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a body corporate for and on behalf of  
Arizona State University*

**COPY**



JAN 27 2020

CLERK OF THE SUPERIOR COURT  
R. MERINO  
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ARIZONA BOARD OF REGENTS, an  
Arizona body corporate, for and on behalf of  
Arizona State University

Plaintiff,

v.

REHAB BURGER THERAPY 2, LLC an  
Arizona limited liability company; AARON  
and DENISE NELSON, individually and  
jointly as husband and wife; KENNETH and  
JULIE LIKEWISE, individually and jointly as  
husband and wife; and WILEY ARNETT III  
and PAULA C. ARNETT, individually and as  
husband and wife

Defendants.

No. **CV2020-001220**

**COMPLAINT**

Plaintiff Arizona Board of Regents, an Arizona body corporate, for and on behalf of Arizona State University (the "Board of Regents"), for its complaint against Defendants Rehab Burger Therapy 2, LLC, ("Rehab Burger 2"), Aaron and Denise Nelson ("the Nelsons"), Kenneth and Julie Likewise ("the Likewises"), and Wiley Arnett III and Paula C. Arnett ("the Arnetts") (Rehab Burger 2, the Nelsons, the Likewises, and the Arnetts are collectively referred to herein as "Defendants") alleges as follows:

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## Rehab Burger 2 Breaches the Lease Agreement

11. Wiley Arnett, as a member of Rehab Burger 2, signed on behalf of Rehab Burger 2 a retail lease agreement dated January 1, 2016 with the Board of Regents (the "Brickyard Lease Agreement") to operate a restaurant at the Brickyard on Mill in Tempe, Arizona.

12. A true and correct copy of the Brickyard Lease Agreement is attached hereto as Exhibit A and incorporated herein by this reference.

13. Article 1 of the Brickyard Lease Agreement sets forth the basic terms of the lease, such as the calendar term, the rent, any additional fees owed, and the default interest rate, among other terms.

14. Article 1.10 of the Brickyard Lease Agreement provides that the term of the lease shall be from January 1, 2016 "continuing approximately 120 months until December 31, 2025."

15. Article 1.12 of the Brickyard Lease Agreement provides for the base rent for the leased premises as shown below

PERIOD	RATE PER SOUARE FOOT	MONTHLY	ANNUAL
1/1/2016 - 12/31/2016	\$20.00	\$0.00	\$0.00
1/1/2017 - 12/31/2017	\$20.60	\$4,944.00	\$59,328.00
1/1/2018 - 12/31/2018	\$21.22	\$5,092.32	\$61,107.84
1/1/2019 - 12/31/2019	\$21.85	\$5,245.09	\$62,941.08
1/1/2020 - 12/31/2020	\$22.51	\$5,402.44	\$64,829.31
1/1/2021 - 12/31/2021	\$24.76	\$5,942.69	\$71,312.24
1/1/2022 - 12/31/2022	\$25.50	\$6,120.97	\$73,451.61
1/1/2023 - 12/31/2023	\$26.27	\$6,304.60	\$75,655.15
1/1/2024 - 12/31/2024	\$27.06	\$6,493.73	\$77,924.81
1/1/2025 - 12/31/2025	\$27.87	\$6,688.55	\$80,262.55

16. Additionally, Article 1.14 of the Brickyard Lease Agreement provides that Rehab Burger 2 shall be responsible for its proportionate share of the CAM expenses, defined as the prorated shares of the expenses and costs to operate the building in which Rehab Burger 2 had its restaurant under the lease.

17. Article 1.15 of the Brickyard Lease Agreement provides that Rehab Burger 2

1 was required to pay a \$9,600.00 security deposit, which would be applied against any  
2 outstanding rent or charges or late fees in the event Rehab Burger 2 failed to perform its  
3 obligations thereunder.

4 18. Article 1.16 of the Brickyard Lease Agreement provides that Rehab Burger 2  
5 was required to pay a parking fee of \$40.00 per space per month for three parking spaces  
6 granted to it thereunder.

7 19. Article 1.20 of the Brickyard Lease Agreement provides that the contractual  
8 interest rate in the event of default is twelve percent (12%) per annum on all amounts due  
9 under the Brickyard Lease Agreement.

10 20. Article 16 of the Brickyard Lease Agreement provides that events of default  
11 thereunder include, among other things, the failure of Rehab Burger 2 to pay rent when due,  
12 and Rehab Burger 2 vacating or abandoning the leased premises.

13 21. Article 16.2 of the Brickyard Lease Agreement provides a list of remedies  
14 available to landlord, the Board of Regents, in the event of Rehab Burger 2's default  
15 thereunder.

16 22. Under Article 16.2(c) of the Brickyard Lease Agreement, the Board of  
17 Regents is entitled to terminate the Brickyard Lease Agreement upon Rehab Burger 2's  
18 default, by giving notice of such termination to Rehab Burger 2.

19 23. Under Article 16.2(d) of the Brickyard Lease Agreement, upon Rehab Burger  
20 2's default, the Board of Regents is entitled to relet the premises without terminating the  
21 lease, and collect and apply the rent from such reletting to offset any amount owed by Rehab  
22 Burger 2.

23 24. Article 16.2 also provides that Rehab Burger 2 shall be responsible and  
24 financially liable to the Board of Regents for any additional costs incurred by the Board of  
25 Regents in enforcing its rights and remedies under the Brickyard Lease Agreement,  
26 including but not limited to reasonable attorneys' fees.

27 25. Article 16.3 of the Brickyard Lease Agreement provides that if it is terminated  
28 by the Board of Regents pursuant to paragraph 16.2, Rehab Burger 2 shall remain liable for

1 “(a) any Rent and damages which may be due or sustained prior to such termination, all  
2 reasonable costs, fees and expenses including, but not limited to, reasonable attorneys’ fees,  
3 costs and expenses incurred by [the Board of Regents] in pursuit of its remedies hereunder  
4 [...] and (b) additional damages (the ‘Liquidated Damages’), which shall be an amount  
5 equal to the Rent which, but for termination of this lease, would have become due during  
6 the remainder of the Lease Term, less the amount of Rent, if any, which [the Board of  
7 Regents] shall receive during such period from other to whom the Leased Premises may be  
8 rented.”

9 26. On information and belief, Rehab Burger 2 breached the Brickyard Lease  
10 Agreement by:

11 (i) failing to pay rent, and the applicable late fees and charges, when due;

12 (ii) failing to pay rent, and the applicable late fees and charges, after the Board  
13 of Regents notified Rehab Burger 2 of its default when the parties entered into an  
14 amendment to the lease in February 2019; and

15 (iii) vacating the leased premises in October 2019.

16 27. On January 14, 2019, the Board of Regents sent a notice of failure of tenant  
17 to pay rent and notice of landlord inspection of premises (the “Notice of Failure”) to Rehab  
18 Burger 2 and the other defendants as guarantors of the Brickyard Lease Agreement.

19 28. A true and correct copy of the Notice of Failure is attached hereto as Exhibit  
20 B and incorporated herein by this reference.

21 29. In compliance with the provisions of the Brickyard Lease Agreement, the  
22 Notice of Failure alerted Rehab Burger 2 and the guarantors that Rehab Burger 2 had failed  
23 to pay rent and late charges and fees when due and that there was an outstanding balance of  
24 \$66,901.30 due.

25 30. Following the Notice of Failure, the Board of Regents, Rehab Burger 2, and  
26 the guarantors negotiated an amendment to the Brickyard Lease Agreement.

27 31. On February 27, 2019, the Board of Regents and Rehab Burger 2, through its  
28 members Wiley Arnett III, Denise Nelson, and Kenneth L. Likewise, entered into the First

1 Amendment to the Brickyard Lease Agreement ("First Amendment").

2 32. A true and correct copy of the First Amendment is attached hereto as Exhibit  
3 C and incorporated herein by this reference.

4 33. In the First Amendment, the Board of Regents agreed to temporarily forbear  
5 from exercising its remedies under the Brickyard Lease Agreement and agreed to  
6 restructure certain payment obligations from Rehab Burger 2.

7 34. The Board of Regents' obligations under the forbearance and restructuring  
8 were conditioned upon Rehab Burger 2's compliance with the terms of the First  
9 Amendment.

10 35. Section 5 of the First Amendment reserved the Board of Regents' rights, upon  
11 any failure by Rehab Burger 2 to fulfill its obligations thereunder, to terminate the  
12 forbearance and exercise all rights and remedies under both the First Amendment and the  
13 Brickyard Lease Agreement.

14 36. On or around August 5, 2019, Rehab Burger 2 defaulted again on its payment  
15 obligations under both the First Amendment and the Brickyard Lease Agreement, failing to  
16 pay the rent and all other amounts due.

17 37. On October 4, 2019, the Board of Regents sent a notice of default and notice  
18 of landlord retaking the premises (the "Notice of Default") to Rehab Burger 2 and the other  
19 named defendants as guarantors of the Brickyard Lease Agreement.

20 38. A true and correct copy of the Notice of Default is attached hereto as Exhibit  
21 D and incorporated herein by this reference.

22 39. In compliance with the provisions of the Brickyard Lease Agreement, the  
23 Notice of Default alerted Rehab Burger 2 and the guarantors that Rehab Burger 2 had failed  
24 to pay rent and late charges and fees when due, had vacated or abandoned the leased  
25 premises or ceased to conduct its usual and customary business on the leased premises, and  
26 that there was an outstanding balance of \$85,677.43 due, including late fees, charges, and  
27 the application of the default interest rate of 12% under the Brickyard Lease Agreement.

28 40. On November 1, 2019, the Board of Regents sent a notice of termination of

1 lease (the "Termination Notice") to Rehab Burger 2 and the other named defendants as  
2 guarantors of the Brickyard Lease Agreement.

3 41. A true and correct copy of the Termination Notice is attached hereto as  
4 Exhibit E and incorporated herein by this reference.

5 42. In compliance with the provisions of the Brickyard Lease Agreement, the  
6 Termination Notice informed Rehab Burger 2 and the guarantors that the Board of Regents  
7 had elected to terminate the lease, effective immediately and was pursuing its available  
8 remedies as further described in the Notice of Default.

9 43. Rehab Burger 2 has failed to make any payments on the outstanding balance  
10 under the Brickyard Lease Agreement to date and has not responded to the Notice of Default  
11 or the Termination Notice.

12 44. Any cure period has expired and the Board of Regents is entitled to exercise  
13 all of its rights and remedies against Rehab Burger 2 regarding the Brickyard Lease  
14 Agreement.

15 **The Nelsons, the Likewises, and the Arnetts Breached the Guaranty.**

16 45. As part of the consideration for the Board of Regents to enter into the  
17 Brickyard Lease Agreement, Aaron and Denise Nelson, Kenneth and Julie Likewise, and  
18 Wiley Arnett III and Paula C. Arnett all signed a personal guaranty for the lease, which was  
19 attached to the lease as exhibit G (the "Guaranty"). The Nelsons, the Likewises, and the  
20 Arnetts are collectively referred to herein as the "Guarantors", and each, a "Guarantor".

21 46. A true and correct copy of the Guaranty is attached hereto as Exhibit F and  
22 incorporated herein by this reference.

23 47. The Guarantors each guaranteed Rehab Burger 2's performance under the  
24 Brickyard Lease Agreement, and each of the Guarantors are jointly and severally liable for  
25 any obligations and liabilities of Rehab Burger 2 arising out of the Brickyard Lease  
26 Agreement.

27 48. Under Section 6 of the Guaranty, the Guarantors each waived all requirements  
28 as to presentment for payment and demand and notice of acceptance or default.

49. Under Section 9 of the Guaranty, the Guarantors each agreed to pay reasonable attorneys' fees and costs incurred by the Board of Regents in connection with enforcement of the Guaranty.

50. The Guarantors have failed and refused to pay the amounts due under the Guaranty and the Brickyard Lease Agreement.

51. Any applicable notice or cure periods have expired, and the Board of Regents is entitled to exercise all of its rights and remedies against the Guarantors regarding the Guaranty.

**COUNT I**

## BREACH OF LEASE AGREEMENT

**(Against Defendant Rehab Burger 2)**

52. Plaintiff restates and incorporates by reference the allegations of Paragraphs 1 through 51 above.

53. The Brickyard Lease Agreement is a valid, binding, and enforceable contract between the Board of Regents and Rehab Burger 2.

54. Rehab Burger 2 breached the Brickyard Lease Agreement by failing to timely pay the amounts due thereunder, and by vacating the premises prior to the expiration of the term of the Brickyard Lease Agreement.

55. Rehab Burger 2's breaches caused the Board of Regents to incur damages in an amount not less than \$524,225.03, or such other greater amount to be proven at trial, plus pre- and post-judgment interest at the rate specified in the Brickyard Lease Agreement, attorneys' fees, and costs.

56. Under the Brickyard Lease Agreement, Rehab Burger 2 agreed to pay the Board of Regents' attorneys' fees, legal expenses, and court costs in the event that Rehab Burger 2 breached the Brickyard Lease Agreement.

57. The Board of Regents is entitled to recover its attorneys' fees and costs pursuant to the Brickyard Lease Agreement, A.R.S. §§ 12-341 and 12-341.01, and any other applicable contract, law, statute or rule.



58. Pursuant to Articles 16.2 and 16.3 of the Brickyard Lease Agreement, the Board of Regents is entitled to an award of its post-judgment attorneys fees, in an amount subject to application to and approval by this Court, incurred in pursuing and enforcing its rights and remedies encompassed within any judgment this Court enters in the Board Of Regents' favor.

## COUNT II

## BREACH OF GUARANTY

**(Against Defendants Nelson, Likewise, and Arnett)**

59. Plaintiff restates and incorporates by reference the allegations of Paragraphs 1 through 58 above.

60. Each of the Guarantors entered into the Guaranty, which constitutes a valid, binding, and enforceable contract.

61. By letter dated January 14, 2019 and October 4, 2019, the Board of Regents notified the Guarantors of Rehab Burger 2's default including but not limited to Rehab Burger 2's default for failure to pay all amounts due under the Brickyard Lease Agreement, and demanded that the Guarantors cure the defaults.

62. The Guarantors have failed to perform under the Guaranty by, among other things, failing and refusing to pay all amounts due thereunder and under the Brickyard Lease Agreement.

63. The Board of Regents performed all its obligations and duties required under the agreements between and among it, Rehab Burger 2, and the Guarantors, including but not limited to the Guaranty.

64. The Guarantors' failure to cure Rehab Burger 2's breaches of the Brickyard Lease Agreement constitutes a material breach of the Guaranty.

65. The Guarantors' breach has damaged the Board of Regents in at least the amount of \$524,225.03, to be proven at trial. The Board of Regents is entitled to recover its damages, attorneys' fees, and costs plus interest at the contract rate of Twelve Percent (12%) per annum under the Guaranty, A.R.S. §§ 12-341, 12-341.01, and any other

1 applicable contract, law, statute or rule.

2 66. Pursuant to the Brickyard Lease Agreement and Guarantors' guaranty of all  
3 amounts due thereunder, the Board of Regents is entitled to an award of its post-judgment  
4 attorneys' fees, in an amount subject to application to and approval by this Court, incurred  
5 in pursuing and enforcing its rights and remedies encompassed within any judgment this  
6 Court enters in the Board of Regents' favor.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff Arizona Board of Regents requests judgment to be  
9 entered against Defendants as follows:

10 A. In favor of Plaintiff Arizona Board of Regents and against Defendants Rehab  
11 Burger Therapy 2, LLC, Aaron and Denise Nelson, Kenneth L. and Julie S. Likewise, and  
12 Wiley Arnett III and Paula C. Arnett for Plaintiff's damages in at least the amount of  
13 524,225.03, to be proven at trial;

14 B. For prejudgment and post-judgment interest at the rate of Twelve Percent  
15 (12%) per annum as set forth in the Brickyard Lease Agreement, from the date of  
16 Defendants' default, January 14, 2019, until paid;

17 C. For Plaintiffs' taxable costs and attorneys' fees pursuant to the terms of the  
18 Brickyard Lease Agreement, the Guaranty, A.R.S. §§ 12-341, 12-341.01, and any other  
19 applicable contract, law, statute or rule;

20 D. For Plaintiff's post-judgment attorneys' fees and costs expended in enforcing  
21 its rights and remedies encompassed in any judgment this Court enters in Plaintiff's favor,  
22 subject to application to, and approval by, this Court; and  
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1 E. For such other and further relief as the Court and jury deem just and proper.

2 DATED January 27, 2020.

3 GALLAGHER & KENNEDY, P.A.

4  
5 By: 

6 Joseph E. Cotterman

7 Guillaume J. Aime

8 2575 East Camelback Road

9 Phoenix, Arizona 85016-9225

10 *Attorneys for Plaintiff*

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# **EXHIBIT A**

***RETAIL LEASE***

***ARIZONA BOARD OF REGENTS,  
a body corporate, for and on behalf of Arizona State University,***

***LANDLORD***

***AND***

***REHAB BURGER THERAPY 2, LLC,  
an Arizona limited liability company,***

***TENANT***

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## **RETAIL LEASE EXHIBITS**

The following drawings and special provisions are attached to the Lease as exhibits and made a part of this Lease.

EXHIBIT "A" – General site plan of the Building and the Project. Said site plan shows, among other things, the principal improvements which comprise the Building.

EXHIBIT "B" - Location and Dimensions of the Leased Premises

EXHIBIT "C" - Landlord's Work

EXHIBIT "D" – Tenant Improvements

EXHIBIT "D-1" – Retail Building Standard Specifications

EXHIBIT "E" – Rules and Regulations

EXHIBIT "F" - Estoppel Certificate

EXHIBIT "G" - Guaranty

EXHIBIT "H" – Confirmation of Rent Commencement Date and Other Terms

EXHIBIT "I" – Estimated First Year CAM Expenses Budget

EXHIBIT "J" – Prohibited Uses

## RETAIL LEASE

### **ARTICLE 1. - FUNDAMENTAL LEASE PROVISIONS AND DEFINITIONS**

- 1.1 **Effective Date:** January 1, 2016.
- 1.2 **Landlord:** ARIZONA BOARD OF REGENTS, a body corporate, for and on behalf of Arizona State University
- 1.3 **Landlord's Notice Address:** Arizona State University  
P.O. Box 873908  
Tempe, Arizona 85287-3908  
Attn: Real Estate Operations Director
- Rent payments shall be made payable to: **ASU-Brickyard Office Retail**, and mailed to:
- c/o Colliers International  
PO Box 4857  
Portland, Oregon 97208-4857
- 1.4 **Tenant:** Rehab Burger Therapy 2, LLC, an Arizona limited liability company
- 1.5 **Tenant's Trade Name:** Rehab Burger Therapy
- 1.6 **Tenant's Notice Address:** 7210 E. 2<sup>nd</sup> Street  
Scottsdale, AZ 85251  
Attn: Wiley Arnett  
Telephone No.: 480-621-5358  
Facsimile No.: 480-659-3640
- 1.7 **Guarantors:** Aaron E. Nelson and Denise Nelson, husband and wife; Kenneth L. Likewise and Julie S. Likewise, husband and wife; Wiley Arnett, III and Paula C. Arnett, husband and wife.
- 1.8 **Leased Premises:** Suite 146 on the first floor of the Building, consisting of approximately 2,880 rentable square feet, shown generally on **Exhibit "B"**, together with the seated patio area permitted pursuant to **Article 3** herein.
- 1.9 **Permitted Use:** Tenant shall use the Leased Premises solely for the purpose of a full service restaurant serving lunch and dinner (and occasionally brunch, at Tenant's discretion), whose primary menu includes gourmet burgers, beer, wine, and other alcoholic beverages. Nothing herein contained shall be construed as providing Tenant an exclusive right within the Project to conduct the Permitted Use.

- 1.10 Lease Term: Commencing on the Effective Date and continuing approximately 120 months until December 31, 2025.
- 1.11 Rent Commencement Date: January 1, 2017. Notwithstanding the foregoing, upon the Effective Date, Tenant shall pay Base Rent plus rental tax of 2.3% for month 1 of the second Lease Year in the amount of \$5,057.71, which amount will be held by Landlord, without interest, and applied to month 1 of the second Lease Year.

1.12 Base Rent:

<u>PERIOD</u>	<u>RATE PER SQUARE FOOT</u>	<u>MONTHLY</u>	<u>ANNUAL</u>
1/1/2016 - 12/31/2016	\$20.00	\$0.00	\$0.00
1/1/2017 - 12/31/2017	\$20.60	\$4,944.00	\$59,328.00
1/1/2018 - 12/31/2018	\$21.22	\$5,092.32	\$61,107.84
1/1/2019 - 12/31/2019	\$21.85	\$5,245.09	\$62,941.08
1/1/2020 - 12/31/2020	\$22.51	\$5,402.44	\$64,829.31
1/1/2021 - 12/31/2021	\$24.76	\$5,942.69	\$71,312.24
1/1/2022 - 12/31/2022	\$25.50	\$6,120.97	\$73,451.61
1/1/2023 - 12/31/2023	\$26.27	\$6,304.60	\$75,655.15
1/1/2024 - 12/31/2024	\$27.06	\$6,493.73	\$77,924.81
1/1/2025 - 12/31/2025	\$27.87	\$6,688.55	\$80,262.55

For this purpose, Year 1 starts on the Effective Date and ends one calendar year (that is, 365 or 366 days) later, but Year 1 shall continue to the end of the calendar month, if it would otherwise expire on a day other than the last day of a month.

All amounts are subject to adjustment based on the final square footage under Paragraph 2.2.

- 1.13 Percentage Rent: None
- 1.14 Tenant's Proportionate Share of CAM Expenses: Tenant shall pay its Proportionate Share of CAM Expenses (for the retail portion of the Building) beginning on the first day of the fourth (4<sup>th</sup>) month of the first Lease Year, and monthly thereafter. See Paragraph 6.2 and Exhibit "I".
- 1.15 Security Deposit: Concurrently with Lease execution, Tenant shall pay to Landlord a security deposit in the amount of \$9,600.00, which shall be held in accordance with Paragraph 5.5 herein.
- 1.16 Parking: Three (3) Parking Permits at the initial rate of \$40.00 per space per month. See Paragraph 8.7.

- 1.17 Tenant Improvements: None. Tenant accepts the Lease Premises in its "AS IS" condition as of the Effective Date as set forth in Exhibit "D".
- 1.18 Brokers: Tenant's Broker: Newmark Grubb Knight Frank  
Landlord's Broker: Collier's International
- 1.19 Late Fee: \$250.00 or five percent (5%) of the delinquent payment, whichever is more.
- 1.20 Default Interest Rate: Twelve percent (12%) per annum.
- 1.21 Dishonored Check/Payment Fee: \$250.00 per check/payment.
- 1.22 Option Terms: None.

Each reference in this Lease to any of the Fundamental Lease Provisions contained in this Article shall be construed to incorporate all of the terms provided under each such Fundamental Lease Provision. In the event of any conflict between any Fundamental Lease Provision and the balance of the Lease, the former shall control.

## **ARTICLE 2. – CERTAIN ADDITIONAL DEFINITIONS AND OTHER PROVISIONS**

### **2.1 Definitions.**

2.1.1. "**Building**" means the portions of the Bank of America Building within Condominium Unit 2 of the Project located at 21 East 6<sup>th</sup> Street, Tempe, Arizona. The Building is part of the Project.

2.1.2. "**Business day**" means all calendar days except Saturdays, Sundays and holidays recognized by the government of the State of Arizona or by the federal government of the United States of America. If any day on which performance is due hereunder occurs on a day that is not a business day, then the day for such performance shall occur on the next occurring business day.

2.1.3. "**City**" means the City of Tempe, Arizona.

2.1.4. "**Project**" means The Brickyard on Mill, a multiuse project composed of multiple buildings and an underground parking garage (the "**Garage**"), and a site plan of the Building and of the current layout of the Project is attached as Exhibit "A".

2.1.5. "**Expiration Date**" means the end of the Lease Term as provided in Paragraph 1.10, subject to Article 4 below.

2.1.6. "**Delivery Date**" means the date Tenant receives keys and access to the Leased Premises.

### **2.2 Confirmation Letter.**

Within ten (10) days of the occurrence of the Rent Commencement Date, the parties will enter into an Addendum to this Lease confirming such date, the Rent Commencement Date, Term and Expiration Date and the Base Rent pursuant to Exhibit "H" attached hereto. However, Tenant's failure to do so will not excuse or relieve Tenant from the requirement to timely pay Rent hereunder.

## 2.3 Exercise of Options to Extend the Lease Term.

[RESERVED]

### **ARTICLE 3. - LEASED PREMISES**

Landlord hereby leases unto Tenant and Tenant hereby leases and takes from Landlord, the Leased Premises for the Lease Term, for the Total Rent, and upon the covenants and conditions hereinafter set forth. Landlord shall deliver the Leased Premises to Tenant in their as-is condition. The Leased Premises do not include any facilities or area outside of such Leased Premises, including but not limited to exteriors of walls, the roof of the Building, the Garage, or any air space above the Building; provided, however, Landlord shall allow Tenant floor access penetrations for the duct through the Common Areas adjacent to the Leased Premises for installing Tenant's exhaust ducts and related equipment in a location to be approved by Landlord, such approval not to be unreasonably withheld. Subject to final approval by Landlord, and Tenant's compliance with all Applicable Laws, including, but not limited to, permitting and compliance with all applicable requirements of the City and of the Arizona Department of Liquor Licenses and Control, Tenant may operate an outdoor seated patio area adjacent to the Leased Premises. Such patio area is hereby deemed to be a part of and included within the definition of "Leased Premises".

### **ARTICLE 4.- LEASE TERM**

The Lease Term shall be as provided in Paragraph 1.10, ending upon the Expiration Date, plus any extensions of the Lease Term pursuant to the provisions of this Lease, unless this Lease is sooner terminated pursuant to its provisions. Notwithstanding the foregoing, all provisions of this Lease shall fully apply during any period after the Lease Term while Tenant occupies all or any portion of the Leased Premises, but the same shall not constitute a waiver of any of Landlord's rights or remedies as a result thereof or an agreement to extend or renew the Lease Term.

### **ARTICLE 5.- RENT**

The Tenant agrees to pay for the use and occupancy of the Leased Premises the sums of money determined as provided in this Article, at the times and in the manner provided:

#### 5.1 Rent Payable.

Tenant covenants and agrees to pay to Landlord as rent ("Rent") for the Leased Premises, all of the following ("Total Rent"):

- (a) the Base Rent specified in Paragraph 1.12. The Base Rent shall be applied against the Percentage Rent as provided below.
- (b) the Percentage Rent specified in Paragraph 1.13, for each calendar quarter of the Lease Year (as defined below) less the Base Rent paid for that quarter.
- (c) all additional sums, charges or amounts of whatever nature to be paid by Tenant to Landlord in accordance with the provisions of this Lease, including but not limited to Tenant's Proportionate Share of CAM Expenses (as defined in Paragraph 6.2), taxes on Rent, Late Fees, interest at the Default Interest Rate, and Dishonored Check/Payment Fees, whether or not such sums, charges or amounts are referred to as additional rent (collectively referred to as "Additional Rent").

5.2 Base Rent.

Base Rent shall be payable monthly on or before the first (1st) day of each calendar month during the Lease Term. The first monthly payment of Base Rent due hereunder shall be paid by Tenant on the Rent Commencement Date, as defined herein. Base Rent due for a period of less than a full month shall be prorated on the basis of a thirty-day month.

5.3 Percentage Rent.

[RESERVED]

5.4 "Lease Year" Defined.

The first "Lease Year" shall commence on the Effective Date and shall end on the last day of the next succeeding month of November. Thereafter, each Lease Year shall consist of successive periods of twelve (12) calendar months, commencing on the first (1st) day of December and ending on the thirtieth (30<sup>th</sup>) day of November of each calendar year. The last "Lease Year" shall commence on the first (1st) day of December and shall end on the Expiration Date.

5.5 "Gross Sales" Defined.

"Gross Sales" means the actual sales prices of all food, alcohol, goods, wares and merchandise sold or delivered, the total gross income from lease or similar activity, and the actual charges for all services performed by Tenant or by any subtenant, agent, licensee, concessionaire or any other person or entity in, at, from, or arising out of the use of the Leased Premises, whether for wholesale, retail, cash, credit, trade-in or otherwise, without reserve or deduction for inability or failure to collect. Gross Sales shall include, without limitation, sales and services (a) where the orders therefor originate in, at, from, or arise out of the use of the Leased Premises, whether delivery or performance is made from the Leased Premises or from some other place, (b) made or performed by mail, facsimile, telephone, or telegraph orders, or otherwise received or filled at the Leased Premises, (c) made or performed by means of mechanical or other vending devices in the Leased Premises, or (d) which Tenant or any subtenant, licensee, agent, concessionaire or other person in the normal and customary course of its business would credit or attribute to its operations in any part of the Leased Premises. Any deposit not refunded shall be included in Gross Sales. Each installment or credit sale shall be treated as a sale for the full price in the month during which such sale is made, regardless of whether or when Tenant receives payment therefor. Without limitation, no operating expense, capital expense, franchise, occupancy or capital stock tax and no income or similar tax based on income or profits shall be deducted from Gross Sales.

The following shall not be included in Gross Sales: (i) any exchange of merchandise between stores of Tenant where such exchange is made solely for the convenient operation of Tenant's business and not for the purpose of consummating a sale made in, at or from the Leased Premises, or for the purpose of depriving Landlord of the benefit of a sale which would otherwise be made in or at the Leased Premises, (ii) returns to shippers or manufacturers, (iii) cash or credit card refunds to customers on transactions (not to exceed the actual selling price of the item returned) otherwise included in Gross Sales, (iv) sales of trade fixtures, machinery and equipment after use thereof in the conduct of Tenant's business in the Leased Premises, (v) amounts collected and paid by Tenant to any government for any sales or excise tax, (vi) the amount of any discount on sales to employees while at work in the Leased Premises, (vii) the amount of any complimentary food and beverage provided to customers of the Leased Premises, and (viii) the amount of credit given for any price reduction coupons redeemed at the Leased Premises. Notwithstanding the foregoing, the amount of the exclusions described in Paragraphs 5.5 (vi), (vii) and

(viii) hereof shall not collectively exceed more than a total of one percent (1%) of Gross Sales in any Lease Year.

#### 5.6 Statements of Gross Sales.

Tenant shall deliver to Landlord: (a) within fifteen (15) days after the close of each calendar quarter of the Lease Term, a reasonably detailed written report signed by Tenant or by an authorized officer or agent of Tenant, showing the Gross Sales made in the preceding calendar quarter, broken down by department and by date and showing promotional and other discounts and employee sales and use, and (b) within sixty (60) days after the close of each Lease Year and within sixty (60) days after the termination of the Lease, a statement of Gross Sales for the preceding Lease Year which shall conform to the foregoing requirements and be in accordance with generally accepted accounting principles consistently applied. The annual statement shall be accompanied by the signed certificate of the corporate executive officer most familiar with Tenant's books and records stating specifically that (i) he has examined the report of Gross Sales for the preceding Lease Year, (ii) his examination included such tests of Tenant's books and records as he considered necessary or appropriate under the circumstances, (iii) such report presents fairly the Gross Sales of the preceding Lease Year, and (iv) the Gross Sales conform with and are computed in compliance with the definition of Gross Sales contained in Paragraph 5.5 hereof.

#### 5.7 Tenant's Records.

For the purpose of permitting verification by Landlord of any amounts due as Rent, Tenant will (i) cause the business upon the Leased Premises to be operated so that a duplicate sales slip, invoice or non-resettable cash register receipt, serially numbered, or such other device for recording sales as Landlord approves, shall be issued with each sale or transaction, whether for cash, credit or exchange, and (ii) preserve during the Lease Term, and shall keep, for at least three (3) years following the expiration of the Lease Term, at the Tenant Notice Address or the Leased Premises, a general ledger, required receipts and disbursement journals and such sales records and other supporting documentation, together with original books and records, which shall disclose all information required to determine Gross Sales and which shall conform to and be in accordance with generally accepted accounting principles consistently applied. At any time or from time to time after five (5) business days advance written notice to Tenant, Landlord or Landlord's Mortgagee, their agents and accountants, shall have the right during business hours to make any examination or audit of such books and records which Landlord or such Mortgagee may desire. If such audit shall disclose a liability in any Lease Year for Rent in excess of the Rent theretofore paid by Tenant for such period, Tenant shall promptly pay such liability. Should any such audit disclose an understatement of Gross Sales equal to or greater than three percent (3%) of reported Gross Sales, (i) Tenant shall, in addition, promptly pay the cost of audit, the Additional Rent and interest at the Default Interest Rate on all such Additional Rent then payable, accounting from the date such Additional Rent was due and payable, and (ii) an Event of Default shall be deemed to exist unless, within ten (10) days after Landlord shall have given Tenant notice of such liability, Tenant shall furnish Landlord with evidence satisfactory to Landlord demonstrating that such liability for Additional Rent was the result of good faith error on Tenant's part. Further, if such audit shall disclose that Tenant's records have not been maintained in accordance with the requirements of this Lease and, in the reasonable opinion of Landlord's independent Certified Public Accountant, are inadequate to disclose such Gross Sales, Landlord shall be entitled to collect, as Additional Rent, an equitable sum determined by such independent Certified Public Accountant to approximate the Percentage Rent payable by Tenant during the period in question, with any uncertainty caused by the inadequacy of such records to be resolved in favor of the Landlord, as well as such accountant's reasonable fees. If such audit shall disclose that Tenant's records, in Landlord's opinion, are inadequate to accurately reflect Tenant's Gross Sales, Landlord shall have the right to retain a consultant to prepare and establish a proper recording system for the determination of Tenant's Gross Sales and Tenant agrees that it shall use the system, books and

records prescribed by such consultant for such purpose. Tenant shall pay to Landlord, as Additional Rent, the fees and expenses of such consultant.

#### 5.8 Payment of Total Rent.

Tenant shall pay the Total Rent when due and payable, without any set-off, deduction or prior demand therefor whatsoever, in lawful money of the United States of America. Tenant shall not pay any Rent earlier than one (1) month in advance. Tenant hereby acknowledges that the late payment of Rent by Tenant to Landlord will cause Landlord to incur costs not contemplated in this Lease, the exact amount of which will be extremely difficult and impracticable to ascertain. Such costs include, but are not limited to, processing, administrative and accounting costs. Accordingly, if Tenant shall fail to pay any Rent within five (5) days after the same is due and unpaid, Tenant shall be obligated to pay a Late Fee for any Rent payment not paid when due. Such late charge represents a fair and reasonable estimate of the costs Landlord will incur by reason of late payment and Rent by Tenant. In addition, any Rent which is not paid within five (5) days after the same is due shall bear interest at the Default Interest Rate from the first day due until paid.

Any Additional Rent which shall become due shall be payable, unless otherwise provided herein, with the next monthly installment of Base Rent. Rent and statements required of Tenant shall be paid and delivered to Landlord during normal business hours, at the office of Landlord or at such other place as Landlord may from time to time designate in a notice to Tenant. Any payment by Tenant or acceptance by Landlord of a lesser amount than shall be due from Tenant to Landlord shall be treated as a payment on account, and further, the parties agree that the acceptance by Landlord of a check for a lesser amount with an endorsement or statement thereon, or upon any letter accompanying such check, that such lesser amount is payment in full, shall be given no effect, and Landlord may accept any lesser payment without prejudice to any rights or remedies which Landlord may have against Tenant, or release or waiver of same or of any default hereunder. Nothing herein obligates Landlord to accept less than full payment. Upon any check being dishonored by the bank or institution drawn upon, Tenant shall pay the Dishonored Check/Payment Fee, and Tenant shall be deemed to have not tendered the payment purportedly represented by the check.

#### 5.9 Security Deposit.

Upon execution of this Lease by Tenant, Tenant shall deliver to Landlord the Security Deposit, the same to be held as security for the performance by Tenant of all obligations imposed under this Lease which Tenant is required to perform. Landlord shall be entitled to apply the Security Deposit against any damages which it may sustain by reason of Tenant's failure to perform its obligations under this Lease, but such application shall not preclude Landlord from recovering greater damages if the same can be established. If the Security Deposit is so used, Tenant agrees to replenish same upon written demand. Upon expiration or termination of the Lease Term, any unapplied portion of the Security Deposit shall be promptly returned to Tenant. Landlord is not required to segregate any cash Security Deposit held by Landlord and may place the same in Landlord's general accounts. No interest shall be due to Tenant thereon or accrue to the benefit of Tenant.

#### 5.10 Taxes or Fees on Rent.

Tenant shall pay to Landlord any sales, transaction privilege, excise and other tax (not including, however, Landlord's income taxes), or any fee or payment in lieu of any such tax, with respect to the Leased Premises, paid or incurred by Landlord to the State of Arizona or any political subdivision thereof, or other taxing authority, upon any Rent payable hereunder, with each payment of Rent.



## **ARTICLE 6.- REAL AND PERSONAL PROPERTY TAXES; CAM EXPENSES**

### **6.1 Tenant's Personal Property Taxes.**

Tenant shall pay, before delinquency, to the appropriate taxing authority, all personal property taxes assessed against the personal property owned by it on or in connection with the Leased Premises. Landlord shall have no obligation to pay or reimburse Tenant for Tenant's personal property taxes on personal property used by it or in connection with the Leased Premises.

### **6.2 CAM Expenses.**

Tenant shall have the obligation to pay common area maintenance expenses for the Project in accordance with the following:

6.2.1. Tenant shall pay to Landlord, as part of Additional Rent, Tenant's Proportionate Share (as defined below) of the total amount of the annual CAM Expenses (as defined below).

6.2.2. "**Tenant's Proportionate Share**" means the rentable area of the Leased Premises divided by the rentable area of the retail portion of the Building. The rentable area of the Leased Premises and the Tenant's Proportionate Share will remain fixed throughout the Lease Term, regardless of future reconfigurations or other changes within the Building (excluding only changes in the proportion of retail and office space as provided below, Building additions or removals resulting from new Building construction, or permanent damage or destruction unrepaired, or condemnation of all or any portion of the Building). Office and retail areas of the Building are measured differently per industry customs, each determined pursuant to BOMA standards. The terms "rentable square feet", "rentable square foot" and "rentable square footage" as used in this Lease with respect to the Leased Premises shall mean "gross leasable area." From time to time, Landlord may convert office space in the Building to retail space, or vice versa. If that occurs, Tenant's Proportionate Share would be adjusted proportionately to reflect the increase or decrease in retail space in the Building.

6.2.3. "**CAM Expenses**" means all costs of operation, repair, maintenance and management of the retail component of the Building, including but not limited to real property taxes and assessments, taxes on leasehold improvements, personal property taxes levied on equipment, fixtures and other personal property of Landlord used in connection with the retail operation of the Building, and any other taxes, excluding Landlord's income taxes, levied by any federal, state, county, municipal or other governmental entity, whether assessed against Landlord and/or Tenant and/or the retail component of the Building; water and sewer charges; insurance premiums of any type, including but not limited to, fire and other casualty insurance, rent loss insurance and public liability insurance; utility expenses, including without limitation, expenses for gas, electricity and telephone; parking charges imposed by the City or other governmental entity and DTC assessments; janitorial expenses; expenses for landscaping and other services; costs, payments, dues or assessments of or contributions to any merchants' association, parking association or other type of association or promotional group or activity or promotional events in which Landlord elects or is obligated to participate; costs incurred in the management of the retail component of the Building, including without limitation, management fees; heating, ventilation and air conditioning and elevator maintenance and repair (excluding maintenance and repair of any elevator leased to a single tenant); the cost of supplies, materials, equipment and tools used in the operation, repair, maintenance and management of the retail component of the Building; the wages and salaries of the employees used in the operation, repair, maintenance and management of the retail component of the Building; costs for any onsite management office, including market rent therefor; expenditures for capital replacements of equipment and/or systems, or for improvements normally designated as capital improvements which improvements are either (a) made or installed for the purpose of reducing CAM Expenses or (b) imposed or required by or result from statutes or regulations, or interpretations thereof, promulgated by any

federal, state, county, municipal or other governmental body or agency of any type performing any governmental or other function or any successor agencies performing the same or similar functions, provided, however, the cost of any capital replacements of equipment or systems, or capital improvements, shall be amortized over the useful life to Landlord of such equipment, system or improvement according to generally accepted accounting principles and only the portion of such amortization applicable to any Lease Year shall be included as a CAM Expense for such Lease Year or partial Lease Year; and all other expenses of any type whether or not now customarily incurred or within the contemplation of the parties hereto. Expenses for the partial Lease Years at the beginning and end of the Lease Term shall be prorated in accordance with Landlord's customary practice.

The first year's estimated CAM Expenses budget is attached as **Exhibit "I"** for illustrative purposes only and (a) the budget is subject to change by Landlord at any time and (b) Landlord providing an estimated budget does not constitute a representation or warranty that expenses will, in total or in any line item, match the budget.

The Building contains office and retail components. Those Building expenses that are common for the entire Building (for example, exterior maintenance) will be divided between the office and retail components based on relative rentable square footages under Paragraph 6.2.2, with only the retail component's share included in CAM Expenses for this Lease. Those expenses which relate to services, facilities or functions for one component or the other (but not both) will be allocated entirely to that component and those allocated to the retail component will be included in CAM Expenses for this Lease. For example, retail tenants receive limited services, do not receive interior janitorial services and pay for their own electricity. Therefore, expenses for janitorial and electrical services for the office tenants will be entirely allocated to the office tenants and will not be included in CAM Expenses.

CAM Expenses further include the retail component's share of all amounts paid or incurred by Landlord with respect to the Building under or pursuant to (a) the Declaration of Covenants, Conditions and Restrictions for Brickyard on Mill Condominiums dated September 13, 1999, as amended, and the Articles, Bylaws and Rules of or adopted by Brickyard on Mill Condominium Association, as amended (the "Brickyard Condo Documents"), and (b) the "Parking Assessment" and any "O&M Costs" for the Building pursuant to the Permanent Parking Use License recorded October 15, 1999 in the official records of the Recorder's Office for Maricopa County, Arizona at Instrument No. 99-0950961, by which the Parking Garage is available to the Building's tenants and their customers (collectively, the "Brickyard Condo Expenses"). To the extent these charges affect more than the Building, the Building shall bear and be charged its proportionate share thereof, with that share to be allocated between the office and retail component per the square footages determined under Paragraph 6.2.2. The Building is part of Unit 2 of the Condominium. The estimated amount of these charges is included in the CAM Expenses budget shown on **Exhibit "I"**.

To the extent Landlord owns multiple buildings in the Project, some or all Operating Expenses for all buildings may be aggregated subject to the terms of this Lease with the Building to be allocated a proportionate share thereof based on rentable area.

As a financial incentive to the development of the Leased Premises and other portions of the Building and Garage, Landlord (or affiliates) receive an abatement or reduction in amounts which would otherwise be payable as real property taxes and assessments to the City, Maricopa County or other taxing authority during all or part of the Lease Term. Further, the property of Landlord (or affiliates) may be exempt from real property taxes and assessments during all or part of the Lease Term due to Landlord's (or its affiliates') status under Arizona law. Even though such tax abatement or exemption constitutes a financial benefit to Landlord (or affiliates), CAM Expenses shall be deemed to include, on a calendar year basis, an amount in lieu of such real property taxes and assessments (the "In Lieu Amount"), for so long

as Landlord (or affiliates) receive the real property tax abatement or exemption during the Lease Term. The current In Lieu Amount(s) are included in the CAM Expenses budget shown on Exhibit "T". For each subsequent Lease Year for which tax abatement or exemption applies, Landlord and Tenant agree that the Landlord will determine the estimated In Lieu Amount for the Lease Year based on the prior year's In Lieu Amount, increased for any estimated increased tax rates and estimated increased assessed values for comparable buildings and facilities in the City, and Landlord will adjust such estimate based on actual increased tax rates and increased assessed values when that information is publicly available; provided, however, that in no event will the increase be less than the increase in abated or exempted taxes for the Building and Garage if and to the extent fixed by the county assessor. After each Lease Year, the In Lieu Amount for such Lease Year included in CAM Expenses will be reconciled as part of the reconciliation of estimated and actual CAM Expenses.

6.2.4. Landlord shall give to Tenant prior to or during each Lease Year throughout the Lease Term an estimated CAM Expense Statement in which Landlord shall estimate the CAM Expenses for the calendar year (the "Estimated CAM Expense Statement"). Tenant's Proportionate Share of estimated CAM Expenses for the Lease Year as set forth on the Estimated CAM Expense Statement shall be divided by twelve (12) and one (1) such installment shall be paid concurrently with each Base Rent payment thereafter until receipt by Tenant of the next Estimated CAM Expense Statement. In addition, Tenant shall pay in full within thirty (30) days following receipt of the Estimated CAM Expense Statement an amount equal to the excess of the monthly installments required to be paid under the current Estimated CAM Expense Statement received by Tenant for the period covered thereby over the actual amount paid by Tenant for such period based on a prior estimate from Landlord. If less than ninety-five percent (95%) of the rentable area of the retail portion of the Building shall be occupied by tenants during the period covered by such estimate, CAM Expenses for such period shall be increased to an amount reasonably determined by Landlord to be equivalent to the CAM Expenses that would be incurred if occupancy would be at least ninety-five percent (95%) during such period.

6.2.5. After each Lease Year, Landlord shall calculate the actual CAM Expenses of the retail component of the Building and shall give Tenant notice of Tenant's proportionate share of the actual CAM Expenses ("Actual CAM Expense Statement"); provided that such CAM Expenses may be increased if less than ninety-five percent (95%) of the rentable area of the retail portion of the Building shall be occupied by tenants during the Lease Term as provided in Paragraph 6.2.4. If Tenant's Proportionate Share of the actual CAM Expenses for the past Lease Year as shown on Actual CAM Expense Statement is greater than the payments made by Tenant for the Lease Year, then within thirty (30) days following receipt by Tenant of the Actual CAM Expense Statement, Tenant shall pay in full an amount equal to such excess. If Tenant's Proportionate Share of the actual CAM Expenses for the past Lease Year as shown on the Actual CAM Expense Statement is less than the payments made by Tenant for that Lease Year, the amount of such overpayment shall be credited against the next payment of Tenant's Proportionate Share of CAM Expense falling due. Even if the Lease has expired or terminated, Tenant shall promptly pay the excess of Tenant's Proportionate Share for the portion of such year in which Tenant was in occupancy over the estimated CAM Expense payments made by Tenant for that Lease Year and, conversely, any overpayment made shall be promptly rebated by Landlord to Tenant.

6.2.6. Each Actual CAM Expense Statement shall be prepared in accordance with generally accepted accounting principles. Within ninety (90) days after its receipt of the Actual CAM Expense Statement, Tenant shall have the right, at its sole cost and expense, on reasonable notice to Landlord, to have its certified public accountant inspect the books and records of Landlord to the extent reasonably necessary to verify the actual CAM Expense Statements charges.

## **ARTICLE 7. - CONSTRUCTION; ALTERATIONS**

### **7.1 Construction by Landlord.**

Landlord has completed all improvements to or for the Leased Premises, such that all other improvements to be constructed in or for the Leased Premises shall be Tenant Improvements under Exhibit "D" attached hereto, and Tenant accepts the Leased Premises in their "as-is" condition.

### **7.2 Completion of the Tenant Improvements.**

Tenant shall, at its sole cost and expense, promptly initiate and diligently pursue the design and construction of the Tenant Improvements to be performed by Tenant pursuant to Exhibit "D", adopting a schedule which will permit Tenant to complete Tenant Improvements and open for business not later than sixty (60) days after the Delivery Date. Tenant shall complete the construction of Tenant Improvements and have a final certificate of occupancy issued therefor, and open for business as required by Article 8, on or before the expiration of sixty (60) days after the Delivery Date.

### **7.3 Alterations by Tenant.**

Tenant will not make any alterations, renovations, improvements or other installations in, on or to any part of the Leased Premises (including, without limitation, any alterations of the storefront, signs, structural alterations, or any cutting or drilling into any part of the Leased Premises or any securing of any fixture, apparatus, or equipment of any kind to any part of the Leased Premises) unless and until Tenant shall have caused plans and specifications therefor to have been prepared, at Tenant's expense, by an architect or other duly qualified person and shall have obtained Landlord's written approval thereof. If such approval is granted, Tenant shall cause the work (including the work described in Exhibit "D" attached hereto) described in such plans and specifications to be performed (without variance from the approved plans or specifications), at its expense, promptly, efficiently, competently and in a good and workmanlike manner by duly qualified and licensed persons or entities, without interference with or disruption to the operations of tenants or other occupants of the Project. All such work shall comply with all applicable codes, rules, regulations and ordinances. In designing and making any approved changes, Tenant will follow all building standard specifications (as referred to in Exhibit "D-1"), unless otherwise expressly agreed to by Landlord in writing. TENANT SHALL NOT MAKE OR ALLOW ANY PENETRATIONS OF OR HOLES IN ANY ROOFS, FLOORS OR WALLS WITHOUT LANDLORD'S EXPRESS WRITTEN CONSENT, AND COMPLYING WITH LANDLORD'S REQUIREMENTS THEREFOR IF CONSENT IS GIVEN. UNDER NO CIRCUMSTANCES MAY TENANT MAKE OR ALLOW ANY PENETRATION OF ANY CONCRETE SLAB OR CONCRETE CEILING AND TENANT WILL BE RESPONSIBLE FOR ALL DAMAGE TO THE BUILDING'S POST-TENSION SYSTEM OR OTHER DAMAGE RESULTING FROM CUTTING HIGH STRESS CABLING.

### **7.4 Mechanic's Liens.**

No work performed by Tenant pursuant to this Lease, whether in the nature of erection, construction, alteration or repair, shall be deemed to be for the immediate use and benefit of Landlord so that no mechanic's or other lien shall be allowed against the estate of Landlord by reason of any consent given by Landlord to Tenant to improve the Leased Premises. Tenant shall place the following contractual provisions in all contracts and subcontracts for Tenant's improvements: for Landlord's benefit, (a) to the extent legally available, no mechanic's liens will be asserted against Landlord's interest in the Leased Premises or the property of which the Leased Premises are a part; (b) notwithstanding anything in said contracts or subcontracts to the contrary, Tenant's contractors, subcontractors, suppliers and materialmen (hereinafter collectively referred to as "**Contractors**") will perform the work and/or furnish the required

materials on the sole credit of Tenant; (c) the Contractors will immediately discharge any such lien against the Leased Premises or Landlord's interest therein filed by any of the Contractor's suppliers, laborers, materialmen or subcontractors; and (d) the Contractors will indemnify and save Landlord harmless from any and all costs and expenses, including reasonable attorneys' fees, suffered or incurred as a result of any such lien against Landlord's interest that may be filed or claimed in connection with or arising out of work undertaken by the Contractors. Tenant shall pay promptly all persons furnishing labor or materials with respect to any work performed by Tenant or its Contractors on or about the Leased Premises, procuring lien waivers therefor which comply with Arizona Revised Statutes ("A.R.S.") § 33-1008. If any mechanic's or other liens shall at any time be filed against the Leased Premises or the property of which the Leased Premises are a part by reason of work, labor, services or materials performed or furnished, or alleged to have been performed or furnished, to Tenant or to anyone holding the Leased Premises through or under Tenant, and regardless of whether any such lien is asserted against the interest of Landlord or Tenant, within twenty (20) days of notice Tenant shall cause the same to be discharged of record or bonded to the satisfaction of Landlord. If Tenant shall fail to cause such lien to be so discharged or bonded, then, in addition to any other right or remedy of Landlord, Landlord may bond same, or discharge the same by paying the amount claimed to be due, and the amount so paid by Landlord, including reasonable attorneys' fees incurred by Landlord either in defending against such lien or in procuring the bonding or discharge of such lien, together with interest thereon at the Default Interest Rate, shall be due and payable by Tenant to Landlord as Additional Rent.

#### 7.5 Tenant's Trade Fixtures.

All leasehold improvements and real property fixtures (as distinguished from trade fixtures) installed in the Leased Premises at any time, whether by or on behalf of Tenant or Landlord, shall not be removed from the Leased Premises at any time, unless such removal is consented to in advance, in writing, by Landlord; and at the expiration of this Lease (either on the Expiration Date or upon such earlier termination as provided in this Lease), all such leasehold improvements and real property fixtures shall be deemed to be part of the Leased Premises, shall not be removed by Tenant when it vacates the Leased Premises, and title thereto shall vest solely in Landlord without payment of any nature to Tenant.

All trade fixtures owned by Tenant and located at the Leased Premises shall remain the property of Tenant and shall be removable at any time, including upon the expiration of the Lease Term, provided Tenant shall not at such time be in default of any terms or covenants of this Lease and that such removal would not prevent Tenant from discharging its operational obligations set forth herein, and provided, further, that Tenant shall repair any damage to the Leased Premises caused by the removal of said trade fixtures and apparatus and shall restore the Leased Premises to substantially the same condition as existed prior to the installation of said trade fixtures, reasonable wear and tear and damage caused by casualty or condemnation excepted. To protect Landlord in the event Tenant defaults hereunder, Tenant hereby grants to Landlord a security interest under the Arizona Uniform Commercial Code in all goods, inventory, equipment, fixtures and all personal property belonging to Tenant or in which Tenant has an interest which are or may be put into the Leased Premises during the Lease Term and all proceeds of the foregoing (the "**Personal Property**"). Tenant shall not remove any Personal Property from the Leased Premises unless Tenant replaces it with similar property of the same or greater value. Said security interest shall secure all amounts to be paid by Tenant to Landlord hereunder, including all costs of collection and other costs specified in this Lease, and any other indebtedness of Tenant to Landlord, as well as the performance of all other obligations of Tenant. Tenant agrees to sign and deliver to Landlord any financing statement, chattel mortgage or other security document requested by Landlord to effect or otherwise evidence such security interest. The security interest shall be a first priority security interest. The lien granted hereunder shall be in addition to any Landlord's lien that may now or at any time hereafter be provided by law, and may be enforced in any manner permitted by Arizona law. At Landlord's direction, Tenant shall remove any of its Personal Property remaining at the expiration of the

Lease Term, and if Tenant does not immediately do so, Landlord may do so with all reasonable costs therefor to be paid by Tenant to Landlord upon demand, and/or Landlord may deem abandoned to Landlord the Personal Property or any specific portions thereof designated by Landlord.

## **ARTICLE 8. - OPERATIONS**

### **8.1 Operations by Tenant.**

Tenant will at its expense use the Leased Premises for the Permitted Use and no other. Nothing herein shall be construed as providing Tenant exclusive right within the Building or Project to conduct all or any part of the Permitted Use.

Tenant will (a) keep the inside and outside of all glass in the doors, store fronts, and windows of the Leased Premises clean; (b) keep all exterior store surfaces of the Leased Premises clean; (c) replace promptly any cracked or broken glass of the Leased Premises with glass of like color, kind and quality; (d) maintain the Leased Premises in a clean, orderly and sanitary condition, free of insects, rodents, vermin and other pests; (e) keep any garbage, trash, rubbish or other refuse in rat-proof containers within the interior of the Leased Premises until removed; (f) have any apparatus free of vibration and noise which may be transmitted beyond the Leased Premises; (g) comply with and cause the Leased Premises to comply with all federal, state, regional, county, municipal and other governmental statutes, laws, rules, orders, regulations and ordinances (collectively, the "Laws") affecting any part of the Leased Premises, or the use and operation thereof for the Permitted Use, also including, but not limited to, those which require the making of any structural, unforeseen or extraordinary changes, whether or not any such statutes, laws, rules, orders, regulations or ordinances which may be hereafter enacted involve a change of policy on the part of the governmental body enacting the same, and all rules, orders and regulations of the National Board of Fire Underwriters, Landlord's casualty insurer(s) and other applicable insurance rating organizations or other bodies exercising similar functions in connection with the prevention of fire or the correction of hazardous conditions which apply to the Leased Premises (collectively, the "Applicable Laws"). Tenant shall continually maintain in full force and effect all certificates of occupancy, other permits and other approvals required for Tenant to fully conduct the Permitted Use. Further, Tenant shall use and authorize the use of the Common Area and Common Elements in a manner which complies with all Applicable Laws. If Tenant receives any notice of actual or potential violation of any law or demand for compliance therein, this Tenant will immediately provide Landlord with a copy of all materials received or, in the case of oral notices or demands, immediately give notice thereof to Landlord. Nothing contained herein shall require Tenant, at its sole cost and expense, to make any repairs which are otherwise required by this Lease to be made by Landlord unless such repairs are caused by the negligence or willful acts of Tenant, its agents, concessionaires, officers, employees, licensees, invitees or contractors; (h) light the exterior signs of the Leased Premises and turn the same off to the extent required by Applicable Laws; (i) comply with and observe and cause those present at the Leased Premises and/or Project with its express or implied consent to comply with and observe all rules and regulations established by Landlord from time to time which apply generally to all tenants in the Building and/or Project. The initial Rules and Regulations are attached hereto as Exhibit "E"; (j) comply with and observe and cause those present at the Leased Premises and/or Project with its express or implied consent to comply with and observe the Brickyard Condo Documents described in Paragraph 6.2; (k) maintain sufficient and seasonal inventory and have sufficient number of personnel to maximize sales volume in the Leased Premises; and (l) conduct its business in all respects in a dignified manner in accordance with high standards of store operation consistent with the quality of operation of the Building and/or Project, as determined by Landlord.

8.1.1. In regard to the use and occupancy of the Leased Premises, Common Areas and Common Elements, Tenant will not:

- (a) Place or maintain any merchandise, signage, trash, refuse or other articles in any vestibule or entry of the Leased Premises, on the footwalks or corridors adjacent thereto or elsewhere on the exterior of the Leased Premises, or otherwise obstruct any driveway, corridor, footwalk, parking area, mall or any other Common Area or Common Element;
- (b) Use or permit the use of any objectionable medium such as, without limitation, loudspeakers, phonographs, public address systems, sound amplifiers, or reception of radio or television broadcasts within the Project, which is in any manner audible or visible outside of the Leased Premises;
- (c) Permit undue accumulations of or burn garbage, trash, rubbish or other refuse within or without the Leased Premises;
- (d) Cause or permit objectionable odors in Landlord's opinion to emanate or to be dispelled from the Leased Premises;
- (e) Solicit business in any Common Area or Common Element;
- (f) Distribute handbills or other advertising matter in any Common Area or Common Element;
- (g) Receive or ship articles of any kind outside the designated loading areas for the Leased Premises;
- (h) Use the mall, corridor, or any other Common Area or Common Element for the sale or display of any merchandise or for any other business, occupation or undertaking;
- (i) Conduct or permit to be conducted any auction, fictitious fire sale, going out of business sale, bankruptcy sale;
- (j) Use or permit the use of any portion of the Leased Premises or the Project in a manner which will be in violation of any Law or for any activity of a type which is not generally considered appropriate for a first-class operation of the Permitted Use conducted in accordance with good and generally accepted standards of operation or which in any manner will interfere with or disturb other tenants' or occupants' quiet possession of their premises or conduct of their businesses;
- (k) Place a load upon any floor which exceeds the floor load which the floor was designed to carry;
- (l) Operate its heating or air-conditioning in such a manner as to drain heat or air-conditioning from the Common Areas, or other portion of the Building or from the premises of any other tenant or other occupant of the Building;
- (m) Use the Leased Premises or the Project for any unlawful or illegal business, use or purpose, or for any business, use or purpose which is immoral or disreputable (including without limitation "adult entertainment establishments" and "adult bookstores"), or in such manner as to constitute a nuisance of any kind (public or private), or for any purpose or in any way in violation of the certificates of occupancy (or other similar approvals of applicable governmental authorities);

- (n) Use or permit the use of the Leased Premises or the Project, or store, use or dispose of materials, chemicals or other property, in violation of any Laws related to environmental conditions or protection, occupational health and safety, public health and safety, hygiene, public nuisance or menace, or Hazardous Substances, as defined in environmental Laws, including, without limitation, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq., U.S.C. § 9600, et seq., the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. § 9600, et seq., the Toxic Substances Control Act, 15 U.S.C. § 2601, et seq., the Clean Air Act, 42 U.S.C. § 7401, et seq. and the Clean Water Act, 33 U.S.C. § 1251, et seq. (collectively, "Environmental Laws"); or
- (o) Allow the leakage or seepage of water or other liquids from the Leased Premises.

8.1.2. Tenant acknowledges that it is Landlord's intent that the Building be operated in a manner which is consistent with the highest standards of decency and morals prevailing in the community which it serves. Toward that end, Tenant agrees that it will not sell, distribute, display or offer for sale any item which, in Landlord's good faith judgment, is inconsistent with the quality of operation of the Building or may tend to injure or detract from the moral character or image of the Building within such community.

## 8.2 Signs and Advertising.

Tenant will not place or suffer to be placed or maintained on the exterior of the Leased Premises any sign, banner, advertising matter or any other thing of any kind, and will not place or maintain any decoration, letter or advertising matter on the glass of any window or door of the Leased Premises without the prior written approval of Landlord (including approval of the proposed method of attachment or installation of the sign) and without obtaining all required permits or approvals therefor, at Tenant's sole cost. Tenant will comply with all sign criteria of Landlord and/or the City. Notwithstanding the foregoing, Tenant may, with Landlord's prior written consent, submit an application to the City for a sign variance, which variance is subject to the City permitting and approval processes. Tenant will keep Landlord advised of the status of the Tenant's application for such variance, and will give Landlord prompt notice of any hearings related to such request. Tenant will, at its sole cost and expense, maintain any such sign, banner, decoration, lettering, advertising matter or other thing as may be permitted hereunder in good condition and repair at all times, and repair any damage caused by such sign or the removal thereof, and if Tenant does not do so, Landlord may do such work, or remove the sign, at the sole cost of Tenant.

## 8.3 Painting and Displays by Tenant.

Tenant will not paint or decorate any part of the exterior of the Leased Premises. Tenant will not paint or decorate any part of the interior of the Leased Premises visible from the exterior thereof, without first obtaining Landlord's written approval. All articles, and the arrangement, style, color and general appearance thereof, in the interior of the Leased Premises including, without limitation, window displays, advertising matter, signs, merchandise and store fixtures, shall be in keeping with the character and standards of the improvements within the Building and/or Project, as determined by Landlord. Landlord reserves the right to require Tenant to correct any non-conformity.

## 8.4 Storage and Office Areas.

Tenant shall use only such minor portions of the Leased Premises for storage and office purposes as are reasonably required therefor for the operation of the Permitted Use at the Leased Premises (and for no business located elsewhere). Tenant shall not, without Landlord's prior written consent, which Landlord



may withhold in its sole discretion, convert any sales area to nonpublic, storage or similar space, unless such change includes creation of new and equivalent sales space.

**8.5 Tenant's Trade Name.**

Unless otherwise approved by Landlord, Tenant shall conduct business in the Leased Premises only in Tenant's Trade Name.

**8.6 Operating Hours.**

Tenant shall cause its business of the Permitted Use to be conducted and operated in good faith and in such manner as shall assure the transaction of a maximum volume of business in and at the Leased Premises. Unless other hours are approved by Landlord in writing, during the Lease Term, Tenant shall cause the Leased Premises to be open for business for at least the minimum hours of 11:00 a.m. until 7:00 p.m. each Monday through Saturday, and from 12 p.m. until 5:00 p.m. each Sunday, and such additional hours as shall be seasonally adjusted as approved by Landlord, with reasonably sufficient staff, equipment and merchandise for the full conduct of such business. If Tenant shall fail to cause its business to be operated during the hours required in the preceding sentence, or as otherwise required by Landlord, in addition to any other remedy available to Landlord under this Lease, Tenant shall pay to Landlord, as Additional Rent and liquidated damages for such breach, a sum equal to One Hundred and 00/100 Dollars (\$100.00) for each hour or portion thereof during which Tenant shall fail to so operate. Tenant shall be entitled to cause its business to be closed for no more than six (6) holidays per Lease Year, which holidays shall include Easter, Thanksgiving and Christmas.

**8.7 Parking.**

All of the parking permits described in Paragraph 1.16 shall allow twelve (12) hour parking (that is, 9:00 a.m. to 9:00 p.m., seven days a week) excluding event days, in unreserved parking spaces in the Garage or in other City controlled downtown parking facilities to be determined from time to time, subject to all applicable rules and regulations, only by Tenant paying, when due, prevailing Garage monthly parking fees in effect from time to time. All unreserved parking spaces in the Garage are available on a first come, first served basis for users. Except for use of these two (2) permits, Tenant's employees shall not park in the Garage.

From time to time, Landlord may make available to Tenant a validation program for customer parking in the Project's underground garage. If Tenant participates therein, Tenant will be subject to all requirements thereof. If and for so long as the DTC Parking Program is available in the downtown Tempe area and Landlord elects for the Building to participate therein, Tenant will fully participate therein, as the same exists from time to time.

Landlord is not responsible for the interference by third parties with or non-availability of parking in any parking facility.

**8.8 Covenant Not to Compete.**

Tenant, its shareholders or other owners, and any Guarantor of Tenant's obligations hereunder each agree that they shall not, during the Lease Term, directly or indirectly, either as a principal, agent, manager, employee, owner, partner, stockholder, director, officer, trustee, consultant, or otherwise, engage in business similar to or in competition with the business engaged in by Tenant within a two (2) mile radius of the Leased Premises, or such smaller area and on such terms as a court of competent jurisdiction shall deem permissible to give effect to this Paragraph 8.8.

#### 8.9 Negative Covenant.

Tenant is expressly prohibited from engaging in any of the prohibited uses set forth in Exhibit "J", and operating a Banking Activity. For the purposes of this Lease, "**Banking Activity**" shall consist of any one or more or all of the following activities: (i) the taking of deposits of money (whether federally insured or not), storing money, lending money, providing financial services by automated machines, renting safe deposit boxes, providing lines of credit, or (ii) otherwise engaging in one or more financial activities that are generally associated with the operation of a federally or state insured bank, saving institution or credit union. The prohibitions of subparagraph (ii) shall not apply to (A) any retailers who sell merchandise or services on credit, (B) sales of insurance products by an insurance agency, (C) any title insurance and/or escrow company, or (D) any real state brokerage office; provided, however, that none of the foregoing are engaged in any of the activities prohibited under subparagraph (i).

### **ARTICLE 9. - REPAIRS**

#### 9.1 Repairs to be Made by Landlord.

Landlord, at its expense, will make, or cause to be made to the Leased Premises, structural repairs to exterior walls, structural columns, roof penetrations and structural floors which collectively enclose the Leased Premises (excluding without limitation, however, all doors, door frames, store fronts, windows and glass) provided, Tenant shall give Landlord reasonable notice of the necessity therefor and provided that the necessity therefor shall not arise from, nor shall be caused by, the negligence or willful acts of Tenant, its agents, concessionaires, officers, employees, licensees, invitees or contractors.

#### 9.2 Repairs to be Made by Tenant.

All repairs to the Leased Premises or any installations, equipment or facilities therein, other than those repairs required to be made by Landlord shall be made by Tenant at its expense. Without limiting the generality of the foregoing, Tenant will keep the interior of the Leased Premises, together with all electrical, plumbing and other mechanical installations therein and the heating, ventilating and air-conditioning system (including the heat pumps but excluding the two pipe chilled water system) in and/or serving the Leased Premises, in good order, condition and repair and will make all replacements from time to time required thereto at its expense. Tenant will surrender the Leased Premises at the expiration of the Lease Term or at such other time as it may vacate the Leased Premises broom clean and in as good condition as when acquired hereunder, excepting ordinary wear and tear and damage covered and paid by casualty insurance, and as further required by Paragraph 19.33 herein. Tenant will not overload the electrical wiring or other utilities serving the Leased Premises or within the Leased Premises, and will install at its expense, subject to the provisions of Paragraph 7.3, any additional electrical wiring or other utilities which may be required in connection with Tenant's requirements. Any damage or injury sustained by any person because of mechanical, electrical, plumbing or any other equipment or installations, whose maintenance and repair shall be the responsibility of Tenant, shall be paid for by Tenant, and Tenant hereby agrees to defend, indemnify and hold Landlord harmless for, from and against all claims, actions, damages and liability in connection therewith, including, but not limited to attorneys' and other professional fees and any other cost which Landlord might reasonably incur.

#### 9.3 Damage to Leased Premises.

Tenant will repair promptly at its expense any damage to the Leased Premises and, upon demand, shall reimburse Landlord (as Additional Rent) for the cost of the repair of any damage elsewhere in the Project, caused by Tenant or its agents, concessionaires, officers, employees, contractors, licensees or invitees, or arising from the activities of same or the installation or removal of property in or from the Leased

Premises, regardless of fault (unless caused by Landlord, its agents, employees or contractors). If Tenant shall fail to commence such repairs within five (5) days after notice to do so, Landlord may make or cause the same to be made and Tenant agrees to pay to Landlord promptly upon Landlord's demand, as Additional Rent, the cost thereof with interest thereon at the Default Interest Rate until paid.

#### **ARTICLE 10. - COMMON AREAS; COMMON ELEMENTS; CHANGES TO BUILDING AND PROJECT**

##### **10.1 Use of Common Areas and Common Elements.**

Landlord grants to Tenant and its agents, employees and customers, a non-exclusive license to use those areas of the Building made available by Landlord from time to time for the common use of all tenants in the Building (the "**Common Areas**") in common with others during the Lease Term, subject to the exclusive control and management thereof at all times by Landlord. As provided in the Declaration described in **Paragraph 6.2**, Tenant and its agents, employees and customers also have a license to use the general "**Common Elements**" of the Project. The Brickyard on Mill Condominium Association will control, maintain and operate the Common Elements as provided in the Declaration.

##### **10.2 Management and Operation of Common Areas.**

Landlord shall have the right to operate and maintain, or cause same to be operated and, maintained, the Common Areas in a manner deemed by Landlord to be reasonable and appropriate and in the best interests of the Project. Landlord shall have the right (i) to establish, modify and enforce reasonable rules and regulations with respect to the Common Areas; (ii) to enter into, modify and terminate easement and other agreements pertaining to the use and maintenance of the Common Areas; (iii) to close all or any portion of the Common Areas to such extent as may, in the opinion of Landlord, be necessary to prevent a dedication thereof or the accrual of any rights to any person or to the public therein; (iv) to close temporarily any or all portions of the Common Areas; and (v) to do and perform such other acts in and to said areas and improvements as Landlord shall determine to be advisable.

##### **10.3 Roof and Walls.**

Landlord shall have the exclusive right to use all or any part of the roof of the Leased Premises for any purpose; to erect additional stories or other structures over all or any part of the Leased Premises; to erect in connection with the construction thereof temporary scaffolds and other aids to construction on the exterior of the Leased Premises, provided that access to the Leased Premises shall not be denied; and to install, maintain, use, repair and replace within the Leased Premises structural components, pipes, ducts, conduits, wires and all other mechanical equipment serving other parts of the Building and/or Project, the same to be in locations within the Leased Premises as will not unreasonably deny Tenant's use thereof. Landlord may make any use it desires of the walls which are not on the interior of the Leased Premises, provided that such use shall not encroach on the interior of the Leased Premises.

##### **10.4 Changes and Additions to Building and/or Project.**

Landlord reserves the right at any time and from time to time to make or permit changes or revisions in the plan for the Building or the Project of which it is a part including changes in the Building name or address, additions to, subtractions from, rearrangements of, alterations to, modifications of, or supplements to, the Building areas, walkways, driveways, parking areas or other Common Areas or Common Elements, constructing additional improvements in the Building and/or Project, and/or alterations thereof or additions thereto, and constructing additional stories to the Building or any other building and buildings adjoining same; provided, however, that no such changes, rearrangements or other

construction shall negatively and materially affect access or to reduce the size of the Leased Premises or unreasonably impair access to or visibility of the same, or reduce the parking available to Tenant below that required by this Lease (although such parking may be relocated to be in any location within the Project site as determined by Landlord), unless such changes, rearrangements or other construction are required by law. Tenant agrees and acknowledges that any such work may result in inconvenience, temporary dislocations or relocations of parking, access, or other Common Areas, noise, dust and other consequences of construction, and the same shall not affect the parties' obligations under this Lease or entitle Tenant to any reduction of rent, damages or other remedies. Tenant further acknowledges that Landlord does not own all of the Building and/or Project and other owners of portions of the Building and/or Project may make changes, additions or revisions thereto, subject to the Declaration described in Paragraph 6.2 and City and other governmental requirements.

## **ARTICLE 11. - UTILITY SERVICES**

### **11.1 Tenant's Responsibility.**

Tenant shall contract with the appropriate Utility companies and services on or before the Delivery Date and promptly pay when due and prior to default for all public and other Utilities and related services separately metered and rendered or furnished to the Leased Premises during the Lease Term, including, but not limited to, water, gas, electricity, telephone, sewer, television services and trash charges (the "Utilities"), and shall keep the Leased Premises free and clear of any lien or encumbrance of any kind whatsoever created by Tenant's acts or omissions. Landlord may require Tenant to separately meter or submeter any Utility service and Tenant shall pay the costs of such meter or submeter, its installation and repair.

### **11.2 Landlord May Furnish.**

Landlord shall have the right, at its sole election at any time and from time to time, to provide and furnish all or part of Tenant's requirements for Utilities to the Leased Premises. In the event of such an election by Landlord, Tenant shall pay as Additional Rent each month to Landlord the actual charges for such services if known, or a monthly amount reasonably estimated by Landlord as one twelfth (1/12) of Tenant's projected annual Lease Year usage; provided, however, that the amount of such charge shall not be greater than the aggregate that Tenant would be charged for the same services if furnished to the Leased Premises by the Utility service which otherwise would furnish such service to the Leased Premises. Any appropriate adjustments to reflect actual charges shall be made between the parties at the end of each Lease Year. In addition, Landlord shall have the right, at its sole election at any time and from time to time, to make available to the Building and/or the Project a master cable, satellite, telephone or communication system. In such case, Tenant shall have the right to participate in such system by paying as Additional Rent each month to Landlord the charges determined by Landlord for use of such system.

### **11.3 Discontinuances and Interruptions of Utility Services.**

Landlord reserves the right to cut off and discontinue, upon notice to Tenant, furnishing any Utility services furnished, or caused to be furnished, by Landlord at any time when Tenant has failed to pay any amount (whether as Rent or otherwise) due under this Lease. Landlord shall not be liable for any damages resulting from or arising out of any such discontinuance and the same shall not constitute a termination of this Lease or an eviction of Tenant. Landlord shall not be liable to Tenant in damages or otherwise (i) if any Utility shall become unavailable from any public utility company, public authority or any other person or entity (excluding Landlord) supplying or distributing such Utility, or (ii) for any interruption in any Utility service (including, without limitation, any heating, ventilation, air-conditioning

or sprinkler) caused by casualty or the making of any repairs or improvements or by any cause beyond Landlord's reasonable control, and the same shall not constitute a termination of this Lease or an eviction of Tenant.

**11.4 Non-Payment by Tenant.**

Failure of Tenant to pay any of the charges described in this Article, whether to Landlord or the Utility provider, shall constitute a default under the terms hereof in like manner as failure to pay Rent when due.

**ARTICLE 12. - INDEMNITY AND INSURANCE**

**12.1 Indemnity by Tenant.**

Tenant shall and does hereby indemnify Landlord and its departments, agencies, boards, commissions, universities and its officers, officials, agents and employees ("Landlord's Associates") and agrees to save Landlord and Landlord's Associates harmless and, at Landlord's option, defend Landlord and Landlord's Associates for, from and against any and all claims (whether groundless or not), actions, damages, liabilities and expenses, including without limitation attorneys' and other professional fees, in connection with loss of life, personal injury and/or damage to property suffered by any person which is caused by Tenant, its officers, agents, contractors, employees, licensees and invitees, or which arises from or out of the business of Tenant or the occupancy or use by Tenant of the Leased Premises or any part thereof or of any other part of the Project, whether occasioned or alleged to be occasioned wholly or in part by any act or omission of Tenant, its officers, agents, contractors, employees or invitees.

**12.2 Landlord Not Responsible For Acts of Others.**

Landlord shall not be responsible or liable to Tenant, or to those claiming by, through or under Tenant, for any loss or damage which may be occasioned by or through the acts or omissions of persons in, or occupying leased space in, the Project or any part of any premises adjacent to or connecting with the Project, including the failure of such persons to perform their lease obligations, or for any loss or damage resulting to Tenant, or those claiming by, through or under Tenant, or its or their property, from the breaking, bursting, stoppage or leaking of electrical, water, gas, sewer, steam or other utilities' cable, wires, pipes or other equipment. To the maximum extent permitted by law, Tenant agrees to use and occupy the Leased Premises, and to use such other portions of the Project as Tenant is herein given the right to use, at Tenant's own risk.

**12.3 Tenant's Insurance.**

At all times after the Delivery Date, and at any time Tenant or its contractors or agents enter for construction of any of its improvements, Tenant will carry and maintain, at its expense, the following:

- (a) commercial (general) liability insurance policy (occurrence form), including bodily injury, property damage and broad form contractual liability coverage against assumed or contractual liability under this Lease with respect to any liability arising out of the ownership, use, occupancy or maintenance of the Leased Premises and all areas appurtenant thereto, including the Building and Project, and including without limitation the serving of alcohol therein, to afford protection with respect to personal injury, death or property damage of not less than One Million Dollars (\$1,000,000) per occurrence, Combined Single Limit with a Five Million Dollar (\$5,000,000) umbrella or excess liability policy. Such insurance must include "liquor liability protection", with the following coverage amounts:

- General Aggregate \$5,000,000
  - Products - Completed Operations Aggregate \$1,000,000
  - Personal and Advertising Injury \$1,000,000
  - Damage to Rented Premises (any one fire) \$500,000
  - Each Occurrence \$1,000,000
- (b) special form property and casualty insurance policy, including without limitation fire, sprinkler damage, and theft coverage, written at replacement cost value and with replacement cost endorsement, covering all of Tenant's personal property in the Leased Premises (including, without limitation, inventory, trade fixtures, floor coverings, furniture and other property removable by Tenant under the provisions of this Lease) and all leasehold improvements installed in the Leased Premises by or on behalf of Tenant pursuant to Exhibit "D" or otherwise.
- (c) comprehensive plate glass policy, if applicable;
- (d) if and to the extent required by law, Worker's Compensation and Employer's Liability policy, or similar insurance and other employee benefits in form and amounts required by law, but at least the following:
- Worker's Compensation Statutory
  - Employer's Liability
    - Each Accident \$1,000,000
    - Disease - Each Employee \$1,000,000
    - Disease - Policy Limit \$1,000,000
- (e) business income insurance, including Rent value, that will pay the Base Rent due hereunder, and the Additional Rent and Percentage Rent at the average monthly rate for the six (6) full calendar months immediately preceding the interruption, such insurance to cover interruptions caused by the usual and customary events described by such forms and shall include in any event interruption by fire, windstorm, theft, vandalism or other commonly insured casualty.
- (f) builder's risk insurance during all periods of construction of tenant improvements by Tenant or Tenant's contractor.

The deductible/retention for any policy may not exceed \$5,000 per incident, and Tenant will be solely responsible therefor. The insurance requirements herein are minimum requirements for this Lease and in no way limit the indemnity covenants contained in this Lease. Landlord in no way warrants that the minimum limits contained herein is sufficient to protect the Tenant from liabilities that might arise from this Lease. Tenant is free to purchase such additional insurance as Tenant deems necessary.

#### 12.4 Tenant's Contractor's Insurance.

Tenant shall require any contractor of Tenant performing work on the Leased Premises to carry and maintain, at no expense to Landlord, the following with deductibles/retentions no higher than \$5,000 per incident (for which Tenant and contractor will be solely responsible):

- (a) commercial (general) liability insurance policy, including contractor's liability coverage, contractual liability coverage, completed operations coverage, explosion and collapse, broad form property damage endorsement and contractor's protective liability coverage,

to afford protection, with respect to personal injury, death or property damage with limits of liability not less than those stated below:

- (i) General Aggregate (\$5,000,000);
- (ii) Products - Completed Operations Aggregate (\$1,000,000);
- (iii) Personal and Advertising Injury (\$1,000,000);
- (iv) Each Occurrence (\$1,000,000);
- (v) Blanket Contractual Liability - Written and Oral (\$1,000,000); and
- (vi) Damage to Rented Premises, fire legal liability (any one fire) (\$500,000);

Such insurance shall provide coverage for Landlord, Landlord's general contractor and sub-contractors against any and all claims for bodily injury, including death resulting therefrom, and damage to the property of others, whether such operations are performed by Tenant's general contractor, sub-contractors or any of their sub-contractors, or by anyone directly or indirectly employed by any of them. The policy shall name Landlord, Landlord's Associates and any mortgagees as additional insureds, and shall be primary and noncontributory for any damage or injury resulting from the activities of the contractor or subcontractors. The policy shall also contain a waiver of subrogation against Landlord and Landlord's Associates for losses arising from work performed by or on behalf of the contractor;

- (b) business automobile liability insurance policy, including the ownership, maintenance and operation of any automobile equipment, owned, hired and non-owned, with limits for each occurrence of not less than One Million Dollars (\$1,000,000) combined single limits coverage. Such insurance shall provide coverage against any and all claims for bodily injury, including death resulting therefrom, and damage to the property of others, arising from the operations under the contract, whether such operations are performed by Tenant's general contractor, sub-contractors, or any of their employees or by anyone directly or indirectly employed by any of them and shall be primary and noncontributory; and
- (c) worker's compensation insurance as required by law, and Employer's Liability insurance with limits of not less than Five Hundred Thousand Dollars (\$500,000.00) bodily injury by disease, per employee; \$500,000 bodily injury by disease, policy limit; and \$100,000 bodily injury by accident, per employee, or such greater amount as required by state law, together with any insurance required by any employee benefit acts or other statutes applicable where the work is to be performed, as will protect Tenant's contractors and sub-contractors from any and all liability under the aforementioned acts.

#### 12.5 Policy Requirements.

The company or companies writing any insurance which Tenant is required to carry and maintain or cause to be carried or maintained by Tenant's Contractors pursuant to the terms hereof, as well as the form of such insurance, shall at all times be subject to Landlord's approval, which shall not be unreasonably withheld, and any such company or companies shall be qualified to do business in the State of Arizona

with an "A.M. Best" rating of not less than A-VII. Landlord in no way warrants that the required minimum insurer rating is sufficient to protect Tenant from potential insurer insolvency. All liability policies shall name Landlord, Landlord's Associates and/or its designee(s) as additional insureds, and all property insurance policies shall name Landlord, Landlord's Associates and/or its designee(s) as an additional insured and loss payee as its interest may appear. All policies shall be primary and non-contributory. Each insurance policy required by the insurance provisions of this Lease shall not be suspended, voided, cancelled, reduced in coverage or in limits except after thirty (30) days prior written notice has been given to Landlord. Such notice shall be sent directly to Landlord and shall be sent by certified mail, return receipt requested. Within two (2) business days of receipt, Tenant (and Tenant's Contractor, as applicable) must provide notice to the State of Arizona (with a copy to Landlord) if Tenant (or Tenant's Contractor, if applicable) if they receive notice of a policy that has been or will be suspended, canceled, materially changed for any reason, has expired, or will be expiring. Such notice must be sent directly to the Arizona Department of Administration, Risk Management Section, 100 North 15th Avenue, Suite 301, Phoenix, AZ 85007, with a copy Landlord at the Landlord's notice address set forth in Article 18. Each such policy, or a certificate thereof, shall be deposited with Landlord and its designees by Tenant promptly upon commencement of Tenant's obligation to procure the same. If Tenant shall fail to perform any of its obligations under this Article, Landlord may perform the same and the cost of same shall be deemed Additional Rent and shall be payable upon Landlord's demand. Coverage provided by the Tenant's contractor shall not be limited to the liability assumed under the indemnification provisions of this Lease.

#### 12.6 Increase in Insurance Premiums.

Tenant will not do or suffer to be done, or keep or suffer to be kept, anything in, upon or about the Leased Premises which will violate Landlord's or Tenant's policies of property or liability insurance or which will prevent Landlord or Tenant from procuring such policies in companies acceptable to Landlord. Landlord and Tenant acknowledge and agree that the minimum rate of fire or other insurance on the Leased Premises is based upon the Permitted Use of the Leased Premises by Tenant and the method of operation of Tenant at the time of the execution of this Lease. If anything done, omitted to be done or suffered by Tenant to be kept in, upon or about the Leased Premises shall cause the rate of fire or other insurance on the Leased Premises or on other property of Landlord or of others within the Project to be increased beyond the minimum rate from time to time applicable to the Leased Premises or to any such property for the use or uses made thereof, Tenant will pay, as Additional Rent, the amount of any such increase upon Landlord's demand.

#### 12.7 Waiver of Subrogation.

Tenant hereby waives any and all rights of recovery, and any and all rights of subrogation that any of its insurers may have, against Landlord or Landlord's Associates for loss or damage to Tenant's property or the property of others under Tenant's control, where such loss or damage is covered by insurance benefiting the party suffering such loss or damage or was required to be insured against under any insurance policy required under this Lease. Tenant shall give notice to its insurance carriers that the foregoing waiver of subrogation is contained in this Lease.

#### 12.8 Verification of Coverage.

Contractor shall furnish Landlord with certificates of insurance (ACORD form or equivalent approved by the State of Arizona) evidencing that Contractor has the insurance required by this Lease. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.



All certificates and endorsements are to be received and approved by Landlord before the Commencement Date, and before any work commences. Each insurance policy required by this Lease must be in effect at or prior to the Commencement Date and must remain in effect for the duration of the Lease Term. Failure to maintain the insurance policies as required by this Lease or to provide timely evidence of renewal will be considered a material breach of the Lease. Landlord reserves the right to require complete, certified copies of all insurance policies and endorsements required by this Lease at any time.

#### 12.9 Approval.

Any modification or variation from the insurance requirements in this Lease must have prior approval from the State of Arizona Department of Administration, Risk Management Section, whose decision shall be final. Such action will not require a formal contract amendment, but may be made by administrative action.

### ARTICLE 13. - DAMAGE AND DESTRUCTION

#### 13.1 Landlord's and Tenant's Obligations to Repair and Reconstruct.

If the Leased Premises shall be damaged by fire, the elements, accident or other casualty (any of such causes being referred to herein as a "Casualty"), but the Leased Premises shall not be thereby rendered wholly or partially untenantable, Landlord shall promptly cause such damage to be repaired and there shall be no abatement of Rent. If, as the result of Casualty, the Leased Premises shall be rendered wholly or partially untenantable, then, subject to the provisions of Paragraph 13.2 below, Landlord shall cause such damage to be repaired, and Rent shall be abated as to the portion of the Leased Premises rendered untenantable during the period of such untenantability; provided, however, that such Rent may be paid from the business income insurance required under Paragraph 12.3(e) to the extent thereof. All such repairs shall be made at the expense of Landlord, but Landlord shall not be required to perform any work beyond appropriate repair of the Project and delivery to Tenant of the shell improvements substantially equivalent to the original shell improvements. Landlord shall not be liable for interruption to Tenant's business or for damage to or replacement or repair of Tenant's personal property (including, without limitation, inventory, trade fixtures, floor coverings, furniture and other property removable by Tenant under the provisions of this Lease) or to any leasehold improvements installed in the Leased Premises by or on behalf of Tenant pursuant to Exhibit "D" or otherwise, all of which damage, replacement or repair shall be undertaken and completed by Tenant at its cost promptly in coordination with Landlord.

#### 13.2 Landlord's Option to Terminate Lease.

If the Leased Premises are (a) rendered wholly untenantable, or (b) damaged as a result of any cause which is not covered by Landlord's insurance or (c) damaged or destroyed in whole or in part during the last three (3) years of the Term, or (d) if the Building in which the Leased Premises is located is damaged to the extent of twenty-five percent (25%) or more of the useable floor area in that Building, or (e) if the Project is totally or substantially damaged or destroyed and Landlord elects not to or cannot rebuild same as it affects the Building, then, in any of such events, Landlord may elect to terminate this Lease by giving to Tenant notice of such election within ninety (90) days after the occurrence of such event. If such notice is given, the rights and obligations of the parties shall cease as of the date of such notice, and Rent (other than any Additional Rent due Landlord by reason of Tenant's failure to perform any of its obligations hereunder which shall be payable in full) shall be adjusted as of the date of such termination.

### 13.3 Insurance Proceeds.

If Landlord does not elect to terminate this Lease pursuant to Paragraph 13.2 above, Landlord shall, subject to the prior rights of any Mortgagee, disburse and apply any insurance proceeds received by Landlord to the restoration and rebuilding in accordance with Paragraph 13.1 hereof, and Tenant shall do likewise with insurance proceeds received by it.

## ARTICLE 14. - CONDEMNATION

### 14.1 Effect of Taking.

If the whole or any part of the Leased Premises shall be taken under the power of eminent domain, this Lease shall terminate as to the part so taken on the date Tenant is required to yield possession thereof to the condemning authority. Landlord shall make, or cause to be made, such repairs and alterations as may be necessary in order to restore the part not taken to useful condition and all Rent (other than any Additional Rent due Landlord by reason of Tenant's failure to perform any of its obligations hereunder which shall be payable in full) shall be reduced in the same proportion as the portion of the leasable square footage of the Leased Premises is reduced. If the aforementioned taking renders the remainder of the Leased Premises materially unsuitable for the Permitted Use, either party may terminate this Lease as of the date when Tenant is required to yield possession by giving notice to that effect on or prior to the day thirty (30) days after such date. If twenty percent (20%) or more of the leasable square footage in the Building in which the Leased Premises are located is taken as aforesaid, then Landlord may elect to terminate this Lease as of or after the date on which Landlord is required to yield possession to the condemning authority, by giving notice of such election on or prior to the day ninety (90) days after such date, to be effective within said 90-day period. If any notice of termination is given pursuant to this Paragraph, this Lease and the rights and obligations of the parties hereunder shall cease as of the appropriate date and Rent (other than any Additional Rent due Landlord by reason of Tenant's failure to perform any of its obligations hereunder which shall be payable in full) shall be adjusted as of such date.

### 14.2 Condemnation Awards.

All compensation awarded for any taking of the Leased Premises or the Building or the Project or any interest therein shall belong to and be the property of Landlord, Tenant hereby assigning to Landlord all rights with respect thereto; provided, however, nothing contained herein shall prevent Tenant from applying for reimbursement from the condemning authority (if permitted by law) but not Landlord for moving expenses, or the expense of removal of Tenant's trade fixtures, or loss of Tenant's business good will, but only if such action shall not reduce the amount of the award or other compensation otherwise recoverable from the condemning authority by Landlord.

## ARTICLE 15. - ASSIGNMENTS AND SUBLETTING

### 15.1 Landlord's Consent Required.

15.1.1. Transfers. Tenant will not assign this Lease, in whole or in part, nor sublet all or any part of the Leased Premises, nor license concessions or lease departments therein, nor pledge or encumber by mortgage or other instruments its interest in this Lease (each individually and collectively a "transfer") without, in each instance, the prior written consent of Landlord (which consent Landlord may withhold in its sole and absolute discretion). This prohibition includes any transfer which would otherwise occur by operation of law, merger, consolidation, reorganization, transfer or other change of Tenant's corporate, partnership or proprietary structure. As a condition to approval, Landlord may impose such requirements as it deems appropriate concerning, without limitation, the matters referenced

in Paragraph 15.1.2 below, confirmation of use requirements, assumption of liability, guarantees, and recovery of transfer profits. Tenant will pay all reasonable costs, including attorneys' fees, incurred by Landlord with respect to any proposed transfer, whether or not approved by Landlord.

15.1.2. Assignment to Affiliate. Notwithstanding anything to the contrary contained in this Paragraph 15.1, provided Tenant is not then in default under any of the terms and conditions of this Lease, Tenant shall have the right to assign this Lease, without Landlord's consent but with prior notice to Landlord, to any parent, majority-owned subsidiary entity or controlled affiliate entity of Tenant or to the surviving entity in connection with a merger, consolidation or acquisition between Tenant and any of such parent, subsidiary or affiliate entity, provided (i) the net assets of the assignee entity shall not be less than the net assets of Tenant at the time of such assignment; (ii) such assignee shall continue to operate the business conducted in the Leased Premises under the same Tenant Trade Name and in the same manner as Tenant and pursuant to all of the provisions of this Lease; (iii) such assignee entity shall assume in writing (in a form approved by Landlord) all of Tenant's obligations hereunder with the consent of Tenant and any Guarantor and Tenant shall provide Landlord with a copy of such assignment and assumption; (iv) such assignee shall continue to remain a parent, subsidiary or affiliate entity of the Tenant executing this Lease; (v) Tenant and any Guarantor shall continue to remain liable on this Lease for the performance of all terms including, but not limited to, payment of Rent and other sums due under this Lease; and (vi) at all times thereafter, the assignee is under effective bona fide management control of Aaron E. Nelson, Kenneth L. Likewise, and Wiley Arnett, III.

#### 15.2 Transfer of Ownership Interests.

If Tenant is an entity (other than an entity the outstanding voting ownership interests of which are listed on a "national securities exchange", as defined in the Securities Exchange Act of 1934) and if, at any time after execution of this Lease, any part of the ownership interests shall be transferred by sale, assignment, bequest, inheritance, operation of law or other disposition (including, but not limited to, such a transfer to or by a receiver or trustee in federal or state bankruptcy, insolvency, or other proceedings) so as to result in a change in the present control of said entity by the person(s) now owning a majority of said ownership interests (whether in one or more transactions), Tenant shall give Landlord notice of such event, and whether or not Tenant has given such notice, Landlord may elect to terminate this Lease at any time thereafter by giving Tenant notice of such election, in which event this Lease and the rights and obligations of the parties hereunder shall cease as of a date set forth in such notice which date shall not be less than sixty (60) days after the date of such notice. In the event of any such termination, all Rent (other than any Additional Rent due Landlord resulting from Tenant's failure to perform any of its obligations hereunder which shall be payable in full) shall be adjusted as of the date of such termination. Notwithstanding anything in this Paragraph 15.2 to the contrary, a registered public offering (as defined by the Securities Act of 1933 and regulations promulgated thereunder) of the Tenant's ownership interests shall not be a default under this Lease.

#### 15.3 Acceptance of Rent from Transferee.

The acceptance by Landlord of the payment of Rent following any assignment or other transfer prohibited by this Article shall not be deemed to be a consent by Landlord to any such assignment or transfer nor shall the same be deemed to be a waiver of any right or remedy of Landlord hereunder.

#### 15.4 Transfer Not a Release.

Regardless of Landlord's consent, no subletting or assignment shall alter the primary liability of Tenant to pay the Total Rent or release Tenant of Tenant's obligation to perform all other obligations to be performed by Tenant hereunder unless Landlord's written consent shall so specifically provide, and

Landlord under no circumstances shall be obligated to release Tenant from any such liability. The acceptance of rent by Landlord from any other person shall not be deemed to be a waiver by Landlord of any provision hereof.

#### **ARTICLE 16. - DEFAULT**

##### **16.1 "Event of Default" Defined.**

Any one or more of the following events shall constitute an "Event of Default":

- (a) The failure of Tenant to pay any Rent or other sum of money within five (5) days after the same is due and unpaid hereunder.
- (b) Default by Tenant in the performance or observance of any covenant or agreement of this Lease (other than a default involving the payment of money), which default is not cured within ten (10) days after the giving of notice thereof by Landlord, unless such default is of such nature that it cannot be cured within such ten (10) day period, in which case no Event of Default shall occur so long as Tenant shall commence the curing of the default within such ten (10) day period and shall thereafter diligently and continuously prosecute the curing of same; provided, however, the matter shall be cured in thirty (30) days after notice in any event, and if Tenant shall default in the performance of any such covenant or agreement of this Lease at least two (2) times in any twelve (12) month period, then notwithstanding such defaults have each been cured by Tenant, any further similar default shall be deemed an Event of Default without the ability for cure. This provision shall not apply to or create any grace or cure period for Tenant's default under Paragraph 8.6 or Paragraph 12.8.
- (c) The sale of Tenant's interest in the Leased Premises under attachment, execution or similar legal process or, if Tenant is adjudicated a bankrupt or insolvent and such adjudication is not vacated within ten (10) days.
- (d) The filing of a voluntary petition proposing the adjudication of Tenant or any Guarantor of Tenant's obligations hereunder as a bankrupt or insolvent, or the reorganization of Tenant or any such Guarantor, or an arrangement by Tenant or any such Guarantor with its creditors, whether pursuant to the Federal Bankruptcy Act or any similar federal or state proceedings and the same is not withdrawn or dismissed within thirty (30) days after the date of filing.
- (e) The admission in writing by Tenant or any such Guarantor of its inability to pay its debts when due.
- (f) The appointment of a receiver or trustee for the business or property of Tenant or any such Guarantor, unless such appointment shall be vacated within ten (10) days of its entry.
- (g) The making by Tenant or any such Guarantor of an assignment for the benefit of its creditors, or if in any other manner Tenant's interest in this Lease shall pass to another by operation of law.

- (h) The vacating or abandonment of the Leased Premises by Tenant or the cessation of Tenant's usual and customary business thereat except as may be authorized by this Lease, at any time following the Rent Commencement Date.
- (i) The occurrence of any other event described as constituting an "Event of Default" elsewhere in this Lease.

## 16.2 Remedies.

Upon the occurrence of an Event of Default, Landlord, without notice to Tenant in any instance (except where expressly provided for below or by applicable law) may do any one or more, or a combination, of the following at any time and from time to time in whole or part:

- (a) Sell at public or private sale all or any part of the goods, chattels, fixtures and other personal property belonging to Tenant which are or may be put into the Leased Premises during the Lease Term, whether exempt or not from sale under execution or attachment (it being agreed that said property shall at all times be bound with a lien in favor of Landlord and shall be chargeable for all Rent and for the fulfillment of the other covenants and agreements herein contained) and apply the proceeds of such sale, first, to the payment of all costs and expenses of conducting the sale or caring for or storing said property (including all attorneys' fees), second, toward the payment of any indebtedness, including (without limitation) indebtedness for Rent, which may be or may become due from Tenant to Landlord, and third, to pay Tenant, on demand in writing, any surplus remaining after all indebtedness of Tenant to Landlord has been fully paid;
- (b) Perform, on behalf and at the expense of Tenant, any obligation of Tenant under this Lease which Tenant has failed to perform and of which Landlord shall have given Tenant notice, the cost of which performance by Landlord, together with interest thereon at the Default Interest Rate from the date of such expenditure, shall be deemed Additional Rent and shall be payable by Tenant to Landlord upon demand. Notwithstanding the provisions of this clause (b) and regardless of whether an Event of Default shall have occurred, Landlord may exercise the remedy described in clause (b) without any notice to Tenant if Landlord, in its good faith judgment, believes it would be materially injured by failure to take rapid action or if the unperformed obligation of Tenant constitutes an emergency;
- (c) Elect to terminate this Lease and the tenancy created hereby by giving notice of such election to Tenant, and reenter the Leased Premises, by summary proceedings or otherwise, and remove Tenant and all other persons and property from the Leased Premises, and store such property in a public warehouse or elsewhere at the cost of and for the account of Tenant without resort to legal process and without Landlord being deemed guilty of trespass or becoming liable for any loss or damage occasioned thereby;
- (d) Reenter the Leased Premises with or without process of law, change the locks thereon, and take possession of the same and of all equipment and fixtures of Tenant therein and expel or remove Tenant and all other parties occupying the Leased Premises using such force as may be reasonably necessary to do so without being liable for such reentry or for the use of such force and without terminating this Lease, and may at any time and from time to time relet the Leased Premises or any part thereof for the account of Tenant, for such term, upon such conditions and at such Rent as Landlord may deem proper. In such event Landlord may receive and collect the rent from such reletting and apply it against

any amounts due from Tenant hereunder (including without limitation such expenses as Landlord may have incurred in recovering possession of the Leased Premises, placing the same in good order and condition, altering or repairing the same for reletting, and all other expenses, commissions and charges, including, without limitation, attorneys' fees, which Landlord may have paid or incurred in connection with such repossession and reletting). Landlord may execute any lease in connection with the reletting in Landlord's name or in the name of Tenant as Landlord may see fit, and the tenant thereunder shall be under no obligation to see to the application by Landlord of any rent collected by Landlord nor shall Tenant have any right to collect any rent thereunder. Whether or not the Leased Premises are relet, Tenant shall pay Landlord all amounts required to be paid by Tenant up to the date of Landlord's reentry and thereafter Tenant shall pay Landlord, until the end of the Lease Term hereof, the amount of all Rent and other charges required to be paid by Tenant hereunder, as determined in accordance with Paragraph 16.3, less the proceeds of such reletting during the Lease Term hereof, if any, after payment of Landlord's expenses as provided above. Such payments by Tenant shall be due at such times as are provided elsewhere in this Lease, and Landlord need not wait until the termination of this Lease to recover them by legal action or otherwise. Landlord shall not by any reentry or other act be deemed to have terminated this Lease or the liability of Tenant for the total Rent hereunder unless Landlord shall give Tenant written notice of Landlord's election to terminate this Lease; or

- (e) Exercise any other legal or equitable right or remedy which it may have in whole or part, at any time and from time to time, all such rights and remedies being cumulative and not exclusive.

Any costs and expenses incurred by Landlord (including, without limitation, reasonable attorneys' fees) in enforcing any of its rights or remedies under this Lease shall be deemed to be Additional Rent and shall be repaid to Landlord by Tenant upon demand.

### 16.3 Damages.

If this Lease is terminated by Landlord pursuant to Paragraph 16.2, Tenant nevertheless shall remain liable for (a) any Rent and damages which may be due or sustained prior to such termination, all reasonable costs, fees and expenses including, but not limited to, reasonable attorneys' fees, costs and expenses incurred by Landlord in pursuit of its remedies hereunder, or in renting the Leased Premises to others from time to time (all such Rent, damages, costs, fees and expenses being referred to herein as "Termination Damages") and (b) additional damages (the "Liquidated Damages"), which shall be an amount equal to the Rent which, but for termination of this Lease, would have become due during the remainder of the Lease Term, less the amount of Rent, if any, which Landlord shall receive during such period from others to whom the Leased Premises may be rented (other than any Additional Rent received by Landlord as a result of any failure of such other person to perform any of its obligations to Landlord), in which case such Liquidated Damages shall be computed and payable in monthly installments, in advance, on the first day of each calendar month following termination of the Lease and continuing until the date on which the Lease Term would have expired but for such termination; any suit or action brought to collect any such Liquidated Damages for any month shall not in any manner prejudice the right of Landlord to collect any Liquidated Damages for any subsequent month by a similar proceeding.

For purposes of the calculation of any Rent which would have become due during the remainder of the Lease Term, and notwithstanding any other language herein, the Annual Percentage Rent shall be deemed equal to the average monthly payment of Annual Percentage Rent during the previous twelve

(12) months of the Lease Term (or such shorter period of time where less than a Lease Year may be applicable).

If this Lease is terminated pursuant to Paragraph 16.2, Landlord may relet the Leased Premises or any part thereof, alone or together with other premises, for such term(s) (which may be greater or less than the period which otherwise would have constituted the balance of the Lease Term) and on such terms and conditions (which may include commissions, concessions or free rent and alterations of the Leased Premises) as Landlord, in its sole discretion, may determine, but Landlord shall not be liable for, nor shall Tenant's obligations hereunder be diminished by reason of, any failure by Landlord to relet the Leased Premises or any failure by Landlord to collect any rent due upon such reletting.

Nothing contained in this Lease shall limit or prejudice the right of Landlord to seek and obtain, in proceedings for the termination of this Lease by reason of bankruptcy or insolvency, an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which, the damages are to be proved, whether or not the amount be greater, equal to, or less than the amount of the loss or damages referred to above. The failure or refusal of Landlord to relet the Leased Premises or any part or parts thereof shall not release or affect Tenant's liability for damages; provided, however, Landlord shall have an obligation to mitigate its damages to the extent required by law.

#### **ARTICLE 17. - SUBORDINATION AND ATTORNMENT**

##### **17.1 Subordination.**

Unless a Mortgagee (as hereinafter defined) shall otherwise elect as provided in Paragraph 17.2, Tenant's rights under this Lease are and shall remain subject and subordinate to the operation and effect of

- (a) any ground lease or superior lease of land only or of land with buildings in a transaction involving the Leased Premises or Landlord's interest therein, or
- (b) any mortgage, deed of trust or other security instrument constituting a lien upon the Leased Premises or Landlord's interest therein,

whether the same shall be in existence at the date hereof or created hereafter, any such lease, mortgage, deed of trust or other security instrument being referred to herein as a "Mortgage", and the party or parties having the benefit of the same, whether as lessor, mortgagee, trustee or noteholder, being referred to herein as a "Mortgagee." Tenant's acknowledgment and agreement of subordination provided for in this Paragraph are self-operative and no further instrument of subordination shall be required; however, Tenant shall execute such further assurances thereof as shall be requisite or as may be requested from time to time by Landlord or any Mortgagee.

##### **17.2 Mortgagee's Unilateral Subordination.**

If a Mortgagee shall so elect by notice to Tenant or by the recording of a unilateral declaration of subordination, this Lease and Tenant's rights hereunder shall be superior and prior in right to the Mortgage of which such Mortgagee has the benefit, with the same force and effect as if this Lease had been executed, delivered and recorded prior to the execution, delivery and recording of such Mortgage, subject, nevertheless, to such conditions as may be set forth in any such notice or declaration.

### 17.3 Attornment.

If any person shall succeed to all or part of Landlord's interest in the Leased Premises, whether by purchase, foreclosure, deed in lieu of foreclosure, power of sale, termination of lease or otherwise, and if so requested or required by such successor in interest, Tenant shall attorn to, and automatically become the lessee of, such successor in interest without any change in the terms or other provisions of this Lease, except that, in the case of foreclosure, deed in lieu of foreclosure or power of sale, such successor in interest shall not be bound by (i) any payment of Rent for more than one (1) month in advance, or (ii) any amendment or modification to this Lease made without the consent of Landlord's Mortgagee in question or any successor in interest, where such consent is required by Mortgagee or such successor in interest. Tenant shall execute such agreement in confirmation of such attornment as such successor in interest shall reasonably request.

### 17.4 Title Exceptions.

Tenant's rights under this Lease are and shall remain subject and subordinate to the operation and effect of all easements, restrictions, rights of way, covenants and other matters of record, as the same may be amended from time to time.

## **ARTICLE 18. - NOTICES**

### 18.1 Sending of Notices.

Any notice, request, demand, approval or consent given or required to be given under this Lease shall be in writing and shall be deemed to have been given when delivered if addressed to the party's notice address under Article 1 and personally delivered to the other party's notice address by messenger (with a signed receipt therefor) or recognized overnight courier, or when received at the telecopier number shown with the notice address (provided a machine generated receipt is retained to evidence the same and provided a confirmation copy is also mailed), or on receipt for notice mailed by United States registered or certified mail, return receipt requested, with all postage charges prepaid. Any notice to be given by any party hereto may be given by legal counsel for such party. Counsel for the parties may give simultaneous notice hereunder to the opposing party and its counsel. Either party may, at any time, change its address for the above purposes by sending a notice to the other party stating the change and setting forth the new address. Any refusal of a proper notice is deemed delivery.

### 18.2 Notice to Mortgagees.

If any Mortgagee shall notify Tenant that it is the holder of a Mortgage affecting the Leased Premises, no notice, request or demand thereafter sent by Tenant to Landlord shall be effective unless and until a copy of the same shall also be sent to such Mortgagee in the manner prescribed in Paragraph 18.1 and to such address as such Mortgagee shall designate.

## **ARTICLE 19. - MISCELLANEOUS**

### 19.1 Estoppel Certificates.

At any time and from time to time, within ten (10) days after Landlord shall request the same, Tenant will execute, acknowledge and deliver to Landlord and to such Mortgagee or other party as may be designated by Landlord, a certificate in a form requested by Landlord or in substantially the form attached hereto as **Exhibit "F"** Estoppel Certificate with respect to the matters set forth therein and such other matters relating to this Lease or the status of performance of obligations of the parties hereunder as may be



reasonably requested by Landlord. If Tenant fails to provide such certificate within ten (10) days after request by Landlord therefor, Tenant shall be deemed to have approved the contents of any such certificate submitted to Tenant by Landlord and Landlord is hereby authorized to so certify.

#### 19.2 Inspections and Access by Landlord.

Tenant will permit Landlord, its agents, employees and contractors to enter all parts of the Leased Premises during Tenant's business hours and all other reasonable times to show the Leased Premises to prospective purchasers, tenants, mortgagees or other parties with a bona fide need for access thereto, to post notices of nonresponsibility, to inspect the same and to enforce or carry out any provision of this Lease, including, without limitation, any access necessary for the making of any repairs which are Landlord's obligation hereunder or any improvements Landlord deems necessary. Landlord may enter at any time in case of emergency. Landlord may erect scaffolding in and other necessary structures where reasonably required by the character of the work to be performed, always provided that the entrance to the Leased Premises shall not be unreasonably blocked thereby and further providing that the business of the Tenant shall not be interfered with unreasonably. Tenant hereby waives any claim for damages or for any injury or inconvenience to or interference with Tenant's business, and loss of occupancy or quiet enjoyment of the Leased Premises and any other loss occasioned thereby. For each of the foregoing purposes, Landlord shall at all times have and retain a key with which to unlock all of the doors in, upon and about the Leased Premises, excluding Tenant's vaults, safes and files, and Landlord shall have the right to use any and all means which Landlord may deem proper to open said doors in an emergency, in order to obtain entry to the Leased Premises, without liability to Tenant, except for any failure to exercise due care for Tenant's property and any entry to the Leased Premises obtained by Landlord by any of said means or otherwise shall not under any circumstances be construed or be deemed to be a forcible or unlawful entry into, or detainer of, the Leased Premises, or an eviction of Tenant from the Leased Premises or any portion thereof.

#### 19.3 No Recording.

Landlord and Tenant agree that neither this Lease nor any notice or memorandum thereof shall be recorded in the public records.

#### 19.4 Remedies Cumulative; No Waiver.

No reference to any specific right or remedy shall preclude Landlord from exercising any other right or from having any other remedy or from maintaining any action to which it may otherwise be entitled at law or in equity. No failure by Landlord to insist upon the strict performance of any agreement, term, covenant or condition hereof, or to exercise any right or remedy consequent upon a breach thereof, and no acceptance of full or partial rent during the continuance of any such breach, shall constitute a waiver of any such breach, agreement, term, covenant or condition, nor create a custom of waiver, nor require any reinstatement of the "time is of the essence" clause hereof. No waiver by Landlord of any breach by Tenant under this Lease or of any breach by any other tenant under any other lease of any portion of the Project shall affect or alter this Lease in any way whatsoever, nor constitute a waiver of any like subsequent breach.

#### 19.5 Successors and Assigns.

This Lease and the covenants and conditions herein contained shall inure to the benefit of and be binding upon Landlord, its successors and assigns, and shall be binding upon Tenant, its successors and assigns and shall inure to the benefit of Tenant and only such assigns and subtenants of Tenant to whom the assignment or subleasing of this Lease by Tenant has been consented to in writing by Landlord as

provided in this Lease, or as may otherwise be permitted by this Lease. Upon any sale or other transfer by Landlord of its interest in the Leased Premises and in this Lease, Landlord shall be relieved of all obligations accruing thereafter.

**19.6 Captions and Headings.**

The table of contents (if any) and the Article and paragraph captions and headings are for convenience of reference only and in no way shall be used to define, expand, limit or modify the provisions set forth in this Lease. Reference to an Article includes all its paragraphs. Reference to a paragraph includes all its subparagraphs.

**19.7 Joint and Several Liability.**

If two or more individuals, corporations, partnerships or other business associations (or any combination of two or more thereof) shall sign this Lease as Tenant, the liability of each such individual, corporation, partnership or other business association to pay rent and perform all other obligations hereunder shall be deemed to be joint and several and all notices payments and agreements given or made by, with or to any one of such individuals, corporations, partnerships or other business associations shall be deemed to have been given or made by, with or to all of them. In like manner, if Tenant shall be a partnership or other business association, the members of which are, by virtue of statute or federal law, subject to personal liability, the liability of each such member shall be joint and several.

**19.8 Broker's Commission.**

A commission shall be paid by Landlord to Colliers International in accordance with a separate agreement with that broker. Each party represents and warrants to the other that there are no other claims for brokerage commissions or finders' fees in connection with the execution of this Lease which arise through the warranting party that will not be paid solely by the warranting party, and agrees to indemnify the non-warranting party against, and hold it harmless from, all liability arising from a breach of such warranty including, without limitation, the cost of counsel fees in connection therewith.

**19.9 No Joint Venture.**

Any intention to create a joint venture or partnership relation between the parties hereto is hereby expressly disclaimed. If this Lease contains any provisions in regard to the payment by Tenant and the acceptance by Landlord of a percentage of Gross Sales of Tenant and others, such provisions are a reservation for rent for the use of the Leased Premises.

**19.10 No Option.**

The submission of this Lease for examination does not constitute a reservation of or option for the Leased Premises, and this Lease shall become effective only upon execution and delivery thereof by both parties. No broker is authorized to sign for, or bind, any party.

**19.11 Holdover.**

Tenant shall have no right to holdover possession of the Leased Premises after the expiration or termination of the Lease without Landlord's prior written consent, which consent Landlord may withhold in its sole and absolute discretion. If, however, Tenant retains possession of any part of the Leased Premises after the Term, Tenant shall become a tenant at sufferance for the entire Leased Premises upon all of the terms of this Lease, except that Tenant shall pay all Base Rent and Tenant's Proportionate Share

of CAM Expenses at double the rate in effect immediately prior to such holdover, computed on a monthly basis for each full or partial month Tenant remains in possession. Tenant shall also pay Landlord all of Landlord's direct and consequential damages resulting from Tenant's holdover. No acceptance of Rent or other payments by Landlord under these holdover provisions shall operate as a waiver of Landlord's right to regain possession or any other of Landlord's remedies.

19.12 No Modification.

This writing is intended by the parties as a final expression of their agreement and as a complete and exclusive statement of the terms thereof, all negotiations, considerations and representations between the parties having been incorporated herein. No course of prior dealings between the parties or their officers, employees, agents or affiliates shall be relevant or admissible to supplement, explain, or vary any of the terms of this Lease. Acceptance of, or acquiescence in, a course of performance rendered under this or any prior agreement between the parties or their affiliates shall not be relevant or admissible to determine the meaning of any of the terms of this Lease. No representations, understandings, or agreements have been made or relied upon in the making of this Lease other than those specifically set forth herein. This Lease can be modified only by a writing signed by the party against whom the modification is enforceable.

19.13 Severability.

If any portion of any term or provision of this Lease, or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Lease shall be valid and be enforced to the fullest extent permitted by law.

19.14 Third Party Beneficiary.

Nothing contained in this Lease shall be construed so as to confer upon any other party the rights of a third party beneficiary except rights specifically stated herein for the benefit of a Mortgagee.

19.15 Entity Tenants.

If Tenant is a corporation or other entity, Tenant and the persons executing this Lease on behalf of Tenant hereby covenant and warrant that: Tenant is a duly constituted corporation or other entity, as applicable, qualified to do business in the State of Arizona; all Tenant's franchise and corporate (or other) taxes have been paid to date; all future forms, reports, fees and other documents necessary for Tenant to comply with Applicable Laws will be filed by Tenant when due; such persons are duly authorized by the board of directors (or other governing body) of such entity to execute and deliver this Lease on behalf of the entity; and this Lease is fully binding upon Tenant. Tenant represents to, and covenants with, Landlord that as of the Effective Date, the members of Tenant are the individuals constituting the Guarantor: Aaron E. Nelson and Denise Nelson, husband and wife; Kenneth L. Likewise and Julie S. Likewise, husband and wife; Wiley Arnett, III, and Paula C. Arnett, husband and wife. Tenant will, prior to Lease execution and thereafter upon request, provide evidence of the foregoing reasonably acceptable to Landlord.

19.16 Governing Law and Venue.

This Lease and the rights and obligations of the parties hereunder shall be construed in accordance with the laws of the State of Arizona, without regard to any conflicts of laws principles. Landlord's obligations hereunder are subject to the regulations/policies of the Arizona Board of Regents. The parties agree that

all actions or proceedings arising under or related to this Lease or the Leased Premises will be brought and maintained exclusively in the courts situated in Maricopa County, Arizona, except to the extent arbitration is required as provided in Paragraph 19.27 below. Each party waives any objection it may now or hereafter have to venue or to convenience of forum.

**19.17 Performance of Landlord's Obligations by Mortgagee.**

Tenant shall accept performance of any of Landlord's obligations hereunder by any Mortgagee of Landlord, but no Mortgagee shall have any obligation therefor.

**19.18 Attorneys' Fees: Waiver of Jury Trial and Waiver of Right to Counterclaim and to Remove.**

19.18.1. Should either party hereto institute any action or proceeding to enforce any provision hereof, or for damages by reason of any alleged breach of any provision of this Lease, or for a declaration of such parties' rights or obligations hereunder, or for any judicial remedy, the prevailing party shall be entitled to receive from the losing party such amount as the court may adjudge to be reasonable attorneys' fees, costs and expenses of the prevailing party. Should relief be awarded to both parties, such attorneys' fees, costs and expenses shall be adjudged against the parties in any manner the court shall deem equitable.

19.18.2. Landlord and Tenant hereby mutually waive any and all rights which either may have to request a jury trial in any action, proceeding or counterclaim (except for those involving personal injury or property damages) arising out of this Lease or Tenant's occupancy of or right to occupy the Leased Premises in any court of competent jurisdiction. Tenant further agrees that in the event Landlord commences any summary proceeding for non-payment of rent or possession of the Leased Premises, Tenant will not interpose and waives all right to interpose any non-mandatory counterclaim of whatever nature in any such proceeding. Tenant further waives any right to remove said summary proceeding to any other court or to consolidate said summary proceeding with any other action, whether brought prior or subsequent to the summary proceeding.

**19.19 Limitation on Right of Recovery Against Landlord.**

Tenant acknowledges and agrees that the liability of Landlord (which term shall include its partners for the purpose of this Paragraph 19.19) under this Lease shall be limited to its interest in the Building and any judgments rendered against Landlord shall be satisfied solely out of Rent payable under this Lease, or if such Rent shall be insufficient to satisfy any judgments rendered against Landlord, out of the proceeds of sale of Landlord's interest in the Building. No personal judgment shall lie against Landlord upon extinguishment of its rights in the Building and any judgment so rendered shall not give rise to any right of execution or levy against Landlord's assets. The provisions hereof shall inure to Landlord's successors and assigns including any Mortgagee. The foregoing provisions are not intended to relieve Landlord from the performance of any of Landlord's obligations under this Lease, but only to limit the personal liability of Landlord in case of recovery of a judgment against Landlord; nor shall the foregoing be deemed to limit Tenant's rights to obtain injunctive relief or specific performance or to avail itself of any other right or remedy which may be awarded Tenant by law or under this Lease.

In the event Tenant claims or asserts that the Landlord has violated or failed to perform a covenant of Landlord not to unreasonably withhold or delay Landlord's consent or approval, Tenant's sole remedy shall be an action for specific performance, declaratory judgment or injunction and in no event shall Tenant be entitled to any money damages for a breach of such covenant and in no event shall Tenant claim or assert any claim for any money damages in any such action or by way of set off, defense or counterclaim and Tenant hereby specifically waives the right to any money damages or other remedies.

19.20 Guaranty Required.

Concurrently with the execution hereof by the parties hereto, Tenant will deliver to Landlord the fully executed Guaranty attached hereto as Exhibit "G", failing which, at Landlord's option at any time thereafter, this Lease shall be void and of no further force or effect. In the event a Guaranty should ever be required under this Lease by reason of the applicability of Paragraph 15.1.1, the form of Guaranty attached hereto as Exhibit "G" would be used.

19.21 Force Majeure.

Any prevention, delay or stoppage of any construction or repair obligation hereunder due to strikes, lockouts, labor disputes, contractor disputes, acts of God, inability to obtain labor or materials or reasonable substitutes thereof, governmental restrictions, governmental regulations, governmental controls or delays, enemy or hostile governmental action, civil commotion, fire or other casualty, and other causes beyond the reasonable control of the party obligated to perform, excluding financial issues or problems ("Force Majeure"), shall excuse the performance by such party for a period equal to any such prevention, delay or stoppage, except the obligations imposed with regard to Rent and payment of any other monies to contractors or materialmen, or pursuant to this Lease.

19.22 Time of Essence.

Time is of the essence in connection with each and every obligation hereof.

19.23 Quiet Enjoyment.

Landlord covenants that Tenant, upon paying the Base Rent, Percentage Rent and the Additional Rent provided for in this Lease, and upon performing and observing all of the terms, covenants, conditions and provisions of this Lease on Tenant's part to be kept, observed and performed, shall quietly hold, occupy and enjoy the Leased Premises during the Term, subject to all matters of record and without hindrance, ejection or molestation by Landlord or any party lawfully claiming through or under Landlord. Tenant acknowledges that to promote downtown Tempe, the City, the Mill Avenue Merchants Association, the Downtown Tempe Community and/or other groups, of which Landlord and/or the Building may or may not be members, may schedule parades, festivals, or other special events that may disrupt traffic or access, cause noise or disruption or other consequences, for which Landlord shall have no responsibility.

Tenant acknowledges that various nightclubs, restaurants, bars and other entertainment uses will operate above or on the same level as the Leased Premises, and/or elsewhere in the Project, resulting in loud music, television, crowd and other noise levels at various times. The Building is part of the Brickyard on Mill, a mixed use development that will contain office, retail, commercial and residential parking, and residential uses. Additional noise may result from such uses. Tenant releases Landlord, its partners, shareholders, members, directors, officers, managers and employees from all claims, liability, controversies and damages resulting or purported or alleged to result to Tenant, its business, its employees or other invitees from such noise. Tenant will, prior to hiring or employing any person, advise such person of the foregoing and that such person is bound by this provision.

19.24 Tenant's and Guarantor's Financial Statements.

Within ten (10) days after Landlord's written request therefor, Tenant shall deliver to Landlord (a) the current, detailed and complete audited annual and quarterly financial statements of Tenant, and annual audited financial statements of the two (2) years prior to the current year's financial statements, each with an opinion of a certified public accountant and including a balance sheet and profit and loss statement, all

prepared in accordance with generally accepted accounting principles consistently applied, and (b) current detailed financial statements for the Guarantors, if any, which, for entity Guarantors, shall also comply with the requirements of (a) above.

#### 19.25 Condominium Acts.

Tenant agrees, within ten (10) business days after receipt of written request therefor from Landlord, to join with Landlord in executing and acknowledging any and all documents and instruments required by the provisions of the Arizona Condominium Act or other law at the time in effect to enable Landlord to submit the Building, or any part thereof, and/or any adjacent buildings, or any part thereof, in which Landlord has an interest and Landlord to a condominium regime and to establish the Building and/or Leased Premises as a separate condominium unit or units under such Act or any and all documents and instruments required by the applicable governmental authorities to establish such buildings as independent, subdivided parcel of land under the local subdivision ordinance; provided however, that such documents and instruments shall not materially affect any of the rights of Tenant under this Lease, shall not increase the Base Rent, shall not increase, in any material respect, the Additional Rent payable by Tenant under this Lease, and shall not diminish Landlord's obligations under this Lease.

#### 19.26 Nondiscrimination.

The parties will comply with all applicable state and federal laws, rules, regulations, and executive orders governing equal employment opportunity, immigration, and nondiscrimination, including the Americans with Disabilities Act. If applicable, the parties will abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability.

#### 19.27 Arbitration in Superior Court.

As required by A.R.S. § 12-1518, the parties agree to make use of arbitration in disputes that are subject to mandatory arbitration pursuant to A.R.S. § 12-133.

#### 19.28 Conflict of Interest.

If within three (3) years after the execution of this Lease, Tenant hires as an employee or agent any Landlord representative who was significantly involved in negotiating, securing, drafting, or creating this Lease, then Landlord may cancel this Lease as provided in A.R.S. § 38-511. Notice is also given of A.R.S. §§ 41-2517 and 41-753.

#### 19.29 Failure of Legislature to appropriate.

In accordance with A.R.S. § 35-154, if Landlord's performance under this Lease depends on the appropriation of funds by the Arizona Legislature, and if the Legislature fails to appropriate the funds necessary for performance, then Landlord may provide written notice of this to Tenant and cancel this Lease without further obligation of Landlord. Appropriation is a legislative act and is beyond the control of Landlord.

19.30 Confidentiality. Tenant acknowledges that each lease of space in the Building is negotiated on its own merits and in light of circumstances that may be unique to each Tenant, that disclosure by Tenant of rental rates or other terms offered by Landlord to Tenant (whether or not ultimately incorporated into this Lease) would be detrimental to Landlord, and that Landlord has a legitimate right to avoid such disclosure. Accordingly, except as otherwise required by law or legal process, Tenant shall not disclose any such information to anyone other than individuals within Tenant's business organization, and outside attorneys, accountants and similar professional consultants, who in each case have a need to know such information and who have been cautioned by Tenant against further disclosure thereof. Any violation of the foregoing covenant shall constitute a default under this Lease.

19.31 Weapons, Explosive Devices and Fireworks.

Landlord prohibits the use, possession, display or storage of any weapon, explosive device or fireworks on all land and buildings owned, leased, or under the control of Landlord or its affiliated or related entities, in all Landlord residential facilities (whether managed by Landlord or another entity), in all Landlord vehicles, and at all Landlord or Landlord affiliate sponsored events and activities, except as provided in A.R.S. § 12-781, or unless written permission is given by the Chief of the ASU Police Department or a designated representative. Notification by Tenant to all persons or entities who are employees, officers, subcontractors, consultants, agents, guests, invitees or licensees of Tenant ("Tenant Notification Parties") of this policy is a condition and requirement of this Lease. Tenant further agrees to enforce this contractual requirement against all Tenant Notification Parties. Landlord's policy may be accessed through the following web page:

<http://www.asu.edu/aad/manuals/pdp/pdp201-05.html>

19.32 Tobacco-Free University.

Landlord, as a university, is tobacco-free. For details, visit [www.asu.edu/tobaccofree](http://www.asu.edu/tobaccofree).

19.33 ASU Names and Marks.

Tenant will not use any names, service marks, trademarks, trade names, logos, or other identifying names, domain names, or identifying marks of Landlord (the "ASU Marks"), without in each case, the prior written consent of Landlord, which Landlord may withhold in its sole and absolute discretion. If permission is granted by Landlord, Tenant's use of any ASU Marks must comply with Landlord's requirements including using the ® indication of a registered trademark where applicable.

19.34 Records.

To the extent required by A.R.S. § 35-214, Tenant will retain all records relating to this Lease. Tenant will make those records available at all reasonable times for inspection and audit by Landlord or the Auditor General of the State of Arizona during the term of this Lease and for five (5) years after the completion of this Lease. Tenant will provide the records at Arizona State University, Tempe, Arizona, or another location designated by Landlord on reasonable notice to Tenant.

19.35 Surrender.

At the expiration or earlier termination of the term of this Lease, Tenant shall surrender to Landlord all keys to the Leased Premises and shall deliver the Leased Premises to Landlord in broom clean and in as good condition as when acquired hereunder, excepting ordinary wear and tear and damage covered and paid by casualty insurance. Provided that Tenant is not then in default, Tenant shall remove from the

Leased Premises all of Tenant's trade fixtures and personal property installed on the Leased Premises by Tenant; remove such installations (including wiring and cabling wherever located), alterations and leasehold improvements made (or if applicable, restore any items removed) by or on behalf of Tenant as Landlord may request, and all Tenant's signs wherever located; repair all damage caused by such removal; and vacate and surrender the Leased Premises (including all installations, alterations and leasehold improvements made by or on behalf of Tenant except as Landlord shall request Tenant to remove). Notwithstanding anything to the contrary contained herein, Tenant shall only be required to remove alterations or leasehold improvements to the extent Landlord informs Tenant of such removal requirement at the time consent to such alterations or leasehold improvements are given by Landlord. Any trade fixtures, personal property, other leasehold improvements or alterations not so removed shall be deemed abandoned, and title thereto shall vest solely in Landlord without payment of any nature to Tenant, and may be removed and disposed of by Landlord in such manner as Landlord shall determine, in Landlord's sole discretion, and Tenant shall pay Landlord the cost and expense incurred by Landlord in effecting such removal and disposition.

[SEE SIGNATURES ON NEXT PAGE]



IN WITNESS WHEREOF, the Landlord and Tenant have duly executed this Retail Lease as of the day and year first above written.

**LANDLORD:**

ARIZONA BOARD OF REGENTS, a body corporate, for and on behalf of Arizona State University

By: 

Name: John P. Creer

Title: AVP, University Real Estate Dev.

**TENANT:**

BURGER REHAB THERAPY 2, LLC, an Arizona limited liability company

By: 

Name: Wdey Arnett

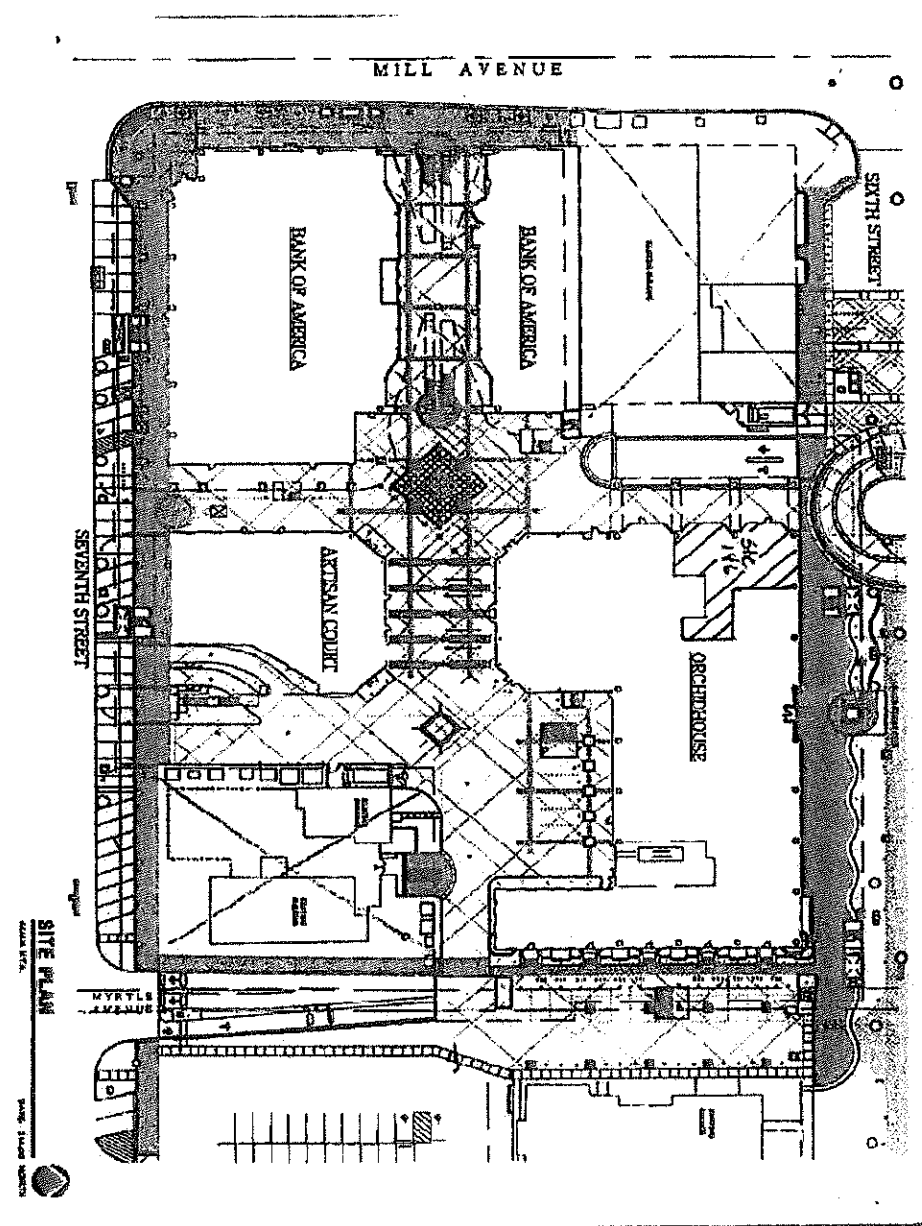
Title: Co-owner

THIS DOCUMENT SHALL NOT BE TREATED AS AN OFFER TO LEASE BUT MERELY AS A DRAFT FOR REVIEW PURPOSES. THIS DOCUMENT SHALL NOT BE VALID OR BINDING, AND IS SUBJECT TO WITHDRAWAL OR MODIFICATION BY LANDLORD WITHOUT NOTICE, UNTIL SUCH TIME, IF EVER, AS IT IS ACCEPTED BY LANDLORD IN WRITING AND A FULLY EXECUTED COPY IS DELIVERED TO ALL PARTIES THERETO. LANDLORD RESERVES THE RIGHT TO OFFER THE LEASED PREMISES SIMULTANEOUSLY TO OTHER THIRD PARTIES, AND THE LEASED PREMISES ARE THEREFOR SUBJECT TO PRIOR LEASING.

## EXHIBIT "A"

### BUILDING AND PROJECT GENERAL SITE PLAN

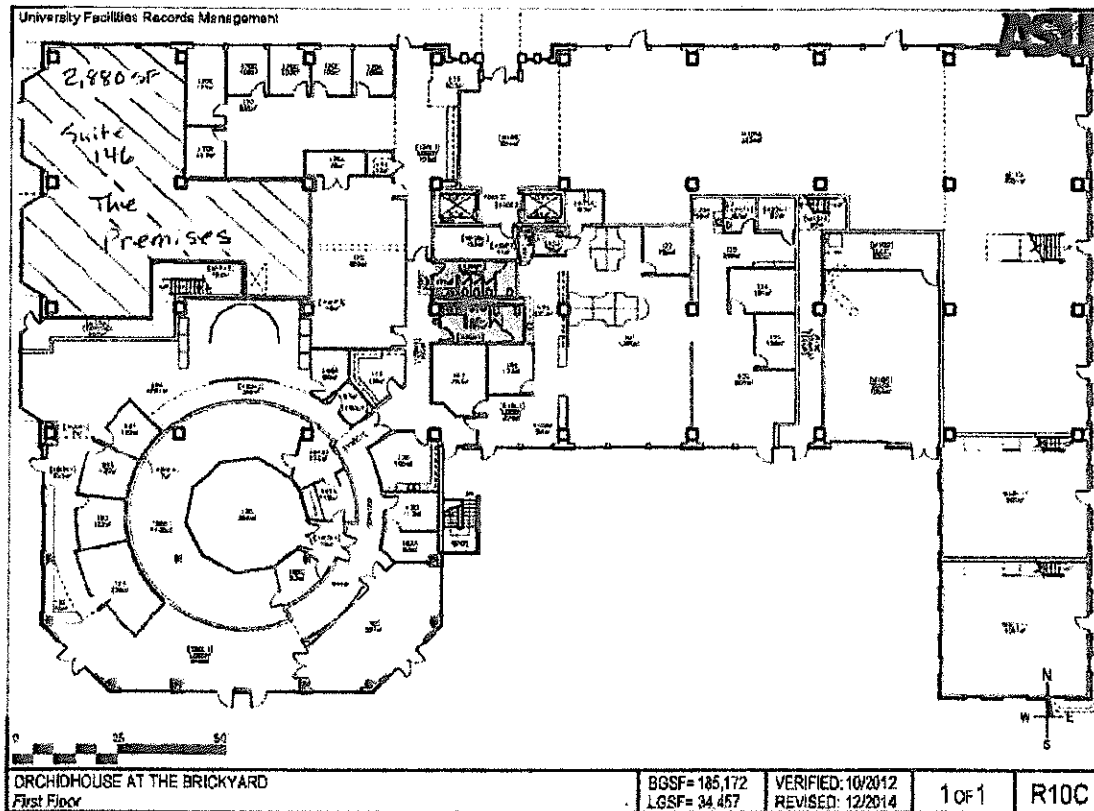
The area marked as "Ste 146" on the below diagram and shown by hatch marks depicts the location of the Leased Premises in relation to the Building.



## EXHIBIT "B"

### LOCATION AND DIMENSION OF THE LEASED PREMISES

The location of the Leased Premises (minus the seated patio area permitted pursuant to Article 3 in the Lease) is depicted by cross-hatching on the below diagram.



**EXHIBIT "C"**

**LANDLORD'S WORK  
(RETAIL LEASE)**

Landlord delivers to Tenant and Tenant accepts the Leased Premises in its "as is" condition with the existing (as of the Effective Date) HVAC, plumbing, and electricity in good working order. All improvements desired by Tenant to improve or serve the Leased Premises will be Tenant Improvements under Exhibit "D" to the Lease.

**[END OF EXHIBIT]**

## EXHIBIT "D"

### TENANT IMPROVEMENTS

#### I. TENANT IMPROVEMENTS

The work to be done by Landlord in satisfying its obligation to construct Tenant's Leased Premises under the Lease shall be limited to Landlord's Work described in Exhibit "C" to the Lease. All other items of work not required to be done by Landlord shall be provided by Tenant, at Tenant's cost and expense (the "**Tenant Improvements**"), utilizing duly licensed contractors, engineers and architects. The Tenant Improvements shall be in accordance with the Tenant's Plans prepared by Tenant's architect pursuant to Paragraph II below, the Building Code of the City of Tempe, Arizona (the "City"), and all other applicable requirements and Applicable Laws. Tenant Improvements and Tenant's Plans shall comply with the building standard specifications adopted by Landlord or any modifications thereof approved by Landlord in writing. The current version of the building standard specifications are attached hereto as **Exhibit "D-1"** to the Lease, but the same are subject to change by Landlord at any time. The Tenant Improvements shall include, but not be limited to, the purchase and/or installation and/or performance of the following (including any and all applicable architectural and engineering services, a construction management fee, and necessary permits and licenses therefor):

1. Ceilings. All ceilings shall allow for structural, mechanical, electrical and fire protection systems.
2. Interior Walls. Tenant shall provide all interior walls.
3. Interior Finish. All finish required to complete the interior walls, including paint, wallpaper and acoustical panels.
4. Interior Insulation. Any additional wall or ceiling insulation required by Tenant.
5. Ceramic Tile. Any ceramic tile material.
6. Floor. Tenant shall be responsible for the preparation of subfloors, and provide and install carpet material and floor finishes in the Leased Premises.
7. Plumbing. Tenant shall provide and install plumbing in the Leased Premises required for Tenant's needs in excess of that provided by Landlord.
8. Fire Sprinkler System Modification. All sprinkler work required to complete the system to accommodate the Tenant's Plans. Design drawings shall be submitted to Landlord for review and approval.
9. Electrical-Fixtures and Equipment. Tenant shall provide and install all electrical work for the Leased Premises not expressly and specifically made the obligation of Landlord in Exhibit "C" to the Lease.
10. Mechanical Equipment/Heating and Ventilating. All air conditioning and heating required by Tenant, including all branching, ducting, thermostats, condensate drains and refrigerant lines, and kitchen exhaust and makeup air.

11. Merchandising Fixtures and Miscellaneous Equipment and Connection Thereof. Tenant shall provide the electrical and mechanical connection of all merchandising floor and wall fixtures or equipment and related parts (including kitchen and food service equipment, if permitted) and other equipment peculiar to Tenant's occupancy.

12. Alteration and Additions. Tenants shall make all alterations and additions to any wall or floor, including penetration or reinforcements required to accommodate Tenant Improvements, subject to Landlord's approval thereof as set forth in the Lease.

13. Roof Penetrations. Roof/floor penetrations required by Tenant shall be engineered and installed in accordance with standard project details, with all repairs caused by penetrations performed by a subcontractor designated by Landlord and strictly conforming to the project specifications.

14. Hardware. Tenant shall provide and install all the hardware required by Tenant.

15. Signs. The lettering of sign panels shall be designed by Tenant in accordance with the sign criteria established by the City, and shall be subject to Landlord's approval. All exterior and interior decorative lighting and signage shall be provided by Tenant. Tenant shall be responsible, at its sole cost and expense, for obtaining any sign permits.

16. Furniture, Equipment and Interior Signs. Equipment, including glass cabinets and special lighting, counters, shelving, and other non-fixture items not specifically described herein shall be provided by Tenant.

17. Interior Decor. All interior decorative items and finishes shall be provided by Tenant.

## II. TENANT'S PLANS

### A. TENANT INFORMATION MATERIAL

Upon execution of this Lease, Landlord will provide Tenant with the "Landlord's Plans" showing thereon column spacing, fixed elements, and overall dimensions, unless the same were previously provided to Tenant. Landlord's Plans are provided to Tenant expressly provided Tenant shall field verify all as-built conditions, as they may vary from the Landlord's Plans.

### B. TENANT'S PLANS

Within ten (10) days after execution of the Lease, Tenant agrees to submit to Landlord four (4) sets of fully dimensioned one-quarter inch (1/4") scale construction drawings and specifications prepared by Tenant's architect (the "Tenant's Plans"), which Tenant's Plans shall indicate the specific requirements of Tenant's space showing clearly the interior partitions, trade fixture plans, lighting, electrical outlets and all signs, all in conformity with the requirements set forth herein for the Tenant Improvements. Tenant's Plans shall be at Tenant's sole cost and expense. In addition, Tenant's Plans will identify the limit of responsibility of the Tenant Improvements described in Paragraph II above. The Leased Premises shall be constructed in accordance with Tenant's Plans, and Tenant agrees to pursue the construction of said work diligently to completion, complying with the Building Code of the City, all other applicable requirements, and this Lease.

### C. APPROVAL OF TENANT'S PLANS

The Tenant's Plans are subject to Landlord's reasonable approval. Landlord shall, within ten (10) business days after receipt of complete Tenant's Plans, either provide comments to such Plans or approve the same. If Landlord does not respond to Tenant's submission, Tenant shall give written notice thereof to Landlord and Landlord shall be deemed to have approved such Plans if it does not provide comments on such Plans within five (5) business days after its receipt of Tenant's notice. If Landlord provides Tenant with comments to the initial draft of the Tenant's Plans, Tenant shall provide revised Tenant's Plans, incorporating Landlord's comments, within one (1) week after receipt of Landlord's comments. Landlord shall within one (1) week after receipt of the revised Tenant's Plans either provide comments to such revised Tenant's Plans or approve such Tenant's Plans. If Landlord does not respond to Tenant's submission, Tenant shall give written notice thereof to Landlord and Landlord shall be deemed to have approved such revised Tenant's Plans if Landlord does not provide comments thereon within five (5) business days after its receipt of Tenant's notice. The process described above shall be repeated, if necessary, until the Tenant's Plans have been finally approved by Landlord.

Tenant may not perform any exterior design, finish or construction other than one that has been approved by Landlord, and Landlord shall be entitled to erect and construct such exterior in keeping with the overall plan and design of Landlord's architect. Tenant shall not be permitted to maintain or place on the exterior of the Leased Premises any awnings except with the written consent of Landlord.

Any changes, modifications or alterations of or to Tenant's Plans following their approval by Landlord shall be at the sole cost and expense of Tenant, and Landlord shall have the right to demand payment for such changes, modifications or alterations prior to the performance of any work in the Leased Premises. No such changes, modifications or alterations of or to the Tenant's Plans shall be made without the written consent of the Landlord after written request therefor by the Tenant.

### D. DESIGN CRITERIA

#### 1. STRUCTURAL

Any structural changes in and/or additions and reinforcements to Landlord's structure required to accommodate the Tenant Improvements shall be Tenant's responsibility and shall be subject to Landlord's prior written approval, and shall conform to the Building Code of the City and all other applicable requirements and Applicable Laws.

#### 2. ROOF

a. Penetrations. There shall be no penetrations of the roof or installations of radio, television or other antennas, satellite dishes or other rooftop or exterior equipment without the prior written approval of Landlord. Any such roof penetrations and antenna or dish installations required by Tenant and approved by Landlord shall be engineered and installed by Landlord's contractor or another sub-contractor of equal competence approved by Landlord at Tenant's expense.

b. Repairs. All flashing, counter-flashing and roofing repairs and such work shall be performed by the project roofing sub-contractors

### III. BUDGET

Not later than the earlier of (a) the date Tenant delivers the Tenant's Plans pursuant to Paragraph II above, or (b) the required date for delivery of the Tenant's Plans, Tenant will deliver to Landlord a bona fide,

detailed budget reasonably acceptable to Landlord for the Tenant Improvements shown on the Tenant's Plans, as the same are revised from time to time as permitted hereunder (the "Budget"). The Budget and all revisions thereof shall be subject to Landlord's reasonable approval, based on verification of the reasonable sufficiency and appropriateness of the amounts shown therein, particularly to ensure a quality level of Tenant Improvements commensurate with the Building. If and to the extent the projected cost of the Tenant Improvements changes, Tenant shall immediately submit a revised Budget to Landlord.

#### IV. PROCEDURE FOR CONSTRUCTION OF TENANT IMPROVEMENTS

##### A. PRECONSTRUCTION REQUIREMENTS

A minimum of fourteen (14) days prior to the commencement of Tenant Improvements or such earlier date as is required by Landlord's Lender, Tenant shall submit the following items to Landlord via certified mail:

1. Contractors. A statement setting forth the name and address of Tenant's contractors and subcontractors involved in the construction of Tenant Improvements, and copies of Tenant's or the general contractor's construction contract(s) therefor, meeting all requirements of this Lease. All contractors and subcontractors shall be subject to Landlord's written approval, which will not be unreasonably withheld or delayed.

2. Construction Schedule. A statement setting forth the proposed commencement date of construction and the estimated completion dates of the Tenant Improvements, including fixturing work and scheduled completion.

3. Insurance Certificates. Certificates of insurance as required by the Lease. Tenant's contractors and subcontractors shall not be permitted to commence any work until all required insurance has been obtained and certificates have been received by Landlord.

##### B. TENANT'S POSSESSION AND CONSTRUCTION

Tenant shall commence its construction of Tenant Improvements and installing its fixtures and other equipment as soon as (a) Tenant shall have obtained Landlord's written approval of the plans and specifications for such work as provided in Paragraph 11 above, (b) Tenant shall have obtained a valid building permit(s) for construction of the Tenant Improvements, (c) Tenant shall have deposited with Landlord the policies or certificates of insurance required by this Lease, and (d) Landlord shall have received full payment of the Security Deposit from Tenant. Tenant's activities shall be conducted so as not to unreasonably interfere with any of Landlord's construction activities and/or with the normal operation of the Building and other tenants'/occupants' activities and quiet enjoyment. Tenant shall maintain the Leased Premises in a clean and orderly condition during the construction by Tenant of its improvements. All trash which may accumulate in connection with Tenant's construction activities shall be deposited daily in dumpsters provided by Tenant after the Delivery Date and placed and emptied as approved and directed by Landlord. During such construction period, Tenant shall diligently pursue the completion of all improvements and other work to be performed by it and shall perform all duties and obligations imposed by this Lease, including without limitation, those provisions relating to insurance and indemnification. Landlord may also occupy the Leased Premises as necessary to complete any Landlord's Work within the Leased Premises. Prior to the Delivery Date, Tenant shall not be entitled to possession of the Leased Premises, but shall have the right to enter same at reasonable times for properly planning the Leased Premises for its business, so long as it does not unreasonably interfere with any construction or other activities of Landlord and complies with the safety regulations thereof.



### C. CONSTRUCTION REQUIREMENTS

Upon approval of Tenant's Plans under Paragraph II.C above, Tenant shall apply for and use diligent efforts to obtain all required Permits (as defined below) for the Tenant Improvements within forty-five (45) days of the Landlord's approval of Tenant's Plans. Tenant shall commence the Tenant Improvements within five (5) days after Tenant receives all required permits and shall proceed diligently to complete the same, provided Tenant's Plans have been approved as required herein and all other requirements have been satisfied (but Tenant's delays in satisfying such requirements shall not delay or waive Tenant's obligations under Paragraph 7.2 of the Lease). "Permits" means any permits and/or licenses (including but not limited to conditional use and zoning permits, building permits and variances) that are required by Applicable Laws (as defined in Paragraph 8.1 of the Lease) to enable Tenant legally (a) to construct the Tenant Improvements in accordance with Tenant's Plans (these Permits are also referred to as the "Construction Permits"); (b) to install Tenant's signage on the Leased Premises; and (c) to conduct its business in accordance with the Permitted Use from the Leased Premises.

Landlord's obligations relative to the construction of improvements shall be limited to those expressly provided in Exhibit "C" to the Lease. Tenant shall pay or cause to be paid all costs for work done by Tenant or caused to be done by Tenant on the Leased Premises, and pay for all materials installed in the Leased Premises; and Tenant shall furnish to Landlord satisfactory evidence of such payments. Any failure of Tenant to pay for said work or material shall constitute a default under the terms of this Lease in like manner as the failure to pay Rent.

Tenant shall confine construction work to within Leased Premises as much as possible and shall work in an orderly manner. At no time will pipes, wires, boards or other construction materials project into public areas where harm could be caused to public. The requirements of Occupational Safety and Health Administration (OSHA) prepared by the Department of Labor will govern. If Tenant fails to comply with these requirements, Landlord will take remedial action (at Tenant's cost) as deemed necessary by Landlord to protect the public.

During all construction, fixturing and merchandise stocking of the Leased Premises, Tenant shall contract and pay for dumpsters directly with an outside vendor and not use those provided for other merchants. It shall be the sole responsibility of Tenant and Tenant's contractors to daily remove all trash and debris from the Leased Premises, to break down all boxes and place all such trash and debris into the containers supplied for that purpose by Tenant.

Tenant will be required to furnish necessary ramps, chutes, coverings, etc., to protect Landlord's and adjoining premises from damage. All repair of damage to Landlord's facilities and to adjoining premises will be at the cost of Tenant causing damage. Actual repair work will be accomplished by Landlord's sub-contractor and be at Tenant's expense.

Tenant's contractor shall store all of his materials into space or spaces assigned by Landlord and not on sidewalks or alleyways. If Tenant's material is found outside of designated areas, then Landlord at its option may confiscate said materials or charge Tenant a fine of Two Hundred Dollars (\$200).

Tenant may install temporary store name signs in the event Tenant does not have permanent approved signs installed as Tenant commences business. Such signs shall be of material and color harmonious with store front, shall be approved by Landlord and shall be in accordance with the sign criteria of the City. Paper signs and signs painted directly on store front or show windows are not permitted.

Tenant will arrange and pay for its own construction period utilities, or if Landlord agrees to provide the same, Tenant will reimburse Landlord for the reasonable pro rata cost thereof within fifteen (15) days of invoicing.

All contractors engaged by Tenant shall be licensed contractors, having good labor relations, capable of performing quality workmanship and working in harmony with Landlord's contractors and other contractors on the job. Tenant will comply (and cause its contractors to comply) with all of Landlord's and its contractor's construction, safety, and jobsite rules and guidelines. In the event that any of Tenant's contractors willfully violates the requirements of the Lease, Landlord may order such contractor to remove himself, his equipment and his employees from Landlord's property. Tenant and Tenant's contractors shall cooperate with Project Manager's monitoring of the Tenant Improvements and comply with Landlord's or Project Manager's construction requirements.

It shall be the responsibility of Tenant to obtain all necessary licenses, permits and Certificates of Occupancy required by the City or other governmental agency prior to opening.

Where Tenant's Plans are in conflict with Exhibit "C" to the Lease and this Exhibit "D", the provisions of Exhibit "C" and Exhibit "D" shall prevail, unless otherwise agreed by Landlord. Tenant hereby releases Landlord from any claim whatsoever for damages against Landlord for any delay in the date on which the Leased Premises shall be ready for Tenant to commence the Tenant Improvements.

**[END OF EXHIBIT]**

## **EXHIBIT "D-1"**

### **RETAIL BUILDING STANDARD SPECIFICATIONS**

<b><u>Item</u></b>	<b><u>Product Description</u></b>
Corridor Partitioning	Metal studs with one layer 5/8" Type X gypsum board one side and two layers 5/8" type X gypsum board one side. Partition extends to underside of floor deck above painted with two coats eggshell paint and 2 1/2" covered rubber base on Tenant side of wall. Provide a smooth finish wall at corridor side of wall. Partition will include R-11 insulation batts and acoustical caulking at floor deck above and floor. Note: Cost of wall split so building cost includes half of wall construction and wall finish for corridor side of wall. Tenant cost includes half of wall construction and Tenant wall finish.
[Demising Partitioning	Metal studs with one layer 5/8" gypsum board both sides (provided the board on the non-Tenant side may be delayed until the space adjacent thereto is built out, unless required to be done earlier under Building or Safety Codes for Tenant to occupy the Leased Premises). Partition extends to floor deck above. Partition will include R-11 insulation batts and acoustical caulking at floor decking above and floor. Partition painted with two coats eggshell paint and smooth finished with 2 1/2" covered rubber base on Tenant side. Cost of wall will be equally divided between adjoining tenants.]
Tenant Partitioning	Metal studs with one layer 5/8" gypsum wall board both sides. Partition to extend from floor to underside of ceiling grid with smooth finish and two coats eggshell paint, 2 1/2" covered rubber base both sides.
Partial Height Partitioning	Metal studs 3" x 3" x 1/2" steel tube wall brace at 6'-0" o.c. for wall lengths over 6'-0" and at each end of wall with one layer 5/8" gypsum wall board both sides. Partition to extend from floor to $\pm 42"$ A.F.F. or as indicated per tenant drawings, painted with a smooth eggshell finish and a 2 1/2" covered rubber base sides.
Tenant Entry Doors	3'-0" X 8' - 10" medium style aluminum/glass door. Door to have aluminum frame to match Building store front finish.
Tenant Interior Doors	3'-0" x 8'-10" solid core doors in aluminum frame to match Building storefront finish.
Tenant Interior Door Hardware	Lever mortise passage latchset, satin stainless steel finish.
Light Switches	Single pole switch with cover plate and toggle switch. (White) Duplex wall outlet with cover plate and plugs.(White)

Electrical Convenience	Outlet Duplex wall outlet with cover plate and plugs. (White)
Telephone Data Outlets	Building standard rough-in box. Tenant will coordinate with their respective communication equipment company for detailed requirements for inclusion into construction plans and schedule.
Telephone Mounting Board	4' x 4' painted plywood mounted board.
Exit Lights	Stencil faced fixture to match shell Building signs.
Heating, Venting, Air Conditioning (HVAC)	Duct work as required, with 2' x 2' diffusers and thermostat control in Tenant areas. special requirements may result in additional cost to Tenant. Tenant shall use Landlord's designated contractor for all work.
Fire Protection Sprinkler System	Sprinkler heads shall be semi-recessed pendants with white escutcheons. Tenant shall use Landlord's designated contractor for all work

Tenant will use Landlord's designated electrical contractor for all work outside the Leased Premises, including all hookups to main Building systems.

## EXHIBIT "E"

### RULES AND REGULATIONS

Tenant expressly covenants and agrees, at all times during the Term, and at such other times as Tenant occupies the Leased Premises or any part thereof, to comply, at its own cost and expense, with the following:

1. Any handling of freight for any purpose, or deliveries to or from the Leased Premises, shall be made in a manner which is consistent with good commercial retail and/or office building practices and only at such times, in such areas, and through such entrances and exits as are from time to time designated for such purposes by Landlord. Any truck or machine used for handling freight or making deliveries in the Leased Premises or in the Building shall have rubber wheels only.

2. All garbage and other refuse shall be kept inside the Leased Premises in the type of container specified by Landlord until such time as it is to be collected. All garbage shall be prepared for collection, and collected in the manner and at the times and places specified by Landlord. Landlord initially shall furnish the service for the removal of garbage and other refuse, and Tenant shall use such service. The cost will be included in CAM Expenses. Tenant shall not be obligated to pay more for such service than the prevailing competitive rates charged by reputable, independent trash removal contractors for equal service on a direct and individual basis. Landlord may also provide trash compactors for compacting tenants' trash and add the cost thereof to the CAM Expenses. If Landlord does not provide trash removal service, Tenant shall be solely responsible for contracting for the removal of all garbage and other refuse from the Leased Premises and shall pay promptly all charges therefor.

3. Tenant shall not (i) suffer, allow or permit any vibration, noise, odor or flashing or bright light to emanate from the Leased Premises or from any machine or other installation located therein, or otherwise suffer, allow or permit the same to constitute a nuisance to or interfere with the safety, comfort or convenience of Landlord or of any other occupant or user of the Building; (ii) display, paint, or place any handbills, bumper stickers or other advertising devices on any vehicle(s) parked in the parking area(s) of the Building, whether belonging to Tenant, its employee(s), or any other person(s); (iii) solicit business or distribute any handbills or other advertising materials in the Common Areas; (iv) conduct or permit any activities in the Building that might constitute a public or private nuisance; (v) permit the parking of any vehicles or the placement of any displays, trash receptacles or other items, so as to interfere with the use of any driveway, fire lane, corridor, walkway, parking area, mall or any other Common Area or Common Element; (vi) use or occupy the Leased Premises or permit anything to be done therein which in any manner might cause injury or damage in or about the Building or Project; or (vii) use or occupy the Leased Premises in any manner which is unreasonably annoying to other tenants in the Building or Project unless directly occasioned by the proper conduct of Tenant's business in the Leased Premises.

4. Tenant shall secure and protect the Leased Premises, and all property located within the Leased Premises. Tenant acknowledges and agrees that it, and not Landlord, is solely responsible for securing and protecting the Leased Premises, and all property located within the Leased Premises.

5. Tenant shall use the plumbing within the Leased Premises and the Building only for the purpose for which it is designed. Tenant shall be solely responsible for any breakage, stoppage or damage resulting from its violation of this provision, and shall pay any costs associated therewith to Landlord upon demand as Additional Rent.

6. Tenant shall contract for and utilize termite and pest extermination services for the Leased Premises, and with such contractor, as Landlord may from time to time designate. Tenant shall not be obligated to pay more for such service than the prevailing competitive rate charged by reputable, independent contractors. If Landlord does not designate such contractor, Tenant may employ a reputable contractor of its choosing, subject to Landlord's prior written consent.

7. Tenant shall install and maintain at all times a display of merchandise in the display windows (if any) of the Leased Premises and shall keep such display windows well lighted during all Building business hours and for at least one (1) hour thereafter. All articles, and the arrangement, style, color and general appearance thereof, shall be in keeping with the character and standards of the Building as reasonably determined by Landlord.

8. Tenant shall participate in any window cleaning program that may be established by Landlord. Tenant shall not be obligated to pay more for its participation in such window cleaning program than the prevailing competitive rate charged by reputable independent window cleaning contractors for equal service on a direct and individual basis.

9. If Tenant undertakes any construction activities which causes any work stoppage, picketing, labor disruption or dispute, so as to interfere with the Landlord's construction activity at the Building, Tenant shall, upon request from Landlord, immediately suspend any construction work being performed in the Leased Premises giving rise to such labor problems, until such time as Landlord has completed its construction activity and notified Tenant that Tenant's construction may resume. Tenant shall have no claim for damages of any nature against Landlord for such suspension nor shall the Term Commencement Date be extended as a result thereof.

10. Tenant shall promptly obtain all permits, including occupancy permits, for the Leased Premises or its use thereof. Tenant shall pay before delinquency all license and permit fees, and other charges of a similar nature, for the conduct of any business in, or any use of, the Leased Premises. Upon request Tenant shall provide to Landlord a copy of all its permits, including the certificate of occupancy.

11. Where reasonably practicable, Tenant shall use the Building name and logo and include the Tenant Trade Name and the address and identity of Tenant's business in the Leased Premises in all advertisements made by Tenant in any manner and in any medium.

12. Tenant shall not conduct or permit to be conducted any auction, fire, "going out of business" or similar type of sale (whether real or fictitious) from the Leased Premises; provided, however that this provision shall not restrict the absolute freedom (as between Landlord and Tenant) of Tenant to determine its own selling prices nor shall it preclude periodic, seasonal, promotional or clearance sales held in the ordinary course of business.

13. Tenant shall not place a load on any floor in the Building which exceeds the load which the floor was designed to carry, or which may result in improper weight distribution on such floors.

14. Tenant shall not install, operate or maintain in the Leased Premises, or in any other area of the Building, electrical equipment which does not bear the Underwriters Laboratories seal of approval, or which would overload the electrical system or any part thereof beyond its capacity for proper, efficient and safe operation.

15. To the extent required by Landlord or by any law, rule, regulation, guideline or order, Tenant shall provide sound barriers for all mechanical systems serving the Leased Premises.

16. Tenant shall not store, display, sell, or distribute any alcoholic beverages, dangerous materials, flammable materials, explosives, or weapons in the Leased Premises, or conduct any unsafe activities therein, unless permitted pursuant to Paragraph 1.9 of the Lease.

17. Except to the extent expressly permitted in Paragraph 1.9 of the Lease, Tenant shall not sell, distribute, display or offer for sale (i) any paraphernalia commonly employed in the use or ingestion of illicit drugs, or (ii) any x-rated, pornographic, lewd, or so-called "adult" newspaper, book, magazine, film, picture, video tape or video disk.

18. Tenant shall comply with all statutes, laws, rules, orders, regulations and ordinances affecting the Leased Premises and all the orders or recommendations of any insurance underwriters, safety engineers, and loss prevention consultants as may from time to time be consulted by Landlord. In no event shall Tenant use the Leased Premises for purposes which are prohibited by zoning or similar laws or regulations, or covenants, conditions or restrictions of record. Tenant acknowledges and agrees it is solely responsible for determining if its business complies with the applicable zoning regulations, and that Landlord makes no representation (explicit or implied) concerning such zoning regulations.

19. Tenant shall not operate or permit to be operated in the Leased Premises any automatic teller machines, or any coin or token operated vending machine or similar device including, without limitation, telephones, lockers, toilets, scales, amusement devices, and machines for the sale of beverages, foods, candy, cigarettes or other goods, except for food and drink vending machines for employee use.

20. No radio or television aerial or other device may be erected by Tenant on the roof or on any exterior wall of the Leased Premises, or in the Building, without Landlord's prior written consent. Any aerial or other device installed without such written consent shall be subject to removal by Landlord, at Tenant's sole risk and expense, without notice.

21. Tenant shall comply with all other reasonable rules and regulations from time to time established by Landlord which apply generally to all other tenants (other than major tenants) in the Building.

**[END OF EXHIBIT]**

**EXHIBIT "F"**

**ESTOPPEL CERTIFICATE**

To:

In connection with the sale or mortgage of the building located at 699 South Mill Avenue, Tempe, Arizona (the "**Property**"), the undersigned tenant ("**Tenant**"), having reviewed the provisions of that certain lease (the "**Lease**") pursuant to which Tenant presently holds a leasehold interest in Suite \_\_\_\_\_ at the Property (the "**Leased Premises**"), hereby agrees to and certifies as follows, except as otherwise stated herein:

1. Landlord, Landlord's successor in interest or any mortgagee, and their respective successors and assigns, may rely on the information set forth in this Estoppel Certificate.

2. The rentable area of the Leased Premises is approximately \_\_\_\_\_ (\_\_\_\_\_) square feet. The Base Rent is currently \_\_\_\_\_ and increases by \_\_\_\_\_. The Percentage Rent under the Lease is \_\_\_\_\_ percent (\_\_\_\_%) of Gross Sales (as defined in the Lease). The due date of monthly payments under the Lease is the \_\_\_\_\_ (\_\_\_\_\_) day of each month.

3. The Lease Term commenced on \_\_\_\_\_, 200 , and will expire on \_\_\_\_\_, \_\_\_\_\_. The following fully identifies all options held by Tenant under the Lease, including, but not limited to, renewal, expansion, extension and purchase options: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

4. Attached to this Estoppel Certificate and incorporated herein by this reference is a true, correct and complete copy of the Lease, including all amendments and modifications thereof. The Lease has been properly executed by a legally authorized representative of Tenant, is in full force and effect, and constitutes a binding obligation on Tenant.

5. Tenant has accepted possession of the Leased Premises described in the Lease; all improvements and all items of an executory nature pertaining thereto have been completed to Tenant's satisfaction; and any allowance provided for in the Lease has been paid or satisfied.

6. All utilities required for the use of the Leased Premises are installed and adequate to service Tenant's needs.

7. There is no default or event that with the passing of time and/or the giving of notice would constitute a default on Tenant's part (or, to the best of Tenant's knowledge, on the part of the Landlord) under the Lease.

8. No Rents are accrued and unpaid or prepaid for more than one (1) month under the Lease; and there is no free rent or security deposit except as may be stated in the Lease. Any such security deposit is in the possession of the Landlord in the full amount stated in the Lease.



9. Tenant has no defense, set-off or counterclaim related to its obligations under the Lease or against the Landlord.

10. Other than the matters referred to in the preamble above, Tenant has not received any notice of any sale, transfer, assignment, hypothecation, mortgage or pledge of Landlord's interest in the Lease.

11. Except as otherwise provided herein, Tenant hereby acknowledges and agrees that Landlord has fulfilled all its obligations and warranties pursuant to the Lease, and that assignment of the Lease to a buyer or as security to a lender shall not constitute a default or breach of any of the terms and conditions of the Lease, and that after the assignment, any buyer shall be substituted in all respects as the Landlord under the terms and conditions of the Lease.

12. Tenant has received no notice of any violation of any law, municipal ordinance or other governmental or quasi-governmental requirements affecting the Leased Premises which has not been satisfied, and Tenant has no reason to believe that any authority contemplates issuing any such notice or that any violation exists.

13. Tenant has not assigned or transferred any of its interest in the Lease nor subleased any portion thereof to another.

14. Except for periods of free rent described in the Lease, Tenant is not entitled to and has made no agreements with Landlord or its agents or employees concerning free rent, partial rent, rebate of rental payments, credit or offset or reduction in rent, or any other type of rental concession, including without limitation, lease support payments or lease buy-outs.

15. The person(s) executing this Estoppel Certificate on behalf of Tenant is duly authorized to execute this Estoppel Certificate.

DATED AS OF \_\_\_\_\_, \_\_\_\_\_.

"TENANT":

\_\_\_\_\_, a(n)  
\_\_\_\_\_ corporation

By \_\_\_\_\_

Its \_\_\_\_\_

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

**EXHIBIT "G"**

GUARANTY

**[SEE DOCUMENT FOLLOWING THE EXHIBIT DESCRIPTION PAGE]**

## GUARANTY

This Guaranty is entered into as of January 1, 2016 (the "**Effective Date**"), by Aaron Nelson and Denise Nelson, husband and wife; Kenneth Likewise and Julie Likewise, husband and wife; Wiley Arnett III and Paula C. Arnett, husband and wife (each jointly and severally a "**Guarantor**" hereunder), for the benefit of the ARIZONA BOARD OF REGENTS, A BODY CORPORATE, FOR AND ON BEHALF OF ARIZONA STATE UNIVERSITY ("**Landlord**").

### RECITALS:

A. Rehab Burger 2, Therapy, LLC, an Arizona limited liability company ("**Tenant**") is desirous of entering into that certain Lease dated January 1, 2016 ("**Lease**"), whereby Tenant will lease from Landlord that certain real property known as Suite 146, 21 East 6<sup>th</sup> Street, Tempe, Arizona, and all improvements located thereon (the "**Leased Premises**").

B. Landlord has required Aaron E. Nelson and Denise Nelson, husband and wife; Kenneth L. Likewise and Julie S. Likewise, husband and wife; and Wiley Arnett III and Paula C. Arnett, husband and wife (collectively, the "**Guarantors**", and each jointly and severally a "**Guarantor**") to execute this Guaranty (the "**Guaranty**"), as a condition of Landlord entering into the Lease.

C. To induce Landlord to enter into the Lease which is being executed simultaneously herewith, the undersigned Guarantors have agreed to execute this Guaranty.

NOW, THEREFORE, in consideration of the foregoing, together with other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the undersigned Guarantors hereby agree as follows:

### AGREEMENT:

1. Guarantors jointly and severally each absolutely and unconditionally guarantee (i) the timely performance and completion of the construction of Tenant Improvements as described on **Exhibit "D"** of the Lease and Tenant's opening for business in the Leased Premises, (ii) the complete and appropriate trade fixturing of the Leased Premises for Tenant's Permitted Use prior to said opening for business, and (iii) that there will be no mechanic's, materialmen's or other liens filed against the Leased Premises as a result of the foregoing performance of Tenant or any Guarantor.

2. Guarantors jointly and severally each absolutely and unconditionally guarantees the availability of unencumbered cash to Tenant, for Tenant's use in completing Tenant Improvements (as defined in the Lease), when and as required by the Lease, in an amount not less than the amount required of Tenant under **Exhibit "D"** of the Lease, including but not limited to the Tenant's Additional Funds described therein.

3. Guarantors jointly and severally each unconditionally guarantee that Tenant will operate the Permitted Use (as defined in the Lease) in the entirety of the Leased Premises throughout the entire Lease Term, subject to casualty and Force Majeure as defined in Paragraph 19.2.1 of the Lease.

4. Guarantors jointly and severally each absolutely and unconditionally guarantee and promise to Landlord the due, punctual and full performance by Tenant of each and all of the covenants, obligations, liabilities and promises of Tenant and the truth and accuracy of each and all of the representations and warranties of Tenant contained in the Lease, including, without limitation, the

payment of Total Rent (as defined in the Lease) and any and all other sums payable thereunder. For the purposes of this Guaranty, the term of the Lease refers to any renewals, extensions, modifications, reinstatements and holdings over thereof. Guarantors hereby covenant and agree with Landlord: (i) if not done by Tenant, to make the due and punctual payment of all rent, expenses, costs, monies and charges expressed to be payable under the Lease; (ii) if not done by Tenant, to render prompt and complete performance of all and each of the terms, covenants, conditions and provisions contained in the Lease on the part of Tenant to be kept, observed and performed; and (iii) to indemnify and save harmless Landlord from any loss, costs or damages arising out of any failure by Tenant to pay the rent, expenses, costs, monies and charges payable under the Lease or the failure by Tenant to perform any of the terms, covenants, conditions and provisions contained in the Lease.

5. Guarantors acknowledge that all of their respective obligations under this Guaranty are independent of and joint and several with the obligations of Tenant under the Lease and the obligations of each Guarantor signing this Guaranty are joint and several with the obligations of every other Guarantor hereunder or under any separate guaranty. In the event of a default under the Lease, each Guarantor waives any right to require Landlord to: (i) first proceed against Tenant or any other Guarantor or pursue any rights or remedies under or with respect to the Lease; (ii) proceed against or exhaust any security that Landlord holds from Tenant or any other Guarantor; or (iii) pursue any other remedy whatsoever in Landlord's power. Landlord will have the right to enforce this Guaranty regardless of the acceptance of additional security from Tenant or any other Guarantor and regardless of the release or discharge of Tenant or any other Guarantor by Landlord or by others, or by operation of law. This is a Guaranty of payment and performance, not of collection.

In any action to enforce this Guaranty, Guarantors may assert and raise any defenses available to Tenant relating to (a) negotiations, discussions and circumstances preceding or surrounding, and related to, the execution of the Lease and the terms thereof; (b) the terms, provisions, conditions and requirements of the Lease, including the obligations of Landlord and Tenant under the Lease; and (c) the nature or condition of the Leased Premises, but Guarantors may specifically and expressly not assert, raise, rely on or otherwise utilize or attempt to utilize any other defenses, justifications or excuses for their non-performance of this Guaranty, including but not limited to any related to (i) bankruptcy, reorganization, insolvency, readjustment of debt, winding up, dissolution, liquidation or receivership by or for Tenant, or (ii) inability of Tenant to pay or perform its debts or obligations, including but not limited to Tenant's inability to pay or perform its debts or obligations under or in connection with the Lease.

6. Guarantors hereby expressly waive (i) any right of setoff against amounts due under this Guaranty; (ii) notice of the acceptance of this Guaranty; (iii) notice of non-performance of or demand on Tenant; and (iv) the provisions of A.R.S. §§ 12-1641, 12-1642, 12-1644, 12-1645 and 12-1646 and Arizona Rules of Civil Procedure, Rule 17(F), and any successor statutes or rules. Guarantors waive any homestead or exemption right. Any married person who is a Guarantor agrees that recourse may be had against all separate and community property of such person.

7. Without limiting the generality of the foregoing, the liability of Guarantors under this Guaranty will not be deemed to have been waived, released, discharged, impaired or affected by reason of any waiver or failure to enforce any of the obligations of the Tenant under the Lease, or assignment of the Lease, or the subletting of the Leased Premises by Tenant, or the release or discharge of Tenant in any receivership, bankruptcy, winding-up or other creditors' proceedings or the rejection, disaffirmance or disclaimer of the Lease by any party in any action or proceeding, and shall continue with respect to the periods prior thereto and thereafter. Guarantors' liability for obligations of Tenant arising or accruing during the term of the Lease shall not be affected by the subsequent expiration or termination of the term of the Lease, and after any expiration or termination of the Lease, Guarantors will be fully responsible for

all post-expiration or post-termination obligations of Tenant pursuant to the Lease. The liability of the Guarantors will not be affected by any repossession of the Leased Premises by Landlord. Guarantors will pay when due from Tenant any balance owing to Landlord from time to time, immediately upon being given written notice of demand by Landlord in the manner for providing notice set forth in the Lease, at its address set forth below.

8. Guarantors agree that, without the consent of or notice to Guarantors and without affecting any of the obligations of Guarantors under this Guaranty: (a) any term, covenant or condition of the Lease may be amended, compromised, released or otherwise altered by Landlord and Tenant, and Guarantors guarantee and promise to perform all the obligations of Tenant under the Lease as so amended, compromised, released or altered; (b) any other Guarantor of or party to the Lease may be released, substituted or added; (c) any right or remedy under the Lease, this Guaranty or any other instrument or agreement may be exercised, not exercised, impaired, modified, limited, destroyed, or suspended; and (d) Landlord or any other person may deal in any manner with Tenant, any guarantor, any party to the Lease or any other person.

9. Guarantors will pay Landlord's reasonable attorneys' fees and all costs and other expenses incurred in any collection or attempted collection of this Guaranty or in any negotiations relative to the obligations hereby guaranteed.

10. Until all the covenants and conditions in the Lease on Tenant's part to be performed and observed are fully performed and observed, Guarantors: (i) will have no right of subrogation against Tenant by reason of any payments or acts of performance by any Guarantor in compliance with the obligations of the Guarantors hereunder; (ii) waives any right to enforce any remedy which Guarantors now or hereafter will have against Tenant by reason of any one or more payments or acts of performance in compliance with the obligations of Guarantors hereunder; and (iii) subordinates any liability or indebtedness of Tenant now or hereafter held by Guarantors to the obligations of Tenant to the Landlord under the Lease. Notwithstanding any provision to the contrary contained herein, Guarantors unconditionally and irrevocably waive (a) any and all rights of subrogation (whether arising under contract, 11 U.S.C. § 509 or otherwise) to the claims, whether existing now or arising hereafter, Landlord may have against Tenant, and (b) any all rights of reimbursement, contribution or indemnity against Tenant which may have heretofore arisen or may hereafter arise in connection with any guaranty or pledge or grant of any lien or security interest made in connection with the Lease. Guarantors acknowledge that the waiver contained in the preceding sentence (the "Subrogation Waiver") is given as an inducement to Landlord to enter into the Lease and, in consideration of Landlord's willingness to enter into the Lease, Guarantors agree not to amend or modify in any way the Subrogation Waiver without Landlord's prior written consent. If any amount is paid to Guarantors (or any of them) by Tenant on account of any claim set forth at any time when all the liabilities of Tenant shall have been paid in full, such amount shall be held in trust by such Guarantors for Landlord's benefit, will be segregated from the other funds of Guarantors and shall forthwith be paid over to Landlord to be applied in whole or in part by Landlord's right, title or interest in the Lease, Guaranty; all such rights of subrogation and participation being hereby expressly waived and released.

11. The liability of Guarantors under this Guaranty shall continue until the expiration of all periods within which any amount at any time paid on account of the obligations guaranteed hereby may be required to be restored or returned by Landlord upon the bankruptcy, insolvency or reorganization of Tenant, any other guarantor or any other person. If any amount at any time paid on account of the obligations guaranteed hereby is required to be restored or returned by Landlord as a result of any such bankruptcy, insolvency or reorganization, Guarantors will; be liable under this Guaranty with respect to such amount as if such amount was never paid.

12. This instrument may not be changed, modified, discharged or terminated orally or in any manner other than by an agreement in writing signed by Guarantors and the Landlord. Notices shall be given pursuant to Article 18 of the Lease, with Guarantors' addresses as specified below, subject to change pursuant to Article 18 of the Lease.

13. All of the terms, agreements and conditions of this Guaranty shall extend to and be binding upon Guarantors, and the successors and assigns of Guarantors and shall inure to the benefit of and may be enforced by Landlord, its successors and assigns as the owner(s) of the property containing the Leased Premises, and the holder of any mortgage to which the Leased Premises may be subject at any time or from time to time. Without limiting the generality of the foregoing, Landlord may, without notice, assign this Guaranty to any party to whom its interests in the Lease have been assigned, or have been otherwise transferred, or to any party succeeding in any manner to the interest of Landlord. Upon request, Guarantors will execute a new Guaranty, in the form hereof, in favor of any such successor.

14. Guarantors represent and warrant to Landlord that the execution of this Guaranty and the performance of their respective obligations hereunder will not result in any breach of, constitute a default under, or be a violation of any government statute, ordinance, rule or regulation, or any indenture, mortgage, deed of trust, bank loan or credit agreement or other instrument to which Guarantors are a party or by which Guarantors are bound.

15. The use of the singular herein shall include the plural. This Guaranty shall be governed by the laws of the State of Arizona. Guarantors consent to and agree that the courts in Maricopa County, Arizona shall have proper jurisdiction and venue for any actions brought to enforce or with respect to this Guaranty. This is a continuing and irrevocable Guaranty and shall remain in full force until each of the obligations guaranteed hereby is satisfied in full.

16. Time is of the essence with respect to each obligation set forth herein.

17. Guarantors agree and acknowledge that Landlord is relying on the assets of each Guarantor as presented by Guarantors to Landlord as of the date of this Guaranty. Guarantors will not transfer any assets to any affiliated entity, other affiliate or other party, except upon receipt of reasonable consideration representing the full value thereof.

18. **Guaranty Termination Date.** Provided that Tenant has fully performed and is current with respect to all of its obligations under the Lease prior to and including those arising as of December 1, 2020 (the "**Guaranty Termination Date**"), this Guaranty will terminate and be of no further force of effect on the Guaranty Termination Date. If Tenant has not fully performed or is not current with respect to all of its obligations under the Lease as of the Guaranty Termination Date, this provision will be null, void and of no further force or effect, and this Guaranty will continue until Tenant fully performs all its obligations under the Lease. Provided that Tenant has fully performed and is current with respect to all of its obligations under the Lease as of the Guaranty Termination Date, the Guarantors may request that Landlord provide written confirmation that this Guaranty has terminated in accordance with this provision.

IN WITNESS WHEREOF, the undersigned Guarantors have executed this Guaranty as of the Effective Date.

[SIGNATURES ON FOLLOWING 3 PAGES]

SIGNATURE PAGE TO GUARANTY  
OF RETAIL LEASE OF  
REHAB BURGER THERAPY 2, LLC, an Arizona limited liability company

"GUARANTOR"

Aaron E. Nelson and Denise Nelson, husband and wife

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

Aaron Nelson

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

Denise Nelson

Guarantor's Notice Address:

7525 E. Highland Ave  
Scottsdale AZ 85257

STATE OF ARIZONA        )

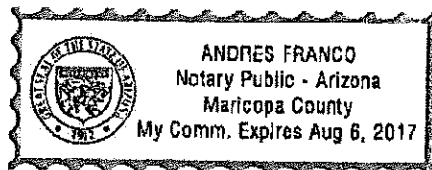
) ss

County of Maricopa    )

The foregoing instrument was acknowledged before me this 3rd day of November, 2015, by  
AARON E. NELSON and DENISE NELSON.

\_\_\_\_\_  
Notary Public

[NOTARY SEAL]



**SIGNATURE PAGE TO GUARANTY  
OF RETAIL LEASE OF  
REHAB BURGER THERAPY 2, LLC, an Arizona limited liability company**

**"GUARANTOR"**

Wiley Arnett, III and Paula C. Arnett, husband and wife

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

Wiley Arnett, III

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

Paula C. Arnett

**Guarantor's Notice Address:**

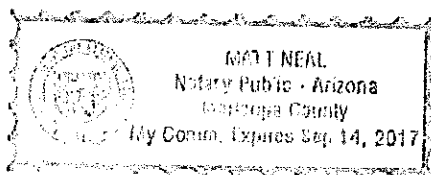
1823 North 77th Street  
Scottsdale, AZ 85257

STATE OF ARIZONA            )  
  ) ss  
County of Maricopa         )

The foregoing instrument was acknowledged before me this 30 day of Nov, 2015, by  
WILEY ARNETT, III, and PAULA C. ARNETT.

\_\_\_\_\_  
Notary Public

[NOTARY SEAL]

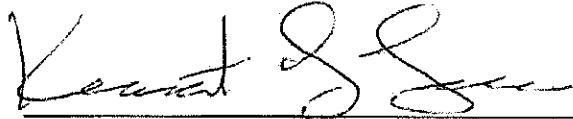





**SIGNATURE PAGE TO GUARANTY  
OF RETAIL LEASE OF  
REHAB BURGER THERAPY 2, LLC, an Arizona limited liability company**

**"GUARANTOR"**

Kenneth L. Likewise and Julie S. Likewise

By:   
Kenneth L. Likewise

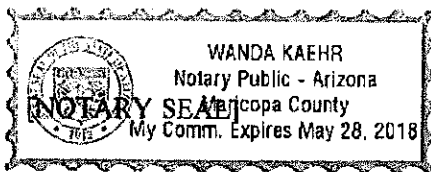
By:   
Julie S. Likewise

**Guarantor's Notice Address:**

1706 South Granada Drive  
Tempe, AZ 85281

STATE OF ARIZONA            )  
  ) ss  
County of Maricopa         )

The foregoing instrument was acknowledged before me this 23 day of Nov, 2015, by  
**KENNETH L. LIKEWISE** and **JULIE S. LIKEWISE**.



  
Notary Public

**EXHIBIT "H"**

**CONFIRMATION OF RENT COMMENCEMENT DATE**

Landlord: The ARIZONA BOARD OF REGENTS, a body corporate for and on behalf of Arizona State University

Tenant: \_\_\_\_\_

This Confirmation is made by Landlord and Tenant pursuant to that certain Lease dated as of \_\_\_\_\_, \_\_\_\_ (the "Lease") for certain premises known as Suite \_\_\_\_\_ in the Building commonly known as \_\_\_\_\_ Building (the "Leased Premises"). This Confirmation is made pursuant to Article 2 of the Lease.

1. Rent Commencement Date, Expiration Date. Landlord and Tenant hereby agree that the Rent Commencement Date of the Lease is \_\_\_\_\_, \_\_\_\_\_, and the Expiration Date of the Lease is \_\_\_\_\_, 20\_\_.

2. Square Footage; Monthly Rent. Landlord and Tenant agree that the leasable square footage of the Leased Premises is \_\_\_\_\_ and the initial Base Rent is \$ \_\_\_\_\_ per month and \$ \_\_\_\_\_ per year.

3. Acceptance of Premises. Tenant has inspected the Leased Premises and affirms that the Leased Premises is acceptable in all respects in its current "as is" condition.

4. Incorporation. This Confirmation is incorporated into the Lease, and forms an integral part thereof. This Confirmation shall be construed and interpreted in accordance with the terms of the Lease for all purposes.

Dated as of \_\_\_\_\_, 20\_\_.

**LANDLORD:**

ARIZONA BOARD OF REGENTS, a body corporate, for and on behalf of Arizona State University

**TENANT:**

\_\_\_\_\_, a(n)  
\_\_\_\_\_

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

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

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

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

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

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

**EXHIBIT "T"**

**ESTIMATED FIRST YEAR  
CAM EXPENSES BUDGET**

**ESTIMATED 2015 COSTS PER SQUARE FOOT  
RETAIL**

<b>MA – Project Common Area R &amp; M</b>	<b>\$ 1.32</b>
<b>Repairs and Maintenance</b>	<b>\$ 0.29</b>
<b>Maintenance Labor</b>	<b>\$ 0.49</b>
<b>Electricity for common area</b>	<b>\$ 0.88</b>
<b>HVAC</b>	<b>\$ 0.04</b>
<b>Painting</b>	<b>\$ 0.01</b>
<b>Window Cleaning</b>	<b>\$ 0.13</b>
<b>Emergency Fire System Repairs</b>	<b>\$ 0.07</b>
<b>Property Management Fees</b>	<b>\$ 0.15</b>
<b>Waste Removal</b>	<b>\$ 0.04</b>
<b>Escalator/Elevator Repairs</b>	<b>\$ 0.02</b>
<b>RE Taxes</b>	<b>\$ 3.24</b>
<b>DTES Assessment</b>	<b>\$ 0.15</b>
<b>Water &amp; Gas</b>	<b>\$ 0.38</b>
<b>Office supplies, other misc.</b>	<b>\$ 0.00</b>
<b>Parking expenses/license/fees</b>	<b>\$ 1.33</b>
<b>Accruals &amp; Adjustments</b>	<b>\$(1.69)</b>

**TOTAL:      \$6.85**

**EXHIBIT "J"**

**PROHIBITED USES**

1. Flea market (other than occasional street fairs and other special events)
2. Swap meet
3. Bowling alley (other than a bowling alley located within a first-class entertainment center)
4. Arcade
5. Game room (other than a game room located within a first-class entertainment center)
6. Skating rink (other than a temporary skating rink on a seasonal basis)
7. Billiard room (except a billiard room located within a bar, tavern or restaurant)
8. Massage parlor (other than a spa or a medical office)
9. Adult book store
10. Motion picture theater
11. Funeral parlor
12. Facility for the sale of paraphernalia for use with illicit drugs
13. Carnival, amusement park or circus (other than occasional special events)
14. New or used car dealership (other than the temporary display of automobiles in Common Areas for promotional purposes)
15. Gas station
16. Auto repair shop

**[END OF EXHIBIT]**

# **EXHIBIT B**



ARIZONA STATE UNIVERSITY

January 14, 2019

**ALL NOTICES SENT VIA CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED, AND BY  
REGULAR U.S. MAIL**

Rehab Burger  
Attn: Wiley Arnett  
7210 E 2<sup>nd</sup> Street  
Scottsdale, AZ 85251

Aaron E. Nelson  
Denise Nelson  
7525 E. Highland Avenue  
Scottsdale, AZ 85251

Wiley Arnett, III  
Paula C. Arnett  
1823 North 77<sup>th</sup> Street  
Scottsdale, AZ 85257

Kenneth L. Likewise  
Julie S. Likewise  
1706 S. Granada Drive  
Tempe, AZ 85281

**RE: NOTICE OF FAILURE OF TENANT TO PAY RENT AND  
NOTICE OF LANDLORD INSPECTION OF PREMISES**

*Lease dated January 1, 2016 (the "Lease"), between Arizona Board of Regents, a body corporate, acting for and on behalf of Arizona State University ("Landlord"), and Rehab Burger Therapy 2, LLC, an Arizona Limited Liability Company ("Tenant"), and Lease Guaranty dated January 1, 2016 (the "Guaranty"), signed by Aaron E. Nelson and Denise Nelson, husband and wife; Kenneth L. Likewise and Julie S. Likewise, husband and wife; and Wiley Arnett II and Paula C. Arnett; husband and wife (collectively, the "Guarantors") for the Lease and Leased Premises located at Suite 146, 21 East 6<sup>th</sup> Street, Tempe, Arizona (the "Premises")*

Dear Tenant and Guarantors:

This letter is to notify you that Tenant has committed an event of default under the Lease, including, but not limited to the failure of Tenant to pay any Rent or other sum of money within five (5) days after the same is due, as provided under Article 16.1(a) of the Lease.

Notice is further provided that Tenant has an outstanding balance, in the amount of \$66,901.30 (which amount includes base rent and taxes); and that Tenant also owes the applicable Late Fees and interest at the Default Interest Rate payable in connection with such late payments, as required by Articles 1.19 and 1.20 of the Lease (such base rent, taxes, Late Fee and interest collectively, "Late Payments"). Landlord demands that Tenant pay all Late Payments within ten

UNIVERSITY REAL ESTATE DEVELOPMENT  
PO Box 873908, Tempe AZ 85287-3908  
Phone (480) 965-6700 | Fax (480) 727-6210

Rehab Burger  
Re. Notice of Default  
January 14, 2019  
Page 2

(10) days from the date of this notice. Landlord further demands that Guarantors pay the Late Payments, as required by Section 4 of the Guaranty, within ten (10) days from the date of this notice. Failure to pay the Late Payments within such ten-day period will result in Landlord exercising its remedies.

Landlord's immediate rights under the Lease include, among other rights, the right to re-enter and take possession of the Leased Premises and of all equipment and fixtures of Tenant located therein, and to expel or remove Tenant and all other parties occupying the Leased Premises. However, provided Tenant does not take actions to remove any such equipment or fixtures from the Premises or otherwise cause damage to the Premises, Landlord is willing to forego such right for ten (10) days from the date of this letter to allow Tenant to pay the Late Payments. If Tenant does not promptly comply with the terms of this letter, Landlord may elect to re-enter and retake possession of the Leased Premises.

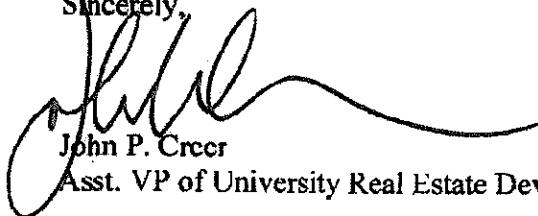
This notice of default is not a waiver of any other event of default that may exist, whether known or unknown. Nothing contained herein shall in any way be construed as a waiver by Landlord of any of the remedies available to it at law or in equity or under the Lease or Guaranty. Nothing contained herein shall in any way be construed as a waiver of Landlord's right to insist on strict performance by you of your obligations in connection with the Lease and Guaranty. Landlord reserves the right to elect to exercise remedies available to Landlord under the Lease, Guaranty and available at law or in equity. To the extent time is of the essence has been previously waived, it is hereby fully reinstated with respect to all your obligations under the Lease and Guaranty.

Notice is also given that Landlord intends to inspect the Premises as permitted by Section 19.2 of the Lease.

All capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms as set forth in the Lease.

Please contact me if you have any questions or concerns regarding this matter.

Sincerely,



John P. Creer  
Asst. VP of University Real Estate Development

JPC/JW

Rehab Burger  
Re. Notice of Default  
January 14, 2019  
Page 3

cc: Jennifer Wittmann, University Real Estate Development  
Barbara Lloyd, University Real Estate Development  
Latonja West, University Real Estate Development  
Maureen Anders, Esq., ASU Office of General Counsel



# **EXHIBIT C**

## FIRST AMENDMENT TO RETAIL LEASE

THIS FIRST AMENDMENT TO RETAIL LEASE (this "**Amendment**"), dated as of February 27, 2019 (the "**Effective Date**"), is entered into by ARIZONA BOARD OF REGENTS, a body corporate, for and on behalf of Arizona State University ("**Landlord**"), and REHAB BURGER THERAPY 2, LLC, an Arizona limited liability company, doing business as Rehab Burger Therapy ("**Tenant**"). Landlord and Tenant are collectively referred to herein as the "**Parties**" and singularly as a "**Party**".

### RECITALS

A. Landlord and Tenant entered into that certain Retail Lease at Brickyard on Mill dated January 1, 2016 (the "**Lease**"), for the lease of Suite 146 on the first floor of the Bank of America Building within Condominium Unit 2 located at 21 East 6<sup>th</sup> Street, Tempe, Arizona (the "**Leased Premises**"), at which Tenant operates a business known as Rehab Burger Therapy.

B. Tenant has committed an Event of Default under the Lease by failing to pay certain Base Rent and Additional Rent as required by the Lease (the "**Current Default**").

C. Tenant has requested that Landlord forbear from exercising its remedies under the Lease arising from the Current Default and otherwise agree to the restructuring of certain payment obligations under the Lease. Landlord is willing to forbear from exercising its remedies under the Lease arising from the Current Default and to agree to the restructuring of certain payment obligations under the Lease as requested by Tenant, but only pursuant to the express terms of this Amendment.

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

1. Recitals. The foregoing Recitals are hereby incorporated in this Amendment as if fully set forth herein.

2. Capitalized Terms. Capitalized terms used in this Amendment and not otherwise defined shall have the meanings set forth in the Lease.

3. Current Default; Past Due Amount. As of the Effective Date, as a result of the Current Default, Tenant owes Landlord (i) past-due Base Rent and Additional Rent in the amount of \$40,032.96 for amounts payable for periods occurring on or before December 31, 2018 (the "**Past Due Amount**"), and (ii) additional amounts for Late Fees and interest at the Default Rate on the Past Due Amount (such Late Fees and interest, the "**Additional Default Charges**"). For avoidance of doubt, the Past Due Amount also includes Tenant's Proportionate Share of CAM Expenses, Utilities (to the extent owing to Landlord) and parking charges, to the extent unpaid for those periods of time, together with applicable sales, transaction privilege, excise or other tax applicable to such amounts. The Past Due Amount, however, does not include the Additional Default Charges.

4. Forbearance and Contingent Restructuring of Lease Payments. Notwithstanding anything to the contrary contained in the Lease, provided that (i) at all times through the end of the Forbearance Period (defined below) no Event of Default exists under the Lease (other than the Current Default), and (ii) Tenant timely pays all payments required below in this Section 4, together with all other payments required pursuant to the Lease (to the extent such payments are not expressly restructured by this Section 4), Landlord agrees to forbear from exercising its rights and remedies for the Current Default and, during the Forbearance Period, to accept payments as follows:

4.1. Payment of Past Due Amount.

4.1.1. During the Forbearance Period, Tenant will pay Landlord the Past Due Amount, plus 8% interest, in equal monthly installments of \$1,810.58 over a twenty-four (24) month period, with each installment due on or before the first day of the calendar month, beginning March 1, 2019 and continuing through and including February 1, 2021 ("Forbearance Period").

4.1.2. If after giving effect to the payments described in Section 4.1.1, any portion of the Past Due Amount remains unpaid on the last day of the Forbearance Period, such unpaid portion shall be due and payable in full on the last day of the Forbearance Period.

4.2. Reduction in Payment of Base Rent. During the Forbearance Period, Tenant shall continue to pay Base Rent in a timely manner pursuant to the terms of the Lease, except that Base Rent for the months of June, July and August during each year of the Forbearance Period shall be abated in full (each such month, a "Rent Abatement Month"). Notwithstanding the abatement of Base Rent during each Rent Abatement Month, Tenant shall remain responsible for, and shall continue to pay during each and every month of the Lease Term (including, without limitation, each Rent Abatement Month), (i) all payments of the Past Due Amount in the manner required pursuant to Section 4.1, and (ii) all payments of Additional Rent.

5. Termination of Forbearance Period. Without limiting the general terms and conditions to forbearance set forth in this Amendment, any failure by Tenant to strictly perform its duties under this Amendment, or any further act, omission or circumstance (excluding the Current Default) that constitutes an Event of Default under the Lease shall permit Landlord immediately and without notice to terminate any obligation of Landlord to forbear from exercising its rights and remedies as provided in this Amendment, and exercise all rights and remedies under the Lease with regard to the Current Default and any new Events of Default for all intents and purposes as if this Amendment were never entered into. Notwithstanding any provision herein to the contrary, in the event of any early termination of the Forbearance Period, all references herein to the Forbearance Period shall refer only to the period from the Effective Date through the date upon which the Forbearance Period is terminated.

6. Modification of Lease. Upon Tenant's full and timely compliance with all of the payment requirements set forth above in Section 4, and satisfaction of the conditions precedent set forth in the first sentence of Section 4, and provided that no early termination of the Forbearance Period has occurred pursuant to Section 5, effective immediately upon the end of the Forbearance Period, Landlord and Tenant agree that the Lease shall be modified as follows:

6.1. The Base Rent reductions provided for in Section 4.2 above shall be extended for the remainder of the Lease Term. More specifically, in such event, Landlord and Tenant agree that for remainder of the Lease Term following the end of the Forbearance Period, the Rent Abatement Months shall be expanded to include the months of June, July and August during each year until the end of the Lease Term, and Base Rent shall be abated in full for such months. Notwithstanding the foregoing abatement of Base Rent, Tenant shall remain responsible for, and shall continue to pay in the manner required in the Lease, all Additional Rent during each and every month of the Lease Term (including, without limitation, each Rent Abatement Month).

6.2. Landlord agrees to waive the Additional Default Charges.

7. Security Deposit. Pursuant to Paragraph 5.9 of the Lease, Tenant's Security Deposit has previously been applied to past due Base Rent and Additional Rent. Tenant agrees to replenish Security Deposit in the amount of Nine Thousand Six Hundred and 00/100 Dollars (\$9,600.00) on or before the end of the Forbearance Period and for the avoidance of doubt, in no event later than February 1, 2021.

8. Late Fees; Default Rate; Time of Essence. Subject to the express agreements set forth herein regarding the Additional Default Charges, but otherwise notwithstanding anything to the contrary herein or in Landlord's prior actions, Landlord's rights under the Lease to charge and collect Late Fees and interest at the Default Interest Rate from the first day Rent is due until paid is hereby reaffirmed and reinstated. Any prior waiver of those rights and/or any prior waiver of the time is of the essence provision of the Lease is rescinded, and all such rights are reaffirmed and reinstated in whole.


9. Counterparts and Electronic Signatures. This Amendment may be executed in any number of counterparts with the same force and effect as if all signatures were appended to one document, each of which shall be deemed an original. Execution and delivery of this Amendment by electronic format (for example, portable document format or other image) bearing the signature of any party hereto shall constitute a valid and binding execution and delivery of this Amendment by such party. Such electronic copies shall constitute enforceable original documents.

10. Ratification. Except as herein and hereby modified and amended, the Lease shall remain in full force and effect and all of the terms, provisions, covenants and conditions thereof are hereby ratified, extended and confirmed, and all such terms are incorporated herein by this reference. Landlord and Tenant reaffirm their respective rights and obligations under the Lease as modified by this Amendment. The Lease and this Amendment shall be construed, to the extent reasonably possible, as supplementing one another; provided, however, that in the event of a conflict or ambiguity between the Lease and this Amendment, the terms and provisions of this Amendment shall control. Each Party hereto represents to the other (i) that the execution and delivery of this Amendment has been fully authorized by all necessary corporate or limited liability company action, and (ii) that the person signing this Amendment on behalf of such Party has the requisite authority to do so and the authority and power to bind such Party to this Amendment by the execution thereof, all in accordance with such Party's governing and/or charter documents.

The Parties have executed this FIRST AMENDMENT TO RETAIL LEASE as of the Effective Date.


**"Landlord":**

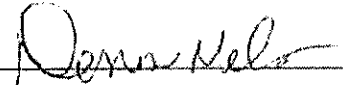
**ARIZONA BOARD OF REGENTS**, a body corporate, for and on behalf of Arizona State University


By:   
John P. Creer, Assistant Vice  
President, University Real Estate  
Development, Arizona State  
University

**"Tenant":**

**REHAB BURGER THERAPY 2, LLC**, an Arizona limited liability company dba REHAB BURGER THERAPY

By:   
Wiley Arnett, III, Member

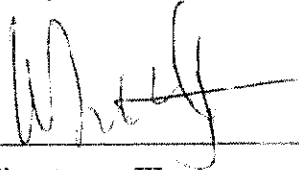
By:   
Denise Nelson, Member

By:   
Kenneth L. Likewise, Member

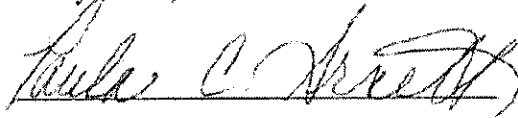
CONSENT OF GUARANTORS TO  
FIRST AMENDMENT TO RETAIL LEASE

The undersigned have executed a Guaranty (the "**Guaranty**") with respect to the obligations of Rehab Burger 2 Therapy, LLC, an Arizona limited liability company ("**Tenant**"), under that certain Retail Lease dated January 1, 2016, by and between Tenant and Arizona Board of Regents, a body corporate, for and on behalf of Arizona State University.

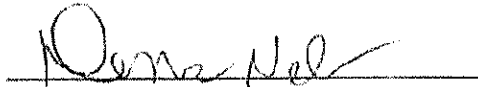
In connection with the foregoing First Amendment to Retail Lease (the "**Amendment**"), to which this Consent of Guarantors (this "**Consent**") is attached, the undersigned hereby approve, authorize and consent to the Amendment, and agree that the Guaranty executed by the undersigned remains in full force and effect with respect to the Lease, as amended by the Amendment. This Consent may be executed in any number of counterparts, all of which together shall be deemed to constitute one instrument, and each of which shall be deemed an original.



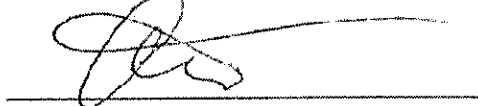
Wiley Arnett, III



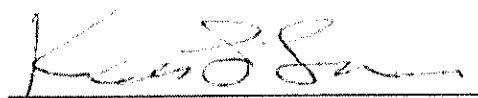
Paula C. Arnett



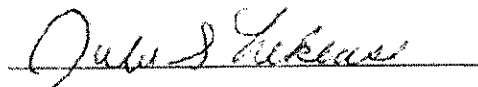
Denise Nelson



Aaron Nelson



Kenneth L. Likewise



Julie S. Likewise

# EXHIBIT D



October 4, 2019

**ALL NOTICES SENT VIA CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED, AND BY  
REGULAR U.S. MAIL**

Rehab Burger  
Attn: Wiley Arnett  
7210 E 2<sup>nd</sup> Street  
Scottsdale, AZ 85251

Aaron E. Nelson  
Denise Nelson  
7525 E. Highland Avenue  
Scottsdale, AZ 85251

Wiley Arnett, III  
Paula C. Arnett  
1823 North 77<sup>th</sup> Street  
Scottsdale, AZ 85257

Kenneth L. Likewise  
Julie S. Likewise  
1706 S. Granada Drive  
Tempe, AZ 85281

**RE: NOTICE OF DEFAULT AND  
NOTICE OF LANDLORD RETAKING THE PREMISES; DEMAND FOR  
PAYMENT**

*Lease dated January 1, 2016, as amended by that First Amendment dated February 27, 2019 (as so amended, the "Lease"), by and between Arizona Board of Regents, a body corporate, acting for and on behalf of Arizona State University ("Landlord"), and Rehab Burger Therapy 2, LLC, an Arizona Limited Liability Company ("Tenant"), and Lease Guaranty dated January 1, 2016 (the "Guaranty"), signed by Aaron E. Nelson and Denise Nelson, husband and wife; Kenneth L. Likewise and Julie S. Likewise, husband and wife; and Wiley Arnett II and Paula C. Arnett; husband and wife (collectively, the "Guarantors"), regarding the leased premises located at Suite 146, 21 East 6<sup>th</sup> Street, Tempe, Arizona (the "Leased Premises")*

Dear Tenant and Guarantors:

This letter is to notify you that Tenant has committed multiple Events of Default under the Lease, including, but not limited to, (i) the nonpayment of Total Rent in a timely manner and (ii) the vacating or abandonment of the Leased Premises by Tenant or the cessation by Tenant of its usual and customary business on the Leased Premises.

UNIVERSITY REAL ESTATE DEVELOPMENT  
PO Box 873908, Tempe AZ 85287-3908  
Phone (480) 965-6700 | Fax (480) 727-6210



Rehab Burger  
Re. Notice of Default  
October 4, 2019  
Page 2

As a result of Tenant's defaults, Landlord is entitled to exercise any and all of its rights and remedies under the Lease and the Guaranty, in such order and manner as Landlord may elect, in its sole discretion. Guarantors have been added as parties to this letter to put them on notice of their direct liability for all amounts owing on the Lease.

Landlord's immediate rights under the Lease include, among other rights, the right to re-enter and take possession of the Leased Premises and of all equipment and fixtures of Tenant located therein. Landlord has exercised its right of re-entry and repossession to retake possession of the Leased Premises.

As a result of Tenant's default, Landlord also is entitled to terminate the forbearance rights previously provided to Tenant in the First Amendment. Notice is hereby given that pursuant to Section 5 of that First Amendment, the Forbearance Period is hereby terminated.

As of September 30, 2019, Tenant owes the amount of \$85,677.43 under the Lease, which amount includes Base Rent and components of Additional Rent, including taxes, applicable Late Fees and interest at the Default Interest Rate payable in connection with such late payments, as required by Articles 1.19 and 1.20 of the Lease. Tenant also owes any additional amounts accruing under the Lease after September 30, 2019, until all such sums are paid in full.

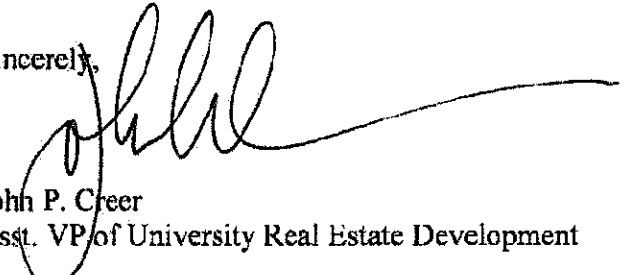
Demand is hereby made that you pay in full all sums owing on the Lease immediately and in any event on or before October 31, 2019. Please contact Barbara Lloyd at 480-965-9080 to make arrangements for payment.

This notice of default and demand for payment is not a waiver of any other event of default that may exist, whether known or unknown. Nothing contained herein shall in any way be construed as a waiver by Landlord of any of the remedies available to it at law or in equity or under the Lease or Guaranty. Nothing contained herein shall in any way be construed as a waiver of Landlord's right to insist on strict performance by you of your obligations in connection with the Lease and Guaranty. To the extent time is of the essence has been previously waived, it is hereby fully reinstated with respect to all your obligations under the Lease and Guaranty.

All capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms as set forth in the Lease.

Rehab Burger  
Re. Notice of Default  
October 4, 2019  
Page 3

Sincerely,



John P. Creer  
Asst. VP of University Real Estate Development

cc: Barbara Lloyd, University Real Estate Development  
Jennifer Wittmann, University Real Estate Development  
Mary Grace McNear, ASU Office of General Counsel

# **EXHIBIT E**

**ASU**  
**ARIZONA STATE UNIVERSITY**

November 1, 2019

**ALL NOTICES SENT VIA CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED, AND BY  
REGULAR U.S. MAIL**

Rehab Burger Therapy 2, LLC  
Attn: Wiley Arnett  
7210 E. 2<sup>nd</sup> Street  
Scottsdale, AZ 85251

Aaron E. Nelson  
Denise Nelson  
7525 E. Highland Avenue  
Scottsdale, AZ 85251

Wiley Arnett, III  
Paula C. Arnett  
1823 North 77<sup>th</sup> Street  
Scottsdale, AZ 85257

Kenneth L. Likewise  
Julie S. Likewise  
1706 S. Granada Drive  
Tempe, AZ 85281

**RE: NOTICE OF TERMINATION OF LEASE**

*Lease dated January 1, 2016, as amended by that First Amendment dated February 27, 2019 (as so amended, the "Lease"), by and between Arizona Board of Regents, a body corporate, acting for and on behalf of Arizona State University ("Landlord"), and Rehab Burger Therapy 2, LLC, an Arizona Limited Liability Company ("Tenant"), and Lease Guaranty dated January 1, 2016 (the "Guaranty"), signed by Aaron E. Nelson and Denise Nelson, husband and wife; Kenneth L. Likewise and Julie S. Likewise, husband and wife; and Wiley Arnett II and Paula C. Arnett, husband and wife (collectively, the "Guarantors"), regarding the leased premises located at Suite 146, 21 East 6<sup>th</sup> Street, Tempe, Arizona (the "Leased Premises")*

Dear Tenant and Guarantors:

This letter gives notice that Landlord is terminating the Lease, effective immediately. Landlord is pursuing this remedy based on Tenant's defaults under the Lease, as more specifically described in the Notice of Default and Notice of Landlord Retaking the Premises and Demand for Payment letter Landlord sent to Tenant and the Guarantors dated October 4, 2019.

This notice of termination is not a waiver of any other event of default that may exist, whether known or unknown. Nothing contained herein shall in any way be construed as a waiver by Landlord of any of the remedies available to it at law or in equity or under the Lease or Guaranty. Nothing contained herein shall in any way be construed as a waiver of Landlord's right

UNIVERSITY REAL ESTATE DEVELOPMENT  
PO Box 873908, Tempe AZ 85287-3908  
Phone (480) 965-6700 | Fax (480) 727-6210

Rehab Burger Therapy 2, LLC  
Re: Notice of Termination  
November 1, 2019  
Page 2

to insist on strict performance by you of your obligations in connection with the Lease and Guaranty. To the extent time is of the essence has been previously waived, it is hereby fully reinstated with respect to all your obligations under the Lease and Guaranty.

All capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms as set forth in the Lease.

Please contact me if you have any questions or concerns regarding this matter.

Sincerely,



John P. Creer

Asst. VP of University Real Estate Development

cc: Barbara Lloyd, University Real Estate Development  
Jennifer Wittmann, University Real Estate Development  
Mary Grace McNear, ASU Office of General Counsel  
Rehab Burger (via U.S. Mail)  
Aaron E. and Denise Nelson (via U.S. Mail)  
Kenneth L. and Julie S. Likewise (via U.S. Mail)  
Wiley Arnett, III and Paula C. Arnett (via U.S. Mail)

# **EXHIBIT F**

## **GUARANTY**

This Guaranty is entered into as of January 1, 2016 (the "**Effective Date**"), by Aaron Nelson and Denise Nelson, husband and wife; Kenneth Likewise and Julie Likewise, husband and wife; Wiley Arnett III and Paula C. Arnett, husband and wife (each jointly and severally a "**Guarantor**" hereunder), for the benefit of the ARIZONA BOARD OF REGENTS, A BODY CORPORATE, FOR AND ON BEHALF OF ARIZONA STATE UNIVERSITY ("**Landlord**").

### **RECITALS:**

A. Rehab Burger 2, Therapy, LLC, an Arizona limited liability company ("**Tenant**") is desirous of entering into that certain Lease dated January 1, 2016 ("**Lease**"), whereby Tenant will lease from Landlord that certain real property known as Suite 146, 21 East 6<sup>th</sup> Street, Tempe, Arizona, and all improvements located thereon (the "**Leased Premises**").

B. Landlord has required Aaron E. Nelson and Denise Nelson, husband and wife; Kenneth L. Likewise and Julie S. Likewise, husband and wife; and Wiley Arnett III and Paula C. Arnett, husband and wife (collectively, the "**Guarantors**", and each jointly and severally a "**Guarantor**") to execute this Guaranty (the "**Guaranty**"), as a condition of Landlord entering into the Lease.

C. To induce Landlord to enter into the Lease which is being executed simultaneously herewith, the undersigned Guarantors have agreed to execute this Guaranty.

NOW, THEREFORE, in consideration of the foregoing, together with other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the undersigned Guarantors hereby agree as follows:

### **AGREEMENT:**

1. Guarantors jointly and severally each absolutely and unconditionally guarantee (i) the timely performance and completion of the construction of Tenant Improvements as described on **Exhibit "D"** of the Lease and Tenant's opening for business in the Leased Premises, (ii) the complete and appropriate trade fixturing of the Leased Premises for Tenant's Permitted Use prior to said opening for business, and (iii) that there will be no mechanic's, materialmen's or other liens filed against the Leased Premises as a result of the foregoing performance of Tenant or any Guarantor.

2. Guarantors jointly and severally each absolutely and unconditionally guarantees the availability of unencumbered cash to Tenant, for Tenant's use in completing Tenant Improvements (as defined in the Lease), when and as required by the Lease, in an amount not less than the amount required of Tenant under **Exhibit "D"** of the Lease, including but not limited to the Tenant's Additional Funds described therein.

3. Guarantors jointly and severally each unconditionally guarantee that Tenant will operate the Permitted Use (as defined in the Lease) in the entirety of the Leased Premises throughout the entire Lease Term, subject to casualty and Force Majeure as defined in Paragraph 19.21 of the Lease.

4. Guarantors jointly and severally each absolutely and unconditionally guarantee and promise to Landlord the due, punctual and full performance by Tenant of each and all of the covenants, obligations, liabilities and promises of Tenant and the truth and accuracy of each and all of the representations and warranties of Tenant contained in the Lease, including, without limitation, the

payment of Total Rent (as defined in the Lease) and any and all other sums payable thereunder. For the purposes of this Guaranty, the term of the Lease refers to any renewals, extensions, modifications, reinstatements and holdings over thereof. Guarantors hereby covenant and agree with Landlord: (i) if not done by Tenant, to make the due and punctual payment of all rent, expenses, costs, monies and charges expressed to be payable under the Lease; (ii) if not done by Tenant, to render prompt and complete performance of all and each of the terms, covenants, conditions and provisions contained in the Lease on the part of Tenant to be kept, observed and performed; and (iii) to indemnify and save harmless Landlord from any loss, costs or damages arising out of any failure by Tenant to pay the rent, expenses, costs, monies and charges payable under the Lease or the failure by Tenant to perform any of the terms, covenants, conditions and provisions contained in the Lease.

5. Guarantors acknowledge that all of their respective obligations under this Guaranty are independent of and joint and several with the obligations of Tenant under the Lease and the obligations of each Guarantor signing this Guaranty are joint and several with the obligations of every other Guarantor hereunder or under any separate guaranty. In the event of a default under the Lease, each Guarantor waives any right to require Landlord to: (i) first proceed against Tenant or any other Guarantor or pursue any rights or remedies under or with respect to the Lease; (ii) proceed against or exhaust any security that Landlord holds from Tenant or any other Guarantor; or (iii) pursue any other remedy whatsoever in Landlord's power. Landlord will have the right to enforce this Guaranty regardless of the acceptance of additional security from Tenant or any other Guarantor and regardless of the release or discharge of Tenant or any other Guarantor by Landlord or by others, or by operation of law. This is a Guaranty of payment and performance, not of collection.

In any action to enforce this Guaranty, Guarantors may assert and raise any defenses available to Tenant relating to (a) negotiations, discussions and circumstances preceding or surrounding, and related to, the execution of the Lease and the terms thereof; (b) the terms, provisions, conditions and requirements of the Lease, including the obligations of Landlord and Tenant under the Lease; and (c) the nature or condition of the Leased Premises, but Guarantors may specifically and expressly not assert, raise, rely on or otherwise utilize or attempt to utilize any other defenses, justifications or excuses for their non-performance of this Guaranty, including but not limited to any related to (i) bankruptcy, reorganization, insolvency, readjustment of debt, winding up, dissolution, liquidation or receivership by or for Tenant, or (ii) inability of Tenant to pay or perform its debts or obligations, including but not limited to Tenant's inability to pay or perform its debts or obligations under or in connection with the Lease.

6. Guarantors hereby expressly waive (i) any right of setoff against amounts due under this Guaranty; (ii) notice of the acceptance of this Guaranty; (iii) notice of non-performance of or demand on Tenant; and (iv) the provisions of A.R.S. §§ 12-1641, 12-1642, 12-1644, 12-1645 and 12-1646 and Arizona Rules of Civil Procedure, Rule 17(F), and any successor statutes or rules. Guarantors waive any homestead or exemption right. Any married person who is a Guarantor agrees that recourse may be had against all separate and community property of such person.

7. Without limiting the generality of the foregoing, the liability of Guarantors under this Guaranty will not be deemed to have been waived, released, discharged, impaired or affected by reason of any waiver or failure to enforce any of the obligations of the Tenant under the Lease, or assignment of the Lease, or the subletting of the Leased Premises by Tenant, or the release or discharge of Tenant in any receivership, bankruptcy, winding-up or other creditors' proceedings or the rejection, disaffirmance or disclaimer of the Lease by any party in any action or proceeding, and shall continue with respect to the periods prior thereto and thereafter. Guarantors' liability for obligations of Tenant arising or accruing during the term of the Lease shall not be affected by the subsequent expiration or termination of the term of the Lease, and after any expiration or termination of the Lease, Guarantors will be fully responsible for



all post-expiration or post-termination obligations of Tenant pursuant to the Lease. The liability of the Guarantors will not be affected by any repossession of the Leased Premises by Landlord. Guarantors will pay when due from Tenant any balance owing to Landlord from time to time, immediately upon being given written notice of demand by Landlord in the manner for providing notice set forth in the Lease, at its address set forth below.

8. Guarantors agree that, without the consent of or notice to Guarantors and without affecting any of the obligations of Guarantors under this Guaranty: (a) any term, covenant or condition of the Lease may be amended, compromised, released or otherwise altered by Landlord and Tenant, and Guarantors guarantee and promise to perform all the obligations of Tenant under the Lease as so amended, compromised, released or altered; (b) any other Guarantor of or party to the Lease may be released, substituted or added; (c) any right or remedy under the Lease, this Guaranty or any other instrument or agreement may be exercised, not exercised, impaired, modified, limited, destroyed, or suspended; and (d) Landlord or any other person may deal in any manner with Tenant, any guarantor, any party to the Lease or any other person.

9. Guarantors will pay Landlord's reasonable attorneys' fees and all costs and other expenses incurred in any collection or attempted collection of this Guaranty or in any negotiations relative to the obligations hereby guaranteed.

10. Until all the covenants and conditions in the Lease on Tenant's part to be performed and observed are fully performed and observed, Guarantors: (i) will have no right of subrogation against Tenant by reason of any payments or acts of performance by any Guarantor in compliance with the obligations of the Guarantors hereunder; (ii) waives any right to enforce any remedy which Guarantors now or hereafter will have against Tenant by reason of any one or more payments or acts of performance in compliance with the obligations of Guarantors hereunder; and (iii) subordinates any liability or indebtedness of Tenant now or hereafter held by Guarantors to the obligations of Tenant to the Landlord under the Lease. Notwithstanding any provision to the contrary contained herein, Guarantors unconditionally and irrevocably waive (a) any and all rights of subrogation (whether arising under contract, 11 U.S.C. § 509 or otherwise) to the claims, whether existing now or arising hereafter, Landlord may have against Tenant, and (b) any all rights of reimbursement, contribution or indemnity against Tenant which may have heretofore arisen or may hereafter arise in connection with any guaranty or pledge or grant of any lien or security interest made in connection with the Lease. Guarantors acknowledge that the waiver contained in the preceding sentence (the "**Subrogation Waiver**") is given as an inducement to Landlord to enter into the Lease and, in consideration of Landlord's willingness to enter into the Lease, Guarantors agree not to amend or modify in any way the Subrogation Waiver without Landlord's prior written consent. If any amount is paid to Guarantors (or any of them) by Tenant on account of any claim set forth at any time when all the liabilities of Tenant shall have been paid in full, such amount shall be held in trust by such Guarantors for Landlord's benefit, will be segregated from the other funds of Guarantors and shall forthwith be paid over to Landlord to be applied in whole or in part by Landlord's right, title or interest in the Lease, Guaranty; all such rights of subrogation and participation being hereby expressly waived and released.

11. The liability of Guarantors under this Guaranty shall continue until the expiration of all periods within which any amount at any time paid on account of the obligations guaranteed hereby may be required to be restored or returned by Landlord upon the bankruptcy, insolvency or reorganization of Tenant, any other guarantor or any other person. If any amount at any time paid on account of the obligations guaranteed hereby is required to be restored or returned by Landlord as a result of any such bankruptcy, insolvency or reorganization, Guarantors will; be liable under this Guaranty with respect to such amount as if such amount was never paid.

12. This instrument may not be changed, modified, discharged or terminated orally or in any manner other than by an agreement in writing signed by Guarantors and the Landlord. Notices shall be given pursuant to Article 18 of the Lease, with Guarantors' addresses as specified below, subject to change pursuant to Article 18 of the Lease.

13. All of the terms, agreements and conditions of this Guaranty shall extend to and be binding upon Guarantors, and the successors and assigns of Guarantors and shall inure to the benefit of and may be enforced by Landlord, its successors and assigns as the owner(s) of the property containing the Leased Premises, and the holder of any mortgage to which the Leased Premises may be subject at any time or from time to time. Without limiting the generality of the foregoing, Landlord may, without notice, assign this Guaranty to any party to whom its interests in the Lease have been assigned, or have been otherwise transferred, or to any party succeeding in any manner to the interest of Landlord. Upon request, Guarantors will execute a new Guaranty, in the form hereof, in favor of any such successor.

14. Guarantors represent and warrant to Landlord that the execution of this Guaranty and the performance of their respective obligations hereunder will not result in any breach of, constitute a default under, or be a violation of any government statute, ordinance, rule or regulation, or any indenture, mortgage, deed of trust, bank loan or credit agreement or other instrument to which Guarantors are a party or by which Guarantors are bound.

15. The use of the singular herein shall include the plural. This Guaranty shall be governed by the laws of the State of Arizona. Guarantors consent to and agree that the courts in Maricopa County, Arizona shall have proper jurisdiction and venue for any actions brought to enforce or with respect to this Guaranty. This is a continuing and irrevocable Guaranty and shall remain in full force until each of the obligations guaranteed hereby is satisfied in full.

16. Time is of the essence with respect to each obligation set forth herein.

17. Guarantors agree and acknowledge that Landlord is relying on the assets of each Guarantor as presented by Guarantors to Landlord as of the date of this Guaranty. Guarantors will not transfer any assets to any affiliated entity, other affiliate or other party, except upon receipt of reasonable consideration representing the full value thereof.

18. **Guaranty Termination Date.** Provided that Tenant has fully performed and is current with respect to all of its obligations under the Lease prior to and including those arising as of December 1, 2020 (the "**Guaranty Termination Date**"), this Guaranty will terminate and be of no further force of effect on the Guaranty Termination Date. If Tenant has not fully performed or is not current with respect to all of its obligations under the Lease as of the Guaranty Termination Date, this provision will be null, void and of no further force or effect, and this Guaranty will continue until Tenant fully performs all its obligations under the Lease. Provided that Tenant has fully performed and is current with respect to all of its obligations under the Lease as of the Guaranty Termination Date, the Guarantors may request that Landlord provide written confirmation that this Guaranty has terminated in accordance with this provision.


IN WITNESS WHEREOF, the undersigned Guarantors have executed this Guaranty as of the Effective Date.

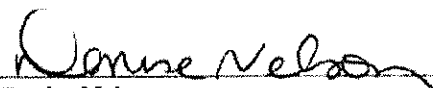
[SIGNATURES ON FOLLOWING 3 PAGES]

**SIGNATURE PAGE TO GUARANTY  
OF RETAIL LEASE OF  
REHAB BURGER THERAPY 2, LLC, an Arizona limited liability company**

**"GUARANTOR"**

Aaron E. Nelson and Denise Nelson, husband and wife

By:   
Aaron Nelson

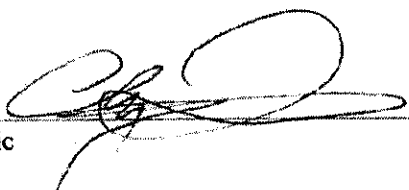
By:   
Denise Nelson

**Guarantor's Notice Address:**

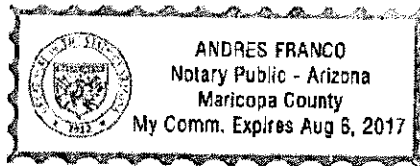
7525 E. Highland Ave  
Scottsdale AZ 85251

STATE OF ARIZONA           )  
  ) ss  
County of Maricopa        )

The foregoing instrument was acknowledged before me this 3rd day of November, 2015, by  
**AARON E. NELSON** and **DENISE NELSON**.

  
Notary Public

[NOTARY SEAL]

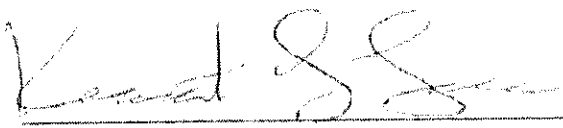


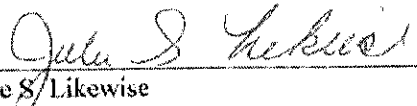
G-6

**SIGNATURE PAGE TO GUARANTY  
OF RETAIL LEASE OF  
REHAB BURGER THERAPY 2, LLC, an Arizona limited liability company**

**"GUARANTOR"**

Kenneth L. Likewise and Julie S. Likewise

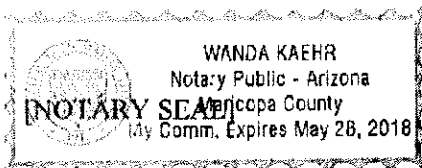
By:   
Kenneth L. Likewise


By:   
Julie S. Likewise

**Guarantor's Notice Address:**  
1706 South Granada Drive  
Tempe, AZ 85281

STATE OF ARIZONA                     )  
  ) ss  
County of Maricopa                    )

The foregoing instrument was acknowledged before me this 26 day of Nov, 2015, by  
**KENNETH L. LIKEWISE and JULIE S. LIKEWISE.**



  
Notary Public