 2013, January – S&C Claims Services; Workers' Comp case Hefter v. Classic Door and Trim; review and research of potential exposures of Mr. Hefter and exposure assessment of those activities in the field.
- 2013, April – Clark County Risk Management; Workers' Comp case Wendy Fenner v. Clark County; Collected supply air vent samples and analyzed for various contaminants to assess potential impact on indoor air quality for **Defendant**.
- 2014, November – The Madeksho Law Firm; Gordon Swain Lung Cancer Railroad Suit; Conducted interview of Mr. Swain to obtain work history for **Plaintiff** in cancer claim against railroad.
- 2015, June – Injury Lawyers of Nevada; Dimery et al v C&L; Review report of findings regarding fiberglass release in call center and writing a letter of expert opinion for **Plaintiff**.

- 2015, September – Law Offices of Frank Sorrentino; Opiana v Aggacid; Evaluate carbon monoxide exposure claims in a rental residence for **Plaintiff**
- 2016, July – York Risk Services Group; Morency v SEN Water and Fire Restoration, Inc.; Evaluate and write letter of expert opinion regarding other consultant's Limited Preliminary Water Impact and Microbial Assessment Report.
- 2016, Oct – Smith & Shapiro; ZAD Investments v. Laboratory Medicine Consultants; Evaluate and write letter of expert opinion regarding other consultant's Basic Mold Inspection Report and an Expert Witness Statement from another consultant. **Deposed as an expert** by opposing counsel for **Plaintiff and Counterdefendant.**
- 2016, March - 2018, March (**Trial**) – Fred N. Carmen Esq representing Vegas Towers, Roy Mayfield vs Vegas Towers Case No. 15C019885 of Justice Court, Las Vegas Township, Clark County Nevada Dept. 4; Issue involved indoor air quality at an apartment; Wrote a Letter of Expert Opinion regarding a consultant's report for **Defendant**; Wrote a Response to Rebuttal of the initial letter; and Provided testimony at March 2, 2018 trial. **Judge found for the Defendant** (Vegas Towers) and wrote "Mr. Walsh's testimony … to be credible" several times in the Court's findings and conclusions document dated April 17, 2018 regarding my **courtroom testimony**.
- 2017, April – Bullen Law transferred to Lipson-Neilson representing Spring Mountain LV LLC regarding fungal contamination and indoor air quality in Chinese restaurant. Conducted fungal sampling assessment and reviewed/commented on opposing side's expert report. Worked for **Defendant**; no testimony.
- 2018, May - Foran Glennon attorneys representing Travelers Insurance regarding water loss at Plaza Hotel/Casino. **Deposed** by plaintiff's counsel as a percipient witness. Provided consulting for an April 2016 water loss involving asbestos and fungal growth for **Defendant**.
- 2018, April – 2018, June - Shepherd v. Northern Nevada Enterprises, Inc. dba Northern Nevada Construction; Case Number CV16-01109, Reno, NV – worked for Wood, Smith, Henning, Berman representing **Defendant**; reviewed documents and wrote a letter of expert opinion in a case involving a claim of hazardous dust in a residence.
- 2018, September - S&C Claims Services workers comp case for Valley Fever. Reviewed and commented on landscaper's job exposures pertaining to possible exposure to pathogenic fungi causing Valley Fever.
- 2018, March – 2018, September – Farmers Insurance fungal contamination claim; attended **mediation** and wrote a letter of expert opinion for **Defendant**.
- 2018, November – 2019, April - Gbelay v. MSE Environmental (MSE) - Case Number A-17-766689-C 8th Judicial District Court, Clark County, Nevada, Department 14–worked for Springel & Fink representing MSE Environmental: **Defendant** in suit over asbestos/fungal contamination in a residence. Reviewed and commented on plaintiff's "expert" report and did site visit.

- 2019, July – 2019, November – Jeffrey Bull v. Berkshire Hathaway HomeServices Nevada Property Case No. A-17-759432-C Clark County Nevada District Court Department 28 - Ace Law Group representing apartment renter plaintiff exposed to fungal contamination in ventilation system – wrote expert report of document review and **deposed** by opposing council as **Plaintiff** expert.
- 2019, August – 2019, October - Li Yin Huang Residence expert response to denial of coverage by insurance company regarding water loss; worked for Lin Law Group, PC for **Plaintiff**.
- 2019, October – 2019, December - Edward and Karen Weston: Plaintiffs vs 24/7 Motorcoach Ltd. et al: Defendants – Aldrich Law Firm representing plaintiffs regarding defendant causing water damage and fungal growth in large motor home – conducted a fungal sampling assessment of the motor home and wrote a letter of findings for **Plaintiffs**. Case settled in Plaintiff's favor.
- 2019, December – 2020, January – Janis Frey: Plaintiff v Palms at Peccole Ranch Apartments et al: Defendant – Ace Law Firms representing Plaintiff. Reviewed documents and conducted research regarding water loss and fungal growth and dust mite proliferation due to water heater leak for **Plaintiff**.
- 2019, December – Active - Mark Richards, M.D.: Plaintiff v. Encompass Indemnity Co. et al: Defendants; Civil Action No. 455991-V; Circuit Court for Montgomery County, Maryland – working for Provident Group to review and comment on fungal growth and contamination expert deposition for Dr. Richards in support of the case for the **Defendant**.

- Various cases of expert services provided relating to Nevada OSHA citation resolution. Issues have included top fuel dragster exhaust exposures of starter employees, noise exposure of live stage show personnel, communication of asbestos hazards for a general contractor, etc.

EXHIBIT B

DALE WALSH EXPERT WITNESS FEE SCHEDULE

Service	Cost
Research	$150.00/hr
Field Service	$150.00/hr
Deposition	$250.00/hr
Court Appearance	$250.00/hr
Expenses	Cost plus 10%
Mileage	$0.50/mile

EXHIBIT C

Walsh Certified Consultants, Inc.

3333 Calle Del Torre
Las Vegas, Nevada 89102
www.WalshCIH.com

Phone/Cell: (702) 468-4782
Fax/Office: (702) 254-7210
E-Mail: dwalsh@WalshCIH.com

February 20, 2020 9029-001-01-20

Bour Enterprises c/o
Mr. Rusty Graf, Esq.
Black & LoBello
10777 West Twain Avenue, Suite 300
Las Vegas, NV 89135

Subject: **Report – Dust Assessment for Silica**
Former Bour Enterprises Leased Spaces
Suites C-10, C-23, C-24, and C-29 (C-23 and C-29 Assessed)
Arville Industrial Park
4560 South Arville Street
Las Vegas, Nevada

Dear Mr. Graf:

In accordance with our *Agreement and Authorization* dated November 11, 2019 and signed November 15, 2019, Walsh Certified Consultants, Inc. (WCCI) conducted the site visit for the subject services on February 7, 2020. The subject dust assessment for silica was requested to help assess for the presence and potential hazards of past elevated dust in the subject suites during Bour Enterprises (Bour) occupancy of the spaces. As a limousine service, Bour management reportedly moved out of the spaces due to health concerns for their employees from airborne dust reportedly due to inadequate cleaning of the space after the previous tenant left. The previous tenant of the space was reportedly a tile and countertop manufacturer. Per an OSHA Hazard Alert, "workers in manufacturing, finishing, and installing natural and manufactured stone countertops are at risk for significant crystalline silica exposure" (see enclosed Hazard Alert). For this reason, silica content of the dust remaining in the suites several months after they were vacated by Bour was assessed. The suites were reportedly cleaned by the property management after Bour vacated.

Scope of Services

The dust assessment for silica included the professional services of Mr. Dale Walsh, a WCCI employed Certified Industrial Hygienist (CIH), Certified Safety Professional (CSP), and Nevada Certified Environmental Manager (CEM). A site visit was conducted on February 7, 2020 to evaluate the subject spaces and collect dust samples for quartz and cristobalite silica analysis. Mr. Mulugeta Bour (previous lessee) was present to show Mr. Walsh locations where accumulated dust remained that was reportedly representative of the dust previously present before the cleaning of the spaces.

Methods

The bulk dust samples were collected by grabbing a bulk sample from dust piles while wearing nitrile gloves which were changed between sample collections. The bulk samples were placed in a clean Ziploc bag and were sent using chain-of-custody methods to ALS Laboratories, Inc. (ALS) in Salt Lake City, Utah. ALS is accredited for industrial hygiene sample analysis (including silica) by the American Industrial Hygiene Association Laboratory Accreditation Programs, LLC (AIHA-LAP) under their Industrial Hygiene Laboratory Accreditation Program (IHLAP).

Results and Discussion

The dust bulk sample lab results are enclosed. Sample C23-1 had a higher level of quartz silica (11%) than the Back-3 background outside dirt sample (7.2%). Sample C29-2 was at 1.8% quartz silica.

The enclosed photographs of the accumulated dust in Suites 23 and 29 indicate large amounts of accumulation in hidden areas that would likely be missed during cleaning. The enclosed photographs of the samples themselves show that the dust from the C23 Suite was morphologically different both in color and particulate size from the outside soil sample. The Suite C23 sample was powdery indicating very small particle sizes that may be respirable (can be breathed into the deep air exchange areas of the lungs). Mr. Walsh has performed dozens of industrial hygiene respirable crystalline silica exposure assessments in his thirty-four (34) year consulting career including a countertop manufacturer, gravel pit quarries, and construction projects. Based on his experience the C23-1 sample appeared similar to the dust he has encountered in these industries, especial the countertop manufacturer.

The Suite C29 dust sample was darker than the Suite C23 sample; however, it was finer than the outside soil sample.

Conclusions

Based upon the dust analysis, photographs, and observations described previously, the following conclusions are made:

1. The lab results indicate that the accumulated dust from Suite C23 had higher quartz silica content than the outside soil sample and the Suite C29 sample. This, plus the visible morphological differences (see photos), indicate that the Suite C23 dust was likely not from outdoor dust accumulation and more likely associated with past dust generating activities one of which may have been the countertop manufacturer (tenant before Bour).

2. If the very fine, powdery dust found in Suite C23 was present in large quantities and was being emitted in the air and breathed by the Bour employees, as reported by Bour, then the Bour workers could have potentially been exposed to a hazardous substance (crystalline silica) known to cause the disease silicosis and potentially lung cancer and other diseases (see enclosed OSHA Hazard Alert).

Recommendations

Based upon the previously described results and conclusions, the following recommendations are made:

1. If there is a desire for further analysis of the samples collected, they were split with a separate portion of each kept before sending the remainder to ALS. These samples can be sent to a different lab for optical microscopic analysis to help identify particle size and microscopic morphology to help better determine the potential source and content of the dust. Micrographs (photos through a microscope) of the dust particles can be taken as well for comparison. Scanning Electron Microscopy can also be performed to identify the elemental makeup of the dust.

Limitations

This report is solely for the use of Bour Enterprises c/o Black & LoBello as it applies to the subject site and activities assessed. WCCI is not responsible for any claims and/or damages associated with interpretation of available information. This assessment should not be regarded as a guarantee that no other hazardous conditions exist

at the subject site. In the event that changes in the nature of the site occur, or additional relevant information about the site is brought to our attention, the conclusions and recommendations contained in this assessment may not be valid unless these changes and additional relevant information are reviewed and the conclusions and recommendations are modified or verified in writing.

Thank you for the opportunity to be of service. Should you have any questions or comments regarding this report, please do not hesitate to call.

At Your Service,
WALSH CERTIFIED CONSULTANTS, INC.

Dale W. Walsh, CIH, CSP, CEM
President

Encl: ALS Lab Report
Photographs
OSHA Silica in Countertop Manufacturing Hazard Alert

ANALYTICAL REPORT

Report Date: February 17, 2020

Dale Walsh
Walsh Certified Consultants
3333 Calle del Torre
Las Vegas, NV 89102

Phone: (702) 468-4782

E-mail: dwalsh@walshcih.com

Workorder: **34-2004139**
Client Project ID: 4560 S Arville Units C23 & C29
Purchase Order: 9029-001-01-19
Project Manager: Paul Pope

Analytical Results

Sample ID: C23-1				Collected: 02/07/2020
Lab ID: 2004139001	Sampling Location: 4560 S Arville			Received: 02/10/2020
Method: NIOSH 7500 Mod.	**Media: Bulk**			**Instrument:** XRAY02
	Sampling Parameter: Volume Not Provided			**Analyzed:** 02/15/2020 (257274)
Analyte	**Result (%)**	**LOD (%)**	**RL (%)**	
Quartz	**11**	0.75	1.5	
Cristobalite	<1.0	1.0	1.5	

Sample ID: C29-2				Collected: 02/07/2020
Lab ID: 2004139002	Sampling Location: 4560 S Arville			Received: 02/10/2020
Method: NIOSH 7500 Mod.	**Media: Bulk**			**Instrument:** XRAY02
	Sampling Parameter: Volume Not Provided			**Analyzed:** 02/15/2020 (257274)
Analyte	**Result (%)**	**LOD (%)**	**RL (%)**	
Quartz	**1.8**	0.75	1.5	
Cristobalite	<1.0	1.0	1.5	

Sample ID: Back-3				Collected: 02/07/2020
Lab ID: 2004139003	Sampling Location: 4560 S Arville			Received: 02/10/2020
Method: NIOSH 7500 Mod.	**Media: Bulk**			**Instrument:** XRAY02
	Sampling Parameter: Volume Not Provided			**Analyzed:** 02/15/2020 (257274)
Analyte	**Result (%)**	**LOD (%)**	**RL (%)**	
Quartz	**7.2**	0.75	1.5	
Cristobalite	<1.0	1.0	1.5	

Report Authorization (/S/ is an electronic signature that complies with 21 CFR Part 11)

Method	Analyst	Peer Review
NIOSH 7500 Mod.	/S/ Paul M. Megerdichian 02/17/2020 13:53	/S/ Peter P. Steen 02/17/2020 16:18

ANALYTICAL REPORT

Workorder: **34-2004139**
Client Project ID: 4560 S Arville Units C23 & C29
Purchase Order: 9029-001-01-19
Project Manager: Paul Pope

Laboratory Contact Information

ALS Environmental
960 W Levoy Drive
Salt Lake City, Utah 84123

Phone: (801) 266-7700
Email: alslt.lab@ALSGlobal.com
Web: www.alsslc.com

General Lab Comments

The results provided in this report relate only to the items tested.
Samples were received in acceptable condition unless otherwise noted.
The following was provided by the client: Sample ID, Collection Date, Sampling Location, Media Type, Sampling Parameter.
Collection Date, Media Type, and Sampling Parameter can potentially affect the validity of the results.
Samples have not been blank corrected unless otherwise noted.
This test report shall not be reproduced, except in full, without written approval of ALS.

ALS provides professional analytical services for all samples submitted. ALS is not in a position to interpret the data and assumes no responsibility for the quality of the samples submitted.

All quality control samples processed with the samples in this report yielded acceptable results unless otherwise noted.

ALS is accredited for specific fields of testing (scopes) in the following testing sectors. The quality system implemented at ALS conforms to accreditation requirements and is applied to all analytical testing performed by ALS. The following table lists testing sector, accreditation body, accreditation number and website. Please contact these accrediting bodies or your ALS project manager for the current scope of accreditation that applies to your analytical testing.

Testing Sector	Accreditation Body (Standard)	Certificate Number	Website
Environmental	PJLA (DoD ELAP)	L17-506	http://www.pjlabs.com
	PJLA (ISO 17025)	L17-507-R1	http://www.pjlabs.com
	Utah (TNI)	UT00953	http://lams.nelac-institute.org/search
	Iowa (TNI)	IA# 376	http://www.shl.uiowa.edu/labcert/idnr/
	Kansas	E-10416	http://www.kdheks.gov/envlab/disclaimer.html
Industrial Hygiene	AIHA (ISO 17025 & AIHA IHLAP)	101574	http://www.aihaaccreditedlabs.org
	DOECAP-AP	L18-606	http://www.pjlabs.com
	Washington	C596	https://ecology.wa.gov/Regulations-Permits/Permits-certifications/Laboratory-Accreditation
Dietary Supplements	PJLA (ISO 17025)	L17-507-R1	http://www.pjlabs.com

Definitions

LOD = Limit of Detection = MDL = Method Detection Limit, A statistical estimate of method/media/instrument sensitivity.
LOQ = Limit of Quantitation = RL = Reporting Limit, A verified value of method/media/instrument sensitivity.
ND = Not Detected, Testing result not detected above the LOD or LOQ.
NA = Not Applicable.
** No result could be reported, see sample comments for details.
< Means this testing result is less than the numerical value.
( ) This testing result is between the LOD and LOQ and has higher analytical uncertainty than values at or above the LOQ.

AI000207

W 2004139

8036/91

ANALYTICAL REQUEST FORM

2004139

1. [XX] REGULAR Status

[ ] RUSH Status Requested - ADDITIONAL CHARGE
RESULTS REQUIRED BY _____ DATE
CONTACT ALS SALT LAKE PRIOR TO SENDING SAMPLES

2. Date 2-8-20 Purchase Order No. 9029-001-01-19

3. Company Name Walsh Certified Consultants, Inc.
Address 3333 Calle Del Torre, Las Vegas, NV 89102
Person to Contact Dale Walsh
Telephone (702) 468-4782-cell
Fax Telephone ( )
E-mail Address dwalsh@walshcih.com
Billing Address (if different from above)

4. Quote No.
ALS Project Manager Paul Pope

5. Sample Collection
Sampling Site 4560 S Arville Units C23 & C29
Industrial Process Tile/Counter Dust Generation-Past
Date of Collection 2/7/20
Time Collected Noon
Date of Shipment 2-8-20
Chain of Custody No. 1

6. How did you first learn about ALS?

7. REQUEST FOR ANALYSES

Laboratory Use Only	Client Sample Number	Matrix*	Sample Volume	ANALYSES REQUESTED - Use method number if known	Units**
	C23-1	Bulk		Percent Quartz & Cristobalite Silica	4
	C29-2	↓		↓	↓
	Back-3	↓		↓	↓

* Specify: Solid sorbent tube, e.g. Charcoal; Filter type; Impinger solution; Bulk sample; Blood; Urine; Tissue; Soil; Water; Other

** 1. µg/sample 2. mg/m^3 3. ppm 4. % 5. µg/m^3 6.____ (other) Please indicate one or more units in the column entitled Units**

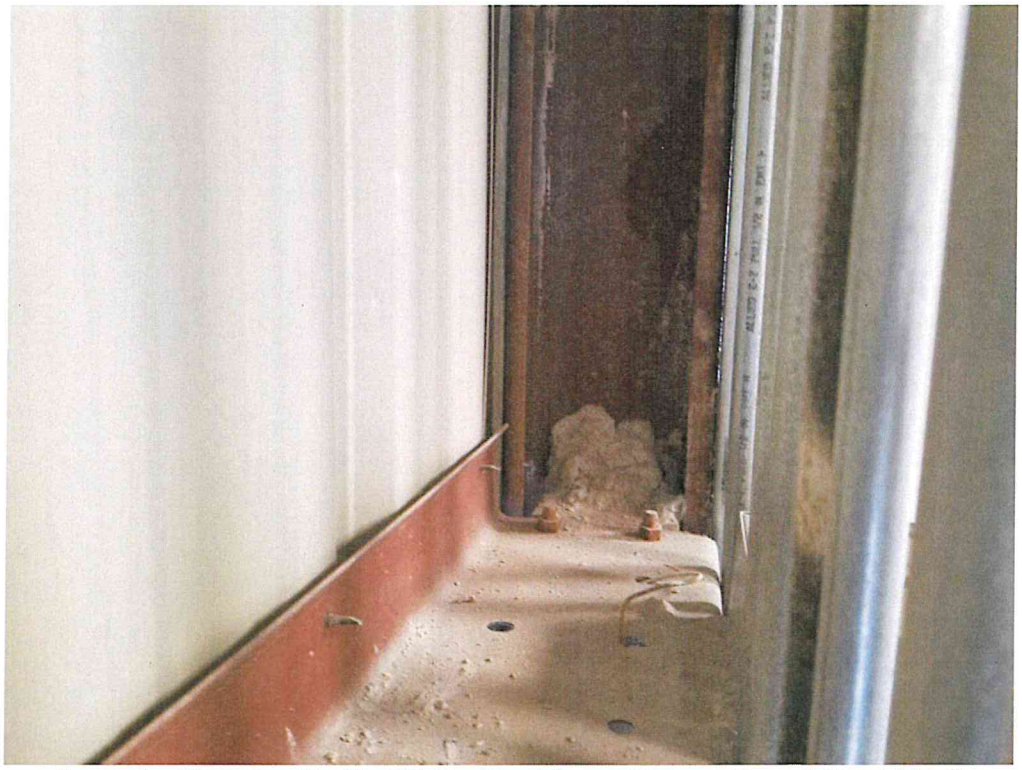
Comments

Possible Contamination and/or Chemical Hazards

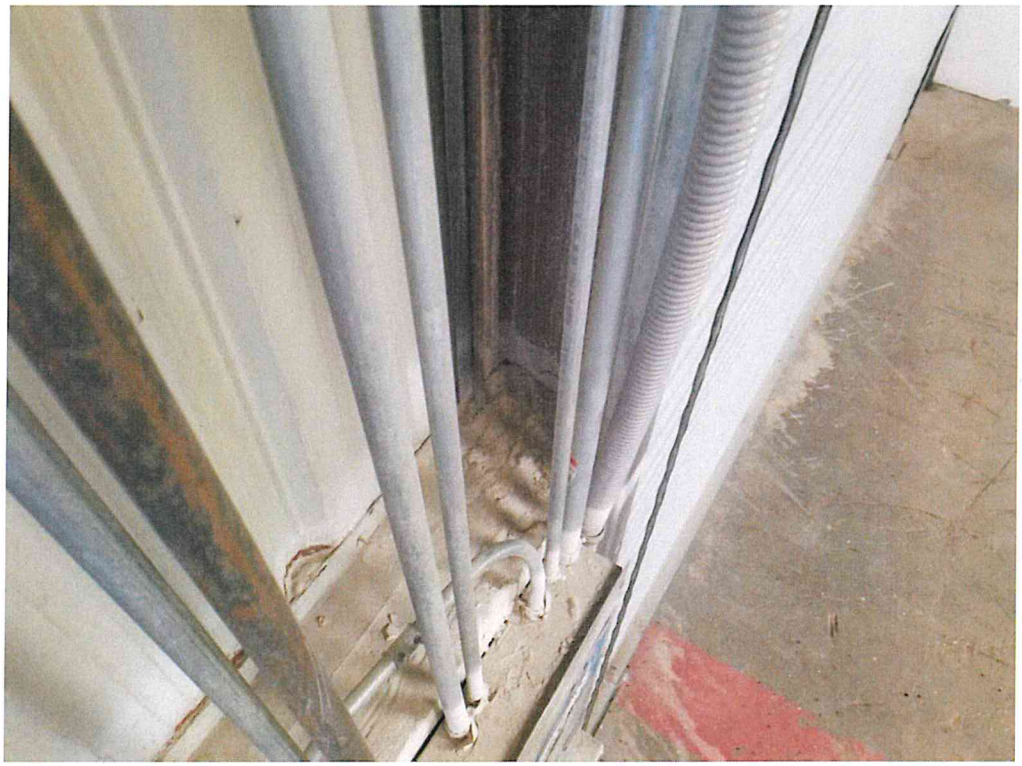
7. Chain of Custody (Optional)

Relinquished by		Date/Time	2-8-20 3:30 Pm
Received by		Date/Time	2.10.2020 0946
Relinquished by		Date/Time	
Received by		Date/Time	

960 West LeVoy Drive / Salt Lake City, UT 84123 800-356-9135 or 801-266-7700 / FAX: 801-268-9992
ALS Environmental



Sample C23-1 – Suite 23 Ledge Above Power Panel East Wall



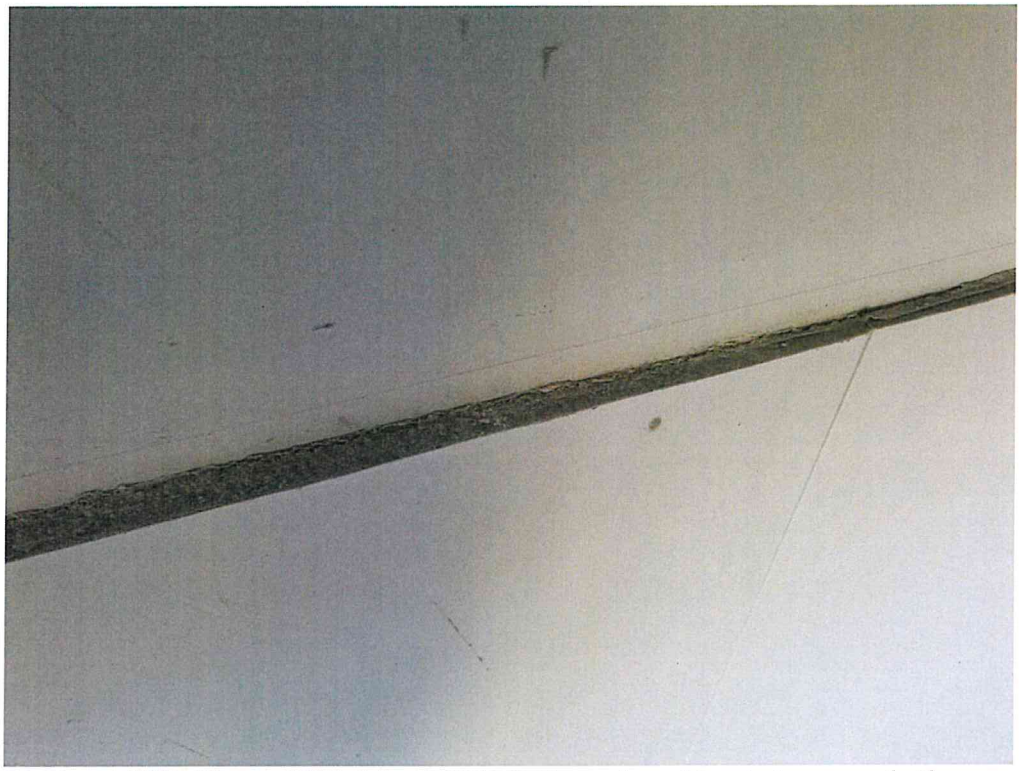
Sample C23-1 Area

More Accumulated Dust Near Sample C23-1

C23-1 Sample Area – Over Power Panel Behind Conduit Next to Rollup Door

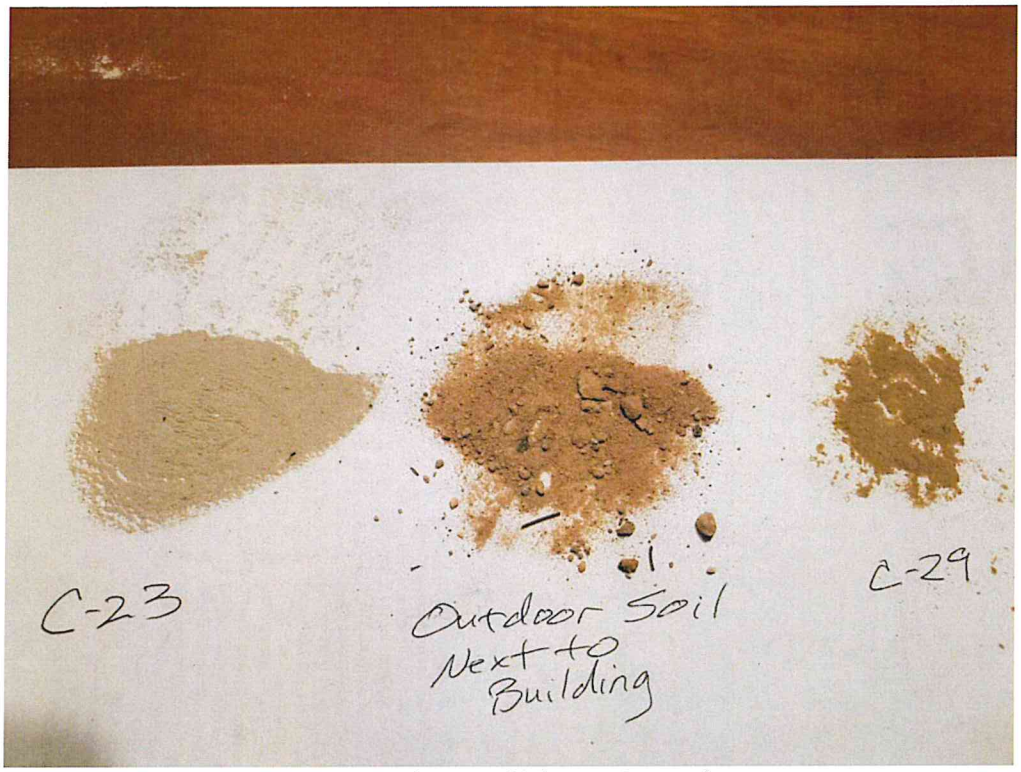
Sample C29-2 – East Wall Right of Rollup Door Suite 29

Sample C29-2 Area



Top of Wallboard Right of C29-2 Sample – Dust Accumulation

Sample Back-3 – North Side of Building Near Power Pole



Comaprison of Three Sample

Sample C23-1

Sample Back-3

Sample C29-2

HAZARD ALERT

Worker Exposure to Silica during Countertop Manufacturing, Finishing and Installation

The Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH) have identified exposure to silica as a health hazard to workers involved in manufacturing, finishing and installing natural and manufactured stone countertop products, both in fabrication shops and during in-home finishing/installation. This hazard can be mitigated with simple and effective dust controls in most countertop operations.

Introduction

Workers involved in manufacturing, finishing, and installing natural and manufactured stone countertops are at risk for significant crystalline silica exposure. Crystalline silica commonly occurs in nature as the mineral quartz, and is found in granite, sandstone, quartzite, various other rocks, and sand. Workers who inhale very small crystalline silica particles are at risk for silicosis – **an incurable, progressively disabling and sometimes fatal lung disease.**

Silicosis results in permanent lung damage. Silica dust particles become trapped in lung tissue, causing inflammation and scarring and reducing the lungs' ability to take in oxygen. Symptoms of silicosis can include shortness of breath, cough and fatigue, and may or may not be obviously attributable to silica. Workers exposed to airborne crystalline silica also are at increased risk for lung cancer, chronic obstructive pulmonary disease (COPD), and kidney disease.

OSHA and NIOSH investigated U.S. worker exposure to respirable crystalline silica in the stone countertop industry following reports from other countries of stone countertop workers developing silicosis.[1, 2] In at least some cases from Spain and Israel, workers were exposed in shops operating without dust suppression, and without respiratory protection.[2, 3] While the stone industry in the United States has worked to implement dust controls to protect workers against the dangers of silica exposure,[4] studies and OSHA inspections indicate that exposure levels may not be adequately controlled in some stone countertop fabrication worksites in the U.S.[5]

Courtesy David L. Johnson & Margaret Phillips, University of Oklahoma Health Sciences Center

Cutting stone, as pictured, generates dangerous crystalline silica dust that can become trapped in lung tissue and cause silicosis.

This Hazard Alert focuses on countertop industry worker exposures to airborne silica dust, including from quartz in stone. It covers the health effects of breathing silica dust, recommends ways to protect workers, and describes how OSHA and NIOSH can help employers effectively reduce silica dust exposures. Employers must ensure that workers are properly protected from exposure to silica.

AI000215
Docket 83099 Document 2021-28552

The Stone Countertop Industry

Stone industry workers in shops and on job sites throughout the United States saw, grind, polish, and drill slabs of natural (mostly granite) and manufactured (man-made, engineered, or cultured) stone as part of manufacturing, finishing, and installing countertops. Whether working with natural or manufactured stone, producing finished countertops involves similar tasks. Working with natural stone, however, involves different initial steps than working with manufactured stone. Granite and other natural stones are quarried and cut into large stone slabs where exposure to crystalline silica dust is likely. These slabs are further cut to countertop sizes at the quarries or at stone finishing shops. Manufactured stone countertop production—actually making the engineered or cultured slabs—involves mixing crystalline silica, resins, and pigments. Workers in the natural cut stone industry as well as those involved in finishing and installing both natural and manufactured stone are at risk of significant silica exposure. In both industries, production operators (such as sawyers), inspectors (including quality control technicians), and staff who perform maintenance and housekeeping activities in manufacturing facilities also may be exposed to hazardous levels of airborne silica-containing dust.

Why is silica a concern for workers in stone countertop manufacturing, finishing and installation?

Stone countertops contain high amounts of the natural mineral silica.

Finished natural and manufactured stone products, including finished countertops, do not present a health hazard themselves. However, cutting, grinding, chipping, sanding, drilling, and polishing natural and manufactured stone products can release hazardous levels of very small, crystalline silica dust particles into the air that workers breathe. Working with ground quartz in the countertop manufacturing industry can also expose workers to dangerous silica dust.

How much silica is in countertop material?

Depending on the type of stone in question, countertops may contain over 90% silica. The highest silica levels are associated with manufactured countertops, where pigments and adhesives comprise the remaining materials. Silica content is generally lower in natural stone products. Calcium-based stones, including limestone and certain varieties of marble (e.g., calcite, dolomite, and onyx), contain little or no silica. In contrast, granite can contain up to 45-50% silica. The table below describes typical silica/quartz content of common natural and engineered stones. Note that silica/quartz content will vary among stone varieties, and the exact content can be determined by petrographic and X-ray diffraction analysis on each rock.

Stone	Average % Silica
Engineered stone	≥93
Quartzite	95
Quartzitic sandstone	90
Sandstone	60
Granite	10 - 45
Slate	Varies
Soapstone	Varies

Sources: Silica Hazards from Engineered Stone Countertops, NIOSH Science Blog, March 2014; ASTM C616, *Standard Specification for Quartz-Based Dimension Stone;* American Geological Institute, *Dictionary of Geological Terms*

Certain work operations release crystalline silica dust into the air.

Workers operating powered hand tools, such as saws, grinders, and high-speed polishers, have some of the highest silica dust exposures in the countertop manufacturing, finishing and installation industries. These exposures come from dry cutting, grinding, edging, and contouring stone, and may occur in shop environments as well as on job sites where finishing work is completed.

In the manufactured stone industry, workers may also be exposed to silica dust when opening bags of ground quartz, moving or mixing bulk raw materials, cleaning and scraping mixers, or cleaning dust collector bag houses.

Workers performing other tasks in areas close to where silica dust-generating operations occur may also be exposed. Without proper engineering controls, such as water sprays or local exhaust ventilation (LEV), and personal protective equipment (PPE), where appropriate, workers can inhale silica-containing dust from these operations.

AI000216

What can be done at stone countertop worksites to protect workers from exposure to silica?

Under the *Occupational Safety and Health (OSH) Act of 1970*, employers are responsible for providing safe and healthful working conditions for their workers. Employers must determine which jobs and activities expose workers to silica and take actions to control overexposures and protect workers. A combination of engineering controls, work practices, protective equipment, worker training, and other measures is needed to protect workers from overexposure to silica during stone countertop manufacturing, finishing and installation.

Monitor the air to determine worker exposures to silica

Collect respirable crystalline silica dust samples to determine which jobs expose workers to silica above exposure limits. Employers should consult with a trained occupational safety and health professional, such as a certified industrial hygienist, or contact OSHA's free On-site Consultation Program for small and medium-sized businesses: www.osha.gov/consultation.

If air samples show levels above OSHA's Permissible Exposure Limit (PEL), employers are required to take action to reduce worker exposures to below the PEL.

NIOSH Recommended Exposure Limit (REL)

NIOSH recommends that employers control exposure to respirable crystalline silica so that no worker is exposed to a time-weighted average concentration of silica greater than 50 $\mu g/m^3$ of air, as determined by a full-shift sample for up to a 10-hour workday of a 40-hour workweek.

OSHA Permissible Exposure Limit (PEL)

The OSHA general industry PEL for quartz, the most common form of crystalline silica, is an 8-hour time-weighted average exposure to respirable dust. For pure quartz silica, the PEL is approximately equal to 100 $\mu g/m^3$ of air.

However, both OSHA and NIOSH recommend that employers take the protective actions below to keep worker exposures below the NIOSH Recommended Exposure Limit (REL).

Control dust exposures by using engineering controls and safe work practices

Engineering controls and work practices provide the best protection for workers and must be implemented first, before respiratory protection is used. Working with industry partners, NIOSH and OSHA have identified the following control options for countertop manufacturing, finishing and installation operations:

Engineering controls and equipment changes for manufacturing and finishing

- Use water spraying systems and remote-controlled tools at the impact site where a saw or grinder generates dust.
- Large bridge or gantry-like saws usually use water sprays and can be remote-controlled for dust control and cooling.
- Hand-held angle grinders can be modified to deliver water to the point of contact with the stone.
- Wet-edge milling machines or stone routers can replace dry grinders in shops. They provide a clean edge profile with a diamond wheel.
- Use hand tools (e.g., drills, masonry saws, grinders) equipped with a shroud and a vacuum with a high efficiency particulate air (HEPA)-filter when wet methods are not practicable.
- Install LEV systems at fixed locations to capture dust at its point of origin.
- Use a combination of both water and ventilation controls, if necessary.

Work practices

- Use wet sweeping or HEPA-filtered vacuuming instead of dry sweeping or compressed air.
- Replace water and air filters as needed to control dust.
- Adjust water flow as necessary to control dust, following manufacturers' recommendations for water flow rates.
- Pre-wash stone slabs prior to cutting.
- Implement regular and thorough housekeeping procedures for water slurry and settled dust.

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In high exposure areas, such as where cutting or polishing work generates silica dust, provide HEPA-filtered vacuums for cleaning worker clothes and water for hand, face, and hair cleaning.

Several OSHA standards and directives cover operations that may expose workers to silica, including:

- Air Contaminants (29 CFR 1910.1000)
- Hazard Communication (29 CFR 1910.1200)
- Respiratory Protection (29 CFR 1910.134)

OSHA's Directive CPL 03-00-007, titled *National Emphasis Program – Crystalline Silica,* has detailed information on silica hazards, guidelines for air sampling, guidance on calculating PELs for dust containing silica, and other compliance information.

Identify and isolate remaining dust-generating operations

- Through air monitoring, identify high exposure activities associated with countertop finishing operations. These likely involve angle grinding, other types of grinding and cutting with saws.
- Isolate the silica dust-producing operation(s) using enclosures or walls. Enclosures are more effective when used with LEV.
- Alternatively, enclose the person, if possible, by putting him or her in a control booth.
- In some severe cases it may be necessary to isolate some finishing tasks in separate areas.[6] This may be needed more frequently for manufactured stone because of its high silica content.

For installation operations in commercial and residential spaces

- Do as much work as possible under controlled shop conditions instead of on site, or perform work outdoors or in well-ventilated areas to reduce respirable crystalline silica dust exposure.
- Wet methods for dust control may not be practicable on or near finished cabinets, walls, and floors, so other suppression methods (e.g., LEV) should be used during these operations.
- Use grinding and drilling tools equipped with dust shrouds coupled with LEV and a HEPA filter. Controls can be either tool mounted (drills) or attached to a vacuum system.
- Use a HEPA-filtered vacuum to clean up dust as soon as practicable.

The Marble Institute of America (MIA) technical module, "Silicosis – An Industry Guide to Awareness and Prevention," offers tips on controlling silica exposures in stone cutting operations. It is available to workers and employers on the MIA web site: www.marble-institute.com/silica/Silicosis_Industry_Guide_Tech_Module_2008.pdf. Other resources from MIA can be found at: www.marble-institute.com/silica.

Provide respiratory protection when it is needed to protect workers

When engineering and work practice controls do not limit silica exposures to OSHA's PEL, employers must provide workers with respirators. Whenever respirators are required, the employer must have a respiratory protection program that meets the requirements of OSHA's Respiratory Protection standard (29 CFR 1910.134, www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=12716). This program must include proper respirator selection, fit testing, medical evaluations, and training.

The workers shown above are wearing a NIOSH-approved N95 filtering facepiece respirator (left), a full facepiece elastomeric respirator (center), and a loose-fitting powered air-purifying respirator (PAPR) (right).

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If respirators are provided, use at least a NIOSH-approved N95 respirator. If the silica level is more than 10 times the PEL, a half-face respirator is not protective enough and a respirator that offers a greater level of protection, such as a full-facepiece respirator that will protect workers at silica levels up to 50 times the PEL, must be used. Powered air-purifying respirators (PAPR) also provide more protection than half-face air-purifying respirators. In general, workers find PAPRs to be more comfortable than pressure-demand respirators, including tight-fitting elastomeric varieties.

For more information, visit OSHA's Safety and Health Topics web page (www.osha.gov/SLTC/respiratoryprotection) and eTool (www.osha.gov/SLTC/etools/respiratory) on respiratory protection.

Provide training and information to workers about the hazards of silica and other chemicals

OSHA's Hazard Communication standard (www.osha.gov/hazcom) requires that employers provide their workers with training and information about hazardous chemicals used in the workplace. Employers must provide training and information to workers in a manner and language that the worker can understand. Employers must:

- Prepare and implement a written hazard communication program.
- Provide training and information on the hazards of silica and other chemicals used in the workplace.
- Provide workers access to Safety Data Sheets (SDSs) on silica and other hazardous chemicals they are exposed to during countertop manufacturing, finishing and installation.
- Ensure that each container of hazardous chemicals is labeled appropriately.

Consider medical monitoring for workers who are exposed to silica

As part of its National Emphasis Program on Silica (www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3790), OSHA recommends that employers provide medical exams to all workers who may be exposed to silica levels at or above one-half the PEL. Recommended medical tests include:

- A medical exam that focuses on the respiratory system and includes a work and medical history.
- A chest X-ray, evaluated by a qualified professional.

Employers should consult with a clinician, such as a Board-Certified Occupational Medicine physician familiar with the health effects of silica, when developing a medical monitoring program for their workers who are exposed to silica.

For additional information on medical monitoring, refer to OSHA Directive CPL 03-00-007, available at: www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3790.

Findings on Worker Exposures to Silica

Data from OSHA and NIOSH air monitoring and other published studies provide estimates of countertop industry worker exposure to airborne crystalline silica. In most countertop manufacturing, finishing, and installation operations, engineering controls and proper work practices are generally effective in reducing worker exposures to the OSHA PEL, and, in many instances, to levels at or below the NIOSH REL. Respiratory protection may still be necessary to protect workers in some cases, however.

In many shops, current practices still involve dry cutting, grinding, polishing, and other work that releases silica dust into the air. Phillips et al. (2012) found that approximately 74% of 47 countertop shops in three metropolitan areas of Oklahoma reported using predominantly dry methods in at least one step of their work, and only four shops (9%) reported using dust collection or suppression systems at all. The data summarized below provide information on worker exposures to airborne crystalline silica dust and illustrate how the implementation of proper controls can help protect workers from overexposures.

Countertop Finishers in Washington State

Simcox et al. (1999) reviewed data from six separate granite countertop shops in Washington State. Nineteen air samples were taken of fabrication and finishing workers using dry methods without engineering controls such as LEV. These samples showed exposures to silica concentrations between <40 and 770 $\mu g/m^3$. Shops using dry methods switched to wet methods, resulting in a dramatic reduction in worker exposure to silica dust. Eighteen samples from workers using wet methods showed silica concentrations between <20 to 100 $\mu g/m^3$. In one shop where the workers who were sampled used

AI000219

bridge saws and angle grinders, the mean silica concentration dropped by 440 µg/m³ after switching to new and retrofitted water-fed tools.

Cutting Stone Blocks and Slabs

OSHA reviewed results of exposure samples for sawyers from 10 OSHA Special Emphasis Program (SEP) Inspection reports and one NIOSH report. Among 22 instances in which sawyers used wet methods—often a water feed to the saw—to reduce dust, full-shift median exposure was 54 µg/m³, with mean exposure of 61 µg/m³ and a range of 15 µg/m³ to 134 µg/m³. Twelve results (55%) exceeded 50 µg/m³, and four results (18%) exceeded 100 µg/m³.

Where a water feed to a saw alone is not sufficient, spraying the stone before cutting it or between multiple cuts can further reduce exposures. In one operation where workers used wet sawing, they were still exposed to average silica concentrations of 70-110 µg/m³. Using these added controls resulted in exposures below the 50 µg/m³ NIOSH REL. The additon of LEV in the shop further reduced exposures to 15-32 µg/m³.

Courtesy David L. Johnson & Margaret Phillips, University of Oklahoma Health Sciences Center

A worker uses an angle grinder with a polishing pad to finish a stone countertop. The water-fed tool helps reduce exposure to respirable crystalline silica dust generated during grinding and polishing operations.

Exposure Varies by Stone Type

Silica exposure can vary depending on the silica content of the stone used. OSHA collected air samples as part of inspections at several granite and marble shops. In the marble shop, two finishers dry grinding green marble with very low silica content (1.8% quartz) were exposed to airborne silica levels of 39 and 45 µg/m³ (both below the NIOSH REL), even though no engineering controls, such as water sprays or LEV, were used. In the granite shop, which also did not use engineering controls, airborne crystalline silica dust exposures were considerably higher, ranging from 89 to 460 µg/m³. It is reasonable to anticipate that performing similar operations using materials with higher silica content, such as some manufactured stone products, could result in even higher exposures.

How Can OSHA and NIOSH Help?

OSHA has compliance assistance specialists throughout the nation who can provide information to employers and workers about OSHA standards, short educational programs on specific hazards or OSHA rights and responsibilities, and information on additional compliance assistance resources. Contact your local OSHA office for more information by visiting: www.osha.gov/html/RAmap.html.

OSHA's On-site Consultation Program offers free and confidential advice for small and medium-sized businesses with fewer than 250 employees at a site (and no more than 500 employees nationwide) to help identify and correct hazards at worksites. On-site consultation services are separate from enforcement and do not result in penalties or citations. To locate the nearest OSHA Consultation office, visit: www.osha.gov/consultation or call 1-800-321-OSHA (6742).

NIOSH Health Hazard Evaluation Program: Employees, employee representatives, or employers can ask NIOSH to conduct Health Hazard Evaluations (HHEs) at their workplace. NIOSH may provide assistance and information by phone or in writing, or may visit the workplace to assess employee exposure and health. Based on their findings, NIOSH will recommend ways to reduce hazards and prevent work-related illness. The evaluation is done at no cost to the employees, employee representatives, or employers. For more information about the HHE program, visit the NIOSH HHE webpage at: www.cdc.gov/niosh/hhe/HHEprogram.html or contact the HHE program by phone at 513-841-4381. For general information or questions about any hazard or illness, call NIOSH Information Service: 1-800-CDC-INFO (1-800-232-4636).

NIOSH recommendations for preventing silicosis, including dust control, sampling and analysis methods, medical monitoring of workers, training, and respiratory protection, can be found at the Silica Topics webpage at www.cdc.gov/niosh/topics/silica.

AI000220

Workers' Rights

Workers have the right to:

- Working conditions that do not pose a risk of serious harm.
- Receive information and training (in a language and vocabulary the worker understands) about workplace hazards, methods to prevent them, and the OSHA standards that apply to their workplace.
- Review records of work-related injuries and illnesses.
- File a complaint asking OSHA to inspect their workplace if they believe there is a serious hazard or that their employer is not following OSHA's rules. OSHA will keep all identities confidential.
- Exercise their rights under the law without retaliation, including reporting an injury or raising health and safety concerns with their employer or OSHA. If a worker has been retaliated against for using their rights, they must file a complaint with OSHA as soon as possible, but no later than 30 days.

For additional information on Workers' Rights, Employer Responsibilities, and other services OSHA offers, visit www.osha.gov.

Contact OSHA

For questions or to get information or advice, to report an emergency, to report a fatality or catastrophe, to order publications, to file a confidential complaint, or to request OSHA's free on-site consultation service, contact your nearest OSHA office, visit www.osha.gov, or call OSHA at 1-800-321-OSHA (6742), TTY 1-877-889-5627.

Many states operate their own occupational safety and health programs approved by OSHA. States enforce similar standards that may have different or additional requirements. A list of state plans is available at www.osha.gov/dcsp/osp.

Contact NIOSH

To receive documents or more information about occupational safety and health topics, please contact NIOSH at 1-800-CDC-INFO (1-800-232-4636), TTY 1-888-232-6348, email cdcinfo@cdc.gov, or visit the NIOSH website at www.cdc.gov/niosh.

Industry Information

The Marble Institute of America—a trade association of natural stone producers, exporters/importers, distributors/wholesalers, fabricators, finishers, installers, and industry suppliers—has developed several training videos, guidebooks, and other training resources to assist employers in the stone countertop industry in protecting their workers from exposure to respirable crystalline silica. Visit www.marble-institute.com/silica to learn more.

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[2] Martinez, C., Prieto, A., Garcia, L., Quero, A., Gonzalez, S., Casan, P. (2010). Silicosis: a Disease with an Active Present. *Arch Bronconeumol*, 46(2):97–100.

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[4] Marble Institute of America (2008). Silicosis: An Industry Guide to Awareness and Prevention. Cleveland, OH: Marble Institute of America.

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[6] Health and Safety Executive. (2001). Controlling Exposure to Stonemasonry Dust. www.hse.gov.uk/pubns/books/hsg201.htm

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AI000221

Disclaimer

This Hazard Alert is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards [and other regulatory requirements]. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace. The Occupational Safety and Health Act *requires employers to comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. The mention of any non-governmental organization or link to its website in this Hazard Alert does not constitute an endorsement by OSHA or NIOSH of that organization or its products, services, or website.*

U.S. Department of Labor

OSHA® Occupational Safety and Health Administration

CDC Workplace Safety and Health

NIOSH

DTSEM 02/2015

DHHS (NIOSH) Publication Number 2015-106 | OSHA - HA-3768-2015

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Steven D. Grierson
CLERK OF THE COURT

Walsh Certified Consultants, Inc.

3333 Calle Del Torre
Las Vegas, Nevada 89102
www.WalshCIH.com

Phone/Cell: (702) 468-4782
Fax/Office: (702) 254-7210
E-Mail: dwalsh@WalshCIH.com

February 20, 2020 9029-001-01-20

Bour Enterprises c/o
Mr. Rusty Graf, Esq.
Black & LoBello
10777 West Twain Avenue, Suite 300
Las Vegas, NV 89135

Subject: Report – Dust Assessment for Silica
Former Bour Enterprises Leased Spaces
Suites C-10, C-23, C-24, and C-29 (C-23 and C-29 Assessed)
Arville Industrial Park
4560 South Arville Street
Las Vegas, Nevada

Dear Mr. Graf:

In accordance with our *Agreement and Authorization* dated November 11, 2019 and signed November 15, 2019, Walsh Certified Consultants, Inc. (WCCI) conducted the site visit for the subject services on February 7, 2020. The subject dust assessment for silica was requested to help assess for the presence and potential hazards of past elevated dust in the subject suites during Bour Enterprises (Bour) occupancy of the spaces. As a limousine service, Bour management reportedly moved out of the spaces due to health concerns for their employees from airborne dust reportedly due to inadequate cleaning of the space after the previous tenant left. The previous tenant of the space was reportedly a tile and countertop manufacturer. Per an OSHA Hazard Alert, "workers in manufacturing, finishing, and installing natural and manufactured stone countertops are at risk for significant crystalline silica exposure" (see enclosed Hazard Alert). For this reason, silica content of the dust remaining in the suites several months after they were vacated by Bour was assessed. The suites were reportedly cleaned by the property management after Bour vacated.

Scope of Services

The dust assessment for silica included the professional services of Mr. Dale Walsh, a WCCI employed Certified Industrial Hygienist (CIH), Certified Safety Professional (CSP), and Nevada Certified Environmental Manager (CEM). A site visit was conducted on February 7, 2020 to evaluate the subject spaces and collect dust samples for quartz and cristobalite silica analysis. Mr. Mulugeta Bour (previous lessee) was present to show Mr. Walsh locations where accumulated dust remained that was reportedly representative of the dust previously present before the cleaning of the spaces.

Methods

The bulk dust samples were collected by grabbing a bulk sample from dust piles while wearing nitrile gloves which were changed between sample collections. The bulk samples were placed in a clean Ziploc bag and were sent using chain-of-custody methods to ALS Laboratories, Inc. (ALS) in Salt Lake City, Utah. ALS is accredited for industrial hygiene sample analysis (including silica) by the American Industrial Hygiene Association Laboratory Accreditation Programs, LLC (AIHA-LAP) under their Industrial Hygiene Laboratory Accreditation Program (IHLAP).

Results and Discussion

The dust bulk sample lab results are enclosed. Sample C23-1 had a higher level of quartz silica (11%) than the Back-3 background outside dirt sample (7.2%). Sample C29-2 was at 1.8% quartz silica.

The enclosed photographs of the accumulated dust in Suites 23 and 29 indicate large amounts of accumulation in hidden areas that would likely be missed during cleaning. The enclosed photographs of the samples themselves show that the dust from the C23 Suite was morphologically different both in color and particulate size from the outside soil sample. The Suite C23 sample was powdery indicating very small particle sizes that may be respirable (can be breathed into the deep air exchange areas of the lungs). Mr. Walsh has performed dozens of industrial hygiene respirable crystalline silica exposure assessments in his thirty-four (34) year consulting career including a countertop manufacturer, gravel pit quarries, and construction projects. Based on his experience the C23-1 sample appeared similar to the dust he has encountered in these industries, especial the countertop manufacturer.

The Suite C29 dust sample was darker than the Suite C23 sample; however, it was finer than the outside soil sample.

Conclusions

Based upon the dust analysis, photographs, and observations described previously, the following conclusions are made:

1. The lab results indicate that the accumulated dust from Suite C23 had higher quartz silica content than the outside soil sample and the Suite C29 sample. This, plus the visible morphological differences (see photos), indicate that the Suite C23 dust was likely not from outdoor dust accumulation and more likely associated with past dust generating activities one of which may have been the countertop manufacturer (tenant before Bour).

2. If the very fine, powdery dust found in Suite C23 was present in large quantities and was being emitted in the air and breathed by the Bour employees, as reported by Bour, then the Bour workers could have potentially been exposed to a hazardous substance (crystalline silica) known to cause the disease silicosis and potentially lung cancer and other diseases (see enclosed OSHA Hazard Alert).

Recommendations

Based upon the previously described results and conclusions, the following recommendations are made:

1. If there is a desire for further analysis of the samples collected, they were split with a separate portion of each kept before sending the remainder to ALS. These samples can be sent to a different lab for optical microscopic analysis to help identify particle size and microscopic morphology to help better determine the potential source and content of the dust. Micrographs (photos through a microscope) of the dust particles can be taken as well for comparison. Scanning Electron Microscopy can also be performed to identify the elemental makeup of the dust.

Limitations

This report is solely for the use of Bour Enterprises c/o Black & LoBello as it applies to the subject site and activities assessed. WCCI is not responsible for any claims and/or damages associated with interpretation of available information. This assessment should not be regarded as a guarantee that no other hazardous conditions exist

at the subject site. In the event that changes in the nature of the site occur, or additional relevant information about the site is brought to our attention, the conclusions and recommendations contained in this assessment may not be valid unless these changes and additional relevant information are reviewed and the conclusions and recommendations are modified or verified in writing.

Thank you for the opportunity to be of service. Should you have any questions or comments regarding this report, please do not hesitate to call.

At Your Service,
WALSH CERTIFIED CONSULTANTS, INC.

Dale W. Walsh, CIH, CSP, CEM
President

Encl: ALS Lab Report
Photographs
OSHA Silica in Countertop Manufacturing Hazard Alert

ANALYTICAL REPORT

Report Date: February 17, 2020

Dale Walsh
Walsh Certified Consultants
3333 Calle del Torre
Las Vegas, NV 89102

Phone: (702) 468-4782

E-mail: dwalsh@walshcih.com

Workorder: **34-2004139**
Client Project ID: 4560 S Arville Units C23 & C29
Purchase Order: 9029-001-01-19
Project Manager: Paul Pope

Analytical Results

Sample ID: **C23-1** | Collected: 02/07/2020
Lab ID: 2004139001 | Sampling Location: 4560 S Arville | Received: 02/10/2020
Method: NIOSH 7500 Mod. | **Media:** Bulk | **Instrument:** XRAY02
Sampling Parameter: Volume Not Provided | **Analyzed:** 02/15/2020 (257274)

Analyte	Result (%)	LOD (%)	RL (%)
Quartz	**11**	0.75	1.5
Cristobalite	<1.0	1.0	1.5

Sample ID: **C29-2** | Collected: 02/07/2020
Lab ID: 2004139002 | Sampling Location: 4560 S Arville | Received: 02/10/2020
Method: NIOSH 7500 Mod. | **Media:** Bulk | **Instrument:** XRAY02
Sampling Parameter: Volume Not Provided | **Analyzed:** 02/15/2020 (257274)

Analyte	Result (%)	LOD (%)	RL (%)
Quartz	**1.8**	0.75	1.5
Cristobalite	<1.0	1.0	1.5

Sample ID: **Back-3** | Collected: 02/07/2020
Lab ID: 2004139003 | Sampling Location: 4560 S Arville | Received: 02/10/2020
Method: NIOSH 7500 Mod. | **Media:** Bulk | **Instrument:** XRAY02
Sampling Parameter: Volume Not Provided | **Analyzed:** 02/15/2020 (257274)

Analyte	Result (%)	LOD (%)	RL (%)
Quartz	**7.2**	0.75	1.5
Cristobalite	<1.0	1.0	1.5

Report Authorization (/S/ is an electronic signature that complies with 21 CFR Part 11)

Method	Analyst	Peer Review
NIOSH 7500 Mod.	/S/ Paul M. Megerdichian 02/17/2020 13:53	/S/ Peter P. Steen 02/17/2020 16:18

ANALYTICAL REPORT

Workorder: **34-2004139**
Client Project ID: 4560 S Arville Units C23 & C29
Purchase Order: 9029-001-01-19
Project Manager: Paul Pope

Laboratory Contact Information

ALS Environmental
960 W Levoy Drive
Salt Lake City, Utah 84123

Phone: (801) 266-7700
Email: alslt.lab@ALSGlobal.com
Web: www.alsslc.com

General Lab Comments

The results provided in this report relate only to the items tested.
Samples were received in acceptable condition unless otherwise noted.
The following was provided by the client: Sample ID, Collection Date, Sampling Location, Media Type, Sampling Parameter, Collection Date, Media Type, and Sampling Parameter can potentially affect the validity of the results.
Samples have not been blank corrected unless otherwise noted.
This test report shall not be reproduced, except in full, without written approval of ALS.

ALS provides professional analytical services for all samples submitted. ALS is not in a position to interpret the data and assumes no responsibility for the quality of the samples submitted.

All quality control samples processed with the samples in this report yielded acceptable results unless otherwise noted.

ALS is accredited for specific fields of testing (scopes) in the following testing sectors. The quality system implemented at ALS conforms to accreditation requirements and is applied to all analytical testing performed by ALS. The following table lists testing sector, accreditation body, accreditation number and website. Please contact these accrediting bodies or your ALS project manager for the current scope of accreditation that applies to your analytical testing.

Testing Sector	Accreditation Body (Standard)	Certificate Number	Website
Environmental	PJLA (DoD ELAP)	L17-506	http://www.pjlabs.com
	PJLA (ISO 17025)	L17-507-R1	http://www.pjlabs.com
	Utah (TNI)	UT00953	http://lams.nelac-institute.org/search
	Iowa (TNI)	IA# 376	http://www.shl.uiowa.edu/labcert/idnr/
	Kansas	E-10416	http://www.kdheks.gov/envlab/disclaimer.html
Industrial Hygiene	AIHA (ISO 17025 & AIHA IHLAP)	101574	http://www.aihaaccreditedlabs.org
	DOECAP-AP	L18-606	http://www.pjlabs.com
	Washington	C596	https://ecology.wa.gov/Regulations-Permits/Permits-certifications/Laboratory-Accreditation
Dietary Supplements	PJLA (ISO 17025)	L17-507-R1	http://www.pjlabs.com

Definitions

LOD = Limit of Detection = MDL = Method Detection Limit, A statistical estimate of method/media/instrument sensitivity.
LOQ = Limit of Quantitation = RL = Reporting Limit, A verified value of method/media/instrument sensitivity.
ND = Not Detected, Testing result not detected above the LOD or LOQ.
NA = Not Applicable.
** No result could be reported, see sample comments for details.
< Means this testing result is less than the numerical value.
( ) This testing result is between the LOD and LOQ and has higher analytical uncertainty than values at or above the LOQ.

W 2004139

8036|91

ANALYTICAL REQUEST FORM

1. [XX] REGULAR Status 2004139

[ ] RUSH Status Requested - ADDITIONAL CHARGE
RESULTS REQUIRED BY _____ DATE
CONTACT ALS SALT LAKE PRIOR TO SENDING SAMPLES

2. Date 2-8-20 Purchase Order No. 9029-001-01-19

3. Company Name Walsh Certified Consultants, Inc.
Address 3333 Calle Del Torre, Las Vegas, NV 89102
Person to Contact Dale Walsh
Telephone (702) 468-4782-cell
Fax Telephone ( )
E-mail Address dwalsh@walshcih.com
Billing Address (if different from above)

4. Quote No.
ALS Project Manager Paul Pope

5. Sample Collection
Sampling Site 4560 S Arville Units C23 & C29
Industrial Process Tile/Counter Dust Generation-Past
Date of Collection 2/7/20
Time Collected Noon
Date of Shipment 2-8-20
Chain of Custody No. 1

6. How did you first learn about ALS?

7. REQUEST FOR ANALYSES

Laboratory Use Only	Client Sample Number	Matrix*	Sample Volume	ANALYSES REQUESTED - Use method number if known	Units**
	C23-1	Bulk		Percent Quartz & Cristobalite Silica	4
	C29-2	↓		↓	↓
	Back-3	↓		↓	↓

* Specify: Solid sorbent tube, e.g. Charcoal; Filter type; Impinger solution; Bulk sample; Blood; Urine; Tissue; Soil; Water; Other

** 1. µg/sample 2. mg/m^3 3. ppm 4. % 5. µg/m^3 6. _____ (other) Please indicate one or more units in the column entitled Units**

Comments

Possible Contamination and/or Chemical Hazards

7. Chain of Custody (Optional)

Relinquished by		Date/Time	2-8-20 3:30 Pm
Received by		Date/Time	2-10-2020 0946
Relinquished by		Date/Time	
Received by		Date/Time	

960 West LeVoy Drive / Salt Lake City, UT 84123 800-356-9135 or 801-266-7700 / FAX: 801-268-9992
ALS Environmental

Sample C23-1 – Suite 23 Ledge Above Power Panel East Wall

Sample C23-1 Area

More Accumulated Dust Near Sample C23-1

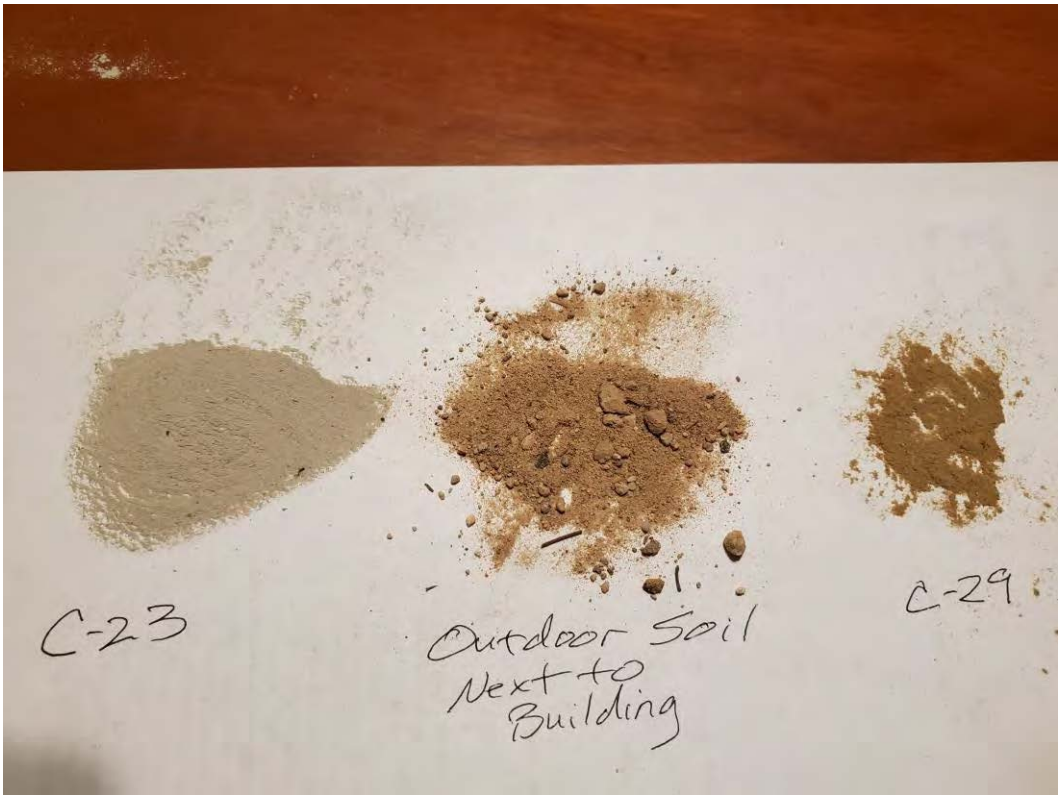
C23-1 Sample Area – Over Power Panel Behind Conduit Next to Rollup Door

Sample C29-2 – East Wall Right of Rollup Door Suite 29

Sample C29-2 Area

Top of Wallboard Right of C29-2 Sample – Dust Accumulation

Sample Back-3 – North Side of Building Near Power Pole



Comaprison of Three Sample

Sample C23-1

Sample Back-3

Sample C29-2

HAZARD ALERT

Worker Exposure to Silica during Countertop Manufacturing, Finishing and Installation

The Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH) have identified exposure to silica as a health hazard to workers involved in manufacturing, finishing and installing natural and manufactured stone countertop products, both in fabrication shops and during in-home finishing/installation. This hazard can be mitigated with simple and effective dust controls in most countertop operations.

Introduction

Workers involved in manufacturing, finishing, and installing natural and manufactured stone countertops are at risk for significant crystalline silica exposure. Crystalline silica commonly occurs in nature as the mineral quartz, and is found in granite, sandstone, quartzite, various other rocks, and sand. Workers who inhale very small crystalline silica particles are at risk for silicosis – **an incurable, progressively disabling and sometimes fatal lung disease.**

Silicosis results in permanent lung damage. Silica dust particles become trapped in lung tissue, causing inflammation and scarring and reducing the lungs' ability to take in oxygen. Symptoms of silicosis can include shortness of breath, cough and fatigue, and may or may not be obviously attributable to silica. Workers exposed to airborne crystalline silica also are at increased risk for lung cancer, chronic obstructive pulmonary disease (COPD), and kidney disease.

OSHA and NIOSH investigated U.S. worker exposure to respirable crystalline silica in the stone countertop industry following reports from other countries of stone countertop workers developing silicosis.[1,2] In at least some cases from Spain and Israel, workers were exposed in shops operating without dust suppression, and without respiratory protection.[2,3] While the stone industry in the United States has worked to implement dust controls to protect workers against the dangers of silica exposure,[4] studies and OSHA inspections indicate that exposure levels may not be adequately controlled in some stone countertop fabrication worksites in the U.S.[5]

Courtesy David L. Johnson & Margaret Phillips, University of Oklahoma Health Sciences Center

Cutting stone, as pictured, generates dangerous crystalline silica dust that can become trapped in lung tissue and cause silicosis.

This Hazard Alert focuses on countertop industry worker exposures to airborne silica dust, including from quartz in stone. It covers the health effects of breathing silica dust, recommends ways to protect workers, and describes how OSHA and NIOSH can help employers effectively reduce silica dust exposures. Employers must ensure that workers are properly protected from exposure to silica.

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The Stone Countertop Industry

Stone industry workers in shops and on job sites throughout the United States saw, grind, polish, and drill slabs of natural (mostly granite) and manufactured (man-made, engineered, or cultured) stone as part of manufacturing, finishing, and installing countertops. Whether working with natural or manufactured stone, producing finished countertops involves similar tasks. Working with natural stone, however, involves different initial steps than working with manufactured stone. Granite and other natural stones are quarried and cut into large stone slabs where exposure to crystalline silica dust is likely. These slabs are further cut to countertop sizes at the quarries or at stone finishing shops. Manufactured stone countertop production—actually making the engineered or cultured slabs—involves mixing crystalline silica, resins, and pigments. Workers in the natural cut stone industry as well as those involved in finishing and installing both natural and manufactured stone are at risk of significant silica exposure. In both industries, production operators (such as sawyers), inspectors (including quality control technicians), and staff who perform maintenance and housekeeping activities in manufacturing facilities also may be exposed to hazardous levels of airborne silica-containing dust.

Why is silica a concern for workers in stone countertop manufacturing, finishing and installation?

Stone countertops contain high amounts of the natural mineral silica.

Finished natural and manufactured stone products, including finished countertops, do not present a health hazard themselves. However, cutting, grinding, chipping, sanding, drilling, and polishing natural and manufactured stone products can release hazardous levels of very small, crystalline silica dust particles into the air that workers breathe. Working with ground quartz in the countertop manufacturing industry can also expose workers to dangerous silica dust.

How much silica is in countertop material?

Depending on the type of stone in question, countertops may contain over 90% silica. The highest silica levels are associated with manufactured countertops, where pigments and adhesives comprise the remaining materials. Silica content is generally lower in natural stone products. Calcium-based stones, including limestone and certain varieties of marble (e.g., calcite, dolomite, and onyx), contain little or no silica. In contrast, granite can contain up to 45-50% silica. The table below describes typical silica/quartz content of common natural and engineered stones. Note that silica/quartz content will vary among stone varieties, and the exact content can be determined by petrographic and X-ray diffraction analysis on each rock.

Stone	Average % Silica
Engineered stone	≥93
Quartzite	95
Quartzitic sandstone	90
Sandstone	60
Granite	10 - 45
Slate	Varies
Soapstone	Varies

Sources: Silica Hazards from Engineered Stone Countertops, NIOSH Science Blog, March 2014; ASTM C616, *Standard Specification for Quartz-Based Dimension Stone*; American Geological Institute, *Dictionary of Geological Terms*

Certain work operations release crystalline silica dust into the air.

Workers operating powered hand tools, such as saws, grinders, and high-speed polishers, have some of the highest silica dust exposures in the countertop manufacturing, finishing and installation industries. These exposures come from dry cutting, grinding, edging, and contouring stone, and may occur in shop environments as well as on job sites where finishing work is completed.

In the manufactured stone industry, workers may also be exposed to silica dust when opening bags of ground quartz, moving or mixing bulk raw materials, cleaning and scraping mixers, or cleaning dust collector bag houses.

Workers performing other tasks in areas close to where silica dust-generating operations occur may also be exposed. Without proper engineering controls, such as water sprays or local exhaust ventilation (LEV), and personal protective equipment (PPE), where appropriate, workers can inhale silica-containing dust from these operations.

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AI000237

What can be done at stone countertop worksites to protect workers from exposure to silica?

Under the *Occupational Safety and Health (OSH) Act of 1970*, employers are responsible for providing safe and healthful working conditions for their workers. Employers must determine which jobs and activities expose workers to silica and take actions to control overexposures and protect workers. A combination of engineering controls, work practices, protective equipment, worker training, and other measures is needed to protect workers from overexposure to silica during stone countertop manufacturing, finishing and installation.

Monitor the air to determine worker exposures to silica

Collect respirable crystalline silica dust samples to determine which jobs expose workers to silica above exposure limits. Employers should consult with a trained occupational safety and health professional, such as a certified industrial hygienist, or contact OSHA's free On-site Consultation Program for small and medium-sized businesses: www.osha.gov/consultation.

If air samples show levels above OSHA's Permissible Exposure Limit (PEL), employers are required to take action to reduce worker exposures to below the PEL.

NIOSH Recommended Exposure Limit (REL)

NIOSH recommends that employers control exposure to respirable crystalline silica so that no worker is exposed to a time-weighted average concentration of silica greater than 50 $\mu g/m^3$ of air, as determined by a full-shift sample for up to a 10-hour workday of a 40-hour workweek.

OSHA Permissible Exposure Limit (PEL)

The OSHA general industry PEL for quartz, the most common form of crystalline silica, is an 8-hour time-weighted average exposure to respirable dust. For pure quartz silica, the PEL is approximately equal to 100 $\mu g/m^3$ of air.

However, both OSHA and NIOSH recommend that employers take the protective actions below to keep worker exposures below the NIOSH Recommended Exposure Limit (REL).

Control dust exposures by using engineering controls and safe work practices

Engineering controls and work practices provide the best protection for workers and must be implemented first, before respiratory protection is used. Working with industry partners, NIOSH and OSHA have identified the following control options for countertop manufacturing, finishing and installation operations:

Engineering controls and equipment changes for manufacturing and finishing

- Use water spraying systems and remote-controlled tools at the impact site where a saw or grinder generates dust.
- Large bridge or gantry-like saws usually use water sprays and can be remote-controlled for dust control and cooling.
- Hand-held angle grinders can be modified to deliver water to the point of contact with the stone.
- Wet-edge milling machines or stone routers can replace dry grinders in shops. They provide a clean edge profile with a diamond wheel.
- Use hand tools (e.g., drills, masonry saws, grinders) equipped with a shroud and a vacuum with a high efficiency particulate air (HEPA)-filter when wet methods are not practicable.
- Install LEV systems at fixed locations to capture dust at its point of origin.
- Use a combination of both water and ventilation controls, if necessary.

Work practices

- Use wet sweeping or HEPA-filtered vacuuming instead of dry sweeping or compressed air.
- Replace water and air filters as needed to control dust.
- Adjust water flow as necessary to control dust, following manufacturers' recommendations for water flow rates.
- Pre-wash stone slabs prior to cutting.
- Implement regular and thorough housekeeping procedures for water slurry and settled dust.

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In high exposure areas, such as where cutting or polishing work generates silica dust, provide HEPA-filtered vacuums for cleaning worker clothes and water for hand, face, and hair cleaning.

Several OSHA standards and directives cover operations that may expose workers to silica, including:

- Air Contaminants (29 CFR 1910.1000)
- Hazard Communication (29 CFR 1910.1200)
- Respiratory Protection (29 CFR 1910.134)

OSHA's Directive CPL 03-00-007, titled *National Emphasis Program – Crystalline Silica,* has detailed information on silica hazards, guidelines for air sampling, guidance on calculating PELs for dust containing silica, and other compliance information.

Identify and isolate remaining dust-generating operations

- Through air monitoring, identify high exposure activities associated with countertop finishing operations. These likely involve angle grinding, other types of grinding and cutting with saws.
- Isolate the silica dust-producing operation(s) using enclosures or walls. Enclosures are more effective when used with LEV.
- Alternatively, enclose the person, if possible, by putting him or her in a control booth.
- In some severe cases it may be necessary to isolate some finishing tasks in separate areas.[6] This may be needed more frequently for manufactured stone because of its high silica content.

For installation operations in commercial and residential spaces

- Do as much work as possible under controlled shop conditions instead of on site, or perform work outdoors or in well-ventilated areas to reduce respirable crystalline silica dust exposure.
- Wet methods for dust control may not be practicable on or near finished cabinets, walls, and floors, so other suppression methods (e.g., LEV) should be used during these operations.
- Use grinding and drilling tools equipped with dust shrouds coupled with LEV and a HEPA filter. Controls can be either tool mounted (drills) or attached to a vacuum system.
- Use a HEPA-filtered vacuum to clean up dust as soon as practicable.

The Marble Institute of America (MIA) technical module, "Silicosis – An Industry Guide to Awareness and Prevention," offers tips on controlling silica exposures in stone cutting operations. It is available to workers and employers on the MIA web site: www.marble-institute.com/silica/Silicosis_Industry_Guide_Tech_Module_2008.pdf. Other resources from MIA can be found at: www.marble-institute.com/silica.

Provide respiratory protection when it is needed to protect workers

When engineering and work practice controls do not limit silica exposures to OSHA's PEL, employers must provide workers with respirators. Whenever respirators are required, the employer must have a respiratory protection program that meets the requirements of OSHA's Respiratory Protection standard (29 CFR 1910.134, www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=12716). This program must include proper respirator selection, fit testing, medical evaluations, and training.

The workers shown above are wearing a NIOSH-approved N95 filtering facepiece respirator (left), a full facepiece elastomeric respirator (center), and a loose-fitting powered air-purifying respirator (PAPR) (right).

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If respirators are provided, use at least a NIOSH-approved N95 respirator. If the silica level is more than 10 times the PEL, a half-face respirator is not protective enough and a respirator that offers a greater level of protection, such as a full-facepiece respirator that will protect workers at silica levels up to 50 times the PEL, must be used. Powered air-purifying respirators (PAPR) also provide more protection than half-face air-purifying respirators. In general, workers find PAPRs to be more comfortable than pressure-demand respirators, including tight-fitting elastomeric varieties.

For more information, visit OSHA's Safety and Health Topics web page (www.osha.gov/SLTC/respiratoryprotection) and eTool (www.osha.gov/SLTC/etools/respiratory) on respiratory protection.

Provide training and information to workers about the hazards of silica and other chemicals

OSHA's Hazard Communication standard (www.osha.gov/hazcom) requires that employers provide their workers with training and information about hazardous chemicals used in the workplace. Employers must provide training and information to workers in a manner and language that the worker can understand. Employers must:

- Prepare and implement a written hazard communication program.
- Provide training and information on the hazards of silica and other chemicals used in the workplace.
- Provide workers access to Safety Data Sheets (SDSs) on silica and other hazardous chemicals they are exposed to during countertop manufacturing, finishing and installation.
- Ensure that each container of hazardous chemicals is labeled appropriately.

Consider medical monitoring for workers who are exposed to silica

As part of its National Emphasis Program on Silica (www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3790), OSHA recommends that employers provide medical exams to all workers who may be exposed to silica levels at or above one-half the PEL. Recommended medical tests include:

- A medical exam that focuses on the respiratory system and includes a work and medical history.
- A chest X-ray, evaluated by a qualified professional.

Employers should consult with a clinician, such as a Board-Certified Occupational Medicine physician familiar with the health effects of silica, when developing a medical monitoring program for their workers who are exposed to silica.

For additional information on medical monitoring, refer to OSHA Directive CPL 03-00-007, available at: www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3790.

Findings on Worker Exposures to Silica

Data from OSHA and NIOSH air monitoring and other published studies provide estimates of countertop industry worker exposure to airborne crystalline silica. In most countertop manufacturing, finishing, and installation operations, engineering controls and proper work practices are generally effective in reducing worker exposures to the OSHA PEL, and, in many instances, to levels at or below the NIOSH REL. Respiratory protection may still be necessary to protect workers in some cases, however.

In many shops, current practices still involve dry cutting, grinding, polishing, and other work that releases silica dust into the air. Phillips et al. (2012) found that approximately 74% of 47 countertop shops in three metropolitan areas of Oklahoma reported using predominantly dry methods in at least one step of their work, and only four shops (9%) reported using dust collection or suppression systems at all. The data summarized below provide information on worker exposures to airborne crystalline silica dust and illustrate how the implementation of proper controls can help protect workers from overexposures.

Countertop Finishers in Washington State

Simcox et al. (1999) reviewed data from six separate granite countertop shops in Washington State. Nineteen air samples were taken of fabrication and finishing workers using dry methods without engineering controls such as LEV. These samples showed exposures to silica concentrations between <40 and 770 $\mu g/m^3$. Shops using dry methods switched to wet methods, resulting in a dramatic reduction in worker exposure to silica dust. Eighteen samples from workers using wet methods showed silica concentrations between <20 to 100 $\mu g/m^3$. In one shop where the workers who were sampled used

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bridge saws and angle grinders, the mean silica concentration dropped by 440 µg/m³ after switching to new and retrofitted water-fed tools.

Cutting Stone Blocks and Slabs

OSHA reviewed results of exposure samples for sawyers from 10 OSHA Special Emphasis Program (SEP) Inspection reports and one NIOSH report. Among 22 instances in which sawyers used wet methods—often a water feed to the saw—to reduce dust, full-shift median exposure was 54 µg/m³, with mean exposure of 61 µg/m³ and a range of 15 µg/m³ to 134 µg/m³. Twelve results (55%) exceeded 50 µg/m³, and four results (18%) exceeded 100 µg/m³.

Where a water feed to a saw alone is not sufficient, spraying the stone before cutting it or between multiple cuts can further reduce exposures. In one operation where workers used wet sawing, they were still exposed to average silica concentrations of 70-110 µg/m³. Using these added controls resulted in exposures below the 50 µg/m³ NIOSH REL. The additon of LEV in the shop further reduced exposures to 15-32 µg/m³.

Courtesy David L. Johnson & Margaret Phillips, University of Oklahoma Health Sciences Center

A worker uses an angle grinder with a polishing pad to finish a stone countertop. The water-fed tool helps reduce exposure to respirable crystalline silica dust generated during grinding and polishing operations.

Exposure Varies by Stone Type

Silica exposure can vary depending on the silica content of the stone used. OSHA collected air samples as part of inspections at several granite and marble shops. In the marble shop, two finishers dry grinding green marble with very low silica content (1.8% quartz) were exposed to airborne silica levels of 39 and 45 µg/m³ (both below the NIOSH REL), even though no engineering controls, such as water sprays or LEV, were used. In the granite shop, which also did not use engineering controls, airborne crystalline silica dust exposures were considerably higher, ranging from 89 to 460 µg/m³. It is reasonable to anticipate that performing similar operations using materials with higher silica content, such as some manufactured stone products, could result in even higher exposures.

How Can OSHA and NIOSH Help?

OSHA has compliance assistance specialists throughout the nation who can provide information to employers and workers about OSHA standards, short educational programs on specific hazards or OSHA rights and responsibilities, and information on additional compliance assistance resources. Contact your local OSHA office for more information by visiting: www.osha.gov/html/RAmap.html.

OSHA's On-site Consultation Program offers free and confidential advice for small and medium-sized businesses with fewer than 250 employees at a site (and no more than 500 employees nationwide) to help identify and correct hazards at worksites. On-site consultation services are separate from enforcement and do not result in penalties or citations. To locate the nearest OSHA Consultation office, visit: www.osha.gov/consultation or call 1-800-321-OSHA (6742).

NIOSH Health Hazard Evaluation Program: Employees, employee representatives, or employers can ask NIOSH to conduct Health Hazard Evaluations (HHEs) at their workplace. NIOSH may provide assistance and information by phone or in writing, or may visit the workplace to assess employee exposure and health. Based on their findings, NIOSH will recommend ways to reduce hazards and prevent work-related illness. The evaluation is done at no cost to the employees, employee representatives, or employers. For more information about the HHE program, visit the NIOSH HHE webpage at: www.cdc.gov/niosh/hhe/HHEprogram.html or contact the HHE program by phone at 513-841-4381. For general information or questions about any hazard or illness, call NIOSH Information Service: 1-800-CDC-INFO (1-800-232-4636).

NIOSH recommendations for preventing silicosis, including dust control, sampling and analysis methods, medical monitoring of workers, training, and respiratory protection, can be found at the Silica Topics webpage at www.cdc.gov/niosh/topics/silica.

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Workers' Rights

Workers have the right to:

- Working conditions that do not pose a risk of serious harm.
- Receive information and training (in a language and vocabulary the worker understands) about workplace hazards, methods to prevent them, and the OSHA standards that apply to their workplace.
- Review records of work-related injuries and illnesses.
- File a complaint asking OSHA to inspect their workplace if they believe there is a serious hazard or that their employer is not following OSHA's rules. OSHA will keep all identities confidential.
- Exercise their rights under the law without retaliation, including reporting an injury or raising health and safety concerns with their employer or OSHA. If a worker has been retaliated against for using their rights, they must file a complaint with OSHA as soon as possible, but no later than 30 days.

For additional information on Workers' Rights, Employer Responsibilities, and other services OSHA offers, visit www.osha.gov.

Contact OSHA

For questions or to get information or advice, to report an emergency, to report a fatality or catastrophe, to order publications, to file a confidential complaint, or to request OSHA's free on-site consultation service, contact your nearest OSHA office, visit www.osha.gov, or call OSHA at 1-800-321-OSHA (6742), TTY 1-877-889-5627.

Many states operate their own occupational safety and health programs approved by OSHA. States enforce similar standards that may have different or additional requirements. A list of state plans is available at www.osha.gov/dcsp/osp.

Contact NIOSH

To receive documents or more information about occupational safety and health topics, please contact NIOSH at 1-800-CDC-INFO (1-800-232-4636), TTY 1-888-232-6348, email cdcinfo@cdc.gov, or visit the NIOSH website at www.cdc.gov/niosh.

Industry Information

The Marble Institute of America—a trade association of natural stone producers, exporters/importers, distributors/wholesalers, fabricators, finishers, installers, and industry suppliers—has developed several training videos, guidebooks, and other training resources to assist employers in the stone countertop industry in protecting their workers from exposure to respirable crystalline silica. Visit www.marble-institute.com/silica to learn more.

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[1] García Vadillo, C., Sánchez Gómez, J., Romero Morillo, J. (2011). Silicosis in Quartz Conglomerate Workers. *Arch Bronconeumol,* 47(1):52-57.

[2] Martinez, C., Prieto, A., Garcia, L., Quero, A., Gonzalez, S., Casan, P. (2010). Silicosis: a Disease with an Active Present. *Arch Bronconeumol,* 46(2):97–100.

[3] Kramer, M., Blanc, P., Fireman, E., Amital, A., Guber, A., Rhahman., N., et al. (2012). Artificial Stone Silicosis: Disease Resurgence Among Artificial Stone Workers. *Chest,* 142(2): 419-424.

[4] Marble Institute of America (2008). Silicosis: An Industry Guide to Awareness and Prevention. Cleveland, OH: Marble Institute of America.

[5] Phillips, M.L., Johnson, D.L., & Johnson, A.C. (2013). Determinants of Respirable Silica Exposure in Stone Countertop Fabrication: A Preliminary Study. *J Occup Environ Hyg,* 10(7), 368-373; Marble Institute of America [MIA], (2013). MIA Safety Services – Crystalline Silica and Silicosis, www.marble-institute.com/silica/Safety_Services_24_0_2013.pdf.

[6] Health and Safety Executive. (2001). Controlling Exposure to Stonemasonry Dust. www.hse.gov.uk/pubns/books/hsg201.htm

[7] Phillips, M.L. & Johnson, A.C. (2012). Prevalence of Dry Methods in Granite Countertop Fabrication in Oklahoma. *J Occup Environ Hyg, 9*: 437-442.

[8] Simcox, N.J., Lofgren, D., Leons, J., & Camp, J. (1999). Silica exposure during granite countertop fabrication. *Applied Occupational and Environmental Hygiene*, 14(9), 577-582.

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Disclaimer

This Hazard Alert is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards [and other regulatory requirements]. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace. The Occupational Safety and Health Act *requires employers to comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. The mention of any non-governmental organization or link to its website in this Hazard Alert does not constitute an endorsement by OSHA or NIOSH of that organization or its products, services, or website.*

U.S. Department of Labor

OSHA® Occupational Safety and Health Administration

DEPARTMENT OF HEALTH & HUMAN SERVICES · USA

CDC Workplace Safety and Health

NIOSH

DTSEM 02/2015

DHHS (NIOSH) Publication Number 2015-106 | OSHA - HA-3768-2015

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03/09/2021 12:35 PM
CLERK OF THE COURT

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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.	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.**
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,	

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Docket 83099 Document 2021-28552

Case Number: A-19-794864-C

HOLLEY DRIGGS

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

HOLLEY DRIGGS

Sandy Sell

Subject: FW: Bour

From: Rusty Graf <rgraf@blackwadhams.law>
Sent: Monday, March 8, 2021 8:07:15 AM
To: Tom Edwards <tedwards@nevadafirm.com>
Cc: Jessica M. Lujan <jlujan@nevadafirm.com>; Diane Meeter <dmeeter@blackwadhams.law>; Mark Lounsbury <mlounsbury@blacklobello.law>
Subject: RE: Bour

No changes to either.

Thank you and Stay safe!

Rusty Graf, Esq.
Partner

BLACK & WADHAMS
ATTORNEYS AT LAW

p: (702)869-8801
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a: 10777 W. Twain Ave., Suite 300
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W: www.blackwadhams.law
E: rgraf@blacklobello.law (Effective until August 1, 2020)
E: rgraf@blackwadhams.law (Effective August 1, 2020)

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From: Tom Edwards <tedwards@nevadafirm.com>
Sent: Friday, March 5, 2021 12:44 PM
To: Rusty Graf <rgraf@blackwadhams.law>
Cc: Jessica M. Lujan <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. 4th Street, Suite 300, Las Vegas NV 89101

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

4520 Arville, Plaintiff(s) vs. Bour Enterprises LLC, Defendant(s)	CASE NO: A-19-794864-C DEPT. NO. Department 5

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District 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:

Service Date: 3/9/2021

Tom Edwards, Esq.	tedwards@nevadafirm.com
BRENT CARSON	bac@winnercarson.com
Diane Meeter	dmeeter@blacklobello.law
J. Graf	Rgraf@blacklobello.law
Sandra Sell	ssell@nevadafirm.com
Jessica Lujan	jlujan@nevadafirm.com
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Steven D. Grierson
CLERK OF THE COURT

F. THOMAS EDWARDS, ESQ.
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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.	Case No: A-19-794864-C Dept. No.: 5 **NOTICE OF ENTRY OF ORDER**
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,	

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-

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HOLLEY DRIGGS

entitled Court on the 9th day of March, 2021, a copy of which is attached hereto.

Dated this 9th 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

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03/09/2021 12:35 PM
CLERK OF THE COURT

F. THOMAS EDWARDS, ESQ.
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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.	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.**
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Case Number: A-19-794864-C

HOLLEY DRIGGS

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:

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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

HOLLEY DRIGGS

Sandy Sell

Subject: FW: Bour

From: Rusty Graf <rgraf@blackwadhams.law>
Sent: Monday, March 8, 2021 8:07:15 AM
To: Tom Edwards <tedwards@nevadafirm.com>
Cc: Jessica M. Lujan <jlujan@nevadafirm.com>; Diane Meeter <dmeeter@blackwadhams.law>; Mark Lounsbury <mlounsbury@blacklobello.law>
Subject: RE: Bour

No changes to either.

Thank you and Stay safe!

Rusty Graf, Esq.
Partner

BLACK & WADHAMS
ATTORNEYS AT LAW

p: (702)869-8801
f: (702)869-2669
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W: www.blackwadhams.law
E: rgraf@blacklobello.law (Effective until August 1, 2020)
E: rgraf@blackwadhams.law (Effective August 1, 2020)

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From: Tom Edwards <tedwards@nevadafirm.com>
Sent: Friday, March 5, 2021 12:44 PM
To: Rusty Graf <rgraf@blackwadhams.law>
Cc: Jessica M. Lujan <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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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

4520 Arville, Plaintiff(s) vs. Bour Enterprises LLC, Defendant(s)	CASE NO: A-19-794864-C DEPT. NO. Department 5

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District 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:

Service Date: 3/9/2021

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CLERK OF THE COURT

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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.	Case No.: A-19-794864-C Dept. No.: 8 **DEFENDANTS' MOTION TO RETAX** **HEARING REQUESTED**
BOUR ENTERPRISES, LLC, a Nevada limited liability company; MULUGETA BOUR, an individual; HILENA MENGESHA, an individual; DOES 1 through 100, inclusive, Counterclaimants,	

Case Number: A-19-794864-C

v.

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

Counter Defendants.

Defendants and Counterclaimants 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 Black & Wadhams, hereby file their MOTION TO RETAX. This Motion is made and based on the papers and pleadings on file herein, the following Memorandum of Points and Authorities, any exhibits attached hereto, and any argument at hearing on this matter.

Dated this 18 day of March 2021.

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MEMORANDUM OF POINTS & AUTHORITIES

I.

INTRODUCTION & BACKGROUND

On December 1, 2020, the Plaintiffs' filed a Motion for Summary Judgment regarding their breach of contract claims. A hearing was held on January 12, 2021 and, subsequently, the Court entered an Order granting that Motion on January 28, 2021. The Plaintiffs then filed a Motion for Entry of Judgment on February 10, 2021 and a hearing was held on March 2, 2021. The Court ultimately granted Plaintiffs' Motion for Entry of Judgment and filed an Order entering Judgments against the Defendants on March 9, 2021. The Judgment was then entered March _____, 2021.

A. PLAINTIFFS' MEMORANDUM OF FEES & COSTS

On March 15, 2021, Plaintiffs filed their Memorandum of Costs and Disbursements (hereinafter the "Memo"). *See attached Exhibit 1.* The Memo states that the Plaintiffs' Costs and Disbursements were as follows:

Clerk's fees (NRS 18.005(1)) $1,323.90

Reporters' fees for depositions/copies (NRS 18.005(2)) ..... $ 2,216.81

Service of process/summons (NRS 18.005(7)) ..... $ 1,126.72

Photocopies and postage (NRS 18.005(12)-(14)) ..... $ 203.64

Legal Research/other "necessary expenses" (NRS 18.005(17)) .... $ 3,665.22

Id. at 1-2. As detailed below, these Costs and Disbursements and improper, inaccurate and/or not compensable under NRS 18.005 and, therefore, the Defendants respectfully request that the Court retax the same.

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II.

LEGAL ARGUMENT

A. LEGAL STANDARD FOR MOTION TO RETAX

A party who disputes the costs contained in an adverse party's verified memorandum may request the court determine the costs pursuant to NRS 18.110(4), which provides:

> Within 3 days after service of a copy of the memorandum, the adverse party may move the court, upon 2 days' notice, to retax and settle the costs, notice of which motion shall be filed and served on the prevailing party claiming costs. Upon the hearing of the motion the court or judge shall settle the costs. *See NRS 18.110(4).*

B. LEGAL STANDARD FOR AWARDING COSTS

Pursuant to NRS 18.020, Costs may properly be recovered to a prevailing party in the following cases:

1. In an action for the recovery of real property or a possessory right thereto.
2. In an action to recover the possession of personal property, where the value of the property amounts to more than $2,500. The value must be determined by the jury, court or master by whom the action is tried.
3. In an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500.
4. In a special proceeding, except a special proceeding conducted pursuant to NRS 306.040.
5. In an action which involves the title or boundaries of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, including the costs accrued in the action if originally commenced in a Justice Court.

See NRS 18.020.

Neither costs nor attorney fees incurred incident to litigation may be recovered unless authorized by statute or rule. *Sun Realty v. Eighth Judicial Dist. Ct.*, 91 Nev. 774, 776, 542 P.2d 1072, 1074 (1975). Even in instances where a party is entitled to request its costs, the trial court still retains discretion when determining the reasonableness of the individual costs to be awarded. *See U.S. Design & Const. Corp. v. International Broth. of Elec. Workers, 118 Nev. 458, 50 P.3d*

170 (2002); See also Bergmann v. Boyce, 109 Nev. 670, 856 P.2d 560 (1993). Discretion should be "sparingly exercised" when considering "expenses not specifically allowed by statute and precedent" because "statutes permitting recovery of costs, being in derogation of the common law, must be strictly construed." *See Bergmann v. Boyce, 109 Nev. at 679.* A strict construction of the statute "requires that the phrase 'reasonable costs' be interpreted to mean actual costs that are reasonable, rather than a reasonable estimate or calculation of such costs based upon administrative convenience." *Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540 (1994).*

NRS 18.005 enumerates compensable costs as follows:

1. Clerks' fees.
2. Reporters' fees for depositions, including a reporter's fee for one copy of each deposition.
3. Jurors' fees and expenses, together with reasonable compensation of an officer appointed to act in accordance with NRS 16.120.
4. Fees for witnesses at trial, pretrial hearings and deposing witnesses, unless the court finds that the witness was called at the instance of the prevailing party without reason or necessity.
5. Reasonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.
6. Reasonable fees of necessary interpreters.
7. The fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action, unless the court determines that the service was not necessary.
8. Compensation for the official reporter or reporter pro tempore.
9. Reasonable costs for any bond or undertaking required as part of the action.
10. Fees of a court bailiff or deputy marshal who was required to work overtime.
11. Reasonable costs for telecopies.
12. Reasonable costs for photocopies.
13. Reasonable costs for long distance telephone calls.
14. Reasonable costs for postage.
15. Reasonable costs for travel and lodging incurred taking depositions and conducting discovery.
16. Fees charged pursuant to NRS 19.0335.
17. Any other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research.

See NRS 18.005.

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The Nevada Supreme Court has held that this statute must be strictly construed to allow only the costs specifically enumerated therein, and only under the circumstances provided for in the statute. *See Bobby Berosini, Ltd v. People for the Ethical Treatment of Animals, 114 Nev. 1348, 1352-53, 971 P.2d 383 (1998).* Applying these principles to the instant matter, Plaintiffs respectfully submit that this Court should grant the Motion to Retax, as some of the costs delineated in Defendants' Memorandum of Costs and Disbursements are not recoverable under applicable and relevant authority.

C. PLAINTIFFS' ASSERTED LEGAL RESEARCH COSTS ARE UNREASONABLE AND UNNECESSARY AND MUST BE RETAXED

As stated above, costs incurred in litigation can only be recovered if authorized by statute or rule and, even if such costs are so authorized, the Court has the discretion to determine the reasonableness of the costs to be award. *See Sun Realty v. Eighth Judicial Dist. Ct., 91 Nev. 774, 542 P.2d 1072 (1975); see also U.S. Design & Const. Corp. v. International Broth. of Elec. Workers, 118 Nev. 458, 50 P.3d 170 (2002).* Here, Plaintiffs' Memo asserts costs of "$3,665.22" for "Legal Research/other necessary expenses" and cites to NRS 18.005(17) as the authorizing statute. *See Plaintiffs' Memorandum, Pg. 2.* NRS 18.005(17) authorized the award of "other reasonable and necessary expense incurred in connection with the action, including **reasonable and necessary expenses for computerized services for legal research.**" *(Emphasis added) See NRS 18.005(17).* However, while computerized services for legal research is authorized by the statute, review of the bills attached to Plaintiffs' Memo demonstrates that a significant portion of the costs asserted under this category was for research on Westlaw which was neither reasonable nor necessary. The unreasonable and unnecessary costs, which should thus be retaxed, are as follows:

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1. **$1,459.60 - Westlaw Research on December 31, 2020:**

The first unreasonable and unnecessary Westlaw cost stated in Plaintiffs' Memo is a charge for $1,459.60 for research conducted on December 31, 2020. *See Plaintiffs' Memorandum of Costs, Pg. 11.* The procedural history of this case demonstrates that: (1) the only pending motion on December 31, 2020 was the Plaintiffs' Motion for Summary Judgment Regarding Their Breach of Contract Claims; and (2) that Defendants filed their Opposition to that Motion on December 17, 2020 and Defendants filed their Reply on January 5, 2021. *See attached Exhibit 1, Pg. 16-18.* Therefore, the January 5, 2021 Reply is the only pleading which could reasonably have necessitated the December 31, 2020 legal research costs asserted by Plaintiffs. *Id.* However, examination of that Reply demonstrates that there was no reasonable or necessary basis for Plaintiffs to have incurred $1,459.60 in legal research expenses.

The Reply's legal argument section begins by discussing the argument of Defendants' that Summary Judgment was inappropriate on a matter of law that had not yet been settled. *See attached Exhibit 2, Pg. 4.* After just a brief discussion, Plaintiffs cited to a Nevada federal court case, *Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat. Tr. & Sav. Ass'n*, in support of the assertion that the Court may look to persuasive authority of other jurisdictions in considering a Motion for Summary Judgment. *See attached Exhibit 2, Pg. 5.* Though research on the case *Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat. Tr. & Sav. Ass'n* may have been necessary, however, Plaintiffs then proceeded to cite to case law from nine (9) other jurisdictions (Louisiana, Tennessee, Mississippi, California, Pennsylvania, Oklahoma, Connecticut, the Fourth Circuit, and the Fifth Circuit) and these were all simply offered as persuasive authority for the assertion that the Court "may consider persuasive authority in the absence of controlling law at summary judgment". *See attached Exhibit 2, Pg. 6.*

It is clear and unambiguous that citing to case law from nine (9) other jurisdictions as

persuasive authority for the argument that the Court may consider persuasive authority was extremely excessive and, thus, both unreasonable and unnecessary. *Id.* Further, Defendants would re-emphasize that, immediately prior to this extensive discussion of case law from across the country, the Plaintiffs cited to persuasive case law from within Nevada (*Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat. Tr. & Sav. Ass'n*) which established the point being argued. Finally, $1500.00 for legal research is not only unreasonable it is incredible. Therefore, the additional research expenses were unquestionably not necessary and non-compensable under NRS 18.005(17) and Defendants' respectfully request the Court retax these asserted costs.

2. $316.67 - Westlaw Research on April 9, 2020:

The next unreasonable and unnecessary Westlaw cost is a charge for $316.67 for research conducted on April 9, 2020. *See Plaintiffs' Memorandum of Costs, Pg. 3.* The cost of this research was not reasonable or necessary because it was not connected with actions taken or pleadings filed in this litigation by either the Plaintiffs or Defendants. This is evidenced in the procedural history by: (1) the only action taken or pleading filed in the preceding month (March 2020) was the Defendants' Addendum to Designation of Expert Witnesses filed March 16, 2020; (2) the only actions taken or pleadings filed in April of 2020 were the filing of an Order Setting Civil Bench Trial (4/6/20), the filing of an Order regarding the Discovery Commissioner's Report and Recommendations (4/9/20), the filing of a Notice of Entry of Order (4/9/20), the filing of a Stipulation and Order to Continue Deadlines (4/27/20) and the filing of another Notice of Entry of Order (4/28/20); (3) there were no pending motions on April 9, 2020; and (4) following the filing of the April 28, 2020 Notice of Entry of Order, no further actions were taken until July 13, 2019 and that action was merely the remittance of a filing fee. *See attached Exhibit 1, Pg. 14-15.* Therefore, it is again clear that this legal research cost was not a "reasonable and **necessary expense** incurred **in connection with the action**", as required by NRS 18.005(17) and pertinent

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case law cited above, and it too must be retaxed. *See NRS 18.005(17).*

3. $446.55 - Westlaw Research on February 6, 2020:

The next unreasonable and unnecessary legal research cost is a charge for $446.55 for Westlaw research conducted on February 6, 2020. *See Plaintiffs' Memorandum of Costs, Pg. 3.* Again, this was not reasonable or necessary because it was not connected with actions taken or pleadings filed in this litigation by either the Plaintiffs or Defendants. Briefly, examination of the procedural history demonstrates that: (1) in December of 2019 Plaintiffs filed a Motion to Compel Discovery and Defendants' filed an Opposition and Countermotion to Extend Time to Disclose Expert Witnesses; (2) both parties filed Replies and hearings were held on January 14, 2020 and January 30, 2020; (3) the Discovery Commissioner's Report & Recommendations were also filed on January 30, 2020; (4) there were no further actions that took place in the case until February 20, 2020, when a status check was held and an Order was entered from the January 30, 2020 hearing; (5) there were no pending motions on February 6, 2020; and (6) there were no other actions taken or pleadings filed which would have necessitated legal research on Westlaw for at least the six months following February 6, 2020. *See attached Exhibit 1, Pg. 11-15.* Thus, it is unambiguous that the Westlaw research costs incurred on February 6, 2020 were not a "reasonable and **necessary expense** incurred **in connection with the action**", as required by NRS 18.005(17) and pertinent case law cited above, and this cost must be retaxed. *See NRS 18.005(17).*

4. $17.55 - Westlaw Research on September 30, 2019:

The final unreasonable and unnecessary legal research cost is a charge for $17.55 for Westlaw research conducted on September 30, 2019. *See Plaintiffs' Memorandum of Costs, Pg. 6.* This Westlaw research was not reasonable or necessary because it too was clearly not connected with actions taken or pleadings filed in this litigation by either the Plaintiffs or Defendants. Examination of the procedural history demonstrates that, prior to September 30, 2019, the only

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recent actions which had occurred in the case had been an Order filed September 12, 2019 (denying Plaintiffs' Motion to Dismiss Counterclaims and Defendants' Countermotion for Summary Judgment), and Notice of Entry of that Order filed September 30, 2019. *See attached Exhibit 1, Case Docket, Pg. 9.* Further, the procedural history demonstrates: (1) the only action taken on September 30, 2019 was an administrative reassignment by the Court; (2) there were no pending motions or other pleadings on September 30, 2019; and (3) there were not any subsequent actions in the case until the October 11, 2019 Mandatory Rule 16 Conference. *Id. at 9-10.* Therefore, as it was unconnected to the actions taken in this case and/or any pleadings filed by Plaintiffs or Defendants, the September 30, 2019 Westlaw research was not a "reasonable and **necessary expense** incurred **in connection with the action**", as required by NRS 18.005(17) and pertinent case law cited above, and this cost must also be retaxed. *See NRS 18.005(17).*

D. THE REQUESTED COSTS, RUNNER FEES, ARE NOT COMPENSABLE UNDER NRS 18.005

Plaintiff's Memo also includes ten "delivery" charges amounting to $150.00 and has attached runner slips for these deliveries. *See Plaintiffs' Memorandum of Costs, Pg. 6-20 & Pg. 27-36.* First, Defendants would emphasize that runner costs are not specifically enumerated under NRS 18.005. *See NRS 18.005.* Further, Plaintiffs do not cite any legal authority authorizing the taxing of such costs, and Court applies its discretion sparingly "when considering whether or not to allow expenses not specifically allowed by statute and precedent". *See Bergmann, 109 Nev. at 679, 856 P.2d at 565-566.* Additionally, it must be noted that there is persuasive legal authority which suggests that such costs are not compensable.

Specifically, federal courts have consistently held that overhead costs, such as administrative fees, supplies and the use of runners are not properly taxable. *See, e.g., Warner Chilcott Labs. Ireland Ltd. v. Impax Labs., Inc., 2013 WL 1876441, at *12 (D. N.J. April 18, 2013)*

(holding costs slip sheets, tabs, binders, folders, red weld file pockets and labels. . . .constitute[d] attorney's overhead and as such, [was] not taxable"); *N.J. Mfrs. Ins. Group v. Electrolux, Inc., 2013 WL 5817161, at *12 (D. N.J. Oct. 21, 2013)* (holding costs "for labels and binders, which constitute attorney's overhead and as such, are not taxable"); *J-Way Leasing, Ltd. v. Am. Bridge Co., 2010 WL 816439, at *4 (N.D. Ohio March 4, 2010)* ("[C]osts for marking exhibits are overhead expenses and not taxable . . . ."); *Butler v. Wright, 2010 WL 599387, at *8 (M.D. Fl. Feb 16, 2010)* (holding "operating overhead is not taxable"); *Osorio v. Dole Food Co., 2010 WL 3212065, at *7 (S.D. Fl. July 7, 2010)* ("Courts have held that costs for tabs and binders are not taxable costs because they are subsumed within operating overhead."); *Van Voorhis v. Hillsborough Bd. of County Comm'rs, 2008 WL 2790244, at *5 (M.D. Fl. July 18, 2008)* (finding cost of supplies movant purchased from Staples was "subsumed within operating overhead and . . . not taxable.").

Again, as runner costs are not specifically mentioned under any of the provisions of NRS 18.005, Plaintiffs' only reasonable argument regarding these costs is that they fall under NRS 18.005(17). It is implicit in both the language of the statute and its application in relevant case law, that the Court analyzes whether non-specifically enumerated costs and fees are compensable under NRS 18.005(17) by putting the burden on the party seeking to tax the costs to demonstrate that those costs are reasonable and necessary (in addition to being incurred in connection with the action). See *Bergmann v. Boyce, 109 Nev. at 679;* See *U.S. Design & Const. Corp. v. International Broth. of Elec. Workers, 118 Nev. 458, 50 P.3d 170 (2002);* See *Bobby Berosini, Ltd v. People for the Ethical Treatment of Animals, 114 Nev. 1348, 1352-53, 971 P.2d 383 (1998);* See also *NRS 18.005(17)*. The demonstration that unenumerated costs are reasonable and necessary must be sufficiently compelling as to persuade the Court that it is appropriate to exercise discretion that the Nevada Supreme Court has directly stated should only be used "sparingly" and deem the costs compensable. *Id.* Here, runner fees are an unenumerated cost and Plaintiffs do not cite any legal

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authority which would either compel or reasonably persuade the Court to exercise discretion meant to be used "sparingly". Thus, the costs are not compensable and should be retaxed.

E. PLAINTIFFS HAVE EITHER MISSTATED THEIR SERVICE OF PROCESS COSTS OR FAILED TO INCLUDE AN ACCURATE ACCOUNTING OF THEIR SERVICE OF PROCESS COSTS

Per NRS 18.005(7), "[t]he fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action, unless the court determines that the service was not necessary" is a compensable expense. *See NRS 18.005(7).* Plaintiffs' Memo asserts that the total compensable costs under NRS 18.005(7) incurred for "Service of process/summons" were "$1,126.72". *See Plaintiffs' Memorandum of Costs, Pg. 2.* However, the transactions listings included with Plaintiffs' Memo only lists the following for service of process costs:

1. June 5, 2019 - $199.00. *See Plaintiffs' Memorandum of Costs, Pg. 6.*
2. June 28, 2019 - $90.00. *Id. at Pg. 12.*
3. May 4, 2020 - $54.00. *Id. at 7.*
4. May 4, 2020 - $54.00. *Id. at 7.*
5. May 4, 2020 - $54.00. *Id. at 13.*
6. May 4, 2020 - $112.35. *Id. at 13.*

The total of these six (6) services of process transactions stated in Plaintiffs' Memo is $563.35, not "$1,126.72" as asserted by Plaintiffs. *See Plaintiffs' Memorandum of Costs, Pg. 2.* Therefore, Defendants respectfully request that the Court retax Plaintiffs' asserted Service of Process/Summons costs.

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III.

CONCLUSION

Based on the foregoing, the Defendants respectfully request that the Court grant their Motion to Retax and: (1) retax the legal research costs asserted by Plaintiffs by $2240.37 as outlined above; (2) retax the runner/delivery costs asserted by Plaintiffs by $150.00 as outlined above; and (3) retax the service of process/summons costs asserted by Plaintiffs by 563.37 as outlined above.

Dated this 18th day of March 2021.

BLACK & WADHAMS

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & WADHAMS and that on the 18th day of March 2021, I caused the above and foregoing document entitled **DEFENDANTS' MOTION TO RETAX** 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

[X] 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.

/s/ Diane Meeter
An Employee of Black & Wadhams

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(702) 869-8801 FAX: (702) 869-2669

EXHIBIT 1

Electronically Filed
3/15/2021 5:29 PM
Steven D. Grierson
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
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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.	Case No: A-19-794864-C Dept. No.: 5
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,	

MEMORANDUM OF COSTS AND DISBURSEMENTS

Clerk's fees (NRS 18.005(1)) ..... $ 1,323.90

Reporters' fees for depositions/copies (NRS 18.005(2))	$ 2,216.81
Service of process/summons (NRS 18.005(7))	$ 1,126.72
Photocopies and postage (NRS 18.005(12)-(14))	$ 203.64
Legal Research/other "necessary expenses" (NRS 18.005(17))	$ 3,665.22
TOTAL	$ **8,536.29**

Dated this 15th day of March, 2021.

HOLLEY DRIGGS

Jessica M. Lujan

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

HOLLEY DRIGGS

Affidavit

STATE OF NEVADA)
ss.
COUNTY OF CLARK)

Jessica M. Lujan, Esq. being duly sworn, states: that affiant is the attorney for the Plaintiffs/Counter-defendants and has personal knowledge of the above costs and disbursements expended; that the items contained in the above memorandum are true and correct to the best of this affiant's knowledge and belief; and that the said disbursements have been necessarily incurred and paid in this action.

JESSICA M. LUJAN, ESQ.
Attorney for Plaintiffs/Counterdefendants

SIGNED AND SWORN to before me this
15 day of March, 2021.

NOTARY PUBLIC

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
MARIA STAFILATOS
Appt No. 06-104150-1
My Appt Expires Feb. 20, 2021

HOLLEY DRIGGS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 15th day of March, 2021, and pursuant to EDCR 8.05 and NRCP 5(b), I caused to be served electronically using the Court's E-Filing E-Service System, a true and correct copy of the foregoing **MEMORANDUM OF COSTS AND DISBURSEMENTS** to all parties in this case registered with the E-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

COSTS

HOLLEY DRIGGS

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
6/5/2019		03827-59 / Commercial Specialists	sp	1.00	199.00	199.00
		Bour Enterprises, LLC		1.00	199.00	199.00
		Service of process				
3/1/2021		03827-59 / Commercial Specialists	pc	22.00	0.15	3.30
		Bour Enterprises, LLC		22.00	0.15	3.30
		Photocopies				
3/9/2021		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
5/15/2019		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
12/14/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
9/6/2019	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				
1/11/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
10/29/2020		03827-59 / Commercial Specialists	pc	395.00	0.15	59.25
		Bour Enterprises, LLC		395.00	0.15	59.25
		Photocopies				
3/9/2020		03827-59 / Commercial Specialists	pc	3.00	0.15	0.45
		Bour Enterprises, LLC		3.00	0.15	0.45
		Photocopies				
12/15/2020		03827-59 / Commercial Specialists	pc	15.00	0.15	2.25
		Bour Enterprises, LLC		15.00	0.15	2.25
		Photocopies				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
11/5/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
3/11/2021		03827-59 / Commercial Specialists	pc	2.00	0.15	0.30
		Bour Enterprises, LLC		2.00	0.15	0.30
		Photocopies				
10/29/2020		03827-59 / Commercial Specialists	pc	5.00	0.15	0.75
		Bour Enterprises, LLC		5.00	0.15	0.75
		Photocopies				
2/27/2020		03827-59 / Commercial Specialists	pc	4.00	0.15	0.60
		Bour Enterprises, LLC		4.00	0.15	0.60
		Photocopies				
3/9/2021		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
12/14/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
10/10/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
6/6/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
12/14/2020		03827-59 / Commercial Specialists	pc	114.00	0.15	17.10
		Bour Enterprises, LLC		114.00	0.15	17.10
		Photocopies				
3/1/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
5/4/2020		03827-59 / Commercial Specialists	sp	1.00	54.00	54.00
		Bour Enterprises, LLC		1.00	54.00	54.00
		Service of process				
10/29/2020		03827-59 / Commercial Specialists	pc	35.00	0.15	5.25
		Bour Enterprises, LLC		35.00	0.15	5.25
		Photocopies				
6/25/2019		03827-59 / Commercial Specialists	bon	1.00	500.00	500.00
		Bour Enterprises, LLC		1.00	500.00	500.00
		Bond fee				
3/9/2020		03827-59 / Commercial Specialists	pc	3.00	0.15	0.45
		Bour Enterprises, LLC		3.00	0.15	0.45
		Photocopies				
2/27/2020		03827-59 / Commercial Specialists	pc	8.00	0.15	1.20
		Bour Enterprises, LLC		8.00	0.15	1.20
		Photocopies				
10/13/2020		03827-59 / Commercial Specialists	pc	17.00	0.15	2.55
		Bour Enterprises, LLC		17.00	0.15	2.55
		Photocopies				
5/4/2020		03827-59 / Commercial Specialists	sp	1.00	54.00	54.00
		Bour Enterprises, LLC		1.00	54.00	54.00
		Service of process				
2/27/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
2/6/2020		03827-59 / Commercial Specialists	wr	1.00	446.55	446.55
		Bour Enterprises, LLC		1.00	446.55	446.55
		Westlaw online research				
1/11/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
12/31/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	3.00 3.00	0.15 0.15	0.45 0.45
5/1/2018		03827-59 / Commercial Specialists Bour Enterprises, LLC Postage E109	po	1.00 1.00	0.94 0.94	0.94 0.94
2/27/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	1.00 1.00	0.15 0.15	0.15 0.15
1/4/2021		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	1.00 1.00	0.15 0.15	0.15 0.15
12/14/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	13.00 13.00	0.15 0.15	1.95 1.95
8/12/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Filing fee	ff	1.00 1.00	4.40 4.40	4.40 4.40
12/14/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	11.00 11.00	0.15 0.15	1.65 1.65
12/18/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	2.00 2.00	0.15 0.15	0.30 0.30
7/9/2019		03827-59 / Commercial Specialists Bour Enterprises, LLC Filing fee	ff	1.00 1.00	3.50 3.50	3.50 3.50
9/3/2019	RC	03827-59 / Commercial Specialists Bour Enterprises, LLC Delivery Charges	de	1.00 1.00	15.00 15.00	15.00 15.00

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
5/16/2019		03827-59 / Commercial Specialists	pc	2.00	0.15	0.30
		Bour Enterprises, LLC		2.00	0.15	0.30
		Photocopies				
1/4/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
5/26/2020		03827-59 / Commercial Specialists	pc	3.00	0.15	0.45
		Bour Enterprises, LLC		3.00	0.15	0.45
		Photocopies				
5/15/2019		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
9/25/2019		03827-59 / Commercial Specialists	po	1.00	0.50	0.50
		Bour Enterprises, LLC		1.00	0.50	0.50
		Postage E109				
12/14/2020		03827-59 / Commercial Specialists	ff	1.00	9.50	9.50
		Bour Enterprises, LLC		1.00	9.50	9.50
		Filing fee				
1/10/2020		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
3/1/2021		03827-59 / Commercial Specialists	pc	112.00	0.15	16.80
		Bour Enterprises, LLC		112.00	0.15	16.80
		Photocopies				
12/14/2020		03827-59 / Commercial Specialists	ff	1.00	200.00	200.00
		Bour Enterprises, LLC		1.00	200.00	200.00
		Filing fee				
3/9/2021		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
9/3/2019	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				
11/5/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
8/12/2020		03827-59 / Commercial Specialists	ff	1.00	30.00	30.00
		Bour Enterprises, LLC		1.00	30.00	30.00
		Filing fee				
7/1/2020		03827-59 / Commercial Specialists	cr	1.00	379.83	379.83
		Bour Enterprises, LLC		1.00	379.83	379.83
		Court reporter				
5/15/2019		03827-59 / Commercial Specialists	pc	6.00	0.15	0.90
		Bour Enterprises, LLC		6.00	0.15	0.90
		Photocopies				
1/11/2021		03827-59 / Commercial Specialists	pc	6.00	0.15	0.90
		Bour Enterprises, LLC		6.00	0.15	0.90
		Photocopies				
9/30/2019		03827-59 / Commercial Specialists	wr	1.00	17.55	17.55
		Bour Enterprises, LLC		1.00	17.55	17.55
		Westlaw online research				
2/16/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
3/5/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
5/15/2019		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
10/13/2020		03827-59 / Commercial Specialists	pc	14.00	0.15	2.10
		Bour Enterprises, LLC		14.00	0.15	2.10
		Photocopies				
1/11/2021		03827-59 / Commercial Specialists	pc	15.00	0.15	2.25
		Bour Enterprises, LLC		15.00	0.15	2.25
		Photocopies				
6/25/2019		03827-59 / Commercial Specialists	bon	1.00	500.00	500.00
		Bour Enterprises, LLC		1.00	500.00	500.00
		Bond fee				
6/28/2019		03827-59 / Commercial Specialists	sp	1.00	90.00	90.00
		Bour Enterprises, LLC		1.00	90.00	90.00
		Service of process				
10/13/2020		03827-59 / Commercial Specialists	pc	14.00	0.15	2.10
		Bour Enterprises, LLC		14.00	0.15	2.10
		Photocopies				
11/15/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
9/4/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
1/7/2021		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
6/21/2019	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				
1/28/2020	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
12/21/2020		03827-59 / Commercial Specialists	pc	21.00	0.15	3.15
		Bour Enterprises, LLC		21.00	0.15	3.15
		Photocopies				
10/30/2020		03827-59 / Commercial Specialists	pc	25.00	0.15	3.75
		Bour Enterprises, LLC		25.00	0.15	3.75
		Photocopies				
2/14/2020	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				
5/4/2020		03827-59 / Commercial Specialists	sp	1.00	54.00	54.00
		Bour Enterprises, LLC		1.00	54.00	54.00
		Service of process				
10/29/2020		03827-59 / Commercial Specialists	pc	5.00	0.15	0.75
		Bour Enterprises, LLC		5.00	0.15	0.75
		Photocopies				
3/1/2021		03827-59 / Commercial Specialists	pc	6.00	0.15	0.90
		Bour Enterprises, LLC		6.00	0.15	0.90
		Photocopies				
10/29/2020		03827-59 / Commercial Specialists	pc	75.00	0.15	11.25
		Bour Enterprises, LLC		75.00	0.15	11.25
		Photocopies				
8/29/2019		03827-59 / Commercial Specialists	wr	1.00	204.44	204.44
		Bour Enterprises, LLC		1.00	204.44	204.44
		Westlaw online research				
1/31/2020		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
5/4/2020		03827-59 / Commercial Specialists	sp	1.00	112.36	112.36
		Bour Enterprises, LLC		1.00	112.36	112.36
		Service of process				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
9/4/2019		03827-59 / Commercial Specialists	ff	1.00	7.00	7.00
		Bour Enterprises, LLC		1.00	7.00	7.00
		Filing fee				
2/26/2021		03827-59 / Commercial Specialists	wr	1.00	224.89	224.89
		Bour Enterprises, LLC		1.00	224.89	224.89
		Westlaw online research				
8/16/2019		03827-59 / Commercial Specialists	wr	1.00	9.84	9.84
		Bour Enterprises, LLC		1.00	9.84	9.84
		Westlaw online research				
1/14/2021		03827-59 / Commercial Specialists	pc	7.00	0.15	1.05
		Bour Enterprises, LLC		7.00	0.15	1.05
		Photocopies				
10/29/2020		03827-59 / Commercial Specialists	pc	5.00	0.15	0.75
		Bour Enterprises, LLC		5.00	0.15	0.75
		Photocopies				
10/10/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
3/1/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
8/12/2020		03827-59 / Commercial Specialists	ff	1.00	4.40	4.40
		Bour Enterprises, LLC		1.00	4.40	4.40
		Filing fee				
2/24/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
6/6/2019		03827-59 / Commercial Specialists	ff	1.00	748.60	748.60
		Bour Enterprises, LLC		1.00	748.60	748.60
		Filing fee				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
9/4/2019	RC	03827-59 / Commercial Specialists Bour Enterprises, LLC Delivery Charges	de	1.00 1.00	15.00 15.00	15.00 15.00
1/11/2021		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	27.00 27.00	0.15 0.15	4.05 4.05
1/11/2021		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	112.00 112.00	0.15 0.15	16.80 16.80
2/8/2021		03827-59 / Commercial Specialists Bour Enterprises, LLC Filing fee	ff	1.00 1.00	3.50 3.50	3.50 3.50
1/11/2021		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	14.00 14.00	0.15 0.15	2.10 2.10
4/9/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Westlaw online research	wr	1.00 1.00	316.67 316.67	316.67 316.67
10/13/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	1.00 1.00	0.15 0.15	0.15 0.15
2/27/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	3.00 3.00	0.15 0.15	0.45 0.45
12/14/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	1.00 1.00	0.15 0.15	0.15 0.15
1/28/2020	RC	03827-59 / Commercial Specialists Bour Enterprises, LLC Delivery Charges	de	1.00 1.00	15.00 15.00	15.00 15.00

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
12/18/2020		03827-59 / Commercial Specialists	pc	2.00	0.15	0.30
		Bour Enterprises, LLC		2.00	0.15	0.30
		Photocopies				
12/21/2020		03827-59 / Commercial Specialists	pc	21.00	0.15	3.15
		Bour Enterprises, LLC		21.00	0.15	3.15
		Photocopies				
12/31/2020		03827-59 / Commercial Specialists	pc	3.00	0.15	0.45
		Bour Enterprises, LLC		3.00	0.15	0.45
		Photocopies				
1/4/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
1/4/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
1/4/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
12/31/2020		03827-59 / Commercial Specialists	wr	1.00	1,459.60	1,459.60
		Bour Enterprises, LLC		1.00	1,459.60	1,459.60
		Westlaw				
1/7/2021		03827-59 / Commercial Specialists	ff	1.00	200.00	200.00
		Bour Enterprises, LLC		1.00	200.00	200.00
		Filing fee				
1/7/2021		03827-59 / Commercial Specialists	ff	1.00	9.50	9.50
		Bour Enterprises, LLC		1.00	9.50	9.50
		Filing fee				
1/7/2021		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
5/15/2019		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
9/4/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
5/16/2019		03827-59 / Commercial Specialists	pc	2.00	0.15	0.30
		Bour Enterprises, LLC		2.00	0.15	0.30
		Photocopies				
1/7/2021		03827-59 / Commercial Specialists	ff	1.00	200.00	200.00
		Bour Enterprises, LLC		1.00	200.00	200.00
		Filing fee				
1/8/2020	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				
3/1/2021		03827-59 / Commercial Specialists	pc	47.00	0.15	7.05
		Bour Enterprises, LLC		47.00	0.15	7.05
		Photocopies				
5/12/2020		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
5/12/2020		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
2/27/2020		03827-59 / Commercial Specialists	pc	10.00	0.15	1.50
		Bour Enterprises, LLC		10.00	0.15	1.50
		Photocopies				
5/16/2019		03827-59 / Commercial Specialists	pc	2.00	0.15	0.30
		Bour Enterprises, LLC		2.00	0.15	0.30
		Photocopies				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
12/3/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	2.00 2.00	0.15 0.15	0.30 0.30
3/26/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	1.00 1.00	0.15 0.15	0.15 0.15
1/7/2021		03827-59 / Commercial Specialists Bour Enterprises, LLC Filing fee	ff	1.00 1.00	9.50 9.50	9.50 9.50
12/1/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	1.00 1.00	0.15 0.15	0.15 0.15
12/3/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	5.00 5.00	0.15 0.15	0.75 0.75
3/3/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Filing fee	ff	1.00 1.00	3.50 3.50	3.50 3.50
12/1/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	1.00 1.00	0.15 0.15	0.15 0.15
9/4/2019	RC	03827-59 / Commercial Specialists Bour Enterprises, LLC Delivery Charges	de	1.00 1.00	15.00 15.00	15.00 15.00
2/10/2021		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	10.00 10.00	0.15 0.15	1.50 1.50
12/3/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	11.00 11.00	0.15 0.15	1.65 1.65

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
1/11/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
11/30/2020		03827-59 / Commercial Specialists	wr	1.00	63.11	63.11
		Bour Enterprises, LLC		1.00	63.11	63.11
		Westlaw online research				
1/11/2021		03827-59 / Commercial Specialists	pc	79.00	0.15	11.85
		Bour Enterprises, LLC		79.00	0.15	11.85
		Photocopies				
8/12/2020		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
1/4/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
12/1/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
10/13/2020		03827-59 / Commercial Specialists	pc	11.00	0.15	1.65
		Bour Enterprises, LLC		11.00	0.15	1.65
		Photocopies				
3/9/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
8/9/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
5/15/2019		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
11/18/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
11/20/2020		03827-59 / Commercial Specialists	pc	16.00	0.15	2.40
		Bour Enterprises, LLC		16.00	0.15	2.40
		Photocopies				
12/3/2020		03827-59 / Commercial Specialists	pc	7.00	0.15	1.05
		Bour Enterprises, LLC		7.00	0.15	1.05
		Photocopies				
5/16/2019		03827-59 / Commercial Specialists	pc	3.00	0.15	0.45
		Bour Enterprises, LLC		3.00	0.15	0.45
		Photocopies				
8/12/2020		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
12/13/2019		03827-59 / Commercial Specialists	wr	1.00	75.51	75.51
		Bour Enterprises, LLC		1.00	75.51	75.51
		Westlaw online research				
8/12/2020		03827-59 / Commercial Specialists	ff	1.00	30.00	30.00
		Bour Enterprises, LLC		1.00	30.00	30.00
		Filing fee				
1/29/2021		03827-59 / Commercial Specialists	wr	1.00	69.00	69.00
		Bour Enterprises, LLC		1.00	69.00	69.00
		Westlaw online research				
11/29/2020		03827-59 / Commercial Specialists	pc	7.00	0.15	1.05
		Bour Enterprises, LLC		7.00	0.15	1.05
		Photocopies				
8/16/2019		03827-59 / Commercial Specialists	wr	1.00	222.11	222.11
		Bour Enterprises, LLC		1.00	222.11	222.11
		Westlaw online research				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative		Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
			Grand Total	Worked:	1,440.00		7,139.70
				Billed:	1,440.00		7,139.70

INVOICES

HOLLEY DRIGGS

Veritext, LLC
Western Region

707 Wilshire Boulevard, Suite 3500
Los Angeles CA 90017
Tel. 877-955-3855 Fax. 949-608-3438
Fed. Tax ID: 20-3132569

VERITEXT LEGAL SOLUTIONS

03827-59

Bill To: F. Thomas Edwards Esq
Marsha Palrose
400 South Fourth Street
Suite 300
Las Vegas, NV, 89101

Invoice #:	CA4280671
Invoice Date:	4/1/2020
Balance Due:	$379.83

Case:	4520 Arville v. Bour Enterprises, LLC
Job #:	4038755 | Job Date: 3/26/2020 | Delivery: Normal
Case #:	A19794864C
Billing Atty:	F. Thomas Edwards Esq
Location:	Holley Driggs 400 South Fourth Street | Suite 300 Las Vegas, NV 89101
Sched Atty:	F. Thomas Edwards Esq | Holley Driggs

Third Party:

Witness	Description	Units	Quantity	Amount
Mahteme Zewdie	Certificate of Non Appearance (CNA)	1	1.00	$335.00
	Electronic Delivery and Handling	Package	1.00	$28.00

Notes:

Invoice Total:	$363.00
Payment:	$0.00
Credit:	$0.00
Interest:	$16.83
Balance Due:	$379.83

TERMS: Payable upon receipt. Accounts 30 days past due will bear a finance charge of 1.5% per month. Accounts unpaid after 90 days agree to pay all collection costs, including reasonable attorney's fees. Contact us to correct payment errors. No adjustments will be made after 90 days. For more information on charges related to our services please consult http://www.veritext.com/services/all-services/services-information

THIS INVOICE IS 90 DAYS PAST DUE, PLEASE REMIT - THANK YOU

To pay online, go to www.veritext.com

Veritext accepts all major credit cards
(American Express, Mastercard, Visa, Discover)

Please remit payment to:
Veritext
P.O. Box 71303
Chicago IL 60694-1303

Invoice #:	**CA4280671**
Job #:	**4038755**
Invoice Date:	**4/1/2020**
Balance:	**$379.83**

121748

Veritext, LLC - Western Region

Tel. 877-955-3855 Email: lvdepo@veritext.com
Fed. Tax ID: 20-3132569

VERITEXT LEGAL SOLUTIONS

Bill To: F. Thomas Edwards Esq
Marsha Palrose
400 South Fourth Street
Suite 300
Las Vegas, NV, 89101

Invoice #: 4645329
Invoice Date: 11/11/2020
Balance Due: $2,296.83

Case: 4520 Arville v. Bour Enterprises, LLC (A19794864C) **Proceeding Type: Depositions**

Job #: 4300753 | Job Date: 11/2/2020 | Delivery: Expedited

Location: Las Vegas, NV

Billing Atty: F. Thomas Edwards Esq

Scheduling Atty: F. Thomas Edwards Esq | Holley Driggs

Witness: 30b6 Bour Enterprises	Quantity	Amount
Original with 1 Certified Transcript	171.00	$1,496.25
Attendance	1.00	$300.00
Waiting Time (Reporter/Videographer Standby Fee)	0.50	$47.50
Exhibits	100.00	$65.00
Exhibits - Color	2.00	$1.90
Exhibits - Multimedia Duplication	1.00	$25.00
Surcharge - Expert/Medical/Technical	171.00	$85.50
Litigation Package-Secure File Suite	1.00	$55.00
Production & Processing	1.00	$50.00
Electronic Delivery and Handling	1.00	$35.00

Notes:

Invoice Total:	**$2,161.15**
Payment:	**$0.00**
Credit:	**$0.00**
Interest:	**$135.68**
Balance Due:	**$2,296.83**

TERMS: Payable upon receipt. Accounts 30 days past due will bear a finance charge of 1.5% per month. Accounts unpaid after 90 days agree to pay all collection costs, including reasonable attorney's fees. Contact us to correct payment errors. No adjustments will be made after 90 days. For more information on charges related to our services please consult http://www.veritext.com/services/all-services/services-information

THIS INVOICE IS 120 DAYS PAST DUE, PLEASE REMIT - THANK YOU

Please remit payment to:
Veritext
P.O. Box 71303
Chicago IL 60694-1303
Fed. Tax ID: 20-3132569

To pay online, go to www.veritext.com
Veritext accepts all major credit cards
(American Express, Mastercard, Visa, Discover)

Invoice #: 4645329
Invoice Date: 11/11/2020
Balance Due: $2,296.83

121748

Tom Edwards

Subject: FW: Veritext West - 4645329 - 4520 Arville v. Bour Enterprises, LLC - 2020-11-02
Attachments: 4645329.pdf

From: Noemi Sandoval <collections-west@veritext.com>
Sent: Monday, March 15, 2021 9:23 AM
To: Marsha Palrose <mpalrose@nevadafirm.com>
Subject: Re: Veritext West - 4645329 - 4520 Arville v. Bour Enterprises, LLC - 2020-11-02

Good morning, Ms. Palrose. I hope you are having a wonderful morning. I would like to follow up with you regarding your last email.

I have reviewed your concerns further with our management team. Management would like to extend a discount of 15% on this invoice. The total amount due for Invoice 4645329 is $1,836.98 if paid within the next 30days.

Please let me know if you have any additional questions or concerns regarding this invoice. Thank you very much for your help with this. Wishing you an amazing day.

Best regards,

Noemi Sandoval
Finance Representative

VERITEXT
611 Anton Blvd. 5th Floor | Costa Mesa, CA 92626
Direct: 949.777.9311 || **Main** 714.549.3700
collections-west@veritext.com
www.veritext.com

Want to pay your bill online? Go to our website, www.veritext.com and click on the "Pay by Credit Card" link. Otherwise, kindly forward payments to P.O. Box 71303, Chicago IL 60694.

AI000688

RUN SLIPS

HOLLEY DRIGGS

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

1/25/17
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 4 PM
Client Name: Coast Specialties Client No: 0337-57
Type of Item: Check
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☐ File With:
☐ County Clerk
☐ Master Calendar
☐ Discovery Commissioner
☐ Arbitration
☐ Family Court Clerk
☐ Bankruptcy Clerk
☐ Federal Court Clerk
☐ Justice Court Clerk
☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: Posting Cost Bond. take to Court for posting. Bring back receipt

Secretary: Sandy Runner: _____
Date Completed: _____ Date Billed: _____

Received by _____

AI000690

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

8/28/19
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 5pm
Client Name: Comm Specialists Client No: 03827-57
Type of Item: Hearing Binder
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☒ File With: ☐ Family Court Clerk
☐ County Clerk ☐ Bankruptcy Clerk
☐ Master Calendar ☐ Federal Court Clerk
☐ Discovery Commissioner ☐ Justice Court Clerk
☐ Arbitration ☐ Justice Court Henderson
☒ Leave Courtesy Copy in Dept. 8 Phx Bldg. 11th Fl Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: _____
Please deliver courtesy copy to Dept. 8 Phx Bldg 11th Floor. Thx

Secretary: Sandy Runner: _____
Date Completed: 8/28/19 Date Billed: _____

Received by _____

AI000691

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

9/3/19
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 2:30 run
Client Name: Comm Specialists Client No: 03827-58
Type of Item: Order + JCCR
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☒ Pick Up From: Black + Lobello
Address: 10777 W. Twain Ave #300 Phone: 702-869-8801
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☒ File With:
☐ County Clerk ☐ Family Court Clerk
☐ Master Calendar ☐ Bankruptcy Clerk
☐ Discovery Commissioner ☐ Federal Court Clerk
☐ Arbitration ☐ Justice Court Clerk
☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: Please pick up signed Order + JCCR from Reception @ Black + LoBello - 10777 W. Twain Ave. Ste 300 LV NV 89135
TKY

Secretary: Sandy Runner: _____
Date Completed: _____ Date Billed: _____

Received by _____

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

9/3/19
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 2:30 pm
Client Name: Comm Specialists Client No: 23227-59
Type of Item: JCCR
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☒ Pick Up From: Winner & Carson 7935 W. Sahara Ave
Address: Ste 101 LV NV 89117 Phone: 702-471-1111
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☐ File With: ☐ Family Court Clerk
☐ County Clerk ☐ Bankruptcy Clerk
☐ Master Calendar ☐ Federal Court Clerk
☐ Discovery Commissioner ☐ Justice Court Clerk
☐ Arbitration ☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: Please pick up JCCR from Winner & Carson @ 7935 W. Sahara Ave #101 Las Vegas NV 89117 Thx

Secretary: Sandy Runner: _____
Date Completed: _____ Date Billed: _____

Received by _____

AI000693

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

9/4/19
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 10 am run
Client Name: Cuzan Specialists Client No: 03827-59
Type of Item: Order
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☒ File With: ☐ Family Court Clerk
☐ County Clerk ☐ Bankruptcy Clerk
☐ Master Calendar ☐ Federal Court Clerk
☐ Discovery Commissioner ☐ Justice Court Clerk
☐ Arbitration ☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☒ Leave in Dept. 8 Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: Please deliver to Dept. 8 Judge's box, Phx Blds 11th Floor.

Thx

Secretary: Sandy Runner: _____
Date Completed: _____ Date Billed: _____

Received by _____

AI000694

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

1/4/17
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 2:30 pm
Client Name: Comm Specialists Client No: 03627.59
Type of Item: JCCR
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☒ File With: ☐ Family Court Clerk
☐ County Clerk ☐ Bankruptcy Clerk
☐ Master Calendar ☐ Federal Court Clerk
☒ Discovery Commissioner ☐ Justice Court Clerk
☐ Arbitration ☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: Please deliver courtesy copy to Discovery Commissioner Thy

Secretary: Sandy Runner: _____
Date Completed: _____ Date Billed: _____

Received by _____

AI000695

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

9/16/19
Date

Due By: ☐ Immediately ☑ Today ☐ Tomorrow

Time Deadline: 5 pm

Client Name: Comm Specialists Client No: 03527-59

Type of Item: Order

☐ Check/Cash in the Amount of $_____ is Attached

☐ Hand Deliver To: _____

Address: _____

Person Receiving: _____ Phone: _____

☐ Wait for Person to Sign and Return ☐ Okay to Leave

☑ Pick Up From: Dept 8 Phx Bldg 11th Floor

Address: _____ Phone: _____

☐ Receipt of Copy

To: _____ At: _____

To: _____ At: _____

To: _____ At: _____

☐ File With:

☐ County Clerk
☐ Master Calendar
☐ Discovery Commissioner
☐ Arbitration
☐ Family Court Clerk
☐ Bankruptcy Clerk
☐ Federal Court Clerk
☐ Justice Court Clerk
☐ Justice Court Henderson

☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.

☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.

☐ Issued By: _____ ☐ Certified By: _____

☐ Record at County Recorder ☐ Deliver to Probate Commissioner

☒ Special Instructions: Please pick up Signed Order from Dept. 8 in Phx Bldg 11th Floor Thx

Secretary: Sandy Runner: [signature]

Date Completed: _____ Date Billed: _____

Received by _____

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

11/3/2020
Date

Due By: ☐ Immediately ☑ Today ☐ Tomorrow
Time Deadline: 2:30 pm
Client Name: Comm Specialists Client No: 03017.57
Type of Item: Hearing Binder
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☐ File With: ☐ Family Court Clerk
☐ County Clerk ☐ Bankruptcy Clerk
☐ Master Calendar ☐ Federal Court Clerk
☐ Discovery Commissioner ☐ Justice Court Clerk
☐ Arbitration ☐ Justice Court Henderson
☒ Leave Courtesy Copy in ~~Dept.~~ Discovery Commissioner Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☑ Special Instructions: Please deliver courtesy copy binder to the Discovery Commissioners office. Thx

Secretary: Sandy Runner: _____
Date Completed: _____ Date Billed: _____

Received by _____

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RUNNER INSTRUCTIONS

1/28/2020
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 5pm
Client Name: Comm Specialist Client No: 03827-59
Type of Item: Disc. Comm Report & Recommendations
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☒ File With:
☐ County Clerk
☐ Master Calendar
☒ Discovery Commissioner
☐ Arbitration
☐ Family Court Clerk
☐ Bankruptcy Clerk
☐ Federal Court Clerk
☐ Justice Court Clerk
☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: _____
Please deliver to Discovery Commissioner's office for ~~Tax~~ filing Thx

Secretary: Sandy Runner: _____
Date Completed: _____ Date Billed: _____

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RUNNER INSTRUCTIONS

Date

Due By: ☐ Immediately ☐ Today ☐ Tomorrow
Time Deadline: _____
Client Name: _____ Client No: _____
Type of Item: _____
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☐ File With:
☐ County Clerk
☐ Master Calendar
☐ Discovery Commissioner
☐ Arbitration
☐ Family Court Clerk
☐ Bankruptcy Clerk
☐ Federal Court Clerk
☐ Justice Court Clerk
☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☐ Special Instructions: _____

Secretary: _____ Runner: _____
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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.	Case No.: A-19-794864-C Dept. No.: 8 **DEFENDANTS' AMENDED MOTION TO RETAX**
BOUR ENTERPRISES, LLC, a Nevada limited liability company; MULUGETA BOUR, an individual; HILENA MENGESHA, an individual; DOES 1 through 100, inclusive, Counterclaimants,	

Case Number: A-19-794864-C

v.

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

Counter Defendants.

Defendants and Counterclaimants 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 Black & Wadhams, hereby file their AMENDED MOTION TO RETAX. This Motion is made and based on the papers and pleadings on file herein, the following Memorandum of Points and Authorities, any exhibits attached hereto, and any argument at hearing on this matter.

Dated this 18th day of March 2021.

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MEMORANDUM OF POINTS & AUTHORITIES

I.

INTRODUCTION & BACKGROUND

On December 1, 2020, the Plaintiffs' filed a Motion for Summary Judgment regarding their breach of contract claims. A hearing was held on January 12, 2021 and, subsequently, the Court entered an Order granting that Motion on January 28, 2021. The Plaintiffs then filed a Motion for Entry of Judgment on February 10, 2021 and a hearing was held on March 2, 2021. The Court ultimately granted Plaintiffs' Motion for Entry of Judgment and filed an Order entering Judgments against the Defendants on March 9, 2021. The Judgment was then entered March 9th, 2021.

A. PLAINTIFFS' MEMORANDUM OF FEES & COSTS

On March 15, 2021, Plaintiffs filed their Memorandum of Costs and Disbursements (hereinafter the "Memo"). *See attached Exhibit 1.* The Memo states that the Plaintiffs' Costs and Disbursements were as follows:

Clerk's fees (NRS 18.005(1)) $1,323.90

Reporters' fees for depositions/copies (NRS 18.005(2)) ..... $ 2,216.81

Service of process/summons (NRS 18.005(7)) ..... $ 1,126.72

Photocopies and postage (NRS 18.005(12)-(14)) ..... $ 203.64

Legal Research/other "necessary expenses" (NRS 18.005(17)) .... $ 3,665.22

Id. at 1-2. As detailed below, these Costs and Disbursements and improper, inaccurate and/or not compensable under NRS 18.005 and, therefore, the Defendants respectfully request that the Court retax the same.

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II.

LEGAL ARGUMENT

A. LEGAL STANDARD FOR MOTION TO RETAX

A party who disputes the costs contained in an adverse party's verified memorandum may request the court determine the costs pursuant to NRS 18.110(4), which provides:

> Within 3 days after service of a copy of the memorandum, the adverse party may move the court, upon 2 days' notice, to retax and settle the costs, notice of which motion shall be filed and served on the prevailing party claiming costs. Upon the hearing of the motion the court or judge shall settle the costs. *See NRS 18.110(4).*

B. LEGAL STANDARD FOR AWARDING COSTS

Pursuant to NRS 18.020, Costs may properly be recovered to a prevailing party in the following cases:

1. In an action for the recovery of real property or a possessory right thereto.
2. In an action to recover the possession of personal property, where the value of the property amounts to more than $2,500. The value must be determined by the jury, court or master by whom the action is tried.
3. In an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500.
4. In a special proceeding, except a special proceeding conducted pursuant to NRS 306.040.
5. In an action which involves the title or boundaries of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, including the costs accrued in the action if originally commenced in a Justice Court.

See NRS 18.020.

Neither costs nor attorney fees incurred incident to litigation may be recovered unless authorized by statute or rule. *Sun Realty v. Eighth Judicial Dist. Ct.*, 91 Nev. 774, 776, 542 P.2d 1072, 1074 (1975). Even in instances where a party is entitled to request its costs, the trial court still retains discretion when determining the reasonableness of the individual costs to be awarded. *See U.S. Design & Const. Corp. v. International Broth. of Elec. Workers, 118 Nev. 458, 50 P.3d*

170 (2002); *See also Bergmann v. Boyce, 109 Nev. 670, 856 P.2d 560 (1993)*. Discretion should be "sparingly exercised" when considering "expenses not specifically allowed by statute and precedent" because "statutes permitting recovery of costs, being in derogation of the common law, must be strictly construed." *See Bergmann v. Boyce, 109 Nev. at 679.* A strict construction of the statute "requires that the phrase 'reasonable costs' be interpreted to mean actual costs that are reasonable, rather than a reasonable estimate or calculation of such costs based upon administrative convenience." *Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540 (1994).*

NRS 18.005 enumerates compensable costs as follows:

1. Clerks' fees.
2. Reporters' fees for depositions, including a reporter's fee for one copy of each deposition.
3. Jurors' fees and expenses, together with reasonable compensation of an officer appointed to act in accordance with NRS 16.120.
4. Fees for witnesses at trial, pretrial hearings and deposing witnesses, unless the court finds that the witness was called at the instance of the prevailing party without reason or necessity.
5. Reasonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.
6. Reasonable fees of necessary interpreters.
7. The fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action, unless the court determines that the service was not necessary.
8. Compensation for the official reporter or reporter pro tempore.
9. Reasonable costs for any bond or undertaking required as part of the action.
10. Fees of a court bailiff or deputy marshal who was required to work overtime.
11. Reasonable costs for telecopies.
12. Reasonable costs for photocopies.
13. Reasonable costs for long distance telephone calls.
14. Reasonable costs for postage.
15. Reasonable costs for travel and lodging incurred taking depositions and conducting discovery.
16. Fees charged pursuant to NRS 19.0335.
17. Any other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research.

See NRS 18.005.

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The Nevada Supreme Court has held that this statute must be strictly construed to allow only the costs specifically enumerated therein, and only under the circumstances provided for in the statute. *See Bobby Berosini, Ltd v. People for the Ethical Treatment of Animals, 114 Nev. 1348, 1352-53, 971 P.2d 383 (1998).* Applying these principles to the instant matter, Plaintiffs respectfully submit that this Court should grant the Motion to Retax, as some of the costs delineated in Defendants' Memorandum of Costs and Disbursements are not recoverable under applicable and relevant authority.

C. PLAINTIFFS' ASSERTED LEGAL RESEARCH COSTS ARE UNREASONABLE AND UNNECESSARY AND MUST BE RETAXED

As stated above, costs incurred in litigation can only be recovered if authorized by statute or rule and, even if such costs are so authorized, the Court has the discretion to determine the reasonableness of the costs to be award. *See Sun Realty v. Eighth Judicial Dist. Ct., 91 Nev. 774, 542 P.2d 1072 (1975); see also U.S. Design & Const. Corp. v. International Broth. of Elec. Workers, 118 Nev. 458, 50 P.3d 170 (2002).* Here, Plaintiffs' Memo asserts costs of "$3,665.22" for "Legal Research/other necessary expenses" and cites to NRS 18.005(17) as the authorizing statute. *See Plaintiffs' Memorandum, Pg. 2.* NRS 18.005(17) authorized the award of "other reasonable and necessary expense incurred in connection with the action, including **reasonable and necessary expenses for computerized services for legal research.**" *(Emphasis added) See NRS 18.005(17).* However, while computerized services for legal research is authorized by the statute, review of the bills attached to Plaintiffs' Memo demonstrates that a significant portion of the costs asserted under this category was for research on Westlaw which was neither reasonable nor necessary. The unreasonable and unnecessary costs, which should thus be retaxed, are as follows:

///

1. **$1,459.60 - Westlaw Research on December 31, 2020:**

The first unreasonable and unnecessary Westlaw cost stated in Plaintiffs' Memo is a charge for $1,459.60 for research conducted on December 31, 2020. *See Plaintiffs' Memorandum of Costs, Pg. 11.* The procedural history of this case demonstrates that: (1) the only pending motion on December 31, 2020 was the Plaintiffs' Motion for Summary Judgment Regarding Their Breach of Contract Claims; and (2) that Defendants filed their Opposition to that Motion on December 17, 2020 and Defendants filed their Reply on January 5, 2021. *See attached Exhibit 2, Pg. 16-18.* Therefore, the January 5, 2021 Reply is the only pleading which could reasonably have necessitated the December 31, 2020 legal research costs asserted by Plaintiffs. *Id.* However, examination of that Reply demonstrates that there was no reasonable or necessary basis for Plaintiffs to have incurred $1,459.60 in legal research expenses.

The Reply's legal argument section begins by discussing the argument of Defendants' that Summary Judgment was inappropriate on a matter of law that had not yet been settled. *See attached Exhibit 3, Pg. 4.* After just a brief discussion, Plaintiffs cited to a Nevada federal court case, *Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat. Tr. & Sav. Ass'n*, in support of the assertion that the Court may look to persuasive authority of other jurisdictions in considering a Motion for Summary Judgment. *See attached Exhibit 3, Pg. 5.* Though research on the case *Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat. Tr. & Sav. Ass'n* may have been necessary, however, Plaintiffs then proceeded to cite to case law from nine (9) other jurisdictions (Louisiana, Tennessee, Mississippi, California, Pennsylvania, Oklahoma, Connecticut, the Fourth Circuit, and the Fifth Circuit) and these were all simply offered as persuasive authority for the assertion that the Court "may consider persuasive authority in the absence of controlling law at summary judgment". *See attached Exhibit 3, Pg. 6.*

It is clear and unambiguous that citing to case law from nine (9) other jurisdictions as

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persuasive authority for the argument that the Court may consider persuasive authority was extremely excessive and, thus, both unreasonable and unnecessary. *Id.* Further, Defendants would re-emphasize that, immediately prior to this extensive discussion of case law from across the country, the Plaintiffs cited to persuasive case law from within Nevada (*Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat. Tr. & Sav. Ass'n*) which established the point being argued. Finally, $1500.00 for legal research is not only unreasonable it is incredible. Therefore, the additional research expenses were unquestionably not necessary and non-compensable under NRS 18.005(17) and Defendants' respectfully request the Court retax these asserted costs.

2. $316.67 - Westlaw Research on April 9, 2020:

The next unreasonable and unnecessary Westlaw cost is a charge for $316.67 for research conducted on April 9, 2020. *See Plaintiffs' Memorandum of Costs, Pg. 3.* The cost of this research was not reasonable or necessary because it was not connected with actions taken or pleadings filed in this litigation by either the Plaintiffs or Defendants. This is evidenced in the procedural history by: (1) the only action taken or pleading filed in the preceding month (March 2020) was the Defendants' Addendum to Designation of Expert Witnesses filed March 16, 2020; (2) the only actions taken or pleadings filed in April of 2020 were the filing of an Order Setting Civil Bench Trial (4/6/20), the filing of an Order regarding the Discovery Commissioner's Report and Recommendations (4/9/20), the filing of a Notice of Entry of Order (4/9/20), the filing of a Stipulation and Order to Continue Deadlines (4/27/20) and the filing of another Notice of Entry of Order (4/28/20); (3) there were no pending motions on April 9, 2020; and (4) following the filing of the April 28, 2020 Notice of Entry of Order, no further actions were taken until July 13, 2019 and that action was merely the remittance of a filing fee. *See attached Exhibit 2, Pg. 14-15.* Therefore, it is again clear that this legal research cost was not a "reasonable and **necessary expense** incurred **in connection with the action**", as required by NRS 18.005(17) and pertinent

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case law cited above, and it too must be retaxed. *See NRS 18.005(17).*

3. $446.55 - Westlaw Research on February 6, 2020:

The next unreasonable and unnecessary legal research cost is a charge for $446.55 for Westlaw research conducted on February 6, 2020. *See Plaintiffs' Memorandum of Costs, Pg. 3.* Again, this was not reasonable or necessary because it was not connected with actions taken or pleadings filed in this litigation by either the Plaintiffs or Defendants. Briefly, examination of the procedural history demonstrates that: (1) in December of 2019 Plaintiffs filed a Motion to Compel Discovery and Defendants' filed an Opposition and Countermotion to Extend Time to Disclose Expert Witnesses; (2) both parties filed Replies and hearings were held on January 14, 2020 and January 30, 2020; (3) the Discovery Commissioner's Report & Recommendations were also filed on January 30, 2020; (4) there were no further actions that took place in the case until February 20, 2020, when a status check was held and an Order was entered from the January 30, 2020 hearing; (5) there were no pending motions on February 6, 2020; and (6) there were no other actions taken or pleadings filed which would have necessitated legal research on Westlaw for at least the six months following February 6, 2020. *See attached Exhibit 2, Pg. 11-15.* Thus, it is unambiguous that the Westlaw research costs incurred on February 6, 2020 were not a "reasonable and **necessary expense** incurred **in connection with the action**", as required by NRS 18.005(17) and pertinent case law cited above, and this cost must be retaxed. *See NRS 18.005(17).*

4. $17.55 - Westlaw Research on September 30, 2019:

The final unreasonable and unnecessary legal research cost is a charge for $17.55 for Westlaw research conducted on September 30, 2019. *See Plaintiffs' Memorandum of Costs, Pg. 6.* This Westlaw research was not reasonable or necessary because it too was clearly not connected with actions taken or pleadings filed in this litigation by either the Plaintiffs or Defendants. Examination of the procedural history demonstrates that, prior to September 30, 2019, the only

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recent actions which had occurred in the case had been an Order filed September 12, 2019 (denying Plaintiffs' Motion to Dismiss Counterclaims and Defendants' Countermotion for Summary Judgment), and Notice of Entry of that Order filed September 30, 2019. *See attached Exhibit 3, Case Docket, Pg. 9.* Further, the procedural history demonstrates: (1) the only action taken on September 30, 2019 was an administrative reassignment by the Court; (2) there were no pending motions or other pleadings on September 30, 2019; and (3) there were not any subsequent actions in the case until the October 11, 2019 Mandatory Rule 16 Conference. *Id. at 9-10.* Therefore, as it was unconnected to the actions taken in this case and/or any pleadings filed by Plaintiffs or Defendants, the September 30, 2019 Westlaw research was not a "reasonable and **necessary expense** incurred **in connection with the action**", as required by NRS 18.005(17) and pertinent case law cited above, and this cost must also be retaxed. *See NRS 18.005(17).*

D. THE REQUESTED COSTS, RUNNER FEES, ARE NOT COMPENSABLE UNDER NRS 18.005

Plaintiff's Memo also includes ten "delivery" charges amounting to $150.00 and has attached runner slips for these deliveries. *See Plaintiffs' Memorandum of Costs, Pg. 6-20 & Pg. 27-36.* First, Defendants would emphasize that runner costs are not specifically enumerated under NRS 18.005. *See NRS 18.005.* Further, Plaintiffs do not cite any legal authority authorizing the taxing of such costs, and Court applies its discretion sparingly "when considering whether or not to allow expenses not specifically allowed by statute and precedent". *See Bergmann, 109 Nev. at 679, 856 P.2d at 565-566.* Additionally, it must be noted that there is persuasive legal authority which suggests that such costs are not compensable.

Specifically, federal courts have consistently held that overhead costs, such as administrative fees, supplies and the use of runners are not properly taxable. *See, e.g., Warner Chilcott Labs. Ireland Ltd. v. Impax Labs., Inc., 2013 WL 1876441, at *12 (D. N.J. April 18, 2013)*

(holding costs slip sheets, tabs, binders, folders, red weld file pockets and labels. . . .constitute[d] attorney's overhead and as such, [was] not taxable"); *N.J. Mfrs. Ins. Group v. Electrolux, Inc., 2013 WL 5817161, at *12 (D. N.J. Oct. 21, 2013)* (holding costs "for labels and binders, which constitute attorney's overhead and as such, are not taxable"); *J-Way Leasing, Ltd. v. Am. Bridge Co., 2010 WL 816439, at *4 (N.D. Ohio March 4, 2010)* ("[C]osts for marking exhibits are overhead expenses and not taxable . . . ."); *Butler v. Wright, 2010 WL 599387, at *8 (M.D. Fl. Feb 16, 2010)* (holding "operating overhead is not taxable"); *Osorio v. Dole Food Co., 2010 WL 3212065, at *7 (S.D. Fl. July 7, 2010)* ("Courts have held that costs for tabs and binders are not taxable costs because they are subsumed within operating overhead."); *Van Voorhis v. Hillsborough Bd. of County Comm'rs, 2008 WL 2790244, at *5 (M.D. Fl. July 18, 2008)* (finding cost of supplies movant purchased from Staples was "subsumed within operating overhead and . . . not taxable.").

Again, as runner costs are not specifically mentioned under any of the provisions of NRS 18.005, Plaintiffs' only reasonable argument regarding these costs is that they fall under NRS 18.005(17). It is implicit in both the language of the statute and its application in relevant case law, that the Court analyzes whether non-specifically enumerated costs and fees are compensable under NRS 18.005(17) by putting the burden on the party seeking to tax the costs to demonstrate that those costs are reasonable and necessary (in addition to being incurred in connection with the action). See *Bergmann v. Boyce, 109 Nev. at 679;* See *U.S. Design & Const. Corp. v. International Broth. of Elec. Workers, 118 Nev. 458, 50 P.3d 170 (2002);* See *Bobby Berosini, Ltd v. People for the Ethical Treatment of Animals, 114 Nev. 1348, 1352-53, 971 P.2d 383 (1998);* See also *NRS 18.005(17)*. The demonstration that unenumerated costs are reasonable and necessary must be sufficiently compelling as to persuade the Court that it is appropriate to exercise discretion that the Nevada Supreme Court has directly stated should only be used "sparingly" and deem the costs compensable. *Id.* Here, runner fees are an unenumerated cost and Plaintiffs do not cite any legal

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authority which would either compel or reasonably persuade the Court to exercise discretion meant to be used "sparingly". Thus, the costs are not compensable and should be retaxed.

E. PLAINTIFFS HAVE EITHER MISSTATED THEIR SERVICE OF PROCESS COSTS OR FAILED TO INCLUDE AN ACCURATE ACCOUNTING OF THEIR SERVICE OF PROCESS COSTS

Per NRS 18.005(7), "[t]he fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action, unless the court determines that the service was not necessary" is a compensable expense. *See NRS 18.005(7).* Plaintiffs' Memo asserts that the total compensable costs under NRS 18.005(7) incurred for "Service of process/summons" were "$1,126.72". *See Plaintiffs' Memorandum of Costs, Pg. 2.* However, the transactions listings included with Plaintiffs' Memo only lists the following for service of process costs:

1. June 5, 2019 - $199.00. *See Plaintiffs' Memorandum of Costs, Pg. 6.*
2. June 28, 2019 - $90.00. *Id. at Pg. 12.*
3. May 4, 2020 - $54.00. *Id. at 7.*
4. May 4, 2020 - $54.00. *Id. at 7.*
5. May 4, 2020 - $54.00. *Id. at 13.*
6. May 4, 2020 - $112.35. *Id. at 13.*

The total of these six (6) services of process transactions stated in Plaintiffs' Memo is $563.35, not "$1,126.72" as asserted by Plaintiffs. *See Plaintiffs' Memorandum of Costs, Pg. 2.* Therefore, Defendants respectfully request that the Court retax Plaintiffs' asserted Service of Process/Summons costs.

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III.

CONCLUSION

Based on the foregoing, the Defendants respectfully request that the Court grant their Motion to Retax and: (1) retax the legal research costs asserted by Plaintiffs by $2240.37 as outlined above; (2) retax the runner/delivery costs asserted by Plaintiffs by $150.00 as outlined above; and (3) retax the service of process/summons costs asserted by Plaintiffs by 563.37 as outlined above.

Dated this 19 day of March 2021.

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & WADHAMS and that on the 18th day of March 2021, I caused the above and foregoing document entitled **DEFENDANTS' AMENDED MOTION TO RETAX** 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

[X] 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.

/s/ Diane Meeter
An Employee of Black & Wadhams

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EXHIBIT "1"

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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.	Case No: A-19-794864-C Dept. No.: 5
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,	

MEMORANDUM OF COSTS AND DISBURSEMENTS

Clerk's fees (NRS 18.005(1)) ..... $ 1,323.90

HOLLEY DRIGGS

Reporters' fees for depositions/copies (NRS 18.005(2))	$ 2,216.81
Service of process/summons (NRS 18.005(7))	$ 1,126.72
Photocopies and postage (NRS 18.005(12)-(14))	$ 203.64
Legal Research/other "necessary expenses" (NRS 18.005(17))	$ 3,665.22
TOTAL	$ **8,536.29**

Dated this 15th day of March, 2021.

HOLLEY DRIGGS

Jessica M. Lujan

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

Affidavit

STATE OF NEVADA)
ss.
COUNTY OF CLARK)

Jessica M. Lujan, Esq. being duly sworn, states: that affiant is the attorney for the Plaintiffs/Counter-defendants and has personal knowledge of the above costs and disbursements expended; that the items contained in the above memorandum are true and correct to the best of this affiant's knowledge and belief; and that the said disbursements have been necessarily incurred and paid in this action.

JESSICA M. LUJAN, ESQ.
Attorney for Plaintiffs/Counterdefendants

SIGNED AND SWORN to before me this
15 day of March, 2021.

NOTARY PUBLIC

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
MARIA STAFILATOS
Appt No. 06-104150-1
My Appt Expires Feb. 20, 2021

HOLLEY DRIGGS

HOLLEY DRIGGS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 15th day of March, 2021, and pursuant to EDCR 8.05 and NRCP 5(b), I caused to be served electronically using the Court's E-Filing E-Service System, a true and correct copy of the foregoing **MEMORANDUM OF COSTS AND DISBURSEMENTS** to all parties in this case registered with the E-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

COSTS

HOLLEY DRIGGS

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
6/5/2019		03827-59 / Commercial Specialists	sp	1.00	199.00	199.00
		Bour Enterprises, LLC		1.00	199.00	199.00
		Service of process				
3/1/2021		03827-59 / Commercial Specialists	pc	22.00	0.15	3.30
		Bour Enterprises, LLC		22.00	0.15	3.30
		Photocopies				
3/9/2021		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
5/15/2019		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
12/14/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
9/6/2019	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				
1/11/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
10/29/2020		03827-59 / Commercial Specialists	pc	395.00	0.15	59.25
		Bour Enterprises, LLC		395.00	0.15	59.25
		Photocopies				
3/9/2020		03827-59 / Commercial Specialists	pc	3.00	0.15	0.45
		Bour Enterprises, LLC		3.00	0.15	0.45
		Photocopies				
12/15/2020		03827-59 / Commercial Specialists	pc	15.00	0.15	2.25
		Bour Enterprises, LLC		15.00	0.15	2.25
		Photocopies				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
11/5/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
3/11/2021		03827-59 / Commercial Specialists	pc	2.00	0.15	0.30
		Bour Enterprises, LLC		2.00	0.15	0.30
		Photocopies				
10/29/2020		03827-59 / Commercial Specialists	pc	5.00	0.15	0.75
		Bour Enterprises, LLC		5.00	0.15	0.75
		Photocopies				
2/27/2020		03827-59 / Commercial Specialists	pc	4.00	0.15	0.60
		Bour Enterprises, LLC		4.00	0.15	0.60
		Photocopies				
3/9/2021		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
12/14/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
10/10/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
6/6/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
12/14/2020		03827-59 / Commercial Specialists	pc	114.00	0.15	17.10
		Bour Enterprises, LLC		114.00	0.15	17.10
		Photocopies				
3/1/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
5/4/2020		03827-59 / Commercial Specialists	sp	1.00	54.00	54.00
		Bour Enterprises, LLC		1.00	54.00	54.00
		Service of process				
10/29/2020		03827-59 / Commercial Specialists	pc	35.00	0.15	5.25
		Bour Enterprises, LLC		35.00	0.15	5.25
		Photocopies				
6/25/2019		03827-59 / Commercial Specialists	bon	1.00	500.00	500.00
		Bour Enterprises, LLC		1.00	500.00	500.00
		Bond fee				
3/9/2020		03827-59 / Commercial Specialists	pc	3.00	0.15	0.45
		Bour Enterprises, LLC		3.00	0.15	0.45
		Photocopies				
2/27/2020		03827-59 / Commercial Specialists	pc	8.00	0.15	1.20
		Bour Enterprises, LLC		8.00	0.15	1.20
		Photocopies				
10/13/2020		03827-59 / Commercial Specialists	pc	17.00	0.15	2.55
		Bour Enterprises, LLC		17.00	0.15	2.55
		Photocopies				
5/4/2020		03827-59 / Commercial Specialists	sp	1.00	54.00	54.00
		Bour Enterprises, LLC		1.00	54.00	54.00
		Service of process				
2/27/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
2/6/2020		03827-59 / Commercial Specialists	wr	1.00	446.55	446.55
		Bour Enterprises, LLC		1.00	446.55	446.55
		Westlaw online research				
1/11/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
12/31/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	3.00 3.00	0.15 0.15	0.45 0.45
5/1/2018		03827-59 / Commercial Specialists Bour Enterprises, LLC Postage E109	po	1.00 1.00	0.94 0.94	0.94 0.94
2/27/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	1.00 1.00	0.15 0.15	0.15 0.15
1/4/2021		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	1.00 1.00	0.15 0.15	0.15 0.15
12/14/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	13.00 13.00	0.15 0.15	1.95 1.95
8/12/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Filing fee	ff	1.00 1.00	4.40 4.40	4.40 4.40
12/14/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	11.00 11.00	0.15 0.15	1.65 1.65
12/18/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	2.00 2.00	0.15 0.15	0.30 0.30
7/9/2019		03827-59 / Commercial Specialists Bour Enterprises, LLC Filing fee	ff	1.00 1.00	3.50 3.50	3.50 3.50
9/3/2019	RC	03827-59 / Commercial Specialists Bour Enterprises, LLC Delivery Charges	de	1.00 1.00	15.00 15.00	15.00 15.00

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
5/16/2019		03827-59 / Commercial Specialists	pc	2.00	0.15	0.30
		Bour Enterprises, LLC		2.00	0.15	0.30
		Photocopies				
1/4/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
5/26/2020		03827-59 / Commercial Specialists	pc	3.00	0.15	0.45
		Bour Enterprises, LLC		3.00	0.15	0.45
		Photocopies				
5/15/2019		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
9/25/2019		03827-59 / Commercial Specialists	po	1.00	0.50	0.50
		Bour Enterprises, LLC		1.00	0.50	0.50
		Postage E109				
12/14/2020		03827-59 / Commercial Specialists	ff	1.00	9.50	9.50
		Bour Enterprises, LLC		1.00	9.50	9.50
		Filing fee				
1/10/2020		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
3/1/2021		03827-59 / Commercial Specialists	pc	112.00	0.15	16.80
		Bour Enterprises, LLC		112.00	0.15	16.80
		Photocopies				
12/14/2020		03827-59 / Commercial Specialists	ff	1.00	200.00	200.00
		Bour Enterprises, LLC		1.00	200.00	200.00
		Filing fee				
3/9/2021		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
9/3/2019	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				
11/5/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
8/12/2020		03827-59 / Commercial Specialists	ff	1.00	30.00	30.00
		Bour Enterprises, LLC		1.00	30.00	30.00
		Filing fee				
7/1/2020		03827-59 / Commercial Specialists	cr	1.00	379.83	379.83
		Bour Enterprises, LLC		1.00	379.83	379.83
		Court reporter				
5/15/2019		03827-59 / Commercial Specialists	pc	6.00	0.15	0.90
		Bour Enterprises, LLC		6.00	0.15	0.90
		Photocopies				
1/11/2021		03827-59 / Commercial Specialists	pc	6.00	0.15	0.90
		Bour Enterprises, LLC		6.00	0.15	0.90
		Photocopies				
9/30/2019		03827-59 / Commercial Specialists	wr	1.00	17.55	17.55
		Bour Enterprises, LLC		1.00	17.55	17.55
		Westlaw online research				
2/16/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
3/5/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
5/15/2019		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
10/13/2020		03827-59 / Commercial Specialists	pc	14.00	0.15	2.10
		Bour Enterprises, LLC		14.00	0.15	2.10
		Photocopies				
1/11/2021		03827-59 / Commercial Specialists	pc	15.00	0.15	2.25
		Bour Enterprises, LLC		15.00	0.15	2.25
		Photocopies				
6/25/2019		03827-59 / Commercial Specialists	bon	1.00	500.00	500.00
		Bour Enterprises, LLC		1.00	500.00	500.00
		Bond fee				
6/28/2019		03827-59 / Commercial Specialists	sp	1.00	90.00	90.00
		Bour Enterprises, LLC		1.00	90.00	90.00
		Service of process				
10/13/2020		03827-59 / Commercial Specialists	pc	14.00	0.15	2.10
		Bour Enterprises, LLC		14.00	0.15	2.10
		Photocopies				
11/15/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
9/4/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
1/7/2021		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
6/21/2019	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				
1/28/2020	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
12/21/2020		03827-59 / Commercial Specialists	pc	21.00	0.15	3.15
		Bour Enterprises, LLC		21.00	0.15	3.15
		Photocopies				
10/30/2020		03827-59 / Commercial Specialists	pc	25.00	0.15	3.75
		Bour Enterprises, LLC		25.00	0.15	3.75
		Photocopies				
2/14/2020	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				
5/4/2020		03827-59 / Commercial Specialists	sp	1.00	54.00	54.00
		Bour Enterprises, LLC		1.00	54.00	54.00
		Service of process				
10/29/2020		03827-59 / Commercial Specialists	pc	5.00	0.15	0.75
		Bour Enterprises, LLC		5.00	0.15	0.75
		Photocopies				
3/1/2021		03827-59 / Commercial Specialists	pc	6.00	0.15	0.90
		Bour Enterprises, LLC		6.00	0.15	0.90
		Photocopies				
10/29/2020		03827-59 / Commercial Specialists	pc	75.00	0.15	11.25
		Bour Enterprises, LLC		75.00	0.15	11.25
		Photocopies				
8/29/2019		03827-59 / Commercial Specialists	wr	1.00	204.44	204.44
		Bour Enterprises, LLC		1.00	204.44	204.44
		Westlaw online research				
1/31/2020		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
5/4/2020		03827-59 / Commercial Specialists	sp	1.00	112.36	112.36
		Bour Enterprises, LLC		1.00	112.36	112.36
		Service of process				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
9/4/2019		03827-59 / Commercial Specialists	ff	1.00	7.00	7.00
		Bour Enterprises, LLC		1.00	7.00	7.00
		Filing fee				
2/26/2021		03827-59 / Commercial Specialists	wr	1.00	224.89	224.89
		Bour Enterprises, LLC		1.00	224.89	224.89
		Westlaw online research				
8/16/2019		03827-59 / Commercial Specialists	wr	1.00	9.84	9.84
		Bour Enterprises, LLC		1.00	9.84	9.84
		Westlaw online research				
1/14/2021		03827-59 / Commercial Specialists	pc	7.00	0.15	1.05
		Bour Enterprises, LLC		7.00	0.15	1.05
		Photocopies				
10/29/2020		03827-59 / Commercial Specialists	pc	5.00	0.15	0.75
		Bour Enterprises, LLC		5.00	0.15	0.75
		Photocopies				
10/10/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
3/1/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
8/12/2020		03827-59 / Commercial Specialists	ff	1.00	4.40	4.40
		Bour Enterprises, LLC		1.00	4.40	4.40
		Filing fee				
2/24/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
6/6/2019		03827-59 / Commercial Specialists	ff	1.00	748.60	748.60
		Bour Enterprises, LLC		1.00	748.60	748.60
		Filing fee				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
9/4/2019	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				
1/11/2021		03827-59 / Commercial Specialists	pc	27.00	0.15	4.05
		Bour Enterprises, LLC		27.00	0.15	4.05
		Photocopies				
1/11/2021		03827-59 / Commercial Specialists	pc	112.00	0.15	16.80
		Bour Enterprises, LLC		112.00	0.15	16.80
		Photocopies				
2/8/2021		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
1/11/2021		03827-59 / Commercial Specialists	pc	14.00	0.15	2.10
		Bour Enterprises, LLC		14.00	0.15	2.10
		Photocopies				
4/9/2020		03827-59 / Commercial Specialists	wr	1.00	316.67	316.67
		Bour Enterprises, LLC		1.00	316.67	316.67
		Westlaw online research				
10/13/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
2/27/2020		03827-59 / Commercial Specialists	pc	3.00	0.15	0.45
		Bour Enterprises, LLC		3.00	0.15	0.45
		Photocopies				
12/14/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
1/28/2020	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
12/18/2020		03827-59 / Commercial Specialists	pc	2.00	0.15	0.30
		Bour Enterprises, LLC		2.00	0.15	0.30
		Photocopies				
12/21/2020		03827-59 / Commercial Specialists	pc	21.00	0.15	3.15
		Bour Enterprises, LLC		21.00	0.15	3.15
		Photocopies				
12/31/2020		03827-59 / Commercial Specialists	pc	3.00	0.15	0.45
		Bour Enterprises, LLC		3.00	0.15	0.45
		Photocopies				
1/4/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
1/4/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
1/4/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
12/31/2020		03827-59 / Commercial Specialists	wr	1.00	1,459.60	1,459.60
		Bour Enterprises, LLC		1.00	1,459.60	1,459.60
		Westlaw				
1/7/2021		03827-59 / Commercial Specialists	ff	1.00	200.00	200.00
		Bour Enterprises, LLC		1.00	200.00	200.00
		Filing fee				
1/7/2021		03827-59 / Commercial Specialists	ff	1.00	9.50	9.50
		Bour Enterprises, LLC		1.00	9.50	9.50
		Filing fee				
1/7/2021		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
5/15/2019		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
9/4/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
5/16/2019		03827-59 / Commercial Specialists	pc	2.00	0.15	0.30
		Bour Enterprises, LLC		2.00	0.15	0.30
		Photocopies				
1/7/2021		03827-59 / Commercial Specialists	ff	1.00	200.00	200.00
		Bour Enterprises, LLC		1.00	200.00	200.00
		Filing fee				
1/8/2020	RC	03827-59 / Commercial Specialists	de	1.00	15.00	15.00
		Bour Enterprises, LLC		1.00	15.00	15.00
		Delivery Charges				
3/1/2021		03827-59 / Commercial Specialists	pc	47.00	0.15	7.05
		Bour Enterprises, LLC		47.00	0.15	7.05
		Photocopies				
5/12/2020		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
5/12/2020		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
2/27/2020		03827-59 / Commercial Specialists	pc	10.00	0.15	1.50
		Bour Enterprises, LLC		10.00	0.15	1.50
		Photocopies				
5/16/2019		03827-59 / Commercial Specialists	pc	2.00	0.15	0.30
		Bour Enterprises, LLC		2.00	0.15	0.30
		Photocopies				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
12/3/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	2.00 2.00	0.15 0.15	0.30 0.30
3/26/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	1.00 1.00	0.15 0.15	0.15 0.15
1/7/2021		03827-59 / Commercial Specialists Bour Enterprises, LLC Filing fee	ff	1.00 1.00	9.50 9.50	9.50 9.50
12/1/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	1.00 1.00	0.15 0.15	0.15 0.15
12/3/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	5.00 5.00	0.15 0.15	0.75 0.75
3/3/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Filing fee	ff	1.00 1.00	3.50 3.50	3.50 3.50
12/1/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	1.00 1.00	0.15 0.15	0.15 0.15
9/4/2019	RC	03827-59 / Commercial Specialists Bour Enterprises, LLC Delivery Charges	de	1.00 1.00	15.00 15.00	15.00 15.00
2/10/2021		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	10.00 10.00	0.15 0.15	1.50 1.50
12/3/2020		03827-59 / Commercial Specialists Bour Enterprises, LLC Photocopies	pc	11.00 11.00	0.15 0.15	1.65 1.65

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
1/11/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
11/30/2020		03827-59 / Commercial Specialists	wr	1.00	63.11	63.11
		Bour Enterprises, LLC		1.00	63.11	63.11
		Westlaw online research				
1/11/2021		03827-59 / Commercial Specialists	pc	79.00	0.15	11.85
		Bour Enterprises, LLC		79.00	0.15	11.85
		Photocopies				
8/12/2020		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
1/4/2021		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
12/1/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
10/13/2020		03827-59 / Commercial Specialists	pc	11.00	0.15	1.65
		Bour Enterprises, LLC		11.00	0.15	1.65
		Photocopies				
3/9/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
8/9/2019		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
5/15/2019		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
11/18/2020		03827-59 / Commercial Specialists	pc	1.00	0.15	0.15
		Bour Enterprises, LLC		1.00	0.15	0.15
		Photocopies				
11/20/2020		03827-59 / Commercial Specialists	pc	16.00	0.15	2.40
		Bour Enterprises, LLC		16.00	0.15	2.40
		Photocopies				
12/3/2020		03827-59 / Commercial Specialists	pc	7.00	0.15	1.05
		Bour Enterprises, LLC		7.00	0.15	1.05
		Photocopies				
5/16/2019		03827-59 / Commercial Specialists	pc	3.00	0.15	0.45
		Bour Enterprises, LLC		3.00	0.15	0.45
		Photocopies				
8/12/2020		03827-59 / Commercial Specialists	ff	1.00	3.50	3.50
		Bour Enterprises, LLC		1.00	3.50	3.50
		Filing fee				
12/13/2019		03827-59 / Commercial Specialists	wr	1.00	75.51	75.51
		Bour Enterprises, LLC		1.00	75.51	75.51
		Westlaw online research				
8/12/2020		03827-59 / Commercial Specialists	ff	1.00	30.00	30.00
		Bour Enterprises, LLC		1.00	30.00	30.00
		Filing fee				
1/29/2021		03827-59 / Commercial Specialists	wr	1.00	69.00	69.00
		Bour Enterprises, LLC		1.00	69.00	69.00
		Westlaw online research				
11/29/2020		03827-59 / Commercial Specialists	pc	7.00	0.15	1.05
		Bour Enterprises, LLC		7.00	0.15	1.05
		Photocopies				
8/16/2019		03827-59 / Commercial Specialists	wr	1.00	222.11	222.11
		Bour Enterprises, LLC		1.00	222.11	222.11
		Westlaw online research				

Transactions Listing with billed amounts

Search for: 03827-59 Search by: Matter ID Stage: (all) Type: All costs

Date	Prof	MatterID/Client Sort Matter Description Narrative		Component Task Code	Units Stm Units	Price Stm Price	Value Ext Amount
			Grand Total	Worked:	1,440.00		7,139.70
				Billed:	1,440.00		7,139.70

INVOICES

HOLLEY DRIGGS

Veritext, LLC
Western Region

707 Wilshire Boulevard, Suite 3500
Los Angeles CA 90017
Tel. 877-955-3855 Fax. 949-608-3438
Fed. Tax ID: 20-3132569

VERITEXT LEGAL SOLUTIONS

03827-59

Bill To: F. Thomas Edwards Esq
Marsha Palrose
400 South Fourth Street
Suite 300
Las Vegas, NV, 89101

Invoice #: CA4280671
Invoice Date: 4/1/2020
Balance Due: $379.83

Case: 4520 Arville v. Bour Enterprises, LLC
Job #: 4038755 | Job Date: 3/26/2020 | Delivery: Normal
Case #: A19794864C
Billing Atty: F. Thomas Edwards Esq
Location: Holley Driggs
400 South Fourth Street | Suite 300
Las Vegas, NV 89101
Sched Atty: F. Thomas Edwards Esq | Holley Driggs

Third Party:

Witness	Description	Units	Quantity	Amount
Mahteme Zewdie	Certificate of Non Appearance (CNA)	1	1.00	$335.00
	Electronic Delivery and Handling	Package	1.00	$28.00

Notes:

Invoice Total:	$363.00
Payment:	$0.00
Credit:	$0.00
Interest:	$16.83
Balance Due:	$379.83

TERMS: Payable upon receipt. Accounts 30 days past due will bear a finance charge of 1.5% per month. Accounts unpaid after 90 days agree to pay all collection costs, including reasonable attorney's fees. Contact us to correct payment errors. No adjustments will be made after 90 days. For more information on charges related to our services please consult http://www.veritext.com/services/all-services/services-information

THIS INVOICE IS 90 DAYS PAST DUE, PLEASE REMIT - THANK YOU

To pay online, go to www.veritext.com

Veritext accepts all major credit cards
(American Express, Mastercard, Visa, Discover)

Please remit payment to:
Veritext
P.O. Box 71303
Chicago IL 60694-1303

Invoice #: CA4280671
Job #: 4038755
Invoice Date: 4/1/2020
Balance: $379.83

121748

Veritext, LLC - Western Region
Tel. 877-955-3855 Email: lvdepo@veritext.com
Fed. Tax ID: 20-3132569

VERITEXT LEGAL SOLUTIONS

Bill To: F. Thomas Edwards Esq
Marsha Palrose
400 South Fourth Street
Suite 300
Las Vegas, NV, 89101

Invoice #:	**4645329**
Invoice Date:	**11/11/2020**
Balance Due:	**$2,296.83**

Case: 4520 Arville v. Bour Enterprises, LLC (A19794864C) **Proceeding Type: Depositions**

Job #: 4300753 | Job Date: 11/2/2020 | Delivery: Expedited

Location: Las Vegas, NV

Billing Atty: F. Thomas Edwards Esq

Scheduling Atty: F. Thomas Edwards Esq | Holley Driggs

Witness: 30b6 Bour Enterprises	**Quantity**	**Amount**
Original with 1 Certified Transcript	171.00	$1,496.25
Attendance	1.00	$300.00
Waiting Time (Reporter/Videographer Standby Fee)	0.50	$47.50
Exhibits	100.00	$65.00
Exhibits - Color	2.00	$1.90
Exhibits - Multimedia Duplication	1.00	$25.00
Surcharge - Expert/Medical/Technical	171.00	$85.50
Litigation Package-Secure File Suite	1.00	$55.00
Production & Processing	1.00	$50.00
Electronic Delivery and Handling	1.00	$35.00

Notes:

Invoice Total:	**$2,161.15**
Payment:	**$0.00**
Credit:	**$0.00**
Interest:	**$135.68**
Balance Due:	**$2,296.83**

TERMS: Payable upon receipt. Accounts 30 days past due will bear a finance charge of 1.5% per month. Accounts unpaid after 90 days agree to pay all collection costs, including reasonable attorney's fees. Contact us to correct payment errors. No adjustments will be made after 90 days. For more information on charges related to our services please consult http://www.veritext.com/services/all-services/services-information

THIS INVOICE IS 120 DAYS PAST DUE, PLEASE REMIT - THANK YOU

Please remit payment to:
Veritext
P.O. Box 71303
Chicago IL 60694-1303
Fed. Tax ID: 20-3132569

To pay online, go to www.veritext.com
Veritext accepts all major credit cards
(American Express, Mastercard, Visa, Discover)

Invoice #:	**4645329**
Invoice Date:	**11/11/2020**
Balance Due:	**$2,296.83**

121748

AI000738

Tom Edwards

Subject: FW: Veritext West - 4645329 - 4520 Arville v. Bour Enterprises, LLC - 2020-11-02
Attachments: 4645329.pdf

From: Noemi Sandoval <collections-west@veritext.com>
Sent: Monday, March 15, 2021 9:23 AM
To: Marsha Palrose <mpalrose@nevadafirm.com>
Subject: Re: Veritext West - 4645329 - 4520 Arville v. Bour Enterprises, LLC - 2020-11-02

Good morning, Ms. Palrose. I hope you are having a wonderful morning. I would like to follow up with you regarding your last email.

I have reviewed your concerns further with our management team. Management would like to extend a discount of 15% on this invoice. The total amount due for Invoice 4645329 is $1,836.98 if paid within the next 30days.

Please let me know if you have any additional questions or concerns regarding this invoice. Thank you very much for your help with this. Wishing you an amazing day.

Best regards,

Noemi Sandoval
Finance Representative

VERITEXT
611 Anton Blvd. 5th Floor | Costa Mesa, CA 92626
Direct: 949.777.9311 || **Main** 714.549.3700
collections-west@veritext.com
www.veritext.com

Want to pay your bill online? Go to our website, www.veritext.com and click on the "Pay by Credit Card" link. Otherwise, kindly forward payments to P.O. Box 71303, Chicago IL 60694.

AI000739

RUN SLIPS

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

4/25/17
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 4 PM
Client Name: Coast Specialties Client No: 0327-57
Type of Item: Check
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☐ File With: ☐ Family Court Clerk
☐ County Clerk ☐ Bankruptcy Clerk
☐ Master Calendar ☐ Federal Court Clerk
☐ Discovery Commissioner ☐ Justice Court Clerk
☐ Arbitration ☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: Posting Cost Bond. take to Court for posting. Bring back receipt

Secretary: Sandy Runner: _____
Date Completed: _____ Date Billed: _____

Received by _____

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

8/28/19
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 5pm
Client Name: Comm Specialists Client No: 03827-57
Type of Item: Hearing Binder
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☒ File With: ☐ Family Court Clerk
☐ County Clerk ☐ Bankruptcy Clerk
☐ Master Calendar ☐ Federal Court Clerk
☐ Discovery Commissioner ☐ Justice Court Clerk
☐ Arbitration ☐ Justice Court Henderson
☒ Leave Courtesy Copy in Dept. 8 Phx Bldg. 11th Fl Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☑ Special Instructions: Please deliver courtesy copy to Dept. 8 Phx Bldg 11th Floor. Thx

Secretary: Sandy Runner: _____
Date Completed: 8/28/19 Date Billed: _____

Received by _____

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

9/3/19
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 2:30 run
Client Name: Comm Specialists Client No: 03827-59
Type of Item: Order + JCCR
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☒ Pick Up From: Black + LoBello
Address: 10777 W. Twain Ave #300 Phone: 702-869-8801
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☒ File With: ☐ Family Court Clerk
☐ County Clerk ☐ Bankruptcy Clerk
☐ Master Calendar ☐ Federal Court Clerk
☐ Discovery Commissioner ☐ Justice Court Clerk
☐ Arbitration ☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: Please pick up signed Order + JCCR from Reception @ Black + LoBello - 10777 W. Twain Ave. Ste 300 LV NV 89135
Thx

Secretary: Sandy Runner: _____
Date Completed: _____ Date Billed: _____

Received by _____

AI000743

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

9/3/19
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 2:30 pm
Client Name: Comm Specialists Client No: 03627.59
Type of Item: JCCR
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☒ Pick Up From: Winner & Carson 7935 W. Sahara Ave
Address: Ste 101 LV NV 89117 Phone: 702-471-1111
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☐ File With:
☐ County Clerk
☐ Master Calendar
☐ Discovery Commissioner
☐ Arbitration
☐ Family Court Clerk
☐ Bankruptcy Clerk
☐ Federal Court Clerk
☐ Justice Court Clerk
☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: Please pick up JCCR from Winner & Carson @ 7935 W. Sahara Ave #101 Las Vegas NV 89117 Thx

Secretary: Sandy Runner: _____
Date Completed: _____ Date Billed: _____

Received by _____

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

9/4/19
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 10 am run
Client Name: Cygan Specialists Client No: 02827.59
Type of Item: Order
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☒ File With: ☐ Family Court Clerk
☐ County Clerk ☐ Bankruptcy Clerk
☐ Master Calendar ☐ Federal Court Clerk
☐ Discovery Commissioner ☐ Justice Court Clerk
☐ Arbitration ☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☒ Leave in Dept. 8 Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: Please deliver to Dept. 8 Judge's box, Phx Clds 11th Floor.

Thx

Secretary: Sandy Runner: _____
Date Completed: _____ Date Billed: _____

Received by _____

AI000745

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

1/4/17
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 2:30 pm
Client Name: Omni Specialists Client No: 13627.59
Type of Item: JCCR
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☒ File With: ☐ Family Court Clerk
☐ County Clerk ☐ Bankruptcy Clerk
☐ Master Calendar ☐ Federal Court Clerk
☒ Discovery Commissioner ☐ Justice Court Clerk
☐ Arbitration ☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: Please deliver courtesy copy to Discovery Commissioner Thx

Secretary: Sandy Runner: _____
Date Completed: 1/4/17 Date Billed: _____

Received by _____

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

9/16/19
Date

Due By: ☐ Immediately ☑ Today ☐ Tomorrow

Time Deadline: 5 pm

Client Name: Comm Specialists Client No: 03527-59

Type of Item: Order

☐ Check/Cash in the Amount of $_____ is Attached

☐ Hand Deliver To: _____

Address: _____

Person Receiving: _____ Phone: _____

☐ Wait for Person to Sign and Return ☐ Okay to Leave

☑ Pick Up From: Dept. 8 Phx Bldg 11th Floor

Address: _____ Phone: _____

☐ Receipt of Copy

To: _____ At: _____

To: _____ At: _____

To: _____ At: _____

☐ File With:

☐ County Clerk
☐ Master Calendar
☐ Discovery Commissioner
☐ Arbitration
☐ Family Court Clerk
☐ Bankruptcy Clerk
☐ Federal Court Clerk
☐ Justice Court Clerk
☐ Justice Court Henderson

☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.

☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.

☐ Issued By: _____ ☐ Certified By: _____

☐ Record at County Recorder ☐ Deliver to Probate Commissioner

☒ Special Instructions: Please pick up Signed Order from Dept. 8 in Phx Bldg 11th Floor Thx

Secretary: Sandy Runner: _____

Date Completed: _____ Date Billed: _____

Received by _____

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

11/3/2020
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow
Time Deadline: 2:30 pm
Client Name: Comm Specialists Client No: 03217.59
Type of Item: Hearing Binder
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☐ File With: ☐ Family Court Clerk
☐ County Clerk ☐ Bankruptcy Clerk
☐ Master Calendar ☐ Federal Court Clerk
☐ Discovery Commissioner ☐ Justice Court Clerk
☐ Arbitration ☐ Justice Court Henderson
☒ Leave Courtesy Copy in ~~Dept.~~ Discovery Commissioner Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☒ Special Instructions: Please deliver courtesy copy binder to the Discovery Commissioner's office. Thx

Secretary: Sandy Runner: _____
Date Completed: _____ Date Billed: _____

Received by _____

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

1/28/2020
Date

Due By: ☐ Immediately ☒ Today ☐ Tomorrow

Time Deadline: 5pm

Client Name: Comm Specialist Client No: 03827-59

Type of Item: Disc Comm Report & Recommendations

☐ Check/Cash in the Amount of $_____ is Attached

☐ Hand Deliver To: _____

Address: _____

Person Receiving: _____ Phone: _____

☐ Wait for Person to Sign and Return ☐ Okay to Leave

☐ Pick Up From: _____

Address: _____ Phone: _____

☐ Receipt of Copy

To: _____ At: _____

To: _____ At: _____

To: _____ At: _____

☒ File With:

☐ County Clerk
☐ Master Calendar
☒ Discovery Commissioner
☐ Arbitration
☐ Family Court Clerk
☐ Bankruptcy Clerk
☐ Federal Court Clerk
☐ Justice Court Clerk
☐ Justice Court Henderson

☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.

☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.

☐ Issued By: _____ ☐ Certified By: _____

☐ Record at County Recorder ☐ Deliver to Probate Commissioner

☒ Special Instructions:
Please deliver to Discovery Commissioner's office for ~~[illegible]~~ filing Thx

Secretary: Sandy Runner: [signature]

Date Completed: _____ Date Billed: _____

Received by _____

HOLLEY•DRIGGS•WALCH•FINE•WRAY•PUZEY•THOMPSON
400 South Fourth Street, Third Floor, Las Vegas, NV 89101
Tel (702) 791-0308 • Fax (702) 791-1912

RUNNER INSTRUCTIONS

Date

Due By: ☐ Immediately ☐ Today ☐ Tomorrow
Time Deadline: _____
Client Name: _____ Client No: _____
Type of Item: _____
☐ Check/Cash in the Amount of $_____ is Attached
☐ Hand Deliver To: _____
Address: _____
Person Receiving: _____ Phone: _____
☐ Wait for Person to Sign and Return ☐ Okay to Leave
☐ Pick Up From: _____
Address: _____ Phone: _____
☐ Receipt of Copy
To: _____ At: _____
To: _____ At: _____
To: _____ At: _____
☐ File With:
☐ County Clerk
☐ Master Calendar
☐ Discovery Commissioner
☐ Arbitration
☐ Family Court Clerk
☐ Bankruptcy Clerk
☐ Federal Court Clerk
☐ Justice Court Clerk
☐ Justice Court Henderson
☐ Leave Courtesy Copy in Dept. _____ Slot/Chambers.
☐ Leave in Dept. _____ Slot/Chambers for Judge's Signature.
☐ Issued By: _____ ☐ Certified By: _____
☐ Record at County Recorder ☐ Deliver to Probate Commissioner
☐ Special Instructions: _____

Secretary: _____ Runner: _____
Date Completed: _____ Date Billed: _____

Received by _____

EXHIBIT "2"

Case Information

A-19-794864-C | 4520 Arville, Plaintiff(s) vs. Bour Enterprises LLC, Defendant(s)

Case Number	Court	Judicial Officer
A-19-794864-C	Department 5	Barisich, Veronica M.
File Date	Case Type	Case Status
05/15/2019	Other Landlord Tenant	Closed

Party

Plaintiff
4520 Arville

Active Attorneys ▾
Lead Attorney
Edwards, F. Thomas
Retained

Attorney
Story, Sean E.
Retained

Attorney
Lujan, Jessica M
Retained

Counter Defendant
4520 Arville

Active Attorneys ▾
Lead Attorney
Edwards, F. Thomas
Retained

Attorney
Story, Sean E.
Retained

	Attorney Lujan, Jessica M Retained
Plaintiff McKinley Manor	Active Attorneys ▾ Lead Attorney Edwards, F. Thomas Retained
	Attorney Story, Sean E. Retained
	Attorney Lujan, Jessica M Retained
Counter Defendant McKinley Manor	Active Attorneys ▾ Lead Attorney Edwards, F. Thomas Retained
	Attorney Story, Sean E. Retained
	Attorney Lujan, Jessica M Retained
Other (Participant) Black & Lobello	
Defendant Bour Enterprises LLC	Active Attorneys ▾ Lead Attorney Carson, Brent A Retained

	Attorney Graf, J. Rusty Retained
Counter Claimant Bour Enterprises LLC	Active Attorneys ▾ Lead Attorney Carson, Brent A Retained
	Attorney Graf, J. Rusty Retained
Defendant Bour, Mulugeta	Active Attorneys ▾ Lead Attorney Carson, Brent A Retained
	Attorney Graf, J. Rusty Retained
Counter Claimant Bour, Mulugeta	Active Attorneys ▾ Lead Attorney Carson, Brent A Retained
	Attorney Graf, J. Rusty Retained
Defendant Mengesha, Hilena	Active Attorneys ▾ Lead Attorney Carson, Brent A Retained
	Attorney

Graf, J. Rusty
Retained

Counter Claimant
Mengesha, Hilena

Active Attorneys ▾
Lead Attorney
Carson, Brent A
Retained

Attorney
Graf, J. Rusty
Retained

Disposition Events

01/28/2021 Judgment ▾

Judicial Officer
Barisich, Veronica M.

Judgment Type
Summary Judgment

Monetary Judgment

Debtors: Bour Enterprises LLC (Defendant), Mulugeta Bour (Defendant), Hilena Mengesha (Defendant)

Creditors: 4520 Arville (Plaintiff), McKinley Manor (Plaintiff)

Judgment: 01/28/2021 Docketed: 01/29/2021

Comment: Certain Claims

03/04/2021 Judgment ▾

Judicial Officer
Barisich, Veronica M.

Judgment Type
Judgment

Monetary Judgment

Debtors: Bour Enterprises LLC (Defendant), Mulugeta Bour (Defendant), Hilena Mengesha (Defendant)

Creditors: Black & Lobello (Other)

Judgment: 03/04/2021 Docketed: 03/05/2021

Total Judgment: $27,517.72

03/09/2021 Judgment ▾

Judicial Officer
Barisich, Veronica M.

Judgment Type
Judgment Plus Interest

Monetary Judgment

Debtors: Bour Enterprises LLC (Defendant), Mulugeta Bour (Defendant), Hilena Mengesha (Defendant)

Creditors: 4520 Arville (Plaintiff), McKinley Manor (Plaintiff)

Judgment: 03/09/2021 Docketed: 03/10/2021

Total Judgment: $162,756.77

Events and Hearings

05/15/2019 Complaint ▾

Comment
Complaint

05/15/2019 Peremptory Challenge ▾

Comment
Peremptory Challenge of Judge

05/15/2019 Initial Appearance Fee Disclosure ▾

Comment
Initial Appearance Fee Disclosure

05/16/2019 Notice of Department Reassignment ▾

Comment
Notice of Department Reassignment

05/16/2019 Summons Electronically Issued - Service Pending ▾

Comment
Summons

05/16/2019 Summons Electronically Issued - Service Pending ▾

Comment
Summons

05/16/2019 Summons Electronically Issued - Service Pending ▾

Comment
Summons

06/20/2019 Initial Appearance Fee Disclosure ▾

Comment
Initial Appearance Fee Disclosure

06/20/2019 Demand for Security of Costs ▾

Comment
Demand for Security Costs 4520 Arville

06/20/2019 Demand for Security of Costs ▾

Comment
Demand for Security Costs McKinley Manor

06/26/2019 Notice of Posting of Cost Bond ▾

Comment
Notice of Posting of Cost Bond

06/26/2019 Notice of Posting of Cost Bond ▾

Comment
Notice of Posting of Cost Bond

07/09/2019 Notice of Intent to Take Default ▾

Comment
Seven Day Notice of Intent to Take Default

07/16/2019 Answer and Counterclaim ▾

Comment
Defendants' Answer and Counterclaim

07/16/2019 Exhibits ▾

Comment
Exhibit 1 - 6

07/16/2019 Initial Appearance Fee Disclosure ▾

Comment
Initial Appearance Fee Disclosures

08/01/2019 Motion to Dismiss ▾

Comment
Plaintiff/Counterdefendants' Motion to Dismiss Counterclaims

08/01/2019 Clerk's Notice of Hearing ▾

Comment
Notice of Hearing

08/12/2019 Opposition to Motion ▾

Comment
Defendants and Counterclaimants Opposition to Motion to Dismiss Counterclaims and Defendants and Counterclaimants Motion for Summary Judgment

08/16/2019 Errata ▾

Comment
Notice of Errata Re Declaration of Anthony Bourt

08/22/2019 Opposition to Motion For Summary Judgment ▾

Comment
Plaintiffs' Opposition to Defendants' Countermotion for Summary Judgment

08/27/2019 Clerk's Notice of Hearing ▾

Comment
Notice of Hearing

08/27/2019 Reply in Support ▾

Comment
Plaintiffs/Counterdefendants' Reply In Support Of Motion To Dismiss Counterclaims

08/29/2019 Reply in Support ▾

Comment
Defendants/CounterClaimant's Reply In Support of Countermotion for Summary Judgment

09/03/2019 Motion to Dismiss ▾

Judicial Officer(s)
Vacant, DC 8, Bixler, James

Hearing Time
8:30 AM

Comment
Plaintiffs/Counterdefendants' Motion to Dismiss Counterclaims

09/03/2019 Opposition and Countermotion ▾

Judicial Officer(s)
Vacant, DC 8, Bixler, James

Hearing Time
8:30 AM

Comment
Defendants and Counterclaimants Opposition to Motion to Dismiss Counterclaims and Defendants and Counterclaimants Motion for Summary Judgment

09/03/2019 All Pending Motions ▾

Judicial Officer(s)
Vacant, DC 8, Bixler, James

Hearing Time
8:30 AM

Result
Matter Heard

Parties Present
Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Graf, J. Rusty

Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Graf, J. Rusty

Defendant

Attorney: Graf, J. Rusty

09/04/2019 Joint Case Conference Report

Comment
Joint Case Conference Report

09/06/2019 Order

Comment
Order to Appear for Scheduling Conference

09/12/2019 Order Denying Motion

Comment
Order Denying Without Prejudice Plaintiffs/Counterdefendants' Motion to Dismiss Counterclaims and Defendants/Counterclaimants' Countermotion for Summary Judgment

09/13/2019 Notice of Entry of Order

Comment
Notice of Entry of Order

09/30/2019 Administrative Reassignment - Judicial Officer Change

Comment
From Vacant DC8 to Judge Trevor L. Atkin

10/11/2019 Mandatory Rule 16 Conference

Original Type
Mandatory Rule 16 Conference

Judicial Officer
Bixler, James

Hearing Time
8:30 AM

Result
Scheduling Order Will Issue

Parties Present ▲
Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Carson, Brent A

Attorney: Graf, J. Rusty

Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Carson, Brent A

Attorney: Graf, J. Rusty

Defendant

Attorney: Carson, Brent A

Attorney: Graf, J. Rusty

10/14/2019 Answer to Counterclaim ▼

Comment
Answer to Counterclaim

10/18/2019 Scheduling and Trial Order ▼

Comment
Scheduling Order and Order Setting Civil Bench Trial

10/22/2019 Scheduling and Trial Order ▼

Comment
Amended Scheduling Order and Order Setting Civil Bench Trial

10/30/2019 Offer of Judgment ▼

Comment
Defendants/Counterclaimants Offer of Judgment

12/05/2019 Motion to Compel ▼

Comment
Plaintiffs/Counterdefendants' Motion to Compel Discovery

12/06/2019 Clerk's Notice of Hearing ▼

Comment
Notice of Hearing

12/20/2019 Opposition and Countermotion ▾

Comment
Opposition to Motion to Compel Discovery And Counter-Motion to Extend The Time To Disclose Expert Witnesses

01/07/2020 Reply in Support ▾

Comment
Reply in Support of Plaintiffs' Motion to Compel Discovery and Opposition to Defendants' Counter-Motion to Extend Time to Disclose Expert Witnesses

01/14/2020 Motion to Compel ▾

Judicial Officer
Truman, Erin

Hearing Time
9:00 AM

Result
Granted in Part

Comment
Plaintiffs/Counterdefendants' Motion to Compel Discovery

01/14/2020 Opposition and Countermotion ▾

Judicial Officer
Truman, Erin

Hearing Time
9:00 AM

Result
Off Calendar

Comment
Deft's Opposition to Motion to Compel Discovery and Counter-Motion to Extend The Time To Disclose Expert Witnesses

01/14/2020 All Pending Motions ▾

Judicial Officer
Truman, Erin

Hearing Time
9:00 AM

Result
Matter Heard

Parties Present ▲

Plaintiff

Attorney: Edwards, F. Thomas

Attorney: Lujan, Jessica M

Defendant

Attorney: Graf, J. Rusty

Plaintiff

Attorney: Edwards, F. Thomas

Attorney: Lujan, Jessica M

Defendant

Attorney: Graf, J. Rusty

Defendant

Attorney: Graf, J. Rusty

01/17/2020 Notice of Hearing ▼

Comment
Motion to Continue Expert Disclosure Deadline on an Order Shortening Time

01/24/2020 Order Shortening Time ▼

Comment
Defendants / Counter Claimants' Motion to Continue Expert Disclosure on Order Shortening Time

01/28/2020 Response ▼

Comment
Plaintifs' Response to Defendants' Motion to Continue on Order Shortening Time

01/28/2020 Reply ▼

Comment
Reply to Plaintiffs' Response to Defendants' Motion to Continue on Order Shortening Time

01/30/2020 Motion to Continue ▼

Judicial Officer
Atkin, Trevor

Hearing Time
10:00 AM

Result
Granted

Comment
Motion to Continue Expert Disclosure Deadlines on Order Shortening Time

Parties Present ▲
Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Graf, J. Rusty

Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Graf, J. Rusty

Defendant

Attorney: Graf, J. Rusty

01/30/2020 Discovery Commissioners Report and Recommendations ▼

Comment
Discovery Commissioner s Report and Recommendations

02/20/2020 Status Check: Compliance ▼

Judicial Officer
Truman, Erin

Hearing Time
3:00 AM

Cancel Reason
Vacated

Comment
Status Check: Compliance / 1-14-2020

02/20/2020 Order ▼

Comment
Order from January 30, 2020 Hearing

02/20/2020 Notice of Entry of Order ▼

Comment
Notice of Entry of Order from January 30, 2020 Hearing

02/21/2020 Miscellaneous Filing ▼

Comment
Defendant's Production - 2nd Supp to NRCP 16.1

02/21/2020 Supplement ▼

Comment
Defendant's Second Supplement To NRCP 16.1 Initial List of Witnesses And Documents

02/21/2020 Miscellaneous Filing ▾

Comment
Log of Priveleged Documents

02/21/2020 Designation of Expert Witness ▾

Comment
Defendants' Designation of Expert Witnesses

02/27/2020 Stipulation and Order ▾

Comment
Stipulation and Order to Continue Deadlines

02/28/2020 Notice of Entry of Stipulation and Order ▾

Comment
Notice of Entry of Stipulation and Order to Continue Deadlines

03/16/2020 Addendum ▾

Comment
Defendants Addendum to Designation of Expert Witnesses

04/06/2020 Order Setting Civil Bench Trial ▾

Comment
Order Setting Civil Bench Trial

04/07/2020 Order ▾

Comment
Order Re: Discovery Commissioner's Report and Recommendations

04/09/2020 Notice of Entry of Order ▾

Comment
Notice of Entry of Order

04/27/2020 Stipulation and Order ▾

Comment
Stipulation and Order to Continue Deadlines (Second Request)

04/28/2020 Notice of Entry of Order ▾

Comment
Notice of Entry of Order

07/13/2020 Filing Fee Remittance ▾

Comment
Filing Fee Remittance

07/29/2020 Stipulation and Order to Extend Discovery Deadlines ▾

Comment
Stipulation And Order to Continue Deadlines (Third Request)

07/29/2020 Order Setting Civil Bench Trial ▾

Comment
Order Setting Civil Bench Trial

07/29/2020 Notice of Entry of Order ▾

Comment
Notice of Entry of Order

10/13/2020 Pre Trial Conference ▾

Judicial Officer
Atkin, Trevor

Hearing Time
8:30 AM

Cancel Reason
Vacated - Superseding Order

11/09/2020 Calendar Call ▾

Judicial Officer
Atkin, Trevor

Hearing Time
8:30 AM

Cancel Reason
Vacated - Superseding Order

11/10/2020 Motion for Summary Judgment ▾

Comment
Plaintiffs' Motion for Summary Judgment Regarding Counterclaim Damages

11/10/2020 Clerk's Notice of Hearing ▾

Comment
Notice of Hearing

11/16/2020 Bench Trial ▾

Judicial Officer
Atkin, Trevor

Hearing Time
9:00 AM

Cancel Reason
Vacated - Superseding Order

11/19/2020 Amended Order Setting Jury Trial ▾

Comment
Amended Order Setting Civil Jury Trial

11/20/2020 Amended Order Setting Civil Non-Jury Trial ▾

Comment
2nd Amended Order Setting Civil Bench Trial

11/25/2020 Opposition to Motion For Summary Judgment ▾

Comment
Opposition to Plaintiffs' Motion for Summary Judgment Regarding Countereclaim Damages

12/01/2020 Motion for Summary Judgment ▾

Comment
Plaintiffs' Motion for Summary Judgment Regarding Their Breach of Contract Claims

12/02/2020 Clerk's Notice of Hearing ▾

Comment
Notice of Hearing

12/08/2020 Reply in Support ▾

Comment
Plaintiffs' Reply In Support Of Motion For Summary Judgment Regarding Counterclaim Damages

12/09/2020 At Request of Court ▾

Original Type
At Request of Court

Judicial Officer
Atkin, Trevor

Hearing Time
3:00 AM

Result
Hearing Set

Comment
BlueJeans Notice for Department 8 on December 15, 2020

12/15/2020 Motion for Summary Judgment ▾

Judicial Officer
Atkin, Trevor

Hearing Time
9:30 AM

Result
Dismissed

Comment
Plaintiffs' Motion for Summary Judgment Regarding Counterclaim Damages

Parties Present ▴
Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Graf, J. Rusty

Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Graf, J. Rusty

Defendant

Attorney: Graf, J. Rusty

12/17/2020 Opposition to Motion For Summary Judgment ▾

Comment
Opposition to Plaintiffs' Motion for Summary Judgment Regarding Breach of Contract Claimis

01/04/2021 Case Reassigned to Department 5 ▾

Comment
Judicial Reassignment to Judge Veronica M. Barisich

01/05/2021 Pre Trial Conference ▾

Judicial Officer
Atkin, Trevor

Hearing Time
8:30 AM

Cancel Reason
Vacated - per Order

01/05/2021 Reply in Support ▾

Comment
Plaintiffs' Reply In Support Of Motion for Summary Judgment Regarding Breach of Contract Claims

01/08/2021 Minute Order ▾

Judicial Officer
Barisich, Veronica M.

Hearing Time
11:50 AM

Result
Minute Order - No Hearing Held

01/12/2021 Motion for Summary Judgment ▾

Judicial Officer
Cherry, Michael A.

Hearing Time
9:30 AM

Result
Granted

Comment
Plaintiffs' Motion for Summary Judgment Regarding Their Breach of Contract Claims

Parties Present ▴

Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Graf, J. Rusty

Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Graf, J. Rusty

Defendant

Attorney: Graf, J. Rusty

01/28/2021 Order Granting Motion ▾

Comment
Order Granting Plaintiffs' Motion for Summary Judgment on Breach of Contract Claims

01/28/2021 Notice of Entry of Order ▾

Comment
Notice of Entry of Order

02/01/2021 Calendar Call ▾

Judicial Officer
Atkin, Trevor

Hearing Time
8:30 AM

Cancel Reason
Vacated

02/04/2021 Minute Order ▾

Judicial Officer
Barisich, Veronica M.

Hearing Time
3:00 AM

Result
Minute Order - No Hearing Held

02/08/2021 Jury Trial ▾

Judicial Officer
Atkin, Trevor

Hearing Time
9:00 AM

Cancel Reason
Vacated - per Order

02/09/2021 Pre Trial Conference ▾

Judicial Officer
Barisich, Veronica M.

Hearing Time
8:30 AM

Result
Matter Heard

Parties Present ▲

Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Graf, J. Rusty

Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Graf, J. Rusty

Defendant

Attorney: Graf, J. Rusty

02/09/2021 Motion to Adjudicate Attorney's Lien ▼

Comment
Black & LoBello's Motion to Adjudicate Attorneys' Lien for Plaintiff's Failure to Pay Fees and Costs

02/09/2021 Clerk's Notice of Hearing ▼

Comment
Notice of Hearing

02/10/2021 Motion for Entry of Judgment ▼

Comment
Plaintiffs' Motion for Entry of Judgment

02/11/2021 Clerk's Notice of Hearing ▼

Comment
Clerk's Notice of Hearing

02/11/2021 Order Setting Civil Bench Trial ▼

Comment
Order Setting Civil Bench Trial, Pretrial, and Calendar Call

02/17/2021 Order Shortening Time ▼

Comment
Plaintiff's Ex Parte Motion for Order Shortening Time on Plaintiff's Motion for entry of Judgment Pursuant to EDCR 2.26

02/18/2021 Notice of Entry of Order ▼

Comment
Notice of Entry of Order Shortening Time and Notice of Hearing

02/22/2021 Notice of Change of Hearing ▾

Comment
Notice of Change of Hearing

02/24/2021 Opposition to Motion ▾

Comment
Opposition to Plaintiffs' Motion For Entry of Judgment on OST

02/25/2021 Minute Order ▾

Original Type
Minute Order

Judicial Officer
Barisich, Veronica M.

Hearing Time
3:00 AM

Result
Minute Order - No Hearing Held

02/26/2021 Reply in Support ▾

Comment
Plaintiffs' Reply In Support Of Motion For Entry of Judgment

03/02/2021 Motion for Judgment ▾

Judicial Officer
Barisich, Veronica M.

Hearing Time
9:00 AM

Result
Granted

Comment
Plaintiffs' Motion for Entry of Judgment

Parties Present ▴
Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Graf, J. Rusty

Plaintiff

Attorney: Edwards, F. Thomas

Defendant

Attorney: Graf, J. Rusty

Defendant

Attorney: Graf, J. Rusty

03/02/2021 Notice of Non Opposition ▾

Comment
Notice of Non-Opposition to Black & Lobello Notice of Motion; Notice of Attorneys' Lien and Motion to Adjudicate Attorneys' Lien for Defendants' Failure to Pay Fees and Costs, to Perfect Attorneys' Lien and Foreclosure on Attorneys' Lien

03/03/2021 Minute Order ▾

Judicial Officer
Barisich, Veronica M.

Hearing Time
3:00 AM

Result
Minute Order - No Hearing Held

Comment
Plaintiff's Motion for Entry of Judgment

03/04/2021 Order ▾

Comment
Order Granting Black and Lobello Notice of Attorney's Lien and Motion to Adjudicate Attorneys' Lien for Client's Failure to Pay Fees and Costs to Perfect Attorneys' Lien and Foreclose on Attorney's Lien

03/08/2021 Calendar Call ▾

Judicial Officer
Barisich, Veronica M.

Hearing Time
8:30 AM

Cancel Reason
Vacated

03/08/2021 Notice of Entry of Order ▾

Comment
Notice of Entry of Order Granting Black and Lobello Notice of Attorneys' Lien' and Motion to Adjudicate Attorneys' Lien for Client's Failure to Pay Fees and Costs, to Perfect Attorneys' Lien and Foreclose on Attorney's Lien

03/09/2021 Order Granting Motion ▾

Comment
Order Granting Motion for Entry of Judgment

03/09/2021 Judgment ▾

Comment
Judgment Against Defendants Bour Enterprises, LLC, Mulugeta Bour and Hilena Mengesha

03/09/2021 Notice of Entry of Order ▾

Comment
Notice of Entry of Order

03/09/2021 Notice of Entry of Judgment ▾

Comment
Notice of Entry of Judgment

03/15/2021 Bench Trial ▾

Judicial Officer
Barisich, Veronica M.

Hearing Time
9:00 AM

Cancel Reason
Vacated - per Order

03/15/2021 Memorandum of Costs and Disbursements ▾

Comment
Memorandum of Costs and Disbursements

03/16/2021 Motion ▾

Judicial Officer
Barisich, Veronica M.

Hearing Time
9:00 AM

Cancel Reason
Vacated - per Order

Comment
Black & LoBello's Motion to Adjudicate Attorneys' Lien for Plaintiff's Failure to Pay Fees and Costs

03/16/2021 Pre Trial Conference ▾

Judicial Officer
Barisich, Veronica M.

Hearing Time
11:00 AM

Cancel Reason
Vacated - per Order

04/12/2021 Calendar Call ▾

Judicial Officer
Barisich, Veronica M.

Hearing Time
8:30 AM

Cancel Reason
Vacated - per Order

04/19/2021 Bench Trial ▾

Judicial Officer
Barisich, Veronica M.

Hearing Time
9:00 AM

Cancel Reason
Vacated - per Order

Financial

4520 Arville

Total Financial Assessment				$1,150.00
Total Payments and Credits				$1,150.00
5/15/2019	Transaction Assessment			$270.00
5/15/2019	Efile Payment	Receipt # 2019-29814-CCCLK	4520 ARVILLE	($270.00)
5/15/2019	Transaction Assessment			$450.00

5/15/2019	Efile Payment	Receipt # 2019-29971-CCCLK	4520 ARVILLE	($450.00)
7/13/2020	Transaction Assessment			$30.00
7/13/2020	Efile Payment	Receipt # 2020-37277-CCCLK	4520 Arville	($30.00)
11/10/2020	Transaction Assessment			$200.00
11/10/2020	Efile Payment	Receipt # 2020-63634-CCCLK	4520 Arville	($200.00)
12/1/2020	Transaction Assessment			$200.00
12/1/2020	Efile Payment	Receipt # 2020-67712-CCCLK	4520 Arville	($200.00)

Bour Enterprises LLC

Total Financial Assessment	$536.00
Total Payments and Credits	$536.00

6/20/2019	Transaction Assessment			$446.00
6/20/2019	Efile Payment	Receipt # 2019-37811-CCCLK	Bour Enterprises LLC	($446.00)
7/16/2019	Transaction Assessment			$90.00
7/16/2019	Efile Payment	Receipt # 2019-43384-CCCLK	Bour Enterprises LLC	($90.00)

McKinley Manor

Total Financial Assessment	$0.00
Total Payments and Credits	$0.00

EXHIBIT "3"

Electronically Filed
1/5/2021 2:22 PM
Steven D. Grierson
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 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 **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.**
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,	

Plaintiffs/Counterdefendants, 4520 Arville, a California general partnership; and McKinley Manor, an Idaho general partnership (collectively "Plaintiffs"), by and through their

HOLLEY DRIGGS

Case Number: A-19-794864-C

attorneys of record, the law firm of Holley Driggs, hereby submit this reply in support of their Motion for Summary Judgment Regarding Contract Claims.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Defendants do not dispute that they abandoned their leases ("Leases") of Plaintiffs' commercial premises (the "Premises") early and without authorization, causing Plaintiffs' damages. Absent any legal justification for doing so, Defendants are unquestionably liable for breaching the Leases. Thus, as their *only* argument in defense of Plaintiffs' claims, Defendants have proffered the unsupportable argument that they were constructively evicted as a result of Plaintiffs' alleged breach of implied warranty of habitability for failing to clean up the "dust and debris" at the Premises. *Id.* Defendants assert that this "constructive eviction" excused their performance under the Leases.

Because of the "as-is" provisions found in the Leases, however, the only way Defendants can show that they were constructively evicted based upon Plaintiffs' alleged failure to clean up the Premises is to show that such action or inaction on the part of Plaintiffs breached an *implied* warranty of habitability that somehow overcame Defendants' express agreement to accept the Premises in an "as-is" condition.[1] Despite Defendants' hollow arguments to the contrary, Plaintiffs have demonstrated that there is no implied warranty of habitability in the commercial context under Nevada law.

Thus, with no implied warranty of habitability imposed in commercial leases under Nevada law, and signed Leases which expressly place the responsibility of custodial upkeep on the Defendants, Defendants are foreclosed from demonstrating—as a matter of fact or law—that a constructive eviction has occurred such that Defendants are relieved from liability for their unauthorized early abandonment of their Leases.

[1] Notably, Defendants were well aware of the condition of the Premises when they signed the 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.

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This Reply will debunk a series of myths concocted by Defendants in a last-ditch attempt to confuse the issues and create a genuine dispute of material fact for trial where none exists:

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 #2: Plaintiffs' presentation of Nevada landlord/tenant statutes, Nevada Supreme Court case law, and persuasive case law from various districts is insufficient to support Plaintiffs' argument that there is no implied warranty of habitability in the commercial context in Nevada.

Myth #3: The "as-is" clauses of the leases are invalid pursuant to NRS 104—*the UCC statute.*

Once these easily refuted myths are set aside, the remaining issues are determinative: Defendants failed to set forth any admissible evidence to overcome Plaintiffs' Motion for Summary Judgment and create a genuine dispute of fact for trial, and therefore the Court must enter summary judgment in Plaintiffs' favor on their breach of contract claims.

I. LEGAL ARGUMENT

Defendants' Opposition fails to set forth any authority supporting their argument that the implied warranty of habitability applies in the commercial context in Nevada, and similarly fails to dispute any facts or present any evidence demonstrating that Defendants did not breach their Leases with Plaintiffs. *See* Opposition. Thus, with none of the facts in dispute, the Court is left with *only* two issues to resolve—both of which are *legal* questions that may be resolved by the Court at summary judgment: (1) does the implied warranty of habitability apply in the commercial context?; and (2) if it does, is such implied warranty enforceable despite the "as-is" clauses in the Leases? Because the answer to both of these legal questions is "no," this Court should grant the instant Motion and enter summary judgment in favor of Plaintiffs on their breach of contract claims.

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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[2]), 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).

[2] 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).

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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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2. ***Myth #2: Plaintiffs' presentation of Nevada landlord/tenant statutes, Nevada Supreme Court case law, and persuasive case law from various districts is insufficient to support Plaintiffs' argument that there is no implied warranty of habitability in the commercial context in Nevada.***

Reality: The various authorities presented by Plaintiffs, when read together, confirm that there is no implied warranty of habitability in the commercial context in Nevada, and Defendants have presented no authority to the contrary.

Defendants take issue with the Nevada case law presented by Plaintiffs' in support of their Motion because the Court did not explicitly hold in any of those cases that the implied warranty of habitability does not apply in the commercial context. *See* Opposition at 6–8, 18–20. While this is true (as the Nevada Supreme Court has never addressed this issue one way or the other), this Court should not be misled by Defendants' attempts to misconstrue these authorities.

The key point illustrated by the Nevada case law cited by Plaintiffs is the simple reality that the Nevada Supreme Court has *never* found a constructive eviction occurred in the commercial context based on a breach of the implied warranty of habitability where the commercial lease did not *expressly* require the action and/or inaction of the landlord. *See* Motion at 10–11 (collecting cases/authority). Rather, in all the Nevada cases discussing constructive eviction from a commercial property, the Nevada Supreme Court found that the constructive eviction occurred based on the landlord's breach of a specific lease provision. *Id.* Defendants have not presented, and Plaintiffs are not aware of, any Nevada case in which a constructive eviction was found to have occurred based solely on the commercial landlord's breach of any *implied* warranty of habitability. *See* Opposition. Thus, it stands to reason that the Nevada Supreme Court has purposely declined to apply the doctrine in the commercial context.

Contrary to Defendants' position, then, this Court would not "expand[] the legal protections in place for landlords" by declining to apply the implied warranty of habitability doctrine to a scenario in which it has *never before been applied*. *See* Opposition at 14–15. Rather, the greater act of "judicial activism" would be for this Court to expand the applicability of the 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[3], 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)).[4]

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[3] 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.

[4] 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. Teliscope Productions, Ltd.*, 378 N.Y.S.2d 553, 554 (App. Term 1975); *Davidow v. Inwood N. Prof'l 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.

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- **Nevada Case Law.** Nevada case law regarding constructive eviction, demonstrating that the Nevada Supreme Court follows the majority rule and does *not* apply the implied warranty of habitability in the commercial context. *See* Motion at 12–13.

Thus, while this Court may consider the ample persuasive authority presented by Plaintiffs, as demonstrated above, there is also considerable Nevada authority supporting Plaintiffs' argument that the implied warranty of habitability does not apply in the commercial context, and thus cannot shield Defendants from liability for their breaches of the Leases under their constructive eviction theory.

3. Myth #3: The "as-is" clauses of the leases are invalid pursuant to NRS 104—the UCC statute.

Reality: The Nevada statute governing UCC law is inapplicable to commercial leases of real property, and therefore Defendants have presented no authority to suggest that the "as-is" clauses are invalid.

Defendants dedicate several pages of their summary judgment opposition to their failed argument that the "as-is" clauses in the Leases are invalid because they are allegedly not "conspicuous," as defined under NRS 104.1201—the *UCC* statute. *See* Opposition at 15–18. First, NRS 104 (Uniform Commercial Code – Original Articles) unquestionably applies only to sale of goods transactions, and not to leases of real property. *See generally* NRS 104.1101 *et seq.* Therefore, the provisions of NRS 104 have no bearing on the validity of the "as-is" clauses in the Leases. "The U.C.C. thus not only clearly limits the application of implied warranties of merchantability and fitness for purpose to sales of goods, but it defines a sale of goods in a manner which precludes a residential lease agreement from being considered as such since the residential lease agreement contains neither a sale nor a good." *Miley v. Harmony Mill Ltd. P'ship*, 803 F. Supp. 965, 969 (D. Del. 1992). *See also, Ritchey v. Patt*, 431 Pa. Super. 219, 222, 636 A.2d 208, 210 (1994) (holding that Article 2 of the UCC did not apply to an action for the alleged breach of lease of real property).

Nonetheless, in this case, the "as-is" provisions are found on the very first page (as the very first term!) of the concurrently signed Lease Addendums that Defendants signed when they leased

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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 COMMERCIALLY 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

material fact for trial). Now that Plaintiffs have debunked Defendants' constructive eviction defense as a matter of law (their *sole* defense to Plaintiffs' breach of contract claims), the only question remaining is whether Plaintiffs satisfied their burden at summary judgment to show that Defendants are liable for breach of the Leases. They unquestionably have.

In their Motion, Plaintiffs presented sufficient evidence to satisfy all the elements of a breach of contract claim based on Defendants' early, unauthorized abandonment of their Leases. Indeed, among other things, Plaintiffs presented (1) signed copies of the Leases (and the guaranties and addendums thereto), which explicitly state that abandoning the Premises and failing to pay rent are breaches thereof; (2) Plaintiffs' Declaration affirming that Defendants vacated the Premises on or about May 8, 2018 (prior to the end of the Leases' term); and (3) ledgers denoting the unpaid rent owed by Defendants under the Leases. *See* Motion at 3–7.

This presentation satisfies Plaintiffs' initial burden under NRCP 56 to set forth evidence demonstrating that no genuine dispute of material fact exists for trial on Plaintiffs' breach of contract claims. *See Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029, 1031 (Nev. 2005) (*quoting* NRCP 56(c)). "When a motion for summary judgment is made and supported as required by NRCP 56, the non-moving 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." *Wood*, 121 Nev. at 731, 121 P.3d at 1030–31 (internal quotations and citations omitted) (emphasis added). If the nonmoving party fails to introduce admissible evidence showing a genuine issue of material fact, the entry of summary judgment is appropriate. *Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 872–73, 265 P.3d 698, 700 (2011) ("Choy did not present any specific facts or affidavits demonstrating the existence of a genuine issue supporting his claim that Ameristar owned or operated the Ameristar Casino Hotel Kansas City. The district court, therefore, properly granted Ameristar's motion for summary judgment."); *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671, 262 P.3d 705, 715 (2011) ("Francis submitted no affidavits or admissible evidence to rebut 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 Nevada*, 123 Nev. 598, 604, 172 P.3d 131, 135 (2007) (Because the

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"opposition failed to introduce admissible evidence of specific facts showing that a genuine factual issue exists for trial," the Nevada Supreme Court "affirm[ed] the district court's order granting summary judgment.").

Critically, in their Opposition, Defendants make *no* argument and cite *no* evidence disputing the fact that they abandoned their leases early and without authorization, and failed to pay rent payments due and owing under the Leases.[5] *See* Opposition. Defendants' failure to direct the Court to *any* evidence demonstrating that they did not breach their Leases of the Premises means that Defendants have failed to create a genuine dispute of material fact for trial.[6] Accordingly, this Court must grant the instant Motion and enter summary judgment in Plaintiffs' favor on their breach of contract claims. *See Wood*, 121 Nev. at 731, 121 P.3d at 1030–31.

II. CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court grant the instant motion and enter summary judgment in Plaintiffs' favor on their breach of contract claims.

Dated this 5th day of January, 2021.

HOLLEY DRIGGS

/s/ F. Thomas Edwards
F. THOMAS EDWARDS, ESQ.
Nevada Bar No. 9549
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Las Vegas, Nevada 89101

Attornevs for Plaintiffs/Counterdefendants

[5] Defendants also did not address Plaintiffs' argument with respect to the additional parking spots Defendants requested prior to abandoning the Premises. *See* Opposition. Therefore, Defendants concede any points related to this argument. *See* NRCP 56(e)(2) (the Court may consider facts undisputed where a party fails to properly address an opposing party's assertion of fact).

[6] 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.

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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:

Rusty Graf, Esq.
BLACK & LOBELLO
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/s/ Sandy Sell
An employee of HOLLEY DRIGGS

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NOAS
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Attorney 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.	Case No.: A-19-794864-C Dept. No.: 8 **NOTICE OF APPEAL**
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,	

BLACK & WADHAMS
10777 W. Twain Avenue, 3rd Floor
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(702) 869-8801 FAX: (702) 869-2669

Case Number: A-19-794864-C

NOTICE IS HEREBY GIVEN that Defendants/Counterclaimants Bour Enterprises, LLC, Mulugeta Bour and Hilena Mengesha, by and through their attorney of record, Rusty Graf, Esq. of the law firm Black & Wadhams, appeals to the Supreme Court of the State of Nevada from the Order granting Plaintiffs/Counterdefendants' Motion for Entry of Judgment filed in the above-captioned matter on March 9, 2021 with Notice of Entry filed March 9, 2021, and from the Judgment entered March 9, 2021 with Notice of Entry of Judgment field March 9, 2021.

Dated this 24 day of March 2021.

BLACK & WADHAMS

#15271

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CERTIFICATE OF E-SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & WADHAMS and that on the 24th day of March 2021, the above and foregoing document entitled **DEFENDANTS/COUNTERCLAIMANTS' NOTICE OF APPEAL** was 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

[X] 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.
Jessica M. Lujan, Esq.
HOLLEY DRIGGS
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.

Diane Meeter
An Employee of Black & Wadhams

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