

**LEASE AGREEMENT**

Dated February 25, 2009

by and between

**TOWN OF BABYLON INDUSTRIAL DEVELOPMENT AGENCY**

and

**JMDH REAL ESTATE OF BABYLON, LLC**

---

RD America, LLC Project

Affecting the Land generally known by the street address  
1966 Broadhollow Road, located  
in the County of Suffolk,  
Farmingdale, New York 11735  
as more particularly described in  
Exhibit A to this Lease Agreement  
and which is also known as  
District 0100  
Section 33.00, Block 1.00, Lot 12.000  
on the Official Tax Map of Suffolk County

Table of Contents

ARTICLE I DEFINITIONS AND REPRESENTATIONS .....3  
    Section 1.1 Definitions.....3  
    Section 1.2 Construction.....8  
    Section 1.3 Section 1.3 Representations and Warranties by Agency .....9  
    Section 1.4 Findings by Agency .....9  
    Section 1.5 Representations and Warranties by the Lessee.....9

ARTICLE II CONVEYANCE TO THE AGENCY; THE PROJECT; AND TITLE  
INSURANCE..... 11  
    Section 2.1 The Deed.....11  
    Section 2.2 The Project .....12  
    Section 2.3 Title Insurance .....13  
    Section 2.4 Limitation on Sales Tax Exemption .....13

ARTICLE III LEASE OF FACILITY AND RENTAL PROVISIONS .....17  
    Section 3.1 Lease of the Facility.....17  
    Section 3.2 Duration of Term .....17  
    Section 3.3 Rental Provisions .....17  
    Section 3.4 Rental Payments Payable Absolutely Net.....18  
    Section 3.5 Nature of Lessee’s Obligation Unconditional.....18  
    Section 3.6 Assignment of Sublease Agreement .....18

ARTICLE IV MAINTENANCE, TAXES, PAYMENTS IN LIEU OF TAXES AND  
INSURANCE.....19  
    Section 4.1 Maintenance, Alterations and Improvements .....19  
    Section 4.2 Removal of Property of the Facility.....20  
    Section 4.3 Payment in Lieu of Real Estate Taxes.....22  
    Section 4.4 Taxes, Assessments and Charges.....26  
    Section 4.5 Insurance .....27  
    Section 4.6 Advances by Agency .....29  
    Section 4.7 Compliance with Law .....30

ARTICLE V DAMAGE, DESTRUCTION AND CONDEMNATION .....31  
    Section 5.1 Damage, Destruction and Condemnation .....31

ARTICLE VI PARTICULAR COVENANTS .....33  
    Section 6.1 Dissolution of Lessee; Restrictions on Lessee.....33  
    Section 6.2 Indemnity .....33  
    Section 6.3 Compensation and Expenses of the Agency.....36  
    Section 6.4 Retention of Title to Facility; Grant of Easements; Release of Facility Realty.....36  
    Section 6.5 Discharge of Liens .....37  
    Section 6.6 Agency’s Authority; Covenant of Quiet Enjoyment .....38  
    Section 6.7 No Warranty of Condition or Suitability .....38  
    Section 6.8 (Reserved).....38  
    Section 6.9 Employment Information, Opportunities and Guidelines.....38

Section 6.10 Further Assurances.....	39
Section 6.11 Recording and Filing.....	39
Section 6.12 Further Encumbrances .....	39
<b>ARTICLE VII EVENTS OF DEFAULT; REMEDIES .....</b>	<b>40</b>
Section 7.1 Events of Default .....	40
Section 7.2 Remedies on Default.....	42
Section 7.3 Remedies Cumulative .....	42
Section 7.4 No Additional Waiver Implied by One Waiver .....	43
Section 7.5 Effect on Discontinuance of Proceedings .....	43
Section 7.6 Agreement to Pay Attorneys' Fees and Expenses .....	43
<b>ARTICLE VIII OPTIONS TO PURCHASE THE FACILITY; RECAPTURE OF BENEFITS</b>	<b>43</b>
Section 8.1 Option to Purchase Facility and to Terminate Agreement.....	43
Section 8.2 Conveyance on Exercise of Option to Purchase .....	44
Section 8.3 Conveyance Upon Expiration of Term .....	44
Section 8.4 (Reserved).....	44
Section 8.5 Recapture of Agency Benefits .....	44
<b>ARTICLE IX MISCELLANEOUS .....</b>	<b>46</b>
Section 9.1 Force Majeure .....	46
Section 9.2 Priority .....	47
Section 9.3 Assignment or Sublease .....	47
Section 9.4 Amendments .....	49
Section 9.5 Notices .....	49
Section 9.6 Prior Agreements Superseded.....	50
Section 9.7 Severability .....	50
Section 9.8 Inspection of Facility .....	50
Section 9.9 Effective Date; Counterparts.....	50
Section 9.10 Binding Effect.....	50
Section 9.11 Third Party Beneficiaries .....	50
Section 9.12 Law Governing .....	50
Section 9.13 Waiver of Trial by Jury.....	51
Section 9.14 Non-Discrimination .....	51
Section 9.15 Recourse Under This Agreement.....	51
Section 9.16 Beneficial Ownership.....	51

## LEASE AGREEMENT

This **LEASE AGREEMENT**, made and entered into February 25, 2009 (this "**Agreement**"), by and between **TOWN OF BABYLON INDUSTRIAL DEVELOPMENT AGENCY**, a corporate governmental agency constituting a body corporate and politic and a public benefit corporation of the State of New York, duly organized and existing under the laws of the State of New York (the "**Agency**"), party of the first part, having its principal office at 47 West Main Street, Babylon, New York 11702, and **JMDH REAL ESTATE OF BABYLON, LLC**, a limited liability company organized and existing under the laws of the State of Delaware (the "**Lessee**"), party of the second part, having its principal office at 15-24 132<sup>nd</sup> Street, College Point, New York 11356:

### WITNESSETH:

**WHEREAS**, the New York State Industrial Development Agency Act, constituting Title 1 of Article 18-A of the General Municipal Law, Chapter 24 of the Consolidated Laws of New York, as amended (the "**Enabling Act**") authorizes and provides for the creation of industrial development agencies in the several counties, cities, villages and towns in the State of New York and empowers such agencies, among other things, to acquire, construct, reconstruct, lease, improve, maintain, equip and furnish land, any building or other improvement, and all real and personal properties, including but not limited to machinery and equipment, deemed necessary in connection therewith, whether or not now in existence or under construction, which shall be suitable for manufacturing, warehousing, research, commercial, industrial or civic purposes, to the end that such agencies may be able to promote, develop, encourage, assist and advance the job opportunities, health, general prosperity and economic welfare of the people of the State of New York and to improve their prosperity and standard of living; and

**WHEREAS**, pursuant to and in accordance with the provisions of the Enabling Act, the Agency was established by Chapter 177 of the 1973 Laws of New York, as amended (together with the Enabling Act, the "**Act**") for the benefit of the Town of Babylon and the inhabitants thereof; and

**WHEREAS**, to accomplish the purposes of the Act, the Agency has entered into negotiations with the Lessee for the acquisition of a "project" within the meaning of the Act (the "**Project**") within the territorial boundaries of the Town of Babylon, New York and located on that certain lot, piece or parcel of land generally known as and located at 1966 Broadhollow Road, in Farmingdale, New York (the "**Land**") and otherwise described in Exhibit A attached hereto; and

**WHEREAS**, the Project will include the acquisition by the Agency of a 12 acre parcel of land and acquisition, renovation and equipping of an approximately 156,000 square foot warehouse facility situated thereon and the acquisition, renovation and equipping thereof all for use by RD America, LLC as a warehouse, office and distribution facility to be used in its business of wholesale food service distribution (the Land and all buildings, structures and other improvements now or hereafter located thereon, and all fixtures and appurtenances and additions thereto and substitutions and replacements thereof, now or hereafter attached to or contained in or located on the Land and/or the buildings and improvements located thereon or placed on any

part thereof, and attached thereto, which are used or usable in connection with the present or future operation thereof or the activities at any time conducted therein and certain machinery, equipment and other tangible personal property (and all repairs, replacements, improvements and substitutions thereof or therefor, and all parts, additions and accessories incorporated therein), subject to the terms hereof, are collectively referred to herein as the “**Facility**”); and

**WHEREAS**, to facilitate the Project, the Agency and the Lessee have entered into negotiations to enter into a “straight lease transaction” within the meaning of the Act in which the Agency will acquire fee simple title to the Facility and the Agency will lease its interest in the Facility to the Lessee pursuant to this Agreement, and, in furtherance of such purposes, on February 17, 2009 the Agency adopted a resolution (the “**Authorizing Resolution**”) authorizing the undertaking of the Project, the acquisition of the Facility by the Agency and the lease of the Facility by the Agency to the Lessee for sublease to RD America, LLC, a Delaware limited liability company (the “**Sublessee**”); and

**WHEREAS**, the provision by the Agency of financial assistance to the Lessee through a straight lease transaction has been determined to be necessary to induce the Lessee to proceed with the Project and thereby to locate and increase jobs in Town of Babylon; and if the Agency does not provide such financial assistance, the Lessee has represented to the Agency herein that the Sublessee could not feasibly proceed with the Project in the State of New York or maintain its competitive position in its industry; and

**WHEREAS**, simultaneously with the execution and delivery of this Agreement, the Lessee will convey, or cause there to be conveyed, to the Agency pursuant to a Bargain and Sale Deed with Covenant Against Grantor's Acts, dated the date hereof (the “**Deed**”), good and marketable fee simple title to the Land subject to Permitted Encumbrances, and all rights or interests therein or appertaining thereto, together with all structures, buildings, foundations, related facilities, fixtures and other improvements existing thereon or therein as of the date thereof; and

**WHEREAS**, pursuant to this Agreement, the Agency will lease to the Lessee the Agency’s interest in the Facility; and

**WHEREAS**, pursuant to Section 4.3 of this Agreement, the Lessee has agreed to make certain payments in lieu of real estate taxes with respect to the Land and the Improvements, to the Agency; and

**NOW, THEREFORE**, in consideration of the premises and the respective representations and agreements hereinafter contained, the parties hereto agree as follows (provided that in the performance of the agreements of the Agency herein contained, any obligation it may incur for the payment of money shall not create a debt of the State of New York or of the Town of Babylon, and neither the State of New York nor the Town of Babylon shall be liable on any obligation so incurred, but any such obligation shall be payable solely out of the lease rentals, revenues and receipts derived from or in connection with the Facility (as hereinafter defined), including moneys received under this Agreement):

## ARTICLE I

### DEFINITIONS AND REPRESENTATIONS

**Section 1.1** Definitions. **The following terms shall have the following meanings in this Agreement:**

**Abatement Termination Date** shall have the same meaning as set forth in Section 4.3 hereof.

**Acquisition** shall mean any acquisition or series of acquisitions (whether by stock or asset purchase, hiring or otherwise), directly or indirectly, by a Company Group Entity of a business or operation of a Person other than a Company Group Entity, during any consecutive six (6) month period, which results directly in an increase in the employment of Company Group Entities within the Town by an aggregate of twenty (20) or more Employees.

**Act** shall mean, collectively, the New York State Industrial Development Agency Act (constituting Title 1 of Article 18-A of the General Municipal Law, Chapter 24 of the Consolidated Laws of New York), as amended, and Chapter 177 of the 1973 Laws of New York, as amended.

**Additional Rent** shall mean any additional rental payments described in Section 3.3(b) of this Agreement.

**An Affiliate of a Person** shall mean a Person which directly or indirectly through one or more intermediaries controls, or is under common control with, or is controlled by, such Person. The term “control” (including the related terms “controlled by” and “under common control with”) means (i) the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise, and (ii) the ownership, either directly or indirectly, of more than 50% of the voting stock or other equity interest of such Person.

**Agency** shall mean the Town of Babylon Industrial Development Agency, a corporate governmental agency constituting a body corporate and politic and a public benefit corporation of the State, duly organized and existing under the laws of the State, and any body, board, authority, agency or other governmental agency or instrumentality which shall hereafter succeed to the powers, duties, obligations and functions thereof.

**Agreement** shall mean this Agreement and shall include any and all amendments hereof and supplements hereto hereafter made in conformity herewith.

**Annual Period** shall mean (i) that period commencing on the Commencement Date and ending on January 1, 2010 which shall be the first Annual Period, and (iii) thereafter each annual period commencing on January 1 and ending on the next succeeding December 31, with the final Annual Period to commence on January 1, 2024 and end on December 31, 2024.

**Annual Period Eligible Employee** shall have the meaning ascribed to such term in Section 6.13 hereof.

**Approved Facility** shall mean the warehouse and distribution facility for use in connection with the Sublessee's business of wholesale food service distribution.

**Authorized Representative** shall mean, (i) in the case of the Agency, the Chief Executive Officer, of the Agency, or any other officer or employee of the Agency who is authorized to perform specific acts or to discharge specific duties hereunder and of whom another Authorized Representative of the Agency has given written notice to the Lessee; and (ii) in the case of the Lessee, its Chief Executive Officer, the President, any manager or any other officer or employee who is authorized to perform specific acts or to discharge specific duties hereunder and of whom another Authorized Representative of the Lessee has given written notice to the Agency.

**Base Employment Number** shall mean, for any Annual Period, 80.

**Base Employment Reduction** shall mean, for any Annual Period, the difference, if any (but not less than 0), derived from subtracting the Annual Period Eligible Employees for such Annual Period from the Base Employment Number.

**Base Employment Reduction Percentage** shall mean the percentage derived by dividing the Base Employment Reduction by the Base Employment Number.

**Base Rent** shall mean the rental payment described in Section 3.3(a) of this Agreement.

**Business Day** shall mean any day which shall not be a Saturday, Sunday, legal holiday or a day on which banking institutions in the City of New York are authorized by law or executive order to close.

**Commencement Date** shall mean February 25, 2009 on which date this Agreement was executed and delivered.

**Company Group Entity** shall mean the Lessee, the Sublessee and its Affiliates.

**Deed** shall mean the Deed referred to in the recitals to this Agreement.

**Eligible Employees** shall mean an Employee of a Company Group Entity (i) located and employed exclusively in the Town, (ii) having his or her principal base of operations in the Town, and (iii) whose income as an Employee of the Company Group Entity is paid exclusively from such Company Group Entity's Town based payroll.

**Employee** shall mean a Full-Time Employee or a Full-Time Equivalent Employee.

**Event of Default** shall have the meaning specified in Section 7.1 hereof.

**Facility** shall mean, collectively, the Facility Realty (defined below) and the Facility Equipment (defined below).

**Facility Equipment** shall mean that machinery, equipment and other tangible personal property acquired and installed in accordance with the Sales Tax Letter as part of the Project

pursuant to Section 2.2 hereof, together with all repairs, replacements, improvements, substitutions and renewals thereof or therefor and all parts, additions and accessories incorporated therein or affixed thereto (but excluding Lessee's Property within the meaning of Section 4.1(c) hereof or Existing Facility Property released pursuant to Section 4.2 hereof), as more particularly described in Exhibit B "Description of the Facility Equipment" hereto, which is made a part of this Agreement. "Facility Equipment" shall not include (i) rolling stock, (ii) any item of personalty which shall have a useful life of less than one year or which shall not constitute a tangible capital asset, and (iii) plants, shrubs, trees, flowers, lawns or plants, or (iv) fine art, objects d'art or other similar decorative items.

**Facility Realty** shall mean, collectively, the Land and the Improvements.

**Fiscal Year of the Lessee** shall mean a year of 365 or 366 days, as the case may be, ending on the final Saturday of December of each calendar year, or such other fiscal year of similar length used by the Lessee for accounting purposes as to which the Lessee shall have given prior written notice thereof to the Agency at least ninety (90) days prior to the commencement thereof.

**Full-Time Employee** shall mean, with respect to an Annual Period, an individual on the payroll of, receiving customary benefits from, and directly employed during such Annual Period by, any Company Group Entity (and excluding any individuals employed by temporary employment or similar agencies) and each of whom works within the Town for any Company Group Entity during such Annual Period on a "full-time basis" (i.e., working at least a 35-hour week, subject to customary vacation, holiday and sick leave).

**Full-Time Equivalent Employee** shall mean, with respect to an Annual Period, two (2) individuals on the payroll of, receiving customary benefits from, and directly employed during such Annual Period by, any Company Group Entity (and excluding any individuals employed by temporary employment or similar agencies) and each of whom works within the Town for any Company Group Entity during such Annual Period on a "part-time basis" (i.e., working at least a 20-hour week, subject to customary vacation, holiday and sick leave).

**Guarantors** shall mean the Lessee and the Sublessee, as corporate guarantors.

**Guaranty Agreement** shall mean the Guaranty Agreement, of even date herewith, from the Guarantors to the Agency, and shall include any and all amendments thereof and supplements thereto hereafter made in conformity therewith.

**Improvements** shall mean all buildings, structures, foundations, related facilities, fixtures and other improvements together with any rail siding improvements existing on the Commencement Date or at any time made, erected or situated on the Land (including any improvements made as part of the Project pursuant to Section 2.2 hereof) and all replacements, improvements, extensions, substitutions, restorations, repairs or additions thereto.

**Independent Accountant** shall mean an independent certified public accountant or firm of independent certified public accountants selected by the Lessee and approved by the Agency (such approval not to be unreasonably withheld, conditioned or delayed).

**Ineligible Employee** means any Full-Time Equivalent Employees which exceed in the aggregate ten percent (10%) of the total Annual Period Eligible Employees for such Annual Period.

**Land** shall mean that certain lot, piece or parcel of land generally known by the street address located in 1966 Broadhollow Road, Farmingdale, New York, all as more particularly described in Exhibit A - "Description of the Land" hereto, which is made a part hereof, together with all easements, rights and interests now or hereafter appurtenant or beneficial thereto; but excluding, however, any real property or interest therein released pursuant to Section 6.4 hereof.

**Lessee** shall mean JMDH Real Estate of Babylon, LLC, a limited liability company organized and existing under the laws of the State of Delaware, and its permitted successors and assigns pursuant to Sections 6.1 or 9.3 hereof.

**Lessee's Property** shall have the meaning specified in Section 4.1(c) hereof.

**Liens** shall have the meaning specified in Section 6.5(a) hereof.

**Loss Event** shall have the meaning specified in Section 5.1(a) hereof.

**Net Proceeds** shall mean, when used with respect to any insurance proceeds or condemnation award, compensation or damages, the gross amount of any such proceeds, award, compensation or damages less all costs and expenses (including reasonable attorneys' fees and any ordinary and reasonable expenses of the Agency) incurred in the collection thereof.

**Non-Relocation Reduction** shall mean any Base Employment Reduction in an Annual Period for any reason other than a Relocation Reduction.

**Opinion of Counsel** shall mean a written opinion of counsel for the Lessee who shall be reasonably acceptable to the Agency.

**Permitted Encumbrances** shall mean:

- (i) this Agreement and the Sublease Agreement;
- (ii) liens for real estate taxes, assessments, levies and other governmental charges, the payment of which is not yet due and payable;
- (iii) any mechanic's, workmen's, repairmen's, materialmen's, contractors', carriers', suppliers' or vendors' Lien or right in respect thereof if payment is not yet due and payable, all if and to the extent permitted by Section 6.5 hereof;
- (iv) any lien, security interest, encumbrance or charge, or any conditional sale or other title retention agreement, that any vendor of Facility Equipment or any contractor hired to perform Project work may place on or with respect to the Facility or any part thereof;

(v) utility, access and other easements and rights-of-way, restrictions and exceptions that an Authorized Representative of the Lessee certifies to the Agency will not materially interfere with or impair the Lessee's use and enjoyment of the Facility as herein provided;

(vi) such minor defects, irregularities, encumbrances, easements, rights-of-way and clouds on title as normally exist with respect to property similar in character to the Facility as do not, as set forth in a certificate of an Authorized Representative of the Lessee delivered to the Agency, either singly or in the aggregate, render title to the Facility unmarketable or materially impair the property affected thereby for the purpose for which it was acquired and held by the Agency hereunder or purport to impose liabilities or obligations on the Agency; and

(vii) those exceptions to title to the Facility enumerated in the title insurance policy delivered pursuant to Section 2.3 hereof insuring the fee simple title of the Agency to the Facility Realty, a copy of which is on file at the offices of the Agency.

**Person** shall mean any individual, corporation, partnership, limited liability company, joint venture, association, joint stock company, trust, unincorporated organization or government or any agency or political subdivision thereof or other entity.

**Permitted Sublessee** shall have the same meaning as set forth in Section 9.3 hereof.

**Prohibited Person** shall mean (i) any Person (A) that is in default or in breach, beyond any applicable grace period, of its obligations under any written agreement with the Agency or the Town, or (B) that directly or indirectly controls, is controlled by, or is under common control with a Person that is in default or in breach, beyond any applicable grace period, of its obligations under any written agreement with the Agency or the Town, unless such default or breach has been waived in writing by the Agency or the Town, as the case may be, and (ii) any Person (A) that has been convicted in a criminal proceeding for a felony or any crime involving moral turpitude or that is an organized crime figure or is reputed to have substantial business or other affiliations with an organized crime figure, or (B) that directly or indirectly controls, is controlled by, or is under common control with a Person that has been convicted in a criminal proceeding for a felony or any crime involving moral turpitude or that is an organized crime figure or is reputed to have substantial business or other affiliations with an organized crime figure.

**Project** shall mean the acquisition of the Land and the Improvements by the Agency and acquisition, renovation and equipping of an approximately 156,000 square foot warehouse facility thereto and the acquisition of the Facility Equipment thereon or therein, all for use by the Lessee or the Sublessee as an Approved Facility.

**Project Cost Budget** shall mean that certain budget for costs of the Project as set forth by the Lessee in Exhibit C - "Project Cost Budget" attached to this Agreement.

**Project Counsel** shall mean Winston & Strawn LLP or such other attorneys that are recognized for their expertise in municipal finance law and are selected by the Agency to render legal advice to the Agency in connection with the transactions contemplated by this Agreement.

**Project Documents** shall mean the Deed, this Agreement, the Guaranty Agreement, the Sales Tax Letter and the Sublease Agreement.

**Relocation Reduction** shall mean a Base Employment Reduction resulting from (i) any transfer or relocation of Eligible Employees to a location outside of the Town, (ii) any reduction in the number of Eligible Employees resulting from the hiring of replacement or substituted employees at a location outside of the Town, or (iii) any transfer, relocation or establishment (following a close of the Facility) of operations or facilities to a location outside of the Town.

**Rental Payments** shall mean, collectively, Base Rent, Additional Rent and amounts due under Section 4.3 hereof.

**Sales Taxes** shall mean any tax(es) imposed by Article 28 of the New York Tax Law, as the same may be amended from time to time.

**Sales Tax Letter** shall mean the Letter of Authorization for Sales Tax Exemption, which the Agency shall make available to the Lessee in accordance with this Agreement.

**State** shall mean the State of New York.

**Sublease Agreement** shall mean that certain Sublease Agreement, dated February 25, 2009, by and between the Lessee, as sublessor, and the Sublessee, as the same may be amended and supplemented in accordance with its terms and as permitted by the terms hereof.

**Sublessee** shall mean RD America, LLC, a Delaware limited liability company, and its permitted successors and assigns under the Sublease Agreement.

**Taxable Status Date** shall mean March 1 of each year or any other date selected by the Town as the date on which the Town shall determine in accordance with law which parcel or parcels of real property located in the Town will be subject to real property taxation.

**Taxing Jurisdictions** shall have the same meaning as provided in the Act.

**Town** shall mean the Town of Babylon, New York.

**Section 1.2 Construction. In this Agreement, unless the context otherwise requires:**

(a) The terms “hereby,” “hereof,” “hereto,” “herein,” “hereunder” and any similar terms, as used in this Agreement, refer to this Agreement, and the term “hereafter” shall mean after, and the term “heretofore” shall mean before, the Commencement Date.

(b) Words of the masculine gender shall mean and include correlative words of the feminine and neuter genders and words importing the singular number shall mean and include the plural number and vice versa.

(c) Words importing persons shall include firms, associations, partnerships (including limited partnerships and partnerships), trusts, corporations, limited liability companies and other legal entities, including public bodies, as well as natural persons.

(d) Any headings preceding the texts of the several Articles and Sections of this Agreement, and any table of contents appended to copies hereof, shall be solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect its meaning, construction or effect.

**Section 1.3 Representations and Warranties by Agency.** The Agency represents and warrants that the Agency (i) is a corporate governmental agency constituting a body corporate and politic and a public benefit corporation duly organized and existing under the laws of the State, (ii) is authorized and empowered to enter into the transactions contemplated by this Agreement and any other Project Documents to which the Agency is a party and to carry out its obligations hereunder and thereunder and (iii) by proper action of its members, has duly authorized the execution and delivery of this Agreement and such other Project Documents to which the Agency is a party.

**Section 1.4 Findings by Agency.** The Agency, based upon the representations and warranties of the Lessee contained in this Agreement and the information contained in the application and other materials heretofore submitted by or on behalf of the Lessee or the Sublessee to the Agency, hereby affirms its findings and determinations set forth in the Authorizing Resolution, and further finds and determines, that

(i) the providing of financial assistance (within the meaning of the Act) through the straight lease transaction (within the meaning of the Act) contemplated by this Agreement is necessary to induce the Lessee and the Sublessee to proceed with the Project;

(ii) the transactions contemplated by this Agreement shall not provide financial assistance in respect of any project where facilities or property that are primarily used in making retail sales (within the meaning of the Act) of goods or services to customers who personally visit such facilities constitute more than one-third of the total project costs and undertaking the Project will serve the public purposes of the Act by preserving permanent, private sector jobs or increasing the overall number of permanent, private sector jobs in the State; and

(iii) no funds of the Agency shall be used in connection with the transactions contemplated by this Agreement for the purpose of preventing the establishment of an industrial or manufacturing plant or for the purpose of advertising or promotional materials which depict elected or appointed government officials in either print or electronic media, nor shall any funds of the Agency be given hereunder to any group or organization which is attempting to prevent the establishment of an industrial or manufacturing plant within the State.

**Section 1.5 Representations and Warranties by the Lessee.** The Lessee makes the following representations and warranties:

(a) The Lessee is a Delaware limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware, is not in violation of any provision of its articles of organization or operating agreement, has the power and authority to own its property and assets, to carry on its business as now being conducted by it and to execute, deliver and perform this Agreement and each other Project Document to which it is or shall be a party.

(b) The execution, delivery and performance of this Agreement and each other Project Document to which it is or shall be a party and the consummation of the transactions herein and therein contemplated will not violate any provision of law, any order of any court or agency of government, or the articles of organization or operating agreement of the Lessee, or any indenture, agreement or other instrument to which the Lessee is a party or by which it or any of its property is subject to or bound, or be in conflict with or result in a breach of or constitute (with due notice and/or lapse of time) a default under any such indenture, agreement or other instrument or result in the imposition of any lien, charge or encumbrance of any nature whatsoever other than Permitted Encumbrances.

(c) There is no action or proceeding pending or threatened by or against the Lessee by or before any court or administrative agency that would adversely affect the ability of the Lessee to perform its obligations under this Agreement and each other Project Document to which it is or shall be a party and all authorizations, consents and approvals of governmental bodies or agencies required to be obtained by the Lessee as of the date hereof in connection with the execution and delivery of this Agreement and each other Project Document to which the Lessee shall be a party or in connection with the performance of the obligations of the Lessee hereunder and under each of the Project Documents have been obtained.

(d) The Facility will constitute a “project” under the Act; and the Lessee intends to operate the Facility, or cause the Facility to be operated, in accordance with this Agreement and as an Approved Facility and a qualified “project” in accordance with and as defined under the Act.

(e) The financial assistance (within the meaning of the Act) provided by the Agency to the Lessee and the Sublessee through the straight-lease transaction (within the meaning of the Act) as contemplated by this Agreement is reasonably necessary to induce the Lessee and the Sublessee to proceed with the Project.

(f) Subject to Sections 4.2 and 5.1 hereof, no Facility Equipment shall be located at any site other than the Facility Realty.

(g) (Reserved).

(h) (Reserved).

(i) The transactions contemplated by this Agreement shall not provide financial assistance in respect of any project where facilities or property that are primarily used in making retail sales (within the meaning of the Act) of goods or services to customers who personally visit such facilities constitute more than one-third of the total project costs and undertaking the Project will, to Lessee's knowledge and intent, serve the public purposes of the Act by preserving

permanent, private sector jobs or increasing the overall number of permanent, private sector jobs in the State.

(j) No funds of the Agency shall be used in connection with the transactions contemplated by this Agreement for the purpose of preventing the establishment of an industrial or manufacturing plant or for the purpose of advertising or promotional materials which depict elected or appointed government officials in either print or electronic media, nor shall any funds of the Agency be given hereunder to any group or organization which is attempting to prevent the establishment of an industrial or manufacturing plant within the State.

(k) This Agreement and the other Project Documents (except for those Project Documents, if any, not executed and delivered as of the Closing Date) constitute the legal, valid and binding obligations of the Lessee enforceable against the Lessee in accordance with their respective terms.

(l) The Lessee is in compliance, and will continue to comply, with all Federal, State and local laws or ordinances (including rules and regulations) relating to zoning, building, safety and environmental quality applicable to the Project and the operation of the Facility.

(m) (Reserved).

(n) (Reserved).

(o) The Project Cost Budget attached as Exhibit C to this Agreement represents a true, correct and complete budget as of the Commencement Date of the proposed costs of the Project.

(p) (Reserved).

(q) Except as permitted by Section 9.3 hereof, no Person other than the Lessee, the Sublessee or any Affiliate thereof, any Guarantor hereunder or the Permitted Sublessee is or will be in use, occupancy or possession of any portion of the Facility.

(r) The Project will be designed, and the operation of the Facility will be, in compliance with all applicable Federal, State and local laws or ordinances (including rules and regulations) relating to safety and environmental quality.

(s) The Lessee is not a Prohibited Person.

## ARTICLE II

### CONVEYANCE TO THE AGENCY; THE PROJECT; AND TITLE INSURANCE

**Section 2.1 The Deed.** The Lessee has caused to be delivered to the Agency, for good and valuable consideration therefor, pursuant to the Deed, good and marketable fee simple title to the Land and the Improvements, and all rights or interests therein or appertaining thereto,

together with all structures, buildings, foundations, related facilities, fixtures and other improvements existing thereon or therein as of the date thereof, free and clear of all liens, claims, charges, encumbrances, security interests and servitudes other than Permitted Encumbrances. It is understood that (i) good and marketable fee simple title to all Improvements and good and merchantable title to all Facility Equipment intended to be incorporated or installed in the Facility as part of the Project shall vest in the Agency immediately upon delivery to or installation or incorporation into the Facility or payment therefor, whichever shall occur first, and (ii) the Lessee shall take all action necessary to so vest title to such Improvements and Facility Equipment in the Agency and to protect such title against claims of any third parties.

**Section 2.2 The Project.** (a) The Agency hereby appoints the Lessee and the Sublessee its true and lawful agent and sub-agent respectively, and the Lessee and the Sublessee hereby accept such agency, for purposes of undertaking the Project, including, without limitation, (i) acquiring the Land and the Improvements and making renovations thereto and acquiring the Facility Equipment thereon or therein, (ii) making, executing, acknowledging and delivering any contracts, orders, receipts, writings and instructions with any other Persons (subject in each case to Section 2.4 hereof), and in general doing all things which may be requisite or proper, all for the purposes of undertaking the Project with the same powers and with the same validity and effect as the Agency could do if acting in its own behalf, (iii) paying all fees, costs and expenses incurred in undertaking the Project from funds made available therefor in accordance with or as contemplated by this Agreement and (iv) asking, demanding, suing for, levying, recovering and receiving all such sums of money, debts due and other demands whatsoever which may be due, owing and payable to the Agency under the terms of any contract, order, receipt or writing issued or contracted for by Lessee or Sublessee in connection with the Project and to enforce the provisions of any such contract, agreement, obligation, bond or other performance security entered into or obtained in connection with the Project. The cost of the Project shall be financed from (i) funds of the Lessee or the Sublessee, and (ii) other funds of the Lessee or the Sublessee to the extent such funds shall be necessary to cover costs of the Project which exceed such other sources of funds. In the event that moneys derived from such other sources are not sufficient to pay the costs necessary to complete the Project in full, the Lessee shall pay or cause to be paid that portion of such costs of the Project as may be in excess of the moneys derived from such sources and shall not be entitled to any reimbursement therefor from the Agency, nor shall the Lessee be entitled to any diminution of the Rental Payments to be made under this Agreement.

(b) The Lessee shall pay (i) all of the reasonable costs and expenses in connection with the preparation of any instruments of conveyance, the delivery thereof and of any instruments and documents relating thereto and the filing and recording of any such instruments of conveyance or other instruments or documents, if required, (ii) all taxes and charges payable in connection with the conveyance and transfer, or attributable to periods prior to the conveyance and transfer, to the Agency as set forth in Section 2.1 hereof, and (iii) all shipping and delivery charges and other expenses or claims incurred in connection with the Project.

(c) The Lessee unconditionally represents, warrants, covenants and agrees that it will obtain or cause to be obtained all necessary approvals from any and all governmental agencies requisite to the Project and operation of the Facility, all of which will be done in compliance with all Federal, State and local laws, ordinances and regulations applicable thereto, and with the

conditions and requirements of all policies of insurance with respect to the Facility and this Agreement. Promptly upon completion of the Project, the Lessee will obtain or cause to be obtained all required occupancy permits, authorizations and licenses from appropriate authorities, if any be required, authorizing the occupancy, operation and use of the Facility for the purposes contemplated by this Agreement and shall furnish copies of same to the Agency immediately upon receipt thereof.

**Section 2.3 Title Insurance.** On or prior to the Commencement Date, the Lessee will obtain and deliver to the Agency (a) a fee title insurance policy in an amount not less than \$500,000 insuring the Agency's fee simple interest in the Land and the Improvements against loss as a result of defects in title, subject only to Permitted Encumbrances, and (b) a current survey of the Land certified to the Lessee, the title company issuing such title insurance policy and the Agency. Any proceeds of such fee title insurance shall be paid to the Lessee and applied by the Lessee to remedy the applicable defect in title in respect of which such proceeds shall be derived. If not so capable of being applied or if a balance remains after such application, the proceeds or the remaining balance of proceeds, as the case may be, derived from any such title insurance policy insuring the Agency's fee title interest shall be applied to the payment of any Rental Payments due hereunder; and any balance thereafter may be used by the Lessee for any corporate purpose.

**Section 2.4 Limitation on Sales Tax Exemption.** (a) Any exemption from Sales Taxes resulting from or occasioned by the Agency's involvement with the Project shall be limited to purchases of property effected by the Lessee as agent and the Sublessee as sub-agent for the Agency, it being the intent of the parties that no operating expenses of the Lessee or the Sublessee shall be subject to an exemption from Sales Taxes because of the Agency's involvement with the Project.

(b) The Lessee and the Sublessee covenant and agree that they each shall include the following language (through an attached rider or otherwise) in and as part of each contract, invoice, bill or purchase order entered into by the Lessee as agent or the Sublessee as sub-agent for the Agency in connection with the Project:

“This [contract, agreement, invoice, bill or purchase order] is being entered into by [JMDH Real Estate of Babylon, LLC, a Delaware limited liability company/ RD America, LLC, a Delaware limited liability company (the “Agent”), as agent for and on behalf of the Town of Babylon Industrial Development Agency (the “Agency”) in connection with a certain project (the “Project”) of the Agency for JMDH Real Estate of Babylon, LLC and RD America, LLC, consisting of the acquisition by the Agency of a 12 acre parcel of land and renovation and equipping of an approximately 156,000 square foot warehouse facility for use by the Sublessee in its business of wholesale food service distribution to be located in 1966 Broadhollow Road, in Farmingdale, New York (the “Premises”). The improvements to be used for the Project and materials to be incorporated as building materials in the Premises which is the subject of this [contract, agreement, invoice, bill or purchase order] shall be exempt from the sales and use taxes levied by the State of New York if

the acquisition thereof is effected in accordance with the terms and conditions set forth in the attached Sales Tax Letter of the Agency; and the Agent hereby represents that this [contract, agreement, invoice, bill or purchase order] is in compliance with the terms of the Sales Tax Letter. This [contract, agreement, invoice, bill or purchase order] is non-recourse to the Agency, and the Agency shall not be directly, indirectly or contingently liable or obligated hereunder in any manner or to any extent whatsoever. By execution or acceptance of this [contract, agreement, invoice, bill or purchase order], the [vendor or contractor] hereby acknowledges and agrees to the terms and conditions set forth in this paragraph.”

If the Lessee or the Sublessee as the case may be shall fail to include, incorporate by reference or otherwise cause the contract, agreement, invoice, bill or purchase order to be, together with the vendor or contractor, subject to the above applicable language in substantially the above form, such contract, invoice, bill or purchase order shall not be an undertaking on behalf of the Agency and shall not be entitled to any of the benefits able to be conferred by the Agency, and neither the Lessee nor the Sublessee shall claim any sales or use tax benefits or exemptions with respect to any such contract, invoice, bill or purchase order and the Lessee shall return to the Agency any such benefits or exemptions so taken, together with interest on such amount at the rate of twelve percent (12%) per annum, from the date of such taking.

(c) On the Commencement Date, the Agency shall make available to the Lessee and the Sublessee the Sales Tax Letter. The Agency, at the sole cost and expense of the Lessee or the Sublessee, as the case may be, shall also execute such other authorizations, letters and documents (and such amendments to the Sales Tax Letter) as may be reasonably necessary to permit the Lessee and the Sublessee to obtain the intended benefits thereunder. Subject to the terms of this Agreement, it is intended that the aggregate scope of the sales and use tax benefits received by the Lessee and the Sublessee pursuant to this Agreement and the Sales Tax Letter shall be limited in duration to February 25, 2011:

(i) The Sales Tax Letter shall be dated the date hereof and shall be effective for a term commencing on its date and expiring upon the earliest of (1) the termination of this Agreement, (2) February 25, 2011, or (3) the termination of the Sales Tax Letter pursuant to the terms thereof.

(ii) The authorizations set forth in the Sales Tax Letter shall automatically be suspended twenty (20) days after notice to the Lessee or the Sublessee that the Lessee or the Sublessee shall be in default under this Agreement or the Sublessee Agreement period until the Lessee or the Sublessee as the case may be shall pay any amounts due, and perform all of its obligations, with respect to any such default.

(iii) The sales and use tax exemption to be provided pursuant to the Sales Tax Letter:

(A) shall not be available for payment of any costs other than the costs of the Project or for any items of personalty except Facility Equipment and

building materials utilized with respect to the Project,

(B) shall only be utilized for building materials and Facility Equipment which shall be purchased, completed or installed for use only by the Lessee and/or the Sublessee and their Affiliates at the Facility Realty (and not with any intention to sell, transfer or otherwise dispose of any such items of property to a Person as shall not constitute the Lessee or the Sublessee or an Affiliate), it being the intention of the Agency and the Lessee that the sales and use tax exemption shall not be made available with respect to any item of building materials or Facility Equipment unless such item is used solely by the Lessee, the Sublessee and their Affiliates at the Facility Realty,

(C) shall not be available for any item of building materials which is not to be incorporated as part of the Improvements,

(D) (Reserved)

(E) shall not be available for any date subsequent to which the Sales Tax Letter shall have been suspended as provided in Section 2.4(c)(ii) hereof; **provided, however**, that in the event the Lessee or the Sublessee shall thereafter cure any defaults under this Agreement, or the Agency shall thereafter waive such suspension, as applicable, the sales and use tax exemption shall again continue from the date of such cure or such waiver,

(F) shall not be available for or with respect to any tangible personal property having a useful life of less than one year, and shall be available only if purchased by the Lessee or the Sublessee as agent or sub-agent respectively for the Agency for use by the Lessee or the Sublessee and any of their Affiliates at the Facility Realty,

(G) (Reserved)

(H) shall not be available for any cost of utilities, cleaning service or maintenance supplies,

(I) shall not be available subsequent to the termination of this Agreement, and

(J) shall only be available for those costs as set forth as permitted hereunder.

(iv) In the event that the Lessee or the Sublessee shall utilize the sales or use tax exemption provided pursuant to the Sales Tax Letter in violation of the provisions of paragraph (c)(iii) of this Section 2.4, the Lessee or the Sublessee shall promptly deliver notice of same to the Agency, and the Lessee or the Sublessee as the case may be shall, upon demand by the Agency, pay to the Agency a return of sales or use tax exemptions in an amount equal to all such unauthorized sales or use tax exemptions together with interest at the rate of twelve percent (12%) per annum from the date and with respect to

the dollar amount for which each such unauthorized sales or use tax exemption was availed of by the Lessee.

(v) The Lessee shall, on or before January 1 of each year, commencing January 1, 2010, and ending on the earlier of the termination of this Agreement or January 1, 2011 deliver to the Agency a certificate of an Authorized Representative of the Lessee certifying (i) as to each sales or use tax exemption availed of by the Lessee and the Sublessee the dollar amount of same and the date availed of, all as availed of by the Lessee or the Sublessee in the immediately preceding calendar year (i.e., January 1 through December 31 for the certificate to be delivered on January 1, except that the first such period shall commence on the Commencement Date through January 1, 2010), and the specific items of Project costs to which they shall relate, (ii) that all such sales or use tax exemptions so availed of were in compliance with the provisions of the Sales Tax Letter and Section 2.4(c) hereof, and (iii) as to the dollar amount of all sales and use tax exemptions availed of by the Lessee and the Sublessee from the Commencement Date through the end of the calendar year period to which such certificate shall relate.

(vi) Upon request by the Agency of, and reasonable notice to, the Lessee and the Sublessee, the Lessee and the Sublessee shall make available at reasonable times to the Agency and the Independent Accountant all such books and records of the Lessee and the Sublessee as the case may be and require all appropriate officers and employees of the Lessee and the Sublessee to respond to reasonable inquiries by the Agency and the Independent Accountant, as shall be necessary to indicate in reasonable detail those costs to which the Lessee shall have utilized the Sales Tax Letter and the dates and amounts so utilized.

(vii) The Lessee or the Sublessee shall use its best efforts to obtain covenants to the Agency from each materialman, supplier, vendor or laborer to whom the Sales Tax Letter is presented by the Lessee or the Sublessee to the effect that such materialman, supplier, vendor or laborer shall not utilize the Sales Tax Letter for any purpose other than for the Project.

(viii) Any expenditure made by the Lessee or the Sublessee for the acquisition of Facility Equipment or building materials in conjunction with the use of the Sales Tax Letter shall constitute payment of rent hereunder.

(d) The Lessee and the Sublessee shall observe and comply with the terms and conditions of the Sales Tax Letter.

(e) The Lessee shall annually file a statement (Form ST-340 or any successor or additional mandated form) with the New York State Department of Taxation and Finance, in the form of Schedule B attached hereto or a form and in a manner and consistent with such regulations as is or may be prescribed by the Commissioner of the New York State Department of Taxation and Finance, of the value of all sales and use tax exemptions claimed by the Lessee, the Sublessee, or agents of the Lessee or the Sublessee in connection with the Project and the Facility as required by Section 874(8) of the New York State General Municipal Law (as the same may be amended from time to time), including, but not limited to, consultants or

subcontractors of such agents, under the authority granted pursuant to this Agreement. The Lessee shall furnish a copy of such annual statement to the Agency at the time of filing with the Department of Taxation and Finance. Should the Lessee fail to comply with the foregoing requirement, the Lessee and the Sublessee shall immediately cease to be the agent and the sub-agent for the Agency in connection with the Project (such agency relationship being deemed to be immediately revoked) without any further action of the parties, the Lessee and the Sublessee shall be deemed to have automatically lost their authority as agents of the Agency to purchase and/or lease property in the Agency's behalf, and shall desist immediately from all such activity, and shall immediately and without demand return to the Agency the Sales Tax Letter issued to the Lessee and the Sublessee by the Agency which is in the Lessee's or the Sublessee's possession or in the possession of any agent of the Lessee or the Sublessee. Nothing herein shall be construed as a representation by the Agency that any property acquired as part of the Project is or shall be exempt from sales taxes or use taxes under the laws of the State.

### ARTICLE III

#### LEASE OF FACILITY AND RENTAL PROVISIONS

**Section 3.1 Lease of the Facility.** (a) The Agency hereby leases to the Lessee, and the Lessee hereby leases from the Agency, the Facility for and during the term herein and subject to the terms and conditions herein set forth. The Agency hereby delivers to the Lessee, and the Lessee hereby accepts, sole and exclusive possession of the Facility (it being understood by the parties hereto that delivery of possession to the Agency of the Facility as the same is acquired and renovated shall take no further act or deed by the parties hereto).

(b) The Lessee hereby unconditionally represents, warrants, covenants and agrees that throughout the term of this Agreement (i) the Facility will be an Approved Facility and a "project" within the meaning of the Act; (ii) the Lessee will not take any action, or suffer or permit any action, if such action would cause the Facility not to be an Approved Facility or a "project" within the meaning of the Act; and (iii) the Lessee will not fail to take any action, or suffer or permit the failure to take any action, if such failure would cause the Facility not to be an Approved Facility or a "project" within the meaning of the Act. The Lessee shall not occupy, use or operate the Facility, or allow the Facility or any part thereof to be occupied, used or operated, for any unlawful purpose or in violation of any certificate of occupancy affecting the Facility or for any use which may constitute a nuisance, public or private, or make void or voidable any insurance then in force with respect thereto.

**Section 3.2 Duration of Term.** The term of this Agreement shall commence on the Commencement Date and shall expire on February 28, 2025, or such earlier date as this Agreement may be terminated as hereinafter provided.

**Section 3.3 Rental Provisions.** (a) *Base Rent.* The Lessee shall pay Base Rent to the Agency, without demand or notice, on the Commencement Date in the amount of \$1.00, which shall constitute the entire amount of Base Rent payable hereunder.

(b) Additional Rent. Throughout the term of this Agreement, the Lessee shall pay to the Agency any additional amounts (including amounts payable under Section 4.3 hereof) required to be paid by the Lessee to or for the account of the Agency hereunder, and any such additional amounts shall be paid as, and shall represent payment of, Additional Rent.

(c) Missed Payments. In the event the Lessee should fail to make or cause to be made any of the Rental Payments required under the foregoing provisions of this Section, the item or installment not so paid shall continue as an obligation of the Lessee until the amount not so paid has been paid in full, together with interest thereon from the date due at the applicable interest rate stated in this Agreement where so provided, or if not so provided, at twelve percent (12%) per annum.

**Section 3.4 Rental Payments Payable Absolutely Net.** The obligation of the Lessee to pay Rental Payments provided for in this Agreement shall be absolutely net to the Agency without any abatement, recoupment, diminution, reduction, deduction, counterclaim, set-off or offset whatsoever, so that this Agreement shall yield, net, to the Agency, the Rental Payments provided for herein, and all costs, expenses and charges of any kind and nature relating to the Facility, arising or becoming due and payable during or after the term of this Agreement, shall be paid by the Lessee and the Agency shall be indemnified by the Lessee for, and the Lessee shall hold the Agency harmless from, any such costs, expenses and charges.

**Section 3.5 Nature of Lessee's Obligation Unconditional.** The Lessee's obligations under this Agreement to pay Rental Payments shall be absolute, unconditional and general obligations, and irrespective of any defense or any rights of set-off, recoupment or counterclaim or deduction and without any rights of suspension, deferment, diminution or reduction it might otherwise have against the Agency or any other Person and the obligation of the Lessee shall arise whether or not the Project has been completed as provided in this Agreement. The Lessee will not suspend or discontinue payment of any Rental Payment due and payable hereunder or performance or observance of any covenant or agreement required on the part of the Lessee hereunder for any cause whatsoever, and the Lessee waives all rights now or hereafter conferred by statute or otherwise to any abatement, suspension, deferment, diminution or reduction in the Rental Payments hereunder.

**Section 3.6 Assignment of Sublease Agreement.** In order to secure the payment and performance of obligations of the Lessee under this Agreement, the Lessee does hereby assign, transfer and set over to the Agency, all of the Lessee's right, title and interest in and to the Sublease Agreement, including all sublease rentals, revenues and receipts therefrom, and the right to enforce all of the Lessee's rights and remedies thereunder. So long as there shall exist no Event of Default nor any default by the Lessee in the performance of any obligation contained herein to be performed or to cause to be performed beyond any applicable notice and grace period, the Agency waives the right to enter the Facility for the purpose of collecting rent and to let the Facility or any part thereof, and the Lessee may continue to collect rents at the time of and to retain, use and enjoy the same and to let the Facility or any part thereof, all subject to the provisions thereof.

The Lessee agrees not to terminate or modify or amend the Sublease Agreement or any of the terms thereof, or grant any material concessions in connection therewith, either orally or in

writing, or to accept a surrender thereof, without the prior written consent of the Agency, which consent shall not be unreasonably withheld, conditioned or delayed, and any attempted termination, modification or amendment of the Sublease Agreement without such written consent shall be null and void.

In the exercise of the powers herein granted, no liability shall be asserted or enforced against the Agency, all such liability being hereby expressly waived and released by the Lessee. The Agency shall not be obligated to perform or discharge any obligation, duty or liability under the Sublease Agreement, or under or by reason of this assignment.

## **ARTICLE IV**

### **MAINTENANCE, TAXES, PAYMENTS IN LIEU OF TAXES AND INSURANCE**

**Section 4.1 Maintenance, Alterations and Improvements.** (a) During the term of this Agreement, the Lessee will keep the Facility in good and safe operating order and condition, (subject to any periods of construction or renovation of any portion of the Facility), ordinary wear and tear excepted, will operate the Facility in the manner for which it was intended and contemplated by this Agreement (subject to any periods of construction or renovation of any portion of the Facility), and will make all replacements, renewals and repairs thereto (whether ordinary or extraordinary, structural or nonstructural, foreseen or unforeseen) necessary to ensure that the operations of the Lessee and the Sublessee at the Facility shall not be impaired or diminished in any material way. All replacements, renewals and repairs shall be equal or better in quality, class and value to the original work and be made and installed in compliance with the requirements of all governmental bodies. The Agency shall be under no obligation to replace, service, test, adjust, erect, maintain or effect replacements, renewals or repairs of the Facility, to effect the replacement of any inadequate, obsolete, worn-out or unsuitable parts of the Facility, or to furnish any utilities or services for the Facility and the Lessee hereby agrees to assume full responsibility therefor.

(b) The Lessee shall have the privilege of making such alterations of or additions to the Facility or any part thereof from time to time as it in its discretion may determine to be desirable for its uses and purposes, provided that:

(i) as a result of such alterations or additions, the fair market value of the Facility is not reduced below its value immediately before such alteration or addition and the usefulness, the structural integrity or operating efficiency of the Facility is not materially impaired,

(ii) such additions or alterations are effected with due diligence, in a good and workmanlike manner and in compliance with all applicable legal requirements,

(iii) such additions or alterations are promptly and fully paid for by the Lessee in accordance with the terms of the applicable contract(s) therefor, and in order that the

Facility shall at all times be free of any mortgage, lien, charge, encumbrance, security interest or claim other than Permitted Encumbrances, and

(iv) such additions or alterations do not change the nature of the Facility so that it would not constitute an Approved Facility and a “project” within the meaning of the Act. The Agency agrees at the sole cost of the Lessee and upon reasonable notice from the Lessee to execute all applications for variances, site plans, building permits and any other municipal approvals reasonably necessary to accomplish same and to create utility or other similar easements provided that such applications, site plans, building permits or other municipal approvals are reasonably acceptable to the Agency and do not materially increase the liability of the Agency.

All alterations of and additions to the Facility shall constitute a part of the Facility, subject to this Agreement and the Sublease Agreement, and the Lessee shall deliver or cause to be delivered to the Agency appropriate documents as may be necessary to convey title to such property to the Agency and to subject such property to this Agreement and the Sublease Agreement, free and clear of all liens, charges, encumbrances, security interests or claims other than Permitted Encumbrances.

(c) The Lessee and Sublessee shall have the right to install or permit to be installed at the Facility machinery, equipment and other personal property at the Lessee’s or Sublessee’s own cost and expense (the “**Lessee’s Property**”) without utilizing the Sales Tax Letter therefor and without conveying title to such Lessee’s Property to the Agency nor subjecting such Lessee’s Property to this Agreement and the Sublease Agreement. The Lessee’s Property shall not constitute part of the Facility leased hereunder. The Agency shall not be responsible for any loss of or damage to the Lessee’s Property. The Lessee shall have the right to create or permit to be created any mortgage, encumbrance, lien or charge on, or conditional sale or other title retention agreement with respect to, the Lessee’s Property, without the consent of or notice to the Agency.

(d) The Lessee shall not create, permit or suffer to exist any mortgage, encumbrance, lien, security interest, claim or charge against the Facility or any part thereof, or the interest of the Agency or the Lessee or the Sublessee in the Facility or this Agreement or the Sublease Agreement except for Permitted Encumbrances.

**Section 4.2 Removal of Property of the Facility.** (a) The Lessee shall have the privilege from time to time of removing from the Facility any fixture constituting part of the Facility Realty or any machinery, equipment or other property constituting part of the Facility Equipment (in either case, the “Existing Facility Property”) and thereby acquiring such Existing Facility Property, provided, however, no such removal shall be effected if (v) such removal is to another location other than the Facility Realty, unless the removed Existing Facility Property is no longer necessary or desirable in the conduct of Lessee’s or Sublessee’s business at the Facility, or same is replaced with fixtures, machinery, equipment or other property reasonably equivalent to the removed Existing Facility Property, (w) such removal would change the nature of the Facility as an Approved Facility or a “project” within the meaning of the Act, (x) such removal would impair the usefulness, structural integrity or operating efficiency of the Facility, or (y) such removal would materially reduce the fair market value of the Facility below its value immediately before such removal. The evaluations made under (v), (w), (x) or (y) of this Section

4.2(a) may be made after taking into account property installed or placed upon the Facility in substitution or replacement of such removed property.

(b) The Lessee shall deliver or cause to be delivered to the Agency any necessary documents conveying to the Agency title to any property installed or placed upon the Facility pursuant to Section 4.2(a) hereof and subjecting such substitute or replacement property to this Agreement and the Sublease Agreement, and upon written request of the Lessee, the Agency shall deliver to the Lessee appropriate documents conveying to the Lessee all of the Agency's right, title and interest in any property removed from the Facility pursuant to Section 4.2(a) hereof. The Lessee agrees to pay all costs and expenses (including reasonable counsel fees) incurred by the Agency in subjecting to this Agreement and the Sublease Agreement any property installed or placed on the Facility as part of the Facility pursuant to this Section 4.2 or Section 4.1 hereof.

(c) The removal from the Facility of any Existing Facility Property pursuant to the provisions of Section 4.2(a) hereof shall not entitle the Lessee to any abatement or reduction in the Rental Payments payable by the Lessee under this Agreement.

**Section 4.3 Payment in Lieu of Real Estate Taxes.**

(a) *Description and Address of Project:*

The Project consists of the acquisition by the Agency of a 12 acre parcel of land and renovation and equipping of an approximately 156,000 square foot warehouse facility on real property related thereto located in 1966 Broadhollow Road, Farmingdale, New York being District 0100, Section 33.00, Block 1.00, Lot 12.000.

(b) *Payments Prior to PILOT Commencement Date:*

The PILOT Commencement Date shall be as defined in subsection (d) hereof. Until the PILOT Commencement Date, or such later date as the Facility Realty is determined to be exempt from real estate taxes, the Lessee shall pay to the Town or the Agency as the case may be all real estate taxes with respect to the Facility Realty at such times, in such manner and in such amounts as would be applicable if the Facility Realty were owned by the Lessee and not owned by the Agency.

(c) *Payments in Lieu of Real Estate Taxes, Generally:*

It is recognized that under the provisions of the Act the Agency is generally required to pay no real estate taxes upon any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities. The Agency and the Lessee agree, however, that the Lessee shall be required to make payments in lieu of real estate taxes with respect to the Facility Realty, payable to the Agency, in the manner and at the time provided in subsection (d) below or at such other times as the Agency may designate in writing.

The Agency makes no representation as to the availability of an exemption from real estate taxes for the Facility Realty in the event that the Town Collector of Taxes, the Assessors' Office of the Town, the Town Surveyor, or any other relevant official of the Town, fails to recognize the Agency's exemption from real estate taxes on the basis of a discrepancy existing between the Facility Realty and the tax map of the Town of Babylon or the existence of another impediment to implementation of the Agency's exemption contemplated hereunder.

(d) *Payments in Lieu of Taxes on the Land and Buildings:*

For the period commencing on the PILOT Commencement Date (hereinafter defined) until the earlier of (i) February 28, 2025 (the "Abatement Termination Date") or (ii) the date on which the Agency no longer owns the Facility Realty, the Lessee shall make payment in lieu of real estate taxes, as follows:

Definitions

X = the then current assessed value of Facility Realty from time to time

PILOT Commencement Date = the Taxable Status Date of the Town immediately following the date hereof.

Normal Tax Due = those payments for taxes and assessments, other than special ad valorem levies, special assessments and service charges against real property located in the Town of Babylon (including any existing incorporated village or any village which may be incorporated after the date hereof, within which the Facility is wholly or partially located) which are or may be imposed for special improvements or special district improvements, which the Lessee would pay without exemption.

Payment

Tax Year (following the PILOT Commencement Date)

1	40.0%	Normal Tax Due on X
2	44.0%	Normal Tax Due on X
3	48.0%	Normal Tax Due on X
4	52.0%	Normal Tax Due on X
5	56.0%	Normal Tax Due on X
6	60.0%	Normal Tax Due on X
7	64.0%	Normal Tax Due on X
8	68.0%	Normal Tax Due on X
9	72.0%	Normal Tax Due on X
10	76.0%	Normal Tax Due on X
11	80.0%	Normal Tax Due on X
12	84.0%	Normal Tax Due on X
13	88.0%	Normal Tax Due on X
14	92.0%	Normal Tax Due on X
15	96.0%	Normal Tax Due on X
16		and thereafter 100% Normal Tax Due on X

The real property tax benefits provided for in this subsection (d) shall be deemed to commence on the PILOT Commencement Date. In no event shall the Lessee be entitled to receive real property tax benefits under this Agreement for a period longer than the period set forth in the formula above. Notwithstanding the foregoing, the Lessee further covenants and agrees that for any period that the Agency continues to hold title to the Facility after February 28, 2025, the Lessee shall pay 100% of Normal Tax due on X in accordance with the provisions of this Section 4.3.

(e) The Lessee shall pay the amounts set forth in paragraph (d) above, as applicable, within 40 days after receipt of each bill therefor from the Agency. Each year the Agency will deliver two bills for PILOTs due in each tax year which commences on December 1 of each year. The first bill will be delivered in December of such tax year in the amount of one-half of PILOTs due in such tax year and the second bill to be delivered in April of such tax year in an amount equal to the remaining PILOTs due in such tax year. Failure to receive a bill shall not relieve the Lessee of its obligation to make all payments provided for hereunder, but no penalties or interest shall accrue for any bills not received by the Lessee. Payments shall be made directly

to the Agency. Payments made after the due date(s) as set forth in the applicable bills shall accrue interest (and penalties) at the rates applicable to late payments of taxes for the respective Taxing Jurisdictions.

(f) The Agency may file a lien on the Facility in order to secure amounts due the Agency hereunder or, at its election, may at any time require that the Lessee grant such lien to the Agency as a condition to any lease of the Facility to the Lessee pursuant to the terms hereof. This Agreement may be filed in the real property records of the County of Suffolk pertaining to the Project at the expense of the Lessee.

(g) As long as provisions of this Section 4.3 are in effect, the Agency and the Lessee agree that (i) the Lessee shall be deemed to be the owner of the Facility Realty for the purpose of instituting judicial review of any assessment of the real estate with respect to the Facility Realty pursuant to the provisions of Article 5 and 7 of the Real Property Tax Law or any other applicable law as the same may be amended from time to time; and (ii) the Lessee shall have full authority to file grievances and protests, protesting any present or future assessment on the Facility Realty; and (iii) absent manifest error, the Lessee shall accept as valid any and all final assessments placed on the Facility Realty by the Assessor of the Town of Babylon after the final determination of any grievance, protest, or judicial review contemplated under subparagraph (ii) above. The Agency shall provide or cause to be provided to the Lessee, in the same manner and at the same time as if the Lessee were a taxpayer (or within fifteen calendar days thereof), notice of any proposed change in assessment of the Facility Realty. Notwithstanding the foregoing, in the event that the assessment of the real estate with respect to the Facility Realty, including any additions thereto, is reduced as a result of any such grievance, protest or judicial review so that the Lessee would be entitled to receive a refund or refunds of taxes paid to the respective Taxing Jurisdictions as if the Lessee were the owner of the Facility Realty, the Lessee shall not be entitled to receive a refund or refunds of the payments in lieu of taxes paid pursuant to this Agreement. In such event, the Lessee's sole relief and remedy shall be the receipt of a credit against prospective payments in lieu of taxes to be paid to the Agency pursuant to this Agreement measured from the date the credit is granted in the amount, within the below described limits, equal to the refund or refunds of taxes paid to the respective Taxing Jurisdictions prior to the date of this Agreement that the Lessee would be entitled to receive if the Lessee were the owner of the Facility Realty and any additions thereto. Provided however, that (i) such credit shall be available and payable only to the Lessee only during the Lessee's occupancy of the Facility Realty under this Lease Agreement and (ii) the amount of such credit shall not exceed aggregate payments in lieu of taxes to be paid under this Lease Agreement measured from the date of the settlement of such grievance or protest or the date the judgment respecting such credit is entered. In no event shall the Lessee have any claim against funds of the Agency with respect to credits provided for in this paragraph (g).

(h) Subject to the provisions of paragraph (g) hereof, the Lessee shall have all of the rights and remedies of a taxpayer as if and to the same extent as if the Lessee were the owner of the Facility Realty with respect to any proposed assessment or change in assessment with respect to the Facility Realty by any of the Taxing Jurisdictions and likewise shall be entitled to protest before and be heard by the appropriate assessors, and shall be entitled to take any and all appropriate appeals or initiate any proceedings to review the validity or amount of any assessment or the validity or amount of any tax equivalent provided for herein, provided,

however, that the Lessee agrees that any action taken by the Lessee or the Sublessee or an Affiliate thereof to reduce the assessed value of the Facility Realty below any such assessed value extant on the date hereof shall constitute a default hereunder and give rise to the remedies provided in Section 7.2 hereof.

(i) To the extent the Facility is declared to be subject to real property taxation or assessment by a final judgment of a court of competent jurisdiction, an amendment to the Act, or other legislative change, or by final judgment of a Court of competent jurisdiction, the obligations of the Lessee to make payments in lieu of real estate taxes under this Section 4.3 shall, to such extent, be null and void.

To the extent permitted by law, any payments previously made shall be credited against any taxes then due and payable and nothing herein contained shall prohibit the Lessee from contesting the validity or constitutionality of any such amendment, legislative change or judicial decision.

(j) If the Lessee enters into any written agreement with any Taxing Jurisdiction providing for payments in lieu of taxes by the Lessee to any or all of them, this Section 4.3 as it relates to the Taxing Jurisdiction with which the Lessee has entered into said written agreement shall be automatically modified to reflect the terms of any such written agreement, and any such written agreement shall be deemed to be incorporated into this Section 4.3 by reference and made a part hereof as an amendment or modification hereof. Should the Lessee receive any real property tax exemption from any of the Taxing Jurisdictions, this Section 4.3 shall automatically be modified to reflect the extent of such exemption.

(k) *Subsequent Alterations and Improvements:*

If, at any time after completion of the Project, the Lessee shall make any alterations of or additions to the Facility Realty (the “**Additional Improvements**”), the Lessee shall deliver written notice to an Authorized Representative of the Agency of same within thirty (30) days after the completion thereof. The Agency shall thereupon request that the Improvements constituting a part of the Facility Realty (including any such Additional Improvements) be reassessed by the appropriate officer or officers of the Town and the Lessee shall make additional payments in lieu of taxes equal to:

(1) the amount of increase in assessed valuation of the Facility Realty resulting from the Additional Improvements when the Additional Improvements are first assessed as completed as above provided, multiplied by

(2) the Town’s real property tax rate prevailing after such first assessment and thereafter.

(l) *Withdrawal of Real Estate Tax Abatements:*

The Lessee understands and agrees that the Lessee is required to pay or cause to be paid, as additional payments in lieu of real estate taxes, the amount of taxes that the Lessee would have been required to pay as if it were the owner of the Land and Improvements constituting the Facility Realty for that portion of the Facility Realty, if any, utilized or occupied in any material

respect by any Person other than the Lessee, the Sublessee or any Affiliate of Sublessee for so long as such utilization or occupation shall continue. The Lessee hereby represents to the Agency that no portion of the Facility Realty is utilized or occupied or is intended to be utilized or occupied by Persons other than the Lessee, the Sublessee or any Affiliate thereof or the Permitted Sublessee. The Lessee agrees that it shall immediately notify in writing the Agency or cause said written notice to be given in the event that there shall be any change in the portion of the Facility Realty utilized or occupied by any Person other than the Lessee, the Sublessee or Affiliates of the Sublessee or the Permitted Sublessee. The Lessee understands and agrees that in such event, unless the Agency in its sole discretion shall determine otherwise, the amounts payable by the Lessee as additional payments in lieu of taxes shall be adjusted to an amount equal to the amount of taxes that the Lessee would have been required to pay as if it were the owner of the Facility Realty for that portion of the Facility Realty utilized or occupied by Persons other than the Lessee, the Sublessee or Affiliates of the Sublessee or the Permitted Sublessee for so long as such utilization or occupation shall continue.

Commencing as of the date on which the Facility is not used in accordance with the Act and this Agreement or upon the occurrence of an Event of Default under this Agreement, the Lessee shall be required to make payments in lieu of real estate taxes on the Land and Improvements constituting a part of the Facility Realty in such amounts as would result from taxes levied on the Facility Realty if the Facility Realty were owned by the Lessee. For purposes of the determination of such payments in lieu of real estate taxes, the tax rate shall be the rate then in effect as shown on the records of the proper Town department.

(m) *Survival of Obligations:*

The obligations of the Lessee under this Section 4.3 shall survive the termination or expiration of this Agreement for any reason whatsoever. The Agency, in its sole discretion and in furtherance of the purposes of the Act, may waive, in whole or in part, payments in lieu of taxes set forth in this Section 4.3, for good cause shown.

**Section 4.4 Taxes, Assessments and Charges.** The Lessee shall pay when the same shall become due all taxes (other than those taxes for which payments in lieu thereof are being paid pursuant to Section 4.3 hereof) and assessments, general and specific, if any, levied and assessed upon or against the Facility, this Agreement, the Sublease Agreement, any estate or interest of the Agency or the Lessee or the Sublessee in the Facility, or the Rental Payments or other amounts payable hereunder or under the Sublease Agreement during the term of this Agreement, and all water and sewer charges, special district charges, assessments and other governmental charges and impositions whatsoever, foreseen or unforeseen, ordinary or extraordinary, under any present or future law, and charges for public or private utilities or other charges incurred in the occupancy, use, operation, maintenance or upkeep of the Facility, all of which are herein called "**Impositions.**" The Agency shall promptly forward to the Lessee any notice, bill or other statement received by the Agency concerning any Imposition. The Lessee may pay any Imposition in installments if so payable by law, whether or not interest accrues on the unpaid balance.

In the event the Facility is exempt from Impositions (other than real estate taxes in respect of which amounts are payable under Section 4.3 hereof) solely due to the Agency's

ownership of the Facility, the Lessee shall pay all Impositions to the appropriate taxing authorities equivalent to the Impositions which would have been imposed on the Facility if the Lessee were the owner of record of the Facility.

**Section 4.5 Insurance.** (a) Notwithstanding any other provision of any agreement to the contrary, at all times throughout the term of this Agreement, including without limitation during any period of construction or reconstruction of the Facility, the Lessee shall maintain or cause to be maintained insurance, with insurance companies authorized to do business in the State, against such risks, loss, damage and liability (including liability to third parties) and for such amounts as are customarily insured against by other enterprises of like size and type as that of the Lessee or the Sublessee, including, without limitation:

(i) During any period of construction, renovation, improvement or reconstruction of the Facility and to the extent not covered by the General Liability insurance referred to below, Owners & Contractors Protective Liability insurance for the benefit of the Lessee and the Agency in a minimum amount of \$2,000,000 aggregate coverage for personal injury and property damage;

(ii) (A) Property damage insurance and (B) during any period of construction, renovation, improvement or reconstruction or substantial renovation of the Facility (to the extent not otherwise covered by property damage insurance), Builders' All Risk insurance, whether by endorsement or otherwise, written on 100% builders' risk completed value, non-reporting form including coverage therein for completion and/or premises occupancy, all of which insurance shall in each case include coverage for removal of debris (but not footings or foundations), insuring the buildings, structures, facilities, machinery, equipment, fixtures and other property constituting a part of the Facility against loss or damage to the Facility by fire, all risk of physical loss at all times in an amount equal to 100% of the replacement cost of the Facility;

(iii) General liability insurance and/or umbrella liability insurance including contractual liability coverage in accordance with reasonable and customary insurance practices for reasonably similar operations with respect to the Facility and the business thereby conducted in a minimum amount of \$2,000,000 per occurrence, per aggregate which insurance (A) will also provide coverage of the Lessee's obligations of indemnity under Section 6.2 hereof (other than the liability pursuant to Section 6.2(a)(i) and (v) hereof, and with respect to Section 6.2(c) hereof, only to the extent such insurance is reasonably available), (B) may be effected under umbrella, overall blanket or excess coverage policies of the Lessee or any Affiliate, **provided, however**, that at least \$500,000 is effected by a general liability insurance policy;

(iv) Workers' compensation insurance, disability benefits insurance and such other forms of insurance which the Lessee, or the Agency are required by law to provide covering loss resulting from injury, sickness, disability or death of the employees of the Lessee or any contractor or subcontractor performing work with respect to the Facility. The Lessee shall require that all said contractors and subcontractors performing any material work at the Facility shall maintain all forms or types of insurance with respect to their respective employees required by law; and

(v) Such other customary insurance in such amounts and against such insurable hazards as the Agency from time to time may reasonably require provided (i) such coverage is reasonably available at commercially reasonable premiums, (ii) are of the types and level of coverage typically maintained by similar businesses and buildings and (iii) such coverage requirements are imposed by the Agency upon other lessees having similar lease arrangement with Agency.

(b) All insurance required by Section 4.5(a) above shall be procured and maintained in financially sound and generally recognized responsible insurance companies authorized to write such insurance in the State, either (i) rated "A-/X" or better by A.M. Best & Co., or (ii) approved by the Agency. The Agency may change such rating requirements if reasonably required by substantial changes in insurance industry premiums, risks or coverage provided that such change does not impose a substantial hardship of financial burden on the Lessee in comparison to the ratings of carriers typically providing average for similar business and buildings in the Town. Each of the policies or binders evidencing the insurance required above to be obtained shall designate (except in the case of workers' compensation, Builder's All Risks, and property damage insurance) the Lessee and the Agency as additional insureds as their respective interests may appear, and, with respect to Builders All Risks Insurance designate the Agency, said insurance may be covered in a combination of primary and umbrella insurance;

(c) Each of the policies or binders evidencing the insurance required above to be obtained shall

(i) designate the Lessee as the named insured (except in the case of workers' compensation insurance) and designate the Agency as additional insured and with respect to property insurance designate as loss payee;

(ii) provide that all insurance proceeds with respect to loss or damage to the Facility be endorsed and made payable to the Lessee;

(iii) provide that there shall be no recourse against the Agency for the payment of premiums or commissions or (if such policies or binders provide for the payment thereof) additional premiums or assessments;

(iv) provide that in respect of the interest of the Agency in such policies, the insurance shall not be invalidated by any action or inaction of the Lessee or Sublessee or any other Person and shall insure the Agency regardless of, and any losses shall be payable notwithstanding any act or negligence, including any breach of any condition, declaration or warranty contained in any such policy of insurance by the Agency or any other Person; the operation or use of the Facility for purposes more hazardous than permitted by the terms of the policy; any foreclosure or other proceeding or notice of sale relating to the Facility; or any change in the title to or ownership of all or any portion of the Facility;

(v) provide that such insurance shall be primary insurance without any right of contribution from any other insurance carried by the Agency to the extent that such

other insurance provides the Agency with contingent and/or excess liability insurance with respect to its interest in the Facility;

(vi) provide that if the insurers cancel such insurance for any reason whatsoever, including the insured's failure to pay any accrued premium, or the same is allowed to lapse or expire, or there be any reduction in amount, or any material change is made in the coverage, such cancellation, lapse, expiration, reduction or change shall not be effective as to the Agency until at least thirty (30) days (10 days for premium non-payment) after receipt by the Agency of written notice by such insurers of such cancellation, lapse, expiration or change;

(vii) waive any right of subrogation of the insurers thereunder against the Agency and waive any right of the insurers to any setoff or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of the Agency; and

(viii) contain such other terms and provisions as any owner or operator of facilities similar to the Facility would, in the prudent management of properties, require to be contained in policies, binders or interim insurance contracts with respect to facilities similar to the Facility owned or operated by them or their Affiliates; and

(d) Concurrently with the execution hereof, the Lessee shall deliver or cause to be delivered to the Agency a broker's certificate of coverage, certificate of liability insurance, evidence of property insurance and certificates or other evidence of other required insurance, and as soon as possible thereafter, duplicate copies of insurance policies and/or binders evidencing compliance with the insurance requirements of this Section 4.5. At least seven (7) Business Days prior to the expiration of any such policy, the Lessee shall furnish the Agency with evidence that such policy has been renewed or replaced or is no longer required by this Agreement.

(e) The Lessee shall, at its own cost and expense, make all proofs of loss and take all other steps necessary or reasonably requested by the Agency to collect from insurers for any loss covered by any insurance required to be obtained by this Section 4.5. The Lessee shall not do any act, or suffer or permit any act to be done, whereby any insurance required by this Section 4.5 would or might be suspended or impaired.

(f) THE AGENCY DOES NOT IN ANY WAY REPRESENT THAT THE INSURANCE SPECIFIED HEREIN, WHETHER IN SCOPE OR COVERAGE OR LIMITS OF COVERAGE, IS ADEQUATE OR SUFFICIENT TO PROTECT THE BUSINESS OR INTERESTS OF THE LESSEE, THE SUBLESSEE OR ANY OTHER PERSONS.

**Section 4.6 Advances by Agency.** In the event the Lessee fails to make any payment or perform or observe any obligation required of it under this Agreement, the Agency, notifying the Lessee of any such failure on its part (except that no prior notification of the Lessee shall be required in the event of an emergency condition that, in the reasonable judgment of the Agency, necessitates immediate action), may (but shall not be obligated to), and without waiver of any of the rights of the Agency under this Agreement or any other Project Document to which the

Agency is a party, make such payment or otherwise cure any failure by the Lessee to perform and observe its other obligations hereunder. All amounts so advanced therefor by the Agency shall become an additional obligation of the Lessee to the Agency, which amounts, together with interest thereon at the rate of twelve percent (12%) per annum, from the date advanced, the Lessee will pay upon demand therefor by the Agency. Any remedy herein vested in the Agency for the collection of Rental Payments or other amounts due hereunder shall also be available to the Agency for the collection of all such amounts so advanced.

**Section 4.7 Compliance with Law.** The Lessee agrees that it will, throughout the term of this Agreement and at its sole cost and expense, promptly observe and comply (or cause the observation or compliance by other Persons) with all Federal, State and local statutes, codes, laws, acts, ordinances, orders, judgments, decrees, rules, regulations and authorizations, whether foreseen or unforeseen, ordinary or extraordinary, which shall now or at any time hereafter be binding upon or applicable to the Lessee, the Facility, any occupant, user or operator of the Facility or any portion thereof (including, without limitation, those relating to zoning, land use, building codes, environmental protection, air, water and land pollution, toxic wastes, hazardous wastes, solid wastes, wetlands, health, safety, equal opportunity, minimum wages, and employment practices) (the “**Legal Requirements**”), and will observe and comply with all conditions, requirements, and schedules necessary to preserve and extend all rights, licenses, permits (including, without limitation, zoning variances, special exception and non-conforming uses), privileges, franchises and concessions. The Lessee will not, without the prior written consent of the Agency (which consent shall not be unreasonably withheld, conditioned or delayed), initiate, join in or consent to any private restrictive covenant, zoning ordinance or other public or private restrictions limiting or defining the uses that may be made of the Facility or any part thereof. The Lessee shall indemnify and hold harmless the Indemnified Parties (as defined in Section 6.2 hereof) from and against all loss, cost, liability and expense (a) in any manner arising out of or related to any violation of or failure by the Lessee (or any other Person occupying, operating or using the Facility or any part thereof) to comply with any Legal Requirement, or (b) imposed upon the Lessee or any of the Indemnified Parties by any Legal Requirement; in case any action or proceeding is brought against any of the Indemnified Parties in respect of any Legal Requirement, the Lessee shall upon notice from any of the Indemnified Parties defend such action or proceeding by counsel reasonably satisfactory to the Indemnified Party.

The Lessee may contest in good faith the validity, existence or applicability of any Legal Requirements if (i) such contest shall not result in the Facility or any part thereof or interest therein being in any danger of being sold, forfeited or lost, (ii) such contest shall not result in the Lessee, the Sublessee or the Agency being in any danger of any civil or any criminal liability for failure to comply therewith, and (iii) the Lessee shall have placed into escrow, at a bank acceptable to the Agency, amounts sufficient to pay any such taxes, assessments and other changes so contested.

## ARTICLE V

### DAMAGE, DESTRUCTION AND CONDEMNATION

**Section 5.1 Damage, Destruction and Condemnation.** (a) In the event that at any time during the term of this Agreement the whole or part of the Facility shall be damaged or destroyed by fire or other casualty, or taken or condemned by a competent authority for any public use or purpose, or by agreement among the Agency, the Lessee and those authorized to exercise such right, or if the temporary use of the Facility shall be so taken by condemnation or agreement (each a “**Loss Event**”)

(i) the Agency shall have no obligation to rebuild, replace, repair or restore the Facility,

(ii) there shall be no abatement, postponement or reduction in the Rental Payments payable by the Lessee under this Agreement or any other Project Document to which it is a party, and

(iii) unless the Agency is a party to the Loss Event, the Lessee will promptly give written notice of such Loss Event to the Agency, generally describing the nature and extent thereof.

(b) In the event a Loss Event shall occur, the Lessee shall

(i) at its own cost and expense (except to the extent paid from the Net Proceeds as provided below), promptly and diligently rebuild, replace, repair or restore the Facility to substantially its condition immediately prior to the Loss Event, or to a condition of at least equivalent value, operating efficiency and function, regardless of whether or not the Net Proceeds derived from the Loss Event shall be sufficient to pay the cost thereof, and the Lessee shall not by reason of payment of any such excess costs be entitled to any reimbursement from the Agency, nor shall the Rental Payments payable by the Lessee under this Agreement or any other Project Document to which it is a party be abated, postponed or reduced, or

(ii) exercise its option to purchase the Agency’s interest in the Facility and to terminate this Agreement as provided in Section 8.1 hereof.

As soon as practicable but no later than ninety (90) days after the occurrence of the Loss Event, the Lessee shall advise the Agency in writing of the action to be taken by the Lessee under this Section 5.1(b).

(c) All rebuilding, replacements, repairs or restorations of the Facility in respect of or occasioned by a Loss Event shall

(i) automatically be deemed a part of the Facility and shall be subject to this Agreement and the Sublease Agreement,

(ii) be effected only if the Lessee shall deliver to the Agency, if requested by the Agency, an Opinion of Counsel reasonably acceptable to the Agency to the effect that such rebuilding, replacement, repair or restoration shall not change the nature of the Facility as an Approved Facility and a qualified “**project**” as defined in the Act, and

(iii) be effected with due diligence in a good and workman-like manner, in compliance with all applicable Legal Requirements and be promptly and fully paid for by the Lessee in accordance with the terms of the applicable contract(s) therefor.

(d) The date of completion of the rebuilding, replacement, repair or restoration of the Facility shall be evidenced to the Agency by a certificate of an Authorized Representative of the Lessee stating (i) the date of such completion, (ii) that all labor, services, machinery, equipment, materials and supplies used therefor and all costs and expenses in connection therewith have been paid for, (iii) that the Facility has been rebuilt, replaced, repaired or restored to substantially its condition immediately prior to the Loss Event, or to a condition of at least equivalent value, operating efficiency and function, (iv) that the Agency has good and valid title to all property constituting part of the Facility and all property of the Facility is subject to this Agreement and the Sublease Agreement, subject to Permitted Encumbrances, and (v) that the restored Facility is ready for occupancy, use and operation for its intended purposes. Notwithstanding the foregoing, such certificate shall state (x) that it is given without prejudice to any rights of the Lessee or the Sublessee against third parties which exist at the date of such certificate or which may subsequently come into being, (y) that it is given only for the purposes of this Section and (z) that no Person other than the Agency may benefit therefrom. Such certificate shall be accompanied by (x) a certificate of occupancy or equivalent (either temporary or permanent, provided that if it is a temporary certificate of occupancy, the Lessee will proceed with due diligence to obtain a permanent certificate of occupancy), if required, and any and all permissions, licenses or consents required of governmental authorities for the occupancy, operation and use of the Facility for the purposes contemplated by this Agreement; and (y) a search prepared by a title company, or other evidence reasonably satisfactory to the Agency, indicating that there has not been filed with respect to the Facility any mechanic’s, materialmen’s or any other lien in connection with the rebuilding, replacement, repair and restoration of the Facility and that there exists no encumbrances on or affecting the Facility or any part thereof other than Permitted Encumbrances or those encumbrances consented to by the Agency.

(e) The Agency and the Lessee shall cooperate and consult with each other in all matters pertaining to the settlement, compromise, arbitration or adjustment of any claim or demand on account of any Loss Event, and the settlement, compromise, arbitration or adjustment of any such claim or demand shall, as between the Agency and the Lessee, be subject to the approval of the Lessee.

(f) Notwithstanding anything contained herein to the contrary, if all or substantially all of the Facility shall be taken, condemned, damaged or destroyed in any Loss Event, or if any Loss Event renders the Facility unsuitable for use by the Lessee (or Sublessee) as contemplated hereby, as determined by Lessee (or Sublessee), in its sole discretion, the Lessee shall exercise its option to terminate this Agreement as provided in Section 8.1 hereof.

(g) The Lessee shall be entitled to all or any insurance proceeds relating to property damage or condemnation award, compensation or damages attributable to the Facility.

(h) The Lessee hereby waives the provisions of Section 227 of the New York Real Property Law or any law of like import now or hereafter in effect.

## ARTICLE VI

### PARTICULAR COVENANTS

**Section 6.1 Dissolution of Lessee; Restrictions on Lessee.** The Lessee covenants and agrees that at all times during the term of this Agreement, it will (i) maintain its existence as a limited liability company, (ii) continue to be subject to service of process in the State and organized under the laws of, or qualified to do business in, the State, (iii) not liquidate, wind-up or dissolve or otherwise dispose of all or substantially all of its property, business or assets remaining after the Commencement Date, and (iv) not consolidate with or merge into another entity or permit one or more entities to consolidate with or merge into it; **provided, however**, the Lessee, without violating the foregoing but with ten (10) days prior written notice to the Agency, may consolidate with or merge into another entity, or permit one or more entities to consolidate with or merge into it, or sell or otherwise transfer all or substantially all of its property, business or assets to another such entity (and thereafter liquidate, wind-up or dissolve or not, as the Lessee may elect) if, (i) the Lessee is the surviving, resulting or transferee entity, and has a net worth (as determined in accordance with generally accepted accounting principles) at least equal to that of the Lessee immediately prior to such consolidation, merger or transfer, or (ii) in the event that the Lessee is not the surviving, resulting or transferee entity (1) the surviving, resulting or transferee entity (A) is solvent and subject to service of process in the State and organized under the laws of the State, or any other state of the United States, and duly qualified to do business in the State and (B) assumes in writing all of the obligations of the Lessee contained in this Agreement and all other Project Documents to which the Lessee shall be a party, (2) the Lessee delivers to the Agency an Opinion of Counsel to the effect that this Agreement and all other Project Documents to which the Lessee shall be a party constitute the legal, valid and binding obligations of such successor Lessee and are enforceable in accordance with their respective terms to the same extent as they were enforceable against the predecessor Lessee, (3) in the opinion of an Independent Accountant, such successor Lessee has a net worth (as determined in accordance with generally accepted accounting principles) after the merger, consolidation, sale or transfer at least equal to that of the Lessee immediately prior to such merger, consolidation, sale or transfer. Notwithstanding anything to the contrary set forth in this Agreement, Lessee may, without the consent of, but upon notice to, the Agency, change or convert Lessee's entity form in a manner permitted under relevant state law (such as converting from a limited liability company to a corporation); provided, however, that, in each instance such action does not cause any breach or violation of any of the representations, warranties, covenants and obligations of Lessee hereunder.

**Section 6.2 Indemnity.** (a) The Lessee shall at all times protect and hold the Agency and any director, member, officer, employee, servant or agent thereof and persons under the Agency's control or supervision (collectively, the "**Indemnified Parties**") and each an

“**Indemnified Party**”) harmless of, from and against any and all claims (whether in tort, contract or otherwise), demands, expenses and liabilities for losses, damage, injury and liability of every kind and nature and however caused, and taxes of any kind and by whomsoever imposed, (other than, with respect to each Indemnified Party, losses arising from the gross negligence or willful misconduct of such Indemnified Party), arising upon or about the Facility or resulting from, arising out of, or in any way connected with (i) the financing of the costs of the Facility and the participation of the Agency in the transactions contemplated by this Agreement and the other Project Documents, (ii) the acquisition, equipping, installation or completion of the Project or any part thereof or the effecting of any work done in or about the Facility, (iii) any defects (whether latent or patent) in the Facility, (iv) the maintenance, repair, replacement, restoration, rebuilding, upkeep, use, occupancy, ownership, leasing, subletting or operation of the Facility or any portion thereof, or (v) the execution and delivery by the Indemnified Party, the Lessee of, or performance by the Indemnified Party, the Lessee or the Sublessee, as the case may be, of, any of its obligations under, this Agreement or any other Project Document or any other document or instrument delivered in connection herewith or therewith or the enforcement of any of their terms hereof or thereof or the transactions contemplated hereby or thereby. The Indemnified Parties, jointly or severally, shall not be liable for any damage or injury to the person or property of the Lessee or the Sublessee or their respective directors, officers, partners, employees, agents or servants or persons under the control or supervision of the Lessee or any other Person who may be about the Facility, due to any act or negligence of any Person other than, with respect to any Indemnified Party, the gross negligence or willful misconduct of such Indemnified Party.

(b) The Lessee releases the Indemnified Parties from, and agrees that the Indemnified Parties shall not be liable for and agrees to indemnify and hold the Indemnified Parties harmless against any expense, loss, damage, injury or liability incurred because of any lawsuit commenced as a result of action taken by any Indemnified Party with respect to any of the matters set forth in subdivision (i) through (v) of Section 6.2(a) hereof or at the direction of the Lessee with respect to any of such matters above referred to. Each Indemnified Party, as the case may be, shall promptly notify the Lessee in writing of any claim or action brought against such Indemnified Party in which indemnity may be sought against the Lessee pursuant to this Section 6.2; such notice shall be given in sufficient time to allow the Lessee to defend or participate in such claim or action, but the failure to give such notice in sufficient time shall not constitute a defense hereunder nor in any way impair the obligations of the Lessee under this Section 6.2.

(c) In addition to and without limitation of all other representations, warranties and covenants made by the Lessee under this Agreement, the Lessee further represents, warrants and covenants that the Lessee has not used Hazardous Materials (as defined hereinafter) on, from, or affecting the Facility in any manner which violates Federal, state or local laws, ordinances, rules, regulations, or published policies applicable to Lessee or the Facility governing the use, storage, treatment, transportation, manufacture, refinement, handling, production or disposal of Hazardous Materials, and that, to the best of the Lessee’s knowledge through no independent inquiry other than Lessee’s consultant review in the information included in the Phase I Environmental Audit prepared by Soil Mechanics Environmental Services, dated September, 2008, a true and complete copy of which the Lessee has delivered to the Agency (the “**Audit**”), and except as provided in the Audit, no prior owner of the Facility or any tenant, subtenant, prior tenant or prior subtenant have used Hazardous Materials on, from or affecting the Facility in any manner which violates any applicable Environmental Laws. The Lessee shall, to the extent

required by applicable law, keep or cause the Facility to be kept free of Hazardous Materials. Without limiting the foregoing, the Lessee shall not cause or permit the Facility or any part thereof to be used to generate, manufacture, refine, transport, treat, store, handle, dispose, transfer, produce or process Hazardous Materials, except in compliance with all applicable Environmental Laws, nor shall the Lessee cause or permit, as a result of any intentional or grossly negligent act or omission on the part of the Lessee or any tenant or subtenant, a release of Hazardous Materials onto the Facility or onto any other property. The Lessee shall comply with and use commercially reasonable efforts to ensure compliance by all tenants and subtenants with all applicable Environmental Laws, whenever and by whomever triggered, and shall obtain and comply with, and use commercially reasonable efforts to ensure that all tenants and subtenants obtain and comply with, any and all approvals, registrations or permits required thereunder; **provided, however**, that if any such tenant or subtenant shall be an Affiliate of the Lessee, the obligation of the Lessee with respect to such Persons shall be absolute and not limited to best efforts. The Lessee shall (i) conduct and complete all investigations, studies, sampling, and testing, and all remedial, removal, and other actions required by applicable Environmental Laws to clean up and remove all Hazardous Materials, on, from, or affecting the Facility (x) in accordance with all applicable Environmental Laws and (y) in accordance with the orders and directives of all Federal, state and local governmental authorities, and (ii) defend, indemnify, and hold harmless each Indemnified Party from and against any claims, demands, penalties, fines, liabilities, settlements, damages, costs, or expenses of whatever kind or nature, known or unknown, contingent or otherwise, arising out of, or in any way related to, (w) the presence, disposal, release, or threatened release of any Hazardous Materials which are on, from, or affecting the Facility; (x) any personal injury (including wrongful death) or property damage (real or personal) arising out of or related to such Hazardous Materials; (y) any lawsuit brought or threatened, settlement reached, or government order relating to such Hazardous Materials; and/or (z) any violation of Environmental Laws or demands of government authorities, which are based upon or in any way related to such Hazardous Materials including, without limitation, reasonable attorney and consultant fees, investigation and laboratory fees, court costs, and litigation expenses. For purposes of this paragraph, “**Hazardous Materials**” includes, without limit, any flammable explosives, radioactive materials, hazardous materials, hazardous wastes, hazardous or toxic substances, or related materials defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. §§ 9601 et seq. ), the Hazardous Materials Transportation Act, as amended (49 U.S.C. §§ 1801 et seq.), the Resource Conservation and Recovery Act, as amended (42 U.S.C. §§ 6901 et seq.), and in the regulations adopted and publications promulgated pursuant thereto, or any other Federal, state or local environmental law, ordinance, rule, or regulation. The provisions of this paragraph shall be in addition to any and all other obligations and liabilities the Lessee may have to any Indemnified Party at common law, and shall survive the termination of this Agreement.

The parties hereto agree that the reference in this Section 6.2(c) to the Audit is not intended, and should not be deemed to intend, to modify, qualify, reduce or diminish the Lessee’s obligations to carry out and perform all of the covenants stated in Section 4.7 hereof and throughout this Section 6.2, including but not limited to, those covenants wherein the Lessee is obligated to indemnify each Indemnified Party and comply with all laws, ordinances, rules and regulations pertaining to Hazardous Materials.

(d) The indemnifications and protections set forth in this Section 6.2 shall be extended to the Agency and its members, directors, officers, employees, agents and servants and persons under the Agency's control or supervision.

(e) (Reserved).

(f) For the purposes of this Section 6.2, the Lessee and the Sublessee shall not be deemed employees, agents or servants of the Agency or a person under the Agency's control or supervision.

**Section 6.3 Compensation and Expenses of the Agency.** The Lessee shall pay the fees, costs and expenses of the Agency together with any reasonable fees and disbursements incurred by the Agency's Project Counsel and the Agency's general counsel in performing services for the Agency in connection with this Agreement or any other Project Document.

**Section 6.4 Retention of Title to Facility; Grant of Easements; Release of Facility Realty.** (a) The Agency shall not sell, assign, further lease, license or otherwise encumber (other than for Permitted Encumbrances existing on the Commencement Date), convey or otherwise dispose of the Facility or any part thereof or interest therein during the term of this Agreement, except as set forth in Sections 4.2, 4.3(f), 5.1 and 7.2 hereof, without the prior written consent of the Lessee (which may be granted or withheld in Lessee's sole discretion) and any purported disposition without such consent shall be void.

Notwithstanding the foregoing paragraph, the Agency will, at the written request of an Authorized Representative of the Lessee, so long as there exists no Event of Default hereunder, grant such rights of way or easements over, across, or under, the Facility Realty, or grant such permits or licenses in respect to the use thereof, free from the leasehold estate of this Agreement and the Sublease Agreement, as shall be necessary or convenient for the operation or use of the Facility, provided that such leases, rights of way, easements, permits or licenses shall not materially and adversely affect the use or operation of the Facility. The Agency agrees, at the sole cost and expense of the Lessee, to execute and deliver any and all instruments necessary or appropriate to confirm and grant any such right of way or easement or any such permit or license and to release the same from the leasehold estate of this Agreement and the Sublease Agreement.

Notwithstanding any other provision of this Agreement, so long as there exists no Event of Default hereunder, the Lessee may from time to time request in writing to the Agency the release of and removal from this Agreement and the leasehold estate created hereby and by the Sublease Agreement of any unimproved part of the Land (on which none of the Improvements or Facility Equipment is situated) provided that such release and removal will not materially and adversely affect the use or operation of the Facility. Upon any such request by the Lessee, the Agency shall, at the sole cost and expense of the Lessee, execute and deliver any and all instruments necessary or appropriate to so release and remove such portion of the Facility Realty and convey title thereto to the Lessee or its third party designee, subject to the following: (i) any liens, easements, encumbrances and reservations to which title to said property was subject at the time of recording of this Agreement; (ii) any liens, easements and encumbrances created at the request of the Lessee or to the creation or suffering of which the Lessee consented; (iii) any liens and encumbrances or reservations resulting from the failure of the Lessee to perform or observe

any of the agreements on its part contained in this Agreement; (iv) Permitted Encumbrances (other than the lien of this Agreement); and (v) any liens for taxes or assessments not then delinquent; **provided, however**, no such release shall be effected unless there shall be delivered to the Agency a certificate of an Authorized Representative of the Lessee, dated not more than sixty (60) days prior to the date of the release, stating that, in the opinion of the Person signing such certificate, the portion of the Facility Realty so proposed to be released and the release of such portion of the Facility Realty is not needed for the operation of the Facility, will not materially and adversely affect the use or operation of the Facility and will not destroy the means of ingress thereto and egress therefrom.

(b) No conveyance or release effected under the provisions of this Section 6.4 shall entitle the Lessee to any abatement or diminution of the Rental Payments payable under Section 3.3 hereof required to be made by the Lessee under this Agreement or any other Project Document to which it shall be a party.

**Section 6.5 Discharge of Liens.** (a) If any lien, encumbrance or charge is filed or asserted (including, without limitation, any lien for the performance of any labor or services or the furnishing of materials), or any judgment, decree, order, levy or process of any court or governmental body is entered, made or issued or any claim (such liens, encumbrances, charges, judgments, decrees, orders, levies, processes and claims being herein collectively called "**Liens**"), whether or not valid, is made against the Facility or any part thereof or the interest therein of the Agency or the Lessee or the Sublessee or against any of the Rental Payments payable under this Agreement or under the Sublease Agreement or the interest of the Agency or the Lessee or the Sublessee under this Agreement or the Sublease Agreement, other than Liens for Impositions (as defined in Section 4.4 hereof) not yet payable, Permitted Encumbrances, or Liens being contested as permitted by Section 6.5(b) hereof, the Lessee promptly following receipt of notice of the filing, assertion, entry or issuance of such Lien (regardless of the source of such notice) shall give written notice thereof to the Agency and take all action (including the payment of money and/or the securing of a bond) at his own cost and expense as may be necessary or appropriate to obtain the discharge in full thereof and to remove or nullify the basis therefor. Nothing contained in this Agreement shall be construed as constituting the express or implied consent to or permission of the Agency for the performance of any labor or services or the furnishing of any materials that would give rise to any Lien against the Agency's interest in the Facility.

(b) The Lessee may at its sole expense contest (after prior written notice to the Agency), by appropriate action conducted in good faith and with due diligence, the amount or validity or application, in whole or in part, of any Lien, if (1) such proceeding shall suspend the execution or enforcement of such Lien against the Facility or any part thereof or interest therein, or in this Agreement or the Sublease Agreement, of the Agency or the Lessee or the Sublessee or against any of the Rental Payments payable under this Agreement or the Sublease Agreement, (2) neither the Facility nor any part thereof or interest therein would be in any danger of being sold, forfeited or lost, (3) neither the Lessee nor the Sublessee nor the Agency would be in any danger of any civil or any criminal liability, other than normal accrual of interest, for failure to comply therewith, and (4) the Lessee or the Sublessee shall have furnished such security, if any, as may be required in such proceedings or as may be reasonably requested by the Agency.

**Section 6.6 Agency's Authority; Covenant of Quiet Enjoyment.** The Agency covenants and agrees that it has full right and lawful authority to enter into this Agreement for the full term hereof, and that, subject to the terms and provisions of the Permitted Encumbrances (and any other impairments of title whether or not appearing on the title insurance policy referred to in Section 2.3 hereof), so long as the Lessee shall pay the Rental Payments payable by it under this Agreement and shall duly observe all the covenants, stipulations and agreements herein contained obligatory upon it and an Event of Default shall not exist hereunder, the Agency shall take no action to disturb the peaceful, quiet and undisputed possession of the Facility by the Lessee, and the Agency (at the sole cost and expense of the Lessee) shall from time to time take all necessary action to that end, subject to the terms of this Agreement and the Permitted Encumbrances.

**Section 6.7 No Warranty of Condition or Suitability.** THE AGENCY HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATION OR WARRANTY WHATSOEVER, EITHER EXPRESS OR IMPLIED, WITH RESPECT TO THE MERCHANTABILITY, CONDITION, FITNESS, DESIGN, OPERATION OR WORKMANSHIP OF ANY PART OF THE FACILITY, ITS FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OR CAPACITY OF THE MATERIALS IN THE FACILITY, OR THE SUITABILITY OF THE FACILITY FOR THE PURPOSES OR NEEDS OF THE LESSEE OR ANY SUBLESSEE OR THE EXTENT TO SUCH FUNDS AVAILABLE TO THE LESSEE WILL BE SUFFICIENT TO PAY THE COST OF COMPLETION OF THE PROJECT. THE LESSEE ACKNOWLEDGES THAT THE AGENCY IS NOT THE MANUFACTURER OF THE FACILITY EQUIPMENT NOR THE MANUFACTURER'S AGENT NOR A DEALER THEREIN. THE LESSEE, ON BEHALF OF ITSELF AND ANY AND ALL SUBLESSEES, IS SATISFIED THAT THE FACILITY IS SUITABLE AND FIT FOR PURPOSES OF THE LESSEE AND ANY SUBLESSEE. THE AGENCY SHALL NOT BE LIABLE IN ANY MANNER WHATSOEVER TO THE LESSEE OR ANY SUBLESSEE OR ANY OTHER PERSON FOR ANY LOSS, DAMAGE OR EXPENSE OF ANY KIND OR NATURE CAUSED, DIRECTLY OR INDIRECTLY, BY THE PROPERTY OF THE FACILITY OR THE USE OR MAINTENANCE THEREOF OR THE FAILURE OF OPERATION THEREOF, OR THE REPAIR, SERVICE OR ADJUSTMENT THEREOF, OR BY ANY DELAY OR FAILURE TO PROVIDE ANY SUCH MAINTENANCE, REPAIRS, SERVICE OR ADJUSTMENT, OR BY ANY INTERRUPTION OF SERVICE OR LOSS OF USE THEREOF OR FOR ANY LOSS OF BUSINESS HOWSOEVER CAUSED.

**Section 6.8 (Reserved).**

**Section 6.9 Employment Information, Opportunities and Guidelines.** (a) Annually, by January 30 of each year during the term of this Agreement commencing on January 30, 2010, the Lessee shall submit or shall cause the Sublessee to submit to the Agency an employment report relating to the period commencing January 1 of the previous year and ending December 31 of such year of the obligation of the filing of such report, substantially in the form of Schedule A hereto, certified as to accuracy by the Authorized Representative of the Lessee and the Sublessee, respectively.

(b) The Lessee shall ensure that all employees and applicants for employment by the Lessee or its Affiliates with regard to the Facility are afforded equal employment opportunities without discrimination. Except as is otherwise provided by collective bargaining contracts or agreements, new employment opportunities created as a result of the Project shall be listed with the New York State Department of Labor Community Services Division, and with the administrative entity of the service delivery area created by the Federal Job Training Partnership Act (P.L. No. 97-300) in which the Facility Realty is located. Except as is otherwise provided by collective bargaining contracts or agreements, the Lessee agrees, where practicable, to first consider, and cause each of his Affiliates at the Facility to first consider, persons eligible to participate in the Federal Job Training Partnership Act (P.L. No. 97-300) programs who shall be referred by administrative entities of service delivery areas created pursuant to such act or by the Community Services Division of the New York State Department of Labor for such new employment opportunities. Such consideration, however, shall not bind or obligate Lessee, Sublessee, or any Affiliate to hire any person through the Federal Job Training Partnership Act programs.

(c) Nothing in this Section shall be construed to require the Lessee or the Sublessee to violate any existing collective bargaining agreement with respect to hiring new employees.

**Section 6.10 Further Assurances.** The Lessee will do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered such further acts, instruments, conveyances, transfers and assurances, including Uniform Commercial Code financing statements, at the sole cost and expense of the Lessee, as the Agency deems reasonably necessary or advisable for the implementation, effectuation, correction, confirmation or perfection of this Agreement and any rights of the Agency hereunder.

**Section 6.11 Recording and Filing.** A memorandum of this Agreement shall be recorded by the Lessee in the appropriate office of the Register of the County of Suffolk, or in such other office as may at the time be provided by law as the proper place for the recordation thereof.

**Section 6.12 Further Encumbrances.** The Lessee shall not create, permit or suffer to exist any mortgage, encumbrance, lien, security interest, claim or charge against the Facility or any part thereof, or the interest of the Lessee or the Sublessee in the Facility or this Agreement or the Sublease Agreement, except for Permitted Encumbrances.

**Section 6.13 Annual Period Eligible Employees.** The number of Eligible Employees during an Annual Period (each such Eligible Employee, an “**Annual Period Eligible Employee**”, and collectively, the “**Annual Period Eligible Employees**”) shall be calculated by the Lessee on the basis of the aggregate sum of the numbers of Eligible Employees employed on the last payroll date for each of the months (including any partial month) during such Annual Period divided by twelve (except that in the first Annual Period, the divisor will be the number of months, including any partial month, contained in such Annual Period), based upon the certificate set forth in Section 6.14 hereof.

**Section 6.14 Calculation of Eligible Employees.** By February 15, as applicable, after the end of each Annual Period, commencing February 15, 2010, and continuing until and

including February 15, 2025 with respect to the last Annual Period (notwithstanding the earlier termination of this Agreement or the cessation of Benefits for any reason), the Lessee shall deliver to the Agency a certificate of an Authorized Representative of the Lessee, with respect to the Annual Period, in substantially the form attached as Schedule A hereto.

**Section 6.15 Employment Information.** The Lessee and the Sublessee agree that, upon request of the Agency, the Lessee and the Sublessee shall furnish to the Agency such information as the Agency shall reasonably request as necessary to verify or confirm the information reported in Schedule A. Upon request by the Agency, the Lessee and the Sublessee shall submit to the Agency copies of each Form EEO-1 and Form IA-5 or the equivalent, with respect to the facilities of the Lessee and the Sublessee and their Affiliates within the Town, as are required to be prepared and filed with Federal or State authorities pursuant to applicable law. In addition, the Lessee and the Sublessee hereby authorize any private or governmental entity, including but not limited to The New York State Department of Labor (“DOL”), to release to the Agency and/or to the successors and assigns of either (collectively, the “Information Recipients”), any and all employment information under DOL’s control which is pertinent to the Lessee and the Sublessee and the Lessee’s and the Sublessee’s employees.

## ARTICLE VII

### EVENTS OF DEFAULT; REMEDIES

**Section 7.1 Events of Default.** Any one or more of the following events shall constitute an “**Event of Default**” hereunder:

(a) Failure of the Lessee to pay within ten (10) Business Days after written notice from the Agency to the Lessee when due any Rental Payment when due after receipt;

(b) (i) Failure of the Lessee to observe and perform any covenant, condition or agreement on its part to be performed under Sections 4.3, 4.4, 4.6, 4.7, 5.1, 6.1, 6.2, 6.3, 6.9, 6.12, 7.6, 8.5, 9.3 or 9.14 hereof and continuance of such failure for a period of thirty (30) days after receipt by the Lessee of written notice specifying the nature of such default from the Agency;

(ii) Failure of the Lessee to observe and perform any covenant or agreement on its part to be performed under Section 4.5 hereof and continuance of such failure for a period of ten (10) days after receipt by the Lessee of written notice specifying the nature of such default from the Agency;

(c) Failure of the Lessee to observe and perform any covenant, condition or agreement hereunder on its part to be performed (except as set forth in Section 7.1(a), or (b) above) and (i) continuance of such failure for a period of thirty (30) days after receipt by the Lessee of written notice specifying the nature of such default from the Agency, or (ii) if by reason of the nature of such default the same can be remedied, but not within the said thirty (30) days, the Lessee fails to proceed with reasonable diligence after receipt of said notice to cure the same or fails to continue with reasonable diligence its efforts to cure the same;

(d) The Lessee, the Sublessee or any Guarantor shall (i) apply for or consent to the appointment of or the taking of possession by a receiver, liquidator, custodian or trustee of itself or of all or a substantial part of its property, (ii) admit in writing its inability, or be generally unable, to pay its debts as such debts generally become due, (iii) make a general assignment for the benefit of its creditors, (iv) commence a voluntary case under the Federal Bankruptcy Code (as now or hereafter in effect), (v) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, (vi) fail to controvert in a timely or appropriate manner, or acquiesce in writing to, any petition filed against itself in an involuntary case under the Federal Bankruptcy Code, (vii) take any action for the purpose of effecting any of the foregoing, or (viii) be adjudicated a bankrupt or insolvent by any court;

(e) A proceeding or case shall be commenced, without the application or consent of the Lessee, the Sublessee or any Guarantor, in any court of competent jurisdiction, seeking, (i) liquidation, reorganization, dissolution, winding-up or composition or adjustment of debts, (ii) the appointment of a trustee, receiver, liquidator, custodian or the like of the Lessee or the Sublessee or any Guarantor or of all or any substantial part of its respective assets, or (iii) similar relief under any law relating to bankruptcy, insolvency, reorganization, winding-up or composition or adjustment of debts, and such proceeding or case shall continue undismissed, or an order, judgment or decree approving or ordering any of the foregoing shall be entered and continue unstayed and in effect, for a period of sixty (60) days; or any order for relief against the Lessee, the Sublessee or any Guarantor shall be entered in an involuntary case under the Federal Bankruptcy Code; the terms "dissolution" or "liquidation" of the Lessee or the Sublessee or any Guarantor as used above shall not be construed to prohibit any action otherwise permitted by Section 6.1 hereof or Section 2.6 of the Guaranty Agreement;

(f) Any representation or warranty made (i) by the Lessee, the Sublessee or any Guarantor in the application and related materials submitted to the Agency for approval of the Project or the transactions contemplated by this Agreement, or (ii) by the Lessee herein or by the Sublessee, or by any Guarantor in any other Project Document, or (iii) in any report, certificate, financial statement or other instrument furnished pursuant hereto or any of the foregoing, shall prove to be false, misleading or incorrect in any material respect as of the date made; and, unless such action was willful or intentional, shall continue to have a material adverse impact upon Lessee, Sublessee, Guarantor, the Agency or the Facility when same is discovered;

(g) (Reserved);

(h) Any loss of title by the Agency to the Facility Realty;

(i) An "Event of Default" under the Guaranty Agreement or the Sublease Agreement shall occur and be continuing; or

(j) The Lessee, the Sublessee or any Guarantor shall become a Prohibited Person; or

(k) The Base Employment Reduction Percentage shall be greater than thirty percent (30%) of the Base Employment Number due to a Non-Relocation Reduction occurring in an Annual Period or continuing from a prior Annual Period; or

(l) At the sole and unlimited discretion of the Agency, the Base Employment Reduction Percentage shall be greater than fifteen percent (15%) of the Base Employment Number due to a Relocation Reduction occurring in an Annual Period or continuing from a prior Annual Period.

**Section 7.2 Remedies on Default.** Whenever any Event of Default referred to in Section 7.1 hereof shall have occurred and be continuing, the Agency may take any one or more of the following remedial steps:

(a) The Agency may terminate this Agreement (with the effect that the term of this Agreement shall be deemed to have expired on such date of termination as if such date were the original expiration date of this Agreement) in which case this Agreement and all of the estate, right, title and interest herein granted or vested in the Lessee shall cease and terminate, and upon any such termination and provided that any amounts due to the Agency under Section 4.3 or 8.5 hereof have been paid, the Agency shall convey all of the Agency's right, title and interest in the Facility to the Lessee, which the Agency may accomplish by executing and recording, at the sole cost and expense of the Lessee, a bargain and sale deed without covenants against grantors acts therefor as required by law, and a bill of sale, and the Lessee hereby waives delivery and acceptance of such deed and bill of sale as a condition to its validity, and appoints the Agency its true and lawful agent and attorney-in-fact (which appointment shall be deemed to be an agency coupled with an interest) with full power of substitution to file on its behalf all affidavits, questionnaires and other documentation necessary to accomplish the recording of such deed;

(b) The Agency may bring an action for damages, injunction or specific performance;

(c) The Agency may suspend or terminate the Sales Tax Letter or require the Lessee and the Sublessee to surrender the Sales Tax Letter to the Agency for cancellation;

(d) The Agency may require the Lessee to make payments in lieu of real estate taxes under Section 4.3 hereof with respect to the Facility Realty in an amount equal to that amount which the Lessee would otherwise be required to pay if it were the owner of the Facility Realty (with credit given for those amounts theretofore paid by Lessee); or

(e) The Agency may take whatever action at law or in equity as may appear necessary or desirable to collect the Rental Payments then due, or to enforce performance or observance of any obligations, agreements or covenants of the Lessee under this Agreement.

No action taken pursuant to this Section 7.2 (including termination of this Agreement pursuant to this Section 7.2 or by operation of law or otherwise) shall, except as expressly provided herein, relieve the Lessee from the Lessee's obligations hereunder, including without limitation, the obligations of the Lessee under Sections 4.3 (until such time as the Lessee shall again pay taxes as the record owner of the Facility Realty), 6.2, 6.3, 8.5, 9.13 and 9.15 hereof, all of which shall survive any such action.

**Section 7.3 Remedies Cumulative.** The rights and remedies of the Agency under this Agreement shall be cumulative and shall not exclude any other rights and remedies of the Agency allowed by law with respect to any default under this Agreement. Failure by the Agency to insist upon the strict performance of any of the covenants and agreements herein set forth or to

exercise any rights or remedies upon default by the Lessee hereunder shall not be considered or taken as a waiver or relinquishment for the future of the right to insist upon and to enforce by mandatory injunction, specific performance or other appropriate legal remedy in strict compliance by the Lessee with all of the covenants and conditions hereof, or of the rights to exercise any such rights or remedies, if such default by the Lessee be continued or repeated.

**Section 7.4 No Additional Waiver Implied by One Waiver.** In the event any covenant or agreement contained in this Agreement should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder. No waiver shall be binding unless it is in writing and signed by the party making such waiver. No course of dealing between the Agency and the Lessee or any delay or omission on the part of the Agency or Lessee in exercising any rights hereunder or under any other Project Document shall operate as a waiver.

**Section 7.5 Effect on Discontinuance of Proceedings.** In case any proceeding taken by the Agency under this Agreement or under any other Project Document on account of any Event of Default hereunder or thereunder shall have been discontinued or abandoned for any reason or shall have been determined adversely to the Agency, then, and in every such case, the Agency shall be restored to its former position and rights hereunder and thereunder, and all rights, remedies, powers and duties of the Agency shall continue as in effect prior to the commencement of such proceedings.

**Section 7.6 Agreement to Pay Attorneys' Fees and Expenses.** In the event an Event of Default exists and is continuing under any of the provisions of this Agreement and the Agency should employ attorneys or incur other expenses for the collection of the Rental Payments payable hereunder or the enforcement of performance or observance of any obligation or agreement on the part of the Lessee herein contained, the Lessee agrees that it will on demand therefor pay to the Agency the reasonable fees and disbursements of such attorneys and such other expenses so incurred.

## ARTICLE VIII

### OPTIONS TO PURCHASE THE FACILITY; RECAPTURE OF BENEFITS

**Section 8.1 Option to Purchase Facility and to Terminate Agreement.** (a) Subject to compliance with Section 8.5 hereof, the Lessee shall have the option to purchase the Agency's interest in the Facility and to terminate this Agreement on any date during the term hereof by paying all Rental Payments due and payable hereunder to the date such purchase option is exercised. The Lessee shall exercise such option by delivering to the Agency a written notice of an Authorized Representative of the Lessee to the Chief Executive Officer or other Authorized Representative of the Agency stating that the Lessee has elected to exercise its option under this Section 8.1(a) and the date on which such purchase and termination is intended to be made. In addition, the Lessee shall purchase the Agency's interest in the Facility on the scheduled expiration date of this Agreement by paying on such date any and all Rental Payments then due hereunder through such date.

(b) The Lessee, in purchasing the Agency's interest in the Facility and terminating this Agreement pursuant to Section 8.1(a) hereof, shall pay to the Agency, as the purchase price, in legal tender, an amount equal to all Rental Payments then due and payable hereunder to the date such purchase option is exercised, plus one dollar (\$1.00).

(c) The Lessee shall not, at any time, assign or transfer its option to purchase the Agency's interest in the Facility as contained in this Section 8.1 separate and apart from a permitted assignment of this Agreement pursuant to the terms of Section 9.3 hereof without the prior written consent of the Agency.

**Section 8.2 Conveyance on Exercise of Option to Purchase.** At the closing of any purchase of the Agency's interest in the Facility pursuant to Section 8.1 hereof, the Agency will, upon payment of the purchase price, deliver or cause to be delivered to the Lessee (i) a bargain and sale deed without covenants against grantor's acts and all other necessary documents, releases, discharges, satisfactions or similar documents necessary to convey to the Lessee all of the Agency's right, title and interest in and to the Facility and terminating this Agreement and terminate all liens or rights of the Agency in the Facility; (including, without limitation, a termination of the memorandum of this Agreement); and (ii) all necessary documents releasing and conveying to the Lessee all of the Agency's rights and interests in and to any rights of action (other than as against the Lessee or any insurer of the insurance policies under Section 4.5(a)(iii) hereof), or any insurance proceeds (other than liability insurance proceeds for the benefit of the Agency) or condemnation awards, with respect to the Facility or any portion thereof.

Upon conveyance of the Agency's interest in the Facility pursuant to this Section 8.2, this Agreement and all obligations of the Lessee hereunder shall be terminated except the obligations of the Lessee under Sections 4.3 (until such time as the Lessee shall again pay taxes as the record owner of the Facility Realty), 6.2, 8.5, 9.13 and 9.15 hereof shall survive such termination.

**Section 8.3 Conveyance Upon Expiration of Term.** Upon the expiration of the term hereof, the Lessee agrees to exercise its option to purchase the Facility as provided in Section 8.1 hereof.

**Section 8.4 (Reserved).**

**Section 8.5 Recapture of Agency Benefits.** It is understood and agreed by the parties to this Agreement that the Agency is entering into this Agreement in order to provide financial assistance to the Lessee for the Project and to accomplish the public purposes of the Act. In consideration therefor, the Lessee hereby agrees as follows:

(a) (i) If there shall occur a Recapture Event (as defined below) after the date hereof the Lessee or the Sublessee shall pay to the Agency as a return of public benefits conferred by the Agency, the following amounts:

(A) one hundred per cent (100%) of the Benefits (as defined below) if the Recapture Event occurs within the first (4) years after the date hereof;

(B) eighty per cent (80%) of the Benefits if the Recapture Event occurs during the fifth (5th) year after the date hereof;

(C) sixty per cent (60%) of the Benefits if the Recapture Event occurs during the sixth (6th) year after the date hereof;

(D) forty per cent (40%) of the Benefits if the Recapture Event occurs during the seventh (7th) year after the date hereof; or

(E) twenty per cent (20%) of the Benefits if the Recapture Event occurs during the eighth (8th) year after the date hereof.

As used in this Section 8.5 the term “**Benefits**” shall mean, collectively:

(1) all real estate tax benefits which have accrued to the benefit of the Lessee or the Sublessee during such time as the Agency was the owner of the Facility Realty by reason of the Agency’s ownership, such tax benefits to be computed by subtracting the payments in lieu of taxes paid under Section 4.3 hereof from those payments which the Lessee or the Sublessee would have been required to pay during the term of this Agreement (within the meaning of Section 3.2 hereof) had the Town determined the amount of such real estate taxes as would be due if the Lessee had been the owner of the Facility Realty during such term; and

(2) all miscellaneous benefits derived from the Agency’s participation in the straight-lease transaction contemplated by this Agreement, including, but not limited to, any exemption from any applicable sales and use tax, mortgage recording tax and filing and recording fees.

As used in this Section 8.5 the term “**Recapture Event**” shall mean any of the following events:

(1) The Lessee or the Sublessee shall have liquidated its operations and/or assets (absent a showing of extreme hardship);

(2) The Lessee or the Sublessee shall have ceased all or substantially all of its operations at the Facility (whether by relocation to another facility or otherwise, or whether to another facility either within or outside of the Town) through no force majeure event;

(3) The Lessee or the Sublessee shall have transferred all or substantially all of its employees within the Town to a location outside of the Town through no force majeure event;

(4) The Lessee or the Sublessee shall have subleased all or any portion of the Facility in violation of the limitations imposed by Section 9.3 hereof, without the prior written consent of the Agency; or

(5) The Lessee or the Sublessee shall have sold, leased (unless the Agency has consented to such lease under section 9.3 hereof), transferred or otherwise disposed of all or substantially all of its interest in the Facility; or

(6) The Base Employment Reduction Percentage shall be greater than fifteen percent (15%) of the Base Employment Number due to a Relocation Reduction occurring with respect to an Annual Period.

Notwithstanding the foregoing, a Recapture Event shall not be deemed to have occurred if the Recapture Event shall have arisen as a direct, immediate result of (i) a taking or condemnation by governmental authority of all or substantially all of the Facility, or of less than substantially all of the Facility, but has a material and adverse impact upon Lessee (or Sublessee's) ability to continue to operate its business within the Facility, (ii) a Loss Event resulting in a loss of all or substantially all of the Facility, or of less than substantially all of the Facility, but has a material and adverse impact upon Lessee (or Sublessee's) ability to continue to operate its business within the Facility, which Loss Event cannot be reasonably remedied within six months of the occurrence thereof, which Loss Event shall have occurred without any malfeasance on the part of the Lessee, the Sublessee or any Affiliate, or (iii) any redevelopment plan adopted by the Town Board or the Town Planning Board of the Town of Babylon with regard to the redevelopment of the portion of the hamlet of Farmingdale where the Facility is located.

(b) The Lessee covenants and agrees to furnish the Agency with written notification upon any Recapture Event or disposition of the Facility or any portion thereof made within ten (10) years of the date hereof, which notification shall set forth the terms of such Recapture Event and/or disposition.

(c) In the event any payment owing by the Lessee or the Sublessee under this Section 8.5 shall not be paid within thirty (30) days following written invoice to the Lessee or the Sublessee, such payment shall bear interest from the due date thereof at the then current interest rate imposed on delinquent payments of real property taxes until the Lessee or the Sublessee shall have paid such payment in full, together with such accrued interest to the date of payment, to the Agency.

(d) The Agency, in its sole discretion, may waive all or any portion of any payment owing by the Lessee or the Sublessee under this Section 8.5.

(e) The provisions of this Section 8.5 shall survive the termination of this Agreement for any reason whatsoever, notwithstanding any provision of this Agreement to the contrary.

## ARTICLE IX

### MISCELLANEOUS

**Section 9.1 Force Majeure.** In case by reason of *force majeure* either party hereto shall be rendered unable wholly or in part to carry out its obligations under this Agreement, then except as otherwise expressly provided in this Agreement, if such party shall give notice and full particulars of such force majeure in writing to the other party within a reasonable time after occurrence of the event or cause relied on, the obligations of the party giving such notice (other than the obligations of the Lessee to make the Rental Payments required under the terms hereof,

or to comply with Sections 4.5 or 6.2 hereof), so far as they are affected by such force majeure, shall be suspended during the continuance of the inability then claimed, which shall include a reasonable time for the removal of the effect thereof, but for no longer period, and such party shall endeavor to remove or overcome such inability with all reasonable dispatch. The term “*force majeure*”, as employed herein, shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, orders of any kind of the Government of the United States or of the State or any civil or military authority, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, hurricanes, storms, floods, washouts, droughts, arrest, restraining of government and people, civil disturbances, explosions, partial or entire failure of utilities, shortages of labor, material, supplies or transportation, or any other similar or different cause not reasonably within the control of the party claiming such inability. It is understood and agreed that the requirements that any force majeure shall be reasonably beyond the control of the party and shall be remedied with all reasonable dispatch shall be deemed to be satisfied in the event of a strike or other industrial disturbance even though existing or impending strikes or other industrial disturbances could have been settled by the party claiming a force majeure hereunder by acceding to the demands of the opposing person or persons.

The Lessee shall promptly notify the Agency upon the occurrence of each force majeure, describing such force majeure and its effects in reasonable detail. The Lessee shall also promptly notify the Agency upon the termination of each such force majeure. The information set forth in any such notice shall not be binding upon the Agency, and the Agency shall be entitled to dispute the existence of any force majeure and any of the contentions contained in any such notice received from the Lessee.

## **Section 9.2 (Reserved)**

**Section 9.3 Assignment or Sublease.** (a) Without the prior written consent of the Agency, which consent shall be in the sole discretion of the Agency, the Lessee shall not at any time (i) except as permitted by Section 6.1 hereof, assign or transfer this Agreement, or (ii) except pursuant to the Sublease Agreement further sublease the Facility, and provided that with respect to any such further sublease:

(i) if requested by the Agency, the Lessee shall deliver to the Agency an Opinion of Counsel acceptable to the Agency to the effect that (A) the sublease shall not cause the Facility to cease being an Approved Facility and a “project” under the Act; and (B) such assignment, transfer or sublease shall not legally impair in any respect the obligations of the Lessee for the payment of all Rental Payments nor for the full performance of all of the terms, covenants and conditions of this Agreement or of any other Project Document to which the Lessee shall be a party, nor impair or limit in any respect the obligations of any Guarantor under the Guaranty Agreement;

(ii) the Lessee shall remain primarily liable to the Agency for the payment of all Rental Payments hereunder and for the full performance of all of the terms, covenants and conditions of this Agreement and of any other Project Document to which it shall be a party;

(iii) any assignee or transferee of the Lessee or any sublessee in whole of the Facility shall have assumed in writing (and shall have executed and delivered to the Agency an instrument in form for recording) and have agreed to keep and perform all of the terms of this Agreement on the part of the Lessee to be kept and performed, shall be jointly and severally liable with the Lessee for the performance thereof, shall be subject to service of process in the State, and, if a foreign corporation, shall be qualified to do business in the State;

(iv) any assignee, transferee or sublessee shall utilize the Facility as an Approved Facility and a qualified "project" within the meaning of the Act;

(v) such assignment, transfer or sublease shall not violate any provision of this Agreement or any other Project Document;

(vi) with respect to any subletting in part, the term of each such sublease does not exceed five (5) years and at any given date, no more than an aggregate of twenty percent (25%) of the Facility Realty would be subleased by the Lessee;

(vii) such Sublessee shall not constitute a Prohibited Person;

(viii) each such sublease shall in no way diminish or impair the Lessee's obligation to carry the insurance required under Section 4.5 of this Agreement and the Lessee shall furnish written evidence satisfactory to the Agency that such insurance coverage shall in no manner be limited by reason of such assignment, transfer or sublease; and

(ix) each such sublease contains such other provisions as the Agency may reasonably require.

The Lessee shall furnish or cause to be furnished to the Agency a copy of any such assignment, transfer or sublease in substantially final form at least thirty (30) days prior to the date of execution thereof. The Agency acknowledges that the Lessee and the Sublessee, in the course of operating its business at the Facility, may, on occasion, enter into license or other similar agreements with one or more third parties to operate a portion of such business. The Agency hereby agrees that Lessee (and/or Sublessee) may enter into such agreements without the Agency's consent, provided that (A) there is no separately demised "premises" for such operation, (B) such operation is conducted such that it appears to the public to be a part of Lessee's or Sublessee's business, and (C) such license agreement complies with all other requirements set forth subparagraph (i) through (vii) of this Section 9.3(a) applicable to any sublease.

(b) Any consent by the Agency to any act of assignment, transfer or sublease shall be held to apply only to the specific transaction thereby authorized. Such consent shall not be construed as a waiver of the duty of the Lessee, or the successors or assigns of the Lessee, to obtain from the Agency consent to any other or subsequent assignment, transfer or sublease, or as modifying or limiting the rights of the Agency under the foregoing covenant by the Lessee.

(c) If the Facility or any part thereof is sublet or occupied by any Person other than the Lessee, the Sublessee, their Affiliates or the Permitted Sublessee, the Agency, in the event of the Lessee's default in the payment of Rental Payments hereunder may, and is hereby empowered to, collect Rental Payments from the sublessee or occupant during the continuance of any such default. In case of such event, the Agency may apply the net amount received by it to the Rental Payments herein provided, and no such collection shall be deemed a waiver of the covenant herein against assignment, transfer or sublease of this Agreement, or constitute the acceptance of the undertenant or occupant as tenant, or a release of the Lessee from the further performance of the covenants herein contained on the part of the Lessee.

(d) The Lessee covenants and agrees that it shall not, without the prior written consent of the Agency (not to be unreasonably withheld, conditioned or delayed), amend or modify in any material manner, terminate or assign, or suffer any amendment or modification in any material manner, termination or assignment of, the Sublease Agreement or any sublease entered into in accordance with this Section.

(e) The limitations in this Section 9.3 on assignment or transfer of this Agreement and subletting in whole or in part of the Facility shall have equal application to any assignment or transfer of the Sublease Agreement and any sub-subletting in whole or in part of the Facility.

(f) Notwithstanding any provision of this Agreement to the contrary, the Lessee may (i) until November 30, 2011 sublease a portion of the Facility not to exceed 71,000 square feet to Crash & Rust Inc. (the "Crash & Rust Sublease"), provided that Crash & Rust Inc. shall utilize such portion of the Facility as a qualified project under the Act and (ii) after the term of the Crash & Rust Sublease, sublease a portion of the Facility not to exceed 39,000 square feet provided such sublease satisfies the requirements set forth in subparagraphs (i) through (vii) of Section 9.3(a).

**Section 9.4 Amendments.** This Agreement may be amended by a written instrument executed and delivered by the parties hereto.

**Section 9.5 Notices.** All notices, consents, approvals, demands, reports, certificates or other communications hereunder shall be sufficient if sent (i) by registered or certified United States mail, return receipt requested, postage prepaid, (ii) by a nationally recognized overnight delivery service, charges prepaid or (iii) by hand delivery, addressed, as follows:

(a) if to the Agency, to the Chief Executive Officer, Town of Babylon Industrial Development Agency, 47 West Main Street, Babylon, New York 11702, and

(b) if to the Lessee at 15-24 132<sup>nd</sup> Street, College Point, New York 11356, Attention: Chief Executive Officer.

The Agency and the Lessee may, by like notice, designate any further or different addresses to which subsequent notices, consents, approvals, demands, reports, certificates or other communications shall be sent. Any notice, consents, approvals, demands, reports, certificate or other communication hereunder shall, except as may expressly be provided herein, be deemed to have been delivered or given (i) three (3) Business Days following posting if transmitted by mail, (ii) one (1) Business Day following sending if transmitted by a nationally recognized overnight

delivery service, or (iii) upon delivery if given by hand delivery, with refusal by an Authorized Representative of the intended recipient party to accept delivery of a notice given as prescribed above to constitute delivery hereunder. Notices may also be given in compliance with this Agreement by telecopy, provided that the recipient party consents to the use of telecopy transmissions for giving of notices hereunder and receipt of any such telecopy transmission is confirmed by the transmitting party.

Any notice, consent, approval, demand, report or other communication required to be given hereunder by the Agency or the Lessee shall also be delivered, at the same time and in the same manner as such notice, consent, approval, demand, report or other communication is required to be given to the Agency or the Lessee hereunder, to the Sublessee.

**Section 9.6 Prior Agreements Superseded.** Except for the Project Documents, this Agreement shall completely and fully supersede all other prior understandings or agreements, both written and oral, between the Agency and the Lessee relating to the Facility.

**Section 9.7 Severability.** If any clause, provision or section of this Agreement be ruled invalid by any court of competent jurisdiction, the invalidity of such clause, provision or section shall not affect any of the remaining provisions hereof.

**Section 9.8 Inspection of Facility.** The Lessee will permit the Agency, or its duly authorized agent, at all reasonable times and upon reasonable advance notice, to enter the Facility but solely for the purpose of (y) assuring that the Sublessee is operating the Facility, or is causing the Facility to be operated, as an Approved Facility and a qualified “**project**” within the meaning of the Act consistent with the purposes set forth in the recitals to this Agreement and with the public purposes of the Agency, and (z) determining whether the Facility and/or the use thereof is in violation of any Environmental Law, and not for any purpose of assuring the proper maintenance or repair of the Facility as such latter obligation is and shall remain solely the obligation of the Lessee.

**Section 9.9 Effective Date; Counterparts.** This Agreement shall become effective upon its delivery on the Commencement Date. It may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

**Section 9.10 Binding Effect.** This Agreement shall inure to the benefit of, and shall be binding upon, the Agency and the Lessee and their respective successors and assigns.

**Section 9.11 Third Party Beneficiaries.** It is the intention of the parties hereto that nothing contained herein is intended to be for, or to inure to, the benefit of any Person other than the parties hereto.

**Section 9.12 Law Governing. THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK, WITHOUT REGARD OR GIVING EFFECT TO PRINCIPLES OF CONFLICTS OF LAWS THEREOF.**

**Section 9.13 Waiver of Trial by Jury.** The parties do hereby expressly waive all rights to trial by jury on any cause of action directly or indirectly involving the terms, covenants or conditions of this Agreement or the Facility or any matters whatsoever arising out of or in any way connected with this Agreement.

The provision of this Agreement relating to waiver of a jury trial shall survive the termination or expiration of this Agreement.

**Section 9.14 Non-Discrimination.** At all times during the maintenance and operation of the Facility, the Lessee shall not discriminate nor permit the Sublessee to discriminate against any employee or applicant for employment because of race, color, creed, age, sex or national origin. The Lessee shall use its best efforts to ensure that employees and applicants for employment with the Lessee or any subtenant of the Facility are treated without regard to their race, color, creed, age, sex or national origin. As used herein, the term “**treated**” shall mean and include, without limitation, the following: recruited, whether by advertising or other means; compensated, whether in the form of rates of pay or other forms of compensation; selected for training, including apprenticeship; promoted; upgraded; downgraded; demoted; transferred; laid off; and terminated.

**Section 9.15 Recourse Under This Agreement.** All covenants, stipulations, promises, agreements and obligations of the Agency contained in this Agreement shall be deemed to be the covenants, stipulations, promises, agreements and obligations of the Agency, and not of any member, director, officer, employee or agent of the Agency in such person’s individual capacity, and no recourse shall be had for any reason whatsoever hereunder against any member, director, officer, employee or agent of the Agency or any natural person executing this Agreement on behalf of the Agency. In addition, in the performance of the agreements of the Agency herein contained, any obligation the Agency may incur for the payment of money shall not create a debt of the State or the Town and neither the State nor the Town shall be liable on any obligation so incurred, by any such obligation shall be payable solely out of amounts payable to the Agency by the Lessee hereunder.

**Section 9.16 Beneficial Ownership.** It is the intention of the parties that as between the Agency and the Lessee that (a) the Lessee shall have a beneficial interest in the Facility (b) the Lessee shall be entitled to all depreciation deductions with respect to the Facility under Section 167 or 168 of the Internal Revenue Code of 1986, as amended (the “**Code**”), or any successor statute or the Treasury Regulations applicable thereunder or other law applicable thereto, as well as all other United States federal income tax benefits (whether by way of deduction, credit or otherwise) applicable to the Facility and any comparable state and local income tax benefits (whether now existing or hereafter enacted or adopted); and (c) without limiting the generality of the foregoing, any investment tax credit or comparable credit which may ever be available shall accrue to the benefit of the Lessee and the Lessee shall, and the Agency upon advice of counsel may, make any election and take other action in accordance with the Code and the Treasury Regulations applicable thereunder, as may be necessary to entitle the Lessee to have such benefit. The Agency makes no representation or warranty whatsoever, however, that any such tax benefits would be available to either the Agency or the Lessee.

**Section 9.17 Mortgage.** In order to finance the cost of the Project and/or in order to provide collateral with respect to any mortgage loan made to the Lessee, the Agency shall reasonably cooperate with the Lessee in connection with the granting of or any modification of any mortgage on the Facility. Such cooperation shall include, without limitation, the execution and delivery of such documents and instruments as the Lessee or the mortgagee may reasonably request (including, without limitation, any amendment or confirmation of this Lease Agreement); provided, that no such document or instrument shall, except to a de minimis extent (i) increase the obligations or reduce the rights of the Agency under this Lease Agreement, (ii) decrease the obligations or increase the rights of the Lessee under this Lease Agreement.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF, the Agency has caused its corporate name to be hereunto subscribed by its duly authorized Chief Executive Officer and attested under the seal of the Agency by its Secretary, an Assistant Secretary or Counsel, and the Lessee has duly executed this Agreement all being done as of the year and day first above written.

**TOWN OF BABYLON INDUSTRIAL  
DEVELOPMENT AGENCY**

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

Name: Robert Stricoff

Title: Chief Executive Officer

(SEAL)

ATTEST: \_\_\_\_\_

John Braslow

General Counsel

**JMDH REAL ESTATE OF BABYLON, LLC**

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

Name: Stanley Fleishman

Title: Chief Executive Officer

**DESCRIPTION OF THE LAND**

ALL that certain plot, piece or parcel of land, situate, lying and being at Farmingdale in the Town of Babylon, County of Suffolk and State of New York, bounded and described as follows:

BEGINNING at a point on the westerly side of Broadhollow Road (Route 110) as widened, distant 1697.14 feet northerly when measured along the westerly side of Broadhollow Road as widened, from the point where the northerly line of the Long Island Railroad intersects the westerly side of Broadhollow Road, as widened, said point of beginning also being where the northerly line of land now or formerly of Anchor Post Products Corp. intersects the westerly side of said Broadhollow Road and from said point or beginning;

RUNNING THENCE North 77 degrees 47 minutes 50 seconds West, 142.73 feet;

THENCE North 57 degrees 33 minutes 10 seconds West, 236.27 feet to a monument;

THENCE South 12 degrees 03 minutes 30 seconds West, 496.21 feet to a monument;

THENCE North 58 degrees 52 minutes 20 seconds West, 610.61 feet to a monument;

THENCE North 57 degrees 46 minutes 35 seconds West, 450.01 feet;

THENCE North 32 degrees 21 minutes 20 seconds East, 310.85 feet;

THENCE South 57 degrees 33 minutes 10 seconds East, 90 feet;

THENCE North 32 degrees 26 minutes 50 seconds East, 231.14 feet (Deed), 230.14 feet (actual) to a monument;

THENCE South 57 degrees 33 minutes 10 seconds East, 1023.66 feet;

THENCE South 77 degrees 47 minutes 50 seconds East, 133.77 feet to the westerly side of Broadhollow Road, as widened;

THENCE along the westerly side of Broadhollow Road, as widened, South 13 degrees 54 minutes 43 seconds West, 60.03 feet to the point or place of beginning.

Being and intended to be the same premises conveyed to Grantor by William B. Aronstein a Successor Trustee U/T/A Dated 3/9/1977 F/B/O David Schwartz Family and as Successor Trustee U/T/A Dated 3/9/1977 F/B/O Milton Schwartz Family, dated January 27, 2009, and left for recording with the Suffolk County Clerk's Office prior to the date of this Agreement.

**District 0100, Section 033.00**

**Block 01.00**

**Lot 012.000**

**DESCRIPTION OF THE FACILITY EQUIPMENT**

Facility Equipment shall mean that machinery, equipment and other tangible personal property acquired and installed in accordance with the Sales Tax Letter as part of the Project pursuant to Section 2.2 hereof, together with all repairs, replacements, improvements, substitutions and renewals thereof or therefor and all parts, additions and accessories incorporated therein or affixed thereto (but excluding Lessee's Property within the meaning of Section 4.1(c) hereof or Existing Facility Property released pursuant to Section 4.2 hereof).

**PROJECT COST BUDGET**

Land and Existing Building	\$18,000,000
New Additions/Expansion of Existing Building	2,500,000
Engineering/Architectural Costs	100,000
Equipment	2,000,000
Legal Fees & Others Charges	<u>100,000</u>
Total	\$22,700,000

**SCHEDULE A**

**ANNUAL CERTIFICATE OF THE OBLIGOR**

The undersigned DOES HEREBY CERTIFY THAT he/she is an Authorized Representative of JMDH Real Estate of Babylon LLC (the "Company"), and has knowledge or access to that knowledge necessary to deliver this certificate, and this certificate is being delivered in accordance with the provisions of Section 6.14 of that certain Lease Agreement, dated as of February 25, 2009 (the "Lease Agreement"), by and between the Town of Babylon Industrial Development Agency and the Company, and does hereby further certify as follows with respect to the Annual Period which commenced [on the Commencement Date/January 1, 20\_\_] and ended [December 31, 20\_\_] (the "Reported Annual Period") (all capitalized terms used but not defined herein shall have the respective meanings assigned to such terms in the Lease Agreement):

1. As of the end of the Reported Annual Period and at all times during the Reported Annual Period, the Company was not in default under any of the provisions which relate to the Company in the Lease Agreement. To the extent that the Authorized Representative of the Company shall have obtained knowledge or notice of any such default, the certificate shall disclose such default(s) or notice thereof and the nature thereof, whether or not the same shall constitute an Event of Default under the Lease Agreement, and the action proposed to be taken by the Company with respect thereto.

2. The number of Annual Period Eligible Employees for the Reported Annual Period was \_\_\_\_, and the respective number of Eligible Employees employed during such Annual Period as constituted Full-time Employees and Full-time Equivalent Employees was \_\_\_\_, and \_\_\_\_, respectively.

3. There was (an increase) (a decrease) in the number of Annual Period Eligible Employees between the Reported Annual Period and the Annual Period immediately preceding the Reported Annual Period, and the amount of such (increase) (decrease) was \_\_\_\_\_%.

4. The number of Ineligible Employees for the Reported Annual Period was \_\_\_\_.

5. No Acquisition occurred in the Reported Annual Period, or, if it did, the following are the details thereof:

6. No Company Group Entity has transferred or established during the Reported Annual Period any operations, facilities and/or Eligible Employees outside of the Town, or, if it did, the following are the details thereof:

7. No Base Employment Reduction occurred in the Reported Annual Period, or, if it did, the following are the details thereof (including, without limitation, whether such Reduction was a Non-Relocation Reduction or a Relocation Reduction, and supporting information and evidence regarding the operations and employment of the Company Group Entity), and the calculation of any amount to be repaid or reduction in future Benefits.

IN WITNESS WHEREOF, the undersigned has hereunto set its hand this \_\_\_\_ day of \_\_\_\_\_.

[COMPANY SIGNATURE BLOCK]



## General Information

### Who must file?

The General Municipal Law (GML) and the Public Authorities Law require the agent/project operator (also known as project occupant) of an Industrial Development Agency or Authority (IDA) to file an annual report with the New York State Department of Taxation and Finance. The agent/project operator required to file this report is the person directly appointed by the IDA to act for and to represent the IDA for the project. The agent/project operator is ordinarily the one for whom the IDA project was created.

There is usually only one agent/project operator directly appointed by the IDA for an IDA project. However, if the IDA directly appoints multiple agents/project operators, each agent/project operator must file this form (unless they are related corporations).

Only the agent/project operator(s) directly appointed by the IDA must file Form ST-340. Contractors, subcontractors, consultants, or agents appointed by the agent/project operator(s) are not required to file Form ST-340.

### What must be reported?

The report must show the total value of all state and local sales and use taxes exempted during the calendar year, as a result of the project's designation as an IDA project. This includes:

- the value of the exemptions obtained by the agent/project .....
- the value of the exemptions obtained by your contractors, subcontractors, consultants, and others, whether or not .....

The report requires only the total combined exemptions obtained by the above people. A break down of the total is not required. However, since the report must include the value of the exemptions they obtained, the agent/project operator must keep records of the amounts others report to the agent/project operator.

It is important that the agent/project operator make it clear to the contractors, subcontractors, consultants, and others that they must keep accurate tax information and have it available so that the agent/project operator can comply with the annual reporting requirements.

Do not include in this report the amount of any sales and use tax exemptions arising out of other provisions of the Tax Law (for example, manufacturer's production equipment exemption, research and development exemption, or contractor's exemption for tangible personal property incorporated into a project of an exempt organization).

See instructions below for additional information required.

### Project information

At the top of the form, identify the reporting period by entering the year in the space provided. If an address is required, always include the ZIP code.

### Name of IDA agent/project operator

Enter the name, address, federal employer identification number (EIN), and telephone number of the IDA agent/project operator.

### Name of IDA agent/project operator's authorized representative

Enter the name, address, title, and telephone number of the individual (e.g. attorney or accountant) authorized by the IDA agent/project operator to submit this report.

### Name of IDA

Enter the name and address of the IDA. If more than one IDA is involved in a particular project, the IDA agent/project operator must file a separate report for the tax exemptions attributable to each IDA.

### Name of Project

Enter the name of the project and the address of the project site. If the IDA agent is involved in more than one project, a separate report must be filed by the IDA agent/project operator for each project, even if authorized by the same IDA.

---

## Line instructions

Line 1 – Project purpose – Check the box that identifies the purpose of the project. If you check Other, please be specific in identifying its purpose.

Line 2 – Enter the date the project started (this means the earliest of the date of any bond or inducement resolution, the execution of any lease, or any bond issuance). Include month, day, and year.

Line 3 – Enter the date on which you, or your general contractor or subcontractor, actually began or expect to begin construction or installation on the project. If the project does not involve any construction, enter Does not apply.

Line 4 – Enter the date the construction phase of the project was completed. If it has not been completed by the end of the reporting period, enter the date you expect to complete this phase of the project.

Line 5 – Enter the date on which installation, lease, or rental of property (for example, machinery or computers) on the project ended. If the project was not completed by the end of the reporting period, enter the date the project is expected to be completed.

Line 6 – Enter the total number of years and months from the project's inception to its completion or expected completion.

## When is the report due?

You must file Form ST-340 on a calendar-year basis. It is due by the last day of February of the following year. The reporting requirement applies to IDA projects started on or after July 21, 1993.

### Need help?

Telephone assistance is available from 8:30 a.m. to 4:25 p.m. (eastern time), Monday through Friday.

Tax information: 1 800 972-1233

Forms and publications: 1 800 462-8100

From outside the U.S. and outside Canada: (518) 485-6800

Fax-on-demand forms: 1 800 748-3676

Internet access: <http://www.tax.state.ny.us>

Hearing and speech impaired (telecommunications device for the deaf (TDD) callers only): 1 800 634-2100 (8:30 a.m. to 4:25 p.m., eastern time)



Persons with disabilities: In compliance with the Americans with Disabilities Act, we will ensure that our lobbies, offices, meeting rooms, and other facilities are accessible to persons with disabilities. If you have questions about special accommodations for persons with disabilities, please call 1 800 225-5829.



If you need to write, address your letter to: NYS Tax Department, Taxpayer Assistance Bureau, Taxpayer Correspondence,

Line 7 – Enter the total amount of New York State and local sales and compensating use taxes exempted during the reporting period (if none, enter "0") as a result of the project's receipt of IDA financial assistance. This includes exemptions obtained at the time of purchase as well as through a refund or credit of tax paid. Include the sales and use taxes exempted on purchases of property or services incorporated into or used on the exempt project. This includes the taxes exempted on purchases made by or on behalf of the agent/project operator, the general contractor for the project, and any subcontractors, consultants, or others. Do not enter total purchases on line 7.

## Signature area

Enter the name and title of the person signing on behalf of the IDA agent/project operator (for example, the IDA agent/project operator's officer, employee, or other

### Privacy notification

The right of the Commissioner of Taxation and Finance and the Department of Taxation and Finance to collect and maintain personal information, including mandatory disclosure of social security numbers in the manner required by tax regulations, instructions, and forms, is found in Articles 8, 28, and 28-A of the Tax Law; and 42 USC 405(c)(2)(C)(i).

The Tax Department uses this information primarily to determine and administer sales and use taxes or liabilities under the Tax Law, and for any other purpose authorized by law.

Failure to provide the required information may subject you to civil or criminal penalties, or both, under the Tax Law.

This information is maintained by the Director of the Registration and Data Services Bureau, NYS Tax Department, Building 8 Room 924, W. A. Harriman Campus, Albany, NY 12227; telephone 1 800 225-5829. From areas outside the U.S. and outside Canada, call (518) 485-6800.