

LEASE BETWEEN THE CITY OF HUNTINGTON BEACH  
AND TINA VIRAY AND NELSON WESCOTT, A GENERAL  
PARTNERSHIP DOING BUSINESS AS THE SURF CITY STORE

THIS LEASE (the "Lease") is made and entered into effective \_\_\_\_\_, 2019 by and between the CITY OF HUNTINGTON BEACH, a municipal corporation of the State of California ("City") and Tina Viray and Nelson Westcott, a general partnership, doing business as The Surf City Store ("Lessee").

WHEREAS, City wishes to lease certain real property (the "Property"), consisting of a gift shop on the pier in the City of Huntington Beach, California, and other related improvements (collectively referred to as the "Improvements"). The term "Premises" as used in this Lease shall mean both the Property and the Improvements. Lessee desires to lease the Premises in the manner set forth below.

NOW, THEREFORE, the parties covenant and agree as follows:

**SECTION 1. SUPERSEDING OF PRIOR LEASE**

This Lease shall supersede and replace any existing lease agreement(s) for the Premises currently entered into by and between the parties and all supplemental agreement(s) entered into by and between the parties regarding the existing lease agreement(s).

**SECTION 2. GRANT OF CONCESSION ON THE PREMISES**

City, pursuant to the terms of this Lease, grants to Lessee for the purposes stated herein, the right, privilege and duty to equip, operate and maintain a gift shop on the pier open to the public located on the Premises (hereinafter sometimes referred to as the "Concession"). Lessee shall not use the Premises for any other purpose or business. A map depicting the Premises is set forth in **Exhibit "A"**, which is attached hereto and incorporated herein by this reference. This Lease is not intended to confer third-party beneficiary status to anyone.

### SECTION 3. RESERVATIONS, ENCUMBRANCES AND RIGHTS-OF-WAY

- (a) City expressly reserves a right to enter upon the Premises with as much advance written, verbal or electronic notice as possible to Lessee for any reason associated with public health, safety or welfare, or for the protection of life, limb or property. In all other cases unless otherwise specifically set forth herein, City reserves the right for such entry but City shall give Lessee at least twenty-four (24) hours advance written, verbal or electronic notice. City shall have a right of reasonable access to the Premises across Lessee owned, controlled or occupied lands adjacent to the Premises, if any, for any purpose associated with this Lease.
- (c) City expressly reserves the right to lease, convey, or encumber the Premises, in whole or in part, for any purpose not inconsistent or incompatible with the rights or privileges of Lessee under this Lease. In addition, Lessee agrees to subordinate the Lease to any existing or future City financing regarding the Premises or any portion thereof. Lessee also agrees to cooperate and provide any documentation necessary for City to obtain any such financing.
- (d) This Lease is subject to pre-existing contracts, leases, licenses, easements, encumbrances and claims affecting the Premises and it is made without warranty by City of title, condition or fitness of the land for the stated or intended use.

### SECTION 4. TIME OF ESSENCE

Time shall be of the essence of this Lease and each and all of its terms, covenants or conditions in which performance is a factor.

#### SECTION 5. TERM

This Lease shall commence at 12:01 a.m. on \_\_\_\_\_, 2019, for a five (5) year term, which shall end at 11:59 p.m. on \_\_\_\_\_, 2024. The term of this Lease may be extended for one additional five (5) year period upon mutual consent of City and Lessee evidenced in writing. City may withhold consent to extend this Lease with or without cause, in which case this Lease shall terminate.

#### SECTION 6. CONDITIONS OF PREMISES AS IS

The taking of possession of the Premises by Lessee shall, in itself, constitute acknowledgment that the Premises are in good and tenantable condition. Upon taking possession of the Premises, Lessee agrees to accept the Premises in their presently existing condition, "as is," and agrees that City shall not be obligated to make any alterations, additions or betterments thereto.

#### SECTION 7. DURATION OF PUBLIC FACILITIES

By entering into this Lease, City makes no stipulation as to the type, size, location or duration of public facilities (excluding the Premises), including, without limitation, any City parking lots to be maintained on property owned, controlled or occupied by City.

#### SECTION 8. ADDITIONS, ALTERATIONS AND REMOVAL

- (a) No modifications, alterations or additions to the Premises, including, without limitation, construction of Improvements or changes to structural design or exterior furnishings shall be constructed or made by Lessee without Lessee first obtaining the prior written approval of City Manager, which will not be unreasonably withheld.

- (b) Except as provided under this Lease, no alteration or removal of existing Improvements on or natural features of the Premises shall be undertaken without Lessee first obtaining the prior written approval of City Manager.
- (c) Lessee's obligation to obtain City's prior written approval is separate and independent of Lessee's obligation to obtain any permits from City, such as, without limitation, a building permit.

#### SECTION 9. CITY'S CONTRACT ADMINISTRATOR

The City Manager, or his or her designee, shall be City's Contract Administrator for this Lease with the authority to act on behalf of City for the purposes of this Lease, and all City approvals and notices required to be given herein to City shall be so directed and addressed.

#### SECTION 10. RENT

Lessee agrees to pay to City as rent (the "Rent") for the use and occupancy of the Premises a minimum base Rent of \$950.00 a month. The base Rent will increase on a yearly basis by a percentage equal to the Los Angeles-Riverside-Orange County All Urban Consumer Price Index (CPI) in an amount not less than three (3%) percent nor more than five (5%) percent per year. During the first five years of this Lease, in those months where ten and one-half (10.5%) percent of gross receipts for non "Surf City" service-mark merchandise exceeds the monthly base Rent, Lessee shall then pay ten and one-half (10.5%) percent of all gross receipts for non- "Surf City" service mark merchandise as Rent instead of the base Rent. At the commencement of year 6 if this Lease is extended, in those months where eleven (11%) percent of gross receipts for non – "Surf City" service-mark merchandise exceeds the monthly base rent, Lessee shall pay eleven (11%) percent of all gross receipts for non – "Surf City" merchandise instead of the base Rent.

Lessee shall pay the Rent monthly to City at the City Treasurer's Office, P.O. Box 711, Huntington Beach, California, 92648, or at such other place or places as City may from time-to-time designate by written notice delivered to Lessee. Lessee shall pay the Rent, which must be received by the City Treasurer within fifteen calendar days after the end of the month for which the Rent is being paid, or on the next business day if the fifteenth day falls on a weekend or holiday.

#### SECTION 11. LATE CHARGE AND PENALTY

If the Rent is not received by the City Treasurer within thirty (30) calendar days after the end of the month for which the Rent is being paid, or the next business day if the thirtieth day falls on a weekend or holiday, Lessee shall pay the following late charge and penalty: (1) a late charge of five percent (5%) shall be applied to any outstanding balance after any payment hereunder is due but unpaid; and (2) one and a half percent (1 ½%) penalty per month shall be added for each month the Rent is due but unpaid. With respect to any other payments required by Lessee, a one and a half percent (1 ½%) penalty per month shall be added for each month such payment hereunder is due but unpaid.

#### SECTION 12. GROSS SALES DEFINED

For the purpose of this Lease, the term "Gross Sales" shall mean the total price of all merchandise, or services sold or rendered, or equipment rented, including the sale of all goods and services processed on the internet, in, on, or from the Premises by Lessee, or anyone contracting with Lessee, including, without limitation, its agents or sublessees (collectively or individually, "Lessee Party(ies)"), whether wholesale or retail, whether for cash or on credit, and if on credit whether or not paid, and whether in exchange for any other product, commodity, service, commercial paper or forbearance, and shall include, without limitation, the following:

- (a) All revenues, receipts, commissions or proceeds from on-line sales by Lessee Party(ies), and/or from all public telephones, vending, weighing and all other machines owned, operated, or leased to or by Lessee Party(ies) in, on, or from the Premises;
- (b) All revenues, receipts, commissions or proceeds from sales based on orders solicited or taken, in, on, or from the Premises, including sales from the internet, for merchandise, or services to be delivered or rendered off, or from sources outside, the Premises, including, without limitation, all orders taken in, on, or from the Premises although the orders may be filled elsewhere;
- (c) All revenues, receipts, commissions or proceeds from the renting of equipment, including orders from the internet, of any kind in, on, or from the Premises; and
- (d) All revenues, receipts, commissions or proceeds generated from offsite, including orders from the internet, but delivered through the Concession.
- (e) All revenues, receipts, commissions or proceeds made by Lessee Party(ies) or their employees or others acting on their behalf for the rendition of services, including services made through the internet, of any kind whatsoever, made in, on, or from the Premises.
- (f) All other revenues, receipts, commissions or proceeds generated by, arising or derived whatsoever from the use of the Premises or derived whatsoever from any business conducted in, on, or from the Premises, including sales and services made through the internet.

For purposes of computing the Gross Sales figure on which to calculate the Rent, the amount of Gross Sales shall start over at zero dollars on the first day of each month.

### SECTION 13. GROSS SALES EXCLUSIONS

Gross Sales shall not include the following items, and Lessee may deduct such items from Gross Sales to the extent they have been included therein or have been included in a prior computation of Gross Sales on which the Rent has been paid under this Lease to City:

- (a) Any sales, excise or other taxes otherwise includable in Gross Sales and which become part of the total price of merchandise or services sold or rendered, or equipment rented, in, on, or from the Premises where Lessee must account for and remit the taxes to the government entity or entities which impose them, but only if such taxes are added to the total price and collected from customers;
- (b) Any transfer of trade inventory from the Premises to the manufacturer or supplier from whom it was obtained by Lessee;
- (c) Sales of Trade Fixtures (as defined in Section 51 below);
- (d) Sums and credits received in the settlement of claims for loss of or damage to trade inventory or Trade Fixtures; and
- (e) Any sales resulting in a cash or credit refund to a customer in the ordinary course of business.
- (f) Any sales of merchandise to City employees which take place at City Hall.
- (g) Any sales of merchandise to City employees during special events as approved in advance by the City Manager or his or her designee.

### SECTION 14. BOOKS AND RECORDS

Lessee shall keep true and accurate books and records showing all of its business transactions in separate records of account for the Concession in a manner acceptable to City, and City and/or its designated representatives shall have the right, at all reasonable times, to

inspect such books and records including, without limitation, State of California sales or use tax returns or other State return records, and Lessee hereby agrees that all such records and instruments shall promptly be delivered and made available to City and/or its designated representatives within thirty (30) days of receiving written request therefor. Lessee shall furnish to City and/or its designated representatives copies of its quarterly California sales and use tax returns at the time each is filed with the State of California.

The books and records shall show the total amount of Gross Sales made each calendar month in, on, or from the Premises and any exclusions listed in Section 13 above. All sales and charges shall be recorded by means of cash registers which display the amount of the transaction certifying the amount recorded. The register shall be equipped with devices which log in daily sales totals and which shall record on tapes the transaction numbers and sales details. At the end of each day the tape shall record the total sales for that day. Lessee agrees to maintain on the Premises, or another location subject to the prior written approval of City, all records, books of account and cash register tapes, showing, or in any way pertaining to the Gross Sales made in, on, or from the Premises during such calendar month, including, without limitation, State of California sales or use tax returns or other State tax returns, for a period of five (5) years following the close of each calendar month.

#### SECTION 15. STATEMENT OF GROSS SALES/AUDIT

At the time specified in Section 10 of this Lease for the payment of the Rent, Lessee shall deliver to City a true and accurate statement signed by Lessee or by an authorized employee of Lessee showing the total Gross Sales and any exclusions listed in Section 13 above made during the preceding calendar month and the amount of the Rent then being paid calculated on such Gross Sales pursuant to this Lease. The acceptance by City of any monies paid to City by Lessee



as the Rent, as shown by any statement furnished by Lessee, shall not be construed as an admission of the accuracy of the statement, or of the sufficiency of the amount of the Rent payment, and City shall be entitled to review the adequacy of such payment as set forth herein. By the end of each January, Lessee shall deliver to City a year-end statement showing the total amount of Gross Sales made in, on, or from the Premises in each month of the preceding year, the total of any exclusions, the total Rent paid to City for each of those months, all with year-end totals. City may at any time within three (3) years after receiving the year-end statement, at its sole cost and expense, cause all records, books of account and cash register tapes for the year purportedly covered by the statement, to be audited by City or an accountant selected by City. Lessee shall, within thirty (30) days of receiving written notice of City's desire for such an audit, deliver and make available all such records, books of account and cash register tapes to City or its designated representative for City's use in the audit and/or for copying. If the audit discloses that Gross Sales were understated and/or exclusions overstated, Lessee shall immediately pay the additional Rent, together with a penalty thereon from the date it was due at the penalty rate set forth in Section 11 above. Furthermore, Lessee shall promptly on demand reimburse City for the full cost and expense of the audit should the audit disclose that the questioned year-end statement purposely understated Gross Sales (including an overstatement of exclusions) or the Rent by any amount greater than Two Hundred Fifty Dollars (\$250.00). City further reserves the right to examine and audit all such records, books of account and cash register tapes at any time during the three (3) year period following the expiration or termination of this Lease. In addition, City shall have the right to enter upon the Premises during business hours and with two (2) hours advance written, verbal or electronic notice to Lessee to perform any audit or inspection function with respect to this Lease.

Lessee, its bookkeeper and/or accountant shall respond to all questions and inquiries of City with respect to the books, records, statements and other documentation being examined, and shall promptly provide other further documentation as may be required by City. City is entitled to take statements by deposition under oath of Lessee, its officers, bookkeepers and/or accountants or any person who prepared the books, records, statements and other documentation required to be provided by Lessee under this Lease.

#### SECTION 16. SECURITY DEPOSIT

Lessee shall maintain at all times during the entire term of this Lease or any renewals or extensions thereof or during any holdover period, a security deposit with City in a sum of not less than Two Thousand Five Hundred Dollars (\$2,500.00) to guarantee all of Lessee's obligations, liabilities, duties and responsibilities under the Lease, including, without limitation, the repair and maintenance of the Premises as provided herein. Such deposit shall be in the form of a cash bond or an assignment of certificate of deposit (the "CD") or savings account to City, and shall be provided to the City Treasurer. The form of any such security deposit shall be approved by the City Attorney and the City Treasurer. No interest shall accrue on cash deposits to the benefit of Lessee, but interest shall accrue on a CD or savings account and shall be paid to Lessee under the terms of the CD or savings account. Lessee shall send a copy of each renewal of the CD to the City Treasurer to ensure that City has the records of each active deposit account.

#### SECTION 17. QUALITY OF SALES, RENTALS AND SERVICES

Lessee, at its sole cost and expense, shall equip, operate, manage and maintain the Premises and Concession and shall keep the same equipped and maintained in a manner acceptable to City during the entire term of this Lease or any renewals or extensions thereof or during any holdover period. It is the intent of City that the Concession's services be provided in

a manner to meet the needs of the visiting public, and should City deem the Concession's hours of operation and/or food, merchandise, services or rentals inadequate to meet such needs, City may require Lessee to make such changes requested by City. Lessee shall not use or permit the Premises to be used, in whole or in part, during the entire term of this Lease or any renewals or extensions thereof or during any holdover period for any purpose other than as herein set forth, without the prior written consent of City.

Lessee shall only sell "Surf City" merchandise, visitor serving merchandise, clothing and souvenirs as approved by the City Manager or his or her designee and related merchandise at the gift shop. The gift shop shall be in operation for a minimum of three hundred fifty (350) days during the calendar year and for a minimum of eight (8) hours a day. The minimum number of operating days and hours may be modified due to weather conditions or unforeseen events. Any modification to this minimum number of days must be approved in advance in writing by the City Manager or his or her designee.

Except as permitted in advance in writing by City, all foods and beverages shall be sold in disposable paper or plastic containers. No pull-top cans or Styrofoam containers are to be vended or dispensed from the Premises unless pre-approved in writing by City. Lessee, wherever feasible, shall eliminate the use of non-recyclable containers and plastics. City may from time to time review the items sold and containers or utensils used or dispensed by Lessee. City reserves the right to prohibit the sale or use of non-recyclable containers or plastics.

City in its sole discretion reserves the right to prohibit Lessee's sale, provision or rental of any item or service rendered or performed, which it deems objectionable or offensive, beyond the scope deemed necessary for proper service to the public, inappropriate for sale, provision or rental by the Concession, or of inferior quality.

## SECTION 18. INDEMNIFICATION, DEFENSE AND HOLD HARMLESS AGREEMENT

Lessee hereby agrees to protect, defend, indemnify and hold harmless City, its officers, elected or appointed officials, employees, agents and volunteers from and against any and all claims, damages, losses, expenses, judgments, demands and defense costs (including, without limitation, costs and fees of litigation (including arbitration) of every nature or liability of any kind or nature) arising out of or in connection with (1) the use or occupancy of the Premises by Lessee, its officers, employees or agents, or (2) the death or injury of any person or the damage to property caused by a condition of the Premises, or (3) the death or injury of any person or the damage to property caused by any act or omission of Lessee, its officers, employees or agents, or (4) any failure by Lessee to keep the Premises in a safe condition, or (5) Lessee's (or Lessee's agents and/or sublessees, if any) performance of this Lease or its failure to comply with any of its obligations contained in this Lease by Lessee, its officers, agents or employees except such loss or damage which was caused by the sole negligence or willful misconduct of City. Lessee shall hold all Trade Fixtures, personal property and trade inventory on the Premises at the sole risk of Lessee and save City harmless from any loss or damage thereto by any cause whatsoever, except such loss or damage which was caused by the sole negligence or willful misconduct of City. Lessee will conduct all defense at its sole cost and expense and City shall approve selection of Lessee's counsel. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as limitation upon the amount of indemnification to be provided by Lessee.

## SECTION 19. WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY

### INSURANCE

Lessee acknowledges awareness of Section 3700 *et seq.* of the *California Labor Code*, which requires every employer to be insured against liability for workers' compensation. Lessee covenants that it shall comply with such provisions prior to the commencement of this Lease. Lessee shall obtain and furnish to City workers' compensation and employers' liability insurance in amounts not less than the State statutory limits. Lessee shall require all sublessees and contractors to provide such workers' compensation and employers' liability insurance for all of the sublessees' and contractors' employees. Lessee shall furnish to City a certificate of waiver of subrogation under the terms of the workers' compensation and employers' liability insurance and Lessee shall similarly require all sublessees and contractors to waive subrogation.

## SECTION 20. GENERAL PUBLIC LIABILITY INSURANCE

In addition to the workers' compensation and employers' liability insurance and Lessee's covenant to defend, hold harmless and indemnify City, Lessee shall obtain and furnish to City, a policy of general public liability insurance, including motor vehicle coverage against any and all claims arising out of or in connection with the Premises. This policy shall indemnify Lessee, its officers, employees and agents, while acting within the scope of their duties, against any and all claims arising out of or in connection with the Premises, and shall provide coverage in not less than the following amount: combined single limit bodily injury and property damage, including products/completed operations liability and blanket contractual liability, of One Million Dollars (\$1,000,000.00) per occurrence. If coverage is provided under a form which includes a designated general aggregate limit, the aggregate limit must be no less than One Million Dollars (\$1,000,000.00) for the Premises. This policy shall name City, its officers, elected or appointed

officials, employees, agents, and volunteers as Additional Insureds, and shall specifically provide that any other insurance coverage which may be applicable to the Lease shall be deemed excess coverage and that Lessee's insurance shall be primary.

Under no circumstances shall said above-mentioned insurance contain a self-insured retention, or a "deductible" or any other similar form of limitation on the required coverage.

#### SECTION 21. PROPERTY INSURANCE

Lessee shall provide before commencement of this Lease and shall obtain and furnish to City, at Lessee's sole cost and expense, property and fire insurance with extended coverage endorsements thereon, by a company acceptable to City authorized to conduct insurance business in California, in an amount insuring for the full insurable value of all Improvements, Trade Fixtures, personal property whether or not owned or leased by Lessee, and all trade inventory in or on the Premises against damage or destruction by fire, theft or the elements. This policy shall contain a full replacement cost endorsement naming Lessee as the insured and shall not contain a coinsurance penalty provision. The policy shall also contain an endorsement naming City as an Additional Insured. The policy shall contain a special endorsement that such proceeds shall be used to repair, rebuild or replace any such Improvements, Trade Fixtures, personal property whether or not owned or leased by Lessee, and all trade inventory so damaged or destroyed; and if not so used, such proceeds (excluding any insurance proceeds for Trade Fixtures, personal property whether or not owned or leased by Lessee, and trade inventory, but only to the extent the insurance proceeds specifically cover those items) shall be paid to City. The policy shall also contain a special endorsement that if the Premises are so destroyed triggering the parties' ability to terminate as set forth in Section 51 (Destruction) below, and either party elects to terminate the Lease, the entire amount of any insurance proceeds (excluding such proceeds for Trade

Fixtures, personal property whether or not owned or leased by Lessee and trade inventory, but only to the extent the insurance proceeds specifically cover those items) shall be paid to City. The proceeds of any such insurance payable to City may be used, in the sole discretion of City, for rebuilding or repair as necessary to restore the Premises or for any such other purpose(s) as City sees fit.

This policy shall also contain the following endorsements:

- (a) The insurer shall not cancel or reduce the insured's coverage without (30) days prior written notice to City;
- (b) City shall not be responsible for premiums or assessments on the policy.

A complete and signed certificate of insurance with all endorsements required by this Section shall be filed with City prior to the execution of this Lease. At least thirty (30) days prior to the expiration or termination of any such policy, a signed and complete certificate of insurance showing that coverage has been renewed shall be filed with City.

SECTION 22. INCREASE IN AMOUNT OF GENERAL PUBLIC LIABILITY  
AND PROPERTY INSURANCE

Not more frequently than once every two (2) years, if, in the sole opinion of City, the amount and/or scope of general public liability insurance in Section 20 above and/or property insurance coverage in Section 21 above at that time is not adequate, Lessee shall increase the insurance coverage as reasonably required by City.

SECTION 23. CERTIFICATES OF INSURANCE; ADDITIONAL INSURED  
ENDORSEMENTS

Prior to commencement of this Lease, Lessee shall furnish to City certificates of insurance subject to approval of the City Attorney evidencing the foregoing insurance coverages as required by this Lease; these certificates shall:

- (a) provide the name and policy number of each carrier and policy;
- (b) shall state that the policy is currently in force; and
- (c) shall promise to provide that such policies shall not be canceled or modified without thirty (30) days' prior written notice of City; however ten (10) days' prior written notice in the event of cancellation for nonpayment of premium, which 10-day notice provision shall not apply to property insurance in Section 21 above.

Lessee shall maintain the foregoing insurance coverages in force during the entire term of the Lease or any renewals or extensions thereof or during any holdover period.

The requirement for carrying the foregoing insurance coverages shall not derogate from Lessee's defense, hold harmless and indemnification obligations as set forth in this Lease. City or its representatives shall at all times have the right to demand the original or a copy of any or all the policies of insurance. Lessee shall pay, in a prompt and timely manner, the premiums on all insurance hereinabove required.

SECTION 24. INSURANCE HAZARDS

Lessee shall not commit or permit the commission of any acts on the Premises nor use or permit the use of the Premises in any manner that will increase the existing rates for, or cause the cancellation of any liability, property, or other insurance policy for the Premises or required by



this Lease. Lessee shall, at its sole cost and expense, comply with all requirements of any insurance carrier providing any insurance policy for the Premises or required by this Lease necessary for the continued maintenance of these policies at reasonable rates.

#### SECTION 25. MAINTENANCE OF PREMISES; TENANT IMPROVEMENTS

City's maintenance responsibilities of the Premises shall be limited to maintaining all sewers and drain lines, and roofs repairs. Except as set forth in the preceding sentence, or in Section 26, Lessee agrees to maintain the Premises in good order and repair, at Lessee's sole cost and expense, during the entire term of this Lease or any renewals or extensions thereof or during any holdover period, pursuant to the City's maintenance standards. A copy of the quarterly evaluation summary sheet setting forth the City's maintenance checklist is attached as **Exhibit "B"**, and incorporated herein by this reference. Except as provided above, Lessee, at its sole cost and expense, shall perform any maintenance and repairs including, without limitation, facility maintenance on the Premises.

Lessee's obligation includes, without limitation, maintaining and operating the Premises in a clean, safe, wholesome and sanitary condition free of trash, garbage or obstructions of any kind and in compliance with any and all present and future laws, general rules or regulations of any governmental authority now, or at any time during the entire term of this Lease or any renewals or extensions thereof or during any holdover period, in force, relating to sanitation or public health, safety or welfare, or for the protection of life, limb or property; and Lessee shall at all times faithfully obey and comply with all laws, rules and regulations applicable thereto. Lessee shall be responsible for maintenance of the mechanical door unless the failure of the door is caused by environmental factors, the determination of which is to be made by the City Manager or his or her designee or his or her designee. Lessee, at its sole cost and expense, shall

remedy without delay any defective, dangerous or unsanitary condition(s) caused by Lessee or anyone related thereto. Lessee shall maintain ADA access around the entire building.

Lessee shall paint, stain or seal the Premises' exterior surfaces a minimum of every three (3) years, unless City determines in its sole discretion that such work shall be done on a more frequent basis. All exterior metal surfaces, except the roof, shall be painted with rust resistant paint no less than once every other year. Any and all graffiti on the Premises may be removed by Lessor, at its sole cost and expense. Lessee shall provide Lessor notice of the graffiti within forty-eight (48) hours of Lessee becoming aware of such graffiti. In addition, with or without notice from City, Lessee shall, at its sole cost and expense, repair and/or replace any broken glass within forty-eight (48) hours of its becoming broken, regardless of cause, except by fault of City. Except as provided above for graffiti and broken glass, Lessee, at its sole cost and expense and with or without notice from City, shall repair and/or replace all damage or destruction to the Premises caused by act(s) of vandalism as soon as possible but in no event later than fourteen (14) days after the date such damage or destruction occurred. Lessee, at its sole cost and expense, shall repair and/or replace all other damage or destruction to the Premises, regardless of cause, except by fault of City.

Lessee shall comply with all written notices served by City with regard to the care and maintenance of the Premises. Any written notice hereunder shall specify the work to be done and the period of time deemed to be reasonably necessary for completion of such work. Should Lessee fail to commence making the necessary repairs within seven (7) days after receiving such notice, or within twenty-four (24) hours of the glass becoming broken in the case of broken glass, or fail to diligently proceed to complete the necessary repairs within the period of time reasonably specified in the City's notice, or within forty-eight (48) hours of the glass becoming

broken in the case of broken glass, or within the forty-eight (48) hour time period for removing graffiti, or within fourteen (14) days of the date that the vandalism damage or destruction occurred, City shall proceed to cause the required work to be performed, and Lessee shall promptly reimburse City for the cost of labor and materials thereof and pay City a penalty on such costs at the penalty rate set forth in Section 11 above from the date the costs were incurred by City to the date they are reimbursed to City by Lessee.

Lessee hereby expressly waives the right to make repairs at the expense of City and the benefit, if any, of the provisions of Sections 1941 and 1942 of the *California Civil Code* relating thereto.

#### SECTION 26. RENT CREDIT

A Rent credit may be available for some or all of any tenant improvements or maintenance performed by Lessee upon prior written approval by the City Manager or his or her designee or his or her designee. The terms of payment of any rent credit will be determined by the City Manager or his or her designee. City in its sole discretion may decide to give Lessee rent credit if Lessee undertakes (1) any repair or maintenance obligation of City under this Lease, or (2) any work City in its sole discretion deems necessary and appropriate. Prior to Lessee undertaking any such work, City must agree in writing to the amount of and procedures for the rent credit, the work to be done by Lessee and the cost of such work.

#### SECTION 27. DAMAGE, DESTRUCTION OR NUISANCE

Lessee shall not commit or permit the commission by others of any damage or destruction of, on, or to the Premises and/or Concession. Lessee shall not maintain, commit or permit the maintenance or commission of any nuisance as defined in Section 3479 and/or Section

3480 of the *California Civil Code* on the Premises; and Lessee shall not use or permit the use of the Premises for any unlawful purpose.

#### SECTION 28. TAXES

This Lease may create a possessory interest in property, which is subject to taxation. In the event that such possessory interest is created, Lessee agrees to be subject to the payment of and to pay taxes levied on such interest, at its sole cost and expense. Lessee also agrees to pay, at its sole cost and expense, before they become delinquent all other lawful taxes, assessments or charges, which at any time may be levied by any governmental agency including, without limitation, the State, County, City or any tax or assessment levying body upon any interest in this Lease, or any possessory right which Lessee may have in or to the Premises, by reason of Lessee's use or occupancy thereof or otherwise, as well as all taxes, assessments, and charges on Trade Fixtures, personal property and trade inventory in, on, or about the Premises. Upon request, Lessee shall promptly furnish to City satisfactory evidence establishing such payment. Lessee shall comply with all laws, regulations and ordinances regarding the collection of taxes due a government agency.

#### SECTION 29. PAYMENT OF OBLIGATIONS

Lessee shall promptly pay, at its sole cost and expense, before they become delinquent, any and all bills, debts, liabilities and obligations incurred by Lessee in connection with Lessee's occupation and use of the Premises and/or operation of the Concession. Upon request, Lessee shall promptly furnish to City satisfactory evidence establishing such payment.

#### SECTION 30. UTILITIES AND SERVICES

Lessee shall be responsible for the payment of all utility charges, including, without limitation, gas, electricity, water, telephone service, cable TV service, and the furnishing of all

necessary refuse and garbage containers and the removal and disposal of all rubbish, refuse and garbage resulting from the operation of the Premises and/or the Concession. All such rubbish, refuse and garbage removed shall be disposed of in accordance with applicable laws and local ordinances. All trash containers and/or trash bins shall be adequately screened and located to the satisfaction of City. For the purposes of this Section, sewage disposal shall be construed as a utility. All such charges shall be paid by Lessee directly to the provider of the service and shall be paid as they become due and payable. Upon request, Lessee shall promptly furnish to City satisfactory evidence establishing such payment. Lessee shall use good energy practices as described in the State of California Flex Your Power Best Practice Guide.

#### SECTION 31. BUSINESS LICENSE

Lessee shall maintain a business license from City during the entire term of this Lease or any renewals or extensions thereof or during any holdover period.

#### SECTION 32. SIGNS, ADVERTISING AND APPROVAL OF NAME

City shall have the right to approve in its sole discretion and at any time require Lessee to change or remove signs, names, placards, decorations or advertising placed on, or inscribed, painted or affixed upon the Premises. No outdoor sales are allowed by Lessee unless prior written approval is obtained from the City Manager or his or her designee or his or her designee. All outdoor displays or banners must first be approved in writing by the City Manager or his or her designee or his or her designee. Should City approve of any sign, name, placard, decoration or advertising, Lessee shall maintain the same at all times during the entire term of this Lease or any renewals or extensions thereof or during any holdover period in good appearance and repair. All signs, names, placards, decorations or advertising must comply with all requirements of any governmental authority with jurisdiction.

SECTION 33. NO ASSIGNING, SUBLEASING OR ENCUMBERING

- (a) Prohibition of Assignment. The parties acknowledge that City is entering into the Lease in reliance upon the experience and abilities of Lessee and its principals. Consequently, Lessee shall not voluntarily assign, encumber or otherwise transfer its interest in the Lease or in the Premises, or sublease all or any part of the Premises, or allow any other person or entity (except Lessee's authorized representatives) to occupy or use all or any part of the Premises without the prior written consent of City, which consent shall not be unreasonably withheld. Provided, however, that City's consent shall not relieve Lessee from any and all of its obligations, liabilities, duties or responsibilities under this Lease. Any assignment, encumbrance, occupation or use, sublease or other transfer without such consent shall be voidable and, at City's sole discretion, shall constitute a Default of this Lease.
- (b) Consent to Transfer. City's consent to any assignment, encumbrance, occupation or use, sublease or other transfer is subject to Lessee providing City with evidence satisfactory to City that the proposed, assignee, encumbrancer, occupier or user, sublessee or other transferee has suitable financial strength, experience and character for operation and control of the Premises and the Concession and that the use of the Premises by the proposed assignee, encumbrancer, occupier or user, sublessee or other transferee is consistent with that specified herein, and is commercially reasonable. Any proposed assignee, encumbrancer, occupier or user, sublessee or other transferee shall agree to abide by the terms and conditions of the Lease including, without limitation, all the obligations, liabilities, duties

and responsibilities of Lessee, and other conditions imposed upon it pursuant to law. An approval by City to one assignment, encumbrance, occupation or use, sublease or other transfer shall not be deemed to be an approval to any other assignment, encumbrance, occupation or use, sublease or other transfer.

- (c) Voluntary assignment defined. Except as otherwise expressly provided herein, any dissolution, merger, consolidation or reorganization of Lessee, or the sale or other transfer resulting in a transfer of a controlling percentage of the capital stock of Lessee (other than a transfer by will, devise, bequest, intestate succession, a transfer to or between the family members of Lessee, or a transfer to or between one or more trusts for the benefit of Lessee and/or Lessee's family members, where applicable) shall be deemed a voluntary assignment.
- (d) Exceptions. Notwithstanding the foregoing paragraphs or anything to the contrary contained herein, City's consent shall not be required for an assignment or subleasing to an Affiliate, Subsidiary or Successor of Lessee (for purposes hereof, an "Affiliate," a "Subsidiary" and a "Successor" of Lessee are defined as follows: (a) an "Affiliate" is any corporation which directly or indirectly controls or is controlled or is under common control with Lessee (for this purpose, "control" shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such corporation, whether through the ownership of voting securities or by contract or otherwise), (b) a "Subsidiary" shall mean any corporation or partnership not less than twenty-five percent (25%) of whose outstanding stock shall, at the time, be owned directly or indirectly by Lessee and which is at least as creditworthy as Lessee,

and (c) a “Successor” shall mean a corporation or partnership in which or with which Lessee is merged or consolidated, in accordance with applicable statutory provisions for merger or consolidation of corporations, or a corporation or partnership acquiring a substantial portion of the property and assets of Lessee.

#### SECTION 34. TERMS BINDING ON SUCCESSORS

All the terms, covenants and conditions of this Lease shall inure to the benefit of and be binding upon the parties and their successors, including, without limitation, their assignees, encumbrancers, occupiers or users, sublessees or other transferees. The provisions of this Section shall not be deemed as a (1) waiver of any of the prohibitions and conditions against assignments, encumbrances, occupations or uses, subleases or other transfers hereinbefore set forth, or (2) City’s consent thereto. If more than one lessee is a party to this Lease, the obligations of the lessees shall be joint and several. Even if City’s consent is not required, Lessee shall immediately provide City with written notice of any, assignment, encumbrance, occupation or use, sublease or other transfer.

#### SECTION 35. DEFAULT

The occurrence of any one or more of the following events shall constitute a material default and breach (“Default”) of this Lease by Lessee:

- (a) Lessee’s failure to make any payment of the Rent or other payment required to be made by Lessee at the time required for payment under this Lease.
- (b) Lessee’s failure to obtain or maintain the insurances and/or the security deposit as required under this Lease.
- (c) Lessee’s vacating or abandonment of the Premises during the entire term of this Lease or any renewals or extensions thereof or during any holdover period.  
Closure of the Concession for more than a combined total of sixty-five (65) days



in a calendar year, minus any days of closure of the Concession caused by City, shall be deemed an abandonment of the Premises.

- (d) Lessee's violation of Section 18 (Indemnification, Defense and Hold Harmless Agreement), Section 33 (No Assigning, Subleasing or Encumbering), Section 46 (Hazardous Substances), Section 47 (Nondiscrimination), Section 48 (Sale of Alcoholic Beverages and Entertainment Prohibited), Section 61 (Conflict of Interest) or Section 63 (Compliance with Laws).
- (e) The insolvency of Lessee as evidenced by a receiver being appointed to take possession of all or substantially all of Lessee's assets located at or on the Premises or of Lessee's interest in this Lease, or the making by Lessee of a general arrangement or assignment for the benefit of creditors, or Lessee's filing a petition in bankruptcy, whether voluntary or involuntary, or the attachment, execution or the judicial seizure of substantially all of Lessee's assets located at or on the Premises or of Lessee's interest in the Lease.
- (f) Lessee's failure to observe or perform any other term, covenant, obligation, duty, responsibility or condition of this Lease to be observed or performed by Lessee when such failure shall continue for a period of thirty (30) days after City's giving written notice to Lessee, or such earlier period if specifically set forth in this Lease; however, if the nature of such failure is such that more than thirty (30) days are reasonably required for its cure, then Lessee shall not be deemed to be in Default if Lessee notifies City of the length of the additional time required to cure and receives City's written approval of the additional time required, which approval will not be unreasonably withheld, and commences such cure within

such thirty (30) day period and diligently proceeds with such cure to completion during such additional time period approved by City.

#### SECTION 36. REMEDIES

(a) Cumulative Nature of Remedies. In the event of any Default by Lessee, City shall have the remedies described in this Section in addition to all other rights and remedies provided by law or equity, to which City may resort cumulatively or in the alternative:

(1) Reentry without Termination. City may at City's sole discretion reenter the Premises, and, without terminating the Lease, at any time and from time to time relet the Premises or any part or parts of them for the account and in the name of Lessee or otherwise. Any reletting may be for the remainder of the term or for a longer or shorter period. City may in City's sole discretion eject all persons or eject some and not others or eject none. In addition, City may in its sole discretion remove some or all of the Trade Fixtures, personal property and trade inventory from the Premises. City may store such removed Trade Fixtures, personal property and trade inventory in a public warehouse or other location at the sole cost, expense and risk of Lessee, and for the account of and in the name of Lessee. City shall apply all rents from reletting as follows: first, to the payment of reasonable expenses (including brokers' commissions) paid or incurred by or on behalf of City in recovering possession, placing the Premises in good condition, and preparing or altering the Premises for reletting; second, to the reasonable expense of securing new subtenants; third, to the

fulfillment of Lessee's covenants to the end of the term. City may execute any leases or subleases made under this provision either in City's name or in Lessee's name and City shall be entitled to all rents from the use, operation or occupancy of the Premises. Lessee shall nevertheless pay to City on the dates specified in this Lease the equivalent of all sums required of Lessee under this Lease, plus City's expenses, less the proceeds of any reletting or attornment.

- (2) Termination. In the event of a Default by Lessee, City may at City's sole discretion terminate this Lease by giving Lessee written notice of termination. In the event City terminates this Lease, City may recover possession of the Premises (which Lessee shall immediately surrender and vacate upon demand) and remove all persons therefrom, and Lessee shall comply with, without limitation, Sections 56 and 57 below. City also shall be entitled to recover as damages all of the following:

- (A) The worth at the time of the award of any unpaid Rent or other charges which have been earned at the time of termination;
- (B) The worth at the time of the award of the amount by which the unpaid Rent (each month's Rent would be calculated as the average Rent for that same month in the preceding years, or if Lessee did own/operate the Concession in the preceding years, then each month's Rent would be calculated as the average of all months Lessee owned/operated the Concession) and other charges which would have been earned after termination until the time of

the award exceeds the amount of the loss of such rental and other charges that Lessee proves could have been reasonably avoided;

- (C) The worth at the time of the award of the amount by which the unpaid Rent (each month's Rent would be calculated as the average Rent for that same month in the preceding years, or if Lessee did not own/operate the Concession in the preceding years, then each month's Rent would be calculated as the average of all months Lessee owned/operated the Concession) and other charges for the balance of the term after the time of the award exceeds the amount of the loss of such rental and other charges that Lessee proves could have been reasonably avoided;
- (D) Any other amount necessary to compensate City for the detriment proximately caused by Lessee's failure to perform its obligations, liabilities, duties or responsibilities under this Lease; and
- (E) At City's sole discretion, such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by applicable California law.

As used in Sections 36(a)(2)(A) and (B) above, the "worth at the time of the award" shall be computed by allowing interest at the rate of twelve percent (12%) per annum. As used in Section 36(a)(2)(C) above, the "worth at the time of the award" shall be computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award, plus one percent (1%). The amount recoverable by City pursuant to Section 36(a)(2)(D) above shall include, without

limitation, any costs or expenses incurred by City in maintaining or preserving the Premises after such Default.

- (3) Use of Personal Property. City may at City's sole discretion use the Trade Fixtures, personal property and/or trade inventory located on, about or appurtenant to the Premises without compensation and without liability for use or damage, or store them in a public warehouse or other location at the sole cost, expense and risk of Lessee, and for the account of and in the name of Lessee.
- (b) Election of Remedy. The election of one remedy for any one item shall not foreclose an election of any other remedy for another item or for the same item at a later time.
- (c) City's Right to Cure Lessee's Default. Upon continuance of any Default, City may in its sole discretion, but is not obligated to, cure such Default at Lessee's sole cost and expense. If City at any time, by reason of such Default by Lessee, pays any sum or does any act, the sum paid by City plus the reasonable cost of performing such act, together with a penalty thereon at the penalty rate set forth in Section 11 above from the date the costs were incurred or the act performed by City to the date they are reimbursed to City by Lessee, shall be due as additional rent not later than five (5) days after service of a written demand therefor on Lessee, including reasonably detailed documentation of the amount owed. No such payment or act shall constitute a waiver of Default or of any remedy for Default or render City liable for any loss or damage resulting from any such act.

- (d) Waiver of Rights. Lessee hereby waives any right of redemption or relief from forfeiture under California Code of Civil Procedure Sections 1174 or 1179, or under any other present or future law, in the event Lessee is evicted or City takes possession of the Premises by reason of any Default by Lessee hereunder.
- (e) Other Rights of City. No act of City, including, without limitation, City's entry on the Premises, efforts to relet the Premises, or maintenance of the Premises, shall be construed as an election to terminate this Lease unless a written notice of such intention is given to Lessee by City or unless the termination thereof is decreed by a court of competent jurisdiction. Notwithstanding if City elects to continue the Lease in full force and effect after a Default by Lessee and to relet the Premises, City may at any time after such reletting elect to terminate this Lease for any such Default.

#### SECTION 37. CUMULATIVE REMEDIES

The remedies given to City in this Lease shall not be exclusive but shall be cumulative and in addition to all remedies now or hereafter allowed by law or elsewhere provided in this Lease. City shall have the right to exercise any other right or remedy which City may have at law or in equity including, without limitation, City's rights under the unlawful detainer laws.

#### SECTION 38. WAIVER OF DEFAULT

The waiver by City of any Default by Lessee of any of the provisions of this Lease shall not constitute a continuing waiver or a waiver of any subsequent Default by Lessee either of the same or another provision of this Lease.

#### SECTION 39. CITY'S DEFAULTS/LESSEE'S REMEDY

In the event City fails to perform any material obligation of City under the Lease within ninety (90) days after receiving written notice from Lessee specifying the nature of such default, or, if the nature of City's obligation is such that more than ninety (90) days are required for its performance, if City fails to commence such performance within such ninety (90) day period and thereafter diligently prosecute the same to completion, then City shall be in default of this obligation. If City's default materially interferes with Lessee's use of the Premises for its intended purpose, Lessee shall have the option to terminate the Rental Agreement by giving City at least sixty (60) days' written notice of its intent to terminate. In such a situation, Lessee must still comply with all of its obligations, liabilities, duties and responsibilities under the Lessee Agreement, including, without limitation, paying any Rent due up to the time of termination and surrendering the Premises pursuant to Sections 55 and 56 below. This remedy of termination is Lessee's sole and exclusive remedy for a default by City.

#### SECTION 40. CONSENT

When City's consent/approval is required under this Lease, its consent/approval for one transaction or event shall not be deemed to be a consent/approval to any subsequent occurrence of the same or any other transaction or event.

#### SECTION 41. HOLDOVER

Should Lessee hold over and continue in possession of the Premises after expiration or termination of this Lease, with or without the express prior written consent of City, Lessee's continued occupancy of the Premises shall constitute a month-to-month tenancy, subject to all the terms and conditions of this Lease, at a monthly rent of one hundred ten percent (110%) of the previous calendar year's annual Rent divided by twelve (12) (or the average monthly Rent for all months Lessee owned/operated the Concession if Lessee has owned/operated the

Concession for less than one (1) year) or that month's actual Rent, whichever is greater, and shall not constitute a renewal or extension of the Lease term.

#### SECTION 42. WAIVER OF CLAIMS

Lessee hereby waives any claim against City, its officers, elected or appointed officials, employees, agents or volunteers for damage or loss caused by any suit or proceeding directly or indirectly attacking the validity of this Lease, or any part thereof, or caused by any judgment or award in any suit or proceeding declaring this Lease null, void or voidable, or delaying the Lease or any part thereof from being carried out.

#### SECTION 43. INSPECTION OF PREMISES

Upon at least twenty-four (24) hours advance written, verbal or electronic notice given by City to Lessee, Lessee shall permit City or City's agents, representatives or employees to enter the Premises at all reasonable times for the purpose of inspecting, investigating and surveying the Premises to determine whether Lessee is complying with the terms of this Lease and for the purpose of doing other lawful acts that may be necessary to protect City's interest in the Premises or to perform City's duties under this Lease. City shall make quarterly physical inspections of the Leased Premises and may direct that interior maintenance or outdoor painting repairs are to be performed where such work is necessary to protect the Premises or to provide a clean, attractive and well-maintained premise. Lessee shall perform those maintenance and repairs which they are responsible for within thirty (30) calendar days. City also shall have the right in its sole discretion to do any and all work of any nature necessary for the preservation, maintenance and operation of property owned, controlled or occupied by City. Lessee shall be given reasonable notice when such work becomes necessary, and Lessee shall adjust the operation of the Concession in such a manner that City may proceed expeditiously.



#### SECTION 44. RESERVED

#### SECTION 45. PHOTOGRAPHY

Lessee acknowledges and agrees that City may grant permits to third parties engaged in the production of still and motion pictures and related activities to take photographs or videos of or on the Premises when such permission shall not interfere with the primary business of Lessee, all without providing Lessee with notice or requiring consent by Lessee.

#### SECTION 46. HAZARDOUS SUBSTANCES

Lessee represents and warrants that its use or occupation of the Premises shall not generate any Hazardous Substance (as defined below in this Section), and it shall not store or dispose on the Premises nor transport to or over the Premises any Hazardous Substance during the entire term of this Lease or any renewals or extensions thereof or during any holdover period. The foregoing restrictions shall not be deemed to restrict or prohibit the use by Lessee of ordinary cleaning products as customarily used in Lessee's ordinary course of business at the Concession, provided that Lessee complies with all provisions of law as to the use, storage and disposal of such products. Lessee further agrees to clean up and remediate any such Hazardous Substance on the Premises, and agrees to protect, defend, indemnify and hold harmless City, its officers, elected or appointed officials, employees, agents and volunteers from and against any and all claims, damages, losses, expenses, judgments, demands and defense costs (including, without limitation, costs and fees of litigation (including arbitration) of every nature or liability of any kind or nature) arising out of or in connection with any such Hazardous Substance and any damage, loss, or expense or liability resulting from any such Hazardous Substance including, without limitation, all attorney's fees, costs and penalties incurred as a result thereof except any release caused by the sole negligence or willful misconduct of City. Lessee will conduct all

defense at its sole cost and expense and City shall approve selection of Lessee's counsel. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as limitation upon the amount of indemnification to be provided by Lessee. "Hazardous substance" shall be interpreted broadly to mean any substance or material defined or designated as a hazardous or toxic waste, hazardous or toxic material, hazardous or toxic or radioactive substance, or other similar term, by any Federal, State or local environmental law, regulation or rule presently in effect or promulgated in the future, as such law, regulation or rule may be amended from time to time; and it shall be interpreted to include, without limitation, any substance which after release into the environment will or may reasonably be anticipated to cause sickness, death or disease.

#### SECTION 47. NONDISCRIMINATION

Lessee and its employees shall not discriminate because of race, religion, color, ancestry, sex, age, national origin or physical handicap against any person by refusing to furnish such person any accommodation, facility, rental, service or privilege offered to or enjoyed by the general public. Nor shall Lessee or its employees publicize the accommodation, facilities, rentals, services or privileges in any manner that would directly or inferentially reflect upon or question the acceptability of the patronage of any person because of race, religion, color, ancestry, sex, age, national origin or physical handicap.

In the performance of this Lease, Lessee shall not discriminate against any employee or applicant for employment, because of race, religion, color, ancestry, sex, age, national origin or physical handicap. Lessee shall take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, religion, color, ancestry, sex, age, national origin or physical handicap. Such action shall include, without

limitation, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including, without limitation, apprenticeship. Lessee shall post in conspicuous places, available to all employees and applicants for employment, notices setting forth the provisions of this Section.

Lessee shall permit access to its records of employment, employment advertisements, application forms, and other pertinent data and records by City, the State Fair Employment Practices Commission or any other agency with jurisdiction over these matters, for the purpose of investigation to ascertain compliance with this Section.

City may determine a violation of this Section to have occurred upon receipt of a final judgment having that effect from a court in an action to which Lessee was a party, or upon receipt of a written notice from the State Fair Employment Practices Commission or other government agency with jurisdiction over these matters that it has investigated and determined that Lessee has violated the Fair Employment Practices Act or other applicable discrimination law and has issued an order which has become final, or obtained an injunction. In the event of violation of this Section, City shall have the right to terminate this Lease, and any loss of revenue sustained by City by reason thereof shall be borne and paid for by Lessee, at its sole cost and expense.

#### SECTION 48. SALE OF ALCOHOLIC BEVERAGES AND ENTERTAINMENT

##### PROHIBITED

Notwithstanding anything to the contrary, the sale or provision of alcoholic beverages and/or live entertainment in, on, or from the Premises is expressly forbidden, unless expressly permitted in writing by City in advance. For any proposed sale or provision of alcoholic

beverages, Lessee must first obtain written City approval prior to submitting any request for approval to the Alcohol Beverage Commission.

#### SECTION 49. LIENS

Lessee shall keep the Premises free and clear from any and all liens, including, without limitation, mechanics' or materialmens' liens, claims and demands for work performed, materials furnished, or operations conducted on or about the Premises or by reason of any use or occupancy by Lessee, or any person claiming under Lessee. When applicable, Lessee shall cause a notice of nonresponsibility to be posted and recorded pursuant to California Civil Code Section 3094.

#### SECTION 50. INSTALLATION AND REMOVAL OF TRADE FIXTURES

Lessee shall have the right during the entire term of this Lease or any renewals or extensions thereof, at Lessee's sole cost and expense, to install or affix in, to, or on the Premises any machinery, equipment and other objects (the "Trade Fixtures"), for use in Lessee's trade or business as Lessee may deem advisable. Any and all such Trade Fixtures that can be removed without structural damage to the Premises shall, subject to Section 56 below, remain the property of Lessee and may be removed by Lessee at any time prior to the expiration or termination of this Lease, provided Lessee repairs any damage caused by the removal. Upon execution of this Lease and every anniversary, Lessee shall provide City with a list of all Trade Fixtures on the Premises.

#### SECTION 51. DESTRUCTION

Should the Premises be partially destroyed, this Lease shall continue in full force and effect, and Lessee, at Lessee's sole cost and expense, shall complete the work of repairing and restoring the Premises to their prior condition providing such work can be accomplished under

all applicable governmental laws and regulations within one hundred eighty (180) days. Should the Premises be so far destroyed that in City's reasonable judgment they cannot be repaired or restored to their former condition within one hundred eighty (180) days, City shall give Lessee notice of such determination in writing and each party may, in that party's sole discretion:

- (a) Continue this Lease in full force and effect in which case Lessee shall repair and restore, at Lessee's sole cost and expense, the Premises to their former condition; or
- (b) Terminate this Lease by giving the other party thirty (30) days' written notice of such termination within sixty (60) days after the date that City gives Lessee notice that the Premises cannot be repaired or restored to their former condition within one hundred eighty (180) days. In the event that either party elects to terminate this Lease, the entire amount of any insurance proceeds (excluding such proceeds for Trade Fixtures, personal property, whether or not owned or leased by Lessee and trade inventory, but only to the extent that the insurance proceeds specifically cover those items) shall be paid to City. The proceeds of any such insurance payable to City may be used, in the sole discretion of City, for rebuilding or repair as necessary to restore the Premises or for any other such purpose(s) as City sees fit. In addition, if Lessee elects to terminate the Lease, Lessee must still comply with all of its obligations, liabilities, duties and responsibilities under the Lease, including, without limitation, paying any Rent due up to the time of termination and surrendering the Premises, pursuant to Sections 55 and 56 below.

In the event of the damage or destruction of Improvements, Trade Fixtures and/or personal property located on the Premises not giving rise to a termination of this Lease, Lessee

shall, at its sole cost and expense, replace and repair the same as soon as reasonably possible to permit the prompt continuation of Lessee's business at the Premises.

#### SECTION 52. NO ABATEMENT OF RENT DURING REPAIR WORK

The Rent shall not be abated for the time Lessee is prevented from using the whole or a portion of the Premises. In addition, Lessee shall not be excused from the payment of taxes, insurance or any other obligations for the time Lessee is prevented from using the whole or a portion of the Premises.

#### SECTION 53. EMINENT DOMAIN

If, during the term of this Lease or any renewals or extensions thereof or during any holdover period, City's real property (whether held by City in fee simple, an easement interest or otherwise) and/or the Premises is taken in eminent domain, the entire award (that is, all forms) of compensation, other than as provided herein, shall belong to and be paid to City. In the event of condemnation, Lessee shall be entitled to an award of only the following forms of compensation, if any, from the condemning authority: compensation for loss of business goodwill; compensation for the value of any of Lessee's Trade Fixtures; compensation for the value of any of Lessee's personal property; compensation for the value of any of Lessee's trade inventory; and compensation for relocation benefits as authorized by law. All other forms of compensation, such as, for example, but not by way of limitation, any bonus value of Lessee's interest in this Lease, shall belong to and be paid to City. In the event of condemnation, unless Lessee is allowed by the condemning authority to continue its operations on the Premises, the Lease shall terminate on the earliest of the following dates: the date the condemning authority obtains a prejudgment order for possession; the date title to the Premises vests in the condemning

authority; or the date when Lessee is required by the condemning authority to cease its operations.

SECTION 54. RELOCATION AND ASSISTANCE, BUSINESS GOODWILL AND  
LEASEHOLD BONUS VALUE

Upon expiration or termination of this Lease for any reason, but excluding eminent domain, Lessee shall not be entitled to any relocation rights or benefits, business goodwill or bonus value attributable to this Lease, and Lessee expressly waives any claim to the same.

SECTION 55. QUITCLAIM DEED

Upon expiration or termination of this Lease as provided for herein, Lessee shall execute and deliver to City within thirty (30) days thereof, a good and sufficient quitclaim deed to the rights and interests of Lessee in the Premises and the Lease. Should Lessee fail or refuse to deliver to City this quitclaim deed, City may record in the Orange County Recorder's Office a written notice reciting the failure of Lessee to execute and deliver this quitclaim deed. The date of recordation of this notice by City shall be conclusive evidence against Lessee and all persons claiming under Lessee of the expiration or termination of this Lease and any rights or interests of Lessee in the Premises and/or the Lease. Lessee also agrees to execute, acknowledge, and deliver to City any other instrument requested by City as necessary to perfect City's right, title and interest to the Premises.

SECTION 56. RESTORATION AND SURRENDER OF PREMISES/TITLE TO  
IMPROVEMENTS TO THE BUILDING

On expiration or termination of this Lease, Lessee shall, without compensation to Lessee, promptly surrender and deliver the Premises to City in as good condition as such were at the commencement date of this Lease, reasonable wear and tear excepted. Lessee also shall, without

compensation to Lessee, surrender all Improvements to the building to City in good condition and repair, ordinary wear and tear excepted, free and clear of all liens and encumbrances. Lessee also shall remove all Trade Fixtures, personal property and trade inventory. City may in its sole discretion accept all or any portion of the Premises, as then improved with Improvements and no sum whatsoever shall be paid to Lessee or any other person; or City may require Lessee to remove all or any portion of such Improvements to the building, at Lessee's own risk and cost and expense; or City may itself remove or have removed all or any portion of such Improvements to the building, at Lessee's own risk and cost and expense. If required by City to do so, in removing any such Improvements to the building, Lessee shall restore the Premises as nearly as possible to the conditions existing prior to their installation or construction. All such removal and restoration shall be to the satisfaction of City and shall be completed within thirty (30) days of the expiration or termination of this Lease; provided, however, that Lessee shall be considered a holdover tenant (pursuant to Section 41 above) after expiration or termination of the Lease until the time Lessee completes this removal and restoration work, including, without limitation, the removal of any Trade Fixtures, personal property and trade inventory left on the Premises. In addition, any Trade Fixtures, personal property or trade inventory left on the Premises after the expiration of this 30-day period, regardless of cause, shall be deemed abandoned by Lessee. In City's sole discretion, it may choose to do one or more of the following: (1) take any or all of such Trade Fixtures, personal property and trade inventory as City property; (2) store any or all of such Trade Fixtures, personal property and trade inventory in a public warehouse or other location at the sole cost, expense and risk of Lessee, and for the account and in the name of Lessee; or (3) dispose of any or all of such Trade Fixtures, personal property and trade inventory without any liability to Lessee. In addition, Lessee's



indemnification, hold harmless and defense obligations set forth in this Lease shall apply to such Trade Fixtures, personal property and/or trade inventory, and to City's actions with respect thereto.

#### SECTION 57. FORCE MAJEURE - UNAVOIDABLE DELAYS

Should the performance of any act required by this Lease to be performed by either City or Lessee be prevented or delayed by reason of an act of God, strike, lockout, labor troubles, inability to secure materials, restrictive governmental laws or regulations, or any other cause except financial inability not the fault of the party required to perform the act, the time for performance of the act shall be extended for a period equivalent to the period of delay and performance of the act during the period of delay shall be excused. Provided, however, that nothing contained in this Section shall excuse the prompt payment of the Rent or other consideration by Lessee as required by this Lease or the performance of any act rendered difficult solely because of the financial condition of the party, City or Lessee, required to perform the act.

#### SECTION 58. CITY'S OPTION TO CLOSE THE PREMISES

City may close the Premises without liability and without advance notice to Lessee therefor at any time as City in its sole discretion deems necessary for the protection of life, limb or property, or for public health, safety or welfare purposes, or other City activities or special events, or upon reasonable notice to effect any repair, remodeling or rebuilding deemed necessary by City in its sole discretion. City retains the right to close the or the Premises or pier for emergencies without any notice to Lessee, for any extent of time and without compensation or credit except Lessee may be provided rent credit for loss of revenue at the discretion of the

City Manager or his or her designee. In those cases where there is a City-planned pier closure, Lessee will be given a two (2) business week notice.

#### SECTION 59. DELIVERIES OF SUPPLIES

The City Manager or his or her designee of City may establish the days and times deliveries of supplies may be made and advise Lessee in writing thereof.

#### SECTION 60. EMPLOYEE PARKING

All employee parking shall comply with Huntington Beach Municipal Code Section 13.08.290(d) and (g).

#### SECTION 61. CONFLICT OF INTEREST

Lessee warrants and covenants that no official or employee of City, nor any business entity in which an official or employee of City is interested, (1) has been employed or retained by Lessee to solicit or aid in the procuring of this Lease; or (2) shall be employed by Lessee in the performance of this Lease without the immediate written divulgence of such fact to City. In the event City determines that the employment of any such official, employee or business entity is not compatible with such official's or employee's duties as an official or employee of City, Lessee, upon request of City, shall terminate such employment immediately. For breaches or violation of this Section, City shall have the right both to terminate this Lease without liability and, in its discretion, recover the full amount of any such compensation paid to such official, employee or business entity. No official or employee of City shall have any financial interest in this Lease in violation of the applicable provisions of the California Government Code.

#### SECTION 62. NOTICE

Unless specifically providing for verbal or electronic notice, all notices, certificates, or other communications required to be given hereunder shall be in writing and made in the following

manner, and shall be sufficiently given and deemed received when (a) personally delivered; or (b) three (3) business days after being sent via United States certified mail – return receipt requested; or (c) one (1) business day after being sent by reputable overnight courier, in each case to the addresses specified below; provided that City and Lessee, by notice given hereunder, may designate different addresses to which subsequent notices, certificates or other communications will be sent:

CITY:  
City of Huntington Beach  
ATTN: City Manager or his or her designee  
2000 Main Street, P.O. Box 190  
Huntington Beach, CA 92648

LESSEE:  
Tina Viray  
Nelson Westcott  
dba Surf City Store

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#### SECTION 63. COMPLIANCE WITH LAWS

Lessee, at its sole cost and expense, shall comply with all statutes, ordinances, regulations and requirements of all governmental entities, including, without limitation, Federal, State, county or municipal, relating to Lessee's use and occupancy of the Premises and/or operation of the Concession whether such statutes, ordinances, regulations and requirements be now in force or hereinafter enacted. This Lease is expressly subject to the laws, regulations and policies of City. Lessee shall deliver to City a copy of any notice from any governmental entity received by Lessee regarding any alleged violation of law regarding the Lease, Premises or the Concession or from any person allegedly entitled to give notice under any conditions, covenants, or restrictions binding or affecting the Premises. The judgment of any court of competent jurisdiction, or the admission by Lessee in a proceeding brought against Lessee by any government entity, that Lessee has violated any such statute, ordinance, regulation or requirement shall be conclusive as between City and Lessee and shall be grounds for termination of this Lease by City.

#### SECTION 64. INTERPRETATION OF THIS LEASE

The language of all parts of this Lease shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. If any provision of this Lease is held by an arbitrator or court of competent jurisdiction to be unenforceable, void, illegal or invalid, such holding shall not invalidate or affect the remaining covenants and provisions of this Lease. No covenant or provision shall be deemed dependent upon any other unless so expressly provided here. As used in this Lease, the masculine or neuter gender and singular or plural number shall be deemed to include the other whenever the context so indicates or requires. Nothing contained herein shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision contained herein and any present or future statute, law, ordinance or regulation contrary to which the parties have no right to contract, then the latter shall prevail, and the provision of this Lease which is hereby affected shall be curtailed and limited only to the extent necessary to bring it within the requirements of the law.

#### SECTION 65. SURVIVAL

Terms and conditions of this Lease, which by their sense and context survive the expiration or termination of this Lease, shall so survive.

#### SECTION 66. MODIFICATION

No waiver or modification of any language in this Lease shall be valid unless in writing and duly executed by both parties.

#### SECTION 67. SECTION HEADINGS

The titles, captions, section, paragraph and subject headings, and descriptive phrases at the beginning of the various sections in this Lease are merely descriptive and are included solely

for convenience of reference only and are not representative of matters included or excluded from such provisions, and do not interpret, define, limit or describe, or construe the intent of the parties or affect the construction or interpretation of any provision of this Lease.

#### SECTION 68. BROKERS

Each party warrants to and for the benefit of the other that it has had no dealings with any real estate broker or other agent (attorneys excepted) in connection with the negotiation or making of this Lease.

#### SECTION 69. INDEPENDENT CONTRACTOR

Lessee is, and shall be, acting at all times in the performance of this Agreement as an independent contractor herein and not as an employee of City. Lessee shall secure at its own cost and expense, and be responsible for any and all payment of all taxes, social security, state disability insurance compensation, unemployment compensation and other payroll deductions for Lessee and its officers, agents and employees and all business licenses, if any, in connection with the Lease and/or any services to be performed hereunder.

#### SECTION 70. ATTORNEY'S FEES

In the event suit is brought by either party to construe, interpret and/or enforce the terms and/or provisions of this Lease or to secure the performance hereof, each party shall bear its own attorney's fees, such that the prevailing party shall not be entitled to recover its attorney's fees from the non-prevailing party.

#### SECTION 71. LEGAL SERVICES SUBCONTRACTING PROHIBITED

Lessee and City agree that City is not liable for payment of any subcontractor work involving legal services, and that such legal services are expressly outside the scope of services contemplated hereunder. Lessee understands that pursuant to Huntington Beach City Charter

Section 309, the City Attorney is the exclusive legal counsel for City; and City shall not be liable for payment of any legal services expenses incurred by Lessee.

#### SECTION 72. GOVERNING LAW

This Lease shall be governed and construed in accordance with the laws of the State of California.

#### SECTION 73. DUPLICATE ORIGINAL

The original of this Lease and one or more copies hereto have been prepared and signed in counterparts as duplicate originals, each of which so executed shall, irrespective of the date of its execution and delivery, be deemed an original. Each duplicate original shall be deemed an original instrument as against any party who signed it.

#### SECTION 74. ENTIRETY

The parties acknowledge and agree that they are entering into this Lease freely and voluntarily following extensive arm's length negotiations, and that each has had the opportunity to consult with legal counsel prior to executing this Lease. The parties also acknowledge and agree that no representations, inducements, promises, agreements or warranties, oral or otherwise, have been made by that party, or anyone acting on that party's behalf, which are not embodied in this Lease, and that that party has not executed this Lease in reliance on any representation, inducement, promise, agreement, warranty, fact or circumstance not expressly set forth in this Lease. The Lease, and the attached exhibits, contain the entire agreement between the parties respecting the subject matter of this Lease, the Premises, the leasing of the Premises to Lessee, or the lease term created under this Lease and supercede all prior understandings and agreements, whether oral or in writing between the parties respecting the subject matter hereof.

IN WITNESS WHEREOF, the parties hereto have caused this Lease to be executed by and through their authorized officers the day, month and year first above written. Each undersigned represents and warrants that its signature hereinbelow has the power, authority and right to bind their respective parties to each of the terms of this Agreement, and shall indemnify CITY fully for any injuries or damages to CITY in the event that such authority or power is not, in fact, held by the signatory or is withdrawn.

TINA VIRAY AND NELSON WESTCOTT, a  
general partnership, doing business as The Surf  
City Store

By: Tina Viray  
print name

ITS: [Signature]  
(circle one) Chairman/President/Vice  
President General Partner

AND

By: NELSON WESTCOTT  
print name

ITS: [Signature]  
(circle one) Secretary/Chief Financial Officer/Asst.  
Secretary - Treasurer

REVIEWED AND APPROVED:

\_\_\_\_\_  
City Manager

CITY OF HUNTINGTON BEACH, a  
municipal corporation of the State of  
California

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
City Clerk

INITIATED AND APPROVED:

\_\_\_\_\_  
City Manager or his or her designee

[Signature]  
Director of Economic Development

APPROVED AS TO FORM:

[Signature]  
City Attorney

LEASE BETWEEN THE CITY OF HUNTINGTON BEACH  
AND TINA VIRAY AND NELSON WESCOTT, A GENERAL  
PARTNERSHIP DOING BUSINESS AS THE SURF CITY STORE

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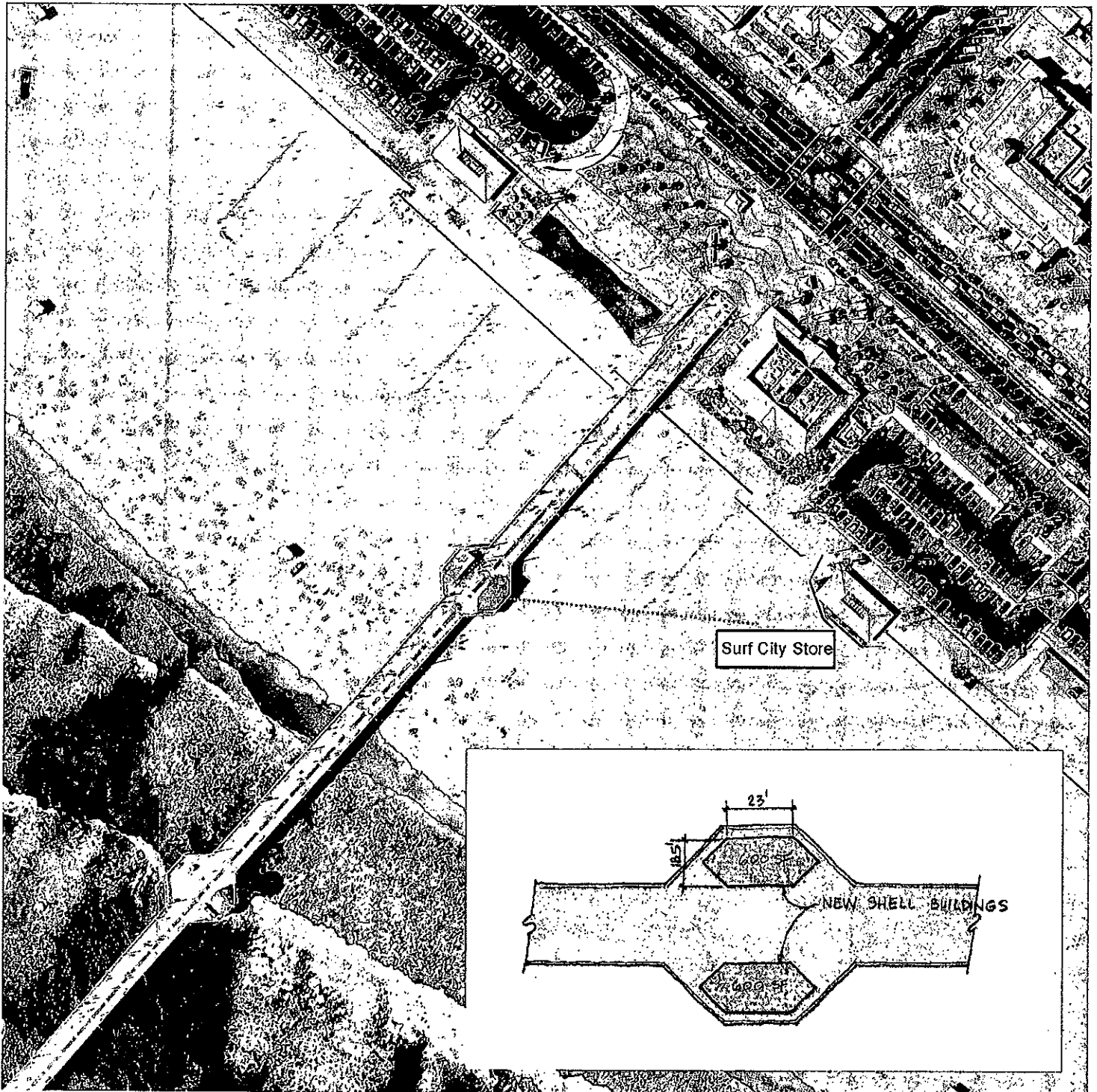


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EXHIBIT "A"

LOCATION MAP  
SURF CITY STORE



**Exhibit "B"**  
**Quarterly Evaluation**

**CITY OF HUNTINGTON**

**Quarterly Evaluation**

**SUMMARY SHEET**

Date Inspected: \_\_\_\_\_ By: \_\_\_\_\_

Representative: \_\_\_\_\_

<b><u>Area</u></b>	<b><u>OK</u></b>	<b><u>Needs Attention</u></b>
<b><u>GENERAL</u></b>		
Doors & Locks		
Exterior Walls		
Graffiti Removal		
Interior Walls		
Removal of Bird Droppings		
Restrooms (Plumbing)		
Roof		
Rust		
Signage		
Trash		
Trim		
Windows		
Other		

**COMMENTS:**



SURFC11

OP ID: EM

## CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

08/08/2019

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER ISU Ins Svcs of Irvine LLC 18022 Cowan, Suite 225 Irvine, CA 92614 Ron Norton		949-419-2100	CONTACT NAME: Sue Martino PHONE (A/C, No, Ext): 949-419-2100 FAX (A/C, No): 949-955-1478 E-MAIL ADDRESS: smartino@isuirvine.com
INSURED Surf City Store 60 Main Street Huntington Beach, CA 92648		INSURER(S) AFFORDING COVERAGE	
		INSURER A: Sentinel Insurance Company	NAIC # 11000
		INSURER B: Preferred Employers Ins Co	10900
		INSURER C:	
		INSURER D:	
		INSURER E:	
		INSURER F:	

## COVERAGES

## CERTIFICATE NUMBER:

## REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	<input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR <input checked="" type="checkbox"/> HNOA GEN'L AGGREGATE LIMIT APPLIES PER: <input checked="" type="checkbox"/> POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC OTHER:	Y		72SBALZ1883	09/01/2019	09/01/2020	EACH OCCURRENCE \$ 2,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 1,000,000 MED EXP (Any one person) \$ 10,000 PERSONAL & ADV INJURY \$ 2,000,000 GENERAL AGGREGATE \$ 4,000,000 PRODUCTS - COMP/OP AGG \$ 4,000,000
A	AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO OWNED AUTOS ONLY <input checked="" type="checkbox"/> HIRED AUTOS ONLY <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS ONLY			72SBALZ1883	09/01/2019	09/01/2020	COMBINED SINGLE LIMIT (Ea accident) \$ 2,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
	UMBRELLA LIAB EXCESS LIAB DED RETENTION \$						APPROVED AS TO FORM By: <i>Michael E. Gates</i> MICHAEL E. GATES CITY ATTORNEY CITY OF HUNTINGTON BEACH
B	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N	N/A	WRN13968610	04/01/2019	04/01/2020	<input checked="" type="checkbox"/> PER STATUTE <input type="checkbox"/> OTH-ER E.L. EACH ACCIDENT \$ 1,000,000 E.L. DISEASE - EA EMPLOYEE \$ 1,000,000 E.L. DISEASE - POLICY LIMIT \$ 1,000,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

\*Except 10 Day Notice of Cancellation for non payment of premium. The City of Huntington Beach, its officers, elected or appointed officials, employees, agents and volunteers are added as an additional insured per CG20260413 where required by written contract, per the lease agreement.

## CERTIFICATE HOLDER

CITYOFH

City of Huntington Beach  
ATTN: Risk Management  
2000 Main St.  
Huntington Beach, CA 92648

## CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

*Ronald J. Norton*



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**ADDITIONAL INSURED - OWNERS, LESSEES OR  
CONTRACTORS - SCHEDULED PERSON OR  
ORGANIZATION**

This endorsement modifies insurance provided under the following:

**BUSINESS LIABILITY COVERAGE FORM**

**SCHEDULE**

**Name Of Additional Insured Person(s) Or Organization(s):**

THE CITY OF HUNTINGTON BEACH, ITS OFFICERS, ELECTED OR APPOINTED OFFICIALS

**Location(s) Of Covered Operations:**

SEE IH1200

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

**A. Section C. – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

**B.** With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - COMPLETED OPERATIONS**

This endorsement modifies insurance provided under the following:

### **BUSINESS LIABILITY COVERAGE FORM**

#### **SCHEDULE**

**Name Of Additional Insured Person(s) Or Organization(s):**

THE CITY OF HUNTINGTON BEACH, ITS OFFICERS, ELECTED OR APPOINTED OFFICIALS

**Location And Description Of Completed Operations:**

SEE IH1200

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

**Section C. – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

POLICY NUMBER: 72 SBA LZ1883



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

ADDITIONAL INSURED - PERSON-ORGANIZATION

THE CITY OF HUNTINGTON BEACH, ITS OFFICERS, ELECTED OR APPOINTED  
OFFICIALS, EMPLOYEES, AGENTS, AND VOLUNTEERS  
2000 MAIN STREET  
HUNTINGTON BEACH CA 92648  
"SURF CITY, HUNTINGTON BEACH"

KITCHEL CONTRACTORS  
1707 EAST HIGHLAND STE 200  
PHOENIX AZ 85016-4659  
PROJECT: 4484-HOKULI'S WORKING ITEMS

POLICY NUMBER: 72 SBA LZ1883



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

ADDITIONAL INSURED - OWNER, LESSEES OR CONTRACTOR

THE CITY OF HUNTINGTON BEACH, ITS OFFICERS, ELECTED OR APPOINTED  
OFFICIALS, EMPLOYEES, AGENTS, AND VOLUNTEERS  
2000 MAIN STREET  
HUNTINGTON BEACH CA 92648  
"SURF CITY, HUNTINGTON BEACH"



# **BUSINESS LIABILITY COVERAGE FORM**

**QUICK REFERENCE**  
**BUSINESS LIABILITY COVERAGE FORM**  
**READ YOUR POLICY CAREFULLY**

<b>BUSINESS LIABILITY COVERAGE FORM</b>	<b>Beginning on Page</b>
<b>A. COVERAGES</b>	<b>1</b>
Business Liability	<b>1</b>
Medical Expenses	<b>2</b>
Coverage Extension - Supplementary Payments	<b>2</b>
<b>B. EXCLUSIONS</b>	<b>3</b>
<b>C. WHO IS AN INSURED</b>	<b>10</b>
<b>D. LIABILITY AND MEDICAL EXPENSES LIMITS OF INSURANCE</b>	<b>14</b>
<b>E. LIABILITY AND MEDICAL EXPENSES GENERAL CONDITIONS</b>	<b>15</b>
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Additional Insureds	<b>18</b>
<b>G. LIABILITY AND MEDICAL EXPENSES DEFINITIONS</b>	<b>20</b>



## BUSINESS LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the stock insurance company member of The Hartford providing this insurance.

The word "insured" means any person or organization qualifying as such under Section C. - Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section G. - Liability And Medical Expenses Definitions.

### A. COVERAGES

#### 1. BUSINESS LIABILITY COVERAGE (BODILY INJURY, PROPERTY DAMAGE, PERSONAL AND ADVERTISING INJURY)

##### Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", "property damage" or "personal and advertising injury" to which this insurance does not apply.

We may, at our discretion, investigate any "occurrence" or offense and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section D. - Liability And Medical Expenses Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments, settlements or medical expenses to which this insurance applies.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Coverage Extension - Supplementary Payments.

- b. This insurance applies:

- (1) To "bodily injury" and "property damage" only if:

- (a) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

- (b) The "bodily injury" or "property damage" occurs during the policy period; and

- (c) Prior to the policy period, no insured listed under Paragraph 1. of Section C. - Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

- (2) To "personal and advertising injury" caused by an offense arising out of your business, but only if the offense was committed in the "coverage territory" during the policy period.

- c. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section C. - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

## BUSINESS LIABILITY COVERAGE FORM

- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
  - (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.
- d. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

**e. Incidental Medical Malpractice**

- (1) "Bodily injury" arising out of the rendering of or failure to render professional health care services as a physician, dentist, nurse, emergency medical technician or paramedic shall be deemed to be caused by an "occurrence", but only if:
  - (a) The physician, dentist, nurse, emergency medical technician or paramedic is employed by you to provide such services; and
  - (b) You are not engaged in the business or occupation of providing such services.
- (2) For the purpose of determining the limits of insurance for incidental medical malpractice, any act or omission together with all related acts or omissions in the furnishing of these services to any one person will be considered one "occurrence".

## 2. MEDICAL EXPENSES

### Insuring Agreement

- a. We will pay medical expenses as described below for "bodily injury" caused by an accident:
- (1) On premises you own or rent;
  - (2) On ways next to premises you own or rent; or
  - (3) Because of your operations;
- provided that:
- (1) The accident takes place in the "coverage territory" and during the policy period;
  - (2) The expenses are incurred and reported to us within three years of the date of the accident; and
  - (3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

- b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid administered at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

## 3. COVERAGE EXTENSION - SUPPLEMENTARY PAYMENTS

- a. We will pay, with respect to any claim or "suit" we investigate or settle, or any "suit" against an insured we defend:
- (1) All expenses we incur.
  - (2) Up to \$1,000 for the cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which Business Liability Coverage for "bodily injury" applies. We do not have to furnish these bonds.
  - (3) The cost of appeal bonds or bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
  - (4) All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$500 a day because of time off from work.
  - (5) All costs taxed against the insured in the "suit".
  - (6) Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
  - (7) All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

Any amounts paid under (1) through (7) above will not reduce the limits of insurance.

b. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

- (1) The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
- (2) This insurance applies to such liability assumed by the insured;
- (3) The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";
- (4) The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interest of the indemnitee;
- (5) The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- (6) The indemnitee:
  - (a) Agrees in writing to:
    - (i) Cooperate with us in the investigation, settlement or defense of the "suit";
    - (ii) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
    - (iii) Notify any other insurer whose coverage is available to the indemnitee; and
    - (iv) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
  - (b) Provides us with written authorization to:
    - (i) Obtain records and other information related to the "suit"; and
    - (ii) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments.

Notwithstanding the provisions of Paragraph 1.b.(b) of Section B. – Exclusions, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the Limits of Insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when:

- (1) We have used up the applicable limit of insurance in the payment of judgments or settlements; or
- (2) The conditions set forth above, or the terms of the agreement described in Paragraph (6) above, are no longer met.

## **B. EXCLUSIONS**

### **1. Applicable To Business Liability Coverage**

This insurance does not apply to:

#### **a. Expected Or Intended Injury**

- (1) "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" or "property damage" resulting from the use of reasonable force to protect persons or property; or
- (2) "Personal and advertising injury" arising out of an offense committed by, at the direction of or with the consent or acquiescence of the insured with the expectation of inflicting "personal and advertising injury".

#### **b. Contractual Liability**

- (1) "Bodily injury" or "property damage"; or
- (2) "Personal and advertising injury"

for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

This exclusion does not apply to liability for damages because of:

- (a) "Bodily injury", "property damage" or "personal and advertising injury" that the insured would have in the absence of the contract or agreement; or

## BUSINESS LIABILITY COVERAGE FORM

(b) "Bodily injury" or "property damage" assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purpose of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage" provided:

- (i) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract", and
- (ii) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

### c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

### d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

### e. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
  - (a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business, or

- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of (1) above.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

### f. Pollution

- (1) "Bodily injury", "property damage" or "personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

- (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";
  - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
  - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:
    - (i) Any insured; or
    - (ii) Any person or organization for whom you may be legally responsible;
  - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:
    - (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;
    - (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
    - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire"; or
  - (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".
- (2) Any loss, cost or expense arising out of any:
- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
  - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".
- However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

## BUSINESS LIABILITY COVERAGE FORM

### g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
  - (a) Less than 51 feet long; and
  - (b) Not being used to carry persons for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft;
- (5) "Bodily injury" or "property damage" arising out of the operation of any of the equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment"; or
- (6) An aircraft that is not owned by any insured and is hired, chartered or loaned with a paid crew. However, this exception does not apply if the insured has any other insurance for such "bodily injury" or "property damage", whether the other insurance is primary, excess, contingent or on any other basis.

### h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

- (1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

- (2) The use of "mobile equipment" in, or while in practice or preparation for, a prearranged racing, speed or demolition contest or in any stunting activity.

### i. War

"Bodily injury", "property damage" or "personal and advertising injury", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

### j. Professional Services

"Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional service. This includes but is not limited to:

- (1) Legal, accounting or advertising services;
- (2) Preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders, designs or drawings and specifications;
- (3) Supervisory, inspection, architectural or engineering activities;
- (4) Medical, surgical, dental, x-ray or nursing services treatment, advice or instruction;
- (5) Any health or therapeutic service treatment, advice or instruction;
- (6) Any service, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement or personal grooming;
- (7) Optical or hearing aid services including the prescribing, preparation, fitting, demonstration or distribution of ophthalmic lenses and similar products or hearing aid devices;



- (8) Optometry or optometric services including but not limited to examination of the eyes and the prescribing, preparation, fitting, demonstration or distribution of ophthalmic lenses and similar products;
- (9) Any:
  - (a) Body piercing (not including ear piercing);
  - (b) Tattooing, including but not limited to the insertion of pigments into or under the skin; and
  - (c) Similar services;
- (10) Services in the practice of pharmacy; and
- (11) Computer consulting, design or programming services, including web site design.

Paragraphs (4) and (5) of this exclusion do not apply to the Incidental Medical Malpractice coverage afforded under Paragraph 1.e. in Section A. - Coverages.

**k. Damage To Property**

"Property damage" to:

- (1) Property you own, rent or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate Limit of Insurance applies to Damage To Premises Rented To You as described in Section D. - Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3) and (4) of this exclusion do not apply to the use of elevators.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraphs (3) and (4) of this exclusion do not apply to "property damage" to borrowed equipment while not being used to perform operations at a job site.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

**l. Damage To Your Product**

"Property damage" to "your product" arising out of it or any part of it.

**m. Damage To Your Work**

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

**n. Damage To Impaired Property Or Property Not Physically Injured**

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

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### **o. Recall Of Products, Work Or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

### **p. Personal And Advertising Injury**

"Personal and advertising injury":

- (1) Arising out of oral, written or electronic publication of material, if done by or at the direction of the insured with knowledge of its falsity;
- (2) Arising out of oral, written or electronic publication of material whose first publication took place before the beginning of the policy period;
- (3) Arising out of a criminal act committed by or at the direction of the insured;
- (4) Arising out of any breach of contract, except an implied contract to use another's "advertising idea" in your "advertisement";
- (5) Arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement";
- (6) Arising out of the wrong description of the price of goods, products or services;
- (7) Arising out of any violation of any intellectual property rights such as copyright, patent, trademark, trade name, trade secret, service mark or other designation of origin or authenticity.

However, this exclusion does not apply to infringement, in your "advertisement", of

- (a) Copyright;
- (b) Slogan, unless the slogan is also a trademark, trade name, service mark or other designation of origin or authenticity; or

(c) Title of any literary or artistic work;

- (8) Arising out of an offense committed by an insured whose business is:

- (a) Advertising, broadcasting, publishing or telecasting;
- (b) Designing or determining content of web sites for others; or
- (c) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs a., b. and c. under the definition of "personal and advertising injury" in Section G. – Liability And Medical Expenses Definitions.

For the purposes of this exclusion, placing an "advertisement" for or linking to others on your web site, by itself, is not considered the business of advertising, broadcasting, publishing or telecasting;

- (9) Arising out of an electronic chat room or bulletin board the insured hosts, owns, or over which the insured exercises control;
- (10) Arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatags, or any other similar tactics to mislead another's potential customers;
- (11) Arising out of the violation of a person's right of privacy created by any state or federal act.

However, this exclusion does not apply to liability for damages that the insured would have in the absence of such state or federal act;

- (12) Arising out of:

- (a) An "advertisement" for others on your web site;
- (b) Placing a link to a web site of others on your web site;
- (c) Content from a web site of others displayed within a frame or border on your web site. Content includes information, code, sounds, text, graphics or images; or
- (d) Computer code, software or programming used to enable:
  - (i) Your web site; or
  - (ii) The presentation or functionality of an "advertisement" or other content on your web site;

- (13) Arising out of a violation of any anti-trust law;
- (14) Arising out of the fluctuation in price or value of any stocks, bonds or other securities; or
- (15) Arising out of discrimination or humiliation committed by or at the direction of any "executive officer", director, stockholder, partner or member of the insured.

**q. Electronic Data**

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate "electronic data".

**r. Employment-Related Practices**

"Bodily injury" or "personal and advertising injury" to:

- (1) A person arising out of any:
  - (a) Refusal to employ that person;
  - (b) Termination of that person's employment; or
  - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" or "personal and advertising injury" to the person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

**s. Asbestos**

- (1) "Bodily injury", "property damage" or "personal and advertising injury" arising out of the "asbestos hazard".
- (2) Any damages, judgments, settlements, loss, costs or expenses that:

- (a) May be awarded or incurred by reason of any claim or suit alleging actual or threatened injury or damage of any nature or kind to persons or property which would not have occurred in whole or in part but for the "asbestos hazard";
- (b) Arise out of any request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, encapsulate, contain, treat, detoxify or neutralize or in any way respond to or assess the effects of an "asbestos hazard"; or
- (c) Arise out of any claim or suit for damages because of testing for, monitoring, cleaning up, removing, encapsulating, containing, treating, detoxifying or neutralizing or in any way responding to or assessing the effects of an "asbestos hazard".

**t. Violation Of Statutes That Govern E-Mails, Fax, Phone Calls Or Other Methods Of Sending Material Or Information**

"Bodily injury", "property damage", or "personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

**Damage To Premises Rented To You – Exception For Damage By Fire, Lightning or Explosion**

Exclusions c. through h. and k. through o. do not apply to damage by fire, lightning or explosion to premises rented to you or temporarily occupied by you with permission of the owner. A separate Limit of Insurance applies to this coverage as described in Section D. - Liability And Medical Expenses Limits Of Insurance.

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### 2. Applicable To Medical Expenses Coverage

We will not pay expenses for "bodily injury":

**a. Any Insured**

To any insured, except "volunteer workers".

**b. Hired Person**

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

**c. Injury On Normally Occupied Premises**

To a person injured on that part of premises you own or rent that the person normally occupies.

**d. Workers' Compensation And Similar Laws**

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

**e. Athletics Activities**

To a person injured while practicing, instructing or participating in any physical exercises or games, sports or athletic contests.

**f. Products-Completed Operations Hazard**

Included with the "products-completed operations hazard".

**g. Business Liability Exclusions**

Excluded under Business Liability Coverage.

### C. WHO IS AN INSURED

1. If you are designated in the Declarations as:

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

- e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

**a. Employees And Volunteer Workers**

Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business.

However, none of these "employees" or "volunteer workers" are insureds for:

**(1) "Bodily injury" or "personal and advertising injury":**

- (a)** To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), or to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

- (b)** To the spouse, child, parent, brother or sister of that co-"employee" or that "volunteer worker" as a consequence of Paragraph **(1)(a)** above;

- (c)** For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs **(1)(a)** or **(b)** above; or

- (d)** Arising out of his or her providing or failing to provide professional health care services.

If you are not in the business of providing professional health care services, Paragraph **(d)** does not apply to any nurse, emergency medical technician or paramedic employed by you to provide such services.

**(2) "Property damage" to property:**

- (a)** Owned, occupied or used by,

- (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

**b. Real Estate Manager**

Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

**c. Temporary Custodians Of Your Property**

Any person or organization having proper temporary custody of your property if you die, but only:

- (1) With respect to liability arising out of the maintenance or use of that property; and
- (2) Until your legal representative has been appointed.

**d. Legal Representative If You Die**

Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this insurance.

**e. Unnamed Subsidiary**

Any subsidiary and subsidiary thereof, of yours which is a legally incorporated entity of which you own a financial interest of more than 50% of the voting stock on the effective date of this Coverage Part.

The insurance afforded herein for any subsidiary not shown in the Declarations as a named insured does not apply to injury or damage with respect to which an insured under this insurance is also an insured under another policy or would be an insured under such policy but for its termination or upon the exhaustion of its limits of insurance.

**3. Newly Acquired Or Formed Organization**

Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain financial interest of more than 50% of the voting stock, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

- a. Coverage under this provision is afforded only until the 180th day after you acquire or form the organization or the end of the policy period, whichever is earlier; and

- b. Coverage under this provision does not apply to:

- (1) "Bodily injury" or "property damage" that occurred; or
- (2) "Personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

**4. Operator Of Mobile Equipment**

With respect to "mobile equipment" registered in your name under any motor vehicle registration law, any person is an insured while driving such equipment along a public highway with your permission. Any other person or organization responsible for the conduct of such person is also an insured, but only with respect to liability arising out of the operation of the equipment, and only if no other insurance of any kind is available to that person or organization for this liability. However, no person or organization is an insured with respect to:

- a. "Bodily injury" to a co-"employee" of the person driving the equipment; or
- b. "Property damage" to property owned by, rented to, in the charge of or occupied by you or the employer of any person who is an insured under this provision.

**5. Operator of Nonowned Watercraft**

With respect to watercraft you do not own that is less than 51 feet long and is not being used to carry persons for a charge, any person is an insured while operating such watercraft with your permission. Any other person or organization responsible for the conduct of such person is also an insured, but only with respect to liability arising out of the operation of the watercraft, and only if no other insurance of any kind is available to that person or organization for this liability.

However, no person or organization is an insured with respect to:

- a. "Bodily injury" to a co-"employee" of the person operating the watercraft; or
- b. "Property damage" to property owned by, rented to, in the charge of or occupied by you or the employer of any person who is an insured under this provision.

**6. Additional Insureds When Required By Written Contract, Written Agreement Or Permit**

The person(s) or organization(s) identified in Paragraphs a. through f. below are additional insureds when you have agreed, in a written

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## BUSINESS LIABILITY COVERAGE FORM

contract, written agreement or because of a permit issued by a state or political subdivision, that such person or organization be added as an additional insured on your policy, provided the injury or damage occurs subsequent to the execution of the contract or agreement, or the issuance of the permit.

A person or organization is an additional insured under this provision only for that period of time required by the contract, agreement or permit.

However, no such person or organization is an additional insured under this provision if such person or organization is included as an additional insured by an endorsement issued by us and made a part of this Coverage Part, including all persons or organizations added as additional insureds under the specific additional insured coverage grants in Section F. – Optional Additional Insured Coverages.

### a. Vendors

Any person(s) or organization(s) (referred to below as vendor), but only with respect to "bodily injury" or "property damage" arising out of "your products" which are distributed or sold in the regular course of the vendor's business and only if this Coverage Part provides coverage for "bodily injury" or "property damage" included within the "products-completed operations hazard".

- (1) The insurance afforded to the vendor is subject to the following additional exclusions:

This insurance does not apply to:

- (a) "Bodily injury" or "property damage" for which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the vendor would have in the absence of the contract or agreement;
- (b) Any express warranty unauthorized by you;
- (c) Any physical or chemical change in the product made intentionally by the vendor;
- (d) Repackaging, except when unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from the manufacturer, and then repackaged in the original container;

- (e) Any failure to make such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;
  - (f) Demonstration, installation, servicing or repair operations, except such operations performed at the vendor's premises in connection with the sale of the product;
  - (g) Products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor; or
  - (h) "Bodily injury" or "property damage" arising out of the sole negligence of the vendor for its own acts or omissions or those of its employees or anyone else acting on its behalf. However, this exclusion does not apply to:
    - (i) The exceptions contained in Subparagraphs (d) or (f); or
    - (ii) Such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products.
- (2) This insurance does not apply to any insured person or organization from whom you have acquired such products, or any ingredient, part or container, entering into, accompanying or containing such products.

### b. Lessors Of Equipment

- (1) Any person or organization from whom you lease equipment; but only with respect to their liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your maintenance, operation or use of equipment leased to you by such person or organization.

- (2) With respect to the insurance afforded to these additional insureds, this insurance does not apply to any "occurrence" which takes place after you cease to lease that equipment.

**c. Lessors Of Land Or Premises**

- (1) Any person or organization from whom you lease land or premises, but only with respect to liability arising out of the ownership, maintenance or use of that part of the land or premises leased to you.
- (2) With respect to the insurance afforded to these additional insureds, this insurance does not apply to:
  - (a) Any "occurrence" which takes place after you cease to lease that land or be a tenant in that premises; or
  - (b) Structural alterations, new construction or demolition operations performed by or on behalf of such person or organization.

**d. Architects, Engineers Or Surveyors**

- (1) Any architect, engineer, or surveyor, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:
  - (a) In connection with your premises; or
  - (b) In the performance of your ongoing operations performed by you or on your behalf.
- (2) With respect to the insurance afforded to these additional insureds, the following additional exclusion applies:
 

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or the failure to render any professional services by or for you, including:

  - (a) The preparing, approving, or failure to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, designs or drawings and specifications; or
  - (b) Supervisory, inspection, architectural or engineering activities.

**e. Permits Issued By State Or Political Subdivisions**

- (1) Any state or political subdivision, but only with respect to operations performed by you or on your behalf for which the state or political subdivision has issued a permit.
- (2) With respect to the insurance afforded to these additional insureds, this insurance does not apply to:
  - (a) "Bodily injury", "property damage" or "personal and advertising injury" arising out of operations performed for the state or municipality; or
  - (b) "Bodily injury" or "property damage" included within the "products-completed operations hazard".

**f. Any Other Party**

- (1) Any other person or organization who is not an insured under Paragraphs a. through e. above, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:
  - (a) In the performance of your ongoing operations;
  - (b) In connection with your premises owned by or rented to you; or
  - (c) In connection with "your work" and included within the "products-completed operations hazard", but only if
    - (i) The written contract or written agreement requires you to provide such coverage to such additional insured; and
    - (ii) This Coverage Part provides coverage for "bodily injury" or "property damage" included within the "products-completed operations hazard".
- (2) With respect to the insurance afforded to these additional insureds, this insurance does not apply to:
 

"Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

## BUSINESS LIABILITY COVERAGE FORM

- (a) The preparing, approving, or failure to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, designs or drawings and specifications; or
- (b) Supervisory, inspection, architectural or engineering activities.

The limits of insurance that apply to additional insureds are described in Section D. – Limits Of Insurance.

How this insurance applies when other insurance is available to an additional insured is described in the Other Insurance Condition in Section E. – Liability And Medical Expenses General Conditions.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

### D. LIABILITY AND MEDICAL EXPENSES LIMITS OF INSURANCE

#### 1. The Most We Will Pay

The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

- a. Insureds;
- b. Claims made or "suits" brought; or
- c. Persons or organizations making claims or bringing "suits".

#### 2. Aggregate Limits

The most we will pay for:

- a. Damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard" is the Products-Completed Operations Aggregate Limit shown in the Declarations.
- b. Damages because of all other "bodily injury", "property damage" or "personal and advertising injury", including medical expenses, is the General Aggregate Limit shown in the Declarations.

This General Aggregate Limit applies separately to each of your "locations" owned by or rented to you.

"Location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway or right-of-way of a railroad.

This General Aggregate limit does not apply to "property damage" to premises while rented to you or temporarily occupied by you with permission of the owner, arising out of fire, lightning or explosion.

#### 3. Each Occurrence Limit

Subject to 2.a. or 2.b. above, whichever applies, the most we will pay for the sum of all damages because of all "bodily injury", "property damage" and medical expenses arising out of any one "occurrence" is the Liability and Medical Expenses Limit shown in the Declarations.

The most we will pay for all medical expenses because of "bodily injury" sustained by any one person is the Medical Expenses Limit shown in the Declarations.

#### 4. Personal And Advertising Injury Limit

Subject to 2.b. above, the most we will pay for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization is the Personal and Advertising Injury Limit shown in the Declarations.

#### 5. Damage To Premises Rented To You Limit

The Damage To Premises Rented To You Limit is the most we will pay under Business Liability Coverage for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, lightning or explosion, while rented to you or temporarily occupied by you with permission of the owner.

In the case of damage by fire, lightning or explosion, the Damage to Premises Rented To You Limit applies to all damage proximately caused by the same event, whether such damage results from fire, lightning or explosion or any combination of these.

#### 6. How Limits Apply To Additional Insureds

The most we will pay on behalf of a person or organization who is an additional insured under this Coverage Part is the lesser of:

- a. The limits of insurance specified in a written contract, written agreement or permit issued by a state or political subdivision; or
- b. The Limits of Insurance shown in the Declarations.

Such amount shall be a part of and not in addition to the Limits of Insurance shown in the Declarations and described in this Section.



If more than one limit of insurance under this policy and any endorsements attached thereto applies to any claim or "suit", the most we will pay under this policy and the endorsements is the single highest limit of liability of all coverages applicable to such claim or "suit". However, this paragraph does not apply to the Medical Expenses limit set forth in Paragraph 3. above.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

## **E. LIABILITY AND MEDICAL EXPENSES GENERAL CONDITIONS**

### **1. Bankruptcy**

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

### **2. Duties In The Event Of Occurrence, Offense, Claim Or Suit**

#### **a. Notice Of Occurrence Or Offense**

You or any additional insured must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

- (1) How, when and where the "occurrence" or offense took place;
- (2) The names and addresses of any injured persons and witnesses; and
- (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

#### **b. Notice Of Claim**

If a claim is made or "suit" is brought against any insured, you or any additional insured must:

- (1) Immediately record the specifics of the claim or "suit" and the date received; and
- (2) Notify us as soon as practicable.

You or any additional insured must see to it that we receive a written notice of the claim or "suit" as soon as practicable.

#### **c. Assistance And Cooperation Of The Insured**

You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
- (2) Authorize us to obtain records and other information;
- (3) Cooperate with us in the investigation, settlement of the claim or defense against the "suit"; and
- (4) Assist us, upon our request, in the enforcement of any right against any person or organization that may be liable to the insured because of injury or damage to which this insurance may also apply.

#### **d. Obligations At The Insured's Own Cost**

No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

#### **e. Additional Insured's Other Insurance**

If we cover a claim or "suit" under this Coverage Part that may also be covered by other insurance available to an additional insured, such additional insured must submit such claim or "suit" to the other insurer for defense and indemnity.

However, this provision does not apply to the extent that you have agreed in a written contract, written agreement or permit that this insurance is primary and non-contributory with the additional insured's own insurance.

#### **f. Knowledge Of An Occurrence, Offense, Claim Or Suit**

Paragraphs a. and b. apply to you or to any additional insured only when such "occurrence", offense, claim or "suit" is known to:

- (1) You or any additional insured that is an individual;
- (2) Any partner, if you or an additional insured is a partnership;
- (3) Any manager, if you or an additional insured is a limited liability company;
- (4) Any "executive officer" or insurance manager, if you or an additional insured is a corporation;
- (5) Any trustee, if you or an additional insured is a trust; or
- (6) Any elected or appointed official, if you or an additional insured is a political subdivision or public entity.

## BUSINESS LIABILITY COVERAGE FORM

This Paragraph f. applies separately to you and any additional insured.

### 3. Financial Responsibility Laws

- a. When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, the insurance provided by the policy for "bodily injury" liability and "property damage" liability will comply with the provisions of the law to the extent of the coverage and limits of insurance required by that law.
- b. With respect to "mobile equipment" to which this insurance applies, we will provide any liability, uninsured motorists, underinsured motorists, no-fault or other coverage required by any motor vehicle law. We will provide the required limits for those coverages.

### 4. Legal Action Against Us

No person or organization has a right under this Coverage Form:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Form unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this insurance or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

### 5. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this policy to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom a claim is made or "suit" is brought.

### 6. Representations

#### a. When You Accept This Policy

By accepting this policy, you agree:

- (1) The statements in the Declarations are accurate and complete;
- (2) Those statements are based upon representations you made to us; and

- (3) We have issued this policy in reliance upon your representations.

### b. Unintentional Failure To Disclose Hazards

If unintentionally you should fail to disclose all hazards relating to the conduct of your business at the inception date of this Coverage Part, we shall not deny any coverage under this Coverage Part because of such failure.

### 7. Other Insurance

If other valid and collectible insurance is available for a loss we cover under this Coverage Part, our obligations are limited as follows:

#### a. Primary Insurance

This insurance is primary except when b. below applies. If other insurance is also primary, we will share with all that other insurance by the method described in c. below.

#### b. Excess Insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

##### (1) Your Work

That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

##### (2) Premises Rented To You

That is fire, lightning or explosion insurance for premises rented to you or temporarily occupied by you with permission of the owner;

##### (3) Tenant Liability

That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner;

##### (4) Aircraft, Auto Or Watercraft

If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section A. – Coverages.

##### (5) Property Damage To Borrowed Equipment Or Use Of Elevators

If the loss arises out of "property damage" to borrowed equipment or the use of elevators to the extent not subject to Exclusion k. of Section A. – Coverages.

**(6) When You Are Added As An Additional Insured To Other Insurance**

That is other insurance available to you covering liability for damages arising out of the premises or operations, or products and completed operations, for which you have been added as an additional insured by that insurance; or

**(7) When You Add Others As An Additional Insured To This Insurance**

That is other insurance available to an additional insured.

However, the following provisions apply to other insurance available to any person or organization who is an additional insured under this Coverage Part:

**(a) Primary Insurance When Required By Contract**

This insurance is primary if you have agreed in a written contract, written agreement or permit that this insurance be primary. If other insurance is also primary, we will share with all that other insurance by the method described in c. below.

**(b) Primary And Non-Contributory To Other Insurance When Required By Contract**

If you have agreed in a written contract, written agreement or permit that this insurance is primary and non-contributory with the additional insured's own insurance, this insurance is primary and we will not seek contribution from that other insurance.

Paragraphs (a) and (b) do not apply to other insurance to which the additional insured has been added as an additional insured.

When this insurance is excess, we will have no duty under this Coverage Part to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

**c. Method Of Sharing**

If all the other insurance permits contribution by equal shares, we will follow this method also. Under this approach, each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

**8. Transfer Of Rights Of Recovery Against Others To Us**

**a. Transfer Of Rights Of Recovery**

If the insured has rights to recover all or part of any payment, including Supplementary Payments, we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them. This condition does not apply to Medical Expenses Coverage.

**b. Waiver Of Rights Of Recovery (Waiver Of Subrogation)**

If the insured has waived any rights of recovery against any person or organization for all or part of any payment, including Supplementary Payments, we have made under this Coverage Part, we also waive that right, provided the insured waived their rights of recovery against such person or organization in a contract, agreement or permit that was executed prior to the injury or damage.

## BUSINESS LIABILITY COVERAGE FORM

### F. OPTIONAL ADDITIONAL INSURED COVERAGES

If listed or shown as applicable in the Declarations, one or more of the following Optional Additional Insured Coverages also apply. When any of these Optional Additional Insured Coverages apply, Paragraph 6. (Additional Insureds When Required by Written Contract, Written Agreement or Permit) of Section C., Who Is An Insured, does not apply to the person or organization shown in the Declarations. These coverages are subject to the terms and conditions applicable to Business Liability Coverage in this policy, except as provided below:

#### 1. Additional Insured - Designated Person Or Organization

WHO IS AN INSURED under Section C. is amended to include as an additional insured the person(s) or organization(s) shown in the Declarations, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:

- a. In the performance of your ongoing operations; or
- b. In connection with your premises owned by or rented to you.

#### 2. Additional Insured - Managers Or Lessors Of Premises

- a. WHO IS AN INSURED under Section C. is amended to include as an additional insured the person(s) or organization(s) shown in the Declarations as an Additional Insured - Designated Person Or Organization; but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Declarations.
- b. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

- (1) Any "occurrence" which takes place after you cease to be a tenant in that premises; or
- (2) Structural alterations, new construction or demolition operations performed by or on behalf of such person or organization.

#### 3. Additional Insured - Grantor Of Franchise

WHO IS AN INSURED under Section C. is amended to include as an additional insured the person(s) or organization(s) shown in the Declarations as an Additional Insured - Grantor Of Franchise, but only with respect to their liability as grantor of franchise to you.

#### 4. Additional Insured - Lessor Of Leased Equipment

- a. WHO IS AN INSURED under Section C. is amended to include as an additional insured the person(s) or organization(s) shown in the Declarations as an Additional Insured - Lessor of Leased Equipment, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your maintenance, operation or use of equipment leased to you by such person(s) or organization(s).
- b. With respect to the insurance afforded to these additional insureds, this insurance does not apply to any "occurrence" which takes place after you cease to lease that equipment.

#### 5. Additional Insured - Owners Or Other Interests From Whom Land Has Been Leased

- a. WHO IS AN INSURED under Section C. is amended to include as an additional insured the person(s) or organization(s) shown in the Declarations as an Additional Insured - Owners Or Other Interests From Whom Land Has Been Leased, but only with respect to liability arising out of the ownership, maintenance or use of that part of the land leased to you and shown in the Declarations.
- b. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

- (1) Any "occurrence" that takes place after you cease to lease that land; or
- (2) Structural alterations, new construction or demolition operations performed by or on behalf of such person or organization.

#### 6. Additional Insured - State Or Political Subdivision - Permits

- a. WHO IS AN INSURED under Section C. is amended to include as an additional insured the state or political subdivision shown in the Declarations as an Additional

Insured – State Or Political Subdivision - Permits, but only with respect to operations performed by you or on your behalf for which the state or political subdivision has issued a permit.

- b. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

- (1) "Bodily injury", "property damage" or "personal and advertising injury" arising out of operations performed for the state or municipality; or
- (2) "Bodily injury" or "property damage" included in the "product-completed operations" hazard.

**7. Additional Insured – Vendors**

- a. WHO IS AN INSURED under Section C. is amended to include as an additional insured the person(s) or organization(s) (referred to below as vendor) shown in the Declarations as an Additional Insured - Vendor, but only with respect to "bodily injury" or "property damage" arising out of "your products" which are distributed or sold in the regular course of the vendor's business and only if this Coverage Part provides coverage for "bodily injury" or "property damage" included within the "products-completed operations hazard".

- b. The insurance afforded to the vendor is subject to the following additional exclusions:

- (1) This insurance does not apply to:

- (a) "Bodily injury" or "property damage" for which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the vendor would have in the absence of the contract or agreement;
- (b) Any express warranty unauthorized by you;
- (c) Any physical or chemical change in the product made intentionally by the vendor;
- (d) Repackaging, unless unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from the manufacturer, and then repackaged in the original container;

- (e) Any failure to make such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;

- (f) Demonstration, installation, servicing or repair operations, except such operations performed at the vendor's premises in connection with the sale of the product;

- (g) Products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor; or

- (h) "Bodily injury" or "property damage" arising out of the sole negligence of the vendor for its own acts or omissions or those of its employees or anyone else acting on its behalf. However, this exclusion does not apply to:

- (i) The exceptions contained in Subparagraphs (d) or (f); or

- (ii) Such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products.

- (2) This insurance does not apply to any insured person or organization from whom you have acquired such products, or any ingredient, part or container, entering into, accompanying or containing such products.

**8. Additional Insured – Controlling Interest**

WHO IS AN INSURED under Section C. is amended to include as an additional insured the person(s) or organization(s) shown in the Declarations as an Additional Insured – Controlling Interest, but only with respect to their liability arising out of:

- a. Their financial control of you; or
- b. Premises they own, maintain or control while you lease or occupy these premises.

## BUSINESS LIABILITY COVERAGE FORM

This insurance does not apply to structural alterations, new construction and demolition operations performed by or for that person or organization.

### 9. Additional Insured – Owners, Lessees Or Contractors – Scheduled Person Or Organization

a. WHO IS AN INSURED under Section C. is amended to include as an additional insured the person(s) or organization(s) shown in the Declarations as an Additional Insured – Owner, Lessees Or Contractors, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:

(1) In the performance of your ongoing operations for the additional insured(s); or

(2) In connection with "your work" performed for that additional insured and included within the "products-completed operations hazard", but only if this Coverage Part provides coverage for "bodily injury" or "property damage" included within the "products-completed operations hazard".

b. With respect to the insurance afforded to these additional insureds, this insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

(1) The preparing, approving, or failure to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, designs or drawings and specifications; or

(2) Supervisory, inspection, architectural or engineering activities.

### 10. Additional Insured – Co-Owner Of Insured Premises

WHO IS AN INSURED under Section C. is amended to include as an additional insured the person(s) or Organization(s) shown in the Declarations as an Additional Insured – Co-Owner Of Insured Premises, but only with respect to their liability as co-owner of the premises shown in the Declarations.

The limits of insurance that apply to additional insureds are described in Section D. – Limits Of Insurance.

How this insurance applies when other insurance is available to an additional insured is described in the Other Insurance Condition in Section E. – Liability And Medical Expenses General Conditions.

## G. LIABILITY AND MEDICAL EXPENSES DEFINITIONS

1. "Advertisement" means the widespread public dissemination of information or images that has the purpose of inducing the sale of goods, products or services through:

- a. (1) Radio;
- (2) Television;
- (3) Billboard;
- (4) Magazine;
- (5) Newspaper;

b. The Internet, but only that part of a web site that is about goods, products or services for the purposes of inducing the sale of goods, products or services; or

c. Any other publication that is given widespread public distribution.

However, "advertisement" does not include:

a. The design, printed material, information or images contained in, on or upon the packaging or labeling of any goods or products; or

b. An interactive conversation between or among persons through a computer network.

2. "Advertising idea" means any idea for an "advertisement".

3. "Asbestos hazard" means an exposure or threat of exposure to the actual or alleged properties of asbestos and includes the mere presence of asbestos in any form.

4. "Auto" means a land motor vehicle, trailer or semi-trailer designed for travel on public roads, including any attached machinery or equipment. But "auto" does not include "mobile equipment".

5. "Bodily injury" means physical:

- a. Injury;
- b. Sickness; or
- c. Disease

sustained by a person and, if arising out of the above, mental anguish or death at any time.

6. "Coverage territory" means:

- a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
- b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in a. above;
- c. All other parts of the world if the injury or damage arises out of:
  - (1) Goods or products made or sold by you in the territory described in a. above;
  - (2) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; or
  - (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

provided the Insured's responsibility to pay damages is determined in the United States of America (including its territories and possessions), Puerto Rico or Canada, in a "suit" on the merits according to the substantive law in such territory, or in a settlement we agree to.

- 7. "Electronic data" means information, facts or programs:
  - a. Stored as or on;
  - b. Created or used on; or
  - c. Transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.
- 8. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
- 9. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
- 10. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.
- 11. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
  - a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

- a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
- b. Your fulfilling the terms of the contract or agreement.

**12. "Insured contract" means:**

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire, lightning or explosion to premises while rented to you or temporarily occupied by you with permission of the owner is subject to the Damage To Premises Rented To You limit described in Section D. – Liability and Medical Expenses Limits of Insurance.
- b. A sidetrack agreement;
- c. Any easement or license agreement, including an easement or license agreement in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. Any obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement; or
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. includes that part of any contract or agreement that indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing.

However, Paragraph f. does not include that part of any contract or agreement:

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- (1) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
    - (a) Preparing, approving or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders, designs or drawings and specifications; or
    - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
  - (2) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (1) above and supervisory, inspection, architectural or engineering activities.
13. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
14. "Loading or unloading" means the handling of property:
- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
  - b. While it is in or on an aircraft, watercraft or "auto"; or
  - c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;
- but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".
15. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:
- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
  - b. Vehicles maintained for use solely on or next to premises you own or rent;
  - c. Vehicles that travel on crawler treads;
  - d. Vehicles, whether self-propelled or not, on which are permanently mounted:
- (1) Power cranes, shovels, loaders, diggers or drills; or
  - (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
- e. Vehicles not described in a., b., c., or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
- (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
  - (2) Cherry pickers and similar devices used to raise or lower workers;
- f. Vehicles not described in a., b., c., or d. above maintained primarily for purposes other than the transportation of persons or cargo.
- However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":
- (1) Equipment, of at least 1,000 pounds gross vehicle weight, designed primarily for:
    - (a) Snow removal;
    - (b) Road maintenance, but not construction or resurfacing; or
    - (c) Street cleaning;
  - (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
  - (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.
16. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
17. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
- a. False arrest, detention or imprisonment;
  - b. Malicious prosecution;



- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that the person occupies, committed by or on behalf of its owner, landlord or lessor;
  - d. Oral, written or electronic publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
  - e. Oral, written or electronic publication of material that violates a person's right of privacy;
  - f. Copying, in your "advertisement", a person's or organization's "advertising idea" or style of "advertisement";
  - g. Infringement of copyright, slogan, or title of any literary or artistic work, in your "advertisement"; or
  - h. Discrimination or humiliation that results in injury to the feelings or reputation of a natural person.
18. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
19. "Products-completed operations hazard";
- a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
    - (1) Products that are still in your physical possession; or
    - (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed to be completed at the earliest of the following times:
      - (a) When all of the work called for in your contract has been completed.
      - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
      - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
- Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
- The "bodily injury" or "property damage" must occur away from premises you own or rent, unless your business includes the selling, handling or distribution of "your product" for consumption on premises you own or rent.
- b. Does not include "bodily injury" or "property damage" arising out of:
    - (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured; or
    - (2) The existence of tools, uninstalled equipment or abandoned or unused materials.
20. "Property damage" means:
- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
  - b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of "occurrence" that caused it.
- As used in this definition, "electronic data" is not tangible property.
21. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
  - b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.
22. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.
23. "Volunteer worker" means a person who:
- a. Is not your "employee";

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- b. Donates his or her work;
  - c. Acts at the direction of and within the scope of duties determined by you; and
  - d. Is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.
24. "Your product":
- a. Means:
    - (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
      - (a) You;
      - (b) Others trading under your name; or
      - (c) A person or organization whose business or assets you have acquired; and
    - (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.
  - b. Includes:
    - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
    - (2) The providing of or failure to provide warnings or instructions.
  - c. Does not include vending machines or other property rented to or located for the use of others but not sold.
25. "Your work":
- a. Means:
    - (1) Work or operations performed by you or on your behalf; and
    - (2) Materials, parts or equipment furnished in connection with such work or operations.
  - b. Includes:
    - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and
    - (2) The providing of or failure to provide warnings or instructions.