



**Monday, April 30**  
**4:30–6:00 pm**

**2005 The Who, What & Why of Contracts**  
*Paralegal Track*

**Matthew Massarelli**  
*General Counsel*  
TowerCo LLC

**Julie B. Young**  
*Senior Legal Assistant*  
Pennsylvania State Employees Credit Union

## *Corporate Legal Services*

### **Contract Review Process**

Note: The department contract coordinator (DCC) will be coordinating all contracts for the department in which he/she is assigned. This person will act as a liaison between the department and Legal. All contract review requests must be submitted by the DCC. Any requests from someone other than the DCC will be returned to the DCC.

- DCC will submit the contract and all necessary supporting documentation to be reviewed to Legal either in the form of paper or electronically.
  - If submitting in paper format DCC will send an email to the LCC making him/her aware that the contract is on its way.
    - Julie Young should be CC'd on either the informational email or the email containing the electronic contract.
- Once the contract is received in Legal
  - An acknowledgment of receipt email will be sent to the DCC.
    - One of two situations will be marked alerting the DCC as to the status of the review request:
      1. Your request appears complete and has been placed on our list of items to be reviewed
      2. Your request is being returned and will not be added to the CLS review list until all deficiencies are corrected. A list of deficiencies follows. The deficiency will be marked with an "X".
  - Legal will make every effort to review the contract within 4 – 5 business days.
- Once the review is complete
  - A copy of the review will be emailed to the DCC
  - Folder with review, marked up agreement/contract, and any supporting documents is placed in the 1-31 cabinet.
  - A CLS Follow-up email will be sent in 30 calendar days if the original is not received in Legal within that time.
    - Copy of email is to be saved under the vendor name in the Vendor List.
- Once the original is received
  - An acknowledgment of original email will be sent to the DCC
    - Copy of email is to be saved under the vendor name in the Vendor List
  - Document is then scanned, imported and indexed into Feith
    - Note: See Scanning Documents Procedure
  - Add the vendor to the Legal Contracts database
  - File the folder

## *Corporate Legal Services*

### TRANSMITTAL SHEET FOR REVIEW

Date Submitted to CLS		Vendor Requested Due Date <i>* include 2 wks of CLS lead time</i>	
Dept. Contract Coordinator		PSECU Primary Contact	
Vendor Name		Product or Service Name	
Vendor's Previous Name(s), if any			

- 1) Product/service to be provided pursuant to this agreement: \_\_\_\_\_
- 2) Is this a critical business function\*? \_\_\_\_ Yes \_\_\_\_ No
- 3) Will the yearly cost for this product/service be \$100,000 or greater at any time during the anticipated term of this agreement? \_\_\_\_ Yes \_\_\_\_ No
- 4) As defined by the Privacy Regulations and Privacy Policy\*, will any confidential member information be shared with vendor or will vendor be granted access in any way to confidential member information?  
\_\_\_\_ Yes \_\_\_\_ No
- 5) Is this a new or existing service/product? \_\_\_\_ New \_\_\_\_ Existing
- 6) Does another vendor currently provide this product/service? \_\_\_\_ Yes \_\_\_\_ No
  - a. If yes, provide name of vendor currently providing product/service:  
\_\_\_\_\_
  - b. If another vendor currently provides this product/service, will this create any issues such as exclusivity or termination fees?  
\_\_\_\_ Yes \_\_\_\_ No If Yes, please explain: \_\_\_\_\_
  - c. Will both relationships exist or will current relationship end? Please explain:  
\_\_\_\_\_
- 7) Does the proposed contract include all of the items/terms that you negotiated with the vendor?  
\_\_\_\_ Yes \_\_\_\_ No
  - a. If No, please explain: \_\_\_\_\_
- 8) What information about PSECU will be provided to the vendor?: \_\_\_\_\_
- 9) Will the vendor be granted access to building or computer system? \_\_\_\_ Yes \_\_\_\_ No

**ALWAYS INCLUDE ANY AND ALL EXHIBITS, ATTACHMENTS, GUIDELINES, TERMS & CONDITIONS, ETC. THAT ARE REFERENCED IN CONTRACT.**

\*A glossary of terms can be found in MIS under the keyword "legal terms"

## Instructions Transmittal Sheet for CLS Review

### Identification Section

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- **Date Submitted:**
  - Date contract was submitted for review.
- **Department Contract Coordinator:**
  - Individual within the department designated to coordinator department contracts
- **PSECU Primary Contact Name:**
  - Individual negotiating with the vendor
- **Vendor Name:**
  - Legal name of the vendor
- **Vendor's Previous Name(s), if any:**
  - Vendor's former name(s)
- **Product/Service Name:**
  - Product or Service vendor will be performing/supplying to PSECU
- **Vendor Requested Due Date:**
  - Date vendor has requested contract be returned
  - Be sure to submit the contract to CLS to allow for approximately a two week turnaround time.

### Contractual Questions

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1. **Product/service to be provided pursuant to this agreement:**
  - a. Explain the product/service the vendor will provide to PSECU with this agreement.
2. **Is this a critical business function?**
  - a. Those functions that are required to serve the basic or primary needs of the members. For example things related to deposits and withdrawals such as cards, checks, phones, pseu@home®, symitar, etc. PSECU has listed the following as some of the characteristics of critical business functions: Member service; Regulatory requirements; Risk of significant financial exposure. Keep in mind that PSECU offers many services that are not critical to the members and your particular contract may involve those services. That does not devalue what you do it just means that for the purposes of this definition it is not a critical business function. It must be critical to the members as a whole not just to your department or unit. The regulators have defined this and PSECU has made it specific to the organization. NCUA says that it is important to note that specific critical systems may be components of a number of core business processes and may serve as an interface between and among the operations of core business processes. In identifying criticality, management should consider their membership and member use. For example, if a credit union has a significant number of members that extensively rely on an electronic system, all of the components that constitute this process would likely be critical.
3. **Will the yearly cost for this product/service be \$100,000 or greater at any time during the anticipated term of this agreement?**
  - a. If at any point during the term of the agreement the annual cost exceeds or is equal to \$100,000 check yes.

- 4. As defined by the Privacy regulations and Privacy Policy, will any confidential member information be shared with the vendor or will the vendor be granted access in any way to confidential member information?**
  - a. Refer to PSECU's privacy policy to determine confidential member information.
- 5. Is this a new or existing service/product?**
  - a. Indicate if this agreement is for a new service/product or renewal of an existing product/service.
- 6. Does another vendor currently provide this service/product?**
  - a. If there is another vendor providing the service/product answer yes and continue to a. If the answer is no continue on the question #7.
- 7. Does the proposed contract include all of the items/terms that you negotiated with the vendor?**
  - a. If the answer is no, explain in the space provided.
- 8. What information about PSECU will be provided to the vendor?**
  - a. List all information about PSECU that will be shared with the vendor.
- 9. Will the vendor be granted access to building or computer system?**
  - a. Answer yes or no.

## *Corporate Legal Services*

### Vendor Management Checklist

This form is required if the proposed product/service meets any of the following criteria:

- Relationship involves a critical business function (see glossary)
- Annual expense is \$100,000 or greater
- PSECU will be sharing confidential member information with the vendor

(Place "X" in appropriate space)

New Vendor
   
  New Product/Service with existing Vendor

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

#### Identification of Vendor

Duty	Input N/A if task is not necessary	Date task was completed (mm/dd/yy)	Name of Person Completing Task
Off-Site visits			
RFP			
Background check			
Reference check			

#### Financial & Insurance Review

Duty	Input N/A if task is not necessary	Date task was completed (mm/dd/yy)	Name of Person Completing Task
Financial Statements			
Insurance			

#### Due Diligence Checklist complete

Duty	Input N/A if task is not necessary	Date task was completed (mm/dd/yy)	Name of Person Completing Task
SAS 70			
Audit & Security			
BRACE			

\_\_\_\_\_  
Signature of Department Vice President Required

\_\_\_\_\_  
Date

## *Corporate Legal Services*

### Due Diligence Checklist

Vendor Name \_\_\_\_\_ Product/Service \_\_\_\_\_

Prepared by \_\_\_\_\_ Department \_\_\_\_\_ Date \_\_\_\_\_

<b>SELECTING A SERVICE PROVIDER</b>				
<b>A. Technical and Industry Expertise</b>	Yes	No	NA	Comment
1. Assess the service provider's experience and ability to provide the necessary services and enhance the institution's strategic direction including anticipated business development goals and objectives, and technology initiatives.				
2. Identify areas where the institution would have to supplement the service provider's expertise to fully manage risk.				
3. Evaluate the service provider's use of third parties or partners that would be used to support the outsourced operations.				
4. Evaluate the experience of the service provider in providing services in the anticipated operating environment. Consider whether additional systems, data conversions, and work are necessary.				
5. Contact references and user groups to learn about the service provider's reputation and performance.				
6. Consider whether additional systems, data conversions, and work are necessary.				
7. Evaluate the service provider's ability to respond to service disruptions.				
8. Evaluate key service provider personnel that would be assigned to support the institution.				
9. Perform on-site visits, where necessary, to better understand how the service provider operates and supports its services.				
10. Review customer complaints on the products and services provided by the service provider.				
<b>B. Operations and Controls</b>	Yes	No	NA	Comment
1. Determine adequacy of the service provider's standards, policies and procedures relating to internal controls, facilities management (e.g., access requirements, sharing of facilities, etc.), security (e.g., systems, data, equipment, etc.), privacy protections, maintenance of records, business resumption contingency planning, systems development and maintenance, and employee background checks.				

B. Operations and Controls (continued)	Yes	No	NA	Comment
2. Determine if the service provider provides sufficient security precautions, including, when appropriate, firewalls, encryption, and customer identity authentication, to protect institution resources as well as detect and respond to intrusions.				
3. Review audit reports (e.g., SAS 70 reviews, security reviews) as well as regulatory examination reports if available, and evaluate the adequacy of the service providers' systems and controls including resource availability, security, integrity, and confidentiality.				
4. Follow up on any deficiencies noted in the audits and reviews of the service provider.				
5. Evaluate whether the institution will have complete and timely access to its information maintained by the provider.				
6. Evaluate the service provider's knowledge of regulations that are relevant to the services they are providing. (e.g., Regulation E, privacy and other consumer protection regulations, Bank Secrecy Act, etc.).				
7. Assess the adequacy of the service provider's insurance coverage including fidelity, fire, and liability, data losses from errors and omissions, and protection of documents in transit.				
C. Financial Condition	Yes	No	NA	Comment
1. Analyze the service provider's most recent audited financial statements and annual report as well as other indicators (e.g., publicly traded bond ratings), if available.				
2. Consider factors such as how long the service provider has been in business and the service provider's market share for a given service and how it has fluctuated.				
3. Consider the significance of the institution's proposed contract on the service provider's financial condition.				
4. Evaluate technological expenditures. Is the service provider's level of investment in technology consistent with supporting the institution's activities? Does the service provider have the financial resources to invest in and support the required technology?				
D. Business Resumption	Yes	No	NA	Comment
1. Evaluate the service provider's business resumption continuity plan and determine the plan is adequate to cause minimal service disruption to the institution.				



<b>CONTRACT ISSUES</b>				
<b>A. Scope of service</b>	Yes	No	NA	Comment
1. Contract includes timeframes and activities for implementation and assignment of responsibility. Implementation provisions should take into consideration other existing systems or interrelated systems to be developed by different service providers (e.g., an Internet banking system being integrated with existing core applications or systems customization).				
2. Contract includes services to be performed by the service provider including duties such as software support and maintenance, training of employees or customer service.				
3. Contract includes obligations of the financial institution.				
4. Contract includes the contracting parties' rights in modifying existing services performed under the contract.				
5. Contract includes guidelines for adding new or different services and for contract re-negotiation.				
<b>B. Performance Standards</b>	Yes	No	NA	Comment
1. Performance standards define the minimum service level requirements and remedies for failure to meet standards in the contract.				
<b>C. Security and Confidentiality</b>	Yes	No	NA	Comment
1. The contract should address the service provider's responsibility for security and confidentiality of the institution's resources (e.g., information, hardware, and data).				
2. The contract should prohibit the service provider and its agents from using or disclosing the institution's information, except as necessary to or consistent with providing the contracted services, to protect against unauthorized use (e.g., disclosure of information to institution competitors).				
3. Require the service provider to fully disclose breaches in security resulting in unauthorized intrusions into the service provider that may materially affect the institution or its customers. The service provider should report to the institution when material intrusions occur, the effect on the institution, and corrective action to respond to the intrusion.				
<b>D. Controls</b>	Yes	No	NA	Comment
1. Contract provisions address internal controls to be maintained by the service provider.				
2. Contract provisions address compliance with applicable regulatory requirements.				
3. Contract provisions address records to be maintained by the service provider.				
4. Contract provisions address access to the records by the institution.				

5. Contract provisions address notification by the service provider to the institution and the institution's approval rights regarding material changes to services, systems, controls, key project personnel allocated to the institution, and new service locations.				
6. Contract provisions address setting and monitoring of parameters relating to any financial functions, such as payments processing and any extensions of credit on behalf of the institution.				
7. Contract provisions address Insurance coverage to be maintained by the service provider.				
<b>E. Audit</b>	Yes	No	NA	Comment
1. Include in the contract the types of audit reports the institution is entitled to receive (e.g., financial, internal control and security reviews). The contract can specify audit frequency, cost to the institution associated with the audits if any, as well as the rights of the institution and its agencies to obtain the results of the audits in a timely manner.				
2. The contract may specify rights to obtain documentation regarding the resolution of audit disclosed deficiencies and inspect the processing facilities and operating practices of the service provider. Management should consider, based upon the risk assessment phase, the degree to which independent internal audits completed by service provider audit staff can be used and the need for external audits and reviews (e.g., SAS 70 Type I and II reviews).				
3. <i>For services involving access to open networks</i> , such as Internet-related services, special attention should be paid to security. The institution may wish to include contract terms requiring periodic audits to be performed by an independent party with sufficient expertise. These audits may include penetration testing, intrusion detection, and firewall configuration.				
<b>F. Reports</b>	Yes	No	NA	Comment
1. Contractual terms should discuss the frequency and type of reports the institution will receive (e.g., performance reports, control audits, financial statements, security, and business resumption testing reports). Guidelines and fees for obtaining custom reports should also be discussed.				
<b>G. Business Resumption and Contingency Planning</b>	Yes	No	NA	Comment
1. The contract should address the service provider's responsibility for backup and record protection, including equipment, program and data files, and maintenance of disaster recovery plans. Responsibilities should include testing of the plans and providing results to the institution.				
2. Contracts should include provisions for business recovery timeframes that meet the institution's business requirements. The institution should ensure the contract does not contain any provisions that would excuse the service provider from implementing its contingency plans.				

H. Sub-contracting and Multiple Service Provider Relationships	Yes	No	NA	Comment
1. Some service providers may contract with third-parties in providing services to the financial institution. To provide accountability, it may be beneficial for the financial institution to seek an agreement with and designate a primary contracting service provider.				
2. Consider including a provision specifying that the contracting service provider is responsible for the service provided to the institution regardless of which entity is actually conducting the operations.				
3. Consider including notification and approval requirements regarding changes to the service provider's significant subcontractors.				
I. Cost	Yes	No	NA	Comment
1. The contract should fully describe fees and calculations for base services, including any development, conversion, and recurring services, as well as any charges based upon volume of activity and for special requests.				
2. Cost and responsibility for purchase and maintenance of hardware and software may also need to be addressed. Any conditions under which the cost structure may be changed should be addressed in detail including limits on any cost increases.				
J. Ownership and License	Yes	No	NA	Comment
1. The contract should address ownership and allowable use by the service provider of the institution's data, equipment/hardware, system documentation, system and application software, and other intellectual property rights. Other intellectual property rights may include the institution's name and logo; its trademark or copyrighted material; domain names; web sites designs; and other work products developed by the service provider for the institution.				
2. The contract should not contain unnecessary limitations on the return of items owned by the institution. Institutions that purchase software should consider establishing escrow agreements. These escrow agreements may provide for the following: institution access to source programs under certain conditions (e.g., insolvency of the vendor), documentation of programming and systems, and verification of updated source code.				
K. Duration	Yes	No	NA	Comment
1. Institutions should consider the type of technology and state of the industry when negotiating the length of the contract and renewal periods.				
2. Consider appropriate length of time required to notify service provider of the institutions' intent not to renew the contract prior to expiration. Institutions should consider coordinating expiration dates of contracts for inter-related services (e.g., web site, telecommunications, programming,) so that they coincide, where practical. Such coordination can minimize the risk of terminating a contract early and incurring penalties as a result of necessary termination of another related service contract.				

L. Dispute Resolution	Yes	No	NA	Comment
1. Consider including in the contract a provision for a dispute resolution process that attempts to resolve problems in an expeditious manner as well as provide for continuation of services during dispute resolution.				
M. Indemnification	Yes	No	NA	Comment
1. Indemnification provisions generally require the financial institution to hold the service provider harmless from liability for the negligence of the institution, and vice versa. These provisions should be reviewed to reduce the likelihood of potential situations in which the institution may be liable for claims arising as a result of the negligence of the service provider.				
N. Limitation of Liability	Yes	No	NA	Comment
1. Some service provider standard contracts may contain clauses limiting the amount of liability that can be incurred by the service provider. If the institution is considering such a contract, consideration should be given to whether the damage limitation bears an adequate relationship to the amount of loss the financial institution might reasonably experience.				
O. Termination	Yes	No	NA	Comment
1. The extent and flexibility of termination rights can vary. Termination rights may be sought for a variety of conditions including change in control, convenience, increase in cost, failure to meet service levels, failure to provide critical services, company closure, and insolvency.				
2. Management should consider whether or not the contract permits the institution to terminate the contract in a timely manner and without prohibitive expense (e.g., reasonableness of cost or penalty provisions).				
3. The contract should state termination and notification requirements with time frames to allow the orderly conversion to another provider.				
4. The contract must provide for return of the institution's data, as well as other institution resources, in a timely manner.				
P. Assignment	Yes	No	NA	Comment
1. Institution should consider contract provisions that prohibit assignment of the contract to a third party without the institution's consent.				
OVERSIGHT OF PROVIDER – CONTINUOUS MONITORING				
Q. Assess Quality of Service and Support	Yes	No	NA	Comment
1. Regularly review reports documenting the service provider's performance. Determine if the reports are accurate and allow for a meaningful assessment of the service provider's performance.				
2. Document and follow up on any problem in service in a timely manner. Assess service provider plans to enhance service levels.				
3. Participate in user groups and other forums.				

R. Monitor Contract Compliance and Revision Needs	Yes	No	NA	Comment
1. Review invoices to assure proper charges for services rendered, the appropriateness of rate changes and new service charges.				
2. Periodically, review the service provider's performance relative to service level agreements; determine whether other contractual terms and conditions are being met, and whether any revisions to service level expectations or other terms are needed given changes in the institution's needs and technological developments.				
3. Maintain documents and records regarding contract compliance, revision and dispute resolution.				

## Email sent when review packet is received or when the original is received

**CORPORATE LEGAL SERVICES ACKNOWLEDGES RECEIPT OF THE FOLLOWING:** [insert document title/description] received from [insert name of person & department]

\_\_\_ Your request appears complete and has been placed on our list of items to be reviewed.

\_\_\_ **Your request is being returned and will not be added to the CLS review list until all deficiencies are corrected.**

See following list of deficiencies:

- Vendor Management Checklist
- Due Diligence
- BRACE
- Transmittal Sheet
- Exhibit(s)
- Other \_\_\_\_\_.

\_\_\_ Original received - will be filed.

If you have any questions regarding the above, please contact the sender of this email.

### PSECU Corporate Legal Services

2150 Kim Frank  
2151 Scott Witwer  
2153 Julie Young  
2155 Chris Ciccocioppo  
2156 Robin Donley  
2164 Amy McNally

## Email sent with the review attached

Attached please find the CLS Review Memo prepared for the [insert vendor name]. If you have any questions regarding this review, please do not hesitate to contact me. Thank you.

### PSECU Corporate Legal Services

2150 Kim Frank  
2151 Scott Witwer  
2153 Julie Young  
2155 Chris Ciccocioppo  
2156 Robin Donley  
2164 Amy McNally

## Corporate Legal Services

### CONTRACT/AGREEMENT REVIEW

**Confidential and Privileged – DO NOT forward attorney work product.**

*This message is intended for internal use by PSECU and it should not be shared with the vendor or other third parties.*

Please carefully review the entire agreement.

Assuming the proposed terms are acceptable from an operational perspective, the following entries are provided for your information:

<b>BASIC INFORMATION</b>			
Vendor Name/Document			
VMC/DD/BRACE	Required		Not Required
Commencement Date			
Expiration Date			
Automatic Renewal	Yes		No
Termination Notice		Days	
Reviewed by		Date Reviewed	
<b>REVIEW TOPICS</b>			
	Choice of Law/Venue		
	Confidentiality		
	Exclusivity		
	Payment Terms/Sales Tax		
	Renewal/Notice Method		
	Right to Audit		
	Security Breach Notice		
	Termination/Penalties/Fees		
	Warranty/Limit of Liability		
	Individual Dept(s) Duties		
	Doc./Ex. Description		
	# of Pages Reviewed		
<b>COMMENTS/CONCERNS</b>			
<b>REQUIRED CHANGES</b>			

#### [ ] DEPARTMENT RESPONSIBILITIES

Please note the following events.

\*Calculate and make note of the corresponding dates on your Department's Calendar

**Required Signature(s): Authorized signer**  
Sign two originals. Please send one original Contract to legal for centralized administration.

**\*Provide VMC/DD/BRACE to Legal every other year during term of contract:**

**\*Action Date:**

**\*Contract Renewal:**

**Provide Ongoing Vendor Management Checklist annually during term of contract.**

**Notify Legal if you are considering terminating contract.**

*Corporate Legal Services*

**Original Cover Sheet**

Note: Please complete and attach to all original documents submitted to CLS.

Date: \_\_\_\_\_ Department: \_\_\_\_\_

Department Contract Coordinator: \_\_\_\_\_

Vendor Name/Product or Service: \_\_\_\_\_

\_\_\_\_\_



Was document reviewed by CLS prior to being signed? \_\_\_\_\_ YES \_\_\_\_\_ NO

If yes, date of review \_\_\_\_\_

Is the document dated? \_\_\_\_\_ YES \_\_\_\_\_ NO  
(Either the signature is dated or the effective date is clearly stated in the body of the contract)

**Reminders:**

- Be sure all necessary attachments/documents are included with the original being submitted
- Record in your department files important dates relevant to this Contract/Agreement
- You may want to keep a copy of all documents for your department files
- Supporting documentation should be kept for the duration of the agreement



## Follow-up email sent at 30 and 60 days past review date

**CORPORATE LEGAL SERVICES COMPLETED A REVIEW FOR THE FOLLOWING:** [insert document name,date of review].

As of today's date we have not received a signed original. Please provide an updated status on this agreement.

### PSECU Corporate Legal Services

2150 Kim Frank  
2151 Scott Witwer  
2153 Julie Young  
2155 Chris Ciccocioppo  
2156 Robin Donley  
2164 Amy McNally

## Final Notice email

### FINAL NOTICE

**CORPORATE LEGAL SERVICES (CLS) COMPLETED A REVIEW FOR THE FOLLOWING:** [insert document name,date of review]. CLS sent an email requesting a status on [insert dates]. As of today's date we have not received a signed original. The reviewed documents that were previously provided are now stale. Therefore we will be reclassifying the contract provided for review from a pending status to an unused status. Should you decided to proceed with this contract at another time, please submit a new and complete review package.

### PSECU Corporate Legal Services

2150 Kim Frank  
2151 Scott Witwer  
2153 Julie Young  
2155 Chris Ciccocioppo  
2156 Robin Donley  
2164 Amy McNally

### Do you need help gathering and reviewing financial information for a vendor contract?

Finance can provide assistance. If you provide the vendor's DUNS number to Gina or Cindy G. in Finance they can return a copy of the vendor's D&B report for your review. If the vendor is publicly held, you can research through [www.sec.gov](http://www.sec.gov) for a SEC 10-K filing, which would contain financial information. Also, the vendor's website (investor section) maybe another source for financial information or an Annual Report containing Audited Financial Statements.

## Example of Contract Formatting

## AGREEMENT

This agreement is dated July 15, 2007, and is between SUPPLY, INC., a Delaware corporation (“Supply”), JANE SMITH, and individual [insert “residing at \_\_\_\_\_” for each individual who is a party if the contract doesn’t contain a notices provision] (“Smith”), and SPORT LLC, a Delaware limited liability company (“Sport”).

A. Insert one or more recitals, if needed.

B. If used, the recitals should contain factual statements to give background and context to the agreement. A recital can be more than one sentence long and should consist of a regular paragraph that ends in a period.

The parties [therefore] agree as follows [this is the lead-in; you only need the “therefore” if the contract includes one or more recitals before the lead-in]:

1. Section Heading. If there is only one paragraph in the section, start the paragraph on the same line of the section heading.

2. Section Heading.

(a) Since there are two subsections in this section, begin a new paragraph. Here’s a set of tabulated enumerated clauses:

(i) here’s the first level-one tabulated enumerated clause, which, like all tabulated enumerated clauses, begins with a lower-case letter (unless the word always has a capital letter), and it would normally end in a semi-colon, but this clause happens to include a further set of tabulated enumerated clauses:

(ii) here’s one level-two tabulated enumerated clause; and

(iii) here’s a second and final level-two tabulated enumerated clause, and it would normally end in a semi-colon, but this clause happens to include a further set of tabulated enumerated clauses:

(A) here’s one level-three tabulated enumerated clause, even though you probably will never need one and even though using level-three tabulated enumerated clauses would probably make your contract harder to read; and

(B) here’s a second and final level-three tabulated enumerated clause;  
and

(b) here’s the next-to-last clause, which has an “and” or “or” after the semi-colon;  
and

(c) here’s the final, which ends in a period, which is the only period that occurs in a given set of tabulated enumerated clauses.

The parties are signing this agreement as of the date stated in the introductory clause.

SUPPLY, INC.

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

\_\_\_\_\_  
JANE SMITH

SPORT LLC

By: Management LLC,  
its manager

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

## Checklist: Contract Terms

Although all contracts can be somewhat different, there are certain contract terms that are among the most commonly included in business contracts. Not all of these provisions will be included in every contract, and most contracts will include additional provisions that relate specifically to their particular subject matter. The following checklist is, however, a basic and general guide as to what provisions it may be important to include, or at least consider, in the business contracts you review or draft.

### Identity of the parties

Individuals or business entities?  
If businesses, what type? (partnership, corporation, etc.)  
Name of person signing on behalf of the business  
Signer's official title  
Does he or she have authority to bind the business?  
Addresses of the parties

Purpose(s) of the contract

### Contract terms

In general  
Duties of each party  
Rights of each party  
Relevant dates  
Relevant prices or other dollar amounts  
Relevant quantities  
Payment terms  
Lump sum, COD, installments?  
Payment due dates  
Taxes  
Interest  
Late fees  
Warranties  
Disclaimers  
Limitations on liability  
Liquidated damages  
Confidentiality provision  
Indemnification agreement  
Default  
Arbitration clause  
Governing law  
Venue of lawsuits involving the contract  
Statement that contract constitutes entire agreement  
Severability of individual provisions

### Format

Signatures of authorized signatories  
Notarization and witnesses (if necessary)

## Contract Drafting Tips

It is helpful to understand the basics of contract drafting even if you rarely draft your own contracts. A basic understanding can add to your confidence in all types of business writing, and will also aid when reviewing and interpreting the contracts in which you are a party.

1. An effective contract should always be clear, specific, and focused.
2. Sentences should be short to avoid unnecessary complexity and ambiguity.
3. You may want to look at sample agreements prior to drafting your own.
4. Make sure all party names are accurate. Include their business titles if applicable.
5. A contract should be consistent in its tone, grammar, word usage, and abbreviations.
6. Outlining the contract can aid clarity and allow for quick reference to certain clauses.
7. Define important terms.
8. Anticipate litigation by including sections regarding venue, choice of law, and attorney fees.
9. All parties should sign the contract, including business titles if applicable.
10. Pages should be numbered. Avoid the appearance that pages could have been added after the agreement was signed.
11. Always, always proofread very carefully.

Inefficient typography is one way to make unreadable an otherwise decent contract. Here are some suggestions for keeping your contracts as readable as possible:

1. Use single-spaced lines of text.
2. Instead of full justification, use left justification (ragged right margin).
3. Use a serif typeface such as Times New Roman, and avoid any Courier typeface.
4. Use all-capitals sparingly (for instance, for the title, for article headings, and for the names of the parties in the introductory clause and the signature blocks).
5. To emphasize text elsewhere (for example, section headings, defined terms when they are first defined, and references to exhibits and schedules), use underlining; for contract drafting (often boldface is too emphatic and italics too subtle).
6. To render conspicuous an entire provision (such as an implied warranty of merchantability), use some alternative to all-capitals (for example, bold italics), if you can do so and still comply with state law.

**DO'S AND DON'TS OF CONTRACT DRAFTING AND REVIEWING****DO:**

DO keep a form file.

DO start with a generic form as a guide, and adapt it to your particular situation.

DO entitle the document "CONTRACT" so that there can be no mistake as to its intent.

DO make sure the parties are properly identified in the first paragraph, that names are spelled correctly, and that addresses are accurate. As obvious as this is, it is one of the most common problems in contracts. For individuals, include full first and last name, and middle initials if available, and other identifying information, if appropriate, such as Jr., M.D., etc. For corporations, check with the Secretary of State where incorporated.

Do include phone numbers in the document's notice section (it sure will make easier for overnighting documents).

DO include the date in the first paragraph so that it is easy to refer back to after contract execution, and so that the contract can later be identified by date, such as "the November 20, 2006 Contract for the Sale of Goods."

DO use recitals in plain English. Include recitals to provide background. Recitals are the factual statements that precede the body of a contract. They provide a simple way to bring the contract's reader (party, judge or jury) up to speed on what the contract is about, who the parties are, why they are signing a contract, etc. The first paragraph in the body of the contract can incorporate the recitals by reference and state that they are true and correct. This will avoid a later argument as to whether or not the recitals are a legally binding part of the contract.

DO use common-sense headings to make it easier to find particular provisions in the contract.

DO outline the contract by writing out and underlining paragraph headings in their logical order. The paragraphs should flow in logical, organized fashion. It is not necessary to write them all at once; you can write them as you think of them. Try to group related concepts in the same paragraphs or in adjacent paragraphs. For example, write a purchase contract's initial paragraph headings like this:

- Recitals.
- Purchase.
- Price and Payment.
- Specifications.
- Warranties.

DO number the paragraphs for ease of reference.

DO use plain language whenever possible.

## DO'S AND DON'TS OF CONTRACT DRAFTING AND REVIEWING

DO keep a pad at hand to remember clauses to add. It is normal to think of additional clauses, wording and issues while writing a contract. Jot these down on a pad as you write; they are easily forgotten. Also keep your outline and other forms in front of you as you write, and check off items as you write them.

DO be consistent in using words. If you refer to the subject matter of a sales contract as "goods" use that term throughout the contract; do not alternately call them "goods" and "items." Maintaining consistency is more important than avoiding repetition. Don't worry about putting the reader to sleep; worry about the opposing lawyer a year from now hunting for ambiguities to get your contract into court.

DO think about formatting. It helps with clarity and improves understanding.

DO define all technical terms.

DO understand the differences between "shall", "must", "may" and "will".

DO write in the present tense.

DO consider the placement of punctuation marks, since even a misplaced comma can change the meaning of a sentence.

DO carefully review the use of conjunctions, especially "and" and "or," since the word you choose can have a dramatic impact on meaning.

DO tell your attorney the ideas that come as you write. Many ideas will occur to you as you write: things that could go wrong with the deal, things that might happen in the future, things that happened in the past, ways to structure things better. Communicate these ideas to your attorney. A better document will result.

DO review the contract to make sure defined terms are actually used in the document.

DO make sure the contract addresses all possible contingencies and that nothing is left to chance.

DO have your attorney review every contract before you sign it.

DO ask your attorney any questions you may have about the contract -- remember, there is no such thing as a stupid question, but it can be stupid to let a question go unanswered and pay for it later.

DO sign in blue or other colored ink to make the original easily distinguishable from photocopies.

DO include notarization if required by applicable law.

DO retain a copy of the contract for your records.

## DO'S AND DON'TS OF CONTRACT DRAFTING AND REVIEWING

DO save the drafts as multiple files on your computer. If you save the first draft on your computer as two files, you will have one file identified as the first draft and the other identified as the current version. This can be done by naming the current version "contract" and the first draft as "contract.d1." Then, subsequent versions can be named "contract.d2", "contract.d3," etc. Don't be afraid to use as many characters as you need to accurately name the document. It will help later when you are trying to search for the most recent document.

DO print the contract on 24 pound bond paper instead of 20 pound copier paper. Using a heavy bond paper will make it easy to tell the original contract from copies. It will also last longer.

DO print on pages using the same paper, and if pages are changed, reprint the document using the same paper. This will avoid an argument that pages were substituted after the contract was signed.

DO sign the contract in blue ink, not black ink. This, too, will make it easier to differentiate the signed original contract from photocopies.

DO identify the parties and witnesses who sign by providing blank lines below their signature lines for their printed names and addresses. This will make it easier to find the witnesses if the contract is contested.

DO have corporate officers include their titles, the corporation name and the word "as." Failure to do this can result in personal liability of the officer. The proper way to sign in a representative capacity is as follows:

ABC Corporation, a North Carolina corporation

By: \_\_\_\_\_  
John Jones, as its President

### **DON'T:**

DON'T include legalese or archaic phrases like "the party of the first part." "heretofore," etc. They generally add little in terms of clarity.

DON'T include overly long sentences; rather, break sentences down into easily digestible thoughts.

DON'T be repetitive unless it is absolutely necessary. It is preferable to refer back to a previous provision according to its number or heading rather than to repeat it verbatim.

DON'T assume the other party defines terms the way you do. If there is any doubt, include a definition in the contract.



**DO'S AND DON'TS OF CONTRACT DRAFTING AND REVIEWING**

DON'T read the contract over hurriedly. It takes time to understand all of the possible nuances of the language used.

DON'T accept the other party's oral explanation of a confusing term. Include everything in writing.

DON'T start acting according to the terms of the contract until both parties have executed it.

DON'T agree to a modification of the contract without memorializing it in writing.


DON'T say "Lessor" and "Lessee." These are bad nicknames for a lease because they are easily reversed or mistyped. Use "Landlord" and "Tenant" instead. The same applies to lienor and lienee, mortgagor and mortgagee, grantor and grantee, licensor and licensee, party A and party B. This is where you can use your creativity to come up with a different nickname for a party, as long as you use it consistently throughout the contract.

DON'T be creative with words. Contract writing is not creative writing and is not meant to provoke reflective thoughts or controversies about nuances of meaning. Contract writing is clear, direct and precise. Therefore, use common words and common meanings. Write for the common man and the common woman.

DON'T assume that use of a standard or form contract eliminates the need for your lawyer's review. Even if a standard contract worked well in one instance, a change of circumstances, date, or party can change the whole equation.

A large, light gray diamond shape is centered on the page, serving as a background for the title text.

***Drafting and  
Interpreting Contracts***

The logo for ACC AMERICA features the letters 'ACC AMERICA' in a large, black, serif font. A red swoosh underline is positioned above the 'C's of 'ACC'.

Association of Corporate Counsel  
1025 Connecticut Avenue, NW, Suite 200  
Washington, DC 20036  
Tel 202.293.4103  
Fax 202.293.4701  
[www.acca.com](http://www.acca.com)  
*The in-house bar association<sup>SM</sup>*

## *Drafting And Interpreting Contracts InfoPAK*

Created August 2005

Provided by the Association of Corporate Counsel  
1025 Connecticut Avenue, Suite 200  
Washington, D.C. 20036  
Tel. 202.293.4103  
Fax 202.293.4107  
www.acca.com

The purpose of this InfoPAK is to provide the reader with the basics of drafting and interpreting contracts. Contained in this InfoPAK are links to ACC online resources, as well as sample documents. This information should not be construed as legal advice or legal opinion on specific facts, or representative of the views of ACC or any of its lawyers, unless so stated. This is not intended as a definitive statement on the subject but a tool, providing practical information for the reader. We hope that you find this material useful. Thank you for contacting the Association of Corporate Counsel.

This InfoPAK was developed and sponsored by:

Nicholas G. Karambelas, Esq.  
Sfikas & Karambelas, LLP

**Drafting And Interpreting Contracts**  
Association of Corporate Counsel August 2005

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## ***I. Introduction - Purpose Of Contract Drafting***

### **Purpose Of Contract Drafting And Contract Reading**

A contract is essentially “legislation” that governs the legal relationship between the parties to the contract. The parties are in effect “legislators” of that legal relationship. Therefore, just as the goal of legislative drafting is to state in writing a law that embodies the intent and policy objective of the legislators, the goal of contract drafting and contract reading is to assure to the extent possible that the rights and obligations (*i.e.* the legal relationship) that the parties have voluntarily agreed to accept and impose on themselves and each other will be accurately reflected in the written contract.

### **Ideals of Contract Drafting**

The drafter of a contract aspires to convert into written language and articulate in a written contract:

- A. The rights and obligations of the parties,
- B. Provisions for events or contingencies that are not expected to but may occur.
- C. Provisions that avoid any undesired default provisions of any applicable law,
- D. Remedies and means of enforcing or avoiding the rights and obligations.

### **Role of the Attorney**

Contract drafting and contract reading requires the attorney to perform the functions of counselor, advocate, planner and negotiator. The attorney must be a counselor by advising the client as to the law governing the subject matter of the contract, be an advocate to predict whether and the extent to which the contract will be enforced or avoided in the courts, be a planner to assist the client in arranging its business in an efficient and legally proper manner and a negotiator to conclude a legal relationship that satisfies the objectives of the client.

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## ***II. Brief Review Of Fundamental Principles Of Contract Law***

### **A. Definition of a Contract**

A contract is defined as an agreement that the law will enforce which contains a promise to act or refrain from acting at some time in the future. Except for contracts covered by the Statute of Frauds, contracts can be either oral or written. Contracts that are contrary to public policy are unenforceable as a matter of law.

### **B. Intent to Contract - Mutual Assent**

The law assumes that a contract is the result of a voluntary act by the parties. For a contract to be formed and enforceable, the parties must intend to contract, i.e. they voluntarily enter into a legally binding arrangement that can ultimately be enforced in the courts. The intent to contract is manifested by mutual assent which means that the parties have had a “meeting of the minds”. The parties have reached an agreement that can be articulated with reasonable certainty.

### **C. Offer - Acceptance**

An “offer” is defined as a proposal to enter into a bargain that is communicated to another person in a manner that is calculated to elicit an “acceptance” leading to a legally binding contract. An acceptance occurs when the person to whom the offer is communicated manifests assent to the offer.

### **D. Consideration - Promissory Estoppel**

As a general proposition, for a contract to be legally binding, it must be either supported by consideration or a party to the contract has relied to its detriment on the promise of the other party, (promissory estoppel). The consideration doctrine is designed to enforce promises that are “bargained for”. Consideration has been defined as having the following two elements (1) the promisee must incur legal detriment, i.e. forego an item of value or circumscribe one’s freedom and (2) the promisor has made the promise to induce the promisee to forego the item of value or permit its freedom to be circumscribed.

The doctrine of promissory estoppel is designed to enforce promises for which there has been no “bargained for” exchange but which have induced the promisee to rely on the promise to its legal or economic detriment.

### **E. Conditions and Covenants**

In most contracts, obligations to perform will be conditional on the occurrence of an event. A condition precedent is any event other than a lapse of time that must occur before performance under a contract is due. A condition subsequent (also referred to as an event in discharge) is an event, the occurrence of which, causes the obligation to perform to be discharged. An express condition is a condition upon which the parties have affirmatively agreed. An express condition can also be implied in fact from the conduct of the parties. A constructive condition is a condition to

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which the parties have not agreed but which the courts impose on the parties to assure fundamental fairness.

The courts do not favor conditions in contracts especially when the occurrence or non-occurrence of a condition leads to a forfeiture. Wherever possible, courts will construe a condition as a covenant that creates an obligation. Therefore, if a condition is intended, the words used must clearly be language of condition.

## **F. Expiration - Termination - Termination of Contracts Prior to Completion of Performance**

A contract expires when each party has performed its duties under the contract or an event occurs which is specified in the contract as an event which causes the contract to expire. The most common such event is the lapse of a specified period of time.

A contract terminates if, prior to the expiration of the contract, an anticipatory breach or an actual breach occurs. An anticipatory breach occurs when a party manifests an intent not to perform before performance is due. An actual breach occurs when a party fails to perform when performance is due. A contract can also be terminated by rescission. Mutual rescission occurs when the parties agree to cancel or annul the contract and return any consideration. Unilateral rescission occurs where one party was subjected to fraud or duress and seeks to be put itself in the position it was in before the contract was concluded.

## **G. Definite Term - Indefinite Term - Perpetual**

A contract can be for a definite term which means that neither party has any further rights against or obligations to one another after an event designated by the parties has occurred. The most common event is the passage of time.

A contract can be for an indefinite term which means that the parties have not designated an event that ends the legal relationship created by the contract. Either party may, in its sole discretion, cause the parties to cease having any further rights and obligations to one another. The most common method used to manifest the end of the contract is a notice sent by one party and delivered to the other party.

A perpetual contract has no designated event that ends the legal relationship. Neither party has either the right or power to cause the contractual relationship to end. Perpetual contracts are disfavored as against public policy in many jurisdictions, *Payroll Exp. Corp. v. Aetna Cas. & Sur. Co.*, 659 F.2d 285 (2d Cir.1981).

## **H. The Statute of Frauds**

The Statute of Frauds was enacted in by the English Parliament in 1677. In an effort to prevent fraud or perjury, the Statute of Frauds required that certain contracts must be in writing to be enforceable in court. The Statute of Frauds was imported into U.S. law as part of English law. Great Britain repealed the Statute of Frauds in 1954. Most states of the United States including the

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area jurisdictions, however, still have some form of the Statute of Frauds. Generally, a contract must be in writing and signed at least by the party to be charged if it is:

- A. A contract of an executor to perform or be liable for the obligation of a decedent,
- B. A contract to perform or be liable for the obligation of another person,
- C. A contract in which the consideration is marriage,
- D. A contract for the sale of an interest in real property,
- E. A contract that is not or cannot be performed within one year from date on which the contract is concluded.
- F. Under the Uniform Commercial Code (UCC), a contract for the sale of goods for a price of \$500.00 or more.
- G. Under the Uniform Computer Information Transactions Act (UCITA), a contract for the transfer of computer information requires a payment of \$5,000 or more or, if the contract is a license or access contract, the agreed term of use is for 1 year or less or the party against whom the contract is asserted can terminate the contract at will

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### *III. Contract Drafting Principles*

#### **A. Know the Subject Matter of the Contract**

The single most important skill in contract drafting is knowing the subject matter of the contract. Before even drafting a word of a contract the attorney must be satisfied that he or she has at least a working knowledge of the subject matter of the contract. Most often, such working knowledge can be obtained through discussions with the client. Clients may not always see the value of “educating” their attorneys as to the subject matter of the contract. However, it will be quite difficult to write an effective contract and work out solutions to contingencies unless the attorney is familiar with the subject matter.

#### **B. Organization of the Written Contract**

##### **1. Identify Parties and Capacities**

The contract should reflect on its face the identity of the parties and the capacity in which they undertake the obligations under the contract. While this may be simple where the parties are individuals, but it can become complicated where the parties are actually levels of corporate bureaucracy or government agencies.

###### *1. Private Entity*

Is the party a parent corporation/LLC or a subsidiary or affiliate of a parent corporation/LLC? If the party is a subsidiary or affiliate, does it have the authority to bind the parent for performance or payment?

###### *2. Partnership*

If the party is a partnership and the partnership is governed by the Revised Uniform Partnership Act (RUPA), is a statement of authority or statement of denial on file with respect to the individual negotiating and signed on behalf of the partnership? (see *D.C. Code §33-153.3 and 153.4*).

###### *3. Government Agency or Instrumentality*

If the party is a government agency or instrumentality, it has the authority to enter into contracts only if that authority is set forth in the enabling legislation creating the agency or instrumentality.

##### **2. “Bargained-For” Exchange**

The “bargain-for” exchange is the heart of the contract. It must be articulated as clearly and in as much detail as possible. The following is a list of items that should be considered in drafting the “bargained-for” exchange:

1. Description of Goods/Services to be Rendered
2. Time and Place for Performance - Order of Performance
3. Price, Payment Terms and Method of Payment
4. Quantity/Quality
5. Standards of Performance
6. Allocation of Risk- Risk of Loss

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7. Warrants and Representations
8. Renewal - Extension - Indefinite
9. Definition of Event in Default, Curing Event in Default
10. Consequences of Failing to Cure Event in Default
11. Remedies, Limitation on Liability, Liquidated Damage
12. Holds Harmless and Indemnification
13. Confidentiality and Non-Disclosure
14. Non-Compete Covenants
15. Guaranty of Performance - Payment
16. Termination - Expiration
17. Definition of Terms
18. Applicable Uniform Laws such as UCC, UCITA, CISG, UNIDROIT

### 3. Contract Governance

The contract governance provisions set forth the basic “legal ground rules” by which the legal relationship created by the contract is to be conducted. Such provisions are also referred to as “boilerplate”. The purpose of these provisions is to either restate common law contract principles or to avoid common law contract principles.

The following is a list of governance provisions that should be considered for every contract but is by no means exhaustive. There are numerous permutations on the principles contained in each provision. However, if the attorney chooses not to include one or more of the following governance provisions, he or she should be able to articulate a reason for not including any such provision.

#### *1. Independent Contractors.*

The Parties are strictly independent contractors. A is not, in any way, an employee, partner, joint venturer or agent of B. A shall not, in any way, bind B to any person unless A has received the written consent of B. A shall undertake all reasonable measures in its operation to inform Third Parties that B has no direct or indirect liability for any act or agreement taken by A and that B does not control the performance of A.

#### *2. Strict Compliance.*

If a Party fails to exercise any right or to insist that the other Party strictly comply any obligation, no such failure or insistence shall be a waiver of the right of a Party to demand strict compliance with each duty or obligation. No custom or practice of the Parties which varies from this Agreement shall constitute a waiver of the right of a Party to demand exact compliance. Waiver by one Party of any particular default by the other Party shall not affect or impair a Party's rights in connection with any subsequent default of the same or of a different nature, nor shall any delay or omission of a Party to exercise any rights arising from such default affect or impair the rights of that Party as to such default or any subsequent default.

#### *3. Severability and Independent.*

Covenants. If any covenant or other provision of this Agreement is invalid, illegal or incapable of being enforced by reason of any rule of law, administrative order, judicial decision or public policy, all other conditions and provisions shall remain in full force and

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effect. No covenant shall be deemed dependent upon any other covenant or provision unless so expressed in this Agreement.

#### *4. Governing Law and Forum.*

Only the laws of the State of \_\_\_\_\_ govern each term of this Agreement as well as each matter that arises from or is incident to this Agreement, not including the law on conflicts of law of the State of \_\_\_\_\_. Any dispute arising from this Agreement that is not resolved through Arbitration shall be resolved only in the Courts and regulatory agencies of or in the State of \_\_\_\_\_. [Conform with any applicable law e.g. UCC, UCITA, CISG]. [NOTE: So called “floating forum” clauses are generally disfavored and have been ruled unenforceable, IFC Credit Corp. v. Alliano Brothers General Contractors, 2005 WL 643288]

#### *5. Full Agreement and Merger.*

The terms and conditions of this Agreement constitute the full and complete agreement between the Parties. No other verbal or written agreement shall, in any way, vary or alter any provision of this Agreement unless both Parties consent to vary or alter any provision of this Agreement in a signed writing. This Agreement is an integrated writing. Any prior oral or written agreements between the Parties are merged into this Agreement and extinguished. No custom, industry standard or course of dealing between the Parties shall in any way vary or alter the terms and conditions of this Agreement.

#### *6. Jointly Drafted.*

This Agreement shall be deemed to have been drafted by both Parties and, in the event of a dispute, shall not be construed against either party. OR Each Party waives the defense of contra proferentum.

#### *7. Waive of [Equitable] Remedies.*

The Parties waive all [equitable] remedies including equitable rescission and rescission at law.

#### *8. Bankruptcy.*

If, at any time, [a Party] seeks the protection of the U.S. Bankruptcy Act of 1978, as amended, or any applicable state bankruptcy law and:

- a. Has a receiver in equity appointed for its property requests or consents to the appointment of a receiver, or
- b. Has a trustee in reorganization appointed for its property, or
- c. Files a voluntary petition for reorganization or arrangement, or
- d. Files a voluntary petition in bankruptcy, or
- e. Files an answer admitting bankruptcy or agreeing to a reorganization or arrangement, or
- f. Makes an assignment for the benefit of its creditors,

then this Agreement shall expire. Any payments due from the bankrupt Party to the other Party under this Agreement shall be deemed an administrative expense under 11 U.S.C. § 503. This Paragraph shall not apply in the event of a withdrawal or discharge of any petition that occurs within 45 days of the date on which any such petition is filed.

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### ***9. Further Assurances.***

If requested by one Party, the other Party shall execute and deliver such other documents and take such other action as may be necessary to effect the terms of this Agreement.

### ***10. Arbitration.***

Any controversy or claim arising out of, incident or related in any way to this Agreement or the breach of this Agreement shall be submitted to and resolved by to the American Arbitration Association (AAA) in accordance with its Commercial Arbitration Rules and at its office located in the District of Columbia. The resolution of the AAA shall be binding on the Parties and either Party may enter any judgment or award rendered by the AAA in any court of competent jurisdiction.

- A. Each Party shall be subject to the personal jurisdiction of the courts located in \_\_\_\_\_ and waives the right to assert lack of personal jurisdiction in any legal proceeding.
- B. Each Party shall bear any cost imposed on that party by the AAA. The Parties share equally any cost imposed on both parties by the AAA.
- C. Each Party shall bear its own attorneys' fees. The arbitrator shall not order nor have the power to order a Party to pay or reimburse the other Party for attorneys' fees, expert fees or any other fees incurred in connection with, preparing, presenting or defending its case.
- D. The arbitrator shall not award nor be empowered to award punitive or exemplary damages.
- E. The arbitrator shall not nor have the power to grant any form of injunctive relief.
- F. The arbitrator shall award interest on a money damage award. Interest shall be calculated at \_\_\_\_\_% or the rate imposed on judgments by the courts of or in \_\_\_\_\_. Interest shall begin to accrue on the date on which the breach or injury occurred and continue to accrue on a compounded/non-compounded basis until the date on which the prevailing Party actually receives the dollar amount of the award plus accrued interest. [See Neil, *Litigation Over Arbitration*, ABA Journal January 2005]

### ***11. No Assignment or Delegation.***

Neither Party shall assign any right under this Agreement nor delegate any duty under this Agreement unless the other Party has consented to any such assignment or delegation in a signed writing. Any purported assignment or delegation that violates this Paragraph is void *ab initio*.

### ***12. Authority to Execute.***

Each of the undersigned individuals represents and warrants that he or she is expressly and duly authorized by his or her respective entity or agency to execute this Agreement and to legally bind each such entity or agency as set forth in this Agreement.

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### ***13. No Third Party Beneficiary.***

This Agreement shall not and is not intended to benefit nor to grant any right or remedy to any person or entity that is not a party to this Agreement.

### ***14. Limitation on Actions.***

The time period within which a Party may assert a cause of action arising from or incident to this Agreement is 365 consecutive calendar days from date on which the cause of action accrued or the date on which the asserting Party should have known that the cause of action had accrued.

### ***15. Notices.***

All notices shall be sent by the most expeditious means available including but not limited to facsimile, overnight courier or certified or registered mail to the addresses set forth below the signatures. Any such notice shall be deemed delivered when received.

## **4. Execution of the Contract and Electronic Signatures**

The only persons bound to a written contract are those who executed the contract. If the individual executing a contract is acting on behalf of another person or entity, then reflect that fact in the signature lines and the authority of the individual should be stated.

### ***1. Uniform Electronic Transactions Act (UETA)***

The UETA was drafted by the NCCUSL and approved for enactment in 1999. It provides a set of rules by which electronic signatures and electronic records in any type of transaction are recognized, respectively, as binding legal acts and binding legal documents.

An electronic signature means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record, *UETA, Definitions*.

### ***2. Electronic Signatures in Global and National Commerce Act (E-Sign) 15 USCA §7031***

E-Sign was signed into law took effect on October 1, 2000. It provides that electronic signatures and electronic contracts used in interstate commerce shall not be denied legal effect merely because they are in electronic form. E-Sign does not pre-empt or limit any law that requires that a particular contract or signature be in a form other than an electronic form and it does not require any person to use electronic signatures or records. Signatures on certain legal documents such as wills, court orders and certain consumer notices are exempt from E-Sign so that signatures on these documents cannot be in electronic form.

E-Sign provides that state law may alter or limit E-Sign as long as the state law is the UETA or another law that specifically provides rules for the validity of electronic signatures. This raises some significant and complicated state pre-emption issues partly because UETA both overlaps with E-Sign and is more comprehensive than E-Sign. Also, with certain issues that UETA and E-Sign have in common, they each deal with those issues in a different manner. For further information, see [www.techlawjournal.com](http://www.techlawjournal.com).

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## C. Letters of Intent

A letter of intent is an agreement to agree. It is generally used to obligate a party to negotiate exclusively with one party for a specified period of time at the end of which a binding contract will be executed or the parties part ways with no further obligation to one another. A letter of intent typically contains the following items:

- A. Description of the objective of the ultimate contract,
- B. Statement of the most fundamental rights and obligations of the parties that the ultimate contract will contain,
- C. Statement that the parties will negotiate exclusively in good faith with each other for a set period of time or until a particular event occurs,
- D. Statement that at the end of the negotiation the letter of intent will merge into the ultimate contract or that it will expire.

## D. Memorandum of Understanding

A memorandum of understanding (referred to as an MOU) is a more detailed letter of intent. An MOU is generally used in connection with substantial transactions, such as mergers/acquisitions or large real estate sales, that require time consuming and expensive due diligence. The MOU will set forth the material terms of the transaction and leave for the ultimate contract only those issues that arise as a result of the due diligence process. Often, in substantial transactions, the letter of intent leads to an MOU which then leads to the ultimate contract.

## E. Notarial Instruments - Civil Law Systems

A notary in civil law systems –“notario” in Spanish speaking countries, “notaire” in French speaking countries, “symvoulographos” in Greece– performs a very different function than does a notary public in the United States. The civil law notary is an attorney who has undergone special training and performs three basic functions, one, drafting legal documents such as wills, contracts, deeds, two, authenticates legal instruments and, three, a public repository of legal instruments. It is the first two functions that distinguish the civil law notary from a U.S. notary public.

The notary is expressly authorized by law to represent the transaction and draft the relevant legal instruments and to authenticate legal documents. In drafting the legal instrument, the notary must make sure that the legal instrument accurately represents the intent of the parties, that the parties understand the legal nature and effect of the instrument and that the legal instrument complies with applicable law. In litigation, a contract that has been authenticated by a notary is conclusively deemed genuine, legally binding and an accurate recital of the agreement. If a party seeks to challenge a contract that has been notarized on the grounds of mistake, fraud, lack of consideration, lack of meeting of the minds, that party must bring a special proceeding. Such proceedings are very rare and, if asserted, usually allege that the notary abused his or her office. If an authenticated legal instrument is ultimately found not to represent the intent of the parties or that it fails to comply with applicable law, the civil law notary is liable for the value of transaction represented by the legal instrument.

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The notary is required to maintain the original of any document that he or she notarizes and the original maintained by the notary is conclusive written evidence of the contents of any such document. The notary does not represent any party to a legal document but rather represents the transaction.

The office of notary is considered a public office. The notary is an attorney who takes special law studies and takes a special notarial examination. The numbers of notaries is limited. In some countries, the office is still hereditary under certain circumstances. A notary can practice only within a designated geographical area. A notary is subject to special civil and criminal liability for abuse or misuse of the office, See generally Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 *Hastings Int'l & Comp. L. Rev.* 389 (Spring, 1996).

## **F. Civil Law Notary in the United States**

Each of Florida and Alabama has enacted a law that replicates the functions of a civil law notary, See *Fla. Stat. § § 118.10, 118.12 (2002)*; *Ala. Code § 36-20-50 et seq.* The functions of the civil law notary under these laws is essentially the same as the function in civil law countries. Legal instruments that are authenticated by a civil law notary are presumed correct. In addition to the efficiencies created by authentication with respect to less litigation, legal instruments authenticated by civil notaries in Florida and Alabama are accepted increasingly by civil law countries so that international business transactions, probate and family matters involving these states and civil law countries are simplified.

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## ***IV. Contract Drafting Techniques***

### **A. Clear Writing Begins With Clear Thinking**

Clear and precise writing will almost inevitably flow from clear and precise thinking. There are no drafting techniques that will make clear on paper a concept that is unclear in the mind of the attorney. Knowledge of the subject matter of the contract, an understanding of the objectives of the parties and an analysis of the practical and logical consequences of each contract provision is essential to a clearly written and precise contract.

Once the thinking is clear and precise, the words used must be clear and precise. As Justice Felix Frankfurter once said: “Exactness in the use of words is the basis of all serious thinking. You will get nowhere without it. Words are clumsy tools, and it is very easy to cut one’s fingers with them, and they need the closest attention in handling; but they are the only tools we have, and imagination itself cannot work without them. You must master the use of them, or you will wander forever guessing at the mercy of mere impulse and unrecognized assumptions and arbitrary associations, carried away with every wind of doctrine.”<sup>1</sup>

### **B. Use of “Shall”, “Must” “May” and “Will”**

A. “Shall” or “Must” are the most powerful words available to a drafter. They are imperatives and cause a legal obligation to be imposed or undertaken. They should always be used to the exclusion of “May” or “Will” whenever a provision is meant to impose an affirmative obligation on a party. They should never be used to specify future performance or a future occurrence.

B. “May” is permissive or discretionary in character. It should be used only when a provision is meant to accord discretion, power or a privilege to a party.

C. “Will” is predictive in character. It should rarely be used at all in a contract and it should never be used to impose an obligation on a party.

D. Never use “Should” in a contract because, while it can mean “Must”, it can also mean “It Would Be Desirable”, See *Ashlodge Ltd. v. Hauser*, 163 F.3d 681 (2d Cir.1998).

### **C. Use of Active Language Rather Than Passive Language and Affirmative Language Rather Than Negative Language**

Wherever possible use active language rather than passive language. The active voice is more precise and avoids some of the vagaries inherent in the passive voice.

A. Do not write: “The rent shall be paid on the first day of each month.”

B. Write: “Tenant shall pay the rent on the first day of each month.”

C. Do not write: “The failure of Tenant to pay the rent on the first day of each month shall not be an incurable event in default.”

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D. Write: “The Tenant may cure an event in default caused by its failure to pay the rent when due.”

## D. Use Present Tense

Even though a contract may refer to or describe an event that will happen in the future or at least some time after the contract is executed, the contract language should be phrased in the present tense. A contract is a “living” document in the sense that once it is executed, it continuously governs the parties and has no present or future.

A. Write: “If a Party dies.....”

B. Do Not Write: “If a Party should die.....”

## E. Use of “And” and “Or”

Never use “and” and “or” interchangeably. Items connected by “and” will be treated the same or in the conjunctive. Items connected by “or” will be treated alternatively or in the disjunctive.

## F. Use of “Any”, “Each” and “No”

A. If an obligation is to be imposed, use “Each”: *“Each Party shall pay its assessment on May 1.”*

B. If discretion, a power or privilege is to be accorded, use “Any”: *“Any Party may pay its assessment on May 1.”*

C. If an obligation to refrain from acting is to be imposed or a discretion, power or privilege is being limited or eliminated, use “No”: *“No Party shall pay its assessment after May 1.”*

## G. Use of Number of Days Rather Than Months or Years

Use number of days to measure time rather than calendar periods such as weeks, months or years. Note that “3 months” and “90 days” are different time periods. Also, always specify whether the days are calendar days or business days.

## H. Use of “Unless” and “As Long As”

Conditions, whether precedent or subsequent, should always be clearly drafted to reflect that they are conditions and not promises. The courts will generally construe a condition that is also a promise to be a promise rather than a condition. The connectors “Unless” or “As Long As” are language of condition and should be used where the parties intend to create a condition to performance or to discharge rather than a promise to perform. The connector “provided” is ambiguous. Depending on the context, it can be construed as either language of condition or as a promise.

A. “Contractor shall pay Subcontractor when Client pays Contractor.”

*Compare to:*

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B. “Contractor shall not pay Subcontractor unless Client has paid Contractor.”

*or*

C. “Contractor shall have no obligation to pay Subcontractor unless Client has paid Contractor.”

Also, in drafting express conditions, be aware that courts will imply constructive conditions to assure fairness particularly where the occurrence of an express condition is within the control of one party. For example, if the parties to a real property sales contract have agreed that the performance of the buyer is conditioned on the buyer securing financing for the purchase, the courts will imply a constructive condition that the buyer must exercise its best efforts to secure financing.

## I. Use of “Reasonableness” Clause

Refrain from using a “reasonableness” clause instead of an actual standard to describe the manner in which an obligation should be performed. An exception is where the consent or approval of a party is required before a benefit can flow to or a power can be exercised by the other party. The most common instance is in leases that require the approval of the landlord before the lease can be assigned or the premises sub-leased.

A. “The Tenant shall not assign this Lease or sub-lease the premises unless it has obtained the consent of the landlord.”

*Compare to:*

B. “The Tenant shall not assign this Lease or sub-lease the premises unless it has obtained the consent of the landlord, which consent shall not be unreasonably withheld.”

## J. Use of Legal Terms of Art

A legal term of art is a term that is imprecise in its ordinary usage but which has acquired a meaning over years of usage in contracts, briefs and decisions so that it is at least intuitively understood by attorneys and judges. These terms include “promptly” and “best efforts”. They should be used only when necessary to effect a compromise on language in a “non-deal breaking” provision in a contract. The legal effect of these terms should be explained to the client.

## K. Use of the General and the Particular

As a matter of contract law, a list of particulars is treated as exhaustive and excludes any item not listed in the list of particulars, (referred to as the doctrine of *expressio unius est exclusio alterius* i.e. the expression of one thing is the exclusion of another). Also, as a matter of contract law, a general description includes only those particulars that are similar to or encompassed by the general description, (referred to as the doctrine of *eiusdem generis* i.e. of the same kind). If it is not practical to list all possible particulars, combine the general and the particular by providing a general description and listing representative particulars preceded by the clause including but not limited to.

A. “The Athlete shall perform every physical act required by the position of quarterback.”

*Compare to:*

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B. “The Athlete shall perform every physical act required by the position of quarterback including but not limited to passing, running and play-calling.”

## **L. Time**

Contracts often contain a “time is of the essence” clause. This clause means that to the extent that there are times for performance specified in the contract, any failure to strictly comply with any such specified time is a material breach of the contract. The clause negates the common law defense of substantial compliance. The clause is most common in real estate sales contracts and leases.

## **M. No “Whereas”**

“Whereas” clauses are neither binding nor enforceable. Do not use them.

## **N. Nunc Pro Tunc**

Translated from the Latin, the term means “now for then”. The principle underlying the term is that a legal effect can be made retroactive to a date prior to the date of a current legal instrument. Parties can agree that, even though they execute a contract today, the rights and obligations under the contract took effect on a date before today.

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## ***V. Principles Of Interpreting Contracts***

### **A. The Plain Meaning Rule**

The fundamental objective of effective contract drafting is to avoid any need for interpreting the contract. The contract should be drafted with sufficient precision so that the intent of the parties with respect to the terms and conditions of the agreement is apparent from the language of the provisions of the contract. This principle is reflected in the primary rule of contract interpretation referred to as the “Plain Meaning Rule”. The Plain Meaning Rule holds that, in the absence of an ambiguity in the language of a contract, the language of the duly executed written contract speaks for itself and binds the parties without resort to any evidence extrinsic to the written document, Hart v. Vermont Inv. Ltd. Partnership, 667 A.2d 578 (D.C.App.1995). The meaning of the plain language of the contract is determined not according to what a party thought the language meant but rather according to what a reasonable person in the position of a party would have thought the language meant, District of Columbia v. C.J. Langenfelder & Son, Inc., 558 A.2d 1155 (D.C.App.1989). That reasonable person is presumed to know all of the circumstances surrounding the making of the contract and bound by the usages of terms that the parties know or have reason to know, Rastall v. CSX Transportation, Inc., 697 A.2d 46 (D.C.App.1997).

#### **1. Words Given Their Ordinary Meaning**

The ordinary definition of a term should be given weight in ascertaining the meaning of a term, Obelisk Corp. v. Riggs Bank, 668 A.2d 847 (D.C.App.1995). A term or provision will be accorded a meaning that is consistent with the contract as a whole, BWX Electronics, Inc. v. Control Data Corp., 929 F.2d 707 (CADC.1991).

#### **2. Words Given Particular Meaning in Custom, Trade Usage or Course of Dealing**

Words that have particular meaning in the context of the custom, trade usage or course of dealing of the contractual relationship, will be accorded that particular even if it differs from the ordinary meaning, Restatement, 2d §§ 219-223.

#### **3. Ambiguity Exception to Plain Meaning Rule**

If an ambiguity is found to exist in the language, then extrinsic evidence may be introduced to demonstrate the intent of the parties. Extrinsic evidence can be in the form of oral testimony about the negotiations, the states of mind of the parties, custom and trade usage in the applicable industry or course of dealing between the parties. A contract provision is ambiguous if it is reasonably susceptible to different constructions, however, it is not ambiguous simply because the parties disagree as to the meaning, Bennett Enterprises, Inc. v. Domino’s Pizza, Inc., 45 F.2d 493 (CADC. 1995); Washington Properties, Inc. v. Chin, Inc., 760 A.2d 546 (D.C. App. 2000). Whether or not a term is ambiguous is a question of law to be resolved by the court and not by a trier of fact, Gryce v. Lavine, 675 A.2d 67 (D.C.App.1996).

Under the traditional application of the ambiguity exception (Williston/Holmes), where the meaning of the term is “plain” either in ordinary usage or in a particularized usage, then no

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ambiguity exists and extrinsic evidence of the meaning of a term is not admissible. Under the modern trend (Corbin/Restatement), if a term is “reasonably susceptible” to the meaning asserted by a party, then extrinsic evidence of the meaning of the term is admissible.

#### 4. Criticism of the Plain Meaning Rule

The Plain Meaning Rule has been criticized by many commentators. They have remarked that, because there are inherent linguistic limits on how precise a writing can be, it is both unconstructive and unfair to rely exclusively on the written document to determine the intent of the parties. Moreover, determining whether or not an ambiguity exists is so subjective as to be almost arbitrary. Any competent evidence that is reasonably calculated to elucidate the intent of the parties should be considered. Despite the criticism, the Plain Meaning Rule is followed by most jurisdictions in the nation, including the area jurisdictions. Therefore, attorneys must draft contracts not only to avoid ambiguities that are inherent in language but also to avoid ambiguities that may be found by the courts. This is an extremely difficult endeavor because, as one court has pointed out, contract interpretation is largely an individualized process so that to the extent that contractual language from prior cases significantly differs from the contract being interpreted, prior cases cannot control, Rivers & Bryan, Inc. v. HBE Corp., 628 A.2d 631 (D.C.App.1993).

#### B. Language Construed Against Drafter

In choosing among the various reasonable meanings of a term, the preferred meaning will be the one that operates against the interest of the party that supplied the disputed words or from the disputed language is derived (referred to as the rule of *contra proferentum*) at least where the parties are in equal bargaining positions, Mesa Air Group v. Dept. of Transportation, 87 F.2d 498 (CAD.C. 1996); American Building Maintenance Co. v. L’Enfant Plaza Properties, Inc., 655 A.2d 858 (D.C.App.1995). This rule is a secondary rule of interpretation and is used only when all other rules of interpretation have failed to resolve the meaning of a disputed term, American Building Maintenance Co. v. L’Enfant Plaza Properties, Inc., *Ibid.*

#### C. Accord Meaning to All Terms

Parties are assumed to intend legal and practical consequences when they enter into a contract. Where two interpretations of a term are possible in a contract and one such interpretation would render the term or the contract without legal or practical effect, the interpretation that accords legal or practical effect to the term or contract. Restatement 2d §203(a).

#### D. Conflicting Terms

Where two terms conflict with one another, the more specific term will be deemed an exception to the more general term, Restatement 2d § 203(d). Where part of the contract is handwritten or typewritten and part of the contract is printed and the handwritten or typewritten parts conflict with the printed part, the handwritten or typewritten parts will control, Ibid.

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## E. The Parol Evidence Rule Distinguished from the Plain Meaning Rule

The Plain Meaning Rule should not be confused with the Parol Evidence Rule. The Parol Evidence Rule holds that where a written contract contains an integration clause stating that it is the final and full expression of the agreement between the parties or a fact finder finds that the written contract is the final and full expression of the agreement between the parties, no prior oral or written agreement or negotiation or custom/usage can be admitted into evidence in a legal proceeding that adds or removes any term or provision from an integrated written contract.

The Parol Evidence Rule is a substantive rule of contract law or a rule of evidence but not a rule of interpretation. The Parol Evidence Rule is used to determine the *content* of the contract *i.e.* which terms and provisions are *to be included* in the contract. The Plain Meaning Rule is used to determine the *meaning* or *legal effect* of the terms and provisions of the contract.

## F. Relational Contracts

A relational contract is a contract in which the social or commercial context as well as the relationship of the parties are as significant to interpreting the contract as are the terms of the contract itself. Relational contracts have existed for as long as there has been commercial activity. However, within the past 20 years, relational contracts have been endowed with a scholarly conceptual framework, (*See 94 Northwestern U Law Rev Symposium on Relational Contract Theory, Spring 2000*). The primary characteristics of a relational contract are:

- A. Extended Duration Rather Than “Spot” or Short Term
- B. Open Terms and Reserved Discretion
- C. Agreed Governance Mechanisms
- D. Benefits and Burdens Shares Rather Than Allocated
- E. Transaction Specific Investments
- F. Overarching Relationship External to Contract

The types of contracts that generally have the characteristics of a relational contract are franchise agreements, employment agreements and long term supply contracts.

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## ***VI. Contracts Subject To Specific Statutes***

### **A. Uniform Commercial Code Article 2 - Sale of Goods**

The Uniform Commercial Code (UCC) is a set of uniform rules that have been enacted, with various differences, by almost all states and the District of Columbia. It consists of nine Articles. Article 1 contains the general provisions that apply to all transactions covered by the UCC. Article 2 governs the sale of goods, Article 2A governs leases of goods, Article 3 governs commercial paper, Article 4 governs bank deposits and collections, Article 5 governs letters of credit, Article 6 governs bulk transfers, Article 7 governs warehouse receipts, bills of lading and other documents of title, Article 8 governs investment securities and Article 9 governs secured transactions. Effective in 1999, Article 9 has been substantially re-drafted. The purpose of the UCC is to codify the law of contracts and business practices with respect to the particular areas governed by the nine Articles.

Unlike the other Articles, Article 2 which governs the sale of goods between merchants makes substantial changes to the common law of contracts. The practitioner should be familiar with Article 2 in drafting a contract for the sale of goods. Note that Article 2 does not govern contracts for labor, services or the sale of land so that those types of contracts are governed by the prevailing common law of contracts.

### **B. U.N. Convention on International Sale of Goods (CISG)**

The CISG is similar in concept and structure to UCC Article 2. It serves as a default statute for transactions that involve the international sale of goods. CISG was drafted by the United Nations Commission on International Trade Law (UNCITRAL). The mandate of the UNCITRAL is to harmonize and unify international trade law in an effort to reduce legal obstacles to international trade and promote the orderly development of new legal concepts to further assist in the growth of international trade. The United States ratified CISG as of December, 1986 and CISG took effect in the United States on January 1, 1988. As of December 31, 2001, over 55 nations were also signatories to the CISG. In drafting a sale of goods contract between a U.S. party and a party with its place of business in another signatory country, the practitioner must be familiar with the provisions of the CISG.

The CISG contains principles of interpretation and definitions of the CISG that are meant to guide the application of CISG, (Article 7-13). There are rules concerning intent and knowledge. Articles 8 and 11 essentially negate the parol evidence rule, (See *MCC-Marble Ceramic Center, Inc. v. Cermica Nuova D'Agostino S.P.A.*, 144 F.3d 1384 (11<sup>th</sup> Cir.1998). An agreement need not be in writing to be enforceable, (Article 11).

The CISG applies where:

- A. the contract is for the sale of goods, and
- B. the Parties have places of business that are in different countries, and
  1. if a party has multiple places of business the place that has the closest relationship to the contract and its performance will determine this requirement.

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- C. those countries are signatories to CISG (referred to as Contracting States), and
- D. the Parties do not by agreement exclude the contract from CISG.

The CISG does not apply to sales:

- A. of goods bought for personal or household use,
- B. by auction,
- C. by execution or by application of law,
- D. of stocks, negotiable instruments, investment securities and other intangibles,
- E. of ships and aircraft,
- F. of electricity,
- G. where the preponderant obligation of the supplier is to provide services.

## C. UNIDROIT Principles

The UNIDROIT Principles of Commercial Contracts (referred to as the UNIDROIT Principles) are promulgated by the International Institute for Unification of Private Law which is an independent inter-governmental organization based in Rome, Italy. Its purpose is to examine ways of harmonizing and coordinating the private domestic law of member States and prepare for adoption by the States uniform laws of private law. The Institute serves as a group of uniform law commissioners similar to NCCUSL. Formed in 1926, the Institute has promulgated uniform laws on international leasing, international wills and international franchising.

The UNIDROIT Principles codify the contract law to be applied in international business transactions. They draw from both civil law legal concepts and common law legal concepts. In form and purpose they are similar to the Restatement of Contracts, (see Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 Fordham L. Rev. 281 (1994)). The UNIDROIT Principles can be found at the Institute's website [www.unidroit.org](http://www.unidroit.org).

The UNIDROIT Principles differ from CISG in the following three respects:

- A. While the CISG is limited to contracts for the sale of goods, the UNIDROIT Principles apply to any type of commercial contract including personal service.
- B. While CISG is a treaty between and among nations, the UNIDROIT Principles are a model act which parties can negotiate and choose to govern their contract. Questions such conflicts of law, whether the CISG is enacted as domestic law and the enforceability of CISG in the domestic courts of non-signatory countries do not arise.
- C. Since the UNIDROIT Principles are a model act rather than a treaty, they are more practical because they more closely reflect international business practices rather the political and diplomatic compromises that are necessary to conclude a treaty.

## D. Sales and Leases of Real Property

Contracts for the sale of real property are most often governed by form agreements and by the custom and usage of the particular jurisdiction. In some jurisdictions including Maryland certain form agreements are mandated by statute.

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Leases, particularly residential leases, are generally governed by the landlord-tenant laws of the applicable jurisdiction. Issues such as holding-over, dispossession actions, conditional limitations, warrants of habitability, notice periods are governed by statute.

## **E. Business Entity Agreements**

The shareholder agreement of a corporation, the operating agreement of a limited liability company and the partnership agreement of a general or limited partnership are contracts. The purpose of each agreement is to order the legal relationship between and among the owners of each entity and to set forth rules by which the entity will be managed and governed. The corporations, limited liability company and partnership statutes contain default provisions. The default provisions of each such statute govern the internal affairs of each such entity as long as the owners have not manifested an agreement on any issue covered by a default statute. It is essential that the drafter of an entity agreement know the default provisions of the applicable entity statute so that the attorney drafts an agreement that reflects the intentions of the parties and that does not merely default to the entity statute.

## **F. Uniform Computer Information Transfer Act (UCITA) - ABA Model Act**

The Uniform Computer Information Transactions Act (referred to as UCITA) is a model act drafted by the National Conference of Commissioners on Uniform State Laws (referred to as NCCUSL). It was originally being drafted as Article 2B to the Uniform Commercial Code (UCC) until the drafters determined that due to the subject matter, it could not be integrated into the framework of Articles 2 and 2A. Article 2B was renamed UCITA and approved by NCCUSL and recommended to the states for approval on July 29, 1999.<sup>1</sup> UCITA is meant to set forth a uniform system of concepts and default rules for transactions in computer information in the same way that Article 2 of the UCC provides such a system for sales of goods.

UCITA is a highly controversial measure. Reportedly, attorneys general in 24 states oppose enactment of UCITA primarily due to concerns about adequate consumer protections. As a measure of its controversy, Iowa has not only rejected UCITA but has also enacted legislation that prohibits any party from enforcing any contract under UCITA against any Iowa citizen or business.

UCITA is a contract law that provides an integrated set of primarily default rules that will govern a transaction subject to the UCITA when the parties to the transaction have not manifested an agreement. It is not meant to be nor does it function as a regulatory scheme. While adopting many of the principles of UCC Article 2, the drafters of UCITA recognized that a fundamental difference exists between the transactions that are subject to UCC Article 2 and the transactions that are subject to UCITA. UCC Article 2 contemplates transactions in which tangible goods are delivered by seller to buyer and legal title to those goods passes from seller to buyer. UCITA contemplates transactions in which a license or the right to use information is granted by the owner of the information to the

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<sup>1</sup> As of July 1, 2001, Virginia had enacted UCITA effective July 1, 2001, Maryland had enacted UCITA effective October 1, 2000 (House Bill 19), in the District of Columbia UCITA was introduced as Bill 14-155 and in Delaware UCITA was introduced as Senate Bill 307. Oklahoma has passed but not enacted UCITA and UCITA has been introduced in about 10 other jurisdictions.

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user and legal title to the information does not commonly pass but rather the parties remain in a continuing legal and commercial relationship.

The parties may opt out of UCITA but must expressly do so. Like UCC Article 2, UCITA contains provisions on contract formation, warranties, consumer protections and enforcement. The American Bar Association (ABA) has drafted a model agreement entitled the Model Electronic Data Interchange Trading Partner Agreement. The Model Agreement provides at least a starting point for resolving contract issues that arise where the contracting process is wholly or partly conducted through the Internet or other electronic media. Both Acts and other information about them are available at the ABA Website which is [www.abanet.org](http://www.abanet.org).

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## ***VII. Ethical Considerations In Contract Negotiation And Drafting***

Attorneys must have a thorough knowledge of the ethical rules and ethical considerations that govern the formation of legal relationships. These rules and considerations are implicated whenever an attorney drafts a contract or forms an entity.

The primary source of rules of ethics is the Model Code of Professional Responsibility recommended for adoption by the American Bar Association (ABA). Though jurisdictions have amended them, the ABA Model Code has been widely accepted by the states. The states have, however, made enough amendments to the ABA Model Code such that each attorney must consult the rules of the particular jurisdiction and cannot assume that they are the same from state to state.<sup>2</sup>

The Rules of Professional Responsibility are essentially rules of reason and should be interpreted with reference to the purpose of legal representation and counseling and the applicable law. Some rules are mandatory and are identified by the connector "shall" or "must". Mandatory rules impose a present and continuing obligation on an attorney. Failure to comply will invoke the disciplinary process. Many rules are permissive or suggestive and are identified by the connector "may". These rules are discretionary and do not impose an obligation. Failure to comply does not invoke the disciplinary process.

Each Rule is followed by a Comment. The Comment is a narrative explanation of the nature, substance and applicability of the Rule to which each such Comment is attached. The Comments are meant to be guides. Ultimately, only the Rule itself is binding and not the Comment to the Rule.

The ethical considerations raised by negotiating and drafting a contract are simple as long as the attorney is hired by one identifiable client to negotiate or draft a contract and the other party(ies) are separate and distinct parties who are also represented by attorneys. The attorney need only pursue the legitimate objectives and protect the interests of the client.<sup>3</sup>

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<sup>2</sup> For example, in the District of Columbia, the authority for admitting, supervising and disbaring attorneys is vested in the D.C. Court of Appeals. The D.C. Court of Appeals has issued the D.C. Bar Rules which created the D.C. Bar and which govern the operation of the D.C. Bar. Rules for admission and disbarment are contained in the D.C. Bar Rules. The Rules of Professional Conduct (referred to as the Rules) are an appendix to the D.C. Bar Rules. If an attorney fails to comply with the Rules, the Board of Professional Responsibility may use that failure as a basis for invoking the disciplinary process. The disciplinary process is set forth at Rule XI of the D.C. Bar Rules. The Legal Ethics Committee of the D.C. Bar was created by the Board of Governors of the D.C. Bar to render periodic advisory opinions on the Rules of Professional Conduct. The Committee does not render opinions in particular cases. Although the opinions of the Committee are advisory, they should be deemed binding on attorneys and Bar Counsel.

<sup>3</sup> Rule 4.2 of the Model Rules of Professional Responsibility prohibits an attorney from communicating directly in connection with the contract with a party who the attorney knows to be represented by an attorney unless the attorney of that party consents to any such communication.

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### **A. Dealing with an Unrepresented Party (Rule 4.3.)**

The ethical considerations become more complicated where a party to the contract is not represented by an attorney. Rule 4.3 prohibits the attorney from giving legal advice to the unrepresented party and from stating or implying that the attorney is disinterested in the transaction. The attorney should express in writing that the unrepresented party should seek independent legal advice and that the attorney represents only the interests of his or her client in the transaction. If the unrepresented party insists on concluding the contract without independent legal advice, the attorney should include a provision in the contract governance section that reflects the facts that the attorney drafted the contract, that in the course of the negotiations and drafting he or she represented only his or her client, that the attorney advised the unrepresented party to seek independent legal advice and that the unrepresented party chose not to seek such advice.

### **B. Rendering Services to Two or More Parties (Rules 1.7)**

The ethical considerations are most complicated where two or more unrepresented parties request the attorney to draft a contract between or among the parties. The attorney is not *per se* prohibited from rendering that service. However, this situation should be avoided if at all possible.

Under the current Rules, if the attorney agrees to render the services, he or she must consider the general conflicts rule (Rule 1.7)<sup>4</sup> The essential duty of the attorney is to advise the parties that:

- A. He or she does not represent any one party,
- B. The attorney client privilege and duties of confidentiality do not apply as between or among the parties,
- C. Each party is entitled to and will receive equal and full disclosure of all legal advice and opinions, and
- D. If the attorney reasonably foresees a conflict or the possibility of a conflict between or among the parties, the attorney will have to represent one particular party (or group of parties) or possibly cease rendering any services.

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<sup>4</sup> In some jurisdictions, Rule 2.2 - Attorney as Intermediary - may also apply. The ABA Ethics 2000 Commission eliminated Rule 2.2 from the Model Rules and the concepts were incorporated into the general conflicts rule in 1.7. For more information visit the ABA's Center for Professional Responsibility website at [www.abanet.org/cpr/e2k-report\\_home.html](http://www.abanet.org/cpr/e2k-report_home.html)

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## ***VIII. Additional Resources***

### ***ACC Resources***

Michael L. Whitener, "Negotiating The Thicket Of IP Clauses: Nine Key Issues For Negotiating Intellectual Property Clauses In Consultancy Contracts," *ACC Docket* May 2005, *available at* [www.acca.com/protected/pubs/docket/may05/negotiate.pdf](http://www.acca.com/protected/pubs/docket/may05/negotiate.pdf)

John K. Villa, "Negotiating Contracts for the Corporate Client: Does the Attorney-Client Privilege Apply?" *ACC Docket* September 2002, *available at* [www.acca.com/protected/pubs/docket/so02/ethics1.php](http://www.acca.com/protected/pubs/docket/so02/ethics1.php)

"Teaching Contract law to Non-lawyers: Training Techniques that Really Work", ACCA's 2001 Annual Meeting, *available at* [www.acca.com/education2k1/am/cm/503.pdf](http://www.acca.com/education2k1/am/cm/503.pdf)

ACC Small Law Department Contracting Manual, *available at* [www.acca.com/infopaks/sldcontract.html](http://www.acca.com/infopaks/sldcontract.html)

### ***Further Reading***

The Guidelines for Drafting and Editing Court Rules, found at 169 F.R.D. 176 (January, 1997) contains an excellent discussion of drafting principles and techniques. Although the Guidelines is intended for drafting court rules, many of the principles and techniques it discusses are instructive and useful for contract drafting.

Adams, "A Manual of Style for Contract Drafting," American Bar Association Section of Business Law, 2004

Burnham, "Drafting Contracts," Michie Second Edition, 1993

Feldman and Nimmer, "Drafting Effective Contracts: A Practitioner's Guide," Aspen Law & Business, Second Edition 1999

Stark, "Negotiating and Drafting Contract Boilerplate," ALM Publishing 2003

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## ***IX. Sample Franchise Agreement***

FRANCHISE AGREEMENT OF TWIN DONUT, INC.

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Location:

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Original Franchisee     Successor Franchisee

Name of Franchisee:

*OR*

Transfer

Transferor:

Transferee:

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Full Service Store Franchise Plan

Independent Satellite Franchise Plan

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Articles III and IV

Apply

Do Not Apply

---

### ARTICLE I THE PARTIES

This Agreement is made this \_\_\_\_ day of \_\_\_\_\_, 2005 between TWIN DONUT, INC., a New York corporation, of 35 East Grassy Sprain Road Suite 500, Yonkers, New York 10710 (referred to as FRANCHISOR) and \_\_\_\_\_ a \_\_\_\_\_ organized and existing under the laws of the State of \_\_\_\_\_, (referred to as FRANCHISEE).

### ARTICLE II GRANT OF FRANCHISE, INITIAL FRANCHISE FEE AND TERM OF THE FRANCHISE

2.1. Grant of Franchise. FRANCHISOR grants a Franchise and FRANCHISEE accepts the Franchise to operate a donut store/luncheonette utilizing the TWIN DONUT system upon the terms and conditions set forth in this Agreement.

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2.2. No Exclusive Territory. Nothing in the grant of this Franchise shall be construed as obligating FRANCHISOR to refrain from granting other Twin Donut Franchises within any particular geographic area at or about the premises on which the Franchise granted under this Agreement will be operated. The FRANCHISOR may, in its sole discretion, grant Twin Donut Franchises to persons other than FRANCHISEE to operate Twin Donut Stores or Twin Donut Satellites at any location without regard to the geographical proximity or distance that any such location bears to the premises upon which the Franchise granted under this Agreement shall be operated.

2.3. Purchase of Additional Twin Donut Franchises. The FRANCHISOR may require FRANCHISEE to execute an agreement within the 90-day period described in Paragraph 3.1 to purchase one or more Twin Donut Franchises within a defined period of time in addition to the Twin Donut Franchise purchased under this Agreement. If FRANCHISOR makes this requirement, that requirement shall be contained in an Addendum to this Agreement.

2.4. Initial Franchise Fee. Upon execution of this Agreement, FRANCHISEE shall pay \$25,000.00 to FRANCHISOR for a Full Service Store Franchise or \$15,000.00 for an Independent Satellite Franchise in a form designated by FRANCHISOR. The Initial Franchise Fee is not a draw or advance against any other payment which FRANCHISEE shall be obligated to make under this Agreement to FRANCHISOR or any Third Party. The Initial Franchise Fee shall be deemed fully earned upon receipt and non-refundable except as provided in Article III.

2.5. Type of Franchise. The Franchise purchased under this Agreement is a (check one):  
 **Full Service Store Franchise--**

The FRANCHISEE shall manufacture baked goods for sale on the Business Premises for consumption on the premises or for take-out.

**Independent Satellite Franchise--**

The FRANCHISEE shall not manufacture or bake goods for sale on the Business Premises. The FRANCHISEE shall offer for sale baked goods any other foods that have been prepared only in another Twin Donut Store for consumption on premises or for take-out.

2.6. Re-Location. Nothing in this Agreement shall be construed to obligate FRANCHISOR to re-locate or enable FRANCHISEE to re-locate the Franchise to another location for any reason including but not limited to the destruction or condemnation of the business premises.

2.7. Supply of Product to Independent Satellite. If the Franchise is an Independent Satellite Franchise, FRANCHISEE shall purchase baked goods from other Twin Donut Stores and no other source. The FRANCHISOR may assist in facilitating such purchasing relationships. The FRANCHISOR has no obligation to supply the Independent Satellite with baked goods or any other product. The FRANCHISOR does not either directly or indirectly guarantee that the FRANCHISEE shall receive baked goods or any other product from another Twin Donut Store.

2.8. Term of Franchise. The Term of this Franchise shall be 20 years except that if the term of the Primary Lease on the business premises described in Article III is less than 20 years, then the Term of this Franchise shall run as follows:

- a. The Term of this Franchise shall commence on the \_\_\_\_ day of \_\_\_\_\_, 2005 and shall expire when the term of any Primary Lease or the Franchisee Store Lease expires unless the Primary Lease or the Franchisee Store Lease terminates prior to expiration, in which case, the Term of this Franchise shall

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expire when the Primary Lease or the Franchisee Store Lease terminates. The FRANCHISEE shall operate the Franchise as of the date of closing and all terms and conditions of this Agreement shall be deemed to run as of that date and be in full force and effect.

- b. If the Primary Lease or Franchisee Store Lease executed by FRANCHISEE extends beyond the expiration date of this Franchise then this Agreement shall expire on the last day of any such extension.
- c. The Term of this Franchise shall expire if at any time the Twin Donut Store is destroyed, condemned or otherwise rendered uninhabitable and FRANCHISEE does not re-build and re-equip the Twin Donut Store or manifest a bona fide intention, in the opinion of FRANCHISOR, to re-build and re-equip the Twin Donut Store within a reasonable time.

### ARTICLE III SITE SELECTION AND BUSINESS PREMISES OF THE FRANCHISE

3.1. Site Selection by FRANCHISEE. The FRANCHISEE shall identify to FRANCHISOR any site that FRANCHISEE has selected to establish and operate the Twin Donut Store. The FRANCHISOR shall inspect the site and approve or reject the site within 3 business days after the day on which any such inspection is complete. If the FRANCHISOR rejects the site, the FRANCHISOR shall refund the Initial Franchise Fee without deduction or set off of any kind and this Agreement shall expire without further obligation between the Parties. Within 90 calendar days after the day on which FRANCHISOR approves the site, the FRANCHISEE shall:

- a. Submit to FRANCHISOR for its written approval, a bona fide proposed lease (or executed lease if FRANCHISEE has legal possession of the site it identifies to FRANCHISOR) that, in the opinion of FRANCHISOR, would if executed evidence present legal possession, and
- b. Upon receipt of the written approval of FRANCHISOR, obtain legal possession of the site, and
- c. Execute bona fide agreements to construct and equip the Twin Donut Store.

3.2. Site Selection by FRANCHISOR. The FRANCHISOR shall identify to FRANCHISEE one or more sites which sites shall be deemed sites approved by FRANCHISOR. Within 90 calendar days after the day on which FRANCHISOR has identified the last such site to FRANCHISEE, the FRANCHISEE shall:

- a. Choose one of the sites and communicate that choice to FRANCHISOR in a signed writing, and
- b. Submit a bona fide proposed lease (or executed lease or other document if FRANCHISEE has legal possession of a site it identifies to FRANCHISOR under Paragraph 3.1) that, in the opinion of FRANCHISOR, evidences present legal possession to FRANCHISOR for its written approval, and

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- c. Upon receipt of the approval of FRANCHISOR, obtain legal possession of the site, and
- d. Execute bona fide agreements to construct and equip the Twin Donut Store.

3.3. Failure to Comply within 90-Day Period. The FRANCHISOR may revoke the Franchise granted under this Agreement when the 90-day period expires, if:

- a. Under Paragraph 3.1, the FRANCHISEE has failed to accomplish each of items a through c of Paragraph 3.1, or
- b. Under Paragraph 3.2, the FRANCHISEE has failed to accomplish each of items a through d of Paragraph 3.2, or
- c. Under either Paragraph 3.1 or 3.2, FRANCHISOR does not approve a proposed lease or an executed lease, or
- d. Under any requirement to execute an agreement to purchase additional Twin Donut Franchises under Paragraph 2.3, the FRANCHISEE failed to execute such agreement.
- e. If FRANCHISOR revokes the Franchise under this Paragraph, then the Parties shall have no further obligation to one another. The FRANCHISOR shall not be obligated to refund any portion of the Initial Franchise Fee and shall not be liable in any way to FRANCHISEE.

3.4. Approval of Lease by FRANCHISOR. If the lease is a Franchisee Store Lease with TDS Leasing, Inc. or TDS Leasing, LLC as lessor, then the lease shall be deemed approved by FRANCHISOR. If the lease is with any person or entity other than TDS Leasing, LLC as lessor, the FRANCHISOR shall not be obligated to approve any lease that does not contain provisions drafted in form acceptable to FRANCHISOR that provide as follows:

- a. The FRANCHISOR or its designee shall replace FRANCHISEE as tenant under the lease if:
  - (i) the lease expires for any reason other than the chronological expiration of the term of the lease, including any renewal or extension term and the procedure described in sub-paragraph b is fully executed, or
  - (ii) the lease terminates for any reason before the chronological expiration of the term of the Store lease, including any renewal or extension term and the procedure described in sub-paragraph b is fully executed, or
  - (iii) FRANCHISEE ceases for any reason to be a Twin Donut Franchisee or ceases to operate the business of a Twin Donut Franchise on the Demised Premises and the procedure described in sub-paragraph c is fully executed.

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- b. If the lease expires or terminates under either a(i) or a(ii), then:
- (i) Within 3 business days after the day on which the lessor determines that the lease has expired or terminated, the lessor shall notify FRANCHISEE in a signed writing. The writing shall contain the balance of the term, a description of any outstanding default, the means of curing any such default and a copy of the Store Lease then in effect, including each amendment or modification, if any.
  - (ii) No later than 15 business days after the day on which it receives the writing in (i), FRANCHISOR shall cure each default contained in the writing. Immediately after accomplishing each such cure, FRANCHISOR or its designee shall be entitled to possession of the premises and the lessor shall recognize FRANCHISOR or its designee as the exclusive Tenant under the lease and the FRANCHISOR shall be entitled to all rights and subject to all obligations of the lease.
  - (iii) If FRANCHISOR fails to cure any default under (ii), then lessor and FRANCHISOR shall have no further obligation to one another including any obligation that may be construed as being incident to the lease or implied in law.
- c. If FRANCHISEE ceases for any reason to be a Twin Donut Franchisee or ceases to operate the business of a Twin Donut Franchise on the premises under the lease, then:
- (i) Within 3 business days after the day on which FRANCHISOR determines that FRANCHISEE has ceased to be a Twin Donut Franchisee or has ceased to operate the business of a Twin Donut Franchise on the premises, FRANCHISOR shall notify the lessor in a signed writing.
  - (ii) Within 3 business days after the day on which the lessor receives the writing in (i), the lessor shall notify FRANCHISOR in writing as to the balance of the term and attach a copy of the lease then in effect, including each amendment or modification, if any.
  - (iii) No later than 7 business days after the day on which it receives the writing in (ii), FRANCHISOR shall either accept or reject the lease. If FRANCHISOR accepts the lease then FRANCHISOR or its designee shall be entitled to possession of the premises and the lessor shall recognize FRANCHISOR or its designee as the exclusive tenant under the lease and the FRANCHISOR or its designee shall be entitled to all rights and subject to all obligations of the lease.
  - (iv) If FRANCHISOR fails to accept the lease under (iii), then lessor and FRANCHISOR shall have no further obligation to one another

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including any obligation that may be construed as being incident to the lease or implied in law.

- d. If FRANCHISEE contests any legal action necessary to enforce sub-paragraph c and FRANCHISOR accepts the lease, then FRANCHISEE shall undertake the prosecution of any such action at its sole cost.
- e. If FRANCHISEE defaults under the lease during the pendency of any legal action described in sub-paragraph d on any payment obligation, FRANCHISOR shall cure any such payment default at any time prior to and as a condition precedent to taking possession of the premises
- f. After FRANCHISOR has approved the lease under this Paragraph, the lessor and FRANCHISEE shall not under any circumstances amend, modify or alter the lease in any way unless FRANCHISOR approves of any such amendment, modification or alteration in a signed writing which approval shall not be unreasonably withheld.

3.5. Binding Lease Prior to Approval. If FRANCHISEE enters into a binding lease before FRANCHISOR has approved any such lease, FRANCHISOR shall not be liable for any loss or damage to FRANCHISEE that arises from or is incident to any such lease by reason of the refusal of FRANCHISOR to approve the lease or other document.

3.6. Definition of Legal Possession. For the purpose of this Agreement, FRANCHISEE has legal possession of a site when it has been granted the use and enjoyment of the site under a written binding lease executed by a person or entity with a possessory right or interest in the site that is superior to the possessory right of FRANCHISEE and which lease is enforceable under the laws of the State in which the site is located.

#### ARTICLE IV CONSTRUCTION AND EQUIPPING OF TWIN DONUT STORE

4.1. Construction by Affiliate of FRANCHISOR. The FRANCHISEE may, in its sole discretion, contract with Spartan Built, Ltd., an affiliate of FRANCHISOR, to construct the Twin Donut Store. If the Twin Donut Store is constructed under this Paragraph, then the construction shall be deemed to conform to the Twin Donut System and be approved by FRANCHISOR under Paragraph 4.5.

4.2. Equipping by Affiliate of FRANCHISOR. The FRANCHISEE shall contract with Spartan Built, Ltd., an affiliate of FRANCHISOR, to equip the Twin Donut Store for Equipment and Furnishings that FRANCHISOR deems essential to the operation of the Franchise. The FRANCHISEE may contract with a Third Party of its choice to equip or furnish the Twin Donut Store with equipment or furnishings required but deemed non-essential by FRANCHISOR subject to Paragraphs 4.3 through 4.6 of this Article.

4.3. Quality of Construction and Equipment. Unless otherwise permitted by FRANCHISOR in a signed writing, each item of construction and each item of equipment shall be in brand new condition.

4.4. Specifications for Construction and Equipment. The Twin Donut Store shall be constructed according to specifications provided to FRANCHISEE by FRANCHISOR (referred to as the Twin Donut Specifications). The Twin Donut Store shall contain each item of equipment specified by FRANCHISOR.

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- a. During construction and equipping, FRANCHISOR may but is not obligated to inspect the Twin Donut Store. If, at any time, FRANCHISOR identifies an item of construction or equipment or any physical condition that fails to comply with the Twin Donut Specifications, FRANCHISEE shall upon oral or written notice from FRANCHISOR immediately rectify any such non-compliance at its sole cost.
- b. If due to a physical condition unique to the site of the Twin Donut Store it is impractical to comply with a Twin Donut Specification, FRANCHISEE shall upon discovery of such condition immediately notify FRANCHISOR. If FRANCHISOR concurs that the physical condition requires a departure from any Twin Donut Specification, then FRANCHISEE shall approve that departure and such departure shall not be deemed non-complying.

4.5. Final Approval of Twin Donut Store. The FRANCHISEE shall notify FRANCHISOR in a signed writing that the Twin Donut Store is fully constructed and equipped and ready to commence business. When it receives the completion notice FRANCHISOR shall inspect the Twin Donut Store. The FRANCHISOR shall either issue a written final approval or identify to FRANCHISEE any non-complying items. The FRANCHISEE shall cure or rectify any such non-compliance at its sole cost. If FRANCHISEE fails to promptly cure or rectify any such non-compliance, FRANCHISOR may revoke the Franchise granted under this Agreement without any liability whatsoever or any further obligation to FRANCHISEE.

4.6. Time for Commencing Business Operations. The FRANCHISEE shall construct, equip and have the Twin Donut Store ready to commence business no later than 90 calendar days after the date on which FRANCHISEE has obtained legal possession of the site for the Twin Donut Store. If, under Paragraph 3.1 of Article III, FRANCHISEE has legal possession of the site when it identifies the site to FRANCHISOR then the 90-day period shall begin on the date on which FRANCHISOR approves the site.

4.7. Commencement of Business. Under this Article, the Twin Donut Store shall be ready to commence business when the public can avail itself of the products and services offered by the Twin Donut Store on a continuous and systematic basis.

4.8. Government Approvals, Consents and Licenses. The FRANCHISEE must apply for, qualify for and obtain all government and quasi-government approvals, consents and licenses necessary to construct, equip, open and operate a Twin Donut Store. The FRANCHISEE is obligated to perform every legal act necessary to obtain each such approval, consent and license.

4.9. Legal Inability to Obtain Approvals, Consents and Licenses. Nothing in this Agreement shall be construed as a representation by FRANCHISOR that FRANCHISEE shall or will obtain the items described in Paragraph 4.8. If, in the opinion of FRANCHISOR, FRANCHISEE found to be legally ineligible for or is otherwise unable as a matter of law to obtain any such item, FRANCHISOR may in its sole discretion terminate this Agreement.

## ARTICLE V MATERIALS, PRODUCTS AND SUPPLIES

5.1. Approved Sources. The FRANCHISEE shall purchase all materials, products, and supplies necessary or incident to the business of the Franchise from sources approved by FRANCHISOR or from another Twin Donut Store, subject to Paragraph 5.5.. Such materials, products and supplies shall include but not be limited to doughnut flour, pastry filling, toppings,

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coffee, tea, chocolate, milk, cream, and other non-alcoholic beverages, ice cream and other dairy products, paper supplies, including coffee containers, cups, paper plates, spoons, doughnut boxes, bags, napkins, doilies, menus, matches, toothpicks, advertising signs or other advertising media, linens and uniforms. The FRANCHISEE shall purchase all equipment and replacement equipment that FRANCHISOR deems necessary to the business of the Franchise only from Approved Sources. Equipment and replacement equipment shall include but not be limited to the items listed in TAB 3 of the current Twin Donut Inc. Franchise Offering Circular. Paragraph 5.5 shall not apply to purchases of equipment or replacements of equipment.

5.2.  Holds Harmless. The FRANCHISEE shall hold FRANCHISOR completely harmless and indemnify FRANCHISOR for any loss, damage or injury to FRANCHISEE or any Third Party arising out of or incident to the purchase or delivery of any such material, product or supply.

5.3.  Uniform System. The FRANCHISEE acknowledges that the purpose of this Article is to insure that a uniform and high quality standard of operation is maintained for all stores operating under the Twin Donut system. The FRANCHISEE shall exercise its best efforts to protect and sustain the reputation of FRANCHISOR. The FRANCHISEE further acknowledges that the Twin Donut System is an evolving concept. FRANCHISOR may at any time change components of the Twin Donut system including but not limited to menus, products, services, policies and procedures. FRANCHISEE shall adopt any such changes and bear the reasonable cost of any such change.

5.4.  No Affiliate. The FRANCHISOR warrants that neither FRANCHISOR nor any of its affiliates is, in any way, an agent, employee or partner of any approved source.

5.5.  Non-Approved Source. The FRANCHISEE may, in its sole discretion, purchase any material, product or supply from a source other than an approved source, as long as:

- a. FRANCHISEE submits a sample of the material, product or supply to FRANCHISOR, and
- b. After FRANCHISOR tests the item or supply for 30 days, the material, product or supply is found in good faith, by FRANCHISOR to be of at least equal quality to the same material, product or supply sold by an approved source.

## ARTICLE VI TRADENAME AND TRADEMARKS

6.1.  Proprietary Marks. FRANCHISOR grants to FRANCHISEE the non-exclusive right to conduct business under the name "TWIN DONUT" or "TWIN DONUT plus" subject to the terms and conditions of this Article.

6.2.  Name. The name "TWIN DONUT" shall be prominently displayed without any other words or symbols accompanying it on the exterior of the business premises.

6.3.  Name Restriction. FRANCHISEE shall not conduct any business under this Franchise under any name other than "TWIN DONUT" or "TWIN DONUT plus" but the name "TWIN DONUT" shall not form any part of the corporate, partnership or business tradename of FRANCHISEE.

6.4.  Manner of Name Display. The name "TWIN DONUT" shall be prominently displayed in a tasteful and attractive manner and always maintained in good repair.

6.5.  Location of Name Display. FRANCHISOR may, in its discretion, and at any time, prescribe the location and manner in which the name "TWIN DONUT" shall be displayed.

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6.6. Name on Products. The name "TWIN DONUT" and its trademark/symbol (as designated by FRANCHISOR) shall appear on all paper goods, napkins, sippers, containers, bags, spoons, cups, utensils, matches, menus and other articles used for or in connection with the sale or display of doughnuts and other products and merchandise to be sold or distributed under this Franchise.

6.7. Display Costs. All costs of any kind arising out of or incident to the display of the name "TWIN DONUT" or any trademark/symbol shall be borne solely by FRANCHISEE.

6.8. Sole Property. The name "TWIN DONUT" and any trademark/symbol shall, at all times, be the sole property of FRANCHISOR and shall not, in any way, become the property of FRANCHISEE.

6.9. Infringement. FRANCHISOR shall, at its sole expense, defend the trademark/symbol from any interference or infringement.

## ARTICLE VII PAYMENTS ON GROSS SALES

7.1. Franchise Fees. In consideration of the rights granted under this Franchise, FRANCHISEE shall pay to FRANCHISOR a percentage of the weekly gross sales realized by FRANCHISEE according to the terms of this Article. The Franchise Fees are and shall be deemed additional rent under any lease between FRANCHISEE and TDS Leasing, LLC.

7.2. Percentage. In each 12 consecutive calendar month period from the commencement date of this Franchise, FRANCHISEE shall pay:

- a. 6% of the total gross sales of each week.

7.3. Gross Sales. Gross sales shall mean all revenues received in any form from any sales of FRANCHISEE which are derived in any manner from any aspect of the business of the Franchise. Gross sales shall not include gratuities paid to employees by customers or the amount of sales tax imposed by any federal, state, municipal or other government authority directly on sales and collected from patrons as long as the amount of tax is added to the selling price or absorbed in the selling price and actually paid by FRANCHISEE to such governmental authority.

7.4. Week. For the purposes of this Article, a week shall run 7 consecutive days beginning at 12:01 A.M. on Sunday to 12:00 midnight on Saturday. The payments described in paragraph 7.2 of this Article shall be received in a form designated by FRANCHISOR no later than the close of business on each Thursday following the Saturday on which the preceding week ends.

7.5. Observer. The FRANCHISOR may, in its sole discretion and at any time, place an observer in the Twin Donut Store to verify gross sales upon reasonable evidence that the gross sales are not being reported or not being reported accurately. The FRANCHISEE shall cooperate in good faith with the observer and pay the costs and fees incurred by FRANCHISOR as a result of placing the observer which costs and fees shall be reasonable. The observer shall exercise its best reasonable efforts not to interfere in the business operation of the Twin Donut Store.

7.6. Administrative Expense in Bankruptcy. If this Agreement is terminated for any under Paragraph 20.2 b-e for any reason related to the bankruptcy of FRANCHISEE, the payments due under this Article shall be deemed an administrative expense under 11 U.S.C. §503.

## ARTICLE VIII REPORTS AND CASH RECEIPTS OF GROSS SALES

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8.1. Weekly Reports. FRANCHISEE shall submit a weekly written report, on a form to be provided by FRANCHISOR, of gross sales realized by FRANCHISEE for each week during the term of this Franchise. This report shall accompany each weekly payment made under Article VII.

8.2. Execution of Weekly Reports. Each weekly report shall be signed by an officer of FRANCHISEE and shall execute a sworn statement attesting to the accuracy of the weekly report on behalf of FRANCHISEE. This statement shall be duly notarized.

8.3. Cash Register. FRANCHISEE shall, at all times, record every sale made under this Franchise on cash registers which record on tape each sale made by FRANCHISEE and such cash registers shall not have any resetting device of any kind. The tapes for each week shall accompany each payment made under Article VII.

8.4. Cash Register Tapes. Any payment made under Article VII which is not accompanied by the weekly report and the cash register tapes for the week shall not be deemed duly received even if FRANCHISOR accepts the payment.

- a. FRANCHISOR may, at any time and in its sole discretion require FRANCHISEE, to replace any cash register in the Twin Donut Store with a cash register specified by FRANCHISOR.
- b. Upon receipt of notice of replacement from FRANCHISOR, FRANCHISEE shall immediately install any new cash register and cease using any prior cash register.

8.5. Right to Estimate Gross Sales. If FRANCHISEE fails to submit the documentation described in this Article with each payment or fails to create or maintain the documentation and records described in Article X, FRANCHISOR shall estimate the gross sales for any period for which FRANCHISEE has failed to submit, create or maintain the foregoing records and documentation. The FRANCHISEE shall be bound by the estimate of FRANCHISOR unless it produces the foregoing records and documentation and those records and documentation demonstrate that the actual gross sales were lower than the estimate of FRANCHISOR.

#### ARTICLE IX ADVERTISING ASSESSMENT

9.1. Advertising Assessment. In addition to the payments due under Article VI and VII, FRANCHISEE shall pay an advertising assessment of 2% of its annual total gross sales as gross sales are defined in paragraph 7.3 at times and in a manner to be specified by FRANCHISOR.

9.2. Use of Assessment. Such assessment shall be used by FRANCHISOR for media advertising including but not limited to print, electronic and direct mail according to a plan developed by FRANCHISOR.

9.3. Advertising Fund. The assessment shall be deposited into and maintained in a separate account entitled the "Twin Donut Advertising Fund". The Fund shall be administered by FRANCHISOR.

#### ARTICLE X ACCOUNTING AND BUSINESS RECORDS

10.1. Bookkeeping and Accounting. FRANCHISEE shall maintain a bookkeeping and accounting system which shall be in accord with the TWIN DONUT system and approved by FRANCHISOR.

10.2. Financial Statements. FRANCHISEE shall maintain and submit to FRANCHISOR a profit and loss statement and a balance sheet in forms acceptable to FRANCHISOR no later than 30

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calendar days after the end of each 6 month period of operations. Both documents shall be certified by an independent Certified Public Accountant engaged by FRANCHISEE at its sole expense.

10.3. Required Documentation. FRANCHISEE shall maintain all forms, documents, records or reports which relate in any way to the business or financial operation of the Franchise including but not limited to:

- a. daily cash reports, and
- b. cash receipts journal and general ledger, and
- c. cash disbursements journal and weekly payroll register, and
- d. monthly bank statements, daily deposit slips and canceled checks, and
- e. all tax returns (federal, state and local) including sales tax returns, and
- f. invoices from suppliers (paid and unpaid), and
- g. daily production, throwaway and finishing records and weekly inventories, and
- h. such other records as FRANCHISOR may from time to time request.

10.4. Other Documentation. FRANCHISEE shall submit to FRANCHISOR any record, report or supporting documentation which FRANCHISOR may, in its sole discretion, request from time to time.

10.5. Inspection. FRANCHISOR may, in its sole discretion and at any time, inspect and copy any record, report or supporting documentation which relate in any way to the business or financial operation of the Franchise. FRANCHISEE shall fully and promptly cooperate with FRANCHISOR when FRANCHISOR exercises its right under this Paragraph.

10.6. Preservation of Records. FRANCHISEE shall preserve for a period of not less than 3 years during this Agreement and not less than 3 years after the expiration or termination of this Agreement all accounting records and supporting documentation described in this Agreement.

10.7. English Language. All records, reports and supporting documentation under this Agreement shall be written in the English language.

#### ARTICLE XI TRAINING OF PERSONNEL

11.1. Training. Prior to the commencement of business operations but as soon as possible after all agreements have been executed, FRANCHISEE shall attend a two-week Training Session at a Twin Donut Store which is currently being operated by FRANCHISOR. During the training session, FRANCHISEE shall observe and participate in all aspects of the actual operation of a Twin Donut Store including but not limited to baking and cooking methods, equipment use and maintenance and record keeping. If FRANCHISEE is a legal entity or a partnership, any person designated by the FRANCHISEE to manage the daily operations shall be trained as well as at least one person who is a holder of shares or an ownership interest in the legal entity or partnership.

11.2. Manual. FRANCHISEE shall receive from FRANCHISOR a manual entitled

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Managerial Duties and Control and any other written instructional material which FRANCHISOR may issue from time to time. The Manual, including any additions, deletions, revisions or supplements, shall not materially alter FRANCHISEE's rights and obligations under this Agreement or place an excessive economic burden on FRANCHISEE's operations.

11.3. Experienced Store Manager. When FRANCHISEE assumes control of the operation or commences business, FRANCHISOR may, in its sole discretion and at its sole expense, place an experienced store manager in the Twin Donut Store to assist FRANCHISEE in the initial stages of the operation.

11.4. No Fees. FRANCHISEE shall not pay any fees for the Training Session or for any manuals or written instructional material it receives from FRANCHISOR except that FRANCHISEE shall pay for any travel and living expenses it incurs in connection with the Training Session.

## ARTICLE XII

### REMODELING, RENOVATION AND COMPLIANCE WITH STANDARDS

12.1. Remodeling and Renovation. The FRANCHISOR may periodically require FRANCHISEE to remodel, renovate, update or re-equip the Twin Donut Store to ensure that it conforms with the current Twin Donut design and equipment standards. FRANCHISEE shall, at its sole cost, re-model, renovate and re-equip according to specifications provided by FRANCHISOR. The total cost of such re-modeling, renovations, updating and re-equipping shall not exceed 50% of the original total cost of construction and equipment in any period of 24 consecutive calendar months during the term of this Franchise.

12.2. Standards Compliance Inspection. To insure compliance with the terms and conditions of this Agreement, FRANCHISOR may, in its sole discretion and at any time, enter the business premises and inspect any aspect of the business operation and confer with employees of FRANCHISEE in connection with any aspect of the business or financial operation.

12.3. Remedies on Non-Compliance. If FRANCHISEE fails, in any way, to observe any of its obligations or conform to the standards of quality of the TWIN DONUT system, FRANCHISOR may in its sole discretion and upon a 5-day prior notice to FRANCHISEE to cure, either:

- a. Correct any deficient or non-conforming condition and charge the expense of such correction to FRANCHISEE, or
- b. Place a representative in the business premises who shall have the power to require FRANCHISEE to correct any deficient or non-conforming condition until FRANCHISOR is satisfied that FRANCHISEE is in compliance.
- c. FRANCHISEE shall pay the costs and expenses incurred by FRANCHISOR incident to the placing of the representative.

12.4. No Liability. FRANCHISOR shall not be liable for or guilty of any tort or trespass if it chooses to exercise its rights under this Article.

## ARTICLE XIII

### INSURANCE

13.1. Insurance Policies. FRANCHISEE shall procure and maintain in full force and effect at its sole expense and during the entire term of this Franchise, insurance policies protecting FRANCHISEE and FRANCHISOR and the directors, officers and employees of FRANCHISOR

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against any loss, liability or expense from fire, personal injury, property damage or other casualty which arises out of or is incident to the use of the business premises or the business operation of the Franchise. FRANCHISOR shall be named as an additional insured on all of these insurance policies. FRANCHISOR may, in its sole discretion, require FRANCHISEE to deposit with FRANCHISOR a total of premium payments in an amount equal to 12 months of premium payments.

13.2. Policy Limits. Such policies shall be written by an insurance company which is acceptable to FRANCHISOR and shall be consistent with the coverage required under any Primary Lease on the premises or provide for:

- a. \$2,000,000 for injury to 1 or more persons per occurrence, and
- b. \$ 500,000 for property damage coverage
- c. Employer's Liability and Workers' Compensation as required by law.

13.3. FRANCHISOR'S Policy. The insurance coverage afforded by any policy procured under this Article shall not be limited in any way by reason of any insurance policy procured and maintained by FRANCHISOR.

13.4. Certificates. FRANCHISEE shall promptly provide certificates of insurance evidencing compliance with this Article upon request by FRANCHISOR. The certificate shall include a statement that the policies shall not be canceled or altered unless FRANCHISOR receives at least 10 days notice of such cancellation or alteration. If FRANCHISEE fails to provide certificates under this Paragraph, FRANCHISOR may, in its sole discretion, obtain insurance and charge the premium payments to FRANCHISEE against any franchise fees paid under this Agreement.

13.5. Effect of Full Compliance. Full compliance with this Article shall not, in any way, relieve FRANCHISEE of any liability under Article XIV.

#### ARTICLE XIV HOLDS HARMLESS AND INDEMNIFICATION

14.1. FRANCHISEE's Holds Harmless. FRANCHISEE shall hold FRANCHISOR completely harmless and indemnify FRANCHISOR for any injury to persons, any damage to property and any contractual liabilities to Third Parties including any costs or attorneys' fees which arise out of or are incident to the construction and equipping of the Twin Donut Store, the use of the business premises or the business operation of this Franchise.

14.2. Party to Cause of Action. If FRANCHISOR is made a party to any litigation by or against FRANCHISEE, FRANCHISEE shall pay all penalties, judgments, contributions or costs (including reasonable attorneys' fees) imposed on or incurred by FRANCHISOR as a result of such litigation.

14.3. No Application. Paragraph 14.2 of this Article shall not apply to litigation which is commenced by one Party to this Agreement against the other Party.

#### ARTICLE XV COVENANTS AND WARRANTS OF FRANCHISEE

15.1. Maintenance. FRANCHISEE shall at all times maintain at its sole expense the interior and exterior of the business premises including all equipment and bathroom facilities and fixtures in the highest degree of cleanliness, healthfulness, orderliness, sanitation and in good repair.

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FRANCHISEE acknowledges that it is essential to the public image of Twin Donut, Inc. that the Twin Donut Store be maintained as set forth in this Paragraph.

15.2. No Alteration. FRANCHISEE shall not alter the interior or exterior of the business premises in any way unless it receives the written consent of FRANCHISOR.

15.3. Operation. FRANCHISEE shall operate the business of the Franchise on such days and during such hours as FRANCHISOR shall determine in its sole discretion.

15.4. Approval of Advertising. FRANCHISEE shall not employ any advertising or promotional methods or copy unless FRANCHISOR has approved of such methods or copy in a signed writing.

15.5. Sales. FRANCHISEE shall exercise its best efforts to establish, maintain and increase sales of all products and merchandise under this Franchise.

15.6. Financial Records. FRANCHISEE shall maintain all financial records in accordance with this Agreement and generally accepted accounting principles.

15.7. Approved Products and Sources. FRANCHISEE shall offer for sale only donuts or pastries which are baked in the Twin Donut Store with equipment and materials purchased from sources designated or approved by FRANCHISOR. FRANCHISEE shall offer for sale luncheonette type food prepared in the Twin Donut Store with equipment and materials purchased from sources designated or approved by FRANCHISOR.

15.8. No Vending Machines. FRANCHISEE shall not place any vending machine or entertainment device nor sell any product (other than approved products) on the business premises unless FRANCHISEE has received the written consent of FRANCHISOR.

15.9. No Diversion. FRANCHISEE shall not, in any way, divert or attempt to divert customers to any other competitive establishment from the Twin Donut Store of this Franchise or from any other Twin Donut Store.

15.10. Personal Operation. FRANCHISEE shall personally operate and manage the business of the Franchise or, if FRANCHISEE is a limited liability company, corporation or partnership, an individual shareholder or partner who owns 50% or more of the shares or ownership interests, whichever applies, shall personally operate and manage the business of the Franchise.

15.11. No Litigation. FRANCHISEE warrants that it or, if a corporation, partnership or limited liability company, any individual who owns 50% or more of the shares, ownership interests or membership interests of FRANCHISEE does not or do not have any civil, administrative or other legal or equitable causes of action pending against it in any court or administrative agency in the United States which could, in any way, adversely affect its ability to perform its duties under this Agreement.

15.12. Capability. FRANCHISEE warrants that it or, if a corporation or partnership or limited liability company, any individual who owns 50% or more of the shares or ownership interests of FRANCHISEE has or have the financial and technical capability to perform all of its duties under this Agreement and has no actual or constructive knowledge of any fact or condition which could adversely affect its ability to perform its duties under this Agreement.

15.13. Compliance with Lease. FRANCHISEE covenants that it shall comply with each obligation and satisfy each condition of any lease and sub-lease on the Demised Premises. FRANCHISEE shall not commit any act or fail to perform any act which would cause the lease or sub-lease to expire or terminate.

#### ARTICLE XVI EMPLOYEES OF FRANCHISEE

16.1. Employees. FRANCHISEE shall employ at its sole expense a sufficient number of qualified persons to meet public demand.

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16.2. Skill and Appearance. Each employee shall conform to such standards of skill, personal hygiene and demeanor as FRANCHISOR shall prescribe. Each employee shall wear uniforms or other dress prescribed by FRANCHISOR at all times during which he or she performs any duty as an employee or any function within the scope of his or her employment.

16.3. Managers. Any employee who performs a managerial function or receives training from FRANCHISOR shall execute a covenant of non-competition which is the same as the covenant set forth in Article XVII.

16.4. Special Training. If any employee performs any work or function which FRANCHISOR deems to require special training or certification, such employee shall receive such training or certification at the sole expense of FRANCHISEE.

#### ARTICLE XVII

#### COVENANT OF NON-COMPETITION AND CONFIDENTIALITY

17.1. No Competition During the Term. During the term of this Agreement, FRANCHISEE shall not in any capacity, except with the written consent of FRANCHISOR, engage at any other place in any business which is the same as, competitive with or substantially similar to the business of a Twin Donut Franchise. FRANCHISEE shall not knowingly employ or seek to employ any person who is employed by any other business operated under the name of TWIN DONUT and shall not, directly or indirectly, induce any such person to leave his or her employment.

17.2. No Competition After the Term. For a period of 24 consecutive calendar months after the month in which this Agreement expires or terminates, FRANCHISEE shall not directly or indirectly, own, enter the employment of, or render services to any person, legal entity or association engaged in a business that is the same as, competitive with or substantially similar to the business of a Twin Donut Franchise and which is located either on the Approved Site or within a 25 mile radius of any of FRANCHISEE's places of business, the place of business of any company-owned Twin Donut Store or any place of business of any other Twin Donut Franchisee. During such period of time, FRANCHISEE shall not within such territory engage in such business on its own account, or become interested directly or indirectly, as an individual, partner, shareholder, member, manager, director, officer, clerk, principal, agent, employee, trustee, or in any relation or capacity whatsoever.

17.3. No Successor Lease Term on Demised Premises. For a period of 24 consecutive calendar months after the month in which this Agreement expires or terminates, FRANCHISEE shall not directly or indirectly, own, enter the employment of, or render services to any person, legal entity or association who or that engages in a business that is the same as, competitive with or substantially similar to the business of a Twin Donut Franchise on the Demised Premises.

17.4. Lesser Included Covenants Enforceable. If all or any part of the covenants set forth under this Article are found to be unreasonable or unenforceable for any reason by an arbitrator or a court, the arbitrator or court is empowered to revise or construe this Article so that it conforms to the then applicable law governing noncompete covenants and is not obligated to find this Article per se unenforceable. FRANCHISEE shall be bound by any such revision or construction as if it was an original term of this Agreement.

17.5. Confidentiality. FRANCHISEE shall not communicate or divulge to, or use for the benefit of, any other person, legal entity or association any information or knowledge concerning the methods of manufacture, promotion, sale, or distribution used or employed by FRANCHISOR in and about its business which may be communicated to FRANCHISEE or which FRANCHISEE may acquire by virtue of its operation under the terms of this Agreement. FRANCHISEE shall not do any act prejudicial or injurious to the business or goodwill of FRANCHISOR.

17.6. Enforcement. The FRANCHISEE acknowledges that if FRANCHISEE violates this

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Article that FRANCHISOR shall suffer immediate and irreparable harm and lack an adequate remedy at law. In any cause of action by FRANCHISOR to enforce the covenants under this Article, FRANCHISEE waives the equitable defenses of no irreparable harm and existence of an adequate remedy at law.

17.7. Independent Covenants. The covenants set forth in this Article shall be construed as independent of any other provision of this Agreement unless otherwise stated, and the existence of any claim or cause of action of FRANCHISEE against FRANCHISOR, whether predicated on this Agreement or otherwise, shall not constitute a defense to the enforcement by FRANCHISOR of such covenants.

17.8. Definitions. For the purposes of this Article, if FRANCHISEE is a partnership, corporation or limited liability company, the term "FRANCHISEE" shall include but not be limited to any individual partner, officer, director, shareholder, manager, member, agent or employee of any such partnership, corporation or limited liability company and any relative of the first degree by blood or marriage of any such individual.

17.9. Waiver of Defense. On behalf of any person within the definition under Paragraph 17.7, the signatory for FRANCHISEE waives any defense to an action to enforce this Article at law or in equity which defense is asserts that a person within that definition is not obligated under this Article because such person did not execute this Agreement or otherwise personally agree to be bound by this Article.

17.10. Survival. The covenants and terms of this Article shall survive the expiration or termination of this Agreement.

#### ARTICLE XVIII ASSIGNMENT AND TRANSFER

18.1. No Assignment. Neither FRANCHISEE nor any partner of FRANCHISEE, if FRANCHISEE is a partnership, nor any shareholder of FRANCHISEE, if FRANCHISEE is a corporation nor any member of FRANCHISEE if FRANCHISEE is a limited liability company, shall assign any benefit or transfer any right nor attempt to make any such assignment or transfer in connection with any interest which arises out of or is incident to the Franchise or assign any benefit or transfer any right in the entity to which FRANCHISOR has granted the Franchise except as otherwise set forth in this Article.

18.2. Procedure. If FRANCHISEE desires to assign any benefit or transfer any right in any interest or asset described in Paragraph 18.1, FRANCHISEE shall inform FRANCHISOR in writing of such desire and shall offer to assign or transfer any such benefit or right to FRANCHISOR before making any such offer to a Third Party or accepting any such offer from a Third Party.

- a. The terms of any such offer shall be the same as the best bona fide offer, if any, received by FRANCHISEE from any Third Party.
- b. FRANCHISEE shall, in the same writing, fully disclose to FRANCHISOR the actual identity of the Third Party, including the shareholders, directors, officers, partners, members and managers, if any.

18.3. First Refusal. Within 30 calendar days after either the date on which FRANCHISOR receives from FRANCHISEE the terms of an offer or the date on which FRANCHISOR receives from FRANCHISEE the terms of the best bona fide offer made by a Third Party and the identity of the Third Party whichever date is later, FRANCHISOR may, to the exclusion of any other person or entity, accept or reject the offer or submit counteroffers to FRANCHISEE.

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18.4. Assignment to Third Party. If, at the end of the 30 day period, FRANCHISOR does not accept such offer or the Parties are otherwise unable to agree on terms, then FRANCHISEE may assign or transfer any benefits or rights under this Franchise to a Third Party, as long as:

- a. The Third Party executes the Franchise Agreement of FRANCHISOR contained in the Franchise Offering Circular for the year in which the assignment or transfer is made, a sworn closing and estoppel certificate and any other contract or document required by FRANCHISOR or any of its affiliates.
  - (i) If the Third Party is a corporation, then all officers and shareholders shall execute the affidavit on behalf of the corporation and not as individuals, or
  - (ii) If the Third Party is a partnership then all partners shall execute the affidavit, or
  - (iii) If the Third Party is a limited liability company then all members and managers shall execute the affidavit on behalf of the limited liability company and not as individuals, and
- b. The Third Party demonstrates at least the same level of business qualifications, credit rating and moral character possessed by FRANCHISEE,
  - (i) If the Third Party is a corporation then the shareholder(s) who will substantially operate and participate in the business shall so demonstrate, or
  - (ii) If the Third Party is a partnership then the partner(s) who will substantially operate and participate in the business shall so demonstrate, or
  - (iii) If the Third Party is a limited liability company then the member who will substantially operate and participate in the business shall so demonstrate, and
- c. Any document of sale or stock certificate shall state prominently on its face that any assignment or transfer is subject to the terms of this Agreement, the Franchisee Store Lease and any other contract, and
- d. FRANCHISEE has fully performed all of its payment and other obligations under this Agreement, the Franchise Store Lease, the Security Agreement and other contract, and
- e. FRANCHISEE pays to FRANCHISOR a transfer fee equal to the dollar amount of the Initial Franchise Fee charged by FRANCHISOR for new Franchises at the time the assignment or transfer occurs, and

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- f. FRANCHISEE and other affiliated persons execute a sworn affidavit affirming to be to be bound by Article XVII, and
  - (i) If the Third Party is a corporation, then all officers and shareholders shall execute the affidavit, or
  - (ii) If the Third Party is a partnership, then all partners shall execute the affidavit, or
  - (iii) If the Third Party is a limited liability company, then all members and managers shall execute the affidavit, and
- g. FRANCHISOR approves of the Third Party in a signed writing which approval shall not be unreasonably withheld or delayed.
- h. The Third Party is not a limited partnership.

18.5. Transfer of Shares. The sale, transfer or exchange of 50% or more of the shares of FRANCHISEE if it is a corporation or 50% or more of the ownership interests of FRANCHISEE if it is a partnership or a limited liability company shall be deemed an assignment and subject to the terms of this Article.

18.6. Assignment by FRANCHISOR. FRANCHISOR may assign any benefit or transfer any right as long as the assignee or transferee agrees in writing to assume all obligations of FRANCHISOR under this Agreement except for any accrued liabilities. Any assignee or transferee shall agree not to substantially vary the obligations of FRANCHISEE or the risks to FRANCHISEE from those contemplated under this Agreement.

#### ARTICLE XIX EVENTS IN DEFAULT

- 19.1. Events in Default. An Event in Default shall be deemed to have occurred if:
- a. FRANCHISEE fails to forward monies due under this Agreement along with the specified documentation on the specified dates or breaches any other agreement or contract with FRANCHISOR, or
  - b. FRANCHISEE fails to procure and maintain the specified insurance coverage and provide certificates of insurance, or
  - c. FRANCHISEE fails to maintain the financial and accounting system under this Agreement, or
  - d. FRANCHISEE fails to report accurately and in good faith any gross sales, or
  - e. FRANCHISEE violates any provision of the lease on the Demised Premises and thereby causes the lease to expire or terminate, or

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- f. FRANCHISEE fails to maintain all records and documentation required under this Agreement or fails to provide any record or document requested by FRANCHISOR under this Agreement, or
- g. FRANCHISEE fails to comply with any other obligation or duty set forth in this Agreement, or
- h. FRANCHISEE violates any provision of the Franchisee Store Lease with any membership series of TDS Leasing, LLC, the Security Agreement (if any) and the Promissory Note (if any) with Spartan Built, Ltd. or any other agreement or contract either with FRANCHISOR or with an affiliate of FRANCHISOR, respectively,
- i. FRANCHISEE fails to promptly apply for or perform every legal act necessary to obtain each government and quasi-government approval, consent and license necessary to construct, equip, open and operate a Twin Donut Store, or
- j. FRANCHISEE fails to maintain the Twin Donut Store as provided in Paragraph 15.1.

19.2. Cure of Default. If an Event in Default occurs other than an Event in Default under Paragraph 19.1(e), FRANCHISEE shall have 5 calendar days after the date upon which it receives written Notice to Cure from FRANCHISOR to cure any such Default. If FRANCHISEE fails to cure within the 5-day period, then the Franchise granted under this Agreement shall expire under Paragraph 20.1 of Article XX. If the Event in Default does not involve the payment of money, then the Default shall be deemed cured if, within the 5-day period, FRANCHISEE takes deliberate action that is calculated to promptly cure the Default even though the Default is not actually cured within the 5-day period.

19.3. Cure of Default under Paragraph 19.1(e). If an Event in Default occurs under Paragraph 19.1(e), then the method of cure and the cure period shall be the method and period specified in whichever agreement, lease or contract has been breached.

19.4. Persistent Default. If FRANCHISEE consistently fails to perform any payment obligation under this Agreement, then an Event in Default shall be deemed to have occurred even though FRANCHISEE may have cured each failure to pay in each individual instance.

19.5. Abandonment. If FRANCHISEE fails to transact the business of the Franchise for 5 consecutive calendar days in any one calendar month or for a total of 7 days that need not be consecutive days in any one calendar month, FRANCHISEE shall be deemed to have abandoned the Franchise and FRANCHISOR may terminate this Agreement. A force majeure shall toll the running of any time period under this Paragraph.

## ARTICLE XX EXPIRATION OR TERMINATION

20.1. Immediate Expiration. This Agreement and the Franchise granted under this Agreement shall immediately expire as if the chronological term of the Franchise had expired if FRANCHISEE fails to cure an Event in Default under Paragraph 19.2 and 19.3 of Article XIX.

20.2. Discretionary Termination. FRANCHISOR may, in its sole discretion, terminate this Agreement prior to the expiration of its term if:

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- a. Any individual signatory to this Agreement dies subject to Article XXI or any legal entity which is a signatory to this Agreement is dissolved or otherwise ceases to exist, or
- b. FRANCHISOR becomes insolvent or makes an assignment for the benefit of creditors, or
- c. A petition in bankruptcy is filed by or against FRANCHISEE or FRANCHISEE is adjudicated a bankrupt, or
- d. A receiver or other custodian is appointed either with or without the consent of FRANCHISOR, or
- e. The real or personal property of FRANCHISEE is sold after levy by a duly appointed authority.

20.3. Events Upon Expiration or Termination. Upon expiration or termination of this Agreement, FRANCHISEE shall immediately:

- a. Pay all monies due and owing under this Agreement and any other contract or lease with FRANCHISOR and any damages or costs including attorneys' fees incurred by FRANCHISOR as a result of default by FRANCHISEE, and
- b. Deliver possession of the business premises to FRANCHISOR according to any lease obligation or lease with FRANCHISOR, and
- c. Discontinue the use of all trade names, trademarks, signs, structures, and forms of advertising indicative of TWIN DONUT or its business or products and shall make or cause to be made such changes in signs, buildings, and structures as FRANCHISOR shall reasonably direct so as to effectively distinguish the same from its former appearance and from any other TWIN DONUT place of business. If FRANCHISEE shall upon request fail or omit to make such changes or cause them to be made, then FRANCHISOR shall have the right to enter upon the premises upon which such business is being conducted without being liable for or guilty of trespass or any other tort, and shall have the right to make such changes or cause them to be made at the expense of FRANCHISEE, which expense FRANCHISEE shall pay on demand. FRANCHISEE shall also on request of FRANCHISOR, and upon the payment of the reasonable market value, deliver to FRANCHISOR all items and things bearing the trademark or trade name of TWIN DONUT and,
- d. Return all manuals or other written operating information supplied by FRANCHISOR.

ARTICLE XXI  
DEATH OR INCAPACITY OF FRANCHISEE

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21.1. Death or Incapacity. If FRANCHISEE or any partner or shareholder or member of FRANCHISEE who substantially manages and operates the business of the Franchise dies or is rendered incapable of operating the Franchise, then the legal representative of the decedent or incompetent and all surviving shareholders and partners, if any, shall apply in writing to FRANCHISOR for the right to transfer the Franchise or the interest of the decedent or incompetent to the person(s) set forth in the written application.

21.2. Application. The written application shall be received by FRANCHISOR within 30 days after the death or incapacity and it shall demonstrate that the proposed transfer and transferees shall satisfy paragraph 18.4 of Article XVIII.

21.3. Consent. If all conditions in paragraph 18.4 of Article XVIII are satisfied, then FRANCHISOR shall consent to the proposed transfer.

21.4. Rights of Estate. If no application is made during the 30 day period or the conditions in paragraph 18.4 are not satisfied, then the legal representative and any surviving shareholders or partners or members shall have only those rights in the Franchise which FRANCHISEE would have upon termination of the Franchise.

## ARTICLE XXII ARBITRATION

22.1. Arbitration. Subject to Paragraph 22.4, if a dispute arises between the Parties which arises out of any provision of this Agreement or in connection with this Agreement, then FRANCHISOR shall have the option of submitting the dispute to arbitration in the State of New York according to the rules of the American Arbitration Association (AAA).

- a. If FRANCHISOR is the claimant, then FRANCHISOR shall exercise its option to arbitrate at any time prior to commencing judicial proceedings against FRANCHISEE.
- b. If FRANCHISEE commences judicial proceedings, then FRANCHISOR shall exercise its option to arbitrate at any time before the last day of the time period within which FRANCHISOR must respond to a summons/complaint or, if the judicial proceedings are commenced by any motion or order to show cause, the last day before the actual return date of any such motion or order to show cause.

22.2. Binding Effect. The decision/award of the AAA shall be final and binding on the Parties and either Party may docket the decision/award as a final judgment in the courts of the State of New York.

22.3. Discovery. If FRANCHISOR exercises its option to arbitrate under this Article, then FRANCHISEE shall provide to FRANCHISOR any record, report or supporting documentation which FRANCHISEE is required to maintain under this Agreement or any record, report or supporting documentation which FRANCHISEE would be required to provide to FRANCHISOR under the Disclosure provisions of the Civil Practice Laws and Rules of New York or under the Discovery provisions of the Federal Rules of Civil Procedure. The FRANCHISEE shall have the same discovery as FRANCHISOR under this Paragraph.

22.4. Rights, Actions or Remedies under Franchisee Store Lease with Leasing Affiliate. If FRANCHISEE leases the business premises from a Leasing Affiliate of FRANCHISOR, the FRANCHISOR may, in its sole discretion, authorize the Leasing Affiliate to pursue any rights, actions or remedies available under any such Lease for non-payment of franchise fees. If the

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FRANCHISOR makes that authorization, then this Article shall not apply to any action or proceeding brought by the Leasing Affiliate pursuant to that authorization and under the Lease.

ARTICLE XXIII  
GOVERNANCE PROVISIONS

23.1. Independent Contractors. FRANCHISOR and FRANCHISEE are strictly independent contractors. FRANCHISEE is not, in any way, an employee, partner, joint venturer or agent of FRANCHISOR. FRANCHISEE shall not, in any way, bind FRANCHISOR to any person unless FRANCHISEE has received the written consent of FRANCHISOR. FRANCHISEE shall undertake all reasonable measures in its operation to inform Third Parties that FRANCHISOR has no direct or indirect liability for any act or agreement taken by FRANCHISEE and that FRANCHISOR does not control the performance of FRANCHISEE.

23.2. Strict Compliance. No failure of FRANCHISOR to exercise any right or to insist upon strict compliance by FRANCHISEE with any obligation and no custom or practice of the Parties at variance with this Agreement shall constitute a waiver of FRANCHISOR's rights to demand exact compliance. Waiver by FRANCHISOR of any particular default by FRANCHISEE shall not affect or impair FRANCHISOR's rights in respect to any subsequent default of the same or of a different nature, nor shall any delay or omission of FRANCHISOR to exercise any rights arising from such default affect or impair FRANCHISOR's rights as to such default or any subsequent default.

23.3. Severability and Independent Covenants. If any term, condition, covenant, provision or any part thereof of this Agreement is invalid, illegal or incapable of being enforced, by reason of any rule of law, administrative order, judicial decision or public policy, all other terms, conditions, covenants and provisions or parts thereof shall remain in full force and effect. No covenant, obligation or provision shall be deemed dependent upon any other covenant, obligation or provision unless so expressed in this Agreement.

23.4. Governing Law. This Agreement shall be governed exclusively by the Laws of the State of New York not including the conflicts of laws principles of New York. Any dispute arising from this Agreement that is not resolved by arbitration (Article XXII) shall be resolved only in the Courts of or in the State of New York.

23.5. Full Agreement. The terms and conditions of this Agreement constitute the full and complete agreement between the Parties. No other verbal or written agreement shall, in any way, vary or alter any provision of this Agreement unless both Parties consent to vary or alter any provision of this Agreement in a signed writing. Each Party waives the application of any exception to the Statute of Frauds enacted under New York law that may render an oral modification effective and binding on the Parties.

23.6. Integration. This Agreement is intended to be an integrated writing and any prior oral or written agreements between the Parties are merged into this Agreement and extinguished. No custom, industry standard or course of dealing between the Parties shall in any way vary or alter the terms and conditions of this Agreement.

23.7. Jointly Drafted. The Parties waive the defense of *contra proferentum* so that, in the event of a dispute, this Agreement shall not be construed against either party.

23.8. Waiver of Equitable Remedies. The FRANCHISEE waives all equitable remedies including equitable rescission and rescission at law.

23.9. Further Assurances. If requested by FRANCHISOR, FRANCHISEE shall execute and deliver such other documents and take such other action as may be necessary to effect the terms of this Agreement and the terms of any other agreement or lease made by FRANCHISEE with any affiliate of FRANCHISOR in connection with the Franchise.

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23.10. Assignment to Corporation or Limited Liability Company. If an individual or a general partnership that is not a limited liability partnership executes this Agreement, FRANCHISOR shall approve an assignment of the Franchise and this Agreement to a corporation or limited liability company as long as 51% or more of the common shares or membership interests of any such corporation or limited liability company are owned by at least one of the individuals who executed this Agreement as FRANCHISEE and the corporation or limited liability company assumes all of the obligations of FRANCHISEE in a written assignment prepared by FRANCHISOR. Nothing in this Paragraph shall be construed to relieve, alter or modify any obligation of any individual who has executed any personal guaranty in connection with this Franchise.

23.11. Limitation on Actions. The statute of limitations on any claim or cause of action by FRANCHISEE arising from or incident to any violation of any franchise law or regulation shall be 365 consecutive calendar days from the date on which the violation occurred or should have been discovered.

23.12. Benefit and Binding Effect. All rights and obligations of this Agreement shall benefit and bind all successors in interest, assigns, transferees or heirs of each Party to this Lease.

23.13. Nature of Obligations. All obligations of FRANCHISOR under this Agreement run only to FRANCHISEE. No other person may rely on or enforce any obligation of FRANCHISOR or obtain redress for any breach of any such obligation either directly or by subrogation.

23.14. Notices. All notices shall be sent by the most expeditious means available including but not limited to facsimile, overnight courier or certified or registered mail to the addresses set forth below the signatures or to the address of the Twin Donut Store set forth in Article III. Any such notice shall be deemed delivered when received. FRANCHISEE acknowledges that its attorney or other designated corporate agent is authorized to issue any notice due or permitted under this Agreement.

INTENDING TO BE LEGALLY BOUND, the undersigned Parties, have duly caused this Agreement to be executed and any individual signatory(ies) executing on behalf of a corporation or limited liability company are duly authorized by their respective corporations or limited liability company to execute this Agreement.

---

Signature

Print Name:

Title:

For:

FRANCHISOR

---

Signature

Print Name:

Title:

For:

FRANCHISEE

By executing this Agreement, the undersigned shareholder(s) of the corporate Franchisee or members of the limited liability company Franchisee or partners of the partnership Franchisee or

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individual Franchisee personally accepts and shall comply with Article XVII of this Agreement. The undersigned shall cause any person described in Paragraph 17.7 to execute and be bound by Article XVII and acknowledges that the Franchisor has executed this Agreement in reliance upon the commitments contained in Article XVII.

---

Signature

Print Name:

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PERSONAL GUARANTY

DATED: \_\_\_\_\_, 2005

PERSONAL GUARANTOR(S):

FRANCHISEE:

FRANCHISOR: Twin Donut, Inc.

LOCATION:

In consideration of and as an inducement to the execution of the foregoing Franchise Agreement of Twin Donut, Inc., each of the undersigned unconditionally guarantees to FRANCHISOR that FRANCHISEE or any assignee-entity formed by him under Article XXIII, Paragraph 23.9 (referred to as FRANCHISEE) shall timely make all payments, perform all duties and comply with all obligations set forth in the foregoing Agreement.

If FRANCHISEE fails to make any payment, perform any duty or comply with any obligation, the undersigned shall personally make any such payment, perform or cause to be performed any such duty or comply or cause compliance with any such obligation. The undersigned shall be primarily liable under this guaranty and waives any notices or demands as a condition to liability. The undersigned shall be jointly and severally liable on this guaranty.

The undersigned shall not be liable under this Guaranty if FRANCHISEE simultaneously vacates and surrenders the Demised Premises to the lessor and unconditionally releases the Twin Donut Franchise to Twin Donut, Inc. However, the undersigned individual shall remain liable for any payment or obligation that accrues between the date that FRANCHISEE fails to pay or perform and the date on which vacates and surrenders the Demised Premises.

The obligations of GUARANTOR are unconditional and independent from any claim or cause of action GUARANTOR has or may have against FRANCHISOR or any subsidiary or affiliate of FRANCHISOR. The GUARANTOR shall not interpose any set off or defense that arises from or is incident to any such claim or cause of action to limit or avoid its obligations under this Guaranty. The rights of FRANCHISOR under this Guaranty are fully vested and shall not be modified or altered by implication. This Guaranty shall remain in full force and effect without regard to any change in the circumstances that existed when this Guaranty was executed or the occurrence of any condition, whether contemplated or not contemplated by the Parties at the time of execution.

I/We, the undersigned, have read the foregoing Guaranty and consulted with an attorney of my choosing as to the legal nature and effect of the Guaranty.

\_\_\_\_\_  
Signature

Print Name: \_\_\_\_\_ an individual PERSONAL GUARANTOR

Street Address: \_\_\_\_\_

County: \_\_\_\_\_ City: \_\_\_\_\_ Zip: \_\_\_\_\_

State: \_\_\_\_\_ Tel. (\_\_\_\_) \_\_\_\_\_

\_\_\_\_\_  
Signature

Print Name: \_\_\_\_\_, an individual PERSONAL GUARANTOR

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Street Address: \_\_\_\_\_

County: \_\_\_\_\_ City: \_\_\_\_\_ Zip: \_\_\_\_\_

State: \_\_\_\_\_ Tel. (\_\_\_\_)

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## *About the Author*

Nicholas G. Karambelas is a founding partner of Sfikas & Karambelas, LLP with offices in Washington, D.C., Baltimore, Maryland, New York City, New York and affiliated offices in Montreal Canada and Athens, Greece. He practices in the areas of business entity organization, international law and business transactions, e-commerce, securities, franchising and appellate litigation. He has written numerous articles on corporate, commercial and transactional law and has authored a three volume treatise entitled "Limited Liability Companies: Law, Practice and Forms" published in its second edition by Thomson West Company. He participated in the drafting of the District of Columbia Limited Liability Company Act of 1994 and drafted the Limited Liability Company Amendment Act of 2000. He is admitted to practice law in New York, Washington, D.C., Maryland, the federal courts and the Supreme Court of United States.

Mr. Karambelas holds a Bachelor of Arts from Union College, a Juris Doctor from Fordham University School of Law and a Master of International Affairs (M.I.A.) from Columbia University School of Public and International Affairs. He was elected Secretary of the D.C. Bar for 2004-2005. He served as Co-Chair of the Continuing Legal Education (CLE) Committee of the D.C. Bar and teaches numerous CLE courses. He is an arbitrator for the Superior Court of the District of Columbia. Mr. Karambelas chairs the American Hellenic Lawyers' Society of Greater Washington, D.C.

Nicholas G. Karambelas, Esq.  
Sfikas & Karambelas, LLP  
1201 Pennsylvania Avenue, N.W. Suite 300  
Washington, D.C. 20004  
Tel. (202) 661-4614  
Fax (202) 363-2882  
E-Mail [nick@ngklaw.com](mailto:nick@ngklaw.com)

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## OPTION AND GROUND LEASE AGREEMENT

THIS OPTION AND GROUND LEASE AGREEMENT ("Agreement") is made this 13<sup>th</sup> day of July, 2004, by and between Roscoe [REDACTED] the Estate of [REDACTED] ("Optionor") and Nextel [REDACTED] a corporation, d/b/a Nextel [REDACTED] ("Optionee").

### I. OPTION TO LEASE

1. Grant of Option. Optionor is the owner of a parcel or parcels of real property located at 6042 Sa [REDACTED] Virginia, [REDACTED] particularly described in Exhibit "A" annexed hereto (the "Parent Parcel"). For good and valuable consideration and the mutual promises herein set forth, Optionor hereby gives and grants unto Optionee and its assigns, an exclusive and irrevocable option to lease a certain portion or portions of the Parent Parcel (the "Property"), together with easements for ingress, egress and utilities for the duration of this Agreement (collectively, the "Easement"). The Property together with the Easement are collectively the "Premises" and are more particularly described and/or depicted on Exhibit "B" attached hereto. Optionor agrees and acknowledges that Optionee may at Optionee's sole cost and expense have a metes and bounds survey prepared of the Premises and that the legal description of the Premises as shown on the survey shall thereafter become the legal description of the Premises.

2. Option Initial Term. The initial term of this Option shall be for twelve (12) months from the date this Option is executed by Optionee ("Option Initial Term").

3. Consideration for Option. Consideration for the Initial Term of the Option granted hereunder shall be One Thousand Dollars (\$1,000.00) ("In Consideration").

4. Optionor's Representations and Warranties. As an inducement for Optionee to enter into and be bound by the terms of this Option, Optionor represents and warrants to Optionee and Optionee's successors and assigns that:

(a) Optionor has good and marketable title to the Premises free and clear of all liens and encumbrances other than those liens and encumbrances shown on Exhibit "C" attached hereto. Optionee may at Optionee's sole cost and expense procure an abstract of title or a commitment to issue a policy of title insurance on the Premises. In the event that Optionee objects to any defect or cloud on title to the Premises, Optionee may declare this Option to be void and of no further force or effect whereupon this Option shall become null and void and there shall be no further liability of Optionee to Optionor; and

(b) Optionor has the authority to enter into and be bound by the terms of this Option; and

(c) There are no pending or threatened administrative actions including bankruptcy or insolvency proceedings under state or federal law, suits, claims or causes of action against Optionor or which may otherwise affect the Premises; and

(d) The Premises are not presently subject to an option, lease or other contract which may adversely affect Optionor's ability to fulfill its obligations under this Option and Optionor covenants that it shall not grant an option or enter into any contract which will adversely affect Optionee's Intended Use (as defined in Paragraph 11 below) of the Premises until this Option expires or is terminated by Optionee.

These representations and warranties of Optionor shall survive the exercise of the Option and the termination or expiration of the term of this Agreement.

5. Taxes. Any ad valorem taxes or other special assessment taxes attributable to the Premises during the Initial Term and any Renewal Term of the Option shall be paid by Optionor.

6. Liquidated Damages. In the event the closing does not occur due to a default or breach of this Option by Optionee, Optionor's damages shall be fixed and liquidated to the sums paid by Optionee to Optionor as consideration for this Option. Optionor hereby expressly waives any other remedies it may have for a breach of this Option by Optionee including specific performance and damages for breach of contract.

7. Inspections and Investigations. Optionor hereby grants to Optionee, its officers, agents, employees and independent contractors the right and privilege to enter upon the Premises at any time after the date of this Option, to perform or cause to be performed test borings of the soil, environmental audits, engineering studies and to conduct a survey of the Premises. Optionor shall provide Optionee with any necessary keys or access codes to the Premises if needed for ingress and egress, and Optionee shall not unreasonably interfere with Optionor's use of the Premises in conducting these activities.

8. Further Acts. Optionor shall cooperate with Optionee in executing any documents necessary to protect Optionee's rights under this Option or Optionee's use of the Premises and to take such action as Optionee may reasonably require to effect the intent of this Option. Optionor hereby irrevocably appoints Optionee or Optionee's agent as Optionor's agent to file applications on behalf of Optionor with federal, state and local governmental authorities which applications relate to Optionee's intended use of the Premises including but not limited to land use and zoning applications.

## II. LEASE AGREEMENT

9. Exercise of Option. Upon the tender of written notice of Optionee's intent to exercise the Option, the terms of this Agreement applying to the lease of the Premises shall govern the relationship of the parties and this Agreement shall thereafter be referred to as the "Lease," Optionor shall thereafter be referred to as Lessor and Optionee shall thereafter be referred to as Lessee. The date of the written notice to exercise the Option shall constitute the commencement date of the Lease ("Commencement Date").

→ 10. Use. The Premises may be used by Lessee for the transmission and receipt of wireless communication signals in any and all frequencies and the construction and maintenance of towers, antennas, or buildings, and related facilities and activities ("Intended Use"). Lessor agrees to cooperate with Lessee in obtaining, at Lessee's expense, all licenses and permits required for Lessee's use of the Premises (the "Governmental Approvals"). Lessee may construct additional improvements, demolish and reconstruct improvements, or restore replace and reconfigure improvements at any time during the Initial Term or any Renewal Term of this Lease.

11. Initial Term. The term of this Lease shall be five (5) years commencing on the Commencement Date and terminating on the fifth (5<sup>th</sup>) anniversary of the Commencement Date ("Initial Term").

12. Renewal Terms. Lessee shall have the right to extend this Lease for five (5) additional five (5) year terms ("Renewal Terms"). Each Renewal Term shall be on the same terms and conditions as set forth in this Lease except that Rent shall increase as provided in Paragraph 14 (c). This Lease shall automatically be renewed for each successive Renewal Term unless Lessee notifies Lessor in writing of

Lessee's intention not to renew the Lease at least thirty (30) days prior to the expiration of the Initial Term or the Renewal Term which is then in effect.

13. Consideration.

(a) During the Initial Term, Lessee shall pay Lessor the sum of [REDACTED] per annum to be paid in equal monthly installments of [REDACTED] as rental ("Rent"). Rent shall be payable on the first day of each month in advance to Lessor at Lessor's address as specified in Paragraph 27 below;

(b) If this Lease is terminated at a time other than on the anniversary of the Commencement Date, Rent shall be prorated as of the date of termination ("Termination Date")

(c) In the event that Lessee elects to renew this Lease as provided in Paragraph 13, Rent during each Renewal Term shall increase by [REDACTED] over the Rent payable during the immediately preceding term.

→ 14. Lessor's Representations and Warranties. Lessor represents and warrants that (i) Lessee's Intended Use of the Premises as a site for the transmission and receipt of wireless communication signals; for the construction and maintenance of towers, antennas or buildings; and related facilities is not prohibited by any covenants, restrictions, reciprocal easements, servitudes, subdivision rules or regulations; (ii) there are no easements, licenses, rights of use or other encumbrances on the Premises which will interfere with or constructively prohibit Lessee's Intended Use of the Premises; and (iii) Lessor further represents and warrants that the execution of this Lease by Lessor will not cause a breach or an event of default of any other agreement to which Lessor is a party.

15. Conditions Subsequent. In the event that Lessee's Intended Use of the Premises is actually or constructively prohibited through no fault of Lessee then, without limiting any other remedy in law or equity, Lessee shall have the option to terminate this Lease.

16. Interference. Lessor shall not use, nor shall Lessor permit its lessees, licensees, invitees or agents to use any portion of adjacent real property owned by Lessor in any way which interferes with Lessee's Intended Use of the Premises. Such interference shall be deemed a material breach of this Lease by Lessor and Lessor shall have the responsibility to terminate said interference. In the event any such interference does not cease or is not promptly rectified, Lessor acknowledges that continuing interference will cause irreparable injury to Lessee, and Lessee shall have the right, in addition to any other rights that it may have at law or in equity, to bring action to enjoin such interference or to terminate this Lease immediately upon notice to Lessor.

→ 17. Improvements; Utilities; Access.

(a) Lessee shall have the right, at Lessee's sole cost and expense, to erect and maintain on the Premises improvements, personal property and facilities, including without limitation, one (1) tower, a structural tower base, radio transmitting and receiving antennas, communications equipment, an equipment cabinet or shelter and related facilities (collectively the "Tower Facilities"). The Tower Facilities shall remain the exclusive property of the Lessee throughout the term and upon termination of this Lease. Lessee shall remove all of the above-ground portions of the Tower Facilities including portions of the Tower Facilities up to one (1) foot below existing grade following any termination of this Lease. Lessor grants Lessee the right to clear all trees, undergrowth, or other obstructions and to trim, cut, and keep trimmed and cut all tree limbs which may interfere with or fall upon the Tower Facilities or Premises. Lessor grants Lessee a non-exclusive easement in, over, across

and through other real property owned by Lessor as reasonably required for construction, installation, maintenance, and operation of the Tower Facilities. In the event that the tower to be constructed by Lessee on the Premises is a guyed tower, Lessor also grants Lessee an easement in, over, across and through Lessor's real property during the Initial Term and any Renewal Term of this Lease for the installation and maintenance of and reasonable access to the guy wires and guy wire anchors.

(b) Lessee shall have the right to install power, telco, and any other utilities on the Property, at Lessee's expense, and to improve present utilities on the Premises (including but not limited to the installation of emergency power generators). Lessee shall have the right to permanently place utilities on (or to bring utilities across or under) the Premises and the Tower Facilities. In the event that utilities necessary to serve the equipment of Lessee or the equipment of Lessee's licensee(s) or sublessee(s) cannot be located within the Premises, Lessor agrees to cooperate with Lessee and to act reasonably in allowing the location of utilities on the Parent Parcel or other real property owned by Lessor without requiring additional compensation from Lessee or Lessee's licensee(s) or sublessee(s). Lessor shall, upon Lessee's request, execute a separate written easement to the utility company providing the service or Lessee in a form which may be filed of record evidencing this right.

(c) Lessor represents and warrants to Lessee that Lessee shall at all times during this Lease enjoy ingress, egress, and access from the Premises to an open and improved public road which presently exists and which shall be adequate to service the Premises and the Tower Facilities. If no such public road exists or ceases to exist in the future, Lessor will grant an appropriate easement to Lessee, Lessee's sublessees and assigns so that Lessee may, at its own expense, construct a suitable private access drive to the Premises and the Tower Facilities. To the degree such access is across other property owned by Lessor, Lessor shall execute an easement evidencing this right and Lessor shall maintain access to the Easement in a free and open condition so that no interference is caused to Lessee by other lessees, licensees, invitees or agents of the Lessor which may utilize the Easement.

18. Termination. Except as otherwise provided herein, this Lease may be terminated, without any penalty or further liability upon written notice as follows:

(a) By either party upon a default of any covenant or term hereof by the other party which default is not cured within sixty (60) days of receipt of written notice of default (without, however, limiting any other rights available to the parties pursuant to any other provisions hereof); provided, that if the defaulting party commences good faith efforts to cure the default within such period the cure period may be extended upon mutual agreement, in writing, of the parties hereto;

(b) Upon thirty (30) days' written notice by Lessee to Lessor if Lessee is unable to obtain or maintain through no fault of Lessee any license, permit or other Governmental Approval necessary to the construction and operation of the Tower Facilities or Lessee's business; or (c) By Lessee for any reason upon written notice from Lessee to Lessor.

(d) If Lessee terminates this Agreement for any reason prior to the fifth (5th) anniversary of the Commencement Date ("Initial Term"), Lessee shall pay to Lessor a sum equal to three (3) months' Rent or [REDACTED].

19. Subleases. Lessee at its sole discretion shall have the right, without any need to obtain the consent of Lessor, to license or sublease all or a portion of the Premises and the Tower Facilities to others whose business includes the provision of wireless communication services. Lessee's licensee(s) and sublessee(s) shall be entitled to modify the Tower and to erect additional improvements on the Premises including but not limited to antennas, dishes, cabling, additional storage buildings or equipment shelters as are reasonably required for the operation and maintenance of the communications equipment

to be installed on the Premises by said licensee(s) and sublessee(s). Lessee's licensee(s) and sublessee(s) shall be entitled to all rights of ingress and egress to the Premises and the right to install utilities on the Premises as if said licensee or sublessee were the Lessee under this Lease.

20. Taxes. Lessee shall pay any personal property taxes assessed on, or any portion of such taxes attributable to, the Tower Facilities. Lessor shall pay when due all real property taxes and all other fees and assessments attributable to the Premises. Lessee shall pay as additional Rent any increase in real property taxes levied against Premises which are directly attributable to Lessee's use of the Premises (but not, however, taxes attributable to periods prior to the Commencement Date such as roll-back or greenbelt assessments) if Lessor furnishes proof that such increase to Lessee. In the event that Lessor fails to pay when due any taxes affecting the Premises or the Easement, Lessee shall have the right but not the obligation to pay such taxes and deduct the full amount of the taxes paid by Lessee on Lessor's behalf from future installments of Rent. Lessor agrees to provide to Lessee a copy of any notice, assessment or billing relating to any real or personal property taxes for which Lessee is responsible under this Lease within thirty (30) days of receipt of same by Lessor. Lessee shall have no obligation to make payment of any real or personal property taxes until Lessee has received notice, assessment or billing relating to such payment in accordance herewith. Lessee shall have the right, at its sole option, and at its sole cost and expense, to appeal, challenge or seek modification of any real or personal property tax assessment or billing for which Lessee is wholly or partly responsible for payment under this Lease. Lessor shall reasonably cooperate with Lessee in filing, prosecuting and perfecting any appeal or challenge to real or personal property taxes as set forth herein, including but not limited to executing consent to appeal or other similar document.

21. Damage or Destruction. If the Premises or the Tower Facilities are destroyed or damaged so as to hinder the effective use of the Tower Facilities in Lessee's judgment, Lessee may elect to terminate this Lease as of the date of the damage or destruction by so notifying the Lessor. In such event, all rights and obligations of Lessee to Lessor shall cease as of the date of the damage or destruction and Lessee shall be entitled to the reimbursement of any Rent prepaid by Lessee.

22. Condemnation. If a condemning authority takes all of the Premises, or a portion sufficient in Lessee's determination, to render the Premises in the opinion of Lessee unsuitable for the use which Lessee was then making of the Premises, this Lease shall terminate as of the date the title vests in the condemning authority. Lessor and Lessee shall share in the condemnation proceeds in proportion to the values of their respective interests in the Premises (which for Lessee shall include, where applicable, the value of its Tower Facilities, moving expenses, prepaid rent and business dislocation expenses). A sale of all or part of the Premises to a purchaser with the power of eminent domain in the face of the exercise of eminent domain power shall be treated as a taking by condemnation for the purposes of this paragraph.

23. Insurance. Lessee, at Lessee's sole cost and expense, shall procure and maintain on the Premises and on the Tower Facilities, bodily injury and property damage insurance with a combined single limit of at least One Million and 00/100 Dollars (\$1,000,000.00) per occurrence. Such insurance shall insure, on an occurrence basis, against liability of Lessee, its employees and agents arising out of or in connection with Lessee's use of the Premises and Tower Facilities.

24. Environmental Compliance. Lessor represents, warrants and agrees (1) that neither Lessor nor, to Lessor's knowledge, any third party has used, generated, stored or disposed of, or permitted the use, generation, storage or disposal of, any contaminants, oils, asbestos, PCBs, hazardous substances or wastes as defined by federal, state or local environmental laws, regulations or administrative orders or other materials the removal of which is required or the maintenance of which is prohibited, regulated or penalized by any federal, state or local government authority ("Hazardous Materials") on, under, about or

within the Parent Parcel and/or Easement in violation of any law or regulation, and (2) that Lessor will not, and will not permit any third party to use, generate, store or dispose of any Hazardous Materials on, under, about or within the Parent Parcel and/or Easement in violation of any law or regulation. Lessee agrees that it will not use, generate, store or dispose of any Hazardous Material on, under, about or within the Premises in violation of any law or regulation. This Lease shall at the option of Lessee terminate and be of no further force or effect if Hazardous Materials are discovered to exist on the Parent Parcel and/or Easement through no fault of Lessee after Lessee takes possession of the Premises and Lessee shall be entitled to a refund of all the consideration paid in advance to Lessor under this Lease.

25. Environmental Indemnities.

(a) Lessor, its heirs, grantees, successors, and assigns shall indemnify, defend, reimburse and hold harmless Lessee from and against any and all environmental damages arising from the presence of Hazardous Materials upon, about or beneath the Parent Parcel and/or Easement, or migrating to or from the Parent Parcel and/or Easement, or arising in any manner whatsoever out of the violation of any environmental requirements pertaining to the Parent Parcel and/or Easement and any activities thereon, which conditions exist or existed prior to or at the time of the execution of this Lease or which may occur at any time in the future through no fault of Lessee.

(b) Lessee, its heirs, grantees, successors, and assigns shall indemnify, defend, reimburse and hold harmless Lessor from and against environmental damages caused by the presence of Hazardous Materials on the Premises arising solely as the result of Lessee's activities after the execution of this Lease.

(c) Notwithstanding the obligation of Lessor to indemnify Lessee pursuant to this Lease, Lessor shall, upon demand of Lessee, and at Lessor's sole cost and expense, promptly take all actions to remediate the Parent Parcel and/or Easement which are required by any federal, state or local governmental agency or political subdivision or which are reasonably necessary to mitigate environmental damages or to allow full economic use of the Premises, which remediation is necessitated from the presence upon, about or beneath the Parent Parcel and/or Easement of a Hazardous Material. Such actions shall include but not be limited to the investigation of the environmental condition of the Parent Parcel and/or Easement, the preparation of any feasibility studies, reports or remedial plans, and the performance of any cleanup, remediation, containment, operation, maintenance, monitoring or actions necessary to restore the Parent Parcel and/or Easement to the condition existing prior to the introduction of Hazardous Material upon, about or beneath the Parent Parcel and/or Easement notwithstanding any lesser standard of remediation allowable under applicable law or governmental policies.

(d) The duties and indemnifications in this paragraph shall survive expiration or earlier termination of this Lease.

26. Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed given if personally delivered or mailed, certified mail, return receipt requested, or via a nationally recognized overnight delivery service to the following addresses or to such other addresses as may be specified in writing at any time during the term of this Lease:

If to Lessor, to:

Name:

Address:

Phone:

Fax:

Social Security

Social Security

If to Lessee, to:

27. Title and Quiet Enjoyment. Lessor warrants and represents that (i) it has the full right, power, and authority to execute this Lease; (ii) it has good and marketable fee simple title to the Premises free and clear of any liens and encumbrances or mortgages; and (iii) the Premises constitutes a legal lot that may be leased without the need for any subdivision or platting approval. Lessor covenants that Lessee shall have the quiet enjoyment of the Premises during the term of this Lease. Lessor shall indemnify Lessee from and against any loss, cost, expense or damage including attorneys fees associated with a breach of the foregoing covenant of quiet enjoyment. In the event that Lessor fails to keep the Premises free and clear of any liens and encumbrances, Lessee shall have the right but not the obligation to satisfy such lien or encumbrance and deduct the full amount paid by Lessee on Lessor's behalf from future installments of Rent. Lessor further warrants that the Property is in compliance with all current State Historical Preservation Office (SHPO) requirements. Lessor agrees to indemnify and hold harmless Lessee from any and all claims and/or notices of non-compliance brought against Lessor for any breach by Lessor of this warranty, and Lessor agrees to allow Lessee to continue to quietly enjoy the use of Lessor's Property while Lessor remedies any such non-compliance. Should Lessee's use of the Property become compromised due to any breach of the warranty contained in this subparagraph, Lessor acknowledges that Lessee shall be substantially harmed and Lessee will seek to recover from Lessor any damages Lessee may sustain.

28. Assignment. Any sublease, license or assignment of this Lease that is entered into by Lessor or Lessee shall be subject to the provisions of this Lease. Lessee may assign this Lease without the consent of Lessor. Additionally, Lessee may mortgage or grant a security interest in this Lease and the Tower Facilities, and may assign this Lease and the Tower Facilities to any such mortgagees or holders of security interests including their successors and assigns (hereinafter collectively referred to as "Secured Parties"). If requested, Lessor shall execute such consent to leasehold financing as may



reasonably be required by Secured Parties. Lessor agrees to notify Lessee and Lessee's Secured Parties simultaneously of any default by Lessee and to give Secured Parties the same right to cure any default as Lessee except that the cure period for any Secured Party shall not be less than ten (10) days after the receipt of the default notice. If a termination, disaffirmance or rejection of the Lease pursuant to any laws (including any bankruptcy or insolvency laws) by Lessee shall occur, or if Lessor shall terminate this Lease for any reason, Lessor will give to the Secured Parties prompt notice thereof and Lessor will give the Secured Parties the right to enter upon the Premises during a thirty (30)-day period commencing upon the Secured Party's receipt of such notice for the purpose of removing any Tower Facilities. Lessor acknowledges that the Secured Parties shall be third-party beneficiaries of this Lease.

29. Successors and Assigns. This Lease shall run with the Premises and shall be binding upon and inure to the benefit of the parties, their respective heirs, successors, personal representatives and assigns.

30. Waiver of Lessor's Lien. Lessor hereby waives any and all lien rights it may have, statutory or otherwise, in and to the Tower Facilities or any portion thereof, regardless of whether or not same is deemed real or personal property under applicable laws.

31. Waiver of Incidental and Consequential Damages. Lessor will not assert any claim whatsoever against Lessee for loss of anticipatory profits or any other indirect, special, incidental or consequential damages incurred by Lessor as a result of the construction, maintenance, operation or use of the Premises by Lessee or its agents, licensees' or sublessees'.

32. Miscellaneous.

(a) The substantially prevailing party in any litigation arising hereunder shall be entitled to its reasonable attorney's fees and court costs, including appeals, if any.

(b) Each party agrees to furnish to the other, within ten (10) days after request, such truthful estoppel information as the other may reasonably request.

(c) This Lease constitutes the entire agreement and understanding of Lessor and Lessee with respect to the subject matter of this Lease, and supersedes all offers, negotiations and other agreements. There are no representations or understandings of any kind not set forth herein. Any amendments to said Lease must be in writing and executed by Lessor and Lessee.

(d) If either Lessor or Lessee is represented by a real estate broker in this transaction, that party shall be fully responsible for any fees due such broker and shall hold the other party harmless from any claims for commission by such broker.

(e) Lessor agrees to cooperate with Lessee in executing any documents necessary to protect Lessee's rights under this Lease or Lessee's use of the Premises, including but not limited to affidavits relating to title curative measures and subordination and non disturbance agreements and to take any further action which Lessee may reasonably require as to effect the intent of this Lease.

(f) This Lease shall be construed in accordance with the laws of the state in which the Premises is situated.

(g) If any term of this Lease is found to be void or invalid, such invalidity shall not affect the remaining terms of this Lease, which shall continue in full force and effect.

(h) Simultaneous with the execution of this Lease, Lessor shall execute and deliver to Lessee a Memorandum of Lease, which Lessee may file of record in the property records in the county in which the Premises are located, which sets forth the names and addresses of Lessor and Lessee, the legal description of the Parent Parcel and the Premises, the duration of the Initial Term and the quantity and duration of the Renewal Terms.

(i) In the event the Premises is encumbered by a mortgage or deed of trust, Lessor agrees to obtain and furnish, within thirty (30) days written request by Lessee, a non-disturbance agreement to the effect that Lessee and Lessee's sublessees or licensees will not be disturbed in the occupancy of the Premises by any foreclosure; provided that the rights and interests of Lessee under this Lease shall be subject and subordinate to such mortgage or deed of trust.

(j) Lessee may obtain title insurance on its interest in the Premises and Easement, and Lessor shall cooperate by executing documentation required by the title insurance company.

(k) Lessor hereby irrevocably appoints Lessee or Lessee's agent as Lessor's agent to file applications on behalf of Lessor with federal, state and local governmental authorities which applications relate to Lessee's intended use of the Premises including but not limited to land use and zoning applications.

(l) This Lease may be executed in two or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by the each of the parties, it being understood that all parties need not sign the same counterpart.

(m) Lessor will not, during the term of this Lease together with any extensions thereof, enter into any other lease, license, or other agreement for a similar purpose as set forth herein, on or adjacent to the Property.

33. Liability and Indemnity. Lessee shall indemnify and hold Lessor harmless from all claims (including reasonable attorneys' fees, costs and expenses of defending against such claims) arising from the negligence or willful misconduct of Lessee or Lessee's agents or employees in or about the Property. Lessor shall indemnify and hold Lessee harmless from all claims (including reasonable attorneys' fees, costs and expenses of defending against such claims) arising from the negligence or willful misconduct of Lessor or Lessor's agents, employees, lessees, invitees, contractors or other tenants occurring in or about the Parent Parcel. The duties described herein survive termination of this Lease.

34. Confidentiality. Lessor shall not disclose to any third party the Option Consideration or Rent payable by Lessee under this Lease and shall treat such information as confidential, except that Lessor may disclose such information to prospective buyers, prospective or existing lenders, to Lessor's affiliates and attorneys, or as may be required by law or as may be necessary for the enforcement of Lessor's rights under this Lease. Lessor acknowledges that the disclosure of such information to any other parties may cause Lessee irreparable harm, and in the event of such disclosure, as an additional remedy, Lessee shall have the right to terminate this Lease upon giving thirty (30) days written notice thereof to Lessor.

[SIGNATURES APPEAR ON NEXT PAGE]