

## **Appendix 6**

Appendix 6A:        Donation Agreement Between Vallco Property Owner, LLC  
                                 and Cupertino Union School District

Appendix 6B:        Donation Agreement Between Vallco Property Owner, LLC  
                                 and Fremont Union High School District

APPENDIX 6A

**DONATION AGREEMENT**

**BETWEEN**

**VALLCO PROPERTY OWNER, LLC**

**("DONOR")**

**and**

**CUPERTINO UNION SCHOOL DISTRICT**

**("DISTRICT")**

Dated: June 7, 2016

## DONATION AGREEMENT

THIS DONATION AGREEMENT ("Agreement") is made this 7th day of June, 2016 ("Effective Date"), by and between VALLCO PROPERTY OWNER, LLC, a Delaware limited liability company ("Donor") and the CUPERTINO UNION SCHOOL DISTRICT, a California public school district ("District"). Donor and District are referred to occasionally herein as a "Party" or "Parties."

### RECITALS

WHEREAS, Donor is the owner of certain real property located within District boundaries in the City of Cupertino, County of Santa Clara, State of California, more specifically known as APNs 316-20-080, -081, -082, -094, -095, -099, -100, -101, -103, -104, -105, -106, -107 ("Property"), on which Donor desires to secure entitlements to construct a mixed-use development pursuant to the Vallco Town Center Specific Plan Initiative ("Initiative"), which allows for the development of a minimum of 389 residential units, approximately 2 million square feet of office space, up to 100,000 square feet of civic space, and approximately 640,000 square feet of retail space ("Development");

WHEREAS, the Property is the subject of the Initiative, which, if approved by the voters of the City of Cupertino ("City"), would enact and require the implementation of the Vallco Town Center Specific Plan ("Specific Plan"), which requires the developer of the Property to provide approximately \$40 million to local school districts; specifically, District and the Fremont Union High School District ("FUHSD");

WHEREAS, according to student demographic information provided by the District and the City-commissioned Schoolhouse Services Enrollment and Fiscal Impact Report dated February 2016, the addition of 800 new residential units on the Property within the District boundaries is expected to generate 212 additional students to be served by the District. The District currently does not have the facilities to accommodate such an increase in student population while still maintaining the District's high educational standards;

WHEREAS, California Education Code, section 17620, *et seq.*, and California Government Code, section 65995, *et seq.* ("Developer Fee Statutes") allow a school district to impose developer impact fees or other requirements to mitigate school-related impacts resulting from residential and non-residential development projects;

WHEREAS, District is currently authorized to impose Level 1 school impact fees at a maximum rate of Three-Dollars-and-Forty-Eight-Cents (\$3.48) per square foot for all residential construction and Fifty-Six-Cents (\$0.56) per square foot for all commercial/industrial construction and senior citizen housing, as defined in the Developer Fee Statutes and Civil Code section 51.3, and pursuant to its agreement with FUHSD, dated January 22, 1993 ("FUHSD Agreement"), District is allowed to collect up to 60% of these maximum fees from the Donor in connection with the Development currently at a rate of Two-Dollars-and-Nine-Cents (\$2.09) per square foot for all residential construction and Thirty-Four-Cents (\$0.34) per square foot for all commercial/industrial construction and senior citizen housing, minus credit for the demolition of existing commercial space ("Developer Fees");

WHEREAS, the Parties agree that Donor shall pay to District Developer Fees imposed in accordance with the Developer Fee Statutes and the FUHSD Agreement; however, the Parties acknowledge that Donor desires to provide additional funding for the District beyond what is required by state law;

WHEREAS, the Parties understand and agree that new school facilities within the District are a part of the infrastructure that is beneficial to serve the residents of the Development when completed; however, State funds for school construction are limited, thus the procurement of funding for the construction of school facilities has become the responsibility of the local community that desires those facilities;

WHEREAS, Donor wishes to fully mitigate any impacts to District not mitigated by Donor's payment of Developer Fees, and desires that the Development move forward without opposition from District. Additionally, Donor acknowledges the well-recognized impact schools may have on local property values, including the Development, and desires the enhancement of the educational environment for all students in the District;

WHEREAS, in order to fully mitigate any impacts to District not mitigated by Donor's payment of Developer Fees and for facilities and/or to enhance the educational environment or opportunities for students in the District, and in consideration of the effect District schools may have on the property values of the Development that will inure to the benefit of Donor after construction of the Development, Donor will, as provided for herein, make a one-time donation of Nineteen-Million and No/100 Dollars (\$19,000,000.00) to District, or alternatively, if agreed to by the Parties, the Donor will donate school facilities in-lieu of a payment ("Enhancement of Educational Environment Donation" or "EEE Donation");

WHEREAS, in order to fully mitigate any impacts to District not mitigated by Donor's payment of Developer Fees, and in consideration of the effect continuing and additional District school programs may have on the property values of the Development that will inure to the benefit of Donor after construction of the Development, Donor will, as provided for herein, make a one-time donation of One-Million-and-No/100-Dollars (\$1,000,000.00) to District for the purpose of supplementing District's fundraising efforts to ensure the long-term viability of the existing Yosemite Science Program serving the District's middle school students ("Yosemite Endowment");

WHEREAS, in order to fully mitigate any impacts to District not mitigated by Donor's payment of Developer Fees and in order to further contribute to the improvement of existing school facilities or the establishment of new school facilities that would not otherwise be available to students by Donor's payment of Developer Fees, in consideration of the effect District funding may have on the property values of the Development that will inure to the benefit of Donor after construction of the Development, and in response to the proposal from District Superintendent Wendy Gudalewicz, Donor will, on an annual basis as provided for herein, pay an amount equivalent to those parcel taxes established by Measure A, Parcel Tax Renewal, Cupertino Union School District, 2014, ("Measure A") for each unrestricted residential apartment unit constructed as part of the Development as long as the parcel tax remains in effect ("Parcel Tax Equivalency Payments");



WHEREAS, the Parties acknowledge that children of future employees who work at the Development but who do not reside in Cupertino do not have a right to attend District schools, which has no bearing on Donor's obligation to pay Developer Fees;

WHEREAS, according to the Fiscal and Economic Impacts Analysis prepared by Keyser Marston Associates, Inc. dated May 2016, implementation of the Specific Plan and this Agreement is anticipated to result in approximately \$1 million of increased property tax revenue dedicated to the repayment of debt service for outstanding bonds issued by District, representing approximately 4 to 5 percent of the property taxes currently collected for debt service within District, and, if this Agreement's in-lieu option is elected, the Donor's donation of new school facilities would result in a net capital facility surplus of approximately \$21.7 million to District;

WHEREAS, Donor and District desire to memorialize Donor's commitments to District — which include Donor's payment to District of Developer Fees, the EEE Donation, the Yosemite Endowment, and of the Parcel Tax Equivalency Payments ("Donor Commitments") — pursuant to the terms and conditions contained herein;

WHEREAS, Donor represents and agrees that the Donor Commitments shall be entirely funded by private financing, and shall not be funded from public financing or in any way at the expense of taxpayers; and

WHEREAS, such Donor Commitments provided by Donor are offered in consideration for their enhancement of the property values in the Development and desirability of the completed Development that will inure to the benefit of Donor after construction of the Development.

NOW THEREFORE, in consideration of the terms and conditions hereinafter set forth, Donor and District agree as follows:

## AGREEMENT

### **1. Term; Timing of Obligations**

1.1 *Effective Date.* This Agreement shall become effective on the date first written above. However, no party shall have any right or obligation under this Agreement unless and until the events described in Section 1.3 have occurred, except as set forth in Section 6.4.

1.2 *Termination.* This Agreement may only be terminated upon the completion of the Donor Commitments, as defined in Section 6.1, unless mutually agreed to by the Parties.

1.3 *Approval of Development.* Except as set forth in Section 6.4, the Parties shall have no rights or obligations under this Agreement unless and until the voters of City approve the Initiative, the City approves Donor's Development to allow a minimum of 389 residential units, approximately 2 million square feet of office space, up to 100,000 square feet of civic space, and approximately 640,000 square feet of retail space, City issues the first building permit for the Development, and all relevant appeal periods and statutes of limitations under CEQA and the State Planning and Zoning Laws (Cal. Gov. Code, section 65000 *et. seq.*) for challenging such

entitlements have run without the filing of a legal challenge (“Approval Date”). The specific timing of the obligations of Donor is as set forth in this Agreement.

## **2. Developer Fees**

2.1 *Calculation of Fees.* The square footages of residential construction, commercial construction, and senior citizen housing associated with the Developer Fees shall be calculated in accordance with the following definitions:

2.1.1 “Residential Construction” shall mean residential “assessable space,” as defined in California Government Code, section 65995(b)(1), as calculated by the City’s Department of Community Development, Building Division, in accordance with the City’s standard practice in calculating structural perimeters.

2.1.2 “Commercial Construction” shall mean commercial/industrial “chargeable covered and enclosed space,” as defined in California Government Code, section 65995(b)(2), as determined the City’s Department of Community Development, Building Division, in accordance with the City’s building standards.

2.1.3 “Senior Citizen Housing,” shall mean the assessable space of “senior citizen housing,” as defined by California Civil Code, section 51.3.

## **2.2 Developer Fees.**

2.2.1 *Payment Due Date; Form.* Developer Fees for Residential Construction, Commercial Construction, and Senior Citizen Housing shall be due and payable in conjunction with the issuance of a building permit for each building including such space, but may also be paid at any time prior to that date in the sole discretion of the Donor, but which payment remains subject to the one-year expiration of the Certificate of Compliance issued by District upon payment of Developer Fees. Fees shall only be for the portion of the Development for which the building permit is being issued and credits shall be granted for the commensurate portion of the commercial space that previously existed at the location of the portion of the Development for which the building permit is being issued. Payment of Developer Fees shall be in the form of a cashier’s check or electronic transfer at District’s discretion and instruction.

2.2.2 *Developer Fee Amount.* Donor shall pay to District Developer Fees in effect at the time of payment, including if fees are paid early, however, said payment remains subject to the one-year expiration of the Certificate of Compliance issued by District upon payment of Developer Fees. As of the date of this Agreement, Developer Fees are equal to sixty percent (60%) of the current Level 1 rates; specifically, Two-Dollars-and-Nine-Cents (\$2.09) per square foot of Residential Construction within the Development, and Thirty-Four-Cents (\$0.34) per square foot of Commercial Construction and Senior Citizen Housing within the Development, minus credit in the amount of three hundred and ninety-six thousand dollars (\$396,000.00) for the demolition of 1.2 million square feet of existing commercial space, at a rate of Thirty-Four-Cents (\$0.34) per square foot (or rate in effect of time of payment), consistent with current District policy. In addition to Donor’s payment of the EEE Donation, the Yosemite Endowment, and the Parcel Tax Equivalency Payments as set forth in this Agreement,

Donor's payment of Developer Fees shall constitute the total and full mitigation of any and all impact of Donor's Development on District.

2.3 *Certificate of Compliance.* Upon tender of Developer Fees by Donor, District shall issue to Donor a certificate of compliance evidencing that, with respect to each building containing Residential Construction, Commercial Construction, or Senior Citizen Housing for which Developer Fees have been paid (which shall be identified by unit, lot number, or other appropriate description), Donor has complied with any and all school mitigation requirements of the District, contingent on Donor's payment of the EEE Donation, Yosemite Endowment, and Parcel Tax Equivalency Payments, as applicable. Donor shall have an ongoing obligation to make the Parcel Tax Equivalency Payments as provided for in Section 5.

2.4 *Expenditure of Developer Fees.* Developer Fees may be used for any District expenditures related to the construction or reconstruction of school facilities including, but not limited to, providing additional facilities necessary or desirable to mitigate the impact of other development within District, and/or to enhance existing facilities to better serve District students. The use of Developer Fees shall be in District's sole discretion.

2.5 *No Reduction or Credit.* Donor's obligation to pay Developer Fees shall be absolute as to all Residential Construction, Commercial Construction, and Senior Citizen Housing built in conjunction with the Development after the Effective Date. Donor acknowledges that in the event that District receives funds from the State of California or any other source to accommodate existing or projected students generated from the Development, Donor or its successors or assigns shall not be entitled to any refund or credit or reduction in Developer Fees as a result of the receipt of such State or other funds.

### **3. The Educational Environment Enhancement (EEE) Donation**

3.1 *Amount, Purpose and Donation of Facilities In-lieu of Payment Option.* In consideration of the effect District schools may have on the property values of the Development that will inure to the benefit of Donor after construction of the Development, Donor agrees to make a one-time donation of Nineteen-Million-and-No/100-Dollars (\$19,000,000.00) to District to mitigate any impacts caused by the Development and for facilities and/or the enhancement of the educational environment or opportunities for students of the District. In-lieu of the payment of \$19,000,000.00, if mutually agreed to by the Parties, the Donor shall donate new school facilities at a location or locations determined by the District in District's sole discretion. If the school facilities in-lieu option is elected, such election shall be documented in a mutually agreed to agreement or agreements setting forth the terms of the design, construction and donation of new school facilities by Donor, including any such related site lease(s) or access agreement(s) to District property.

3.2 *Payment Due Date.* The Donor shall pay District the EEE Donation prior to City's issuance of the first final occupancy permit for residential uses in Development. The EEE Donation shall be in the form of a cashier's check or electronic transfer at the District's discretion and instruction.

3.3 *Expenditure of EEE Donation.* The District shall use the EEE Donation to first mitigate impacts caused by the Development and then for the enhancement of facilities and/or

the educational environment or opportunities for District students, in the District's sole discretion. The EEE Donation funds shall not be used for payment of salary or benefits of District staff or employees.

#### **4. Yosemite Endowment Gift**

4.1 *Amount.* In consideration for the heightened property values that the District's continuation and expansion of its Yosemite Science Project will generate for the completed Development, Donor agrees to make a one-time donation of One-Million-and-No/100-Dollars (\$1,000,000.00) to District for the purpose of supplementing District's fundraising efforts to ensure the long-term viability of the in-place Yosemite Science Program.

4.2 *Payment Due Date.* The Donor shall pay District the Yosemite Endowment gift prior to the City's issuance of the first final occupancy permit for residential uses in the Development. The Yosemite Endowment gift may be paid at any time prior to that date in the sole discretion of Donor. The Yosemite Endowment gift shall be in the form of a cashier's check or electronic transfer at the District's discretion and instruction.

4.3 *Expenditure of Yosemite Endowment.* The District may use the Yosemite Endowment gift for any District expenditures directly related to the Yosemite Science Program at District's sole discretion.

#### **5. Parcel Tax Equivalency Payments**

5.1 *Amount.* Donor shall pay the Parcel Tax Equivalency Payments to District on an annual basis in an amount equivalent to the Measure A parcel tax for each unrestricted apartment unit constructed in the Development, less any parcel taxes Donor is otherwise obligated to pay for the Development. The Parcel Tax Equivalency Payments shall be the same amount as the Measure A parcel tax in effect that year, including any increases, or in the same amount as a substantially similar measure that may be imposed in the future. However, if the Measure A parcel tax expires or is repealed and not replaced with a substantially similar measure, no further payment will be due. No payments will be made on units restricted as affordable units or Senior Housing units.

5.2 *Payment Due Date.* The initial Parcel Tax Equivalency Payment shall be prorated and payable within thirty (30) days of the City's issuance of the first final occupancy permit for residential uses in Development, and shall be in an amount calculated on a per unit basis as provided above. Thereafter, the Parcel Tax Equivalency Payment shall be payable on or before the first installment of property taxes are due each year. Payments will be due only on units with a final certificate of occupancy from the City.

#### **6. Full Mitigation; Successors & Assigns**

6.1 *Sole and Exclusive Mitigation.* It is agreed by the parties that Donor's payment of Developer Fees, the EEE Donation (including, if applicable, the donation of new school facilities in-lieu of the \$19,000,000.00 payment), the Yosemite Endowment gift, and the Parcel Tax Equivalency Payments ("Donor Commitments") fully and completely mitigates any and all impacts that the Development may have on District, and creates a net positive impact on District,

and District will not request or require any further school impact mitigation in connection with the Development, regardless of any future change in law, rule, regulation, or policy and shall be in lieu of any and all other school mitigation requirements whatsoever due, payable, or sought by District currently or in the future relating in any manner to school impacts or school facilities. District shall not be prohibited from or limited in levying any general obligation tax or other exaction on the Property (subject to applicable law) in the future, provided such tax is uniformly imposed on all similar property within District boundaries. Notwithstanding the foregoing or anything contained in this Agreement or otherwise, Donor's Donor Commitments shall terminate at the election of either party if the Initiative fails, but shall have no effect on Donor's statutory obligation to pay Developer Fees pursuant to the Developer Fee Statutes.

6.2 *Satisfactory Performance.* Completion and satisfaction of the Donor Commitments (or failure of the Initiative) shall extinguish the burden of this covenant on the Property or part of the Property ("Released Property"), and shall release Donor from the obligations of this Agreement as to the Released Property, but shall have no effect on Donor's statutory obligation to pay Developer Fees pursuant to the Developer Fee Statutes. Upon satisfaction of the Donor Commitments (or due to failure of the Initiative), this Agreement shall be terminated and of no further force or effect and shall not be a matter of record.

6.3 *District Position on Development.* District covenants and agrees that, with respect to the Property, it shall not assist or engage in any of the following actions if the result of any of them, directly or indirectly, would be to require payment of any exaction or imposition of any mitigation measures on the Property (with respect to the Development only) other than or in excess of the Donor Commitments expressly provided for in this Agreement:

6.3.1 Oppose the Development, directly or indirectly, or seek to condition any portion of the Development of the Property on the basis of inadequate school facilities;

6.3.2 Suggest, request, initiate or support, directly or indirectly, litigation to oppose the Development;

6.3.3 Exercise any power or authority (under the School Facilities Act or any other provision of applicable law) to levy a fee, charge, dedication, special tax, or other form of requirement against the Development of the Property for the purpose of funding or financing any school facilities; or

6.3.4 Require any other governmental entity to exercise, or cooperate with any city, county or other governmental entity in the exercise of the power under Title 7, Division 1, Chapter 4.7 of the Government Code (commencing with Section 65970) or any other applicable provision of law, to require the dedication of land, the payment of fees in lieu thereof, and/or the payment of special taxes for interim or permanent school facilities as a condition to the approval of the Development on the Property.

6.3.5 *Donor's Use of District's Name.*

6.3.5.1 *Prohibited Uses of District's Name.* Donor agrees that in no way may Donor state, suggest, or otherwise represent that District (including its Board and individual members thereof whether through written, oral or visual materials) supports or

endorses the Initiative or Development, or the campaign in support thereof, unless the District provides prior written authorization for pre-approved statements regarding the District's support or endorsement. Donor may not use the names of individual Board members, or republish or reissue past statements made prior to the date of this Agreement by District, its Board, or individual Board members, in its campaign materials for any purpose without the District's prior written approval.

6.3.5.2 *Allowed Uses of District's Name.* Donor may use District's name to describe any fact in the public record in a factually accurate manner, specifically this Agreement or any obligations to provide assistance to the District set out in any City approval or any ballot measure.

6.3.5.3 *Applicability of Restrictions.* Donor must adhere to the obligations under this paragraph regardless of whether the events described in Section 1.3 have occurred to trigger other obligations in this Agreement.

6.4 *Running Covenant.* Subject to the limitations set forth herein, the covenants of this Agreement shall run with the land and shall bind and inure to the benefit of the successors and assigns of the Parties. Donor agrees for the benefit of District that the Property shall be held, transferred, and encumbered subject to the provisions of this Agreement which are for the use and benefit of the Development upon it and of each and every person who now or in the future develops the Development, until all of the Development has been completed.

6.5 *Transfer Rights.* Nothing in this Agreement shall in any way limit the ability of Donor to transfer, sell, assign, encumber or in any way convey (collectively, "Transfer") any interest in the Development without the consent of District, provided that, prior to a Transfer, Donor gives written notice of a Transfer to District, which shall include confirmation that the transferee ("Transferee") assumes the obligations of Donor under this Agreement. Upon the Transferee's written assumption of the obligations under this Agreement and the closing of the Transfer, the transferring Donor shall be released from all obligations under this Agreement, and District shall look solely to the Transferee for performance of the obligations hereunder, and the Transferee shall have all rights and benefits of Donor set forth in this Agreement.

## **7. Breach, Default & Cure**

7.1 *Breach, Default and Cure.* If either party materially breaches or fails to comply with any of its obligations under this Agreement, such breaching party shall have thirty (30) days following receipt of written notice of breach from the non-defaulting party ("Breach Notice") to cure such breach or noncompliance ("Cure Period"). If such breaching party shall not have cured such breach or noncompliance within the Cure Period and after the expiration of fifteen (15) days from the later of the expiration of the Cure Period and the date it receives written notice of default ("Default Notice"), it shall be deemed in default ("Default") under this Agreement; provided, that each of the Breach Notice and the Default Notice shall set forth in reasonable detail the nature of the breach, noncompliance or default, as the case may be.

7.2 *Default Remedies.* Upon a Default pursuant to Section 7.1, the non-defaulting party shall have any and all rights and remedies under this Agreement and/or under the law by reason of

such default, provided that such remedies shall not include recovery of any indirect, punitive, special, or consequential damages.

## **8. Dispute Resolution**

8.1 *Informal Discussions; Mediation.* If a dispute arises relating to the interpretation of, enforcement of or compliance with the terms of this Agreement, Donor and the District will first attempt to resolve it through informal discussions or other alternative means of resolving such dispute. Any party may convene such discussions by written notice, and shall reasonably accommodate the other party with respect to scheduling. If the dispute is not resolved in this manner within thirty (30) days, it may be referred to mediation upon the request of either party for a period not to exceed an additional thirty (30) days.

8.2 *No Waiver.* This dispute resolution process shall be undertaken in good faith and exhausted prior to judicial review. However, compliance with this process does not waive any party's obligation to comply with, or right to assert as a defense, any applicable statute of limitations. The parties may agree in writing to toll any applicable statute of limitations for such period as may reasonably be necessary to complete the dispute resolution process.

## **9. Miscellaneous**

9.1 *Recitals.* The recitals above are true and correct, and are incorporated into this Agreement by this reference.

9.2 *Governing Law.* This Agreement shall be construed in accordance with, and governed by, the laws of the State of California applicable to contracts to be performed wholly within the State.

9.3 *Interpretation.* The singular includes the plural, "shall" is mandatory, and "may" is permissive. The Parties acknowledge and agree that each of the Parties have participated fully in the negotiation and drafting of this Agreement. In cases of uncertainty as to the meaning, intent or interpretation of any provision of this Agreement, the Agreement shall be construed without regard to which of the Parties caused, or may have caused, the uncertainty to exist. No presumption shall arise from the fact that particular provisions were or may have been drafted by a specific party, and prior versions or drafts of this Agreement shall not be used to interpret the meaning or intent of this Agreement or any provision hereof.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

9.4 *Notice.* Any notice to be given hereunder to either Party shall be in writing and shall be given either by personal delivery (including express or courier service), or by registered or certified mail, with return receipt requested, postage prepaid (excluding electronic messaging) and addressed as follows:

DONOR:

VALLCO PROPERTY OWNER, LLC  
2882 Sand Hill Road, Suite 241  
Menlo Park, CA 94025  
Attn: Peter Pau

With copy to:  
Morrison & Foerster LLP  
425 Market St.  
San Francisco, CA 94105  
Attn: Miles Imwalle

DISTRICT:

CUPERTINO UNION SCHOOL DISTRICT  
1309 S. Mary Avenue, Suite 150  
Sunnyvale, CA 94087  
Attn: Superintendent

With copy to:  
Dannis Woliver Kelley  
275 Battery Street, Suite 1150  
San Francisco, CA 94111  
Attn: Deidree Y.M.K. Sakai, Esq.

Any notice personally given shall be effective upon receipt. Any notice sent by overnight delivery service shall be effective the business day next following delivery thereof to the overnight delivery service. Any notice given by mail shall be effective five (5) days after deposit in the United States mail.

9.5 *Relationship.* The relationship of the Parties to this Agreement is determined solely by the provisions of this Agreement. This Agreement does not create and shall not be construed to create any agency, partnership, joint venture, trust or other relationship with duties or incidents different from those of parties to an arm's length contract.

9.6 *Independent Contractors.* Each party is an independent contractor and shall be solely responsible for the employment, acts, omissions, control and directing of its employees. Except as expressly set forth herein, nothing contained in this Agreement shall authorize or empower any party to assume or create any obligation or responsibility whatsoever, express or implied, on behalf of or in the name of any other party or to bind any other party or make any representation, warranty or commitment on behalf of any other party.

9.7 *Third Parties.* Nothing in this Agreement, whether express or implied, is intended to or shall do any of the following: (a) confer any benefits, rights or remedies under or by reason of this Agreement on any persons other than the express parties to it; (b) relieve or discharge the obligation or liability of any person not an express party to this Agreement; or (c) give any person not an express party to this Agreement any right of subrogation or action against any party to this Agreement.

9.8 *Cooperation.* Parties shall cooperate fully with each other and any consultants or representatives retained by the other in connection with their commitments and obligations herein.



9.9 *Amendments and Waivers.* No amendment of, supplement to or waiver of any obligations under this Agreement will be enforceable or admissible unless set forth in writing and signed by the Party against which enforcement or admission is sought. No delay or failure to require performance of any provision of this Agreement shall constitute a waiver of that provision as to that or any other instance. Any waiver granted shall apply solely to the specific instance expressly stated.

9.10 *Further Assurances.* Each party to this Agreement shall perform all acts and execute all documents and instruments that may be necessary or convenient to carry out its obligations and commitments under this Agreement. The Parties shall execute and deliver all such papers and take all such steps as the Parties may require for the purpose of the Parties' performance of their obligations and commitments, and fully vesting in the Parties their respective rights and benefits, under this Agreement.

9.11 *Severability.* If any provision of this Agreement is held invalid, void or unenforceable, the remainder of the Agreement shall not be affected and it shall remain in full force and effect, unless amended or modified by mutual consent of the parties; provided, however, that if the invalidity or unenforceability of any provision of this Agreement results in a material failure of consideration, then the party adversely affected thereby shall have the right in its sole discretion to terminate this Agreement upon providing written notice of such termination to the other party.

9.12 *Attorneys' Fees.* If either party files any action or brings any proceedings against the other arising out of this Agreement, then, as between District and Donor, the prevailing party shall be entitled to recover, in addition to its costs of suit and damages, reasonable attorneys' fees to be fixed by the court. The "prevailing party" shall be the party that is entitled to recover its costs of suit, whether or not suit proceeds to final judgment.

9.13 *Entire Agreement.* This Agreement sets forth the entire understanding of the Parties relating to the transactions it contemplates, and supersedes all prior understandings relating to them, whether written or oral.

9.14 *Execution in Counterparts.* This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and counterpart signature pages may be assembled to form a single original document. Consolidated signature pages shall be compiled by the District and forwarded to Donor to constitute the Donor's executed copy of the Agreement.

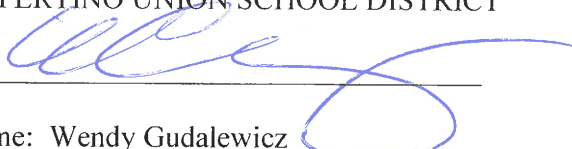
9.15 *Signatures.* By signing below, each of the signatories represents and warrants that he or she has been duly authorized to execute this Agreement on behalf of the Party on whose behalf he or she is signing. The Superintendent of the District further represents and warrants, by her signature, that this Agreement has been duly ratified and approved by the Board of Trustees of the District.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the dates written below.

**DISTRICT:**

CUPERTINO UNION SCHOOL DISTRICT

By: 

Name: Wendy Gudalewicz

Title: Superintendent

Date: 6-7-16

**DONOR:**

VALLCO PROPERTY OWNER, LLC

By: 

Name: Peter Tai

Title: Manager

Date: 6-8-16

# California All-Purpose Certificate of Acknowledgment

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA )  
 ) SS.  
COUNTY OF SANTA CLARA )

On \_\_\_\_\_, 2016, before me, \_\_\_\_\_,  
Notary Public, personally appeared \_\_\_\_\_, who proved to me on the  
basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within  
instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized  
capacity(ies), and that by his/her/their signature on the instrument the person(s), or the entity upon  
behalf of which the person(s) acted, executed the instrument.

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

Witness my hand and official seal.

Signature of Notary Public

## EDUCATIONAL FACILITIES AND DONATION AGREEMENT FOR FREMONT UNION HIGH SCHOOL DISTRICT

This EDUCATIONAL FACILITIES AND DONATION AGREEMENT FOR FREMONT UNION HIGH SCHOOL DISTRICT (“Agreement”) is entered into as of June 17, 2016 (“Effective Date”), by and between VALLCO PROPERTY OWNER, LLC (“Property Owner”) and the FREMONT UNION HIGH SCHOOL DISTRICT (“District”) (together, “Parties”), in reference to the following facts:

### RECITALS

WHEREAS, Property Owner is the owner of certain real property located within District boundaries in the City of Cupertino, County of Santa Clara, State of California, more specifically known as APNs 316-20-080, -081, -082, -094, -095, -099, -100, -101, -103, -104, -105, -106, -107 (“Property”), on which Property Owner desires to secure entitlements to construct a mixed-use development pursuant to the Vallco Town Center Specific Plan Initiative (“Initiative”), which allows for the development of a minimum of 389 residential units, approximately 2,000,000 square feet of office space, up to 100,000 square feet of civic space, and approximately 640,000 square feet of retail space (“Development”);

WHEREAS, the Property is the subject of the Initiative, which, if approved by the voters of the City of Cupertino (“City”), would enact and require the implementation of the Vallco Town Center Specific Plan (“Specific Plan”), which requires the developer of the Property to provide approximately \$40 million to local school districts; specifically, District and the Cupertino Union School District (“CUSD”);

WHEREAS, according to student demographic information provided by the District and the City-commissioned Schoolhouse Services Enrollment and Fiscal Impact Report dated February 2016, the addition of 800 new residential units on the Property within District boundaries is expected to generate 46 students to be served by the District. District currently does not have access to the facilities needed to provide the student population with the full breadth of meaningful extracurricular activities that help students relate their comprehensive, high-quality classroom education to the technology activities of Silicon Valley;

WHEREAS, California Education Code, section 17620, *et seq.*, and California Government Code, section 65995, *et seq.* (“Developer Fee Statutes”) allow a school district to impose developer impact fees or other requirements to mitigate school-related impacts resulting from residential and non-residential development projects;

WHEREAS, District is currently authorized to impose Level 1 school impact fees at a maximum rate of three dollars and thirty-nine cents (\$3.39) per square foot for all residential construction and fifty-five cents (\$0.55) per square foot for all commercial construction and senior citizen housing, as defined in the Developer Fee Statutes, and pursuant to its agreement with CUSD, dated January 22, 1993 (“CUSD Agreement”), District is allowed to collect up to 40% of these maximum fees from Property Owner in connection with the Development at a rate of one dollar and thirty-six cents (\$1.36) for all residential units and twenty-two cents (\$0.22) per square

foot for all commercial development and senior citizen housing, minus credit for the demolition of existing commercial space ("Developer Fees");

WHEREAS, the Parties agree that Property Owner shall pay to District Developer Fees imposed in accordance with the Developer Fee Statutes and the CUSD Agreement, however the Parties acknowledge that Property Owner desires to provide additional funding and facilities for the District beyond what is required by state law;

WHEREAS, the Parties understand and agree that new school programs within the District are a part of the infrastructure that is beneficial to serve the residents of the Development when completed, however State funds for construction of facilities are limited, thus the procurement of funding for the construction of facilities to benefit students has become the responsibility of the local community that desires those facilities;

WHEREAS, Property Owner wishes to improve or establish facilities that would not otherwise be available to students by Property Owner's payment of Developer Fees, and desires that the Development move forward without opposition from District. Additionally, Property Owner acknowledges the well-recognized impact schools may have on local property values, including the Development, and desires adequate school facilities, curriculum, and extracurricular programming in the District to serve all students in the District;

WHEREAS, in order to fully mitigate any impacts to District not mitigated by Property Owner's payment of Developer Fees, and in consideration of the continuing and additional effect District school programs may have on the property values of the Development, Property Owner will construct to a turn-key condition, that materially complies with the design specifications to be attached hereto as Exhibit "B," and at no cost to District, an approximately 10,000 square foot new high school Innovation Center within the Development ("Innovation Center Project") to be owned by Property Owner and leased to District for extracurricular purposes for a term of thirty-four (34) years at a rent of one dollar (\$1.00) per year on a full service basis by a charitable lease agreement ("Innovation Center Charitable Lease Agreement");

WHEREAS, in order to fully mitigate any impacts to District not mitigated by Property Owner's payment of Developer Fees, and in consideration of the continuing and additional effect District school programs may have on the property values of the Development that will inure to the benefit of Property Owner after construction of the Development, Property Owner will construct to a warm shell condition at Property Owner's sole cost up to 5,000 square feet of administrative and/or instruction space for FUHSD's Adult Education Center to assist in FUHSD's mission to prepare its students to achieve educational, career, and personal goals and its commitment to serve the life-long learning needs of the residents of the District's diverse community ("Adult Education Project") (together with the Innovation Center Project, "Projects") to be owned by Property Owner and leased to District for adult education purposes for a term of thirty-four (34) years at a base rent of one dollar (\$1.00) per year on a triple-net ("NNN") basis by a charitable lease agreement ("Adult Education Charitable Lease Agreement") (together with the Innovation Center Charitable Lease Agreement, "Charitable Lease Agreements");

WHEREAS, in order to improve or establish additional District education facilities that would not otherwise be available to students by Property Owner's payment of Developer Fees,

and in consideration of the effect District funding may have on the property values of the Development that will inure to the benefit of Property Owner after construction of the Development, Property Owner will, on an annual basis as provided for herein, pay an amount equivalent to those parcel taxes established by Measure J, Parcel Tax Renewal, Fremont Union High School District, 2014, (“Measure J”) for each unrestricted residential apartment unit constructed as part of the Development, as long as the parcel tax remains in effect (“Parcel Tax Equivalency Payments”);

WHEREAS, District will not own any portion of the Projects and because District has determined that the Projects are not subject to competitive bidding requirements because the Projects shall be constructed by Property Owner as gifts and at no cost to District, thus advertising the Projects for competitive bidding in efforts to obtain a greater public benefit or better economic result for District would be incongruous and unavailing, undesirable, impractical, or impossible, and would not produce any advantage to, or benefit the best interest of District or the public (*see, e.g., Los Angeles Dredging Co. v City of Long Beach* (1930) 210 Cal. 348, 354–355; *Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal. App. 3d 631, 635–636; *Meakin v. Steveland, Inc.* (1977) 68 Cal. App. 3d 490, 498);

WHEREAS, the Parties acknowledge that children of future employees who work at the Development but who do not reside in Cupertino do not have a right to attend District schools;

WHEREAS, in addition to providing \$40 million to local school districts, the developer of the Property will, as part of the Initiative, spearhead and provide substantial funding for a community shuttle in partnership with other stakeholders, including the local school districts;

WHEREAS, Property Owner has started the effort to organize and design such a community shuttle, which is intended to also serve District students, and the Parties desire to cooperate in the planning, implementation, and operation of that service to ensure it meets the needs of the entire community, including the needs of the District;

WHEREAS, in order to fully mitigate any impacts to District not mitigated by Property Owner’s payment of Developer Fees, and in consideration of the effect continuing and additional District school programs may have on the property values of the Development that will inure to the benefit of Property Owner after construction of the Development, Property Owner commits to including as a condition of its commercial leases that a majority of major office and retail tenants must provide internship or other experiential learning opportunities that will be available to District students (“Commercial Lease Conditions”);

WHEREAS, according to the Fiscal and Economic Impacts Analysis prepared by Keyser Marston Associates, Inc. dated May 2016, implementation of the Specific Plan and this Agreement is anticipated to result in a net direct positive annual fiscal impact of approximately \$3 million to District, a net capital facility surplus of approximately \$31.5 million to District, and approximately \$1 million of increased property tax revenue dedicated to the repayment of debt service for outstanding bonds issued by District, representing approximately 4 to 5 percent of the property taxes currently collected for debt service within District;

WHEREAS, Property Owner and District believe that it is in their mutual interests to cooperate and work together to implement a program to establish facilities and support District programs associated with the Development—which includes Property Owner’s payment of Developer Fees to District, Property Owner’s construction of the Innovation Center Project , Property Owner’s execution of the Innovation Center Charitable Lease Agreement with District, Property Owner’s construction of the Adult Education Project, Property Owner’s execution of the Adult Education Charitable Lease Agreement with District, Property Owner’s commitment to the Commercial Lease Conditions, and Property Owner’s payment of the Parcel Tax Equivalency Payments—and Property Owner and District desire to memorialize Property Owner’s commitments to District pursuant to the terms and conditions contained herein; and

WHEREAS, such commitments provided by Property Owner are offered in consideration for their enhancement of the property values and desirability of the completed Development.

NOW, THEREFORE, in consideration of the terms and conditions hereinafter set forth, Property Owner and District agree as follows:

## AGREEMENT

### **1. Term; Timing of Obligations**

1.1 The term of this Agreement shall be from the Effective Date until all of the following events occur:

1.1.1 *Developer Fees.* Property Owner pays the applicable Developer Fees to District, as provided for in this Agreement;

1.1.2 *The Innovation Center Project and Innovation Center Charitable Lease Agreement.* Property Owner completes construction of the Innovation Center Project and executes a Charitable Lease Agreement whereby Property Owner leases the Innovation Center Project to District for a term of thirty-four (34) years at a rate of one dollar (\$1.00) per year.

1.1.3 *The Adult Education Project and Adult Education Charitable Lease Agreement.* Property Owner completes construction of the Adult Education Project and executes a Charitable Lease Agreement whereby Property Owner leases the Adult Education Project to District for a term of thirty-four (34) years at a rate of one dollar (\$1.00) per year.

1.2 *Approval of Development.* The Parties shall have no rights or obligations under this Agreement unless and until Property Owner obtains all discretionary approvals from the City of Cupertino (“City”) required to construct the Development, provided that such approvals allow a minimum of 389 residential units, approximately 2 million square feet of office space, up to 100,000 square feet of civic space, and approximately 640,000 square feet of retail space, and all relevant appeal periods and statutes of limitations for challenging such entitlements have run (“Approval Date”). The specific timing of the obligations of Property Owner is as set forth in this Agreement.

## **2. Developer Fees**

2.1 *Calculation of Fees.* The square footages of residential construction, commercial construction, and senior citizen housing associated with the Developer Fees shall be calculated in accordance with the following definitions:

2.1.1 “Residential Construction” shall mean residential “assessable space,” as defined in California Government Code, section 65995(b)(1); specifically, all of the square footage within the perimeter of a residential structure, not including any carport, covered or uncovered walkway, garage, overhang, patio, enclosed patio, detached accessory structure, or similar area, as calculated by the City’s Department of Community Development, Building Division, in accordance with the City’s standard practice in calculating structural perimeters.

2.1.2 “Commercial Construction” shall mean commercial “chargeable covered and enclosed space,” as defined in California Government Code, section 65995(b)(2); specifically, the covered and enclosed space determined to be within the perimeter of a commercial structure, not including any storage areas incidental to the principal use of the construction, garage, parking structure, unenclosed walkway, or utility or disposal area, as determined the City’s Department of Community Development, Building Division, in accordance with the City’s building standards.

2.1.3 “Senior Citizen Housing,” shall mean the assessable space of “senior citizen housing,” as defined by California Civil Code, section 51.3.

### **2.2 Developer Fees.**

2.2.1 *Payment Due Date.* Developer Fees for Residential Construction, Commercial Construction, and Senior Citizen Housing shall be due and payable in conjunction with the issuance of a building permit for each building including such space, but may also be paid at any time prior to that date at the sole discretion of Property Owner. Fees shall only be for the portion of the Development for which the building permit is being issued and credits shall be granted for the commensurate portion of the commercial space that previously existed at the location of the portion of the Development for which the building permit is being issued. Payment of Developer Fees shall be in the form of a cashier’s check or electronic transfer at District’s discretion and instruction.

2.2.2 *Developer Fee Amount.* Property Owner shall pay to District Developer Fees in effect at the time of payment, including if fees are paid early. As of the date of this Agreement, Developer Fees are equal to forty percent (40%) of the current Level 1 rates; specifically, one dollar and thirty-six cents (\$1.36) per square foot of Residential Construction within the Development, and twenty-two cents (\$0.22) per square foot of Commercial Construction and Senior Citizen Housing within the Development, minus credit in the amount of (two hundred and sixty four dollars (\$264,000) for the demolition of 1.2 million square feet of existing commercial space, at a rate of twenty-two cents (\$0.22) per square foot. In addition to Property Owner’s obligation to complete the Projects, to execute the Charitable Lease Agreements with District, and to make the Parcel Tax Equivalency Payments as set forth in this Agreement, Property Owner’s payment of Developer Fees, subject to adjustment pursuant to the inflationary



clause set forth herein, shall constitute the total and full mitigation of the impact of Property Owner's Development on District.

2.3 *Certificate of Compliance.* Upon tender of Developer Fees by Property Owner, District shall issue to Property Owner a certificate of compliance evidencing that, with respect to each building containing Residential Construction, Commercial Construction, or Senior Citizen Housing for which the Developer Fees have been paid (which shall be identified by unit, lot number, or other appropriate description), Property Owner has complied with any and all school mitigation requirements of the District, contingent on Property Owner's completion of the Projects and execution of the Charitable Lease Agreements with District as applicable. Property Owner shall have an ongoing obligation to make the Parcel Tax Equivalency Payments as provided for in Section 5.

2.4 *Expenditure of Developer Fees.* Developer Fees may be used for any District expenditures related to capital facilities including, but not limited to, providing the additional facilities necessary to mitigate the impact of other development within District, and/or to enhance existing facilities to better serve District students. The use of Developer Fees shall be in District's sole discretion.

2.5 *No Reduction or Credit.* Property Owner's obligation to pay Developer Fees shall be absolute as to all Residential Construction, Commercial Construction, and Senior Citizen Housing built within the Development after the Effective Date. Property Owner acknowledges that in the event that District receives funds from the State of California or any other source to house existing or projected students generated from the Development, Property Owner or its successors or assigns shall not be entitled to any refund or credit or reduction in Developer Fees as a result of the receipt of such State or other funds.

### **3. The Projects and Charitable Lease Agreements**

#### **3.1 *The Innovation Center Project.***

3.1.1 The Innovation Center Project shall be the approximately 10,000 square foot high school Innovation Center to be constructed by Property Owner in connection with the Development on the Property. The Parties agree and understand that the purpose of the Innovation Center Project is for extracurricular activities only so is not considered a "school building" under Education Code section 17283.

3.1.2 *Preparation of Plans and Specifications.* Within 120 days of the Approval Date, District and Property Owner (including Property Owner's architects and consultants, if any) shall coordinate the preparation of plans and specifications for the Innovation Center Project ("Preliminary Plans"). The Preliminary Plans shall designate and include the necessary information for the conceptual design for the Innovation Center Project, identify the approximate site location of the building (which shall be subject to change at the reasonable discretion of Property Owner based on expedient construction and leasing requirements of the Development), and anticipated core facilities and related infrastructure. Property Owner, in coordination with District, shall be responsible for preparation of the final plans and specifications ("Final Plans").

3.1.3 *Timing.* Property Owner shall make good faith efforts to commence construction of the Innovation Center Project prior to commencement of construction of any residential portion of the Development and shall substantially complete the Innovation Center Project not later than the issuance of the first certificate of occupancy for any residential unit in the Development, or at such other time as may be otherwise agreed to by Property Owner and District.

3.1.4 *Innovation Center Project Completion.* The Innovation Center Project shall be deemed complete upon the City's certificate of occupancy of the Innovation Center Project and after all disputes and claims are resolved with contractor(s), consultants, or others performing work, services, or providing supplies to the construction of the Innovation Center Project ("Innovation Center Project Completion").

3.1.5 *Innovation Center Charitable Lease Agreement.* As soon as practicable after Innovation Center Project Completion, Property Owner and District shall execute a Charitable Lease Agreement in a form substantially similar to that attached hereto as Exhibit A. The Parties acknowledge and agree that as of the Effective Date, the Charitable Lease Agreement has not been finalized and that the Parties intend to further negotiate and revise the form agreement.

### 3.2 *The Adult Education Project.*

3.2.1 The Adult Education Project shall be the administrative and/or instruction space for FUHSD's Adult Education Center to be constructed by Property Owner to a "warm shell" condition in connection with the Development on the Property. The Parties agree and understand that the District remains responsible for building out the space to suit its purposes and that the purpose of the Adult Education Project is for extracurricular activities only so is not considered a "school building" under Education Code section 17283.

3.2.2 *Timing.* Property Owner shall make good faith efforts to commence construction of the Adult Education Project not later than the issuance of the first certificate of occupancy for any residential unit in the Development, or at such other time as may be otherwise agreed to by Property Owner and District.

3.2.3 *Adult Education Project Completion.* The Adult Education Project shall be deemed complete upon the City's certificate of occupancy of the Adult Education Project and after all disputes and claims are resolved with contractor(s), consultants, or others performing work, services, or providing supplies to the construction of the Adult Education Project ("Adult Education Project Completion").

3.2.4 *Adult Education Charitable Lease Agreement.* As soon as practicable after Adult Education Project Completion, Property Owner and District shall execute a Charitable Lease Agreement in a form substantially similar to that attached hereto as Exhibit A.

## 4. **Commercial Lease Conditions**

4.1 *Commercial Lease Conditions.* Property Owner shall use commercially reasonable efforts to include as a condition of its commercial leases that major tenants must provide internship or other experiential learning opportunities that will be available to District students.

## **5. Parcel Tax Equivalency Payments**

5.1 *Amount.* Property Owner shall pay the Parcel Tax Equivalency Payments to the District on an annual basis in an amount equivalent to the Measure J parcel tax for each unrestricted apartment unit, up to 680 units, less any parcel taxes Property Owner is otherwise obligated to pay. The Parcel Tax Equivalency Payments shall be the same amount as the Measure J parcel tax in effect that year, including any increases, or in the same amount as a replacement measure that may be imposed in the future. However, if the Measure J parcel tax is repealed and not replaced with a substantially similar measure, no further payment will be due. No payments will be made on units restricted as affordable units or senior housing units, and in no event shall the annual payment be greater than 680 times the equivalent parcel tax payment in effect at the time.

5.2 *Payment Due Date.* The initial Parcel Tax Equivalency Payment shall be prorated and payable within thirty (30) days of the City's issuance of the first final occupancy permit for residential uses in Development, and shall be in an amount calculated on a per unit basis as provided above. Thereafter, the Parcel Tax Equivalency Payment shall be payable on or before the first installment of property taxes are due each year. Payments will be due only on units with a final certificate of occupancy from the City.

6. **Periodic Reviews.** At least once every six (6) months, Property Owner shall demonstrate its good faith compliance with the terms of this Agreement by contacting the District to request a meeting with the District Superintendent or other District staff in order to demonstrate that it has sufficiently followed the terms of this Agreement so as to carry out the intent of the Parties in entering into it.

7. **Exclusive Terms Regarding Mitigation.** The Parties acknowledge and agree that payment of the Developer Fees, completion of the Projects, execution of the Charitable Lease Agreements, and ongoing payment of the Parcel Tax Equivalency Payments, as provided for in this Agreement, fully and completely mitigate any and all impacts that the Development may have on District, and create a net positive impact on District, and District will not request or require any further school impact mitigation in connection with the Development, regardless of any future change in law, rule, regulation, or policy, or any future change in general plan designation, rezoning, subdivision or other current or future development approval, and shall be in lieu of any and all other school mitigation requirements whatsoever due, payable, or sought by the District or any other entity currently or in the future relating in any manner to the Property. District shall not be prohibited from or limited in levying any general obligation tax or other exaction on the Property (subject to applicable law) in the future, provided such tax or other exaction is not for the purpose of funding the Property Owner's construction of the Projects and is uniformly imposed on all similar property within District boundaries. Property Owner's participation and cooperation in implementing this Agreement and satisfying its commitments hereunder shall constitute full mitigation of the impacts on the District and/or its school facilities resulting from the Development; provided, however, that such mitigation is contingent upon Property Owner's payment of all Development Fees and Property Owner's delivery of the Projects ("Property Owner Commitments"). Notwithstanding the foregoing or anything contained in this Agreement or otherwise, Property Owner's Property Owner Commitments shall terminate at the election of either party if the Initiative fails.

7.1 District covenants and agrees that, with respect to the Property, if Property Owner has not materially defaulted on any obligations hereunder, it shall not assist or engage in any of the following actions if the result of any of them, directly or indirectly, would be to require payment of any exaction or imposition of any mitigation measures on the Property other than or in excess of the Property Owner Commitments expressly provided for in this Agreement:

7.1.1 Exercise any power or authority (under the School Facilities Act or any other provision of applicable law) to levy a fee, charge, dedication, special tax, or other form of requirement against the Property for the purpose of funding or financing any school facilities;

7.1.2 Require any other governmental entity to exercise, or cooperate with any city, county or other governmental entity in the exercise of the power under Title 7, Division 1, Chapter 4.7 of the Government Code (commencing with Section 65970) or any other applicable provision of law, to require the dedication of land, the payment of fees in lieu thereof, and/or the payment of special taxes for interim or permanent school facilities as a condition to the approval of development of the Property;

7.1.3 Oppose or seek to condition any portion of the development of the Property on the basis of inadequate school facilities or seek other forms of mitigation with respect to the adequacy of school facilities to serve the Development, including, but not limited to, the establishment of developer fees, the payment of special taxes, the payment of money, the dedication of land, or the application of an assessment or requirement of any nature against the Property or any portion thereof permitted by present or future state law, rulings, regulations and court decisions; and

7.1.4 Suggest, request, initiate or support litigation to require developer fees, mitigation fees, or any other charges or school impact mitigation in connection with the Property.

**8. Indemnification by Property Owner.** To the fullest extent permitted by California law, Property Owner, as applicable shall, at its sole cost and expense, defend, indemnify, and hold harmless the District and its respective trustees, officers, directors, employees, agents, attorneys, shareholders, subsidiaries, and affiliates from and against any and all claims, demands, losses, liabilities, suits, and actions of any kind, nature, or description (including, but not limited to, personal injury, death, and property damage, and consultants and/or including all attorneys' fees and expert fees and costs) ("Claims") caused from any activity, work, thing done, or omission by Property Owner to the extent caused by Property Owner's (1) default and/or material breach of any provision of this Agreement, and/or (2) negligence and/or willful misconduct, if either arise out of its performance under this Agreement.

**9. Indemnification by District.** To the fullest extent permitted by California law, and except as indicated herein, District shall, at its sole cost and expense, defend, indemnify, and hold harmless Property Owner and its respective owners, trustees, officers, members, financial partners, directors, partners, employees, agents, attorneys, shareholders, subsidiaries, and affiliates from and against any and all Claims caused by the use or operation of the Projects or by any breach or failure by District to perform any of its material obligations under this Agreement, except to the extent that such Claims result from any act or omission of Property Owner (the party responsible for such act or omission, the "Responsible Party") or its owners, trustees, officers, directors, partners,

employees, agents, attorneys, shareholders, subsidiaries, and affiliates, in which event the Responsible Party shall defend, indemnify and hold harmless the other Parties against such Claims.

**10. Third Party Challenges.** If any claim, action or proceeding is brought by any person or entity challenging the validity or enforceability of this Agreement (“Third Party Claim”), the Parties shall cooperate with and assist each other with the intention of vigorously defending against that Third Party Claim and attempting to fully preserve all of the terms of the Agreement and the benefits and obligations secured hereby. All costs and expenses in connection with defending against that Third Party Claim shall be borne by Property Owner.

## **11. Breach, Default And Cure**

**11.1 Breach, Default and Cure.** If either Party materially breaches its obligations under this Agreement and fails to cure such breach within thirty (30) days following receipt of written notice of that breach from the non-defaulting Party, it shall be deemed in default under this Agreement (“Default”); provided, however, that if the nature of the breach reasonably requires more than thirty (30) days to cure, the breaching Party shall not be in Default under this Agreement so long as the breaching Party commences to cure such breach within such thirty (30) day period and diligently prosecutes an effective cure to completion.

**11.2 Default Remedies.** Upon a Default, the non-defaulting Party shall have the following rights and remedies:

**11.2.1** To specifically enforce the obligations under this Agreement; provided, however, that the District’s right to specific performance relating to the occupancy of the Innovation Center and/or the Adult Education Center shall be limited to the right to occupy space within the Development once the City has issued its certificate of occupancy for Commercial Space sufficient to accommodate the District’s use contemplated hereunder but only if the Innovation Center and/or the Adult Education Project are not completed by the completion dates contemplated hereunder; and

**11.2.2** To exercise any and all rights and remedies the non-defaulting Party may have under the law by reason of such default to the extent that such rights and remedies are not inconsistent with the non-defaulting Party’s right to specifically enforce this Agreement, provided that such remedies shall not include recovery of any indirect, punitive, special, or consequential damages.

**11.3 Limitation on Damages.** Notwithstanding any other provision of this Agreement to the contrary, no Party shall have any liability to any Party under this Agreement for any indirect, punitive, special, or consequential damages.

**12. Informal Discussions; Mediation.** If a dispute arises relating to the interpretation of, enforcement of or compliance with the terms of this Agreement, Property Owner and District will first attempt to resolve it through informal discussions. Either party may convene such discussions by written notice, and shall reasonably accommodate the other Party with respect to scheduling. If the dispute is not resolved in this manner within twenty-one (21) days, it shall be referred to a mediation process upon election of either of the Parties.

**13. No Waiver.** The dispute resolution process described in the paragraph immediately above shall be undertaken in good faith and exhausted prior to judicial review. However, compliance with this process does not waive any party's obligation to comply with, or right to assert as a defense, any applicable statute of limitations. The Parties may agree in writing to toll any applicable statute of limitations for such period as may reasonably be necessary to complete the dispute resolution process.

**14. Attorneys' Fees.** During any dispute(s) between the Parties related to this Agreement, if any, each Party shall pay their own attorneys' fees and related expenses incurred and shall not have a right to recover any of those fees from the other Party.

**15. Captions.** The headings used in this Agreement are for convenience only and shall not affect the interpretation of this Agreement.

**16. Governing Law.** This Agreement shall be construed in accordance with, and governed by, the laws of the State of California applicable to contracts to be performed wholly within the State. The county in which the District administration office is located shall be the venue for any action or proceeding that may be brought or arise out of, in connection with, or by reason of this Agreement.

**17. Construction of Agreement.** The Parties mutually acknowledge that they and their attorneys have participated in the preparation and negotiation of this Agreement. In cases of uncertainty, this Agreement shall be construed without regard to which of the Parties caused the uncertainty to exist. Prior versions or drafts of this Agreement shall not be used to interpret the meaning or intent of this Agreement or any provision hereof. The words "include" or "including" shall be read as if followed by the phrase "without limitation." All references to this Agreement shall include the Agreement as it may be amended or supplemented in compliance with its terms. Any reference to a statute or regulation shall include any amendment thereto. The words "party" or "parties" refer only to named parties to this Agreement. The definitions in this Agreement apply equally to both singular and plural forms of the defined term.

**18. Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and counterpart signature pages may be assembled to form a single original document.

**19. Days.** In this Agreement, "business days" means days other than Saturdays, Sundays, and federal and state legal holidays, and "days" means calendar days. If the time for performance of an obligation under this Agreement that references a business day but falls other than on a business day, the time for performance shall be extended to the next business day.

**20. Further Assurances.** Each party to this Agreement shall at its own expense perform all acts and execute all documents and instruments that may be necessary or convenient to carry out its obligations under this Agreement. Each party shall pay its own attorneys' fees and other expenses in connection with the negotiation or execution of, or the consummation of the transactions contemplated by, this Agreement.

**21. Notices.** Any notices, requests, demands or other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given

on the date of delivery if delivered personally to the party to whom notice is to be given (including messenger or recognized delivery or courier service) or on the second day after mailing, if mailed to the party to whom notice is to be given, by first-class mail, postage prepaid, and properly addressed as follows:

<u>To Property Owner:</u>	<u>To the District:</u>
VALLCO PROPERTY OWNER, LLC 2882 Sand Hill Road, Suite 241 Menlo Park, CA 94025 Attn: Peter Pau  With copy to: Morrison & Foerster LLP 425 Market St. San Francisco, CA 94105 Attn: Miles Imwalle	FREMONT UNION HIGH SCHOOL DISTRICT 589 W. Fremont Ave Sunnyvale, Ca 94087 Attn: Superintendent  With a copy to: Orbach Huff Suarez & Henderson LLP 1901 Harrison Street Oakland, CA 94612 Attn: Nancy Taylor

**22. Relationship.** The relationship of the Parties to this Agreement is determined solely by the provisions of this Agreement. This Agreement does not create and shall not be construed to create any agency, partnership, joint venture, trust or other relationship with duties or incidents different from those of parties to an arm's length contract. Each party is an entity and/or independent contractor and shall be solely responsible for the employment, acts, omissions, control and directing of its employees. Nothing contained in this Agreement shall authorize or empower any Party to assume or create any obligation or responsibility whatsoever, express or implied, on behalf of or in the name of any other Party or to bind the other Party in a manner or make any representation, warranty or commitment on behalf of the other Party.

**23. Assignment.** No rights of any Party under this Agreement may be assigned, transferred, hypothecated, or otherwise alienated, whether voluntarily or by operation of law, except with the express written consent of the Party against which such rights are enforceable, which consent shall not be unreasonably withheld or delayed; provided, however, that either Party may assign its rights and delegate its obligations hereunder to a subsidiary, affiliate, or parent company of such Party without the consent of any other Party. Any purported assignment without the required consent shall be null and void. Subject to the foregoing, this Agreement shall be binding on and enforceable against any and all successors and assigns.

**24. No Third Party Rights.** Nothing in this Agreement shall be construed to give any person other than the express Parties to this Agreement any benefits, rights or remedies.

**25. Time of the Essence.** Time is of the essence in the performance of each Party's respective obligations under this Agreement.

**26. Waiver; Amendment.** No amendment of, supplement to or waiver of any obligations under this Agreement will be enforceable or admissible unless set forth in a writing signed by the Party against which enforcement or admission is sought. No delay or failure to require performance

of any provision of this Agreement shall constitute a waiver of that provision as to that or any other instance. Any waiver granted shall apply solely to the specific instance expressly stated.

**27. Integration.** Except as indicated in this Agreement, this Agreement sets forth the entire understanding of the Parties relating to the transactions it contemplates, and supersedes all prior understandings relating to them, whether written or oral. There are no obligations, commitments, representations or warranties relating to them except those expressly set forth in this Agreement.

**28. Severability.** Should any portion of any provision of this Agreement be held unenforceable or invalid for any reason, but the remainder of the Agreement can be enforced without failure of material consideration to any Party, then the remaining portions or provisions shall be unaffected.

**29. Incorporation of Recitals and Exhibits.** The Recitals and the Exhibits attached hereto are hereby incorporated herein and made a part of this Agreement by this reference.

**30. Signatories' Warrant.** By signing below, each of the signatories represents and warrants that he or she has been duly authorized to execute this Agreement on behalf of the Party on which behalf he or she is signing. District Superintendent further represents and warrants, by her signature, that this Agreement has been duly ratified and approved by the Board of Education of District.

**31. Financial Interest Certification.** By signing below, each of the signatories represents and warrants that neither it, nor its agents, representatives, officers, consultants, employees or trustees have been offered, given, or agreed to give, receive, accept or agreed to accept, any gift, contribution, or any financial incentive whatsoever to or from any person in connection with the Development or as an inducement to enter into this Agreement. As used in this section, "person" means any natural person, business, partnership, corporation, union, committee, club, or other organization, entity, or group of individuals.

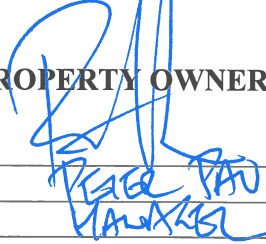
**32. Parties to Bear Their Own Costs.** Except as specifically set forth in this Agreement, the Parties shall each bear their own costs, including, without limitation, attorneys' and consultants' fees, incurred in connection with any negotiations, strategic planning, analysis and due diligence relating to this Agreement.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

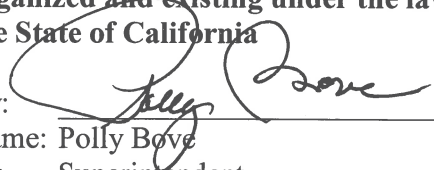


IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

**VALLCO PROPERTY OWNER, LLC**

By:   
Name: Peter Dao  
Its: Manager

**FREMONT UNION HIGH SCHOOL  
DISTRICT, a public school district  
organized and existing under the laws of  
the State of California**

By:   
Name: Polly Bove  
Its: Superintendent

By:   
Name: Hung Wei  
Its: President, Board of Trustees

**EXHIBIT A**

**CHARITABLE LEASE AGREEMENT**

**EXHIBIT B**  
**DESIGN SPECIFICATIONS**

**EXHIBIT A**

**CHARITABLE LEASE AGREEMENT**

**LEASE AGREEMENT**

**BETWEEN**

**VALLCO PROPERTY OWNER, LLC**

**AND**

**FREMONT UNION HIGH SCHOOL DISTRICT**

**THIS LEASE** ("Lease") is entered into as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between **VALLCO PROPERTY OWNER, LLC**, a [REDACTED] ("Lessor") and **FREMONT UNION HIGH SCHOOL DISTRICT**, a California public school district ("Tenant").

**Recitals**

**WHEREAS**, Lessor owns and operates The Hills at Vallco ("Development") located in Cupertino, California.

**WHEREAS**, [Insert District's statutory authority for entering the Agreement and statement of necessary Board findings made, if any]; and

**WHEREAS**, the Lessor and Tenant desire to enter into this Agreement whereby Lessor leases the Premises to Tenant, and Tenant leases the Premises from Lessor, pursuant to the terms and conditions contained in this Agreement.

**NOW THEREFORE**, in consideration of the covenants and agreements hereinafter set forth, Lessor and Tenant hereby agree as follows:

**ARTICLE I – EXHIBITS**

The exhibits listed below and attached to this Lease are incorporated herein by reference:

**EXHIBIT A** – Plot Plan of that area of the Development upon which is located the space to be leased to Tenant. This Exhibit is provided for informational purposes only, and shall not be deemed to be a warranty, representation or agreement by Lessor that the Development or buildings and/or any stores will be exactly as indicated on the Exhibit, or that the other tenants which may be drawn on said Exhibit will be occupants in the Development. Lessor reserves unto itself the unlimited right to modify the configuration of the Development at any time for the purpose of incorporating additional buildings within the Development.

**EXHIBIT B** – Description of Lessor's Work and Tenant's Work.

**EXHIBIT C** – Lessor's Logo.

**EXHIBIT D** – Lessor's Contractor Work Standards.

Notwithstanding Exhibit A or anything else contained in this Lease, Lessor reserves the right to change or modify and add to or subtract from the size and dimensions of the Development, or any part thereof, the number, location and dimensions of buildings and stores, the size and configuration of the parking areas, entrances, exits and parking aisle alignments, dimensions of hallways, malls and corridors, the number of floors in any building, the location, size and number of kiosks which may be erected in or fronting on any mall or otherwise (so long as kiosks and use of Lessor's frontage space do not materially and adversely interfere with Tenant's operations or the queuing area of the Premises), the identity, type and location of other stores and tenants, and the size, shape, location and arrangement of Common Areas (hereinafter defined), and to use, design and decorate any portion of the Development as it desires. Except pursuant to Section 2.5 and 2.6, Lessor will not make modifications and/or changes to the Development which would materially and adversely interfere with the access to or visibility of the Premises.

## **ARTICLE II – PREMISES AND TERM**

### **Section 2.1. Premises.**

Lessor hereby leases to Tenant, and Tenant hereby rents from Lessor, the space located at the Development which is designated (by cross-hatching) on Exhibit A attached hereto containing approximately \_\_\_\_\_ (\_\_\_\_\_) square feet (the "Premises").

### **Section 2.2. Floor, Roof, and Walls.**

Lessor shall have the exclusive right to use all or any part of the roof, side and rear walls of the Premises for any purpose. including but not limited to erecting signs or other structures on or over all or any part of the same, erecting scaffolds and other aids to the construction and installation of the same, and installing, maintaining, using, repairing and replacing pipes, ducts, conduits and wires leading through, to or from the Premises and serving other parts of the Development. Tenant shall have no right whatsoever in the exterior of exterior side and rear walls or the roof of the Premises. Tenant, with Lessor's advance written approval exercising sole and absolute discretion, may be permitted to install signage on the exterior walls of the Premises but the location, size, design and content of any such signage is subject to Lessor's prior written approval in Lessor's sole and absolute discretion. However, Lessor shall have the unrestricted right to require Tenant to remove such signage at Tenant's sole cost and expense at any time during the Lease Term.

### **Section 2.3. Lease Term.**

This Lease shall be in full force and effect from and after the date executed by Lessor and Tenant, save and except that the term of this Lease (hereinafter called "Lease Term") shall not begin to run until the first day of the month after Tenant opens the Premises for normal occupancy, the applicable date being hereinafter called the "Commencement Date." The term of this Lease shall end on the last day of the thirty-fourth (34<sup>th</sup>) "Lease Year," as defined herein, after the Commencement Date unless sooner terminated as herein provided.

### **Section 2.4. Lease Year Defined.**

"Lease Year," as used herein, means a period of twelve (12) consecutive months during the Lease Term commencing on the Commencement Date and each subsequent anniversary thereof.

### **Section 2.5. Relocation of Premises and Termination.**

A. Lessor shall have the right on one (1) occasion during the Lease Term, subject to Tenant's right of termination as set forth in subparagraph (B), to relocate Tenant's operation to other premises (the "New Premises") in another part of the Development in accordance with the following:

(i) Lessor shall notify Tenant, at least one hundred twenty (120) days prior to the proposed relocation date, of Lessor's intention to relocate Tenant's operation to the New Premises;

(ii) The proposed relocation date (Tenant shall not be required to cease its normal occupancy of the Premises for a period in excess of ten (10) days and Annual Rent and Monthly Common Area Maintenance Charges shall be abated for any period Tenant is required to be closed) and the size, configuration and location of the New Premises shall be set forth in Lessor's notice; and

(iii) The New Premises shall be located in an area with similar access and be substantially identical in size (not less than ninety percent (90%) of the square footage of the Premises) to the Premises described in the Lease. Lessor shall, at Lessor's cost, construct on the New Premises improvements substantially similar to those constructed pursuant to Tenant's final plans. All reasonable costs of relocation shall be paid for by Lessor, including those fixtures built into walls and not moveable but excluding the purchase or replacement of Tenant's furniture, moveable non-trade fixtures, equipment and inventory, salaries, and other fixed costs for the period Tenant is required to be closed.

(iv) If the New Premises contain more square footage than the Premises, the Annual Rent and the Common Area Monthly Maintenance Charge Will not be increased.

B. In the event the New Premises described in Lessor's relocation notice are unacceptable to Tenant, Tenant shall have the right, exercisable by written notice to Lessor, given sixty (60) days following receipt of Lessor's relocation notice, to terminate this Lease, such termination to be effective as of the proposed relocation date as set forth in Lessor's notice. Failure by Tenant to timely exercise such right shall be deemed a waiver with respect thereto and confirmation that the New Premises are acceptable to Tenant. Tenant shall have the right to accept the New Premises only for the unexpired term of this Lease. Notwithstanding anything hereinabove to the contrary, should Tenant notify Lessor of Tenant's election to terminate this Lease, Lessor shall have the right to rescind Lessor's relocation notice to Tenant, within fifteen (15) days after receipt of Tenant's notice to terminate and Tenant's termination notice shall be of no force and effect.

#### **Section 2.6. Remodel of the Development.**

Lessor may, in connection with any remodeling of all or any portion of the Development, change the dimensions or reduce the size of the Premises; provided, however, that (i) Lessor shall notify Tenant, at least one hundred twenty (120) days prior to the proposed commencement of the remodeling work (which notice shall specify the proposed reconfiguration of the Premises), (ii) Lessor shall be responsible for all costs in connection with the remodeling, including all construction work, and (iii) all reasonable out of pocket costs incurred by Tenant in connection with such remodeling, including relocating fixtures, equipment and inventory, salaries, and other fixed costs for the period Tenant is required to be closed, shall be paid for by Lessor. If a reduction in size of the Premises would reduce the Premises to less than ninety percent (90%) of the Premises' original size and if as a result thereof the remaining portion of the Premises is not suitable for the purpose for which Tenant has leased said Premises, or if the proposed reconfiguration of the Premises results in the Premises not being suitable for the purpose for which Tenant has leased said Premises, then in either such case, Tenant may terminate this Lease by written notice to Lessor given within thirty (30) days after Lessor notifies Tenant of Lessor's intention to remodel; provided further, however, that such termination shall not be effective if within thirty (30) days of Tenant's notice thereof, Lessor notifies Tenant of either Lessor's election to relocate Tenant pursuant to Section 2.5 hereof or rescind Lessor's decision to remodel the Premises. In the event of any remodeling pursuant to this Section 2.6, Lessor shall repair any damage to the Premises caused thereby at Lessor's sole cost and expense. In connection with any such remodeling, Lessor may require Tenant to cease its normal occupancy of the Premises for a period not in excess of ten (10) days.

### **ARTICLE III – LESSOR'S AND TENANT'S WORK**

#### **Section 3.1. Lessor's Work.**

Prior to the Commencement Date, Lessor agrees to configure and construct the interior finishes of the Premises to suit Tenant's intended use of the leased space. Lessor shall, at Lessor's sole expense, build out the Premises to Tenant's specifications as set forth in

Exhibit B as “Lessor’s Work,” and provide the Premises to Tenant ready to accept Tenant’s furniture, fixtures, and equipment (FF&E) as set forth in Exhibit B as “Tenant’s Work”.

Except as expressly provided otherwise in this Section, Lessor shall only be obligated to provide the Premises to Tenant "as is" in the Premises' present condition. Tenant's taking possession of the Premises shall be conclusive evidence of Tenant's acceptance thereof in good order and satisfactory condition. Lessor shall deliver possession of the Premises to Tenant on \_\_\_\_\_, 20\_\_ (the "Delivery Date") or such later date as is mutually agreed upon by Lessor and Tenant, such agreement not to be unreasonably withheld, conditioned or delayed. Tenant agrees that no representation respecting the condition of the Premises and no warranties or guarantees, expressed or implied, with respect to workmanship or any defects in material, and no promise to decorate, alter, repair or improve the Premises either before or after the execution hereof (except to the extent expressly provided herein), have been made by Lessor or Lessor's agents to Tenant.

### **Section 3.2. Tenant's Work.**

All work not provided herein to be done by Lessor shall be performed by Tenant (hereinafter called "Tenant's Work") including, but not limited to, providing and installing all FF&E and all other work designated as Tenant's Work in Exhibit B, and Tenant shall do and perform at Tenant's expense all Tenant's Work diligently and promptly and in accordance with the following provisions.

Notwithstanding anything to the contrary contained herein, each and every aspect of Tenant's Work shall be subject to the prior written approval of Lessor and shall be in accordance with the first class standards of the Development. Tenant's Work shall at all times comply with all applicable laws, ordinances, rules and regulations including, but not limited to, the Occupational Safety and Health Act and the Americans with Disabilities Act of 1990. In addition, Tenant’s Work shall at all times be conducted in accordance with Lessor's Contractor Work Standards, a copy of which is attached hereto as Exhibit D.

Tenant shall not contract with any contractors or subcontractors, and Tenant's contractors and subcontractors may not perform any work on the Premises or the Development, unless and until Lessor has, in Lessor's reasonable discretion, approved the general contractor for Tenant’s Work. Further, and in addition to any other indemnity obligation contained herein, Tenant hereby covenants and agrees to indemnify, defend, save, and hold Lessor, and Lessor's parent company, subsidiaries and affiliates, and their officers, directors, shareholders and employees, free, clear and harmless from, and against, any and all liabilities, losses, costs, expenses (including reasonable attorney's fees), judgments, claims, liens, fines, penalties, and demands of any kind whatsoever caused by, resulting from, or in any way connected with, Tenant's use of any particular contractor or subcontractor, or that subcontractor's use of any particular contractor or subcontractor, for any work in connection with the Premises (whether part of Tenant's Work or otherwise)



regardless of whether Lessor approved of such contractor or subcontractor pursuant to this Section.

### **Section 3.3. Lessor's Obligations Before Commencement Date.**

On or before the following dates, Lessor shall complete the following with regard to its build-out of the Premises:

Conceptual Design:

Preliminary Design Documents:

Final Plans & Specifications:

Start Construction:

Finish Construction:

Lessor shall use commercially reasonable efforts to complete Lessor's Work within \_\_\_\_\_ ( ) days from the date the building permit for the build-out work is issued, (the "Required Completion Date"). Lessor shall submit all of Lessor's planned build-out of the Premises including, but not limited to, all drawings, specifications, color boards and other samples, to Tenant for Tenant's review and guidance. Within five (5) days after receipt of each such submittal from Lessor, Tenant shall notify Lessor of any failure to meet with Tenant's requirements. Lessor shall use its best efforts to reasonably accommodate Tenant's input in the final construction documents, which shall become a part hereof by this reference as Exhibit B-1. Preparation of the construction documents by Lessor shall not constitute the assumption of any responsibility by Lessor for their accuracy or sufficiency, or compliance with applicable laws, ordinances, rules and regulations.

### **Section 3.4. Failure of Lessor to Perform.**

Because of the difficulty or impossibility of determining Tenant's damages resulting from Tenant's failure to open for normal occupancy on the Required Completion Date, Tenant may, upon the failure of Lessor to provide the Premises to Tenant on the Required Completion Date and the expiration of ten (10) days written notice to Lessor without cure or material steps taken by Lessor that are reasonably likely to cause cure within a reasonable amount of time, proceed with completing Lessor's Work using any qualified and licensed contractor Tenant selects and making any changes or revisions to Lessor's Work required because of any delay or failure of Lessor to perform Lessor's obligations hereunder, which changes or revisions shall in any event be made at Lessor's expense (so long as such charges are reasonable and at or below market rates). For purposes of this Lease, the term "business day" shall mean each Monday thru Friday, inclusive, which is not a U.S. and/or State of California designated holiday.

### **Section 3.5. Governmental Approvals.**

Lessor is responsible for obtaining all governmental permits and approvals required in connection with Lessor's Work. Tenant is responsible for obtaining all governmental

permits and approvals required in connection with Tenant's Work and the use of the Premises as permitted herein.

## **ARTICLE IV – RENT**

### **Section 4.1. Initial Lease Term.**

Tenant covenants and agrees to pay to Lessor, without notice or demand, at Lessor's address for notice (Lessor's and Tenant's notice addresses being the addresses specified in Section 23 hereof), as rent for the Premises during the initial Lease Term, Annual Rent in the amount of One Dollar (\$1.00) per annum payable in advance upon the first day of each and every year commencing upon the Commencement Date and continuing thereafter through and including the last month of the initial Lease Term.

### **Section 4.2. Miscellaneous Rent Provisions.**

No Rent or Percentage Rent shall be due for the period of time prior to the Required Completion Date. Any rent or other amounts to be paid by Tenant which are not paid by the thirtieth (30<sup>th</sup>) day after the date when due shall bear interest as of the first day of the month on which any sum is due and owing at the legal rate of interest in the State of California, or if there is no such legal rate, at a rate equal to two percent (2%) over the prime rate announced by Citibank, N.A.

### **Section 4.3. Taxes.**

A. Real Estate Taxes. Lessor shall pay or cause to be paid all Real Estate Taxes (as hereinafter defined) assessed or imposed upon the Development, which, after all due credits, offsets and exemptions, become due or payable during the Lease Term. As used in this Section 4.4 the term Real Estate Taxes shall mean and include all real estate taxes, public and governmental charges and assessments, including all extraordinary or special assessments, or assessments against any of Lessor's personal property now or hereafter located in the Development, all costs, expenses and attorney's fees incurred by Lessor in contesting or negotiating with public authorities (Lessor having the sole authority to conduct such a contest or enter into such negotiations) as to any of the same; but shall not include taxes on Tenant's operation(s) in the Premises, machinery, equipment, inventory or other personal property or assets of Tenant, or other taxes or assessments from which the Tenant is or otherwise would be exempt, excused or credited; Tenant agreeing to pay, before delinquency, all taxes upon or attributable to such excluded items without apportionment.

B. Other Taxes. Tenant's proportionate share of any governmental tax or charge (other than income tax) levied, assessed, or imposed on account of the Tenant's use of the Premises or payment by Tenant or receipt by Lessor of, or based in whole or in part upon, the rents in this Lease, or upon the Development or the value thereof, shall be paid by Tenant.

#### **Section 4.4. Lessor's Expenses.**

If Lessor pays any monies or incurs any expense to correct a breach of this Lease by Tenant or to do anything in this Lease required to be done by Tenant, or incurs any expense (including, but not limited to, reasonable attorney's fees and court costs), as a result of Tenant's failure to perform any of Tenant's obligations under this Lease, all reasonable and necessary amounts so paid or incurred shall, on notice to Tenant, be considered additional rent payable in full by Tenant with the first Minimum Annual Rent installment thereafter becoming due and payable, and may be collected as by law provided in the case of rent.

### **ARTICLE V – PARKING AND COMMON AREAS AND FACILITIES**

#### **Section 5.1. Common Areas.**

All parking areas, access roads and facilities furnished, made available or maintained by Lessor in or near the Development, including employee parking areas, truck ways, driveways, loading docks and areas, delivery areas, multi-story parking facilities, package pickup stations, elevators, escalators, pedestrian sidewalks, courts and ramps, landscaped areas, retaining walls, stairways, lighting facilities, sanitary systems, utility lines, water filtration and treatment facilities, those areas within and adjacent to the Development for ingress and egress to and from the Development, which from time to time may be provided by Lessor or others for the convenience, use or benefit of the tenants of the Development, Lessor, the occupants and visitors of the Development and their respective concessionaires, agents, employees, customers, invitees and licensees, those areas, if any, upon which temporary or permanent off-site utility systems or parking facilities serving the Development, may from time to time be located and other areas and improvements provided by Lessor for the general use in common of tenants and their employees and customers in the Development (all herein called "Common Areas") shall at all times be subject to the exclusive control and management of Lessor, and Lessor shall have the right, from time to time, to establish, modify and enforce reasonable rules, regulations and requirements with respect to all Common Areas.

Tenant agrees to comply with, and to cause Tenant's students, employees and contractors to comply with, all rules, regulations and requirements set forth by Lessor, and all amendments thereto, regardless of whether such rules, regulations and requirements relate to the Common Areas, Premises or Development.

Subject to the terms hereof, Lessor shall have the right from time to time to: change or modify and add to or subtract from the sizes, locations, shapes and arrangements of parking areas, entrances, exits, parking aisle alignments and other Common Areas; designate parking areas for Lessor, Lessor's employees and students, and/or limit the total number of such employee spaces; restrict parking by Tenant and Tenant's employees to designated areas; construct surface, sub-surface or elevated parking areas and facilities; establish and from time to time change the level or grade of parking surfaces; add to or subtract from the buildings in the Development; eliminate such access as may, from time

to time, be available to the Development; and do and perform such other acts in and to said Common Areas as Lessor, in Lessor's sole and absolute discretion deems desirable for the use thereof by tenants and their customers. Tenant further acknowledges that this Section 5.1 shall be for the benefit of, and directly enforceable by, Lessor.

In the event that Lessor determines, in Lessor's reasonable discretion, to provide parking or transportation facilities for the Development, Lessor may impose and enforce such rules and regulations concerning the use thereof which shall be applied to all other tenants on a nondiscriminatory basis (including a prohibition of use by Tenant's employees provided the employees of all other similarly situated tenants are also prohibited from using such facilities) as Lessor may, in Lessor's reasonable discretion, deem desirable. Lessor shall have the right at any and all times to utilize portions of Common Areas for promotions, exhibits, entertainments, product and other shows, displays, the leasing of kiosks or food facilities, or such other uses as may in Lessor's judgment tend to attract the public to benefit the Development. Except as specifically otherwise provided, Lessor may do such other acts in and to the Development and those Common Areas located on the Development as in Lessor's reasonable judgment may be desirable, including, but not limited to, the conversion of portions thereof to other uses.

#### **Section 5.2. Use of Common Areas.**

Tenant and Tenant's employees, students and invitees shall have the non-exclusive right, in common with Lessor, and all others to whom Lessor has granted or may hereafter grant rights, to use the Common Areas for ingress, egress and parking subject to such reasonable regulations as Lessor or such other person may from time to time impose and the rights of Lessor set forth above. Tenant and Tenant's students and invitees shall also have a non-exclusive right to walk through the Development in order to gain ingress to and egress from the Premises. . Tenant authorizes Lessor to cause any car of Tenant, a concessionaire, employee or agent of Tenant that is parked outside any area designated by Lessor for employee parking to be towed from such undesignated area and Tenant shall reimburse Lessor for the cost thereof upon demand, and otherwise indemnify and hold Lessor harmless with respect thereto. Tenant shall abide by all rules and regulations and use its commercially reasonable efforts to cause Tenant's concessionaires, officers, employees, agents, customers and invitees to abide thereby.

Lessor may at any time close temporarily any Common Areas to make repairs or changes, prevent the acquisition of public rights therein, discourage non-customer parking, or for other reasonable purposes, and Lessor shall in all such cases (except in the event of an emergency) attempt to provide Tenant with prior notice of each such closure. If requested by Lessor, Tenant shall furnish Lessor license numbers and descriptions of cars used by Tenant and Tenant's concessionaires and employees. Tenant shall not interfere with Lessor's or other permitted users' rights to use any part of the Common Areas.

**ARTICLE VI – MAINTENANCE OF COMMON AREAS  
AND COMMON AREA MAINTENANCE CHARGE**

Lessor will at all times during the Lease Term operate, manage, maintain and repair, or cause to be operated, managed, maintained or repaired, the Common Areas of the Development including, but not limited to, all parking facilities. In addition to the Annual Rent provided for herein, Tenant shall pay to Lessor in advance on the first day of each year during the Lease Term a Common Area maintenance charge in the amount of \_\_\_\_\_ (\$\_\_\_\_\_) per square foot of leased area as set forth in Exhibit A (the "Common Area Maintenance Charge") as Tenant's share of the costs incurred by Lessor to operate, manage, maintain and repair the Common Areas of the Development.

**ARTICLE VII – UTILITIES AND SERVICES**

**Section 7.1. Utilities.**

Tenant shall not install any equipment at the Premises or the Development which can exceed the capacity of any utility facilities currently serving, or intended or available to serve, the Premises and if any equipment installed by Tenant, or if Tenant's utility demands for the Premises, require additional utility facilities and/or the relocation or resizing of the existing facilities, the same shall be installed, relocated or resized, as applicable, at Tenant's expense in compliance with all code requirements and plans and specifications which must be approved in writing by Lessor. Except as expressly provided otherwise in Section 7.2 of this Lease, Tenant shall be solely responsible for and promptly pay all charges for the connection and use of sewer, gas, electricity, water, telecommunications and all other utility services relative to the Premises. Lessor will, at Lessor's expense, install electric, gas and water meters on the Premises. Tenant agrees to directly and promptly, but in any event before the date due, pay the utilities providing the sewer, gas, electrical, water or telecommunications service for such services. In the event that Lessor is not able to install separate electric, gas and/or water meters on the Premises, Lessor shall allocate the cost of such unmetered services to the Premises based upon the square footage and usage of the Premises, and Tenant shall promptly reimburse Lessor for such allocated costs for each month of the Term. Lessor may make additional services including, but not limited to, pest control, cleaning and security available to the Premises and, in such event, Tenant shall utilize such services, at Tenant's expense.

**Section 7.2. Air Conditioning of Premises.**

Lessor, at Lessor's cost, shall provide Tenant with heating and air conditioning for the Premises during the customary periods of the year and during normal business hours when, and to the same extent, as furnished to other portions of the Development and if sufficient capacity exists. If sufficient heating and/or air conditioning capacity does not currently exist at the Development to provide sufficient heating and/or air conditioning for the Premises based upon Tenant's use thereof, any additional facilities and/or the relocation or resizing of existing facilities required to provide sufficient heating and/or air conditioning for the Premises shall be installed, relocated or resized, as applicable, at

Tenant's expense and in compliance with all code requirements and plans and specifications which must be approved of in advance and in writing by Lessor. Tenant acknowledges that because of the nature of the Premises, Tenant might not have access to the controls for heating and air conditioning at the Premises and shall not attempt to make any changes to such controls located outside the Premises.

### **Section 7.3. Enforcement and Termination.**

In the event of any default by Tenant, but subject to Section 17.1 of this Lease, Lessor reserves the right, in addition to all other rights and remedies available to Lessor, to cut off and discontinue, without notice or liability to Tenant, any utilities which are not separately metered and being paid for by Tenant and/or services provided in accordance with the provisions of this Article VII. Lessor shall not be liable to Tenant in damages or otherwise if any utilities or services, whether or not furnished by Lessor here under, are interrupted or terminated because of repair, installation of improvements, or any cause beyond Lessor's reasonable control, nor shall any such termination relieve Tenant of any of Tenant's obligations under this Lease. Tenant shall operate the Premises in such a way as shall not waste fuel, energy or natural resources. Lessor may cease to furnish any one or more of said utilities or services to Tenant without liability for the same and no discontinuance of any utilities or services shall constitute a constructive eviction.

## **ARTICLE VIII – TENANT’S CONDUCT**

### **Section 8.1. Use of Premises.**

The Premises shall be occupied and used by Tenant solely for the purpose of conducting thereon the operation of [FILL IN SPECIFIC PERMITTED USES]:

Tenant shall not use or permit or suffer the use of the Premises for any commercial activities or other business or purpose or purposes whatsoever, without Lessor's written consent therefor first had and obtained, which consent may be withheld at the Lessor's sole discretion. The design, theme and content of the Premises, and any modifications or changes thereto, shall be subject to the prior written approval of Lessor, such approval not to be unreasonably withheld or delayed. This Lease does not grant any exclusive use rights to Tenant nor in any event shall this Lease grant any exclusive use rights with respect to the Development or with respect to any merchandise or goods currently or in the future sold at or from the Premises.

### **Section 8.2. Prompt Occupancy and Use.**

Tenant will occupy the Premises upon the Commencement Date and thereafter continuously operate and conduct the operations permitted under Section 8.1 hereof on such days, and during such hours, as are required in Section 8.3 of this Lease with a full staff and using only such minor portions of the Premises for storage and office purposes as are reasonably required.

### **Section 8.3. Conduct of Operations.**

Tenant's shall at all times keep the Premises open during normal, fixed operating hours at least five (5) days per week throughout the Term ("Minimum Hours of Operation"). Any extension of the Minimum Hours of Operation shall require Lessor's consent which shall not be unreasonably withheld.

Notwithstanding anything to the contrary contained herein, Tenant shall not be subject to penalty or deemed in default hereunder if Tenant fails to open or if Tenant at any time fails to operate within the entirety of the Premises due to events of force majeure, or during any periods of repairs or alteration which cannot be commenced and completed during the hours in which Tenant is normally closed. In such events, Tenant shall be permitted to close or partially close on an "as needed basis" to make whatever repairs or alterations are necessary to maintain the first class facilities that exist at the Commencement Date. Tenant shall use reasonable efforts to commence any and all such work so as to minimize any closure. Except in cases of emergency repairs, Tenant shall provide Lessor with not less than five (5) days prior notice of Tenant's intention to close and reasons therefore. Tenant shall be permitted to close five (5) days per Lease Year for minor refurbishment.

### **Section 8.4. Operation by Tenant.**

A. Tenant covenants and agrees that it will: not place or maintain any merchandise, goods, equipment, machinery or other articles in any vestibule or entry of the Premises or outside the Premises; store garbage, trash, rubbish and other refuse in rat-proof and insect-proof containers inside the Premises, and remove the same frequently and regularly and, if directed by Lessor, by such means and methods and at such times and intervals as are designated by Lessor, all at Tenant's expense; not permit any sound system audible, or objectionable medium visible, outside the Premises; keep all mechanical equipment free of vibration and noise and in good working order and condition; not commit or permit waste or a nuisance upon the Premises; not permit or cause odors to emanate or be dispelled from the Premises; not solicit business in the Common Areas; not distribute advertising matter to, in or upon any Common Areas; not permit the loading or unloading or the parking or standing of delivery vehicles outside any area designated therefor, nor permit any use of vehicles which will interfere with the use of any Common Areas; comply with all laws, recommendations, ordinances, rules and regulations of governmental, public, private and other authorities and agencies, including those with authority over insurance rates, with respect to the use or occupancy of the Premises, and including but not limited to the Occupational Safety and Health Act and the Americans with Disabilities Act of 1990; not permit any noxious, toxic or corrosive fuel or gas, dust, dirt or fly ash on the Premises; and not place a load on any floor, ramp or other surface in the Development which exceeds the load capacity thereof.

B. Tenant acknowledges that Lessor's security department and security officers are not responsible for providing security services in the Premises and that all such responsibility is the obligation of Tenant. In no event shall Lessor be liable to Tenant or any third-party

for the security department's failure to respond to a request for aid or assistance by Tenant.

C. Tenant's method of conducting its operations in the Premises shall at all times be in keeping with and not inconsistent with or detrimental to the operation by Lessor of a first-class mixed-use facility.

D. Tenant acknowledges that Lessor has or will enter into other leases within the Development and that the operations of other tenants may, during the Lease Term, create a conflict with Tenant. In the event of a controversy between Tenant and Lessor or Tenant and the lessee or operator of any other business in the Development, Lessor shall have the sole right to resolve such controversy, so long as Lessor exercises reasonable discretion, and such decision shall be binding on all parties involved. In the event that Tenant fails or refuses to abide by the decision of Lessor, such failure or refusal shall be deemed a material breach, unless Lessor's resolution violates the preceding sentence, in which case the parties shall submit the matter to binding arbitration in accordance with Section 23.16 of this Lease.

E. Tenant shall forthwith notify Lessor in writing each time that the Premises is inspected by, or Tenant receives a citation, notice of violation or citation, or inquiry, from the California Industrial Relations Division or the United States Department of Occupational Safety and Health (each an "OSHA Enforcement Agency") or any other regulatory body. In addition, Tenant shall forthwith provide to Lessor copies of any and all correspondence, violations, citations, documents or other information received from, sent to, or in connection with, the Premises and an OSHA Enforcement Agency. In the event Tenant is cited or notified by an OSHA Enforcement Agency of a violation of any law, recommendation, ordinance, rule, regulation or requirement enforced by an OSHA Enforcement Agency including, but not limited to, the Occupational Safety and Health Act, and without limiting any other provision of this Lease, Tenant shall promptly (but in no event later than the time allowed by the OSHA Enforcement Agency) respond to the citation or violation in writing addressed to the OSHA Enforcement Agency (a copy of which Tenant shall at the same time provide to Lessor) and correct the violation(s) in question to the satisfaction of the OSHA Enforcement Agency and Lessor. All notices, documentation and information to be provided by Tenant to Lessor pursuant to this subsection shall be sent to the Lessor's Risk Management Department.

F. Tenant may not store, use or operate any equipment at the Development which interferes with the operation of any other equipment at the Development by any other tenant, licensee, contractor or subcontractor.

#### **Section 8.5. Vending Machines.**

Tenant shall not, without Lessor's prior written approval, operate or permit to be operated on the Premises any coin or token operated vending machines or similar device for the sale or leasing to the public of any goods, wares, merchandise, food, beverages, and/or



service including, without limitation, pay telephones, pay lockers, pay toilets, scales and amusement devices.

#### **Section 8.6. Tenant's Security.**

Tenant hereby covenants and agrees to at all times during the Lease Term fully "document" each "Incident," both as defined herein, occurring in, or in connection with, the Premises. For purposes of this Lease, the term "Incident" means any injury, illness, accident, altercation, fight, trespass, theft (including embezzlement), arrest or suppression of, or alleged by, any person in, or in connection with, the Premises. In the event of an Incident, Tenant shall, to the extent any persons involved with, or witnessing, such Incident cooperate, fully document the Incident. For purposes of this Lease, the term "document" shall mean to complete and retain, promptly following an Incident, thorough and accurate Security Incident Reports, Medical Evaluations, witness statements (both of Tenant's employee's and Tenant's students and patrons) and recordings in whatever format including, but not limited to, video tapes, CD Rom and DVD, if applicable, of the Incident (collectively the "Documentation"). Tenant shall (a) within two (2) days of each Incident, notify Lessor's Security Department in writing of such Incident and (b) upon request from Lessor's Security Department, forthwith deliver to Lessor's Security Department a full and complete copy of all Documentation for an Incident. In addition, Tenant shall immediately notify Lessor, by calling Lessor's Security Dispatch, in the event that (a) a physical altercation has taken place in, or in connection with, the Premises, (b) Tenant has called for the police, Fire Department and/or emergency medical technicians/paramedics to respond to the Premises, or (c) Tenant is preparing to eject someone from the Premises (regardless of the reason). In the event of an ejection pursuant to subsection (c) above, Tenant shall notify Lessor's Security Dispatch of such ejection a sufficient time before such ejection takes place to allow Lessor's Security Department to promptly respond and be present near the entrance of the Premises when such person is ejected.

#### **Section 8.7. Public Relations.**

Tenant acknowledges that the Development is a first class mixed-use project and that the maintenance of Lessor's and the Development's reputation and the goodwill of all of Lessor's customers, guests and invitees is absolutely essential to Lessor and that any impairment thereof whatsoever will cause great damage to Lessor. Tenant therefore covenants that it shall operate the Premises in accordance with the highest standards of honesty, integrity, quality and courtesy so as to maintain and enhance the reputation and goodwill of Lessor and the Development. Tenant shall continuously monitor the performance of each of Tenant's employees and students at the Premises to insure that such standards are consistently maintained. Tenant therefore further agrees, as a material inducement to Lessor, that repeated failure to maintain such standards or repeated complaints from customers or guests which, in each case, are communicated specifically in writing to Tenant in a timely manner, for which, in Lessor's reasonable judgment, Tenant has no credible explanation, shall be deemed a material breach by Tenant to perform conditions and covenants of this Lease.

## **Section 8.8. Emissions and Hazardous Materials.**

Tenant shall not, without the prior written consent of Lessor, cause or permit, knowingly or unknowingly, any Hazardous Material (hereinafter defined) to be brought or remain upon, kept, used, discharged, leaked, or emitted in or about, or treated at the Premises or the Development. As used in this Lease, "Hazardous Material(s)" shall mean any hazardous, toxic or radioactive substance, material, matter or waste which is or becomes regulated by any federal, state or local law, ordinance, order, rule, regulation, code or any other governmental restriction or requirement, and shall include asbestos, petroleum products and the terms "Hazardous Substance" and "Hazardous Waste" as defined in the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. § 9601 et seq. ("CERCLA"), and the Resource Conservation and Liability Act, as amended, 42 U.S.C. § 6901 et seq. ("RCRA"). To obtain Lessor's consent, Tenant shall prepare an "Environmental Audit" for Lessor's review. Such Environmental Audit shall list: (1) the name(s) of each Hazardous Material and a Material Safety Data Sheet (MSDS) as required by the Occupational Safety and Health Act; (2) the volume proposed to be used, stored and/or treated at the Premises (monthly); (3) the purpose of such Hazardous Material; (4) the proposed on-premises storage location(s); (5) the name(s) of the proposed off-premises disposal entity; and (6) an emergency preparedness plan in the event of a release. Additionally, the Environmental Audit shall include copies of all required federal, state, and local permits concerning or related to the proposed use, storage, or treatment of any Hazardous Material(s) at the Premises.

Tenant shall submit a new Environmental Audit whenever it proposes to use, store, or treat a new Hazardous Material at the Premises or when the volume of existing Hazardous Materials to be used, stored, or treated at the Premises expands by ten percent (10%) during any thirty (30) day period. If Lessor, in Lessor's reasonable judgment, finds the Environmental Audit acceptable, then Lessor shall deliver to Tenant Lessor's written consent. Notwithstanding such consent, Lessor may revoke Lessor's consent if (a) Tenant fails to remain in full compliance with applicable environmental permits and/or any other requirements under any federal, state, or local law, ordinance, order, rule, regulation, code or any other governmental restriction or requirement (including but not limited to CERCLA and RCRA related to environmental safety, human health, or employee safety; (b) Tenant's business operations pose or potentially pose a human health risk to other Tenants; or (c) Tenant expands Tenant's use, storage, or treatment of any Hazardous Material(s) in a manner inconsistent with the safe operation of the Development. Should Lessor consent in writing to Tenant bringing, using, storing or treating any Hazardous Material(s) in or upon the Premises or the Development, Tenant shall strictly obey and adhere to any and all federal, state or local laws, ordinances, orders, rules, regulations, codes or any other governmental restrictions or requirements (including but not limited to CERCLA and RCRA which in any way regulate, govern or impact Tenant's possession, use, storage, treatment or disposal of said Hazardous Material(s). In addition, Tenant represents and warrants to Lessor that (a) Tenant shall apply for and remain in compliance with any and all federal, state or local permits in regard to Hazardous Materials; (b) Tenant shall report to any and all applicable governmental authorities any release of reportable quantities of any Hazardous Material(s) as required by any and all

federal, state or local laws, ordinances, orders, rules, regulations, codes or any other governmental restrictions or requirements; (c) Tenant, within five (5) days of receipt, shall send to Lessor a copy of any notice, order, inspection report, or other document issued by any governmental authority relevant to Tenant's compliance status with environmental or health and safety laws; and, (d) Tenant shall remove from the Premises all Hazardous Materials at the termination of this Lease.

In addition to, and in no way limiting, Tenant's duties and obligations as set forth in Section 11.6 of this Lease, should Tenant breach any of Tenant's duties and obligations as set forth in this Section, or if the presence of any Hazardous Material(s) on the Premises results in contamination of the Premises, the Development, any land other than the Development, the atmosphere, or any water or waterway (including groundwater), or if contamination of the Premises or of the Development by any Hazardous Material(s) otherwise occurs for which Tenant is otherwise legally liable to indemnify or reimburse Lessor for damages resulting therefrom, Tenant shall indemnify, save harmless and, at Lessor's option and with attorneys approved in writing by Lessor, defend Lessor, and Lessor's parent company, subsidiaries and affiliates, and their respective directors, officers, employees, agents, contractors, partners and mortgagees, if any, from any and all claims, demands, damages, expenses, fees, costs, fines, penalties, suits, proceedings, actions, causes of action, and losses of any and every kind and nature (including, without limitation, diminution in value of the Premises or the Development, damages for the loss or restriction on use of the rentable or usable space or of any amenity of the Premises or the Development, damages arising from any adverse impact on marketing space in the Development, and sums paid in settlement of claims and for attorney's fees, consultant fees and expert fees, which may arise during or after the Lease Term or any extension thereof as a result of such contamination). This includes, without limitation, costs and expenses, incurred in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work required by any federal, state or local governmental agency or political subdivision because of the presence of Hazardous Material(s) on or about the Premises or the Development, or because of the presence of Hazardous Material(s) anywhere else which came or otherwise emanated from Tenant or the Premises. Without limiting the foregoing, if the presence of any Hazardous Material(s) on or about the Premises or the Development caused or permitted by Tenant results in any contamination of the Premises or the Development, Tenant shall, at Tenant's sole expense, promptly take all actions and expense as are necessary to return the Premises and/or the Development to the condition existing prior to the introduction of any such Hazardous Material(s) to the Premises or the Development; provided, however, that Lessor's approval of such actions shall first be obtained in writing.

Lessor hereby represents and warrants to Tenant that as of the respective Delivery Date the Premises shall be free from all Hazardous Materials. In the event that Tenant discovers that Hazardous Materials did exist on the Premises as of the respective Delivery Date, Tenant shall promptly provide Lessor with written notice thereof and thirty (30) days in which to remove such Hazardous Materials.

## **Section 8.9. Tenant's Employees.**

A. Tenant shall staff the Premises with such number of Tenant's employees as are reasonably required for the proper and efficient operation thereof. Tenant shall keep Lessor informed about its key personnel and changes thereto. Lessor must give its reasonable advance approval to any prospective manager(s) of the day-to-day operations of the Innovation Center. Each of Tenant's employees working at the Premises shall, at Tenant's reasonable expense, attend an orientation program conducted by Lessor from time to time intended to educate tenant employees about the Development. Further, and in addition to any other indemnity obligation contained herein, Tenant hereby covenants and agrees to indemnify, defend, save, and hold Lessor, and Lessor's parent company, subsidiaries and affiliates, and their officers, directors, shareholders and employees, free, clear and harmless from, and against, any and all liabilities, losses, costs, expenses (including reasonable attorney's fees), judgments, claims, liens, fines, penalties, and demands of any kind whatsoever caused by, resulting from, or in any way connected with, Tenant's failure to comply with, adopt the applicable terms and conditions of, and/or take and accept an assignment of, and/or become a signatory to; as they relate to Tenant's operation of the Premises.

B. Tenant shall not cause or permit Tenant's employees to enter upon those areas of the Development which are designated "Employees Only" as the parties acknowledge that for the purpose of this Section, "Employees" refers to the employees of Lessor and not to the employees of Tenant. However, Tenant shall, at Lessor's discretion, require that Tenant's employees only enter and exit the Development through the Development's employee entrance.

C. Tenant shall, in Tenant's sole discretion, fix the salary rate and provisions of employee benefits of Tenant's employees and shall be responsible for all such salaries, employee benefits, social security taxes, federal and state unemployment insurance and any and all similar taxes relating to Tenant's employees and for workers' compensation coverage with respect thereto pursuant to applicable law. Tenant's employees shall not be entitled to participate in, or to receive, any of Lessor's employee benefit or welfare plans, and they shall not be deemed agents of Lessor for purposes of this Lease.

## **ARTICLE IX – MAINTENANCE OF PREMISES**

### **Section 9.1. Maintenance by Lessor.**

Lessor shall keep or cause to be kept the foundations, roof and structural portions of the walls of the Premises in good order, repair and condition except for damage thereto due to the acts or omissions of Tenant, Tenant's agents, employees or invitees. Lessor shall commence required repairs as soon as reasonably practicable after receiving written notice from Tenant thereof. This Section 9.1 shall not apply in case of damage or destruction by fire or other casualty or condemnation or eminent domain, in which events the obligations of Lessor shall be controlled by Article XVI and XVII. Except as provided in this Section 9.1, Lessor shall not be obligated to make repairs, replacements

or improvements of any kind upon the Premises, or to any leasehold improvements, equipment, merchandise, goods, stock in trade, facilities or fixtures therein, all of which shall be Tenant's responsibility, but Tenant shall give Lessor prompt written notice of any accident, casualty, damage or other similar occurrence in or to the Premises or the Common Areas of which Tenant has knowledge.

### **Section 9.2. Maintenance by Tenant.**

Tenant shall at all times keep the Premises (including all entrances and vestibules) and all partitions, window and window frames and moldings, glass, doors, door openers, fixtures including leasehold improvements, equipment and appurtenances thereof (including lighting, heating, electrical, plumbing (including applicable greasetraps), ventilating and air conditioning fixtures and systems and other mechanical equipment and appurtenances including roto-clones) and all parts of the Premises, and parts of Tenant's Work not on the Premises, not required herein to be maintained by Lessor, in good order, condition and repair and clean, orderly, sanitary and safe, damage by unavoidable casualty excepted (including, but not limited to, doing such things as are necessary to cause the Premises to comply with applicable laws, ordinances, rules, regulations and orders of governmental and public bodies and agencies, such as but not limited to the Occupational Safety and Health Act). If replacement of equipment, fixtures and appurtenances thereto is necessary, Tenant shall replace the same with the new or completely reconditioned equipment, fixtures and appurtenances, and repair all damages done in or by such replacement. Without limiting the foregoing and if applicable, Tenant shall, at Tenant's expense and at such times as Lessor deems appropriate, utilize Lessor's designated contractor to clean any hoods, exhaust systems and ducts on the Premises. All such work shall be performed subject to Lessor's standards and Tenant shall, following each such cleaning, provide Lessor with photographs and other certificates and receipts satisfactory to Lessor evidencing that such cleaning has been conducted. If Tenant fails to perform Tenant's obligations hereunder, Lessor without notice may, but shall not be obligated to perform Tenant's obligations or perform work resulting from Tenant's acts, actions or omissions and add the cost of the same to the next installment of Annual Rent due hereunder to be repaid in full.

### **Section 9.3. Surrender of Premises.**

At the expiration or earlier termination of the Lease Term, Tenant shall surrender the Premises in the same condition as they were required to be in on the Required Completion Date, reasonable wear and tear and damage by unavoidable casualty excepted, and deliver all keys for, and all combinations on locks, safes and vaults in, the Premises to Lessor at Lessor's notice address as specified in Section 23.7.

## **ARTICLE X – SIGNS, AWNINGS, CANOPIES, FIXTURES, ALTERATIONS**

### **Section 10.1. Fixtures/Requirement to Refurbish.**

Except as otherwise required by the nature of the Premises, all fixtures and equipment installed by Tenant shall be new. Upon the request of Lessor, and without limiting the refurbishment obligation provided for in this Section, Tenant shall refurbish all or any portion of the interior of the Premises so that the furnishings, furniture, flooring, wall fixtures and coverings, lighting, equipment and other appurtenances in the Premises are kept in like new order, condition and repair in conformity with the standards of appearance for the Development. In that regard, Tenant hereby agrees to spend on refurbishments of the Premises, excluding the cost of regular and ordinary maintenance and cleaning, an amount equal to or greater than \_\_\_\_\_ dollars (\$\_\_\_\_\_) during the fifth (5<sup>th</sup>) thru fifteenth (15<sup>th</sup>) Lease Years of the Term and an amount equal to or greater than \_\_\_\_\_ dollars (\$\_\_\_\_\_) during the sixteenth (16<sup>th</sup>) through thirtieth (30<sup>th</sup>) Lease Years. All refurbishment work to be performed pursuant to this Section shall be deemed Tenant's Work for, and subject to, the approvals and other conditions of Tenant's Work.

### **Section 10.2. Removal and Restoration by Tenant.**

Tenant shall make no alterations, changes, additions or improvements to the Premises without obtaining Lessor's prior written consent. All alterations, changes and additions and all improvements, including leasehold improvements, made by Tenant, or made by Lessor on Tenant's behalf, whether part of Tenant's Work or not and whether or not paid for wholly or in part by Lessor, shall remain Tenant's property for the Lease Term. Any alterations, changes, additions and improvements shall immediately upon the termination of this lease become Lessor's property, be considered part of the Premises, and not be removed at or prior to the end of the lease Term without Lessor's written consent. If Tenant fails to remove any shelving, decorations, equipment, trade fixtures or personal property from the Premises prior to the end of the Lease Term, they shall become Lessor's property and Tenant shall repair or pay for the repair of any damage done to the Premises resulting from removing same but not for painting or redecorating the Premises.

### **Section 10.3. Tenant's Liens.**

A. Tenant acknowledges that Lessor is the Owner of the Development and the Premises and that Tenant neither has, nor at any time hereunder will have, any ownership interest in the Development or the Premises. Tenant shall not permit any mechanics' or materialmen's lien to be filed against the Premises or the Development by reason of work, labor, services or materials performed or furnished to Tenant or anyone holding any part of the Premises under Tenant. If any such lien shall at any time be filed as aforesaid, Tenant may contest the same in good faith, but, notwithstanding such contest, Tenant shall, within fifteen (15) days after the filing thereof, cause such lien to be released of record by payment, bond, order of a court of competent jurisdiction, or otherwise in a manner satisfactory to Lessor and Lessor's mortgagee. In the event of Tenant's failure to

release of record any such lien within the aforesaid period, Lessor may remove said lien by paying the full amount thereof or by bonding or in any other manner Lessor deems appropriate, without investigating the validity thereof, and irrespective of the fact that Tenant may contest the propriety or the amount thereof, and Tenant, upon demand, shall pay Lessor the amount so paid out by Lessor in connection with the discharge of said lien, together with interest thereon at the rate set forth in Section 4.2 herein and reasonable expenses incurred in connection therewith, including reasonable attorneys' fees, which amounts are due and payable in full to Lessor as additional rent on the first day of the next following year. Nothing contained in this Lease shall be construed as consent on the part of Lessor to subject Lessor's estate in the Premises to any lien or liability under the lien laws of the State of California. Tenant's obligation to observe and perform any of the provisions of this Section 10.3 shall survive the expiration of the Lease Term or the earlier termination of this Lease. Lessor shall have the right to post and maintain on the Premises any notices of non-responsibility provided for under applicable law.

B. Tenant shall not create or suffer to be created a security interest or other lien against any improvements, additions or other construction made by Tenant in or to the Premises or against any fixtures installed by Tenant therein (other than a purchase money security interest in favor of an institutional lender and relative to Tenant's fixtures, equipment or furniture), and should any security interest be created in breach of the foregoing, Lessor shall be entitled to discharge the same by exercising the rights and remedies afforded it under paragraph A of this Section.

C. As soon as available after Tenant's opening for business in the Premises, Tenant shall furnish to Lessor lien waivers from all contractors, subcontractors and materialmen who provided work, labor, services equipment or material to Tenant.

#### **Section 10.4. Signs, Awnings and Canopies.**

Tenant's signs, placards, and other visual displays must strictly comply with all local regulations and city ordinances. Tenant shall not place or permit on any exterior door or window or any wall of the Premises or otherwise, any sign, awning, canopy, advertising matter, decoration, lettering or other thing of any kind which has not been approved by Lessor. Lessor reserves the right to disapprove in its sole and absolute discretion, any signage or decoration located on the exterior of the Premises or which can be seen outside the Premises which it deems to be inappropriate or offensive and Tenant shall remove such sign or item from the Premises upon Lessor's written notice to Tenant. Tenant agrees not to use any advertising medium, such as flashing lights, searchlights, loudspeakers, phonographs, radios or televisions, which can be heard or experienced outside the Premises. Tenant agrees not to display, paint or place any handbills, bumper stickers, or other advertising fliers on any vehicle in the parking area of the Development. Tenant will not distribute any handbills or other advertising devices within the Development without first obtaining Lessor's written consent.

### **Section 10.5. Storefronts.**

Tenant shall design, install, illuminate and maintain all storefront window floors, ceilings, and backgrounds/backdrops, which shall be subject to the prior approval of Lessor, to promote and display the active use of the Premises by Tenant and its patrons, while reflecting and maintaining the vitality and first-class standards of the Development.

## **ARTICLE XI – INSURANCE**

### **Section 11.1. By Lessor.**

Lessor shall carry commercial general liability insurance on those portions of the Common Areas included in the Development providing coverage of not less than Ten Million Dollars (\$10,000,000.00) combined single limit against liability for bodily injury including death and personal injury and fire legal liability. Lessor may obtain such coverage through one (1) or more insurance policies including policies of basic and/or excess coverage. Lessor shall also carry insurance for fire, extended coverage, vandalism, malicious mischief and other endorsements deemed advisable by Lessor, insuring all improvements on the Development, including the Premises, appurtenances thereto (excluding Tenant's leasehold improvements, merchandise, goods, trade fixtures, furnishings, equipment, personal property and excluding plate glass) for the full replacement value thereof, with such deductibles as Lessor deems advisable, such insurance coverage to include approved improvements provided by Tenant (excluding wall covering, floor covering, carpeting and drapes) and Lessor's Work.

### **Section 11.2. By Tenant.**

Tenant shall obtain and keep in full force and effect prior to commencement of Tenant's Work and until completion thereof and during the Lease Term a commercial general liability, commercial automobile liability, all risk, and business interruption insurance policies. The commercial general liability insurance policy shall include blanket contractual liability coverage recognizing this Lease and products, completed operations, independent contractors, fire legal damage, and owner's protective liability coverage. Tenant will maintain limits of not less than \_\_\_\_\_ dollars (\$ \_\_\_\_\_) combined single limit per occurrence for bodily injury (including death), personal injury, and property damage, and limits of not less than One Million Dollars (\$1,000,000.00) for fire legal damage. Tenant will furnish commercial automobile liability insurance coverage for damage due to bodily injury or death of any person, or property damage arising out of the ownership, maintenance, or use of any motor vehicles whether owned, non-owned, hired, or leased. Tenant will maintain limits of not less than One Million Dollars (\$1,000,000.00) combined single limit per accident for bodily injury and property damage. Tenant also agrees to obtain and keep in full force and effect a standard all risk or special form policy of property insurance protecting against all risks of physical loss or damage including, without limitation, sprinkler leakage coverage and plate glass insurance covering all plate glass in the Premises (including store fronts), in amounts not less than actual replacement cost, covering all of Tenant's leasehold improvements,



merchandise, goods, trade fixtures, furnishing, wall covering, floor covering, carpeting, drapes, equipment and all items of personal property of Tenant located on or within the Premises and all materials stored at the site of Tenant's Work and all materials, equipment, supplies and temporary structures of all kinds incidental to Tenant's Work, and equipment, all while forming a part of or contained in such improvements or temporary structures, or while on the Premises or within the Development, all to the actual replacement cost thereof at all times and on a completed value basis. Tenant further agrees to procure and maintain workers' compensation insurance in accordance with the laws of the State of California including employers' liability insurance with a single limit of liability of not less than One Million Dollars (\$1,000,000.00) for each accident or illness. Tenant is to name Lessor, Lessor's parent company, subsidiaries and affiliates, and their directors, officers and employees as additional insureds or loss payees, as appropriate, on all such policies, except for workers' compensation insurance. Without the prior written consent of Lessor, Tenant's retention (deductible or SIR) under such aforementioned policy or policies shall be no greater than Twenty-Five Thousand Dollars (\$25,000.00). Lessor shall grant Lessor's consent to a higher retention if it determines, in Lessor's reasonable judgment, that a higher retention is prudent based upon (i) Tenant's use of the Premises, (ii) the use and nature of the Development, (iii) applicable insurance rates and premiums, (iv) whether Lessor believes, in Lessor's reasonable judgment, that such an increase could have an adverse or detrimental affect upon Lessor's operation of, or ability to obtain insurance for, the Development and (v) such other factors as Lessor from time to time reasonably deems to be appropriate.

All such insurance shall be in a form and content satisfactory to Lessor and issued by a Carrier licensed to transact business in the State of California with a current A.M. Best Company rating of at least A:VII. Upon the first day of the fifth (5<sup>th</sup>), tenth (10<sup>th</sup>), fifteenth (15<sup>th</sup>), twentieth (20<sup>th</sup>), twenty-fifth (25<sup>th</sup>) and thirtieth (30<sup>th</sup>) Lease Years of the Lease Term, the minimum coverage limits of the commercial general liability, commercial automobile liability and, employers liability insurance policies shall be adjusted upward as agreed by the Parties. Tenant shall thereafter promptly deliver to Lessor certificates of insurance evidencing such coverage in such adjusted amounts.

Tenant shall require all of Tenant's contractors and subcontractors engaged in the performance of Tenant's Work to effect and maintain and deliver to Tenant and Lessor certificates evidencing the existence of, and covering Lessor, Tenant and Tenant's contractors, prior to commencement of Tenant's Work and until completion thereof, of the workers' compensation insurance, employer's liability insurance, commercial general liability insurance and commercial automobile liability insurance policies in the amounts and as described above. Tenant's, Tenant's contractors' and subcontractors', insurance is primary with respect to Lessor; any other insurance maintained by Lessor, Lessor's parent company, subsidiaries and affiliates is excess and non-contributing. Failure of Tenant, Tenant's contractors or subcontractors to take out and/or maintain the required insurance shall not relieve Tenant from any liability under this Lease, nor shall the insurance requirements be construed to conflict with or otherwise limit the obligations of Tenant under Section 11.6.

Not later than fourteen (14) days before Tenant commences Tenant's Work, Tenant shall furnish to Lessor certificates of insurance evidencing that the required insurance and workers' compensation coverage are in full force and effect. All deductibles and self-insured retentions shall be fully disclosed on the certificates and shall provide Lessor with at least thirty (30) days prior written notice of cancellation or modification of policy limits or coverage. Such certificates shall be delivered to The Hills at Vallco, Risk Management Department. In the event Tenant does not timely provide certificates evidencing such insurance, Lessor may treat such failure as a material breach. Lessor reserves the right to insure Tenant according to Lessor's standards with Tenant being liable for all costs and premium expenses incurred by Lessor.

### **Section 11.3. Mutual Waiver of Subrogation Rights.**

Lessor and Tenant and all parties claiming under them mutually release and discharge each other from all claims and liabilities arising from or caused by any casualty or hazard covered or required hereunder to be covered in whole or in part by insurance on the Premises or in connection with property on or activities conducted on the Premises to the extent of such insurance coverage or required coverage, and waive any right of subrogation which might otherwise exist in or accrue to any person on account thereof to the extent of such insurance coverage or required coverage and evidence such waiver by endorsement to the required insurance policies, provided that such release shall not operate in any case where the effect is to invalidate or increase the cost of such insurance coverage (provided, that in the case of increased cost, the other party shall have the right, within thirty (30) days following written notice, to pay such increased cost, thereby keeping such release and waiver in full force and effect).

### **Section 11.4. Waiver.**

Lessor, Lessor's agents and employees, shall not be liable for, and Tenant waives all claims for damage, including but not limited to consequential damages, to person, property or otherwise sustained by Tenant or any person claiming through Tenant resulting from any accident or occurrence in or upon any part of the Development including, but not limited to, claims for damage resulting from: (a) any equipment or appurtenances becoming out of repair; (b) Lessor's failure to keep any part of the Development in repair; (c) injury done or caused by wind, water, or other natural element; (d) any defect in or failure of plumbing, heating or air conditioning equipment, electric wiring or installation thereof, gas, water, and steam pipes, roof, walls, stairs, porches, escalators, elevators, railings or walks; (e) broken glass; (f) the backing up of any sewer pipe or downspout; (g) the bursting, leaking or running of any tank, tub, washstand, water closet, waste pipe, drain or any other pipe or tank in, upon or about the Premises; (h) the escape of steam or hot water; (i) water, snow or ice upon the Premises; (j) the falling of any fixture, plaster or stucco; (k) damage to or loss by theft or otherwise of property of Tenant or others; (l) acts or omissions of persons in the Premises, other tenants in the Development, occupants of nearby properties, or any other persons; and (m) any act or omission of occupants of adjacent or contiguous property, or of Lessor, Lessor's agents or employees. All property of Tenant kept in the Premises shall be so kept

at Tenant's risk only and Tenant shall save Lessor harmless from claims arising out of damage to the same, including subrogation claims by Tenant's insurance carrier.

#### **Section 11.5. Insurance – Tenant's Operation.**

Tenant will not do or suffer to be done anything, which will contravene Lessor's insurance policies or prevent Lessor from procuring such policies in amounts and with companies selected by Lessor. If anything done, omitted to be done or suffered to be done by Tenant in, upon or about the Premises shall cause the rates of any insurance effected or carried by Lessor on the Premises or other property to be increased beyond the regular rate from time to time applicable to the Premises for use for the purpose permitted under this Lease, or such other property for the use or uses made thereof, Tenant will pay the amount of such increase promptly upon Lessor's demand and Lessor shall have the right to correct any such condition at Tenant's expense. In the event that this Lease so permits and Tenant engages in the preparation of food or packaged foods or engages in the use, sale or storage of inflammable or combustible material, Tenant shall install chemical extinguishing devices (such as ansul) approved by Underwriters Laboratories and Factory Mutual Insurance Company and the installation thereof must be approved by the appropriate local authority. Tenant shall keep such devices under service as required by such organizations. If gas is used in the Premises, Tenant shall install gas cut-off devices (manual and automatic).

#### **Section 11.6. Indemnities.**

A. Tenant hereby covenants and agrees to indemnify, defend, save, and hold Lessor, and Lessor's parent company, subsidiaries and affiliates, and their officers, directors, shareholders and employees, the Premises and the leasehold estate created by this Lease free, clear and harmless from, and against, any and all liabilities, losses, costs, expenses (including reasonable attorney's fees), judgments, claims, liens, fines, penalties, and demands of any kind whatsoever caused by, resulting from, or in any way connected with (i) any act, omission, or negligence of Tenant, or Tenant's agents, employees, servants, contractors, subtenants, licensees, customers, or business invitees, while in, upon, about, or in any way connected with the Premises or the Development, (ii) arising from any accident, injury or damage, howsoever and by whomsoever caused, to any person or property whatsoever occurring, in, upon, about or in any way connected with Tenant's activities, Tenant's Work or Tenant's use of the Premises or the Development, or any portion thereof, or (iii) Tenant's breach of this Lease or any of Tenant's representations or warranties contained herein.

B. Subject to the terms and conditions of this subsection, Lessor hereby covenants and agrees to indemnify, defend, save and hold Tenant, and Tenant's employees, free, clear and harmless from, and against, any and all liabilities, losses, costs, expenses (including reasonable attorneys' fees), judgments, liens, fines, penalties and demands of any kind whatsoever caused by, resulting from, or in any way connected with (i) any act, omission, or negligence of Lessor, or Lessor's agents or employees, in connection with the Premises or (ii) Lessor's breach of this Lease or any of Lessor's representations or warranties

contained herein. Notwithstanding the foregoing, in no event shall Lessor be liable to Tenant or to any other person whatsoever for any damage to the Premises or Tenant's furniture, fixtures, equipment, inventory or personal property located therein whether caused fire, smoke, falling plaster, electricity, plumbing, gas, water, steam, sprinkler, or other pipe and sewage system or by the bursting, running, or leaking of any tank, washstand, closet, waste or other pipes, nor for any damages occasioned by water being upon or coming through the roof, skylight, vent, trapdoor, or otherwise or for any damage arising from any acts or neglect of co-lessees or other occupants of the Development or of adjacent property, or of the public, nor shall Lessor be liable in damages or otherwise for any failure to furnish, or interruption of, service of any utility.

## **ARTICLE XII – ESTOPPEL CERTIFICATE, ATTORNMEN, SUBORDINATION**

### **Section 12.1. Estoppel Certificate.**

Upon Lessor's written request, Tenant shall deliver, executed in recordable form, Lessor's standard subordination, non-disturbance, and attornment agreement, as well as a declaration to any person designated by Lessor (a) ratifying this Lease; (b) stating the commencement and termination dates; and (c) certifying (i) that this Lease is in full force and effect and has not been assigned, modified, supplemented or amended (except by such writings as shall be stated), (ii) that all conditions under this Lease to be performed by Lessor have been satisfied (stating exceptions, if any), (iii) that no defenses or offsets against the enforcement of this Lease by Lessor exist (or stating those claimed); (iv) as to advance rent, if any, paid by Tenant, (v) the date to which rent has been paid, (vi) as to the amount of security deposited with Lessor, and such other information as Lessor reasonably requires. Persons receiving such statements shall be entitled to rely upon them.

### **Section 12.2. Attornment.**

Tenant shall, in the event of a sale or assignment of Lessor's interest in the Premises or the Development or this Lease, or if the Premises or the Development comes into the hands of a mortgagee or any other person whether because of a mortgage foreclosure, exercise of a power of sale under a mortgage, or otherwise, attorn to the purchaser or such mortgagee or other person and recognize the same as Lessor hereunder. Tenant shall execute, at Lessor's request, any attornment agreement required by any mortgagee or other such person to be executed, containing such provisions as such mortgagee or other person requires. Tenant's occupancy of the Premises hereunder shall not be subject to disturbance if Tenant complies with the requirements hereof (and is not otherwise in default under the terms and conditions of this Lease).

### **Section 12.3. Subordination.**

A. Mortgage. Lessor may, in Lessor's sole and absolute discretion and at any time, finance or refinance, as applicable, any portion of the Development. This Lease shall be secondary, junior and inferior at all times to the lien of any mortgage and to the lien of

any deed of trust or other method of financing or refinancing (hereinafter collectively referred to as "mortgage") now or hereafter existing against all or a part of the Development, and to all modifications, replacements, consolidations and extensions thereof, and Tenant shall execute and deliver all documents requested by any mortgagee or security holder to effect such subordination. If Tenant fails to execute and deliver any such document requested by a mortgagee or security holder to effect such subordination, Lessor is hereby authorized to execute such documents and take such other steps as are necessary to effect such subordination on behalf of Tenant as Tenant's duly authorized irrevocable agent and attorney-in-fact.

B. Construction, Easement Agreements. This Lease is subject and subordinate to one (1) or more construction, or similar agreements that may have been entered into or, hereafter may be entered into, by Lessor and to any and all easements and easement agreements which may be or have been entered into with or granted to any person heretofore or hereafter, whether such persons are located within or upon the Development or not, and Tenant shall execute such instruments as Lessor requests to evidence such subordination.

#### **Section 12.4. Failure to Execute Instruments.**

Tenant's failure to execute instruments or certificates provided for in this Article XII within thirty (30) days after the mailing by Lessor of a written request shall be a default under this Lease.

### **ARTICLE XIII – ASSIGNMENT, SUBLETTING AND CONCESSIONS**

#### **Section 13.1. No Assignment or Subletting.**

Tenant shall not sell, assign, mortgage, pledge or in any manner transfer this Lease or any interest therein, nor sublet all or any part of the Premises, nor license concessions nor lease departments therein. This prohibition shall include a prohibition against any subletting or assignment by operation of law. If this Lease is nevertheless assigned or the Premises or any part sublet or occupied by anybody other than Tenant, Lessor may collect rent from the assignee, subtenant or occupant and apply the same to the rent herein reserved, but no such assignment, subletting, occupancy or collection of rent shall be deemed a waiver of any restrictive covenant contained in this Section 13.1 or the acceptance of the assignee, subtenant or occupant as tenant, or a release of Tenant from the performance by Tenant of any covenants on the part of Tenant herein contained. Any assignment (a) which is required by reason of a final nonappealable order of a court of competent jurisdiction; or (b) which is made by reason of and in accordance with the provisions of any law or statute, including, without limitation, the laws governing bankruptcy, insolvency or receivership, shall be subject to all terms and conditions of this Lease, and shall not be effective or deemed valid unless, at the time of such assignment:

A. Each assignee or sublessee shall agree, in a written agreement satisfactory to Lessor, to assume and abide by all of the terms and provisions of this Lease, including those which govern the permitted uses of the Premises described in Article VIII herein; and

B. Each assignee or sublessee has submitted a current financial statement, audited by a certified public accountant, showing a net worth and working capital in amounts determined by Lessor to be sufficient to assure the future performance by such assignee or sublessee of Tenant's obligations hereunder; and

C. The business reputation of each assignee or sublessee shall meet or exceed generally acceptable commercial standards; and

D. The use of the Premises by each assignee or sublessee shall not violate, or create any potential violation of applicable laws, codes or ordinances, nor violate any other agreements affecting the Premises, Lessor or other tenants in the Development; and

E. Tenant shall pay Lessor for all administrative and legal expenses incurred by Lessor in connection with any such assignment or subletting up to a maximum of Five Thousand Dollars (\$5,000.00).

F. Notwithstanding any assignment or subletting, Tenant shall remain fully liable on this Lease and for the performance of all terms, covenants and provisions of this Lease.

#### **ARTICLE XIV – PROMOTION OF DEVELOPMENT AND PREMISES AND TENANT**

##### **Section 14.1. Promotion of Development and Premises.**

Tenant shall refer to the Development under the name "The Hills at Vallco" (the "Name"), or such other names as Lessor may designate from time to time, in designating the location of the Premises in all newspaper and other advertising and in all other references to the location of the Premises.

The logo styles, illustrated in Exhibit C attached hereto and made a part hereof, shall be used by Tenant whenever Tenant is entitled to use the Name hereunder, except that, when the Name is being used solely as an address, another style may be used. All signage, advertising and literature of or on behalf of Tenant using the Name shall be submitted to Lessor for Lessor's prior written approval as to form and content, such approval to be at the reasonable discretion of Lessor. Lessor shall either approve such usage or provide the reasons for disapproval within fourteen (14) days of such submission. Lessor's failure to disapprove within such fourteen (14) day period shall be deemed approval.

The rights granted herein shall not be assigned or sublicensed to any third party, other than in accordance with the provisions of this Section or to the assignee or sublessee of Tenant's interest in this Lease pursuant to a permitted assignment or sublease. Should Lessor reasonably determine that any advertising by Tenant adversely affects the image, reputation or operation of the Development, or promotes any competitor of Lessor or Lessor's affiliates, Tenant shall cease such advertising promptly upon receipt of notice to do so from Lessor. Tenant shall not use with respect to the Development a name the same or substantially the same as a name then used by Lessor or Lessor's affiliates at the Development (or any other facility owned and operated by Lessor or Lessor's affiliates).

The prohibitions set forth in this Section 14.1 are for the benefit of and directly enforceable by Lessor.

#### **ARTICLE XV – DAMAGE AND DESTRUCTION**

If the Premises are hereafter damaged or destroyed or rendered partially untenable for their accustomed use by fire or other casualty insured under the coverage which Lessor is obligated to carry pursuant to Section 11.1 hereof, Lessor shall promptly repair the same to substantially the condition which they were in immediately prior to the happening of such casualty (excluding stock in trade, fixtures, furniture, leasehold improvements, furnishings, carpeting, floor covering, wall covering, drapes, ceiling and equipment), and from the date of such casualty until the Premises are so repaired and restored, the Annual Rent payments payable hereunder shall abate in such proportion as the part of said Premises thus destroyed or rendered untenable bears to the total Premises; provided, however, that Lessor shall not be obligated to repair and restore if such casualty is not covered by the insurance which Lessor is obligated to carry pursuant to Section 11.1 hereof or is caused directly or indirectly by the negligence of Tenant, Tenant's agents, employees and invitees and no portion of the Annual Rent and other payments payable hereunder shall abate, and provided, further, that Lessor shall not be obligated to expend for any repair or restoration an amount in excess of the insurance proceeds recovered therefor, and provided, further, that if the Premises be damaged, destroyed or rendered untenable for their accustomed uses by fire or other casualty to the extent of more than fifty percent (50%) of the cost to replace the Premises during the last five (5) years of the Lease Term, then Lessor shall have the right to terminate this Lease effective as of the date of such casualty by giving to Tenant, within sixty (60) days after the happening of such casualty, written notice of such termination. If such notice be given, this Lease shall (without further obligation or liability) terminate and Lessor shall promptly repay to Tenant any rent theretofore paid in advance, which was not earned at the date of such casualty. Any time that Lessor repairs or restores the Premises after damage or destruction, then Tenant shall promptly repair or replace Tenant's stock in trade, fixtures, furnishings, furniture, leasehold improvements, carpeting, wall covering, floor covering, drapes, ceiling and equipment to the same condition as they were in immediately prior to the casualty, and if Tenant has closed the Premises, Tenant shall promptly reopen for business upon the completion of such repairs. Should Lessor not repair the Premises to substantially the condition which they were in immediately prior to the casualty, as hereinabove described, within one hundred eighty (180) days of the casualty, Tenant shall have the right to terminate this Lease if Tenant provides written notice to Lessor within ten (10) days after the expiration of the one hundred eighty (180) day period.

Notwithstanding anything to the contrary set forth herein, in the event all or any portion of the Development shall be damaged or destroyed by fire or other cause (notwithstanding that the Premises may be unaffected thereby), to the extent the cost of restoration thereof would exceed fifteen percent (15%) of the amount it would have cost to replace the Development in the Development's entirety at the time such damage or destruction occurred, then Lessor may terminate this Lease (without further obligation or liability) by giving Tenant thirty (30) days prior notice of Lessor's election to do so,

which notice shall be given, if at all, within ninety (90) days following the date of such occurrence. In the event of the termination of this Lease as aforesaid, this Lease shall cease thirty (30) days after such notice is given, and the rent and other charges hereunder shall be adjusted as of that date.

## **ARTICLE XVI – EMINENT DOMAIN**

### **Section 16.1. Condemnation.**

If ten percent (10%) or more of the floor area for the Premises and/or fifteen percent (15%) or more of the Development shall be acquired or condemned by right of eminent domain for any public or quasi-public use or purpose, then Lessor may terminate this Lease by giving notice to Tenant of Lessor's election, and in such event rentals shall be apportioned and adjusted as of the date of termination. If the Lease shall not be terminated as aforesaid, then it shall continue in full force and effect, and Lessor shall within a reasonable time after possession is physically taken (subject to delays due to shortage of labor, materials or equipment, labor difficulties, breakdown of equipment, government restrictions, fires, other casualties or other causes beyond the reasonable control of Lessor) repair or rebuild what remains of the Premises for Tenant's occupancy; and a just proportion of the Annual Rent shall be abated, according to the nature and extent of the injury of the Premises until such repairs and rebuilding are completed, and thereafter for the balance of the Lease Term.

### **Section 16.2. Damages.**

Lessor reserves, and Tenant assigns to Lessor, all rights to damages on account of any taking or condemnation or any act of any public or quasi-public authority for which damages are payable. Tenant shall execute such instruments of assignment as Lessor requires, join with Lessor in any action for the recovery of damages, if requested by Lessor, and turn over to Lessor any damages recovered in any proceeding. If Tenant fails to execute instruments required by Lessor, or undertake such other steps as requested, Lessor shall be deemed the duly authorized irrevocable agent and attorney-in-fact of Tenant to execute such instruments and undertake such steps on behalf of Tenant. However, Lessor does not reserve any damages payable for trade fixtures installed by Tenant at Tenant's own cost, which are not part of the realty.

## **ARTICLE XVII – DEFAULT BY TENANT**

### **Section 17.1. Tenant Default.**

The following shall be considered for all purposes to be defaults under and breaches of this Lease: (i) any failure of Tenant to pay any rent or other amount when due following ten (10) days written notice to Tenant specifying the amount overdue hereunder, (ii) any failure by Tenant to perform or observe any other of the terms, provisions, conditions or covenants of this Lease for more than thirty (30) days after written notice of such failure provided; however, that if the default complained of in such notice is of such a nature that



the same can be rectified or cured, but cannot with reasonable diligence be cured within said thirty (30) day period, then such default shall be deemed to be rectified or cured if Tenant shall, within said thirty (30) day period, commence to rectify and cure the same and shall thereafter complete such rectification and cure with all due diligence; (iii) a determination by Lessor that Tenant has submitted any false report required to be furnished hereunder; (iv) anything done by Tenant upon or in connection with the Premises or the construction, remodeling, or refurbishment of any part thereof which directly or indirectly interferes in any way with, or results in a work stoppage in connection with, construction, remodeling, or refurbishment of any part of the Development or any other tenant's space; (v) the bankruptcy or insolvency of Tenant or the filing by or against Tenant of a petition in bankruptcy or for reorganization or arrangement or for the appointment of a receiver or trustee of all or a portion of Tenant's property, or Tenant's assignment for the benefit of creditors; (vi) if Tenant abandons or vacates or does not utilize the Premises when required to do so under this Lease; (vii) if Tenant, except as otherwise allowed in this Lease, does not use the Premises for its intended purposes when required to do so under this Lease; provided, however, Tenant shall not be considered in default under this provision for occasional, de minimis late openings and early closings; (viii) this Lease or Tenant's interest herein or in the Premises or any improvements thereon or any property of Tenant are executed upon or attached; or (ix) the Premises come into the hands of any person other than expressly permitted under this Lease. In any such event, and without grace period, demand or notice (the same being hereby waived by Tenant), Lessor, in addition to all other rights or remedies it may have, and notwithstanding Section 23.16 of this Lease, shall have the right thereupon or at any time thereafter (without first submitting the dispute, controversy or claim to arbitration pursuant to Section 23.16 of this Lease) to terminate this Lease.

In addition, and notwithstanding anything to the contrary set forth above or elsewhere in this Lease, if written notice has been sent to Tenant pursuant to this Section 17.1 with respect to (i) the timely payment of any Rent due Lessor from Tenant or the payment of any other money due Lessor from Tenant under the terms of this Lease, or (ii) the failure of Tenant to provide Lessor with a current set of keys to the Premises as required by Section 20.1 of this Lease, two (2) or more times in any period of twelve (12) consecutive months during the Term, then, notwithstanding that such deficiencies may have been cured, any further written notice to Tenant of an event as set forth in this Section within a twelve (12) month period shall be deemed to be a "Repeated Event of Default". In the event of a Repeated Event of Default, Lessor, without affording Tenant an opportunity to cure such Repeated Event of Default, may terminate this Lease forthwith by notice to Tenant given within ninety (90) days of such Repeated Event of Default.

#### **Section 17.2. Late Charge.**

If any installment of rent or any other sum payable by Tenant hereunder is not received by Lessor within thirty (30) days of the date when due, a late charge of ten percent (10%) of such overdue installment or other payment shall be immediately and automatically payable by Tenant to Lessor, without the necessity of delivery of any notice.

### **Section 17.3. Set-Off.**

The covenants to pay rent and other amounts hereunder are independent covenants and Tenant shall have no right to hold back, offset or fail to pay any such amounts for default by Lessor or any other reason whatsoever. Notwithstanding the foregoing, though, Tenant hereby agrees that Lessor may, in Lessor's sole and absolute discretion, hold back, offset and fail to pay to Tenant any amount due from Lessor to Tenant hereunder in exchange for any amount due from Tenant to Lessor hereunder which was not paid by Tenant. In the event of any such offset by Lessor, Lessor shall provide to Tenant in writing an explanation of such offset and a copy of the supporting documentation in connection with such offset.

### **Section 17.4. Waiver of Rights of Redemption.**

To the extent permitted by law, Tenant waives any and all rights of redemption granted by or under any present or future laws if Tenant is evicted or dispossessed for any cause, or if Lessor obtains possession of the Premises due to Tenant's default hereunder or otherwise.

### **Section 17.5. Bankruptcy.**

A. Assumption of Lease. In the event Tenant shall become a Debtor under Chapter 9 of the Bankruptcy Code ("Code") or a petition for reorganization or adjustment of Tenant's debts is filed, the Trustee as Debtor may not elect to assume this Lease unless, at the time of such assumption, the Trustee has:

(i) Cured or provided Lessor "Adequate Assurance" (as defined below) that:

(a) Within ten (10) days from the date of such assumption the Trustee or Tenant will cure all monetary defaults under this Lease and compensate Lessor for any actual pecuniary loss resulting from any existing default, including without limitation, Lessor's reasonable costs, expenses, accrued interest as set forth in Section 4.2 of the Lease, and attorneys' fees incurred as a result of the default;

(b) Within thirty (30) days from the date of such assumption the Trustee will cure all non-monetary defaults under this Lease; and

(c) The assumption will be subject to all of the provisions of this Lease.

(ii) For purposes of this Section 17.5, Lessor and Tenant acknowledge that, in the context of a bankruptcy proceeding of Tenant, at a minimum "Adequate Assurance" shall mean:

(a) The Trustee has and will continue to have sufficient unencumbered assets after the payment of all secured obligations and administrative expenses to assure Lessor that the Trustee or Tenant will have sufficient funds to fulfill the obligations of Tenant under this

Lease, and to keep the Premises properly staffed with sufficient employees to conduct full operations in the Premises; and

(b) The Bankruptcy Court shall have entered an Order segregating sufficient cash payable to Lessor and/or the Trustee shall have granted a valid and perfected first lien and security interest and/or mortgage in property of Trustee acceptable as to value and kind to Lessor, to secure to Lessor the obligation of the Trustee to cure the monetary and/or non-monetary defaults under this Lease within the time periods set forth above; and

(c) The Trustee at the very least shall deposit a sum, sufficient to fund the Tenant's then-current Refurbishment obligations under Section, 10.1, above, to be held by Lessor (without any allowance for interest thereon) to secure Tenant's future performance under the Lease.

B. Assignment of Lease. If the Trustee has assumed the Lease pursuant to the provisions of this Section 17.5 for the purpose of assigning Tenant's interest hereunder to any other person or entity, such interest may be assigned only after the Trustee or the proposed assignee have complied with all of the terms, covenants and conditions of Section 13.1 herein, including, without limitation, those with respect to additional rent and the use of the Premises only as permitted in Article VIII herein; Lessor and Tenant acknowledging that such terms, covenants and conditions are commercially reasonable in the context of a bankruptcy proceeding of Tenant. Any person or entity to which this Lease is assigned pursuant to the provisions of the Code shall be deemed without further act or deed to have assumed all of the obligations arising under this Lease on and after the date of such assignment. Any such assignee shall upon request execute and deliver to Lessor an instrument confirming such assignment.

C. Adequate Protection. Upon the filing of a petition by or against Tenant under the Code, Tenant, as Debtor, and any Trustee who may be appointed agree to adequately protect Lessor as follows:

(i) To perform each and every obligation of Tenant under this Lease until such time as this Lease is either rejected or assumed by Order of the Bankruptcy Court; and

(ii) To pay all monetary obligations required under this Lease, including without limitation, the payment of Annual Rent, and such other additional rent charges payable hereunder, which is considered reasonable compensation for the use and occupancy of the Premises; and

(iii) Provide Lessor a minimum thirty (30) days prior written notice, unless a shorter period is agreed to in writing by the parties, of any proceeding relating to any assumption of this Lease or any intent to abandon the Premises, which abandonment shall be deemed a rejection of this Lease.

(iv) To perform to the benefit of Lessor otherwise required under the Code.

The failure of Tenant to comply with the above shall result in an automatic rejection of this Lease.

D. Accumulative Rights. The rights, remedies and liabilities of Lessor and Tenant set forth in this Section 17.5 shall be in addition to those which may now or hereafter be accorded, or imposed upon, Lessor and Tenant by the Code.

#### **ARTICLE XVIII – DEFAULT BY LESSOR**

##### **Section 18.1. Default Defined, Notice.**

Lessor shall in no event be charged with default in any of Lessor's obligations hereunder unless and until Lessor shall have failed to perform such obligations within thirty (30) days (or such additional time as is reasonably required to correct any such default) after written notice as set forth in Section 23.7 to Lessor by Tenant, specifically describing such failure.

#### **ARTICLE XIX – TENANT'S PROPERTY**

##### **Section 19.1. Taxes on Leasehold.**

Tenant shall be responsible for and shall pay before delinquent all municipal, county, federal or state taxes whether enacted now or in the future coming due during or after the Lease Term against Tenant's interest in this Lease or against personal property of any kind owned or placed in, upon or about the Premises by Tenant.

#### **ARTICLE XX – ACCESS BY LESSOR**

##### **Section 20.1. Right of Entry.**

Lessor and Lessor's agents and employees shall have the right to enter the Premises at any reasonable times including, but not limited to, during the conduct of Tenant's Work and/or the right of immediate entry at any time in the case of an emergency or to protect access to the Development, to examine the Premises and show them to prospective purchasers and other persons and to post notices as Lessor may deem reasonably necessary or appropriate for protection of Lessor, Lessor's interests, the Premises or the Development. Lessor shall attempt in all such cases to provide Tenant with prior notice. Lessor and Lessor's respective agents and employees shall have the further right to enter the Premises from time to time at reasonable times and upon prior notice to Tenant to (i) make such repairs, alterations, improvements or additions to the Premises or other portions of the Development as Lessor deems desirable or (ii) to verify that Tenant is operating in the Premises in compliance with this Lease and the standards set forth herein. Rent shall not abate while any such repairs, alterations, improvements, or additions are being made. During the last six (6) months of the Lease Term, Lessor may exhibit the Premises to prospective tenants and maintain upon the Premises notices deemed advisable by Lessor. In addition, during any apparent emergency, Lessor or

Lessor's agents may enter the Premises forcibly without liability therefor and without in any manner affecting Tenant's obligations under this Lease. Nothing herein contained, however, shall be deemed to impose upon Lessor any obligation, responsibility or liability whatsoever, for any care, maintenance or repair except as otherwise herein expressly provided. Tenant shall ensure that Lessor at all times during the Term has the correct keys necessary to gain access to the Premises in the event of an emergency.

## **ARTICLE XXI – HOLDING OVER, SUCCESSORS**

### **Section 21.1. Holding Over.**

If Tenant holds over or occupies the Premises beyond the Lease Term (it being agreed there shall be no such holding over or occupancy without Lessor's written consent), Tenant shall pay Lessor for each day of such holding over a sum equal to the Annual Rent prorated for the number of days of such holding over. If Tenant holds over with or without Lessor's written consent, Tenant shall occupy the Premises on a tenancy at sufferance but all other terms and provisions of this Lease shall be applicable to such period.

### **Section 21.2. Successors.**

All rights and liabilities herein given to or imposed upon the respective parties hereto shall bind and inure to the several respective heirs, successors, administrators, executors and assigns of the parties, except that no rights shall inure to the benefit of any assignee or subtenant of Tenant unless the assignment or sublease was authorized as provided in Section 13.1 hereof. Lessor, at any time and from time to time, may make an assignment of Lessor's interest in this Lease and, in the event of such assignment, Lessor and Lessor's successors and assigns (other than the assignee of Lessor's interest in this Lease) shall be released from any and all liability thereafter.

## **ARTICLE XXII – QUIET ENJOYMENT**

### **Section 22.1. Lessor's Covenant.**

If Tenant pays the rents and other amounts herein provided, observes and performs all the covenants, terms and conditions hereof, Tenant shall peaceably and quietly hold and enjoy the Premises for the Lease Term without interruption by Lessor or any person or persons claiming by, through or under Lessor; subject, nevertheless, to the terms and conditions of this lease.

## **ARTICLE XXIII – MISCELLANEOUS**

### **Section 23.1. Waiver.**

No waiver by Lessor or Tenant of any breach of any term, covenant or condition hereof shall be deemed a waiver of the same or any subsequent breach of the same or any other

term, covenant or condition. The acceptance of rent by Lessor shall not be deemed a waiver of any earlier breach by Tenant of any term, covenant or condition hereof, regardless of Lessor's knowledge of such breach when such rent is accepted. No covenant, term or condition of this Lease shall be deemed waived by Lessor or Tenant unless waived in writing.

#### **Section 23.2. Accord and Satisfaction.**

Lessor is entitled to accept, receive and cash or deposit any payment made by Tenant for any reason or purpose or in any amount whatsoever, and apply the same at Lessor's option to any obligation of Tenant and the same shall not constitute payment of any amount owed except that to which Lessor has applied the same. No endorsement or statement or any check or letter of Tenant shall be deemed an accord and satisfaction or otherwise recognized for any purpose whatsoever. The acceptance of any such check or payment shall be without prejudice to Lessor's right to recover any and all amounts owed by Tenant hereunder and Lessor's right to pursue any other available remedy.

#### **Section 23.3. Entire Agreement.**

There are no representations, covenants, warranties, promises, agreements, conditions or undertakings, oral or written, between Lessor and Tenant other than herein set forth. Except as herein otherwise provided, no subsequent alteration, amendment, change or addition to this Lease shall be binding upon Lessor or Tenant unless in writing, signed by them.

#### **Section 23.4. No Partnership.**

Lessor does not, in any way or for any purpose, become a partner, employer, principal, master, agent or joint venturer of, or with, Tenant.

#### **Section 23.5. Force Majeure.**

If either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lockouts, failure of power, restrictive governmental laws or regulations, riots, insurrection, war or other reason of a like nature not the fault of the party delayed in performing work or doing acts required under this Lease, the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. Notwithstanding the foregoing, an informational or recognitional picket line shall not be deemed a force majeure event. In addition, the provisions of this Section 23.5 shall not operate to excuse Tenant from any obligations for payment of Annual Rent or any other payments required by the terms of this Lease when the same are due, and all such amounts shall be paid when due.

**Section 23.6. Submission of Lease.**

Submission of this Lease to Tenant does not constitute an offer to lease; this Lease shall become effective only upon execution and delivery thereof by Lessor and Tenant. The effective day of this Lease shall be the date filled in on Page 1 hereof by Lessor, which shall be the date of execution by the last of the parties to execute the Lease.

**Section 23.7. Notices.**

All notices from Tenant to Lessor required or permitted by any provision of this Agreement shall be directed to Lessor as follows:

[NAME]  
[CONTACT INFO]

With a copy to:

[NAME]  
[CONTACT INFO]

All notices from Lessor to Tenant required or permitted hereunder shall be directed as follows:

[NAME]  
[CONTACT INFO]

With a copy to:

[NAME]  
[CONTACT INFO]

All notices to be given hereunder by any person shall be written and sent by registered or certified mail, return receipt requested, postage pre-paid or by an express mail delivery service, addressed to the person intended to be notified at the address set forth above. Any person may, at any time, or from time to time, notify the other persons named herein in writing of a substitute address for that above set forth, and thereafter notices shall be directed to such substitute address. Notice given as aforesaid shall be sufficient service thereof and shall be deemed given as of the date received, as evidenced by the return receipt of the registered or certified mail or the express mail delivery receipt, as the case may be.

**Section 23.8. Lessor's Parent Company Liability.**

Tenant hereby agrees that in the event (a) there is any default or alleged default by Lessor under this Lease or (b) Tenant has, or may have, any claim arising from, or relating to, the terms of this Lease, Tenant shall not commence any lawsuit or otherwise seek to

impose any liability whatsoever against any person or entity other than Lessor. Tenant shall not assert or permit any party claiming through Tenant to assert a claim or impose any liability against any person or entity other than Lessor as to any matter or thing arising out of, or relating to, this Lease or any alleged breach or default of this Lease by Lessor.

**Section 23.9. Captions and Section Numbers.**

This Lease shall be construed without reference to titles of Articles and Sections, which are inserted only for convenience of reference.

**Section 23.10. Number and Gender.**

The use herein of a singular term shall include the plural and use of the masculine, feminine or neuter genders shall include all others.

**Section 23.11. Objection to Statements.**

Notwithstanding the provisions of Section 23.1, Tenant's failure to object to any statement, invoice or billing rendered by Lessor within a period of thirty (30) days after receipt thereof shall constitute Tenant's acquiescence with respect thereto and shall render such statement, invoice or billing an account stated between Lessor and Tenant.

**Section 23.12. Representation by Tenant.**

Tenant hereby covenants and warrants that all future forms, reports, fees and other documents necessary to comply with applicable laws will be filed when due, and the person signing this Lease on behalf of the Tenant is duly authorized to sign and execute this Lease.

**Section 23.13. Lessor's Limitation of Liability.**

Notwithstanding anything to the contrary herein, there shall be absolutely no personal liability on persons, firms or entities who constitute Lessor with respect to any of the terms, covenants, conditions and provisions of this Lease, and Tenant shall, subject to the rights of any first mortgagee, look solely to the interest of Lessor, Lessor's successors and assigns, in the Development for the satisfaction of each and every remedy of Tenant in the event of default by Lessor hereunder; such exculpation of personal liability is absolute and without any exception whatsoever.

**Section 23.14. Broker's Commission.**

Each party represents and warrants that it has caused or incurred no claims for brokerage commissions or finder's fees in connection with the execution of this Lease, and each party shall indemnify and hold the other harmless against and from all liabilities arising



from any such claims caused or incurred by it {including without limitation, the cost of attorney's fees in connection therewith.

#### **Section 23.15. Partial Invalidity.**

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

#### **Section 23.16. Arbitration.**

Any controversy or claim arising out of, or relating to, this Lease, or the breach thereof, shall be settled by binding arbitration in accordance with the commercial arbitration rules then in effect of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof. The arbitration proceedings shall be conducted in Santa Clara County, California. Lessor on the one hand and Tenant on the other hand shall select an arbitrator from a list provided by the American Arbitration Association that is mutually satisfactory to them. If Lessor and Tenant are unable to agree on an arbitrator, Lessor and Tenant shall each choose an arbitrator from a list provided by the American Arbitration Association. The two arbitrators so selected shall then select a third arbitrator mutually satisfactory to them from the list provided by the American Arbitration Association. The single arbitrator so selected by the aforesaid procedure shall hear the dispute and decide it. The award of the arbitrator shall be binding and final on all parties. Any and all legal, accounting and other costs and expenses incurred by the prevailing party shall be borne by the non-prevailing party. This Lease shall be governed by and construed under and pursuant to the laws of the State of California applicable to contracts made and to be performed entirely within such State without regard to the conflicts of laws principles of such State. Subject to the terms of this Section, any and all litigation concerning any dispute arising under or in connection with this Lease shall be filed and maintained only in a state or federal courts located in Santa Clara County, California.

#### **Section 23.17. Mortgagee's Approval.**

If any mortgagee of the Development requires any modification of the terms and provisions of this Lease as a condition to such financing as Lessor may desire, then Lessor shall have the right to cancel this Lease if Tenant fails or refuses to approve and execute such modification(s) within thirty (30) days after Lessor's request therefore, provided such request is made at least thirty (30) days prior to delivery of possession. Upon such cancellation by Lessor, this lease shall be null and void and neither party shall have any liability either for damages or otherwise to the other by reason of such cancellation. In no event, however, shall Tenant be required to agree, and Lessor shall not have any right of cancellation for Tenant's refusal to agree, to any modification of the provisions of this Lease relating to: the amount of rent or other charges reserved herein;

the size and/or location of the Premises; the duration and/or Commencement Date of the Lease Term; or a modification which will result in a material decrease in Tenant's rights or a material increase in Tenant's obligations under this Lease .

**Section 23.18. Reservation of Air Rights.**

There has been no representation or warranty by Lessor and Tenant acknowledges that there is no inducement or reliance to lease the Premises on the basis that the existing access to light, air and views from the Premises would continue unabated. Tenant acknowledges and understands that it shall have no rights to the airspace above the Development and those rights shall be the sole property of Lessor.

**Section 23.19. Delay in Delivery.**

Notwithstanding anything to the contrary contained in this lease, Lessor shall not be liable in any manner to Tenant for damages or any other claim resulting from failure to deliver the Premises or for any delay in commencing or completing any work Lessor is to perform or is authorized by Tenant to perform under Exhibit B or with respect to the Development, save and except that all obligations of Tenant with time limits under this Lease including, but not limited to, the Commencement Date, will be tolled for the same number of days and any delay described above, and Tenant hereby waives all such liability provided that in the event that the Commencement Date shall not have occurred within one (1) year after the effective date of this Lease (unless such failure shall be due to Tenant's fault), then Tenant shall have the right to terminate this Lease upon written notice to Lessor in which case this Lease shall become null and void (except that items which have been theretofore accrued and not yet paid shall remain outstanding), and both parties hereto shall be relieved of all obligations hereunder, in which event each party will, at the others request, execute an instrument in recordable form containing a release and surrender of all right, title and interest in and to this Lease.

**Section 23.20. Construction/Remodeling or Redesign of Development.**

In addition to any other provision contained herein, Tenant acknowledges that Lessor may conduct construction at or upon, or remodel or redesign all or any portion of, the Development (excluding the Premises), and that such work will not result in a breach of this Lease or, as long as Tenant is not prevented by such work from enjoying a substantial portion of Tenant's occupancy of the Premises, an abatement of Annual Rent except as otherwise provided herein, Lessor shall have no liability to Tenant relative to such work.

**Section 23.21. Definition of Days.**

Except as otherwise expressly provided herein, the term day shall mean a single calendar day, whether or not a working or business day.

**Section 23.22. Confidentiality.**

Lessor and Tenant agree that all information furnished by one party to the other or obtained by a party through such party's own investigation, shall be treated as confidential information.

**IN WITNESS WHEREOF,**

Each individual executing the Agreement on behalf of a Party represents and warrants that he or she is duly authorized to execute and deliver the Agreement on behalf of the Party that the individual is executing the Agreement and that the Agreement is binding upon that Party in accordance with its terms.

**ACCEPTED AND AGREED** on the date first indicated above:

Dated: \_\_\_\_\_, 20\_\_

Dated: \_\_\_\_\_, 20\_\_

**VALLCO PROPERTY OWNER LLC**

**FREMONT UNION HIGH SCHOOL DISTRICT**

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

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

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

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

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

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

**EXHIBIT A**

**DIAGRAM OF THE LEASED AREA OF THE DEVELOPMENT**

[To Be Provided]

DRAFT

**EXHIBIT B**

**DESCRIPTION OF LESSOR'S WORK AND TENANT'S WORK**

[To Be Provided]

DRAFT

**EXHIBIT C**  
**LESSOR'S LOGO**

[To Be Provided]

DRAFT

**EXHIBIT D**

**LESSOR'S CONTRACTOR WORK STANDARDS**

[To Be Provided]

DRAFT

## **EXHIBIT B**

### **DESIGN SPECIFICATIONS**

#### **INNOVATION FACILITIES (“THE SIXTH CAMPUS”) AT VALLCO SHOPPING DISTRICT FREMONT UNION HIGH SCHOOL DISTRICT**

##### **SUMMARY**

Provide a newly constructed, turn-key educational facilities of approximately 10,000 SF within the proposed “Hills at Vallco” project (Project) with the following elements:

1. Located within the Project to maximize both visibility to and access for the community.
2. Located within the project near business and retail establishments. That is, the facility shall be fully integrated with the other business and retail activities.
3. Located within the Project to provide easy access to outdoor area/s that can be developed into outdoor learning areas.
4. The facility shall be multi-level so that different program spaces can overlook others. That is, the facility shall be two-stories with the possibility of intermediate levels between the upper and lower levels. The lower level should be approximately 70% of the total area.
5. The facility shall have natural light as well as the ability to darken and control the light.
6. The building systems shall maximize flexibility and minimize the effort necessary to reconfigure and/or adapt the space as the innovation program evolves over time. For example, movable walls/partitions and ceiling pipe grids to support production lighting and power drops.
7. Building utilities, at a minimum, shall include water, sewer, gas, vacuum, and compressed air.
8. Complete building HVAC as well as natural ventilation. Additional exhaust requirements will also be necessary.
9. Electrical systems, at a minimum, shall include power, lighting, data, communication, clock/speaker, audio visual, and fire alarm system.
10. The facility will have the following program spaces:



- Large, flexible multi-use space with double height ceiling and promenade and overlooks for viewing below
- Flexible laboratory and maker spaces
- Conference and collaboration spaces
- Administration and office space
- Support spaces including restrooms and storage

**ADULT EDUCATION FACILITY AT VALLCO SHOPPING DISTRICT  
FREMONT UNION HIGH SCHOOL DISTRICT**

**SUMMARY**

Provide for the District's use as Adult Educational facilities a newly constructed space of up to 5,000 SF within the proposed "Hills at Vallco" project (Project) with the following elements:

1. Located within the Project for easy access from parking and vehicular drop-off and pick-up area.
2. Located where there is direct access to the outside for outdoor play area.
3. Located within the Project to maximize both visibility to and access for the community.
4. Located within the Project where expansion can occur into adjacent lease space. Expanded space does not need to be contiguous but must be in close proximity.
5. The facility shall have natural light.
6. Building utilities, at a minimum, shall include stub-outs for water, sewer, and gas.
7. Electrical systems, at a minimum, shall be sufficient to accommodate District's power, lighting, data, communication, clock/speaker, audio visual, and fire alarm system.
8. Complete building HVAC as well as natural ventilation.
9. The facility shall be available to accommodate the following program spaces;
  - Administration and office space
  - Classrooms (3-4)
  - Support spaces including restrooms and storage
  - Play area