

## **BUYING/SELLING COMMERCIAL REAL ESTATE, PART 1 & PART 2**

First Run Broadcast: June 25 & 26, 2019

1:00 p.m. E.T./12:00 p.m. C.T./11:00 a.m. M.T./10:00 a.m. P.T. **(60 minutes each day)**

Commercial real estate is in generally robust, with office and industrial space strong and only retail space lagging because of the continuing transition from bricks-and-mortar store fronts to digital commerce. Negotiating and drafting the sale or exchange of commercial real estate is a complex set of tasks. Reps and warranties have become more extensive and exacting in detail. Financing contingencies have become lengthy and surpassingly complex because of tighter underwriting standards. Due diligence has become lengthier, more invasive and costlier – or barely permitted at all, in particularly “hot” markets. This program will discuss the major components of commercial real estate buy/sell agreements and negotiating other operative documents.

### **Day 1 – June 25, 2019:**

- Planning opportunities and challenges for real estate and real estate entrepreneurs
- Planning for lifetime giving of fractional interests in real estate
- Asset protection techniques for real estate assets
- Issues related to restructured real estate assets
- Planning for family properties – QPRTs, SERTs, and LLC techniques

### **Day 2 – June 26, 2019:**

- Unique challenges of planning for liquidity with illiquid assets
- Valuation discount issues and planning in a rising but volatile market
- Value freezing techniques using LLCs
- Grantor Retained Annuity Trust (GRAT), sales to defective grantor trusts, and sales of self-cancelling installment notes
- Charitable giving techniques for real estate

### **Speakers:**

**John S. Hollyfield** is of counsel and a former partner in the Houston office Norton Rose Fulbright, LLP. He has more than 40 years’ experience in real estate law practice. He formerly served as chair of the ABA Real Property, Probate and Trust Law Section, president of the American College of Real Estate Lawyers, and chair of the Anglo-American Real Property Institute. He has been named a "Texas Super Lawyer" in Real Estate Law by *Texas Monthly* magazine and is listed in *Who’s Who in American Law*. He is co-editor of *Modern Banking and Lending Forms* (4<sup>th</sup> Edition), published by Warren, Gorham & Lamont. He received his B.B.A. from the University of Texas and his LL.B. from the University of Texas School of Law.

**Richard R. Goldberg** is a retired partner, resident in the Philadelphia office of Ballard Spahr, LLP, where he established an extensive real estate practice, including development, financing, leasing, and acquisition. Earlier in his career, he served as vice

president and associate general counsel of The Rouse Company for 23 years. He is past president of the American College of Real Estate Lawyers, past chair of the Anglo-American Real Property Institute, and past chair of the International Council of Shopping Centers Law Conference. Mr. Goldberg is currently a Fellow of the American College of Mortgage Attorneys and is a member of the American Law Institute. Mr. Goldberg received his B.A. from Pennsylvania State University and his LL.B. from the University of Maryland School of Law.

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### Buying & Selling Commercial Real Estate, Part 1

#### Teleseminar

June 25, 2019

1:00PM - 2:00PM

1.0 MCLE GENERAL CREDITS

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### Buying & Selling Commercial Real Estate, Part 2

#### Teleseminar

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1:00PM - 2:00PM

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Seminar Title: Buying & Selling Commercial Real Estate, Part 2

Location: Teleseminar - LIVE

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Program Minutes: 60 General

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## **BUYING AND SELLING COMMERCIAL REAL ESTATE, PART 1 AND PART 2**

### **Compendium of Material:**

Checklists

Letter of Intent Background Article

Sample Purchase and Sale Agreement

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## CHECKLIST

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### A. ENTITY SELECTION

1. Discuss form of acquiring entity: corporation, Partnership (general or limited), Limited Liability Company, etc.
2. Review effect of local taxation including transfer taxes.

### B. TITLE

1. Review of owner's last title report (procure all underlying documents.)
2. Review last know survey. Is ALTA as-built?
3. Order and negotiate title insurance and new survey. Specify endorsements:
  - a. comprehensive;
  - b. contiguity and access:
  - c. survey;
  - d. special endorsements (sub-division, single tax lot, zoning 3.0 or 3.1);
  - e. other endorsements;
  - f. special services (NY style closing).
4. Abstract all underlying covenants, seemingly unperformed conditions, encumbrances and restrictions.

### C. ENGINEERING AND ENVIRONMENTAL

1. Structural engineering report; special reviews; cost of remediation estimates; soils reports; utility availability; mechanical and electrical review.
2. Phase I environmental review; Phase II; is there remediation?
3. Asbestos Survey.
4. Radon Test.
5. Code Compliance; Agency check; report of code consultant; flood zone.
6. Air Quality.
7. Parking Requirements (see REA, leases, zoning).
8. Certificates of Occupancy.
9. Special Governmental Requirements (Cal. Coastal Commission, etc.)

### D. LEASES

1. See attached summary (tailored for specific lease form, if possible).
2. Rent Roll (all economics: utilities, HVAC, CAM, Merchants Associations, other charges.)
3. Exclusives; caps on CAM; restrictions on use of common areas; go-dark and co-tenancy clauses.
4. Estoppels.



- E. REA'S
  - 1. Summary
  - 2. Operating Covenants.
  - 3. Continuing covenants and agreements.
  - 4. Restrictions on transfer of title; of covenants.
  - 5. Estoppels.
  - 6. Condominium documents (if any).
  
- F. CORRESPONDENCE
  - 1. Check each tenant file for potential claims and offsets.
  - 2. Mail general correspondence and security correspondence.
  
- G. EXISTING FINANCING
  - 1. Does it permit assumption or is it due on sale?
  - 2. Summarize.
  - 3. Estoppels.
  
- H. SELLER'S RIGHTS PRIOR TO CLOSING
  - 1. Lease execution.
  - 2. Service contracts.
  - 3. Supplies and materials.
  - 4. Wear and tear.
  - 5. Repairs.
  - 6. Code Violations.
  
- I. EMPLOYEES
  - 1. Retain or discharge.
  - 2. Are benefits plans funded and transferable?
  - 3. Union vs. Non-Union; are benefits funded through union welfare plan? Is the plan underfunded?
  - 4. More than 50 employees, apply Federal Plan Closing Law.
  
- J. BOOKS AND RECORDS
  - 1. Gain access and inspect all books and records, tax returns, partnership returns, and other financial corroborating information.
  
- K. MARKET REVIEW
  - 1. Obtain seller's market studies.
  - 2. Perform own study.
  
- L. PRORATIONS
  - 1. Minimum and Percentage Rents (percentage rent on days or sales basis).
  - 2. CAM adjustments (on days or expense incurred basis).
  - 3. Brokers commissions.
  - 4. Taxes (billed in advance or arrears; local custom).
  - 5. Insurance premiums.

6. Utility bills.
7. Transfer taxes and other closing costs.
8. Other income.
9. Accounts Receivable.
10. Merchants' Association dues.
11. Employee wages and benefits; pay off or accrue?
12. Service Contracts.
13. Supplies.
14. Loan Assumption Fees.
15. Title Insurance and Attorneys Fees.
16. Environmental Inspections and Other Tests.
17. Escrow Fees.
18. Transfer and Other Closing Taxes.

Center Name:

Date:

Tenant Trade Name:

Person Reviewing:

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**LEASE REVIEW FORM**

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Section

Tenant's Corp./Indiv. Name:

State of Incorp./Formation:

Date of Lease:

Date(s)/Name(s) of Amend/Assign.:

Floor Area of Premises: \_\_\_\_\_ square feet

TERM:

Commencement Date:

Termination Date:

Early termination rights/kickouts: \_\_\_\_\_ **NONE** or

Describe:

Renewal Options:    Length \_\_\_\_\_ yrs

                                 Length \_\_\_\_\_ yrs

                                 Length \_\_\_\_\_ yrs

PURCHASE RIGHTS/RIGHTS OF FIRST REFUSAL: \_\_\_\_\_

OPENING COVENANTS - CONTINUOUS OPERATIONS (?)

USE CLAUSE.

Center Name:

Tenant Trade Name:

ANNUAL BASIC RENTAL Current \$\_\_\_\_\_psf/yr

Graduations (Include renewal graduations):

Rental Years \_\_\_\_\_ \$\_\_\_\_\_psf/yr

Rental Years \_\_\_\_\_ \$\_\_\_\_\_psf/yr

Rental Years \_\_\_\_\_ \$\_\_\_\_\_psf/yr

ANNUAL PERCENTAGE RENT Current \_\_\_\_\_% over \$\_\_\_\_\_psf

Graduations (Include renewal graduations):

Rental Years \_\_\_\_\_% \$\_\_\_\_\_psf/yr

Rental Years \_\_\_\_\_% \$\_\_\_\_\_psf/yr

Rental Years \_\_\_\_\_% \$\_\_\_\_\_psf/yr

OFFSETS AGAINST PERCENTAGE RENT Describe:

UNPAID CONSTRUCTION ALLOWANCE

RENTAL YEAR Standard: 12 mos. starting first day of Term. Deviation from standard:  
\_\_\_\_\_ **None** or Describe: \_\_\_\_\_

SUBORDINATION Standard: Automatically subordinate to

SUBORDINATION Standard: Automatically subordinate to existing and future  
Mortgage. Tenant agrees to unilateral subordination of mortgage to lease. Deviation  
from standard: **None** or Describe:

LIMITATION ON RIGHT OF RECOVERY Standard: Landlord's liability limited to  
interest in Shopping Center Area and satisfied out of proceeds of sale. Inures to benefit  
of Landlord's successors including Mortgagee. Deviation from standard: \_\_\_\_\_ **None** or  
Describe:

GUARANTY Guarantor Name and Address:

STORAGE LEASE \_\_\_\_\_ **None** or Date: \_\_\_\_\_

State terms: Term:

Square feet: \_\_\_\_\_ Rent: \$\_\_\_\_\_ per \_\_\_\_\_

Other:

EXCLUSIVES: NONE OR LIST

CO-TENANCIES: OPENING  
ON-GOING

ASSIGNMENT RIGHTS.

RECAPTURE RIGHTS?

## PURCHASE AND SALE AGREEMENT – ISSUES TO CONSIDER

### PROPERTY BEING ACQUIRED

- Legal description of land
- Improvements; appurtenances
- Personal property
- Intangible property
- Leases and rents
- Minerals; water rights
- Excluded property
- Utility capacity; development rights

### PURCHASE PRICE

- Cash
- Assumption/subject to existing debt
- New loan
- Seller financing
- Subordinate debt

### EARNEST MONEY DEPOSIT

- Amount
- Escrow holder
- Form - cash, letter of credit, other
- Independent consideration
- Refundability

### DUE DILIGENCE

- Length of time to conduct
- Title/survey
- Rent roll
- Zoning
- Condition of property
- UCC search
- Service contracts
- Financial review
- Insurance
- Government records
- Environmental
- Plans/specifications
- Appraisal

## **OBJECTION/CURE PERIOD**

- Purchaser's deadline to notify
- Seller's obligation to respond/cure
- Termination of contract
- Silence is approval

## **SELLERS REPRESENTATIONS AND WARRANTIES**

- As is condition, except as noted
- Cover things that Purchaser can't independently identify without effort – authority, no litigation, no default, no pending condemnation
- Knowledge standard
- Remedy for breach
- Seller's obligation to update
- Survival

## **SELLER'S PRE-CLOSING UNDERTAKINGS**

- Leasing/operation
- Repair, maintenance, insurance
- Disclose changes

## **CONDITIONS PRECEDENT**

- New financing
- No material adverse change in condition of property or income
- No damage or condemnation
- Risk of loss
- Third party consents and approvals
- Permits
- Tenant estoppels

## **CLOSING**

- Selection/creation of entity to take title
- Warranty of title in deed
- Bill of Sale/Assignment
- Title policy coverages and endorsements
- Termination of contracts or employees
- Proration of taxes, operating expenses, rents, mortgage interest
- Transfer of tenant security deposits
- Allocation of closing costs
- Post closing income and expenses

- Leasing commissions
- Payment for incomplete tenant improvement

### **DEFAULT/REMEDIES**

- Seller – retain deposit or specific performance
- Purchaser – specific performance or damages
- Liquidated damages
- Attorneys' fees and court costs
- Lost opportunity costs

### **OTHER ISSUES**

- Commission on sale
- Assignability of contract
- Time is of the essence
- Waivers
- Indemnities

# LETTERS OF INTENT

J. S. Hollyfield

## Introduction

I want to acknowledge that Jesse Heath and Ed Peterson have graciously permitted me to borrow from the materials they prepared on this subject in connection with previous continuing legal education programs. Those materials are referenced in the Bibliography at the end of this paper.

How often when you are asked to prepare a letter of intent do you ask yourself or your client — do you really want to do this? Or, why don't we draft the operative agreements and negotiate those rather than a letter of intent? We all know the answer — the client wants to see if a deal can be made without spending too much time and money on negotiations that may lead nowhere. I doubt that answer alone justifies preparing the letter of intent or the risks involved, particularly to a seller, lender or landlord, should the "preliminary agreement" become an enforceable obligation. All too often, lawyers and their clients fail to appreciate the dangers inherent in a letter of intent until it is too late. See *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex.App.--Houston [1st. Dist.] 1987, writ ref'd n.r.e.).

## What is it?

A letter of intent is generally understood to be a preliminary statement of the more important business terms of a transaction and there is an expectation of the need for further and final documentation of that transaction. For our purposes, the terms "letter of intent", "memorandum of understanding", "gentleman's agreement", "agreement in principle", "terms sheet" and "heads of agreement" are synonymous. However, I prefer "letter of intent" because the title does not contain a word that is or implies agreement. Stephen Volk (see Bibliography) has described the letter of intent as "an invention of the devil and should be avoided at all costs". An English jurist had the following comment; "A gentleman's agreement is an agreement which is not an agreement, made between two persons neither of whom is a gentleman, whereby each expects the other to be strictly bound without himself being bound at all." Another author has said that it is the client's goal in entering into a letter of intent to bind the opposite party, but not himself. Likely, the other party to the letter has the same goal, but the name of the bound party is reversed.

Letters of intent are said to be useful in confirming to third parties (lenders, investors, partners, landlords) that a deal in principle has been reached. They also allow negotiators to identify and concentrate on resolving the open issues of a deal. In some instances the letter of intent provides for the property to be taken off the market for a period of time or bars one side from shopping the deal to third parties during an agreed period of negotiations.



Should the letter of intent be long or short, specific or general? My view is that less is best if you want to avoid being bound by the letter. I have seen lease letters of intent that are almost as long as the lease. The longer the letter of intent, the longer it takes to negotiate. An exception to this rule may be the loan commitment which is frequently considered to be a binding agreement, enforceable against the lender (but not usually enforceable against the borrower), subject only to memorializing the agreement in the loan documents. Seldom are there significant business terms left to be negotiated after a loan commitment is entered into.

### **Types of Letters**

Professor Farnsworth's article in the *Columbia Law Review* (see Bibliography) describes the typical letter of intent as falling into one of two categories. The first is an agreement with open terms. This type of letter sets out some terms by which the parties agree (explicitly or implicitly) to be bound. The parties also agree to negotiate on open terms to be included in an ultimate agreement for the transaction. The open terms to be negotiated can be specifically identified, or the parties may acknowledge only that there are some unspecified terms to be negotiated. Specificity is better if one party hopes a court will fill in the open terms should negotiations fail. If the letter of intent is enforceable (and we will get to this later), liability under it may arise if the parties fail to negotiate. If they do negotiate, but cannot agree, the parties are bound by what they agreed to and the open matters are subject to court determination, where possible. The problems inherent with such agreement include one, whether or not the parties intended to be bound, and two, the likelihood of a court being able to adequately determine the parties intent on the open matters. The mere reference in this type of letter to the need for and expectation of a mutually acceptable ultimate agreement for the transaction may or may not resolve the question of the parties intent.

The other type of preliminary agreement discussed by Professor Farnsworth is one that contains the substantive terms of the transaction, but the parties have not agreed to be bound by those terms. This is basically an agreement to conduct negotiations and it is likely that no one is bound to any point. An interesting issue is the obligation of the parties to conduct negotiations with each other. What happens if one party fails to negotiate or chooses to negotiate with a third party? It seems unrealistic to believe that parties to a letter of intent would not want to be bound by some of its terms since a totally non-binding letter of intent is of no apparent value, but it may have some persuasive effect for some period of time.

### **Binding or Non-Binding**

For a letter of intent to be a binding contract, it must contain the essential terms of the contract and the parties must intend to be bound by them. Certainly, if the letter of intent involves real estate, the letter must fulfill the requirements of

the Statute of Frauds. Therefore, one way to ensure that a letter of intent is not enforceable as a contract is to omit an essential term or to fail to satisfy the Statute of Frauds. Essential terms will vary from deal to deal and I doubt that there is an absolutely complete list of essential terms for any transaction. With respect to real estate, it is probably desirable to have an inadequate legal description if the parties want to avoid enforcement of the letter based on a violation of the Statute of Frauds. The question of what the parties intended by entering into the letter is not easily answered where the letter of intent does not specify if the parties are to be bound in whole or in part. Much of the case law on letters of intent has been developed as a result of the courts attempting to discern the parties intent. *Scott v. Ingle*, 489 S.W.2d 554 (Tex. 1972) is the leading Texas case on determining the intent of the parties in a transaction where some terms were specifically agreed upon, but other aspects of the transaction were not documented. The Court held that the intent of the parties was a question of fact, not law. Therefore, a jury will usually decide intent and their decisions defy categorization or simple analysis. Stephen Volk has observed that the cases dealing with the intent of the parties who have entered into a letter of intent is “all over the place”.

Language that has been held to indicate an intent to create a binding obligation includes:

- o Please indicate your acceptance on the enclosed copy of this letter and return to us.
- o The parties will execute a definitive lease in the usual standard form of business lease in this community.
- o Please acknowledge your intent to proceed with the leasing of the captioned store under the above terms, conditions and understanding by signing the enclosed copy of this letter and returning it within 10 days from the date hereof.
- o This letter is intended to set forth the terms upon which we and our nominee intend to negotiate and consummate an agreement.
- o The parties agree to use their best efforts to reach an agreement.

The following phrases have been held to indicate an intent not to create a binding obligation:

- o The outline of our future agreement.
- o This is a general understanding of the agreement.
- o When we have a draft we will discuss it and hopefully shall have a completed contract.

- o The validity of said proposed agreement is subject and conditioned upon the parties agreeing upon and reducing to writing all terms and conditions necessary and incidental to the validity of said proposed agreement.
- o If a lease upon the above terms and conditions has not been executed within 30 from the date hereof, both parties reserve the rights at anytime thereafter, but prior to the execution of such a lease, to terminate this offer.
- o The signatories to this letter confirm their intent to continue good faith discussions directed toward the creation of a formal written contract.

However, see *160 Chambers St. Realty Corp. v. Register of the City of New York*, 641 N.Y.S. 351 (App. Div. 1996). In *160 Chambers St.* the Court found a letter memorandum enforceable as a contract of sale even though the parties expected to sign a more formal agreement. The memorandum contained enough of the essential contract terms to constitute a contract and the missing terms (cash payment and due date of payment of purchase price) were supplied by the Court..

In addition to the content of the letters of intent, the courts often look at the subsequent conduct of the parties to the letter to determine if they intended to have an enforceable agreement by which each party is bound. A classic example would be the press release in the *Pennzoil v. Texaco* case. Another example would be the continuation of negotiations beyond a drop dead date stated in the letter of intent without formally extending that drop dead date in writing. In short, if you want to be bound by the letter, say so. If you don't want to be bound by the agreement, then say so. In the latter case the provision should cover any obligation to negotiate, the right to discontinue negotiations, a disclaimer of liability if negotiations terminate and a drop dead date for executing the definitive agreement, after which date all parties are relieved of their obligations.

Ed Peterson (See Bibliography) has suggested the following mutually exclusive clauses for use at the beginning of the letter of intent. Pick the clause that describes your situation and don't leave the issue open to doubt.

#### Binding

This letter constitutes the legal, binding and enforceable agreement of the parties hereto, with respect to the matters set forth herein and is intended by the parties to form a contract between the parties. The representatives of the parties that execute this letter have the power and authority to execute this letter agreement.

#### Non-Binding

This letter is not intended to be enforceable by or against, or in any manner binding upon, the undersigned parties, but is intended to be an outline of the major points to be negotiated between the parties as a part of a definitive agreement between the parties relating to the subject matter of this letter. Neither party shall have a good faith obligation to negotiate a definitive agreement, but each of the parties will endeavor to negotiate and execute a definitive agreement relating to the subject matter of this letter on or before \_\_\_\_\_, \_\_\_\_\_, and such negotiation and execution is a condition to the formation and enforceability of any agreement relating to the subject matter of this letter. Either party, in such party's sole and absolute discretion, may terminate the negotiations between the parties at any time, for any reason or for no reason, without any obligation of any kind to the non-terminating party.

#### Binding and Negotiable

The parties hereto intend this letter to be an outline of the major points to be negotiated between the parties to be included in a definitive agreement between the parties relating to the subject matter of this letter. The parties to this letter agree that each party shall have a good faith exclusive obligation to negotiate a definitive agreement concerning the subject matter set forth in this letter and each of the parties will use its best efforts to negotiate and execute a definitive agreement relating to the subject matter of this letter on or before \_\_\_\_\_, \_\_\_\_\_. **Alternative additional provisions: [Either party, in such party's sole and absolute discretion, may terminate the negotiations between the parties at any time, for any reason or for no reason without any obligation of any kind to the non-terminating party.] or [If either party fails to negotiate in good faith or to utilize its best efforts to negotiate and execute a definite agreement, the other party hereto may bring an action for damages against the failing party.]**

#### **Partially Binding Letter**

Admittedly, the totally non-binding letter of intent may not make for satisfactory negotiations. Therefore, it is not uncommon to divide the letter and make some provisions specifically binding, while other specified provisions are agreed not to be binding. Provisions of a letter of intent that are typically agreed to be binding are as follows:

- o Identification of brokers, amount of brokerage commissions and who pays.

- o A period of exclusive negotiations with the opposite party to the letter of intent.
- o Take the property off the market for a certain period of time.
- o Who pays particular costs and expenses.
- o Right of inspection and ability to conduct feasibility study.
- o Access to business information for purposes of due diligence and an obligation to return that information.
- o Preserve confidential information and general non-disclosure.
- o Indemnification.
- o No publicity.

Additionally, if the parties agree that certain provisions are binding, it may be necessary to establish a governing law for the enforcement of those provisions and remedies should there be a default with respect to the binding agreements. Note however, that in a typical letter of intent situation, specifically binding provisions may be unenforceable because there is a lack of consideration. It may well be that the partially binding letter of intent is no better than an option for which no consideration has been paid. Therefore, it may be desirable to recite and pay some specific consideration for the binding effect of the binding portions of a letter of intent.

### **Negotiation**

When the parties have negotiated a letter of intent that has some terms to be agreed upon, the next important legal issue is the obligation, if any, of the parties to negotiate in good faith for some period of time to attempt to reach closure on the open issues. Of course, the letter of intent could specifically state the obligation to negotiate in good faith, but the hard question is what happens if the letter of intent is silent. Citing *Weitzman v. Steinberg*, 638 S.W.2d 171 (Tex.App.--Dallas 1982, no writ), Jesse Heath concludes "Texas courts have been reluctant to enforce agreements to enter into negotiations because of the court's inability to determine what sort of contract the parties would have entered into had they completed their negotiations." However, the cases go the other way in other jurisdictions. Absent a special relationship, Texas courts will not imply a covenant of good faith and fair dealing as an obligation in contracts. *English v. Fischer*, 660 S.W.2d 521 (Tex. 1983). Again, however, that's not necessarily the case in states such as California. Jesse Heath has aptly observed that "the rule whereby good faith and fair dealing is implied does not deal with good faith in the formation or negotiation of a contract. The rule is concerned solely with good faith performance and good faith enforcement of a contract". Heath therefore argues that a letter of intent that is not enforceable because (i) it lacks essential

terms, and (ii) it is only an agreement to agree, and a Texas court should not imply any obligations to negotiate in good faith in that instance. Notwithstanding the likelihood that a Texas court should not imply any obligation to negotiate in good faith, I would be very concerned if a jury in Texas were allowed to hear evidence that notwithstanding that the letter of intent said further negotiations were contemplated, one of the parties either refused to negotiate or insisted on renegotiating terms that were apparently agreed upon at the time the letter was signed. Likewise, if the letter of intent states that it or the final documentation or both are subject to board or shareholder approvals, what happens if one party declines to seek that approval? There is case law in Texas that if a contract for the purchase of real property is subject to obtaining satisfactory financing, the buyer is obligated to make some effort to obtain financing absent a specific contract provision to the contrary. See *Foreca S.A. v. G.R.D. Development Company, Inc.*, 758 S.W.2d 744 (Tex. 1988). In short, don't allow a jury to consider these issues if you can help it. Or, stated another way, if your agreement says you are going to negotiate, it will be difficult to explain to a jury why you didn't enter into negotiations or submit the matter for board approval. Other inconsistent acts by the parties during negotiations following the signing of the letter of intent can create for the jury a perception of unfair dealing with subsequent bad results for (big judgment against) the "bad actor". Inconsistent acts include a refusal to negotiate, hard bargaining over non-essential terms, unreasonable proposals, failure to make disclosures of pertinent facts, conducting negotiations with a third party, renegeing on the deal (changing the price or essential term) and summarily breaking off negotiations.

### **Remedies**

Assuming there is a breakdown in negotiations after a letter of intent is signed, what causes of action may be pursued by the disappointed party. They include:

- o Breach of contract, assuming the letter of intent resulted in the formation of a contract, notwithstanding some open terms.
- o Specific performance if the contract involves real property. It is doubtful that a court would order specific performance of an agreement to conduct further negotiations.
- o Fraud or negligent misrepresentation.
- o Promissory estoppel.
- o Breach of implied or explicit duty to negotiate and/or to do so in good faith and with fair dealing.
- o Tortious interference with contractual relations. This is *Pennzoil v. Texaco*.

The damages to be recovered under these various causes of action may be limited to reliance damages rather than actual or consequential damages. Certainly, the letter of intent could specify the types of damages available in the event there is a breach of an enforceable contract. A complete discussion of available remedies and damages for a breach of a letter of intent is outside the scope of this presentation.

See *Clardy Mfg. Co. v. Marine Business Loans Inc.*, 88 F.3d 349 (5<sup>th</sup> Cir. 1996) for a discussion of why actions taken by a borrower in connection with a loan commitment which was not issued did not warrant damages based on claims of negligent misrepresentation, fraud and promissory estoppel.

As a concluding recommendation, the careful lawyer should treat a letter of intent much like any other contract and put into the letter the “intent of the parties” on the issues of binding vs. non-binding, enforceable vs. non-enforceable, obligations to negotiate or not negotiate, rights to terminate negotiations and consequences of that termination.

## Bibliography

1. Carbone, et al, Using Letters of Intent in Real Estate Transactions, Probate and Property, January/February 1997, p. 42.
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3. Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 Columbia L. Rev., 217 (1987).
4. Heath, et al, Letters of Intent and Other Preliminary Agreements Involving Real Property, 3d Annual Advanced Real Estate Drafting Course (State Bar of Texas, 1992). Also in 8 Tex. Real Est. L. Rep. 33 (1992).
5. Klein, Devil's Advocate: Salvaging the Letter of Intent, 37 Emory L.J. 139 (1988).
6. Ominsky, Counseling the Client on "Gentleman's Agreements", 36 The Practical Lawyer No. 8, p. 25 (December 1990).
7. Peterson, The Letter of Intent: To Be Enforceable or Not To Be Enforceable, 12th Annual Real Estate Law Conference (South Texas College of Law, 1996).
8. Volk, The Letter of Intent, 16 Inst. on Sec. Reg. 143 (1985).
9. Wolff, Letters of Intent, Preliminary Agreements, and Binding Acquisition Agreements, 111 Banking L.J., 292 (1994).



## PURCHASE AND SALE AGREEMENT

**THIS PURCHASE AND SALE AGREEMENT** (this “Agreement”) is entered into by and between \_\_\_\_\_, a Texas limited partnership (the “Seller”), and \_\_\_\_\_, a Delaware limited liability company (the “Purchaser”).

### ARTICLE I

#### AGREEMENT OF PURCHASE AND SALE

1.1. Agreement. For the consideration and upon the terms and conditions contained herein, Seller agrees to sell and convey to Purchaser, and Purchaser agrees to purchase from Seller, the following:

(a) That certain tract of land located in \_\_\_\_\_, and being more particularly described in Exhibit “A” attached hereto, together with all the rights and appurtenances pertaining thereto, including, but not limited to, all right, title, and interest of Seller, if any, in and to any and all sewer and wastewater discharge capacity allocated or reserved thereto, any and all potable water capacity allocated or reserved thereto, any and all other utility rights allocated or reserved thereto, any and all development rights with respect thereto, any adjacent strips and gores between the property and any abutting properties, and any land lying in or under the bed of any creek, stream, or waterway or any highway, avenue, road, easement, street, alley or right-of-way, open or proposed, in, on, across, abutting or adjacent to the property (collectively, the “Land”).

(b) All buildings, structures, fixtures and other improvements of every kind and nature presently situated on, in or under, or used in, on or about the Land, including an office building located at \_\_\_\_\_ (collectively, the “Improvements”).

(c) All of Seller’s right, title and interest in and to all (i) equipment, fixtures, machinery, HVAC equipment, and building materials owned by Seller and located on, attached to or used in connection with the Land and the Improvements; (ii) plans, specifications, surveys, architectural, engineering, soils, and environmental studies related to the Land or Improvements, if any, in Seller’s possession, (iii) warranties, guaranties, indemnities and claims related to the Improvements, if any, (iv) licenses, permits, governmental approvals, development rights or zoning rights or any other similar rights, including, without limitation, building permits, notices of completion, certificates of completion and certificates of occupancy for the Improvements, and (v) any other tangible and intangible personal property owned by Seller and located on, attached to or used in connection with the operation, management and maintenance of the Land and the Improvements (collectively, the “Personal Property”).

(d) All of Seller’s right, title and interest in and to all tenant leases for the use or occupancy of any portion of the Land or Improvements (collectively, the “Leases”).

(e) All of Seller's right, title and interest in and to all service, maintenance, utility, management or other written contracts or agreements related to the maintenance and operation of the Land and Improvements (the "Service Contracts").

The Land, Improvements, Personal Property, Leases and Service Contracts are sometimes hereinafter collectively referred to as the "Property."

## ARTICLE II

### PURCHASE PRICE

2.1. Purchase Price. The purchase price for the Property (the "Purchase Price") is Fifteen Million Seven Hundred Thousand and No/100 Dollars (\$15,700,000.00), payable in cash at Closing (hereinafter defined) subject to the offsets and credits described herein.

## ARTICLE III

### CONTRACT CONSIDERATION AND EARNEST MONEY

3.1. Independent Contract Consideration. Upon execution of this Agreement by Seller, Purchaser hereby delivers to Seller a check in the amount of \$100.00, which is hereby accepted by Seller as the independent contract consideration for Seller's execution and delivery of this Agreement, which consideration is in addition to and independent of any other consideration provided for in this Agreement, is earned, and is nonrefundable.

3.2. Earnest Money; Amount and Payment. Within three (3) days from the date hereof, Purchaser shall deliver by wire transfer One Hundred Fifty Thousand and No/100 Dollars (\$150,000.00) (the "Earnest Money") to \_\_\_\_\_ (the "Title Company"). The Title Company shall deposit the Earnest Money in an interest bearing account, and all interest shall accrue to the benefit of Purchaser and shall become part of the Earnest Money. The Earnest Money, together with all interest that accrues thereon, unless earlier returned to Purchaser or unless delivered to Seller as herein provided, shall be applied to the Purchase Price at the Closing.

3.3. Additional Earnest Money. If Purchaser does not elect to terminate this Agreement pursuant to Section 6.1 hereof, then after the expiration of the Inspection Period, Purchaser shall deliver by wire transfer an additional One Hundred Fifty Thousand and No/100 Dollars (\$150,000.00) (the "Additional Earnest Money") to the Title Company. The Title Company shall deposit the Additional Earnest Money in an interest bearing account, and all interest shall accrue to the benefit of Purchaser and shall become part of the Additional Earnest Money. The Additional Earnest Money, together with all interest that accrues thereon, shall become part of the Earnest Money. If the transaction contemplated by this Agreement closes, the Earnest Money shall be applied to the Purchase Price. If Purchaser terminates this Agreement pursuant to an express right granted to Purchaser pursuant to this Agreement, the

Title Company shall and is hereby instructed to immediately return the Earnest Money to Purchaser.

#### ARTICLE IV

##### DUE DILIGENCE ITEMS

4.1. Due Diligence Items. Within five (5) days after the Effective Date (hereinafter defined), Seller, at its sole cost and expense, shall deliver to Purchaser, all of the following (collectively, the “Due Diligence Items”).

(a) To the extent in Seller’s possession, or the possession of Seller’s agents, employees or contractors, any engineering and architectural plans, drawings, specifications, and reports which relate to the Property (collectively, the “Plans”).

(b) Copies of the Leases (including all modifications, amendments, or supplements thereto).

(c) Copies of all Service Contracts (including all modifications, amendments or supplements thereto).

(d) Any licenses and permits with respect to the ownership and operation of the Property in Seller’s possession or the possession of Seller’s agents, employees or contractors.

(e) Any environmental or engineering reports relating to the Property in Seller’s possession or the possession of Seller’s agents, employees or contractors.

(f) The real estate and personal property tax statements with respect to the Property for 2002, 2003 and 2004.

(g) A current inventory of all tangible personal property owned by Seller and located on or used in connection with the Property.

(h) A current rent roll certified by Seller as being true, correct and complete in all material respects as of the date of delivery (the “Rent Roll”).

(i) The most current financial statements (balance sheet and income statement) available for the Property together with financial statements for the three (3) most recent completed fiscal years.

(j) a complete list of Seller’s personnel employed to work full time or part time at or on the Property and their respective compensation.

(k) copies of any inspection reports, correspondence or other documentation concerning the compliance of the Property with applicable rules, regulations, ordinances and

laws of all governmental authorities having jurisdiction, including, without limitation, any inspection reports, correspondence or documentation concerning the Property's compliance or noncompliance, as the case may be, with the Americans with Disabilities Act of 1990 and \_\_\_\_\_ (the "Building Code").

(l) copies of any reports and correspondence relating to the availability of utilities and/or utility capacity, including, without limitation, water, sewer, gas and electricity, at or near the Property.

(m) copies of any statements for assessments imposed by private covenant constituting a lien or charge on the Property and evidence of payment thereof for 2002, 2003, and 2004.

(n) Any other documents and information pertaining to the Property reasonably requested by Purchaser in Seller's possession or the possession of Seller's agents, employees and contractors.

4.2. Assumption of Certain Service Contracts. Within five (5) days after the expiration of the Inspection Period Purchaser shall provide Seller with written notice (the "Assumed Service Contracts Notice") of those Service Contracts which Purchaser elects, in its sole and absolute discretion, to assume (collectively the "Assumed Service Contracts"); provided, however, that Purchaser shall have no obligation to assume any Service Contracts. Seller shall, at its sole cost and expense, terminate all other Service Contracts effective at Closing. Purchaser's failure to deliver to Seller the Assumed Service Contracts Notice within five (5) days after the expiration of the Inspection Period shall be deemed an election by Purchaser to assume none of the Service Contracts, in which event Seller shall, at its sole cost and expense, terminate all Service Contracts effective at Closing.

## ARTICLE V

### TITLE AND SURVEY REVIEW

5.1 Title Commitment. Within five (5) days after the Effective Date, Seller shall deliver or cause to be delivered to Purchaser a Commitment for Title Insurance (the "Title Commitment") issued by the Title Company, as agent for \_\_\_\_\_, dated no earlier than the Effective Date of this Agreement insuring the Property for the Purchase Price and showing the Purchaser as the proposed insured. The Title Commitment shall be on the current form promulgated by the Texas Department of Insurance. At the time of delivery of the Title Commitment, Seller shall also deliver or cause to be delivered to Purchaser copies of all documents referenced or contained as title exceptions in the Title Commitment.

5.2 Uniform Commercial Code Searches. Seller shall, within five (5) days from the Effective Date and at Seller's sole cost and expense, obtain and deliver to Purchaser (a) a Uniform Commercial Code Search performed on Seller and any assumed name Seller uses or has

used in connection with the ownership, operation, use, enjoyment, development or redevelopment of the Property, certified by the County Clerk of Harris County, Texas, and (b) a Uniform Commercial Code Search performed on Seller and any assumed name Seller uses or has used in connection with the ownership, operation, use, enjoyment, development or redevelopment of the Property, certified by the Secretary of State of Texas (together, the "UCC Searches").

5.3 Survey. Within five (5) days after the Effective Date, Seller shall deliver to Purchaser a copy of Seller's existing survey of the Property (the "Existing Survey") dated \_\_\_\_\_, prepared by \_\_\_\_\_ (the "Surveyor"). Prior to the expiration of the Inspection Period, Purchaser, at Purchaser's sole cost and expense, may obtain a current update of the Existing Survey which shall be a Category 1A, Condition II survey in accordance with the Manual of Practice for Land Surveying in Texas (the "Updated Survey"). The Updated Survey shall be certified to Purchaser (such certificate to be reasonably acceptable to Purchaser), and shall be in a form sufficient to cause the Title Company to modify, at Purchaser's expense, the survey exception in the Title Policy to read "shortages in area" only and shall be substantially the same as the Existing Survey, except for locating any easements granted by Seller after the date of the Existing Survey. Purchaser shall pay for the cost of the Updated Survey; provided, however, at Closing, Seller shall reimburse Purchaser for up to \$\_\_\_\_\_ of the cost of the Updated Survey.

5.4 Survey and Title Review. Purchaser shall have a period of fifteen (15) days from the date on which it receives the last of the Title Commitment, the Existing Survey, legible copies of all instruments referred to on Schedules B and C of the Title Commitment, and the UCC Searches in which to review the state of Seller's title to the Property (the "Title Review Period"). If the Existing Survey, Title Commitment, or the UCC Searches reflects or discloses any defect, exception or other matter (individually, "Title Defect" and collectively, "Title Defects") that is unacceptable to Purchaser for any reason whatsoever, then prior to the expiration of the Title Review Period, Purchaser shall provide Seller with written notice of its objections and the efforts Purchaser would like Seller to initiate to attempt to cure such objections. Seller shall have ten (10) days (the "Cure Period") from the date of Seller's receipt of such notice to attempt to cure such Title Defects to the reasonable satisfaction of Purchaser; provided, however, Seller shall not be required to remove or cure the Title Defects or incur any costs or liability in so doing. Notwithstanding the forgoing, Seller shall have the absolute obligation to cure or remove all liens of any kind against the Property (the same to automatically be considered unacceptable to Purchaser regardless whether or not Purchaser delivers to Seller a written notice of such objection), including, without limitation, (i) mortgage liens, (ii) security interests, (iii) tax liens, (iv) abstracts of judgment, (v) environmental liens, and (vi) materialmen's and mechanic's liens (collectively, "Liens").

If Seller does not cure any or all of the Title Defects within the Cure Period, Seller shall notify Purchaser in writing, prior to the expiration of the Cure Period, specifying Seller's decision, regarding the cure of each of the Title Defects (the "Cure Notice"), and Purchaser may, as its sole and exclusive remedies, on or before five (5) days after receipt of the Cure Notice (the "Defect Review Period"), either: (i) terminate this Agreement by written notice to the Seller, in which event the Earnest Money shall be immediately returned to Purchaser, or (ii) elect in

writing to waive any uncured Title Defect which Seller has not agreed in the Cure Notice to cure at or prior to Closing; provided, however, that such election shall have no effect on Seller's obligation to cure or remove all Liens.

If Purchaser fails to terminate the Agreement on or prior to expiration of the Defect Review Period, then any Title Defect (i) that Seller has failed to cure on or prior to the expiration of the Cure Period and has not agreed in the Cure Notice to cure or cause to be cured by Closing, and (ii) that is set forth on Schedule B of the Title Commitment or the Existing Survey shall be deemed waived by Purchaser; provided, however, such election shall have no effect on Seller's obligation to cure or remove all Liens. In the event Seller fails to provide Purchaser with the Cure Notice prior to the expiration of the Cure Period, such failure shall not be a default hereunder, but shall be deemed to be a notice from Seller that it will not remove or cure such Title Defects, and Purchaser shall have the right as its sole and exclusive remedies, with such right to be exercised within five (5) days after the expiration of the Cure Period, to either: (i) terminate this Agreement by written notice to Seller, in which event the Earnest Money shall be immediately returned to Purchaser; or (ii) elect in writing to waive any uncured Title Defects; provided, however, such election shall have no effect on Seller's obligation to cure or remove all Liens.

Purchaser shall have five (5) days after receipt of the Updated Survey (the "Updated Survey Review Period") to review and deliver written objections to Seller to any matter shown on the Updated Survey that is not shown on the Existing Survey (the "Updated Survey Defects"). Except for Seller's obligation to cure or remove all Liens, Seller shall not be obligated to cure any Updated Survey Defects prior to Closing, or incur any costs or liability in so doing. If Seller is unable or unwilling to cure any Updated Survey Defects by the Closing Date, then Purchaser shall have the right to either (i) terminate this Agreement and receive a complete refund of the Earnest Money, together with all interest which has accrued thereon, or (ii) waive such Objections and proceed to Closing; provided, however, such election shall have no effect on Seller's obligation to cure or remove all Liens.

Any exceptions to the Title Commitment, the Existing Survey or the Updated Survey (i) (a) to which Purchaser has not objected or (b) which have been waived or deemed waived by Purchaser, and (ii) which are shown on Schedule B of the Title Commitment or on the Existing Survey or the Updated Survey shall be "Permitted Exceptions"; provided, however, no Liens shall be Permitted Exceptions. If Purchaser terminates this Agreement as provided for herein, then the Earnest Money shall be returned immediately to Purchaser and neither Seller nor Purchaser shall have any further right or obligation hereunder.

## ARTICLE VI

### INSPECTION

6.1 Inspection Period. Purchaser shall have until April 26, 2005 (same being fifty (50) days from the date the letter of intent was signed by Seller and Purchaser) (the "Inspection Period") to conduct, at Purchaser's expense, an examination of the Property and to review such other matters as Purchaser deems necessary (including, without limitation, a review of Seller's

business records, a non-invasive physical inspection of the Property, an appraisal, an environmental audit, a review of the Leases, conduct interviews with the tenants under the Leases (“Tenants”) in the presence of one of Seller’s representatives, and a non-invasive engineering inspection of the Property) to determine if the Property is satisfactory to Purchaser in its sole and absolute discretion. Purchaser and Purchaser’s agents and representatives shall have the right to enter upon the Property at reasonable times during normal business hours and upon one (1) business days prior notification to Seller, which notification may be made by telephone to Seller’s building manager rather than by means of the notice requirement of Section 14.1 of this Agreement, and to conduct such inspections thereon, as long as such activities do not unreasonably interfere with the Tenants in possession. Seller or its representatives shall have the right to accompany Purchaser or its inspectors during any inspection of the Property. If for any reason Purchaser, in its sole and absolute discretion, is not satisfied with the Property, Purchaser may terminate this Agreement by delivering to Seller, prior to the expiration of the Inspection Period a written notice stating that Seller desires to terminate this Agreement (the “Termination Notice”), whereupon (i) the Title Company is hereby instructed to refund the Earnest Money to Purchaser, and (ii) except as expressly set forth herein and Purchaser’s Termination Obligations, neither party shall have any further obligation or liability hereunder. If Purchaser fails to deliver the Termination Notice prior to the expiration of the Inspection Period, Purchaser shall be deemed to have waived its right to terminate this Agreement under this Section 6.1.

Notwithstanding the foregoing, Tenants in possession shall have the right to restrict Purchaser’s access to certain portions of the Improvements (the “Restricted Property”) for security purposes. If any Tenants in possession restrict Purchaser’s access to the Restricted Property, Seller shall attempt to persuade such restricting Tenant to permit Purchaser to inspect the Restricted Property, so long as a representative of Tenant is present during such inspection. If after such attempt such restricting Tenant still does not permit Purchaser to inspect the Restricted Property, then Seller shall represent and warrant to Purchaser that the Restricted Property is in good condition and repair and free from any and all faults and defects, which representation and warranty shall survive Closing.

6.2 Purchaser’s Indemnity. Purchaser shall not permit any liens to attach to the Property by reason of the Purchaser’s inspection or tests. Purchaser hereby indemnifies and holds Seller harmless from and against any and all liens by contractors, subcontractors, materialmen or laborers performing such work, tests or inspections for Purchaser, as well as any claims asserted by third parties for injuries or damages to said third parties or their property resulting from the negligence or willful misconduct of Purchaser, its agents, employees or contractors during such inspection or tests.

PURCHASER SHALL INDEMNIFY AND HOLD SELLER HARMLESS FROM AND AGAINST ANY LOSS, CLAIM OR LIABILITY (INCLUDING, WITHOUT LIMITATION, COURT COSTS AND REASONABLE ATTORNEY’S FEES) TO THE PROPERTY ARISING OR RESULTING FROM THE NEGLIGENCE OR WILLFUL MISCONDUCT OF PURCHASER, ITS AGENTS, EMPLOYEES OR CONTRACTORS DURING SUCH INSPECTION OR TESTS, AND REPAIR ANY AND ALL PHYSICAL DAMAGE DONE TO THE PROPERTY BY PURCHASER, ITS AGENTS, EMPLOYEES OR CONTRACTORS

DURING SUCH INSPECTION OR TESTS PURSUANT TO THIS SECTION 6.2, SUCH INDEMNIFICATION (THE “PURCHASER’S INDEMNIFICATION OBLIGATIONS”) TO SURVIVE THE TERMINATION OR CLOSING OF THIS AGREEMENT, FOR A PERIOD OF SIX (6) MONTHS FROM THE EFFECTIVE DATE OF THIS AGREEMENT.

\_\_\_\_\_  
Seller=s Initials

\_\_\_\_\_  
Purchaser=s Initials

6.3 Purchaser=s Termination Obligations. If Purchaser timely delivers to Seller a Termination Notice, or if this Agreement otherwise terminates or if Purchaser fails to close the purchase of the Property, then Purchaser will comply with the following (“Purchaser=s Termination Obligations”): (1) repair any damage to the Property caused by the negligence or willful misconduct of Purchaser, its agents, employees or contractors during such inspection or tests, (2) return to Seller all due diligence documents or information delivered by Seller to Purchaser in accordance with Section 4.1 of this Agreement, and (3) deliver to Seller copies of all environmental audits, engineering reports, feasibility studies, or any other documents or information related to the Property prepared for Purchaser in connection with Purchaser’s inspection of the Property. Subject to any proprietary rights of the consultants who prepared such documents, Seller will thereafter have the right to use any document delivered by Purchaser to Seller but only to the extent not prohibited by the third party preparer of such documents. PURCHASER MAKES NO REPRESENTATION OR WARRANTY AS TO THE TRUTH, ACCURACY OR COMPLETENESS OF ANY MATERIALS, DATA OR INFORMATION DELIVERED BY PURCHASER TO SELLER IN CONNECTION WITH THE TRANSACTION CONTEMPLATED HEREBY. SELLER ACKNOWLEDGES AND AGREES THAT ALL MATERIALS, DATA AND INFORMATION DELIVERED BY PURCHASER TO SELLER IN CONNECTION WITH THE TRANSACTION CONTEMPLATED HEREBY ARE PROVIDED TO PURCHASER AS A CONVENIENCE ONLY AND THAT ANY RELIANCE ON OR USE OF SUCH MATERIALS, DATA OR INFORMATION BY PURCHASER SHALL BE AT THE SOLE RISK OF SELLER. Notwithstanding anything contained in this Agreement to the contrary, the agreements and indemnities set forth in Sections 6.2 and 6.3 will survive the termination of this Agreement, and Seller will have the right to enforce Purchaser’s Termination Obligations under this Section 6.3 by specific performance.

6.4 Confidentiality. Purchaser agrees to maintain strict confidentiality with respect to all non-public information contained in the Due Diligence Materials and to allow limited access to the Due Diligence Materials only to Purchaser’s attorneys, consultants, affiliates, prospective lenders and investors and other professional agents who are assisting with the investigation and inspection of the Property.

6.5 Corporate Office Approval. Purchaser has disclosed to Seller, and Seller hereby acknowledges, that Purchaser must obtain corporate office approval for the purchase of the Property. Purchaser acknowledges and agrees than any such corporate office approval shall be obtained, if at all, prior to the expiration of the Inspection Period. Purchaser agrees to deliver written confirmation of corporate office approval prior to the expiration of the Inspection Period.



If Purchaser fails to deliver corporate office approval to Seller prior to the expiration of the Inspection Period, then Purchaser shall be deemed to have delivered to Seller a Termination Notice as described in Section 6.1, whereupon (i) the Title Company is hereby instructed to refund the Earnest Money to Purchaser, and (ii) except as expressly set forth herein and Purchaser's Termination Obligations, neither party shall have any further obligation or liability hereunder.

## ARTICLE VII

### REPRESENTATIONS, WARRANTIES, COVENANTS AND AGREEMENTS OF SELLER

7.1. Representations and Warranties. In order to induce Purchaser to enter into this Agreement, Seller makes the following warranties and representations that shall be true and correct as of the Effective Date and on the Closing Date:

(a) Seller has good and indefeasible fee simple title to Property, subject to all matters of record in the Official Public Records of Harris County, Texas, and applicable to the Property, and at the Closing, Seller will have and will convey to Purchaser by special warranty deed, good and indefeasible fee simple title to the Property, free and clear of all liens, defects, encumbrances, conditions, exceptions, restrictions, or other matters affecting title except the Permitted Exceptions.

(b) There are no actions, suits, claims, assessments, or proceedings pending or, to Seller's current actual knowledge, without inquiry, threatened against or relating to the Seller or the Property.

(c) Seller is a limited partnership duly organized and validly existing under the laws of the State of Texas. Seller is authorized and permitted to enter into this Agreement and to perform all covenants and obligations of Seller hereunder, and Seller's right to execute this Agreement is not limited by any other agreements. The person signing this Agreement has been authorized by Seller to do so. The execution and delivery of this Agreement, the consummation of the transaction described herein and compliance with the terms of this Agreement will not conflict with, or constitute a default under, any agreement to which Seller is a party or by which Seller or the Property is bound, or violate any regulation, law, court order, judgment, or decree applicable to Seller or the Property.

(d) There are no attachments, executions, assignments for the benefit of creditors, or voluntary or involuntary proceedings under the Bankruptcy Code, 11 U.S.C. §101, et seq., or under any other debtor relief laws contemplated by or pending or threatened against Seller.

(e) Seller is not a "foreign person" as that term is defined in Section 1445 of the Internal Revenue Code of 1986, as amended, and applicable regulations.

(f) No person, corporation, or other entity has or on the Closing Date shall have any right or option granted by Seller (or any other right or option of which Seller is aware to its current, actual knowledge, without inquiry) to acquire all or any portion of the Property.

(g) Except for debts, liabilities, and obligations for which provision is made herein for proration or other adjustment at Closing, as of Closing, all debts, liabilities and obligations arising from the ownership and operation of the Property (including, but not limited to, utility services and tap fees) will have been paid.

(h) There are no other tenant leases other than the Leases. There are no parties in possession of the Property other than the Tenants under the Leases.

(i) Seller has not received any written notice of any violations of any ordinance, regulation, law, or statute of any governmental agency pertaining to the Property or any portion thereof.

(j) There are no unpaid bills, claims, or Liens in connection with any construction or repair of the Property incurred by Seller, except for those that will be paid in the ordinary course of business prior to Closing or the payment of which has otherwise been adequately provided for to the satisfaction of Purchaser.

(k) Seller has not received written notice of any pending proceedings, nor to Seller's current actual knowledge, without inquiry, are any proceedings contemplated to condemn the Property or any part of it.

(l) The operating statements furnished to Purchaser in connection with or pursuant to this Agreement (a) fairly and accurately reflect the financial condition of the Property as of the date thereof in all material respects, and (b) to the Seller's current actual knowledge, without inquiry, do not fail to state any material liability, contingent or otherwise, or any other material facts the omission of which would be misleading.

(m) Seller has no information of and to Seller's current actual knowledge there is not (i) any change contemplated in any applicable law, statute, ordinance, rule, regulation, order, or determination of any governmental authority or any board of fire underwriters (or other body exercising similar functions), (ii) any law, ordinance, regulation, administrative ruling, restrictive covenant or deed restriction affecting all or any part of the Property, including without limitation, any applicable zoning ordinances, building codes, flood disaster laws, wetlands regulation, health law or environmental law, (iii) any judicial or administrative action, (iv) any action by adjacent landowners, (v) any administrative action, (vi) any natural or artificial conditions on or about the Property, or (vii) any significant adverse fact or condition relating to the Property or its use, that would prevent, limit, impede, or render more costly the ownership, operation, use, enjoyment, development or redevelopment of the Property.

(n) No Hazardous Substances (as such term is hereinafter defined) have been incorporated, used, generated, manufactured, stored, or disposed of in, on, under, or about the

Property or transferred to or from the Property and there are no claims, litigation, administrative or other proceedings, whether actual or threatened, or judgments or orders, relating to the use, generation, manufacture, storage or disposal of any Hazardous Substances in, on, under or about the Property. As used in this Agreement, the term “Hazardous Substances” means (i) any substance or material that is listed, defined or otherwise designated as a “hazardous substance” under Section 101(14) the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et. seq., (ii) any petroleum or petroleum products, (iii) any radioactive material, urea-formaldehyde, asbestos or PCBs, and (iv) any other chemical, substance or waste that is regulated under any Environmental Law. The term “Environmental Law” means any federal, state, municipal or local law, rule, regulation, statute, ordinance or order of any governmental agency or entity relating to (i) the control of any potential pollutants or protection of the air, water or land, (ii) solid, gaseous or liquid waste generation, handling, treatment, storage, disposal or transportation and (iii) the regulation of or exposure to hazardous, toxic or other substances alleged to be harmful.

(o) The Property includes all sewer and wastewater discharge capacity, potable water capacity, other utility rights and development rights which were originally obtained with the Property by Seller, and no such capacity or rights have been previously been conveyed or transferred by Seller.

(p) To Seller’s current actual knowledge, the Property complies in all respects with the rules, regulations, ordinances and laws of all governmental authorities having jurisdiction, including, without limitation, the ADA and the Building Code.

(q) To Seller’s current actual knowledge, Seller is not in default under all or any of the Leases or the Service Contracts, and there is no event or fact which upon the passage of time or the giving of notice, or both, would constitute a default by Seller under all or any of the Leases or the Service Contracts.

(r) As a result of the sale of the Property from Seller to Purchaser as contemplated by this Agreement, there will be no taxes or assessments assessed against the Property by any taxing authority for the year of Closing or prior years based on change in use or ownership.

(s) Seller has no current actual knowledge of any (i) engineering and architectural plans, drawings, specifications, or reports which relate to the Property, (ii) licenses or permits with respect to the ownership and operation of the Property, or (iii) environmental or engineering reports relating to the Property, that are not in the possession of Seller or Seller’s agents, employees or contractors (collectively “Documents Not In Possession”).

(u) The Due Diligence Materials are true, accurate and complete in all material respects.

The foregoing representations and warranties of Seller are made by Seller as of the date hereof and again as of Closing and shall survive the Closing for a period of six (6) months and shall not be merged as of the date of the Closing hereunder.

7.2. Covenants of Seller. Seller covenants that from and after the Effective Date, Seller shall:

(a) Subject to the rights of the Tenants in possession under the Leases, including, specifically, any government contractor Tenant having the right to restrict access to certain portions of the Improvements for security purposes, give Purchaser and Purchaser's agents and representatives access, during normal business hours prior to the Closing, to physically inspect the Improvements and the Personal Property to evaluate the operating condition thereof, and to conduct such non-invasive inspections, surveys, and tests, and to examine the books and records to the extent in Seller's possession relating to the operation, ownership and management of the Property. The expenses of Purchaser's investigation shall be borne solely by Purchaser.

(b) Not market the Property for sale or disposition to any other party.

(c) Not without the prior written consent of Purchaser, terminate or amend any of the Leases. In addition, Seller shall not lease or renew the lease of -

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(d) Cause at or prior to Closing the release of all Liens and encumbrances (except Permitted Exceptions) against the Property and the cure of all Title Defects that Seller has agreed to cure, and cooperate in good faith with the Title Company to satisfy all requirements and conditions set forth on the Title Commitment.

(e) Cause to maintain in force property insurance upon the Property, and commercial general liability insurance with respect to damage or injury to persons or property occurring on the Property in at least such amounts, and with the same deductibles, as are maintained by Seller on the date hereof.

(f) Not, without Purchaser's prior written approval, enter into any Service Contract, purchase and sale agreement, earnest money contract, option agreement, right of first refusal, letter of intent or other agreement affecting the Property that can not be cancelled on thirty (30) days notice.

(g) During the Inspection Period, Seller will use commercially reasonable efforts to continue to lease the Property at market rates in accordance with Seller's current leasing practices. If Seller enters into any leases, or any renewal leases, during the Inspection Period, Seller agrees to provide copies of such leases or renewal leases to Purchaser, and Purchaser shall have three (3) days to approve such lease. If Purchaser disapproves any such lease, Purchaser must either (i) waive the remainder of the Inspection Period and acknowledge that the Earnest Money is non-refundable and deliver the non-refundable Additional Earnest Money to the Title Company, or (ii) terminate this Agreement and receive a refund of the Earnest

Money. If Purchaser approves any such lease, all leasing commissions, tenant improvements and other expenses associated with such new or renewal lease will be prorated between Seller and Purchaser based on the time period from the date the new Tenant occupies the leased premises (or the term of the renewal lease becomes effective) and the end of such lease term or renewal term. Upon the expiration of the Inspection Period and the Earnest Money becoming non-refundable, Seller will not enter into any new leases or renewal leases unless they are approved by Purchaser, and all leasing commissions, tenant improvements or other associated costs and expenses associated with any such new or renewal leases shall be fully paid by Purchaser. At Closing, Purchaser will assume all of Seller's obligations under the Leases, including but not limited to, the obligations relating to the security deposits of the Tenants transferred at Closing, and shall indemnify, defend and hold Seller harmless for any and all claims arising under the leases on and after the Closing Date. Seller shall indemnify, defend and hold Purchaser harmless for any and all claims arising under leases prior to the Closing Date.

(h) At its sole cost and expense, terminate all Service Contracts other than the Assumed Service Contracts and pay all leasing commissions and other accrued obligations arising out of the ownership, operation, use, enjoyment, development or redevelopment of the Property, and in such regard, Seller agrees to indemnify, defend and hold Purchaser harmless from and against any and all loss, liability, cost, damage or expense (including, without limitation, attorneys' fees, accountants' fees, court costs and interest) resulting from any claims or causes of actions existing in favor of or asserted by any party arising out of or relating to Seller's failure to perform any duties or obligations of Seller (i) prior to Closing with respect to the Assumed Service Contracts, and (ii) prior to or after Closing with respect to the Service Contracts (other than the Assumed Service Contracts). The indemnity in this Section 7.2(h) shall survive Closing.

(i) At its sole cost and expense, comply with any and all applicable subdivision regulations and similar ordinances necessary to allow for the conveyance of the Property from Seller to Purchaser.

(j) Notify Purchaser immediately after the same occurs of any material change concerning the Property, these representations and warranties contained in Section 7.1 hereof, or any other information heretofore or hereafter furnished to Purchaser concerning the Property.

(k) Notify Purchaser immediately if Seller obtains actual knowledge of the existence of any Documents Not In Possession, and cooperate with Purchaser to obtain copies of such Documents Not In Possession.

(l) Use reasonable diligence to obtain an Estoppel Certificate (hereinafter defined) in accordance with Section 9.1(f) hereof from all Tenants prior to Closing.

## ARTICLE VIII

### REPRESENTATIONS AND WARRANTIES OF PURCHASER

8.1. Representations and Warranties. To induce Seller to enter into this Agreement, Purchaser is fully authorized and empowered to enter into this Agreement and to consummate the transactions contemplated hereunder. The execution and delivery of this Agreement, the consummation of the transaction described herein and compliance with the terms of this Agreement will not conflict with, or constitute a default under, any agreement to which Purchaser is a party or by which Purchaser is bound, or violate any regulation, law, court order, judgment, or decree applicable to Purchaser. Notwithstanding the foregoing, Purchaser has disclosed to Seller, and Seller acknowledges that Purchaser's obligations to close the purchase of the Property are subject to Purchaser receiving corporate office approval of the purchase; provided, however, Purchaser agrees that such corporate office approval shall be obtained, if at all, no later than the expiration of the Inspection Period.

8.2 Property Condition Acknowledgement. PURCHASER ACKNOWLEDGES AND AGREES THAT PURCHASER IS EXPERIENCED IN THE ACQUISITION, DEVELOPMENT, OWNERSHIP AND OPERATION OF PROPERTIES SIMILAR TO THE PROPERTY AND THAT PURCHASER, PRIOR TO THE CLOSING DATE, WILL HAVE INDEPENDENTLY INVESTIGATED AND INSPECTED THE PROPERTY TO ITS SATISFACTION AND IS QUALIFIED TO MAKE SUCH INSPECTION. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT IT IS RELYING ON SUCH INDEPENDENT INVESTIGATION AND INSPECTION AND EXCEPT FOR SELLER'S REPRESENTATIONS AND WARRANTIES SET FORTH HEREIN, IS NOT RELYING ON ANY INFORMATION BY SELLER, ANY OF SELLER'S REPRESENTATIVES OR EMPLOYEES, OR THE BROKER OR ANY STATEMENTS (ORAL OR WRITTEN) WHICH MAY HAVE BEEN MADE OR MAY BE MADE (OR PURPORTEDLY MADE) BY SELLER OR ANY OF ITS REPRESENTATIVES OR EMPLOYEES, IN DETERMINING WHETHER TO PURCHASE THE PROPERTY. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT EXCEPT AS OTHERWISE EXPRESSLY SET FORTH HEREIN, ANY INFORMATION PROVIDED BY SELLER TO PURCHASER WITH RESPECT TO THE PROPERTY HAS BEEN OBTAINED FROM A VARIETY OF SOURCES AND THAT SELLER HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION AND MAKES NO REPRESENTATIONS AS TO THE ACCURACY OR COMPLETENESS OF SUCH INFORMATION. PURCHASER FURTHER ACKNOWLEDGES THAT IF IT PROCEEDS TO CONSUMMATE THE TRANSACTION CONTEMPLATED BY THIS AGREEMENT, AT CLOSING, IT WILL BE FULLY AND COMPLETELY SATISFIED THAT THE PROPERTY IS SATISFACTORY IN ALL RESPECTS FOR ITS INTENDED USE AND EXCEPT AS OTHERWISE EXPRESSLY SET FORTH HEREIN, PURCHASER SHALL HAVE NO RECOURSE WHATSOEVER AGAINST SELLER OR THE BROKER IN CONNECTION WITH THE PROPERTY.

PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT EXCEPT AS EXPRESSLY SET FORTH HEREIN AND FOR SELLER'S SPECIAL WARRANTY OF TITLE TO THE PROPERTY, SELLER HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY DISCLAIMS ANY AND ALL REPRESENTATIONS, WARRANTIES, PROMISES, COVENANTS, AGREEMENTS OR GUARANTIES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN,

PAST, PRESENT OR FUTURE, OF, AS TO, CONCERNING OR WITH RESPECT TO THE PROPERTY, INCLUDING, BUT NOT LIMITED TO: (A) THE NATURE, MANNER, QUALITY, CHARACTERISTICS OR CONDITION OF THE PROPERTY, OR ANY PORTION THEREOF, ON THE SURFACE OR SUBSURFACE THEREOF, WHETHER OR NOT OBVIOUS, VISIBLE OR APPARENT; (B) THE USE, INCOME OR POTENTIAL INCOME TO BE DERIVED FROM THE PROPERTY; (C) THE SUITABILITY OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH PURCHASER MAY CONDUCT THEREON; (D) THE PRESENCE, OR ABSENCE OF, OR CONTAMINATION BY HAZARDOUS MATERIALS OF THE PROPERTY, OR THE COMPLIANCE OF OR BY THE PROPERTY OR ITS OPERATION WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR BODY, INCLUDING, BUT NOT LIMITED TO, ANY STATE OR FEDERAL ENVIRONMENTAL LAW, RULE OR REGULATION; (E) THE HABITABILITY, MERCHANTABILITY, DESIGN OR FITNESS FOR ANY SPECIFIC PURPOSE OR PARTICULAR PURPOSE OF THE PROPERTY FOR A PARTICULAR PURPOSE; OR GOOD AND WORKMANLIKE CONSTRUCTION, OR THE COMPLIANCE OF OR BY THE PROPERTY OR ITS OPERATION WITH ANY STATE OR FEDERAL ACCESSIBILITY LAW RULE OR REGULATION, INCLUDING, WITHOUT LIMITATION, THE AMERICANS WITH DISABILITIES ACT OR THE TEXAS ARCHITECTURAL BARRIERS ACT; (F) THE SOIL CONDITIONS, DRAINAGE, DETENTION REQUIREMENTS, FLOODING CHARACTERISTICS, UTILITIES OR OTHER CONDITIONS EXISTING IN, ON OR UNDER THE PROPERTY; OR (G) ANY OTHER MATTER WITH RESPECT TO THE PROPERTY. EXCEPT AS OTHERWISE EXPRESSLY SET FORTH HEREIN, PURCHASER HEREBY WAIVES ANY SUCH REPRESENTATION, WARRANTY, PROMISE, COVENANT, AGREEMENT OR GUARANTY.

EXCEPT AS OTHERWISE EXPRESSLY SET FORTH HEREIN, AND FOR SELLER'S SPECIAL WARRANTY OF TITLE, SELLER IS CONVEYING THE PROPERTY TO PURCHASER "AS IS, WHERE IS", AND WITH ALL FAULTS AND SPECIFICALLY AND EXPRESSLY WITHOUT ANY WARRANTIES, REPRESENTATIONS OR GUARANTEES, EITHER EXPRESS OR IMPLIED, OF ANY KIND, NATURE, OR TYPE WHATSOEVER FROM OR ON BEHALF OF SELLER.

THE FOREGOING PROVISIONS SHALL SURVIVE THE CLOSING IN ALL RESPECTS.

\_\_\_\_\_  
Seller=s Initials

\_\_\_\_\_  
Purchaser=s Initials

## ARTICLE IX

### CONDITIONS PRECEDENT TO CLOSING

9.1. Conditions Precedent to Purchaser's Performance. The obligation of Purchaser to close the transaction described in this Agreement shall be subject to the following conditions precedent:

(a) All the representations and warranties of Seller set forth in this Agreement shall be true and correct in all material respects as of the Effective Date and on the Closing Date.

(b) There shall be no material adverse change in the matters reflected on the Title Commitment or the Updated Survey from those matters appearing therein on the date thereof (except those changes requested by Purchaser in its notice of Title Defects), and no encumbrance or Title Defect shall affect the Property except the Permitted Exceptions.

(c) Seller shall have duly performed or complied with all covenants, acts and agreements to be performed or complied with by Seller on or prior to the Closing Date in all material respects.

(d) There shall be no litigation or material adverse claims affecting the Property.

(e) There shall be no material adverse change to the Property or any part thereof.

(f) Purchaser shall have received from Seller at least seven (7) days prior to Closing estoppel certificates (collectively the "Estoppel Certificates") in the form of Exhibit F attached hereto and made a part hereof for all purposes from University of Phoenix and from the Tenants (other than University of Phoenix) occupying in the aggregate not less than 85% of the remaining rentable area of the building on the Land, each dated less than thirty (30) days prior to the date of Closing, and containing no information that (a) is inconsistent with the Rent Roll or other Due Diligence Materials, (b) indicates that any party other than Purchaser has an agreement to purchase, right of first refusal, option to purchase or any other right to acquire all or any part of the Property, (c) constitutes a default under the lease described therein on the part of Seller or the Tenant, or a condition or event that upon the giving of notice, the passage of time or both, would constitute an event of default on the part of the Tenant or Seller, (d) indicates that any of Seller's representations and warranties contained in this Agreement are untrue or incorrect in any material respect, or (e) indicates that Seller is in default under this Agreement or that there exists a condition or event that upon the giving of notice, the passage of time or both, would constitute an event of default by Seller under this Agreement. Additionally, the Estoppel Certificate for Suite 725 must specifically state that the Tenant thereof had a renewal option which expired without being exercised.



If any of the foregoing conditions are not satisfied or waived in writing by Purchaser prior to the Closing, Purchaser must give Seller written notice specifically setting forth the condition that has not been satisfied, and Seller shall have ten (10) days to cure such condition and the Closing Date shall be automatically extended accordingly. If Seller fails to satisfy such condition within such ten (10) day period, then Purchaser shall have the right to terminate this Agreement by delivery of a written Termination Notice to Seller, in which event the Earnest Money shall be immediately returned to Purchaser.

## ARTICLE X

### DAMAGE OR DESTRUCTION; CONDEMNATION

10.1. Damage or Destruction. Prior to Closing, risk of loss with regard to the Property shall be borne by Seller. If the Improvements or any of the Personal Property are damaged or destroyed prior to Closing, then:

(a) if the cost of repairing such damage is less than or equal to \_\_\_\_\_ as determined by an architect (the “Architect”) mutually acceptable to Seller and Purchaser, then, at Seller’s option: (i) Seller may repair such damage as promptly as is reasonably possible, restoring the damaged property at least to its condition immediately prior to such damage and, in the event such repairs have not been completed prior to Closing, then the Closing nevertheless shall proceed as scheduled and the Title Company shall withhold from Seller in an escrow account the funds necessary to make such repairs until Seller has repaired such damage pursuant to the provisions hereof, at which time such funds shall be distributed to Seller; or (ii) Seller shall assign to Purchaser all insurance proceeds payable with respect to such damage, and Purchaser shall receive a cash credit against the Purchase Price for (i) the amount of the deductible under Seller’s insurance policy, (ii) the amount estimated by the Architect necessary to fully repair any uninsured damage or destruction to the Property, and (iii) the difference between any insurance proceeds actually received by Purchaser in connection with such damage or destruction and the amount estimated by the Architect to fully repair such damage or destruction, and Purchaser shall be obligated to proceed to purchase the Property in accordance with the terms hereof; or

(b) if the cost of repairing such damage is greater than \_\_\_\_\_, as determined by the Architect, then, at Purchaser’s option (such election to be made in writing within ten days of the event): (i) Purchaser may elect to terminate this Agreement by written notice to Seller, whereupon the Earnest Money shall be returned immediately to Purchaser and neither party shall have any further obligation to the other, other than Purchaser’s indemnification obligations set forth in Section 6.3 hereof; or; (ii) Seller shall assign to Purchaser all insurance proceeds payable with respect to such damage, and Purchaser shall receive a cash credit against the Purchase Price for (i) the amount of the deductible under Seller’s insurance policy, (ii) the amount estimated by the Architect necessary to fully repair any uninsured damage or destruction to the Property, and (iii) the difference between any insurance proceeds actually received by Purchaser in connection with such damage

or destruction and the amount estimated by the Architect to fully repair such damage or destruction, and the sale shall be closed without Seller's repairing such damage.

10.2 Condemnation. If, prior to the Closing, condemnation proceedings are commenced or threatened in writing with respect to all or any portion of the Property, Purchaser may at its sole option, either (a) terminate this Agreement by delivering written notice thereof to Seller and receive an immediate refund of the Earnest Money, and neither party shall have any further right or obligation under this Agreement, except for Purchaser's indemnification obligations set forth in Section 6.1 hereof, or (b) proceed to close the transaction contemplated herein pursuant to the terms hereof, in which event Seller shall deliver to Purchaser at the Closing, or as soon as available, any proceeds actually received by Seller attributable to the Property from such condemnation or eminent domain proceeding or assign to Purchaser any right it may have to receive proceeds attributable to the Property from such condemnation or eminent domain proceeding, and there shall be no reduction in the Purchase Price.

## ARTICLE XI

### CLOSING

11.1. Time and Place. The sale and purchase of the Property shall be consummated at a closing (the "Closing") to be held at the offices of the Title Company on or before fifteen (15) days after the expiration of the Inspection Period (the "Closing Date").

11.2. Items to be Delivered by Seller at the Closing. At the Closing, Seller shall deliver or cause to be delivered to Purchaser, at Seller's expense, each of the following items:

(a) A special warranty deed in form attached hereto as Exhibit "B" and incorporated herein by reference, duly executed and acknowledged, granting, conveying, and warranting to Purchaser good and indefeasible fee simple absolute title to the Property, free and clear of any Liens, encumbrances, easements, restrictions or other matters affecting title to the Property except the Permitted Exceptions.

(b) An updated Title Commitment irrevocably committing the Title Company to issue as soon as practical after Closing an Owner's Policy of Title Insurance (Form T-1 as promulgated by the Texas Department of Insurance) (the "Title Policy") issued by the Title Company in a face amount equal to the Purchase Price, insuring good and indefeasible fee simple title to the Property in the Purchaser and containing no exceptions except the Permitted Exceptions and the standard printed exceptions therein, except:

(1) the exception relating to restrictions affecting the Property shall be deleted, except for such restrictions as may be included in the Permitted Exceptions;

(2) the exception relating to discrepancies, conflicts or shortages in area or boundary lines or any encroachment or overlapping of improvements which a survey may

show may be amended to read “shortages in area” only, but the additional premium for such amendment shall be at Purchaser’s sole cost and expense; and

(3) the blank in the printed exception for standby fees and taxes shall show the year of Closing, not yet due and payable.

(c) A Blanket Conveyance and Bill of Sale in form attached hereto as Exhibit ”C” and incorporated herein by reference, duly executed and acknowledged by Seller, conveying to Purchaser all of Seller’s right, title and interest in the Personal Property, with the same “AS IS” provision as contained in the Deed and in Section 8.2 hereof.

(d) An Assignment and Assumption of the Leases in form attached hereto as Exhibit “D” and incorporated herein by reference, duly executed and acknowledged by Seller, assigning all of Seller’s interest in, to, and under the Lease.

(e) Such evidence that may be reasonably required by Purchaser or the Title Company to evidence the status and capacity of Seller and the authority of the persons who are executing the various documents on behalf of the Seller.

(f) An affidavit in compliance with Section 1445 of the Internal Revenue Code of 1986, as amended, and applicable regulations stating, under penalty of perjury, Seller’s United States taxpayer identification number and that Seller is not a “foreign person” as that term is defined in said Section 1445.

(g) A letter (the “Tenant Notification Letter”) dated as of the Closing Date, in the form attached hereto as Exhibit “E” and incorporated herein by reference, evidencing the assumption by Purchaser of the landlord’s duties and obligations under the Lease accruing on or after the Closing Date.

(h) A “bills paid affidavit” in accordance with Section 53.085 of the Texas Property Code.

(i) Deliver to Purchaser the originals of all Leases and all Assumed Service Contracts.

(j) Deliver to Purchaser an assignment of any utility deposits currently on deposit with any utility providers (collectively the “Continuing Utility Deposit”) providing public utilities to the Property as of the date of Closing pursuant to accounts that will remain in effect after Closing (collectively the “Continuing Utility Accounts”).

(k) Deliver to Purchaser all keys to the Property.

(l) Deliver to Purchaser original Estoppel Certificates required by Section 9.1(f).

(m) If an Assumed Name has been filed by Seller in connection with the ownership, use, enjoyment, occupancy or operation of the Property, deliver to Purchaser an executed withdrawal thereof.

(n) File or cause to be filed, in a timely manner, all reports or returns required by Section 6045(e) of the Internal Revenue Code of 1986, as amended (the "Code").

(o) Pay all sums due in respect of Service Contracts not being assumed by Purchaser.

11.3. Items to be Delivered by Purchaser at the Closing. At the Closing, Purchaser shall deliver to Seller the Purchase Price. In addition, Purchaser shall execute the Bill of Sale, the Assignment and Assumption of the Leases and the Tenant Notification Letters.

11.4. Seller's Closing Costs. At Closing, Seller shall pay any costs related to the issuance of the Title Commitment and the base premium for the Title Policy necessary to issue the Title Policy, reimburse Purchaser for the actual cost of the Survey, not to exceed \$1,500.00, the cost of satisfying any Liens on the Property, Seller's legal fees, and all other items which are normally paid by sellers in real estate transactions in Houston, Texas.

11.5. Purchaser's Closing Costs. Purchaser shall pay the cost of Purchaser's due diligence inspection, the cost to modify the areas and boundaries exception in the Title Policy to read "shortages in area" only (if same is requested by Purchaser), any inspection fees charged by the Title Company to delete the exception for "rights of parties in possession", the cost of any other available endorsements to the Title Policy as requested by Purchaser and all other items which are normally paid by Purchasers in real estate transactions in Harris County, Texas.

11.6. Possession. Upon completion of Closing, Seller shall deliver to Purchaser possession of the Property, subject to the rights of the Tenants under the Leases and the Permitted Exceptions.

11.7. Prorations. The day of Closing shall belong to Purchaser and all prorations hereinafter provided to be made as of the Closing shall each be made as of the end of the day before the Closing Date. In each such proration set forth below, the portion thereof applicable to periods beginning as of Closing shall be credited or charged to Purchaser and the portion thereof applicable to periods ending as of Closing shall be credited or charged to Seller.

(a) Taxes and Assessments. General real estate taxes and assessments imposed by governmental authority and any assessments imposed by private covenant constituting a lien or charge on the Property for the then current calendar year or other current tax period (collectively, "Taxes") not yet due and payable shall be prorated. If the Closing occurs prior to the receipt by Seller of the tax bill for the calendar year or other applicable tax period in which the Closing occurs, Purchaser and Seller shall prorate Taxes for such calendar year or other applicable tax period based upon the most recent ascertainable assessed values and tax rates.

(b) Collected Rent. All collected rent and other collected income (and any applicable state or local tax on rent) paid on the Leases in effect on the Closing Date shall be prorated. Seller shall be charged with any rent and other income collected by Seller before Closing but applicable to any period of time after Closing. Uncollected rent and other income shall not be prorated at Closing. Purchaser shall apply rent and other income from Tenants that are collected after the Closing first to the obligations then owing to Purchaser for its period of ownership and to reasonable costs of collection, remitting the balance, if any, to Seller. Any prepaid rents for the period following the Closing Date shall be paid over by Seller to Purchaser. Purchaser will make reasonable efforts, without suit, to collect any rents applicable to the period before closing. Seller shall credit to the account of Purchaser against the Purchaser Price any security deposits or prepaid rent (in whatever form) previously deposited by the Tenants, and Seller shall keep all such security deposits and prepaid rent.

(c) Operating Costs. Seller, as landlord under the Leases, is currently collecting from Tenants under the Leases additional rent to cover Taxes, insurance, utilities (to the extent not paid directly by Tenants), common area maintenance and other operating costs and expenses (collectively, "Operating Costs") incurred by Seller in connection with the ownership, operation, maintenance and management of the Property. At Closing, Purchaser shall receive a credit equal to the amount, if any, by which payments made by Tenants in respect of Operating Costs for the period for which such Operating Costs were collected exceed the amount actually and properly paid by Seller during this same period of time for Operating Cost items. Operating Costs that are not paid by Tenants either directly or reimbursed under the Leases shall be prorated.

(d) Fees and Charges under Service Contracts. Fees and charges under the Service Contracts assumed by Purchaser at the Closing shall be prorated.

(e) Final Adjustment After Closing. If final prorations cannot be made at Closing for any item being prorated under Section 11.7, including Taxes, then Purchaser and Seller agree to allocate such items on a fair and equitable basis as soon as invoices or bills are available, with final adjustment to be made as soon as reasonably possible after the Closing, to the effect that income and expenses are received and paid by the parties on an accrual basis with respect to their period of ownership. Payments in connection with the final adjustment shall be due within 30 days of written notice. Seller shall have reasonable access to, and the right to inspect an audit, Purchaser's books to confirm the final prorations, at Seller's expense, and upon three (3) business days advance written notice to Purchaser.

## ARTICLE XII

### REMEDIES UPON DEFAULT

12.1. Default of Seller. Notwithstanding anything in this Agreement to the contrary, if Seller defaults in the performance of this Agreement, Purchaser must give Seller written notice specifically setting forth such default, and Seller shall have ten (10) days to cure such default,

and the Closing Date shall be automatically extended accordingly. If Seller fails to cure such default within such ten (10) day period, then Purchaser, as Purchaser's sole and exclusive remedies, may either (a) terminate this Agreement by written notice delivered to Seller, in which event the Earnest Money shall be immediately returned to Purchaser (free of any claim thereto by Seller) and neither party shall have any further obligations to the other, other than Purchaser's indemnification obligations set forth in Section 6.3 hereof; or (b) enforce specific performance of this Agreement.

12.2. Default by Purchaser. Notwithstanding anything in this Agreement to the contrary, if Purchaser fails to consummate this Agreement, Seller, as Seller's sole and exclusive remedy, shall have the right to terminate this Agreement by giving written notice thereof to Purchaser, whereupon neither party shall have any further rights or obligations hereunder, and the Title Company shall deliver the Earnest Money to Seller, free of any claims by Purchaser. The Earnest Money is a reasonable, good faith estimate of actual damages that Seller would suffer and shall be liquidated damages for default of Purchaser because of the difficulty, inconvenience, and uncertainty of ascertaining Seller's actual damages for Purchaser's default. The payment of the Earnest Money upon Purchaser's breach shall constitute full satisfaction of Purchaser's obligations hereunder.

12.3. Instructions to Title Company. If either Seller or Purchaser becomes entitled to the Earnest Money upon termination of this Agreement in accordance with its terms, Purchaser and Seller agree to deliver a letter of instruction to the Title Company directing disbursement of the Earnest Money to the party entitled thereto.

## ARTICLE XIII

### REAL ESTATE COMMISSION AND DISCLOSURES

13.1 Commission. \_\_\_\_\_ have negotiated this sale on behalf of Seller, and Seller agrees to pay CCC a commission equal to two percent (2%) of the Purchase Price, but only upon Closing, and agrees to pay \_\_\_\_\_ a commission pursuant to a separate agreement, but only upon Closing. \_\_\_\_\_ has negotiated this sale on behalf of Purchaser, and Purchaser agrees to pay \_\_\_\_\_ a commission pursuant to a separate agreement, but only upon Closing. If this Agreement is terminated for any reason prior to Closing, or if this transaction does not close for any reason, then no commission will be due. Seller shall be solely responsible for the payment of the commission to \_\_\_\_\_, and Purchaser shall be solely responsible for the payment of the commission to \_\_\_\_\_. Seller hereby agrees to indemnify, defend and hold Purchaser harmless for the commissions due to \_\_\_\_\_. Purchaser hereby agrees to indemnify, defend and hold Seller harmless for the commission due to \_\_\_\_\_. Purchaser and Seller each warrant and represent to the other that no agent or broker other than \_\_\_\_\_, \_\_\_\_\_ are entitled to a commission or fee as a result of this sale, and Seller and Purchaser each agree to indemnify and hold the other party harmless from any loss, liability or expense suffered by the other party by reason of a breach of such warranty or representation.

13.2 TITLE DISCLOSURE. IN ACCORDANCE WITH THE TERMS OF THE REAL ESTATE LICENSE ACT OF TEXAS, YOU, AS PURCHASER, ARE ADVISED THAT YOU SHOULD HAVE THE ABSTRACT COVERING THE PROPERTY EXAMINED BY AN ATTORNEY OF YOUR CHOICE, OR BE FURNISHED WITH OR OBTAIN A POLICY OF TITLE INSURANCE. PURCHASER ACKNOWLEDGES RECEIPT OF SUCH NOTICE BY ITS EXECUTION OF THIS CONTRACT.

ARTICLE XIV

MISCELLANEOUS

14.1 Notices. Any notice, demand, or other communication required to be given or to be served upon any party hereunder shall be in writing and delivered to the person to whom the notice is directed, either: (i) in person; (ii) by United States Mail, as a registered or certified item with return receipt requested; (iii) delivered by delivery service (including any express mail or overnight delivery service), or (iv) sent by telex, telecopy or e-mail. Notices, demands, or other communications delivered by mail shall be deemed given and received when deposited in a post office or other depository under the care or custody of the United States Postal Service, enclosed in a wrapper, addressed properly, with proper postage affixed. Any notice, demand, or other communication given other than by certified or registered mail, return receipt requested, shall be deemed to have been given and received when delivered to the address of the party to whom it is addressed as stated below:

Seller:

With Copy To:

And Copy To:

Purchaser:

With Copy To:

Either party hereto may change its address for notice by giving the other party ten days' advance written notice of such change of address.

14.2 Agreement Not to Survive. Except as expressly set forth herein to the contrary, all representations, warranties, disclaimers of representations or warranties, covenants and agreements contained herein, whether to be performed before or after the Closing Date, shall be deemed to be merged into or waived by the instruments of the Closing, and shall not survive Closing.

14.3 Assignment. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns. The

Purchaser may assign this Agreement to any wholly owned, related, controlled or affiliated entity or party without the consent of Seller; provided, however, in the event of such assignment, Purchaser shall not be released from any liability or obligation under this Agreement.

14.4 Interpretation and Applicable Law. THIS CONTRACT SHALL BE CONSTRUED AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN HARRIS COUNTY, TEXAS. Where required for proper interpretation, words in the singular shall include the plural; and words of any gender shall include all genders. The descriptive headings of the articles, sections, and paragraphs in this Agreement are for convenience only and shall not control or affect the meaning or construction of any of the provisions hereof.

14.5 Amendment. This Agreement may not be amended except by an agreement in writing signed by Seller and Purchaser.

14.6 Attorneys' Fees. If either party files a lawsuit in connection with this Agreement, the party that prevails in such action shall be entitled to recover from the non-prevailing party, in addition to all other remedies or damages as limited herein, reasonable attorneys' fees and costs of court incurred in such lawsuit.

14.7 Entire Agreement. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith.

14.8 Multiple Counterparts. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one instrument.

14.9 Effective Date; Dates. The effective date of this Agreement (the "Effective Date") shall be the date on a fully executed copy of this Agreement has been delivered and received by the Title Company. Any act performable on an official United States holiday or a Saturday or Sunday shall be performable on the next business day following such date.

14.10 Construction. The parties acknowledge that they have had the opportunity to be represented by counsel in connection with this transaction and that this Agreement shall be interpreted according to its fair construction and shall not be construed against either party.

14.11 Invalidity. If any provision in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.



14.12 Time is of the Essence; Waiver. Time is of the essence with respect to every provision of this Agreement. No waiver by either party of any of its rights or remedies hereunder or otherwise shall be considered a waiver of any other subsequent right or remedy.

**(remainder of page intentionally left blank; signature page follows)**

**SELLER:**

By:

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

**PURCHASER:**

a Delaware limited liability company

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

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

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

The undersigned Title Company hereby acknowledges receipt of a fully executed copy of the Agreement, and agrees to accept, hold and disburse the Earnest Money in accordance with the provisions of the Agreement. The undersigned acknowledges that it is not a party to this Agreement and that it is executing below solely for the purpose of the foregoing acknowledgment and agreement.

**TITLE COMPANY:**

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

**EXHIBITS:**

- A - Property Description
- B - Special Warranty Deed
- C - Blanket Conveyance and Bill of Sale
- D - Assignment and Assumption of Lease
- E - Tenant Notification Letter



AGREEMENT OF SALE AND PURCHASE

THIS AGREEMENT OF SALE AND PURCHASE (this "Agreement") is entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2007 (the "Effective Date"), by and among \_\_\_\_\_, a Texas limited partnership ("Seller"), and \_\_\_\_\_ ("Purchaser").

In consideration of the mutual covenants and agreements set forth herein, the parties hereto hereby agree as follows:

ARTICLE I  
AGREEMENT TO SELL AND PURCHASE

Seller shall sell to Purchaser and Purchaser shall purchase from Seller, at the price and upon the terms and conditions set forth in this Agreement, the following described property located in Harris County, Texas:

- (a) The following tracts or parcels of land located in Harris County, Texas:
  - (i) the 1.2172 acre tract ("Tract I"), more or less, more specifically described on **Exhibit A-1** attached hereto and made a part hereof, together with any and all improvements located thereon; and
  - (ii) the 0.728 acre tract ("Tract II"), more or less, more specifically described on **Exhibit A-2** attached hereto and made a part hereof, together with any and all improvements located thereon and Seller's interest in and to those certain easements filed under \_\_\_\_\_;

(Tract I and Tract II are hereinafter collectively referred to as the "Land"), together with any and all rights, titles and interests of Seller in and to any easements, including, without limitation, that certain Reciprocal Agreement dated as of \_\_\_\_\_ (the "Reciprocal Agreement"), by and between \_\_\_\_\_ and \_\_\_\_\_, filed for record under \_\_\_\_\_ in the Real Property Records of Harris County, Texas, adjacent rights—of—way, streets or alleys, air rights, development rights, permits, water rights, sewer rights and drainage rights incidental to the Land, all water and sewer discharge treatment capacity and water capacity serving or allocated to the Land, and any reversionary rights relating to or incident to the Land;

(b) All tangible personal property owned or leased by Seller that is located on or used in the connection with the ownership, operation, use, enjoyment, development or redevelopment of the Land, including, without limitation, Seller's sign which is located below \_\_\_\_\_'s sign on the pylon currently situated on the tract of land owned by \_\_\_\_\_'s Restaurants Limited Partners, which is adjacent to the Land (the "Personalty"); and

(c) All of Seller's right, title and interest in and to all assignable contracts and agreements relating to the upkeep, repair, maintenance or operation of the Land and the

Personalty which will extend beyond the date of Closing, to the extent and only to the extent that the same may be permissibly assigned by Seller at no cost and expense to Seller.

The items described in (a) through (c) above are hereinafter collectively referred to as the "Property."

## ARTICLE II PURCHASE PRICE, EARNEST MONEY AND ADJUSTMENTS

2.1 Purchase Price and Payment of Purchase Price. Subject to adjustments to be made at Closing, the total purchase price (the "Purchase Price") for the Property shall be \$\_\_\_\_\_, which shall be paid by Purchaser to Seller in immediately available funds at Closing.

2.2 Earnest Money. Simultaneously with the execution of this Agreement, Purchaser shall deliver to Charter Title Company (the "Title Company") having its office at \_\_\_\_\_, the sum of \$\_\_\_\_\_ in cash (such sum and any additional sums deposited as provided below hereinafter referred to as the "Earnest Money"), to be held by the Title Company as earnest money in accordance with the terms and conditions of this Agreement. The Title Company is hereby instructed to hold the Earnest Money in an interest bearing account insured by the Federal Depository Insurance Corporation. All interest earned on the Earnest Money shall become a part thereof and shall be delivered to the party entitled to receive the Earnest Money. If this Agreement is not sooner terminated, Purchaser shall deposit an additional \$\_\_\_\_\_ with the Title Company not later than the last day of the Inspection Period (hereinafter defined), which sum shall become additional Earnest Money. Purchaser's failure to deliver such additional sum shall affect a termination of this Agreement. If this transaction is closed, the Earnest Money shall be applied to the Purchase Price. If Purchaser fails to deposit all of the Earnest Money as required by the terms hereof, this Agreement shall terminate. If this Agreement has not been terminated pursuant to the terms of this Agreement prior to the expiration of the Inspection Period, then all the Earnest Money is non-refundable unless Seller defaults hereunder.

2.3 Independent Contract Consideration. Contemporaneously with its execution of this Agreement, Purchaser has delivered to Seller a check in the amount of One Hundred and No/100 Dollars (\$100.00) (the "Independent Agreement Consideration"), which amount the parties bargained for and agreed to as consideration for Seller's execution and delivery of this Agreement. The Independent Consideration is in addition to and independent of any other consideration or payment provided in this Agreement, is non-refundable, and shall be retained by Seller notwithstanding any other provision of this Agreement.

## ARTICLE III TITLE AND SURVEY

3.1 Commitment for Title Insurance. Within fifteen (15) days after the Effective Date of this Agreement, Seller shall deliver or cause to be delivered to Purchaser at Seller's sole cost and expense (a) a current Commitment for an Owner Policy of Title Insurance ("Title

Commitment”) issued by the Title Company, whereby the Title Company commits to issue its Owner Policy of Title Insurance (“Owner’s Policy”) in accordance with this Agreement, and (b) legible copies of all instruments shown as exceptions on the Title Commitment. The Title Commitment shall describe the Land, list Purchaser as the prospective named insured, and shall show as the policy amount the Purchase Price.

3.2 Survey. Seller has delivered to Purchaser a copy of a prior survey of the Land dated March 31, 1998, prepared by \_\_\_\_\_ (the “Surveyor”). Seller shall, at its sole cost and expense, cause such prior survey to be updated (as updated, the “Survey”) promptly after the Effective Date by the Surveyor, the cost of which shall be borne by Seller. For purposes of the legal description of the Land to be included in the Deed to be delivered pursuant to Section 5.2 hereof, the field notes in the Survey shall control any conflicts or inconsistencies with the legal description contained in the attached Exhibit A or in the instruments set forth under Section 1(a)(ii) and Section 1(a)(iii) of this Agreement. Seller makes no warranties or representations concerning said prior survey. Such updated survey work shall conform to the Texas Board of Professional Land Surveying requirements for a Category 1A, Condition II survey and be so certified. Unless otherwise agreed by Seller and Purchaser in writing, the legal description contained in the Survey shall be the legal description contained in the documents used to convey the Property from Seller to Purchaser and in Schedule A of the Owner’s Policy.

3.3 Title Review Period. Purchaser shall have a period of thirty (30) days from the later of: (a) receipt by Purchaser of the Title Commitment and legible copies of all instruments shown as exceptions thereon; or (b) receipt by Purchaser of the Survey delivered by Seller or obtained by Purchaser, within which to review the Title Commitment and Survey and to notify Seller of those matters and items to which Purchaser objects (“Non-Permitted Exceptions”) and of those items which Purchaser is willing to accept title to the Property subject to (“Permitted Exceptions”). All title encumbrances or exceptions set forth in Title Commitment or Survey to which Purchaser does not object within such thirty (30) day review period (other than liens securing the payment of money, to which Purchaser is not required to object and which shall be Non-Permitted Exceptions) and the matters set forth on Exhibit B attached hereto and made a part hereof shall be deemed to be Permitted Exceptions. If any such Non-Permitted Exception, other than liens securing payment of money and accounts payable, are not cured on or prior to the Closing Date, then Purchaser shall have the right to terminate this Agreement by giving Seller written notice thereof not later than the Closing Date, in which event, the Earnest Money shall be returned to Purchaser and neither party shall have any further rights or obligations hereunder. If Purchaser shall fail to terminate this Agreement within such time period, Purchaser shall be deemed to have waived such Non-Permitted Exceptions and agreed to accept title subject thereto in which case all uncured Non-Permitted Exceptions shall automatically be deemed Permitted Exceptions. Seller shall cure any lien or encumbrance placed or asserted against the Property by Seller but may use a portion of the Purchase Price for curing such matter at Closing.

3.4 Owner’s Policy. At Closing, the Title Company shall furnish to Purchaser, at Seller’s sole cost and expense, the Owner’s Policy. The Owner’s Policy may contain as exceptions the standard printed exceptions and the Permitted Exceptions. Notwithstanding anything contained herein to the contrary, in the event Purchaser requests that the “survey

exception” in the Owner’s Policy be modified to read “shortages in area,” Purchaser shall pay all fees and additional premiums charged by the Title Company in connection with such modification.

ARTICLE IV  
ACCESS TO AND INSPECTION OF THE PROPERTY

4.1 Delivery of Materials. Within five (5) days after the Effective Date, Seller shall deliver to Purchaser a copy of (i) 2006 ad valorem tax statements, and (ii) other information about the Property in the possession of Seller and its attorneys and not previously provided to Purchaser. SELLER MAKES NO REPRESENTATION OR WARRANTY AS TO THE TRUTH, ACCURACY OR COMPLETENESS OF ANY MATERIALS, DATA OR INFORMATION DELIVERED BY SELLER TO PURCHASER IN CONNECTION WITH THE TRANSACTION CONTEMPLATED HEREBY, PURCHASER ACKNOWLEDGES AND AGREES THAT ALL MATERIALS, DATA AND INFORMATION DELIVERED BY SELLER TO PURCHASER IN CONNECTION WITH THE TRANSACTION CONTEMPLATED HEREBY ARE PROVIDED TO PURCHASER AS A CONVENIENCE ONLY AND THAT ANY RELIANCE ON OR USE OF SUCH MATERIALS, DATA OR INFORMATION BY PURCHASER SHALL BE AT THE SOLE RISK OF PURCHASER.

4.2 Right of Inspection. Purchaser shall, at its sole cost and expense, have the right, for a period of sixty (60) days from the Effective Date (the “Inspection Period”), to enter the Land to make a physical inspection and assessment of the Property; provided, however, that Purchaser shall give Seller at least two (2) business days prior notice before entering the Land (which may be written or oral), and if requested by Seller, any such inspections and assessments shall be conducted in the presence of Seller or its designated representative. Purchaser shall, at its sole cost and expense, (a) promptly repair any damage done to the Property in connection with such inspection and assessment, (b) maintain or have its agents and contractors conducting such inspections and assessments maintain liability insurance coverage not less than \$1,000,000 per occurrence, (c) keep the Land free and clear of any liens which may arise as a result of any such inspections and assessments, and (d) use its good faith efforts to keep confidential any information Purchaser and/or its agents, contractors or representatives obtain or develop during or as a result of such inspections and assessments (in connection therewith, Purchaser will advise all parties conducting such inspections and assessments of this confidentiality requirement, and use good faith efforts to cause such parties not to disclose any such information unless required by applicable governmental regulations).

4.3 Purchaser’s Indemnification Obligations. The respective terms which are entirely capitalized below are defined in this Section 4.3. In the case of any person who may go upon the Land as an agent, representative or inspector acting for Purchaser under Section 4.2 hereof, Purchaser agrees to indemnify Seller and to hold Seller harmless, and to defend Seller or, at Seller’s option, to reimburse Seller for all costs of defense and legal fees as incurred (including all appeal and supersedes bonds) arising directly or indirectly from all CLAIMS, DEMANDS, AND CAUSES OF ACTION FOR ALL DAMAGES that result from the sole ACTS OR OMISSIONS of Purchaser.

As used in this Section 4.3, the term “ALL CLAIMS, DEMANDS, AND CAUSES OF ACTION FOR ALL DAMAGES” means all claims, demands, and causes of action recognized now or at any later time under the applicable law for injury to or death of any such person or damage to or loss of any Property and all resulting damages, namely, all actual damages, statutory damages, punitive and exemplary damages, pre-judgment and post-judgment interest, legal fees and costs of court, and all other damages or losses recoverable now or at a later time under the applicable law.

As used in this Section 4.3, the term “ACTS OR OMISSIONS” means negligence, gross negligence, breaches of express or implied warranties, premises liability, violations of the Texas Deceptive Trade Practices Act, breaches of duties under the law of strict liability in tort (including defects in design, manufacturing, marketing, warnings, and distribution), defamation, false arrest or imprisonment, malicious prosecution, or any other misfeasance, malfeasance, nonfeasance, breaches of legal duties, tortious conduct, intentional torts, malicious conduct, false or misleading of deceptive, or unconscionable conduct, or any combination thereof.

As used in this Section 4.3, “Seller” means that entity so named in the preamble hereof and its respective agents, employees, subcontractors, independent contractors, officers and directors, but not Purchaser.

In this Section 4.3, the use of the singular shall include the plural, and vice versa; and the use of the conjunctive shall include the disjunctive, and vice versa. As used in this Section 4.3, the word “including” means “including without limitation.” Seller and Purchaser agree that the invalidity of any portion or portions of this Section 4.3 shall not affect in any way the remainder of this Section 4.3, but the valid portions of this Section 4.3 shall remain in full force and effect as though the Section 4.3 had never contained the invalid portion or portions.

Subject to the limitation stated in this paragraph, Purchaser shall abide by and honor any request by Seller under this Section 4.3 to defend Seller or, at Seller’s option, to reimburse Seller for all defense costs and legal fees described above, as they are incurred, in any claim, demand, or cause of action described above. Seller agrees that Purchaser so agrees with the reservation that Seller will reimburse Purchaser for all reasonable defense costs and fees if Purchaser is ultimately adjudged not to owe indemnity by virtue of the findings of the trier of fact and the judgment rendered as a result of the claim, demand, and cause of action described above. Seller agrees that so long as Purchaser is providing a defense to Seller pursuant to this Section 4.3 by legal counsel reasonably acceptable to Seller, Purchaser shall not be obligated to reimburse Seller for the costs and expenses of additional legal counsel for such defense.

4.4 Right of Termination. In consideration of the circumstances set out in this Section 4.4 and the further consideration of Purchaser’s agreement hereby made by Purchaser in favor of Seller that upon and incident to Purchaser’s exercising any right to terminate this Agreement as provided for in this Section 4.4, Purchaser will furnish to Seller, without any charge and also without warranty (express or implied) or representation with respect to accuracy or quality thereof, legible copies of all written reports or analyses (excluding any reports or analyses prepared by Purchaser for its internal use and any reports or analyses in respect of the marketing of Purchaser’s potential development of the Property) which may have been made or obtained by Purchaser in connection with its inspection and assessment of the Land. Seller grants



to Purchaser the irrevocable right and privilege, exercisable by Purchaser's giving notice to Seller and to the Title Company on or before the expiration of the Inspection Period to declare this Agreement terminated if Purchaser determines, in its sole and absolute discretion, that the Property is not suitable for its intended use for any reason whatsoever. If this Agreement is terminated pursuant to this Section 4.4 (including as a result of a deemed termination because of failure of Purchaser to deliver an Earnest Money deposit), Seller and Purchaser shall be released from any further obligations under this Agreement except as otherwise provided below in this Section 4.4, and the Earnest Money shall be returned to Purchaser. However, if this Agreement is not terminated by the expiration of the Inspection Period, then it shall be conclusively presumed that Purchaser has accepted the Property in all respects, including, without limitation, Seller's title thereto as described in the Title Commitment subject to Seller curing such title matters as Seller have previously agreed to cure.

The right and privilege granted to Purchaser to declare this Agreement terminated may be exercised at any time during the Inspection Period by Purchaser's giving notice of termination to Seller and the Title Company. Upon such exercise or the deemed exercise of such right as provided above, this Agreement shall terminate and the Earnest Money shall be paid as provided in this Section 4.4 above (with Purchaser being responsible for any fees to be charged by the Title Company). As a condition to the return of any Earnest Money to Purchaser, the copies of the reports and analyses specified in this Section 4.4 and the results of any inspections or assessment conducted by Purchaser of the Land will be delivered to Seller by Purchaser. Thereafter, both parties shall be released from any further obligations under this Agreement, except Purchaser shall remain responsible for the costs of restoration or repair of the Land to the extent provided in Section 4.2 hereof and the agreement to indemnify Seller contained in Section 4.3 hereof shall continue in the case of any event of happening or occurring prior to the effective date of such termination. Purchaser's obligations to make payments, deliver copies of reports and to indemnify Seller as provided in this paragraph shall be applicable also in the event of Purchaser's default under this Agreement or upon a valid termination of this Agreement occurring after the end of the Inspection Period.

## ARTICLE V THE CLOSING

5.1 Time and Place. Unless otherwise agreed in writing by the parties hereto, the closing of the transaction contemplated hereby (the "Closing") shall take place at 10:00 a.m. Houston, Texas time at the offices of the Title Company or other location mutually agreeable to the parties hereto on or before \_\_\_\_\_ (the "Closing Date").

5.2 Seller's Obligations at Closing. At the Closing, Seller shall deliver or cause to be delivered to Purchaser, at Seller's sole cost and expense (other than the premium for the deletion of the boundary exception in the title policy which shall be paid by Purchaser) the following:

- (a) a Special Warranty Deed (the "Deed") in form and substance reasonably acceptable to Purchaser conveying good and indefeasible fee simple title to the Property, subject only to the Permitted Exceptions, duly executed and acknowledged by Seller;

(b) a bill of sale and assignment of all properties or interests described in subsections (b) and (c) of Article I, in form and substance reasonably acceptable to Purchaser and duly executed by Seller;

(c) the Owner's Policy, guaranteeing good and indefeasible title in Purchaser and containing no exception other than the Permitted Exceptions and the standard printed exceptions;

(d) such instruments as are necessary or are reasonably required by Purchaser or the Title Company to evidence the authority of Seller and Seller's representatives executing instruments at the Closing;

(e) such affidavits or letters of indemnity as the Title Company may require in order to omit from its insurance policies all exceptions for unfiled mechanic's, materialmen's or similar liens;

(f) such notices or disclosures regarding restrictive covenants and water/municipal utility districts, as well as any other statutory notices or disclosures;

(g) all originals or copies of any reports, studies, books and records provided to Purchaser pursuant to Section 4.1 above in connection with the Property;

(h) the original, or copy, of each statement for current real estate taxes and assessments, sewer charges and assessments, water charges and other utilities for the Property, if any, together with proof of payment (if any of the same are then due and payable); and

(i) an affidavit stating Seller's taxpayer identification number and that Seller is not a "foreign person" within the meaning of section 1445, et. seq., of the Internal Revenue Code of 1986, as amended.

5.3 Purchaser's Obligations at Closing. At the Closing, Purchaser shall deliver to the Title Company the following:

(a) the Purchase Price in cash or immediately available funds, it being agreed that the Earnest Money shall be delivered to Seller at Closing and applied towards the payment of the Purchase Price;

(b) such instruments as are necessary or are reasonably required by Seller or the Title Company to evidence the authority of Purchaser and Purchaser's representatives executing instruments at the Closing; and

(c) such notices or disclosures regarding restrictive covenants and water/municipal utility districts, as well as any other statutory notices or disclosures.

5.4 Prorations. Ad valorem taxes, personal property taxes, and other state, county, municipal, community, owners' association, maintenance and other similar taxes, charges and assessments (special or otherwise), and rents shall be adjusted between Seller and Purchaser and

shall be prorated on a per diem basis as of midnight of the day preceding the Closing Date on the basis of the fiscal year for which same are levied, imposed or assessed, and regardless of when the same become a lien or are payable. If the fixed rate of any taxes, rents, charges or assessments shall not be fixed prior to the Closing, adjustment thereof at the Closing shall be upon the basis of the rate for the preceding fiscal year applied to the latest assessed valuation (or other basis of valuation) and the same shall be further adjusted when the rate for the current fiscal year is fixed. If the Permitted Exception or waived Non-Permitted Exception include liens for special taxes or assessments (other than special taxes or assessments for the drainage ditch serving the Land), the same shall be satisfied by Seller and Purchaser.

5.5 Closing Costs. Seller shall pay (a) the fees of any counsel representing it in connection with the transaction contemplated hereby, (b) the cost of the Survey, (c) the basic premium for the Owner's Policy (excluding the fees and additional premiums charged by the Title Company in connection with the modification of the "survey exception," which fees and additional premiums shall be paid by Purchaser if such modification is requested by Purchaser), (d) the Broker's Commission (as such term is defined in Section 9.1 hereof), and (e) one-half (1/2) of any escrow fee which may be charged by the Title Company in connection with the transaction contemplated hereby. Purchaser shall pay (a) the fees of any counsel representing Purchaser in connection with the transaction contemplated hereby, (b) the fees and additional premiums charged by the Title Company in connection with the modification of the "survey exception" to the Owner's Policy if such modification is requested by Purchaser, (c) the fees for recording the Deed, the bill of sale and assignment set forth under Section 5.2(b) of this Agreement and any other instrument used to convey the Property from Seller to Purchaser, and (d) one-half (1/2) of any escrow fees charged by the Title Company in connection with the transaction contemplated hereby. All other costs and expenses incurred in connection with the transaction contemplated hereby shall be paid by the party incurring the same.

5.6 Conditions Precedent to Closing. It shall be an express condition precedent to the obligations hereunder of each of the parties hereto that as of the Closing Date Seller shall have obtained a release executed by an authorized officer or representative of \_\_\_\_\_'s and properly acknowledged waiving \_\_\_\_\_ preferential right to purchase Tract I pursuant to Section 15 of the Reciprocal Agreement. If the above-described condition is not fully satisfied by the Closing Date, either party hereto shall have the right (but not the obligation) to terminate this Agreement by written notice to the other party hereto, in which event neither party shall have any further rights, duties or obligations hereunder (other than Purchaser's obligations arising under Section 4.2 and Section 4.3 hereof, which shall survive the termination of this Agreement) and the Earnest Money shall be immediately returned to Purchaser in full.

## ARTICLE VI REPRESENTATIONS, WARRANTIES AND COVENANTS OF SELLER

6.1 Representations and Warranties of Seller. To induce Purchaser to enter into this Agreement and to purchase the Property, Seller represents and warrants to and agrees and covenants with Purchaser that:

- (a) to the best of its actual knowledge, Seller owns good and indefeasible title in fee simple in the Property, and to the best of its actual knowledge, owns all of the

Property subject only to all matters of record in Harris County, Texas, and all matters that a true and correct survey of the Property would reveal; and

(b) Seller is authorized to convey its interest in the Property pursuant to this Agreement.

In the event Purchaser believes that Seller has breached the warranties contained in this Section 6.1, and in the event Purchaser brings a lawsuit thereon, the parties hereto agree that the burden of proof shall be upon the Purchaser to prove that Seller knew or should have known that the warranty was untrue at such time Seller gave the warranty or at Closing.

As used in this Agreement, Seller's actual knowledge is deemed to be the actual knowledge of W. Dow Hamm III.

6.2 Seller's Covenants. Between the Effective Date and the Closing Date, Seller shall:

(a) not enter into, execute, extend or renew any lease for a term extending beyond the Closing Date or execute or modify any lease, easement, license or any other agreement or contract relating to or affecting the Property, or any portion thereof, without, in each case, Purchaser's prior written consent and approval;

(b) not mortgage, hypothecate or further encumber the Property or any portion thereof; and

(c) not authorize the imposition of any mechanic's or materialmen's claims or create any circumstance which would result in the likely imposition of any such claims.

6.3 Conditions Precedent to Close. The obligations of Purchaser to close the transactions contemplated by this Agreement and to pay the Purchase Price and are conditioned upon and subject to the satisfaction or waiver by Purchaser on or before the Closing Date of each of the following conditions:

(a) Seller shall have performed and complied with all agreements, covenants and conditions to be performed or complied with under this Agreement on or prior to the Closing Date.

(b) All of Seller's representations and warranties set forth in this Agreement shall be true and correct in all material respects as of the Closing Date.

(c) Seller shall have complied with all procedures reasonably required by the Title Company or which are customary or appropriate in real estate sales transactions similar to the transactions contemplated hereby in connection with the consummation of all transactions contemplated hereby.

(d) The Title Company shall be irrevocably committed to issue the Owner's Policy in accordance with this Agreement upon conveyance of the Property to Purchaser and payment of the Purchase Price to Seller.

ARTICLE VII  
DESTRUCTION, DAMAGE OR CONDEMNATION PRIOR TO CLOSING

7.1 Casualty. Seller shall bear the risk of all loss or damage to the Property, or any portion thereof, from any and all causes whatsoever until and including the Closing Date. Seller shall maintain its existing insurance coverage on the Property until and including the Closing Date. In the event there is any damage or destruction to the Property subsequent to the Effective Date and prior to the date of Closing, and the estimated cost to repair the Property as determined by a third party contractor selected by Purchaser and reasonably acceptable to Seller, is equal to or in excess of One Hundred Thousand and No/100 Dollars (\$100,000.00), Purchaser may, as its sole and exclusive option, either terminate this Agreement (except for Purchaser's obligations set forth under Article IV of this Agreement, which shall survive the termination of this Agreement) and the Earnest Money shall be immediately returned to Purchaser, or Purchaser may elect to consummate the transaction contemplated hereby, in which event Seller's right to all insurance proceeds resulting from such damage or destruction shall be assigned in writing by Seller to Purchaser and delivered to Purchaser, after which Seller shall have no further obligation to Purchaser with regard to such damage or destruction. In the event there is any damage or destruction to the Property subsequent to the Effective Date and prior to the date of Closing, and the estimated cost to repair the Property as determined by a third party contractor selected by Purchaser and reasonably acceptable to Seller is less than One Hundred Thousand and No/100 Dollars (\$100,000.00), Purchaser shall have no right to terminate this Agreement as a result thereof, Seller's right to all insurance proceeds resulting from such damage or destruction shall be assigned in writing by Seller to Purchaser and delivered to Purchaser, after which Seller shall have no further obligation to Purchaser with regard to such damage or destruction.

7.2 Condemnation. If prior to the Closing Date Seller receives any notice of a taking of any portion of the Land or a taking affecting access to the Land, by condemnation, eminent domain proceedings or deed in lieu thereof, which taking would in Purchaser's sole and absolute discretion render the Property unsuitable for Purchaser's purposes, Purchaser may, at its option, terminate this Agreement by written notice to Seller. Such option must be exercised by Purchaser within ten (10) days after Seller gives Purchaser notice of such taking. If Purchaser exercises such option, the Earnest Money shall be returned to Purchaser and this Agreement will terminate (except for Purchaser's obligations set forth under Article IV hereof, which shall survive the termination of this Agreement), but if Purchaser does not exercise such option, the Closing Date shall not be postponed by reason of the pendency of such taking proceedings and pending Closing, Seller and Purchaser shall have the right to appear and defend their separate interests in such proceedings. If such proceedings are finally concluded prior to Closing, any condemnation award shall become the property of Seller and the Purchase Price shall be reduced by the same amount with Purchaser taking at Closing title to the Property save and except the portion which may be taken in fee or subject to such easement or other non-fee interest taken. If such proceedings are not finally concluded prior to Closing then upon Closing Purchaser shall take subject to such pending proceedings and become the sole condemnee therein and Seller shall assign to Purchaser at Closing all of their right, title and interest in and to any condemnation award.

ARTICLE VIII  
DEFAULT AND REMEDIES

8.1 Seller's Default. If Seller shall refuse or fail to convey the Property as herein provided or to perform any other covenants or obligations hereunder or breach any material representation or warranty contained herein, Purchaser shall have as its sole and exclusive remedies hereunder either the right (a) to terminate this Agreement and recover the Earnest Money which return shall operate to terminate this Agreement and release Seller from any and all obligations, duties and liabilities hereunder (except for Purchaser's obligations set forth under Article IV hereof, which shall survive the termination of this Agreement), or (b) to enforce specific performance of Seller's obligations hereunder, provided that no such action in specific performance shall or may seek to require Seller to do any of the following: (i) to change the condition of the Property or restore same after any casualty; or (ii) to expend money, post a bond, institute legal proceedings, or take other actions to cure or remove a title encumbrance or objection or correct any matter shown on the Title Commitment or the Survey except as agreed to be cured by Seller.

8.2 Purchaser's Default. If Purchaser refuses to consummate the purchase of the Property pursuant to this Agreement for any reason other than termination of this Agreement pursuant to a right granted to Purchaser hereunder to do so, then Seller, as its sole and exclusive remedy, shall have the right to terminate this Agreement by giving Purchaser written notice thereof, in which event neither Purchaser nor Seller shall have any further rights, duties or obligations hereunder (except for Purchaser's obligations set forth under Article IV hereof, which shall survive the termination of this Agreement), and Escrow Agent shall deliver to Seller, as liquidated damages, the Earnest Money. Such sum is agreed upon as liquidated damages because of the difficulty and inconvenience of ascertaining the actual damages. Seller shall be entitled to no other damages or relief.

ARTICLE IX  
REAL ESTATE BROKERAGE

9.1 Brokers. Purchaser warrants that it has been represented by, and only by, \_\_\_\_\_ ("Purchaser's Broker") in connection with this Agreement, to whom Seller has agreed to pay a brokerage commission equal to \$\_\_\_\_\_ (the "Broker's Commission"). Purchaser and Seller hereby indemnify, defend and hold harmless the other from and against any or all liability or claims made by a broker other than Purchaser's Broker against the indemnified party for any such brokerage fees, commissions or finder's fees arising out of or under such alleged agreement or commitment of the indemnifying party.

9.2 Assignment. Purchaser may not assign its rights under this Agreement, mortgage, pledge or hypothecate this Agreement or grant or create any security interest in the rights of Purchaser under this Agreement except with the prior written consent of Seller, which consent may be given or withheld in Seller's sole and absolute discretion. Any such transfer or attempted transfer in violation of the provisions of this Section 9.2 shall be null and void and shall constitute a default by Purchaser. In the event that Seller gives its prior written consent to the assignment of Purchaser's rights and obligations under this Agreement to a proposed assignee, any and all sums paid by such assignee to Purchaser in connection with such

assignment, other than any sums that are paid to Purchaser as reimbursement of out of pocket expenses actually incurred by Purchaser in connection herewith, shall be the property of and delivered by Purchaser to Seller. Any such sums so delivered to Seller shall be deemed consideration for Seller's consent to the proposed assignment.

ARTICLE X  
MISCELLANEOUS

10.1 Disclaimer. PURCHASER AGREES THAT PURCHASER WILL EXAMINE AND INVESTIGATE ALL ASPECTS AND FEATURES OF THE PROPERTY (INCLUDING, WITHOUT LIMITATION, ALL FAULT LINES, SPECIAL FLOOD HAZARD CLASSIFICATION AND HYDROLOGICAL CHARACTERISTICS) THAT PURCHASER CONSIDERS TO BE RELEVANT PRIOR TO THE EXPIRATION OF THE INSPECTION PERIOD AND THAT PURCHASER WILL RELY SOLELY UPON SUCH EXAMINATIONS AND INVESTIGATIONS AND SELLER'S WARRANTIES AND REPRESENTATIONS IN SECTION 6.1 ABOVE IN PURCHASING THE PROPERTY. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT, IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT PURCHASER IS PURCHASING THE PROPERTY "AS IS" AND THAT SELLER IS MAKING NO REPRESENTATIONS OR WARRANTIES, WHETHER EXPRESS OR IMPLIED, BY OPERATION OF LAW OR OTHERWISE, WITH RESPECT TO THE PROPERTY (EXCEPT AS PROVIDED IN SECTION 6.1 ABOVE, INCLUDING WITHOUT LIMITATION, ITS QUALITY, PHYSICAL CONDITION OR VALUE, THE INCOME OR EXPENSES FROM OR OF THE PROPERTY, ITS HABITABILITY, SUITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. EXCEPT AS PROVIDED IN SECTION 6.1 ABOVE, SELLER SPECIFICALLY MAKES NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, WITH REGARD TO TITLE TO THE PROPERTY OR ANY INTEREST THEREIN.

10.2 Notices. All notices, requests and other communications under this Agreement shall be in writing and shall be delivered in person or by confirmed facsimile transmission or sent by certified mail, return receipt requested, or sent by private receipt courier (Fed. Ex. or the like) addressed as follows:

(a) In the case of Seller:

\_\_\_\_\_  
c/o \_\_\_\_\_

\_\_\_\_\_

Phone: \_\_\_\_\_

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

and

\_\_\_\_\_  
\_\_\_\_\_

(b) In the case of Purchaser:

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

or at such other address, and to the attention of such other person, as the parties shall give notice as herein provided. All such notices, requests and other communications shall be deemed to have been sufficiently given for all purposes hereof on the first to occur of the following: (a) two business days after the date of deposit with the United States Postal Service by certified mail, (b) upon the personal delivery or confirmed facsimile transmission thereof, or (c) one (1) day after deposit into the custody of a recognized overnight delivery service to be sent by overnight delivery, as the case may be. In the event the date by which any notice must be given under this Agreement falls upon a Saturday, Sunday or holiday, such notice shall be permitted to be given on the first business day thereafter.

10.3 Entire Agreement; Modifications. This Agreement embodies and constitutes the entire understanding between the parties with respect to the transactions contemplated herein, and all prior or contemporaneous agreements, understandings, representations and statements (oral or written) are merged into this Agreement. Neither this Agreement nor any provision hereof may be waived, modified, amended, discharged or terminated except by an instrument in writing signed by the party against whom the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument.

10.4 Captions. The captions in this Agreement are inserted for convenience of reference only and in no way define, describe, or limit the scope or intent of this Agreement or any of the provisions hereof.

10.5 Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors, and assigns.

10.6 Time of the Essence. Time is of the essence of this Agreement.

10.7 Construction. The parties acknowledge that each party and its counsel have reviewed and revised this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any amendments or exhibits hereto.

10.8 Exhibits. All references to Exhibits contained herein are references to Exhibits attached hereto, all of which are made a part hereof for all purposes the same as if set forth herein verbatim.



10.9 Further Acts. In addition to the acts recited in this Agreement to be performed by Seller and Purchaser, Seller and Purchaser agree to perform or cause to be performed at the Closing or after the Closing any and all such further acts as may be reasonably necessary to consummate the transactions contemplated hereby.

10.10 Governing Law; Venue. This Agreement shall be governed by and construed by the laws of the State of Texas. All obligations herein shall be performable in Harris County, Texas. The parties hereby stipulate and agree that any suit or proceeding brought to enforce any obligation or covenant under this Agreement shall be brought exclusively in Harris County, Texas, it being stipulated and agreed that such County is the exclusive County for venue for any such suit or proceeding. Each party to this Agreement consents to personal jurisdiction in Harris County, Texas.

10.11 Waiver. Purchaser shall be entitled to waive any defect in title or other condition of this Agreement and thereupon close the sale and purchase hereunder despite such defect or failure.

10.12 Interpretation. Whenever the context of this Agreement so requires, the singular shall include the plural, the plural shall include the singular, the whole shall include any part thereof, and any gender shall include all other genders. All terms defined in the Agreement shall have such defined meanings when used herein. The paragraph headings contained herein are for convenience and reference only and are not intended to define or limit the scope of any provision of this Agreement. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity or unenforceability of any one provision or portion thereof shall not affect the validity or enforceability of any other provision hereof. If the last day of any time period stated herein shall fall on a Saturday, Sunday or legal holiday, then the duration of such time period shall be extended so that it shall end on the next succeeding day which is not a Saturday, Sunday or legal holiday.

10.13 Confidential. In the event the sale and purchase contemplated by this Agreement are not consummated, all information furnished to Purchaser by Seller with respect to the Land and all information derived by Purchaser (other than internal analyses and reports prepared by Purchaser) in respect of its evaluation of the Land, shall remain confidential and shall not be disclosed by Purchaser to any third party or parties (except as permitted by Section 4.2 above) unless required by law or government regulation to do so, and Purchaser agrees to forthwith return to Seller any and all copies of any such information, data or records in the possession of Purchaser or of any of their respective agents or representatives.

10.14 Invalidity. If any term, provision, covenant, or restrictions of this Agreement is held by a court of competent jurisdiction to be invalid, voidable, void or unenforceable, the remainder of this Agreement and the other terms, provisions, covenants and restrictions shall remain in full force and effect and shall in no way be affected, impaired or invalidated and this Agreement shall thereafter be construed as though such invalid, voidable, void or unenforceable term, provision, covenant or restriction had not been included herein. Further, if any provision hereof is so held void, voidable, invalid or unenforceable in part or with respect to particular circumstances, such provision shall nevertheless remain in full force and effect in all other parts or with respect to all other circumstances.

10.15 General. Whenever from the context it appears appropriate, each term stated in either the singular or the plural shall include both the singular and plural, the pronouns stated in the masculine or the neuter gender shall include the masculine, the feminine and the neuter gender. The terms "hereof", "herein", and "hereunder" shall refer to this Agreement as a whole and not to any particular Article, Section or paragraph hereof.

10.16 Fees and Expenses. In the event of any controversy, claim or dispute between Seller and Purchaser affecting or relating to the transaction contemplated by or the performance of the rights and obligations under this Agreement, the prevailing party shall be entitled to recover from the nonprevailing party all of the prevailing party's reasonable expenses, including, without limitation, attorneys' fees, accountants' fees, consultants' fees, court costs and interest.

10.17 No Third Party Beneficiary. The provisions of this Agreement and of the documents to be executed and delivered at Closing are and will be for the benefit of Seller and Purchaser only and are not for the benefit of any third party. No third party shall have the right to enforce the provisions of this Agreement or the documents to be executed and delivered at Closing.

10.18 Counterparts. This Agreement may be executed in one or more counterparts by Seller and by Purchaser, and shall be binding upon Seller, together with Purchaser, execute the same so long as Seller and Purchaser shall have executed some (but not necessarily the same) counterpart. Each such counterpart shall be deemed an original, and all such counterparts shall constitute one and only one agreement. Facsimile copies of executed counterparts shall constitute originals for all purposes.

10.19 Effective Date of Agreement. Upon the execution of this Agreement by Purchaser, this Agreement shall constitute an offer by Purchaser. The offer by Purchaser evidenced hereby shall automatically be withdrawn and become of no force or effect unless this Agreement is executed by Seller and delivered to the Title Company on or before 5:00 p.m., Houston, Texas time, on \_\_\_\_\_, 2007.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement effective as of the Effective Date.

SELLER:

Executed by Seller this  
\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_

By \_\_\_\_\_, its general partner

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

PURCHASER:

Executed by Purchaser this  
\_\_\_\_ day of \_\_\_\_\_, 2007.

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The Title Company hereby agrees to perform its obligations under this Agreement and acknowledges receipt of Earnest Money from Purchaser in the amount of \$\_\_\_\_\_ on the \_\_ day of \_\_\_\_\_, 2007. The Title Company hereby acknowledges receipt of a fully executed counterpart of this Agreement from Seller on the \_\_ day of \_\_\_\_\_, 2007.

TITLE COMPANY:

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## **PROFESSIONAL EDUCATION BROADCAST NETWORK**

### Speaker Contact Information

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