

**AGENCY LEASE AGREEMENT**

Dated as of December 1, 2013

by and between

**NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY**

and

**FRESH PROPERTY BRONX, LLC,**

a limited liability company organized and existing under  
the laws of the Delaware, having its principal office in  
New York City at 23-30 Borden Avenue, Long Island  
City, New York 11101, as Lessee

2013 Fresh Direct, LLC/Fresh Property Bronx, LLC Project

Affecting the Land located between East 132<sup>nd</sup> Street and the Harlem River, and  
between Willis Avenue Bridge to the west and the Robert F. Kennedy bridge to the east  
in the Harlem River Yards, in Bronx, New York, and  
known by the street address of 2 St. Ann's Avenue, in Bronx, New York,  
constituting part of Lot 1 in Block 2543 and part of Lot 62 in Block 2260  
in the County of Bronx, City and State of New York  
as more particularly described in  
Exhibit A to this Agency Lease Agreement  
on the Official Tax Map of Bronx County

Record and Return to:  
**WINSTON & STRAWN LLP**  
200 Park Avenue  
New York, New York 10166  
Attention: Patricia A. Mollica, Esq.  
File No. 90570.301

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## AGENCY LEASE AGREEMENT

This **AGENCY LEASE AGREEMENT**, made and entered into as of December 1, 2013 (this "Agreement"), by and between **NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY**, a corporate governmental agency constituting a body corporate and politic and a public benefit corporation of the State of New York, duly organized and existing under the laws of the State of Delaware, having its principal office at 110 William Street, New York, New York 10038, party of the first part, and the Lessee, party of the second part (capitalized terms used but not defined herein shall have the respective meanings assigned to such terms in Section 1.1 of this Agreement);

### WITNESSETH:

**WHEREAS**, the Enabling Act authorizes and provides for the creation of industrial development agencies in the several counties, cities, villages and towns in the State and empowers such agencies, among other things, to acquire, construct, reconstruct, lease, improve, maintain, equip and furnish land, any building or other improvement, and all real and personal properties, including machinery and equipment deemed necessary in connection therewith, whether or not now in existence or under construction, which shall be suitable for manufacturing, warehousing, research, commercial, civic or industrial purposes, to the end that such agencies may be able to promote, develop, encourage, assist and advance the job opportunities, health, general prosperity and economic welfare of the people of the State and to improve their prosperity and standard of living; and

**WHEREAS**, pursuant to and in accordance with the provisions of the Enabling Act, the Agency was established by the Agency Act for the benefit of the City and the inhabitants thereof; and

**WHEREAS**, to accomplish the purposes of the Act, the Agency has entered into negotiations with the Lessee and the Sublessee for a "project" within the meaning of the Act within the territorial boundaries of the City and located on the Land described in Exhibit A — "Description of the Land"; and

**WHEREAS**, the Project will further the purposes of the Act and promote job opportunities for the benefit of the City and the inhabitants thereof; and

**WHEREAS**, to facilitate the Project, the Agency, the Lessee and the Sublessee have entered into negotiations to enter into a Straight-Lease Transaction pursuant to which (i) the Lessee has leased the Facility to the Agency pursuant to the Company Lease, (ii) the Agency will sublease the Facility to the Lessee pursuant to this Agreement, and (iii) the Lessee will sub-sublease the Facility to the Sublessee pursuant to the Sublease Agreement; and

**WHEREAS**, in furtherance of the Straight-Lease Transaction, the Agency adopted its Inducement Resolution and its Authorizing Resolution inducing and authorizing the undertaking of the Project and the Project Work, the lease of the Facility by the Lessee to the Agency, the sublease of the Facility by the Agency to the Lessee, and the sub-sublease of the Facility by the Lessee to the Sublessee; and

**WHEREAS**, the provision by the Agency of Financial Assistance to the Lessee and the Sublessee through a Straight-Lease Transaction has been determined to be necessary to induce the Sublessee to remain and expand its operations within the City and not otherwise relocate the same outside of the City; and if the Agency does not provide such Financial Assistance, the Lessee and Sublessee the could not feasibly proceed with the Project; and

**WHEREAS**, the cost of the Project is being financed in accordance with the Project Finance Plan;

**NOW, THEREFORE**, in consideration of the premises and the respective representations and agreements hereinafter contained, the parties hereto agree as follows:

## ARTICLE I

### DEFINITIONS AND CONSTRUCTION

**Section 1.1. Definitions.** In addition to the definitions set forth in Sections 5.1(a), 5.3(a), 5.4 and 8.1(a), the following terms shall have the respective meanings in this Agreement:

**Act** shall mean, collectively, the Enabling Act and the Agency Act.

**Acquired Assets** shall mean, collectively, (i) newly acquired machinery, equipment and other items of personalty to be acquired by the Lessee or the Sublessee for installation and use at the Facility Realty and described in Exhibit B – “Description of Acquired Assets and Facility Personalty and (ii) newly acquired delivery trucks to be acquired by the Lessee or the Sublessee for use in connection with the Project.

**Additional Improvements** shall mean any buildings, structures, foundations, related facilities, fixtures, and other improvements constructed, erected, placed and/or installed on, under and/or above the Land, when such improvements are not part of the Project Work, including but not be limited to all replacements, improvements, additions, extensions and substitutions to the Existing Improvements and/or the Project Improvements.

**Additional Rent** shall have the meaning set forth in Section 4.3(b).

**Adjusted CRET** shall have the meaning set forth in Section 5.1.

An **Affiliate** of a Person shall mean a Person that directly or indirectly through one or more intermediaries Controls, or is under common Control with, or is Controlled by, such Person.

**Agent** shall have the meaning set forth in Section 5.2(d).

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

**Agency Act** shall mean Chapter 1082 of the 1974 Laws of New York, as amended.

**Agreement** shall mean this Agency Lease Agreement, dated as of the date set forth in the first paragraph hereof, between the Agency and the Lessee, and shall include any and all amendments hereof and supplements hereto hereafter made in conformity herewith.

**Annual Administrative Fee** shall mean that annual administrative fee established from time to time by the Agency’s Board of Directors as generally applicable to Entities receiving or that have received Financial Assistance (subject to such exceptions from such general applicability as may be established by the Agency’s Board of Directors).

**Approved Facility** shall mean the Facility as occupied, used and operated by the Lessee and the Sublessee substantially for the Approved Project Operations, including such other activities as may be substantially related to or substantially in support of such operations, all to be effected in accordance with this Agreement.

**Approved Project Operations** shall mean use of the Facility by the Lessee and the Sublessee in connection with their food manufacturing and distribution business.

**Authorized Representative** shall mean, (i) in the case of the Agency, the Chairperson, Vice Chairperson, Treasurer, Assistant Treasurer, Secretary, Assistant Secretary, Executive Director, Deputy Executive Director, General Counsel or Vice President for Legal Affairs, or any other officer or employee of the Agency who is authorized to perform specific acts or to discharge specific duties, (ii) in the case of the Lessee, a person named in Exhibit C – “Authorized Representative”, or any other officer or employee of the Lessee who is authorized to perform specific duties hereunder or under any other Project Document and of whom another Authorized Representative of the Lessee has given written notice to the Agency, (iii) in the case of the Sublessee which shall constitute an Entity, a person named in Exhibit C – “Authorized Representative”, or any other officer or employee of the Sublessee who is authorized to perform specific duties hereunder or under any other Project Document and of whom another Authorized Representative of the Sublessee has given written notice to the Agency, (iv) in the case of any Guarantor which shall constitute an Entity (other than the Lessee or the Sublessee), a person named in Exhibit C – “Authorized Representative”, or any other officer or employee of such Guarantor who is authorized to perform specific duties hereunder or under any other Project Document and of whom another Authorized Representative of such Guarantor has given written notice to the Agency and (v) in the case of any individual Guarantor, such individual Guarantor; provided, however, that in each case for which a certification or other statement of fact or condition is required to be submitted by an Authorized Representative to any Person pursuant to the terms of this Agreement or any other Project Document, such certificate or statement shall be executed only by an Authorized Representative in a position to know or to obtain knowledge of the facts or conditions that are the subject of such certificate or statement.

**Authorizing Resolution** shall mean the resolution of the Agency adopted on July 23, 2013 providing for Financial Assistance and authorizing the Project Documents to which the Agency is a party.

**Base Rent** shall mean the rental payment described in Section 4.3(a).

**Benefits** shall have the meaning set forth in Section 5.4(a).

**Business Day** shall mean any day that shall not be:

- (i) a Saturday, Sunday or legal holiday;
- (ii) a day on which banking institutions in the City are authorized by law or executive order to close; or
- (iii) a day on which the New York Stock Exchange is closed.

**Business Incentive Rate** shall mean the rate in connection with the Business Incentive Rate program, an energy discount program co-administered by NYCEDC and Con Edison.

**Cessation Date** shall have the meaning set forth in Section 5.1.

**City** shall mean The City of New York, New York.

**Claims** shall have the meaning set forth in Section 8.2(a).



**Commencement Date** shall mean December 19, 2013, on which date this Agreement was executed and delivered.

**Company Lease** shall mean the Company Lease Agreement, dated as of the date hereof, between the Lessee, as landlord, and the Agency, as tenant, as the same may be amended and supplemented in accordance with its terms and as permitted by the terms thereof.

**Completed Improvements Rentable Square Footage** shall mean approximately 500,000 rentable square feet, the rentable square footage of the Improvements upon completion of the Project Work.

**Completion Date** shall mean December 1, 2018.

**Control** or **Controls**, including the related terms “controlled by” and “under common control with”, shall mean the power to direct the management and policies of a Person (x) through the ownership, directly or indirectly, of not less than a majority of its voting securities, (y) through the right to designate or elect not less than a majority of the members of its board of directors or trustees or other Governing Body, or (z) by contract or otherwise.

**CRET** shall have the meaning set forth in Section 5.1.

**DLP** shall have the meaning set forth in Section 5.1.

**DOL** shall have the meaning set forth in Section 8.7(c).

**Due Date** shall have the meaning set forth in Section 9.8.

**ELT** shall have the meaning set forth in Section 5.1.

**Employment Information** shall have the meaning set forth in Section 8.7(c).

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

**Entity** shall mean any of a corporation, general partnership, limited liability company, limited liability partnership, joint stock company, trust, estate, unincorporated organization, business association, tribe, firm, joint venture, governmental authority or governmental instrumentality, but shall not include an individual.

**Environmental Audit** shall mean that certain Phase I Environmental Site Assessment Report dated November, 2011, as updated on November 8, 2013, prepared by the Environmental Auditor.

**Environmental Auditor** shall mean AKRF, Inc.

**Estimated Project Cost** shall mean \$142,454,000.

**Equity Requirement** shall mean that the requirement that the Lessee expend at least \$10,450,000 of its own funds in connection with the Project.

**Event of Default** shall have the meaning specified in Section 9.1.

**Exempt Fixtures** shall mean those fixtures (and their components) to be acquired by or on behalf of the Agency pursuant to the Sales Tax Letter as part of the Project Work and which are to be part of the Improvements and incorporated in the Facility Realty.

**Exempt Materials** shall mean those construction materials (exclusive of fixtures or their components) to be acquired by or on behalf of the Agency pursuant to the Sales Tax Letter as part of the Project Work and which are to be incorporated in the Improvements.

**Exempt Mortgage** shall have the meaning specified in Section 5.3(a).

**Exempt Personalty** shall mean those items of machinery, equipment and other items of personalty (including, without limitation, Acquired Assets but exclusive of Exempt Materials and Exempt Fixtures) to be acquired by or on behalf of the Agency pursuant to the Sales Tax Letter as part of the Project Work for installation and use at the Facility Realty; provided, however, that "Exempt Personalty" shall not include "Ineligible Personalty".

**Exempt Property** shall mean, collectively, the Exempt Fixtures, the Exempt Materials and the Exempt Personalty.

**Existing Facility Property** shall have the meaning set forth in Section 3.6(a).

**Existing Improvements** shall mean, if any, all buildings, structures, foundations, related facilities, fixtures, and other improvements erected, placed and/or situated on, over and/or under the Land and existing on the Commencement Date other than all or any part of the foregoing that (i) is intended to be demolished as part of the Project Work, and (ii) is in fact demolished by the Completion Date.

**Expiration Date** shall mean the day immediately preceding the 25<sup>th</sup> anniversary of the PILOT Commencement Date.

**Facility** shall mean, collectively, the Facility Personalty and the Facility Realty.

**Facility Personalty** shall mean, collectively, the Acquired Assets and the Exempt Personalty, described in Exhibit B --"Description of Acquired Assets and Facility Personalty", together with all repairs, replacements, improvements, substitutions and renewals thereof or therefor, and all parts, additions and accessories incorporated therein or affixed thereto. Facility Personalty shall, in accordance with the provisions of Sections 3.6 and 6.4, include all property substituted for or replacing items of Facility Personalty and exclude all items of Facility Personalty so substituted for or replaced, and further exclude all items of Facility Personalty removed as provided in Section 3.6.

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

**Final Project Cost Budget** shall mean that certain budget of costs paid or incurred for the Project to be submitted by the Lessee pursuant to Section 3.3(f) upon completion of the Project.

**Financial Assistance** shall have the meaning assigned to that term in the Enabling Act.

**Fiscal Year** shall mean a year of 365 or 366 days, as the case may be, commencing on January 1 and ending on December 31 of each calendar year, or such other fiscal year of similar length used by the Lessee and the Sublessee, as applicable, for accounting purposes as to which the Lessee shall have given prior written notice thereof to the Agency at least ninety (90) days prior to the commencement thereof.

**Fixed Date Deliverables** shall have the meaning set forth in Section 9.8(a)(ii).

**GAAP** shall mean those generally accepted accounting principles and practices that are recognized as such by the American Institute of Certified Public Accountants or by the Financial Accounting Standards Board or through other appropriate boards or committees thereof, and that are consistently applied for all periods, after the Commencement Date, so as to properly reflect the financial position of the Lessee or the Sublessee, as applicable, except that any accounting principle or practice required to be changed by the Financial Accounting Standards Board (or other appropriate board or committee of the said Board) in order to continue as a generally accepted accounting principle or practice may be so changed.

**Governing Body** shall mean, when used with respect to any Person, its board of directors, board of trustees or individual or group of individuals by, or under the authority of which, the powers of such Person are exercised.

**Guarantors** shall mean each Person as shall be a Guarantor under the Guaranty Agreement, and their respective permitted estates, administrators, successors and assigns.

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

**Hazardous Materials** shall include any petroleum, flammable explosives, radioactive materials, hazardous materials, hazardous wastes, hazardous or toxic substances, or related materials defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. Sections 9601, et seq.), the Hazardous Materials Transportation Act, as amended (49 U.S.C. Sections 5101, et seq.), the Resource Conservation and Recovery Act, as amended (42 U.S.C. Sections 6901, et seq.), and in the regulations adopted and publications promulgated pursuant thereto, or any other federal, state or local environmental law, ordinance, rule, or regulation.

**HRY** shall mean HRY Holdings, LLC, a limited liability company organized and existing under the laws of the State of Delaware, and its successors and assigns.

**Impositions** shall have the meaning set forth in Section 8.17(a).

**Improvements** shall mean, collectively, the Existing Improvements, if any, and the Project Improvements and any Additional Improvements. In the alternative, "Improvements" shall mean: (i) all buildings, structures, foundations, related facilities and other improvements existing on the Commencement Date and erected or situated on the Land, if any, and (ii) any other buildings, structures, foundations and related facilities and other improvements erected or constructed on the land throughout the term of this Agreement (including any improvements or demolitions made as part of the Project Work pursuant to Section 3.3), and (iii) all other replacements, improvements, additions, extensions, substitutions, restorations and repairs to any of the foregoing.

**Indemnification Commencement Date** shall mean February 14, 2012, the date on which the Agency first adopted a resolution with respect to the Project.

**Indemnified Parties** shall have the meaning set forth in Section 8.2(a).

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

**Inducement Resolution** shall mean the resolution of the Agency adopted on February 14, 2012 inducing the Project.

**Ineligible Personalty** shall mean (i) vehicles of any sort, including watercraft and rolling stock, (ii) personalty having a useful life of one year or less, (iii) fine art, (iv) objects d'art and other similar decorative items, (v) plants, whether potted or landscaped, (vi) ordinary office supplies such as pencils, paper clips and paper, and (vii) any cost of utilities, cleaning services or supplies or other costs of operation.

**Information Recipients** shall have the meaning set forth in Section 8.7(c).

**Initial Annual Administrative Fee** shall mean \$1,250.

**Initial CRET** shall have the meaning set forth in Section 5.1.

**Land** shall mean those certain lots, pieces or parcels of land located between East 132<sup>nd</sup> Street and the Harlem River, and between Willis Avenue Bridge to the west and the Robert F. Kennedy bridge to the east in the Harlem River Yards, in Bronx, New York, and known by the street address of 2 St. Ann's Avenue, in Bronx, New York, constituting part of Lot 1 in Block 2543 and part of Lot 62 in Block 2260, all as more particularly described in Exhibit A - "Description of the Land", together with all easements, rights and interests now or hereafter appurtenant or beneficial thereto; but excluding, however, any real property or interest therein released pursuant to Section 8.10(c).

**Land Square Footage** shall mean approximately 12.9 acres.

**Legal Requirements** shall mean the Constitutions of the United States and the State of New York and all laws, statutes, codes, acts, ordinances, resolutions, orders, judgments, decrees, injunctions, rules, regulations, permits, licenses, authorizations, certificates of occupancy, directions and requirements (including zoning, land use, planning, environmental protection, air, water and land pollution, toxic wastes, hazardous wastes, solid wastes, wetlands, health, safety, equal opportunity, minimum wages, and employment practices) of all governments, departments, commissions, boards, courts, authorities, agencies, officials and officers, including those of the City, foreseen or unforeseen, ordinary or extraordinary, that are applicable now or may be applicable at any time hereafter to (i) the Lessee or the Sublessee, (ii) the Facility or any part thereof, or (iii) any use or condition of the Facility or any part thereof.

**Lessee** shall mean Fresh Property Bronx, LLC, a limited liability company organized and existing under the laws of the State of Delaware, and its successors and assigns; provided, however, that nothing contained in this definition shall be deemed to limit or modify the obligations of the Lessee under Section 8.9 or 8.20.

**Lessee's Property** shall have the meaning specified in Section 3.5(d).

**Liability** shall have the meaning set forth in Section 8.2(a).

**Liens** shall have the meaning specified in Section 8.11(a).

**Loss Event** shall have the meaning specified in Section 6.1.

**Merge** shall have the meaning specified in Section 8.20(a)(v).

**Modified Exempt Mortgage** shall have the meaning set forth in Section 5.3(a).

**Mortgagees** shall mean each Person, if any, who shall be the mortgagee under a Mortgage.

**Mortgage Loans** shall mean each Mortgage Loan, if any, referred to in the Project Finance Plan.

**Mortgage Notes** shall mean each mortgage note, if any, referred to in the Project Finance Plan.

**Mortgages** shall mean each mortgage, if any, referred to in the Project Finance Plan, and each other mortgage creating a lien upon the Facility Realty and to which an Authorized Representative of the Agency shall consent in writing.

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

**Notification of Failure to Deliver** shall have the meaning specified in Section 9.8(b).

**NYCDOF** shall have the meaning set forth in Section 5.1.

**NYCEDC** shall mean New York City Economic Development Corporation, and any successor thereof.

**Operations Commencement Date** shall have the meaning set forth in Section 5.4(a).

**Opinion of Counsel** shall mean a written opinion of counsel for the Lessee, the Sublessee, any other Guarantor or any other Person (which counsel shall be reasonably acceptable to the Agency) with respect to such matters as required under any Project Document or as the Agency may otherwise reasonably require, and which shall be in form and substance reasonably acceptable to the Agency.

**Organizational Documents** shall mean, (i) in the case of an Entity constituting a limited liability company, the articles of organization or certificate of formation, and the operating agreement of such Entity, (ii) in the case of an Entity constituting a corporation, the articles of incorporation or certificate of incorporation, and the by-laws of such Entity, and (iii) in the case of an Entity constituting a general or limited partnership, the partnership agreement of such Entity.

**Per Diem Fees** shall mean, collectively, the Per Diem Late Fee and the Per Diem Supplemental Late Fee.

**Per Diem Holdover Rental Amount** shall mean that per diem rental amount established from time to time by the Agency's Board of Directors generally imposed upon Entities receiving or that have received Financial Assistance (subject to such exceptions from such general applicability as may be

established by the Agency's Board of Directors) and that have failed to terminate the Company Lease and this Agreement within the ten (10) day period referred to in Section 10.2.

**Per Diem Late Fee** shall mean that per diem late fee established from time to time by the Agency's Board of Directors generally imposed upon Entities receiving or that have received Financial Assistance (subject to such exceptions from such general applicability as may be established by the Agency's Board of Directors) and that have not (x) paid to the Agency the Annual Administrative Fee on the date required under Section 8.3, (y) delivered to the Agency all or any of the Fixed Date Deliverables on the respective dates required under Section 8.14 or 8.16, and/or (z) delivered to the Agency all or any of the Requested Document Deliverables under Section 8.15 within five (5) Business Days of the Agency having made the request therefor.

**Per Diem Supplemental Late Fee** shall mean that supplemental per diem late fee established from time to time by the Agency's Board of Directors generally imposed upon Entities receiving or that have received Financial Assistance (subject to such exceptions from general applicability as may be established by the Agency's Board of Directors).

**Permitted Encumbrances** shall mean:

- (i) the Prime Lease, this Agreement, the Company Lease, the Sublease Agreement, and any Mortgage;
- (ii) liens for real estate taxes, assessments, levies and other governmental charges, the payment of which is not yet due and payable;
- (iii) any mechanic's, workmen's, repairmen's, materialmen's, contractors', warehousemen's, carriers', suppliers' or vendors' lien, security interest, encumbrance or charge or right in respect thereof, placed on or with respect to the Facility or any part thereof, if payment is not yet due and payable, or if such payment is being disputed pursuant to Section 8.11(b);
- (iv) utility, access and other easements and rights of way, restrictions and exceptions that an Authorized Representative of the Lessee certifies to the Agency will not materially interfere with or impair the Sublessee's use and enjoyment of the Facility as herein provided;
- (v) such minor defects, irregularities, encumbrances, easements, rights of way and clouds on title as normally exist with respect to property similar in character to the Facility as do not, as set forth in a certificate of an Authorized Representative of the Lessee delivered to the Agency, either singly or in the aggregate, render title to the Facility unmarketable or materially impair the property affected thereby for the purpose for which it was leased by the Agency under the Company Lease or purport to impose liabilities or obligations on the Agency;
- (vi) those exceptions to title to the Facility Realty enumerated in the title insurance policy delivered pursuant to Section 3.8 insuring the leasehold interest of the Agency in the Facility Realty, a copy of which is on file at the offices of the Agency;
- (vii) liens arising by reason of good faith deposits with the Lessee in connection with the tenders, leases of real estate, bids or contracts (other than contracts for the payment of money), deposits by the Lessee to secure public or statutory obligations, or to secure, or in lieu of, surety, stay or appeal bonds, and deposits as security for the payment of taxes or assessments or other similar charges;

(viii) any lien arising by reason of deposits with, or the giving of any form of security to, any governmental agency or any body created or approved by law or governmental regulation for any purpose at any time as required by law or governmental regulation as a condition to the transaction of any business or the exercise of any privilege or license, or to enable the Lessee to maintain self-insurance or to participate in any funds established to cover any insurance risks or in connection with workmen's compensation, unemployment insurance, old age pensions or other social security, or to share in the privileges or benefits required for companies participating in such arrangements;

(ix) any judgment lien against the Lessee, so long as the finality of such judgment is being contested in good faith and execution thereon is stayed;

(x) any purchase money security interest in movable personal property, including equipment leases and financing;

(xi) liens on property due to rights of governmental entities or third party payors for recoupment of excess reimbursement paid;

(xii) a lien, restrictive declaration or performance mortgage with respect to the operation of the Facility arising by reason of a grant or other funding received by the Lessee from the City, the State or any governmental agency or instrumentality;

(xiii) any additional leasehold interest in the Facility or any portion thereof granted by the Lessee to the Agency and any sublease, sale, assignment or other transfer of such leasehold interest by the Agency to the Lessee or any trustee for bonds of the Agency; and

(xiv) any lien, security interest, encumbrances or charge approved in writing by the Agency from time to time, in its sole discretion.

**Person** shall mean an individual or any Entity.

**PILOT** shall mean payments in lieu of City real estate taxes with respect to the Facility Realty.

**PILOT Bill** shall have the meaning set forth in Section 5.1.

**PILOT Commencement Date** shall have the meaning set forth in Section 5.1.

**PILOT Depository** shall mean The Bank of New York Mellon, a banking corporation organized and existing under the laws of the State of New York, or its successors.

**PILOT Payment Default** shall have the meanings set forth in Section 5.1.

**PILOT Term** shall have the meaning set forth in Section 5.1.

**Policy(ies)** shall have the meaning set forth in Section 8.1(a)

**Predecessor Lessee** shall have the meaning set forth in Section 8.20(b)(ii).

**Prime Lease** shall mean that certain Amended and Restated Ground Sublease, dated as of February 15, 2012, between HRY and the Lessee, as the same may be amended and supplemented in accordance with its terms therewith and the Project Documents.

**Principals** shall mean, with respect to any Entity, the most senior three officers of such Entity, any Person with a ten percent (10%) or greater ownership interest in such Entity, and any Person as shall have the power to Control such Entity, and "principal" shall mean any of such Persons.

**Project** shall mean the construction, furnishing and equipping of an approximately 500,000 square foot industrial, manufacturing and distribution facility, including without limitation the acquisition and/or leasing and installation of Acquired Assets and Facility Personalty, including machinery, equipment, furniture, fixtures and other tangible personal property for use at such Facility, all to be located on the Land and used by the Lessee and the Sublessee in connection with their food manufacturing and distribution business.

**Project Application Information** shall mean the eligibility application and questionnaire submitted to the Agency by or on behalf of the Lessee and/or the Sublessee, for approval by the Agency of the Project and the providing of Financial Assistance by the Agency therefor, together with all other letters, documentation, reports and financial information submitted in connection therewith.

**Project Cost Budget** shall mean that certain budget as set forth by the Lessee in Exhibit E — "Project Cost Budget".

**Project Counsel** shall mean attorneys or a firm of attorneys that are recognized for their expertise in municipal finance law and are selected by the Agency to render legal advice to the Agency in connection with the transactions contemplated by this Agreement.

**Project Documents** shall mean the Company Lease, this Agreement, the Sales Tax Letter, the Sublease Agreement, the Guaranty Agreement, each Mortgage and each Mortgage Note.

**Project Fee** shall mean \$734,063, representing the \$724,063 Agency Closing Fee, plus the unpaid application fee of \$10,000.

**Project Finance Plan** shall mean the plan for financing of the costs of the Project set forth in Exhibit L — "Project Finance Plan".

**Project Improvements** shall mean all buildings, structures, foundations, related facilities, fixtures and other improvements resulting from the Project Work, including but not limited to Exempt Fixtures, Exempt Materials and Site Improvements.

**Project Payments** shall have the meaning set forth in Section 10.1.

**Project Work** shall mean the work required to complete the construction and/or renovation portion of the Project as such work is further explained by reference to the Project Cost Budget.

**Purchase Commitment** shall mean \$10,450,000.

**Real Estate Taxes** shall have the meaning set forth in Section 5.1.

**Recapture Event** shall have the meaning set forth in Section 5.4(a).

**Recapture Period** shall have the meaning set forth in Section 5.4(a).

**Rental Payments** shall mean, collectively, Base Rent and Additional Rent.



**Requested Document Deliverables** shall have the meaning set forth in Section 9.8(a).

**Required Disclosure Statement** shall mean that certain Required Disclosure Statement in the form of Exhibit F – “Form of Required Disclosure Statement”.

**Sales Taxes** shall mean City and State sales and/or compensating use taxes imposed pursuant to Sections 1105, 1107, 1109, and 1110 of the New York State Tax Law, as each of the same may be amended from time to time (including any successor provisions to such statutory sections).

**Sales Tax Agent Authorization Letter** shall mean the Sales Tax Agent Authorization Letter, substantially in the form set forth in Exhibit I – “Form of Sales Tax Agent Authorization Letter” and to be delivered in accordance with Section 5.2(d).

**Sales Tax Letter** shall mean the Letter of Authorization for Sales Tax Exemption, substantially in the form set forth in Exhibit H – “Form of Sales Tax Letter” and to be delivered pursuant to Section 5.2(c) on the Commencement Date.

**Sales Tax Registry** shall mean the Sales Tax Registry in the form set forth in Exhibit K.

**Sales Tax Savings** shall mean all exemptions from Sales Taxes realized by or for the benefit of the Lessee and the Sublessee pursuant to this Agreement and/or the Sales Tax Letter by reason of the Agency’s interest in the Project or any part thereof.

**Sign** shall have the meaning set forth in Section 8.5.

**Special Provisions** shall have the meaning set forth in sub-Section 5.2(g).

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

**Straight-Lease Transaction** shall have the meaning assigned to that term in the Enabling Act.

**Sublease Agreement** shall mean that certain Sublease Agreement, dated as of even date herewith, between the Lessee, as sublessor, and the Sublessee, as sublessee, as the same may be amended and supplemented in accordance with its terms and as permitted by the terms thereof.

**Sublessee** shall mean, collectively, Fresh Direct, LLC, a limited liability company organized and existing under the laws of the State of Delaware, and its successors and assigns, and U.T.F. Trucking, Inc., a corporation organized and existing under the laws of the State of New York, and its successors and assigns; provided, however, that nothing contained in this definition shall be deemed to limit or modify the obligations of the Sublessee under Section 8 of the Sublease Agreement.

**Successor Lessee** shall have the meaning set forth in Section 8.20(b)(ii).

**Termination Date** shall mean such date on which this Agreement may terminate pursuant to its terms and conditions prior to the Expiration Date.

**Transfer** shall have the meaning set forth in Section 8.20(a)(iv).

**Zone** shall have the meaning set forth in Section 5.1.

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

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

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

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

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

(e) Unless the content indicates otherwise, references to designated “Exhibits”, “Appendices,” “Schedules,” “Articles”, “Sections”, “Subsections”, “clauses” and other subdivisions are to the designated Exhibits, Appendices, Schedules, Articles, Sections, Subsections, clauses and other subdivisions of or to this Agreement.

(f) The words “include”, “includes” and “including” shall be deemed to be followed by the phrase “without limitation”.

(g) The word “will” shall be construed to have the same meaning and effect as the word “shall”.

(h) Any definition of or reference to any agreement, instrument or other document herein shall be construed to refer to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth therein).

(i) Any reference to any Person, or to any Person in a specified capacity, shall be construed to include such Person’s successors and assigns or such Person’s successors in such capacity, as the case may be.

## ARTICLE II

### REPRESENTATIONS AND WARRANTIES

**Section 2.1. Representations and Warranties by Agency.** The Agency makes the following representations and warranties:

(a) The Agency is a corporate governmental agency constituting a body corporate and politic and a public benefit corporation duly organized and existing under the laws of the State.

(b) Assuming the accuracy of representations made by the Lessee and by the Sublessee, the Agency is authorized and empowered to enter into the transactions contemplated by this Agreement and any other Project Documents to which the Agency is a party and to carry out its obligations hereunder and thereunder.

(c) By proper action of its board of directors, the Agency has duly authorized the execution and delivery of this Agreement and each of the other Project Documents to which the Agency is a party.

**Section 2.2. Representations and Warranties by the Lessee.** The Lessee makes the following representations and warranties:

(a) The Lessee is an Entity of the type, and duly organized under the laws of the state, set forth on the cover page of this Agreement, is validly existing and in good standing under the laws of its state of organization, is duly qualified to do business and in good standing under the laws of the State, is not in violation of any provision of any of the Lessee's Organizational Documents, has the requisite power and authority to own its property and assets, to carry on its business as now being conducted by it and to execute, deliver and perform this Agreement and each other Project Document to which it is or shall be a party.

(b) This Agreement and the other Project Documents to which the Lessee is a party (x) have been duly authorized by all necessary action on the part of the Lessee, (y) have been duly executed and delivered by the Lessee, and (z) constitute the legal, valid and binding obligations of the Lessee, enforceable against the Lessee in accordance with their respective terms.

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

(d) Except as otherwise provided in the Opinion of Counsel of the Lessee, there is no action or proceeding pending or, to the best of the Lessee's knowledge, after diligent inquiry, threatened, by or against the Lessee by or before any court or administrative agency that would adversely affect the ability of the Lessee to perform its obligations under this Agreement or any other Project Document to which it is or shall be a party.

(e) The Financial Assistance provided by the Agency to the Lessee and the Sublessee through the Straight-Lease Transaction as contemplated by this Agreement is necessary to induce the Lessee and the Sublessee to proceed with the Project.

(f) The transactions contemplated by this Agreement shall not result in the removal of any facility or plant of the Lessee or any other occupant or user of the Facility from one area of the State outside of the City to within the City or in the abandonment of one or more facilities or plants of the Lessee or any other occupant or user of the Facility located within the State, but outside of the City.

(g) The transactions contemplated by this Agreement shall not provide Financial Assistance in respect of any project where facilities or property that are primarily used in making retail sales of goods or services to customers who personally visit such facilities constitute more than one-third of the total project costs. For purposes of this Section 2.2(g), "retail sales" shall mean (i) sales by a registered vendor under article twenty-eight of the New York Tax Law primarily engaged in the retail sale of tangible personal property, as defined in subparagraph (i) of paragraph four of subdivision (b) of section eleven hundred one of the New York Tax Law, or (ii) sales of a service to such customers.

(h) Undertaking the Project is anticipated to serve the public purposes of the Act by preserving permanent, private sector jobs or increasing the overall number of permanent, private sector jobs in the State.

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

(j) The Facility will be the Approved Facility and a qualified "project" within the meaning of the Act.

(k) Except as permitted by Section 8.9, no Person other than the Lessee and/or the Sublessee is or will be in use, occupancy or possession of any portion of the Facility.

(l) The Lessee has obtained all authorizations, consents and approvals of governmental bodies or agencies required to be obtained by it as of the Commencement Date in connection with the execution and delivery of this Agreement and each other Project Document to which it shall be a party or in connection with the performance of its obligations hereunder and under each of the Project Documents.

(m) The Project will be designed, and the operation of the Facility will be, in compliance with all applicable Legal Requirements.

(n) The Lessee and the Sublessee are in compliance, and will continue to comply, with all applicable Legal Requirements relating to the Project, the Project Work and the operation of the Facility.

(o) The Lessee has delivered to the Agency a true, correct and complete copy of the Environmental Audit.

(p) The Lessee has not used Hazardous Materials on, from, or affecting the Facility in any manner that violates any applicable Legal Requirements governing the use, storage, treatment, transportation, manufacture, refinement, handling, production or disposal of Hazardous Materials, and except as set forth in the Environmental Audit, to the best of the Lessee's knowledge, no prior owner or occupant of the Facility has used Hazardous Materials on, from, or affecting the Facility in any manner that violates any applicable Legal Requirements.

(q) The Project Cost Budget attached as Exhibit E - "Project Cost Budget" represents a true, correct and complete budget as of the Commencement Date of the proposed costs of the Project; the Estimated Project Cost is a fair and accurate estimate of the Project Cost as of the Commencement Date; and that portion of the Estimated Project Cost as shall not derive from Mortgage Loans shall be provided from the sources set forth on Exhibit E - "Project Cost Budget". The Lessee has no reason to believe that funds or financing sufficient to complete the Project will not be obtainable.

(r) The amounts to be provided to the Lessee pursuant to the Mortgage Loans, together with other moneys available to the Lessee and/or the Sublessee, will be sufficient to pay all costs in connection with the completion of the Project.

(s) All of the Land comprises part of two tax lots, which tax lots are currently known as Block 2543, part of Lot 1, and Block 2260, part of Lot 62, and, upon completion of tax lot reapportionment, will be known as Block 2543, Lot 1 and Block 2543, Lot 71.

(t) Subject to Section 3.6 and Article VI, no property constituting part of the Facility shall be located at any site other than at the Facility Realty.

(u) The Completed Improvements Rentable Square Footage and the Land Square Footage are true and correct.

(v) The Fiscal Year is true and correct.

(w) None of the Lessee, the Principals of the Lessee, or any Person that directly or indirectly Controls, is Controlled by, or is under common Control with the Lessee:

(i) is in default or in breach, beyond any applicable grace period, of its obligations under any written agreement with the Agency or the City, unless such default or breach has been waived in writing by the Agency or the City, as the case may be;

(ii) has been convicted of a misdemeanor related to truthfulness and/or business conduct in the past five (5) years;

(iii) has been convicted of a felony in the past ten (10) years;

(iv) has received formal written notice from a federal, state or local governmental agency or body that such Person is currently under investigation for a felony criminal offense; or

(v) has received written notice of default in the payment to the City of any taxes, sewer rents or water charges, which have not been paid, unless such default is currently being contested with due diligence in proceedings in a court or other appropriate forum.

(x) The Project Application Information was true, correct and complete as of the date submitted to the Agency, and no event has occurred or failed to occur since such date of submission which would cause any of the Project Application Information to include any untrue statement of a material fact or omit to state any material fact required to be stated therein to make such statements not misleading.

(y) Information as to the Principals of the Lessee and of the Sublessee, and their respective ownership interests in the Lessee and the Sublessee, as set forth in Exhibit D, is true, correct and complete.

## ARTICLE III

### LEASEHOLD INTEREST CONVEYED TO THE AGENCY; THE PROJECT; MAINTENANCE; REMOVAL OF PROPERTY AND TITLE INSURANCE; AND PURCHASE OF ACQUIRED ASSETS

#### **Section 3.1.   The Company Lease.**

(a) Pursuant to the Company Lease, the Lessee has leased to the Agency the Facility, and all rights or interests therein or appertaining thereto, free and clear of all liens, claims, charges, encumbrances, security interests and servitudes other than Permitted Encumbrances.

(b) A valid leasehold interest in all Improvements and items of Facility Personality incorporated or installed in the Facility Realty as part of the Project shall vest in the Agency immediately upon delivery to or installation or incorporation into the Facility Realty or payment therefor, whichever shall occur first.

(c) The Lessee shall take all action necessary to so vest a valid leasehold interest in such Improvements and items of Facility Personality in the Agency and to protect such leasehold interest and title claims against claims of any third parties.

#### **Section 3.2.   Appointment as Agent.**

The Agency hereby appoints the Lessee its true and lawful agent, and the Lessee hereby accepts such agency for purposes of undertaking the Project Work, with the same powers and with the same validity and effect as the Agency could do if acting in its own behalf, including:

- (i) effecting the Project Work,
- (ii) making, executing, acknowledging and delivering any contracts, orders, receipts, writings and instructions with any other Persons (subject in each case to Section 5.2), and in general doing all things which may be requisite or proper, all for the purposes of undertaking the Project Work,
- (iii) paying all fees, costs and expenses incurred in the Project Work from funds made available therefor in accordance with or as contemplated by this Agreement, and
- (iv) asking, demanding, suing for, levying, recovering and receiving all such sums of money, debts due and other demands whatsoever that may be due, owing and payable to the Agency under the terms of any contract, order, receipt or writing in connection with the Project Work and to enforce the provisions of any contract, agreement, obligation, bond or other performance security entered into or obtained in connection with the Project Work.

#### **Section 3.3.   Manner of Project Completion.**

(a) The Lessee will complete the Project Work, or cause the Project Work to be completed, by the Completion Date, in a first class workmanlike manner, free of defects in materials and workmanship (including latent defects); provided, however, the Lessee may revise the scope of the Project Work, subject to the prior written consent of the Agency (which consent shall not be unreasonably withheld, delayed or conditioned).

(b) In undertaking the Project Work, the Lessee shall take such action and institute such proceedings as shall be necessary to cause and require all contractors, manufacturers and suppliers to complete their agreements relating to the Project Work in accordance with the terms of the contracts therefor including the correction of any defective work.

(c) The cost of the Project Work shall be financed in accordance with the Project Finance Plan. In the event moneys derived from the Mortgage Loans, if any, are not sufficient to pay the costs necessary to complete the Project Work in full, the Lessee shall pay or cause to be paid that portion of such costs of the Project Work as may be necessary to complete the Project Work and shall not be entitled to any reimbursement therefor from the Agency, nor shall the Lessee be entitled to any diminution of the Rental Payments to be made under this Agreement.

(d) The Lessee shall pay (i) all of the costs and expenses in connection with the preparation of any instruments of conveyance, the delivery thereof and of any instruments and documents relating thereto and the filing and recording of any such instruments of conveyance or other instruments or documents, if required, (ii) all taxes and charges payable in connection with the vesting with the Agency of a leasehold estate in the Facility, or attributable to periods prior to such vesting, as set forth in Sections 3.1 and 3.2, and (iii) all shipping and delivery charges and other expenses or claims incurred in connection with the Project Work.

(e) The Lessee will perform or cause to be performed the Project Work in accordance with all applicable Legal Requirements, including, but not limited to all work related to the construction and equipping of the Project, all requirements set forth in the Inducement Resolution and all requirements of New York State Office of Parks, Recreation and Historic Preservation, and with the conditions and requirements of all policies of insurance with respect to the Facility and the Project Work. Promptly upon finishing of the Project Work and the completion of the Project Improvements, the Lessee will obtain or cause to be obtained all required permits, authorizations and licenses from appropriate authorities, if any be required, authorizing the occupancy, operation and use of the Facility as an Approved Facility and shall furnish copies of same to the Agency immediately upon the Agency's demand therefor.

(f) Upon completion of the Project Work, the Lessee shall (w) deliver to the Agency the Final Project Cost Budget, which budget will include a comparison with the Project Cost Budget, and indicate the source of funds (i.e., borrowed funds, equity, etc.) for each cost item, (x) evidence completion of the Project by delivering to the Agency a certificate of an Authorized Representative of the Lessee in substantially the form set forth in Exhibit G – "Form of Project Completion Certificate", together with all attachments required thereunder, (y) deliver and surrender to the Agency the original of the Sales Tax Letter and all copies thereof, and (z) deliver a financing statement or statements terminating the financing statements filed pursuant to Section 3.9(b)(iv).

(g) Upon request by the Agency, the Lessee shall make available to the Agency copies of any bills, invoices or other evidences of costs as shall have been incurred in the effectuation of the Project Work.

(h) In the event that the aggregate costs of the Project Work upon the completion thereof shall be significantly different from the estimated costs thereof set forth in the Project Cost Budget (i.e., more than a ten percent (10%) difference in either total Project costs or in major categories of Project Work cost), on request of the Agency, the Lessee shall provide evidence to the reasonable satisfaction of the Agency as to the reason for such discrepancy, and that the scope of the Project Work as originally approved by the Agency has not been modified in a material manner without the prior written consent of the Agency.



(i) Thirty (30) days prior to the commencement of the Project Work, the Lessee shall deliver to the Agency a Construction Manager's Certificate in form attached hereto as Exhibit O, together with any additional or updated insurance certificates required by Section 8.1

**Section 3.4. Maintenance.**

(a) During the term of this Agreement, the Lessee will:

(i) keep the Facility in good and safe operating order and condition, ordinary wear and tear excepted,

(ii) occupy, use and operate the Facility, or cause the Facility to be occupied, used and operated, as the Approved Facility, and

(iii) make or cause to be made all replacements, renewals and repairs thereto (whether ordinary or extraordinary, structural or nonstructural, foreseen or unforeseen) necessary to ensure that the operations of the Lessee and the Sublessee at the Facility shall not be materially impaired or diminished in any way.

(b) All replacements, renewals and repairs shall be similar in quality, class and value to the original work and be made and installed in compliance with all applicable Legal Requirements.

(c) The Agency shall be under no obligation to replace, service, test, adjust, erect, maintain or effect replacements, renewals or repairs of the Facility, to effect the replacement of any inadequate, obsolete, worn out or unsuitable parts of the Facility, or to furnish any utilities or services for the Facility, and the Lessee hereby agrees to assume full responsibility therefor.

**Section 3.5. Alterations and Improvements.**

(a) The Lessee shall have the privilege from time to time of making Additional Improvements to the Facility Realty as it may determine in its discretion to be desirable for its uses and purposes, provided that:

(i) as a result of the Additional Improvements, the usefulness, structural integrity or operating efficiency of the Facility is not materially impaired,

(ii) the Additional Improvements are effected with due diligence, in a good and workmanlike manner and in compliance with all applicable Legal Requirements,

(iii) the Additional Improvements are promptly and fully paid for by the Lessee in accordance with the terms of the applicable contract(s) therefor, and

(iv) the Additional Improvements do not change the nature of the Facility so that it would not constitute the Approved Facility and a qualified "project" within the meaning of the Act.

(b) All Additional Improvements shall constitute a part of the Facility, subject to the Company Lease, this Agreement and the Sublease Agreement.

(c) If at any time after the Operations Commencement Date, the Lessee shall make any Additional Improvements, the Lessee shall (i) notify an Authorized Representative of the Agency of

such Additional Improvements by delivering written notice thereof within thirty (30) days after the completion of the Additional Improvements, and (ii) take the actions required by Section 5.1(f)(i)(3).

(d) In addition to the Facility Personalty, the Lessee shall have the right to install or permit to be installed at the Facility Realty, machinery, equipment and other personal property at the Lessee's own cost and expense (the "Lessee's Property"). Once so installed, the Lessee's Property shall not constitute Facility Personalty and shall not be subject to the Company Lease, this Agreement or the Sublease Agreement, nor constitute part of the Facility, provided that the same is not made fixtures appurtenant to the Facility Realty. The Lessee shall have the right to create or permit to be created any mortgage, encumbrance, lien or charge on, or conditional sale or other title retention agreement with respect to, the Lessee's Property, without the consent of or notice to the Agency.

**Section 3.6. Removal of Property of the Facility.**

(a) The Lessee shall have the right from time to time to remove from the Facility any fixture constituting part of the Facility Realty or any machinery, equipment or other item of personal property constituting part of the Facility Personalty (in any such case, the "Existing Facility Property"), and thereby remove such Existing Facility Property from the leasehold estates of the Company Lease, this Agreement and this Sublease Agreement; provided however:

(i) (A) at any time prior to the Completion Date, such Existing Facility Property is substituted or replaced by property (y) having equal or greater fair market value, operating efficiency and utility and (z) free of all mortgages, liens, charges, encumbrances, claims and security interests other than Permitted Encumbrances, or

(B) at any time after the Completion Date, such Existing Facility Property is substituted or replaced by property (y) having operating efficiency and utility and (z) free of all mortgages, liens, charges, encumbrances, claims and security interests other than Permitted Encumbrance, and

(ii) no such removal shall be effected if (w) such removal would change the nature of the Facility as the Approved Facility and a qualified "project" within the meaning of the Act, (x) such removal would materially impair the usefulness, structural integrity or operating efficiency of the Facility, (y) such removal would materially reduce the fair market value of the Facility below its value immediately before such removal, or (z) there shall exist and be continuing an Event of Default hereunder.

(b) Within thirty (30) days after receipt of written request of the Lessee, the Agency shall deliver to the Lessee appropriate documents conveying to the Lessee all of the Agency's right, title and interest in any property removed from the Facility pursuant to Section 3.6(a).

(c) The removal from the Facility of any Existing Facility Property pursuant to the provisions of Section 3.6(a) shall not entitle the Lessee to any abatement or reduction in the Rental Payments payable by the Lessee under this Agreement or under any other Project Document.

**Section 3.7. Implementation of Agency's Interest in New Property.**

(a) In the event of any Additional Improvements or substitution or replacement of property pursuant to Section 3.5 or 3.6, the Lessee shall deliver or cause to be delivered to the Agency any necessary documents conveying to the Agency a leasehold estate in any property installed or placed

upon the Facility pursuant to such Section and subjecting such Additional Improvements or substitute or replacement property to the Company Lease, this Agreement and the Sublease Agreement.

(b) The Lessee agrees to pay all costs and expenses (including reasonable counsel fees) incurred by the Agency in subjecting to, or releasing from, the Company Lease, this Agreement and the Sublease Agreement any property installed or placed on, or removed from, the Facility as part of the Facility pursuant to Section 3.5 or 3.6.

(c) Reference is made to Section 8.15(d) and (e) pursuant to which the Lessee has agreed to furnish a report or certificate to the Agency of any action taken by the Lessee pursuant to the provisions of Section 3.5 or 3.6.

**Section 3.8. Leasehold Title Insurance.** On or prior to the Commencement Date, the Lessee will obtain and deliver to the Agency (y) a leasehold title insurance policy (in form and substance acceptable to the Agency) in an amount not less than \$500,000 insuring the Agency's leasehold interest under the Company Lease in each of the Land and the Existing Improvements against loss as a result of defects in title, subject only to Permitted Encumbrances, and (z) a current or updated survey of each of the Land and the Existing Improvements certified to the Lessee, the title company issuing such title insurance policy and the Agency. The title insurance policies shall be subject only to Permitted Encumbrances and shall provide for, among other things, the following: (1) full coverage against mechanics' liens; (2) no exceptions other than those approved by the Agency; (3) an undertaking by the title insurer to provide the notice of title continuation or endorsement; and (4) such other matters as the Agency shall request. Any proceeds of such leasehold title insurance shall be paid to the Lessee and applied by the Lessee to remedy the applicable defect in title in respect of which such proceeds shall be derived. If not so capable of being applied or if a balance remains after such application, the proceeds or the remaining balance of proceeds, as the case may be, derived from any such title insurance policy insuring the Agency's leasehold interest shall be applied to the payment of any Rental Payments then due hereunder; and any balance thereafter may be used by the Lessee for its authorized purposes.

**Section 3.9. Purchase of Acquired Assets.**

(a) On the Commencement Date, the Lessee delivered to the Agency the Project Finance Plan set forth in Exhibit L hereto. As set forth therein, the Lessee anticipates that the Project Work will be financed in part with equity from the Lessee in the approximate amount of \$30,454,000. At such time that the Lessee satisfies the Equity Requirement, it shall deliver to the Agency: (i) a certificate executed by an Authorized Representative of the Lessee certifying, as of the date of such certificate, the amount of Project costs incurred and the amount of Project costs to be incurred in connection with the Facility, and (ii) budgets, cost breakdowns, invoices or other evidence reasonably satisfactory to the Agency to support such certification.

(b) On or after the Equity Satisfaction Date, the Lessee may seek reimbursement or payment from the Agency for the purchase of Acquired Assets in an amount not to exceed the Purchase Commitment, by delivering a written request or requisition therefor accompanied by (i) a detailed list of each Acquired Assets, an identifying number or description of such Acquired Assets and the respective cost(s) of each Acquired Asset in the form set forth in Exhibit N hereto, (ii) a certificate executed by an Authorized Representative of the Lessee certifying that such purchases were made at a price equal to the fair market thereof and providing an accounting of the Purchase Commitment expended by the Agency before and after payment or reimbursement to the Lessee for such purchases, (iii) copies of invoices or bills for such purchases, and (iv) copies of financing statements to be filed by the Lessee at the direction of the Agency (at the sole cost and expense of the Lessee) perfecting the Agency's security interest in such Acquired Assets, which financing statements shall be in accordance with the New York State

Uniform Commercial Code-Secured Transactions. The Lessee covenants and agrees that upon receipt of payment by the Agency for such Acquired Assets, it shall immediately file such financing statement(s) and provide evidence of such filing to the Agency.

(c) Upon completion of the Project by the Lessee, as evidenced by the delivery of (i) the items set forth in Section 3.3(f) hereof, and (ii) a certificate executed by an Authorized Representative of the Lessee certifying that the Project Work was financed in part with equity from the Lessee in the approximate amount of \$30,454,000, the Agency shall cooperate with the Lessee to effectuate the termination of any security interests the Agency may have in the Acquired Assets.

## ARTICLE IV

### LEASE OF FACILITY AND RENTAL PROVISIONS

**Section 4.1. Lease of the Facility.** The Agency hereby leases the Facility to the Lessee, and the Lessee hereby leases the Facility from the Agency, for and during the term herein and subject to the terms and conditions herein set forth. The Agency hereby delivers to the Lessee, and the Lessee hereby accepts sole and exclusive possession of the Facility. Simultaneous with the execution of this Agreement, the Lessee will execute and deliver the Sublease Agreement with the Sublessee.

**Section 4.2. Duration of Term.** The term of this Agreement shall commence on the Commencement Date and shall expire at 11:58 p.m. (New York City time) on the earlier of the Expiration Date or the Termination Date, if any.

**Section 4.3. Rental Provisions.**

(a) The Lessee shall pay Base Rent to the Agency, without demand or notice, on the Commencement Date in the amount of \$1.00 (receipt of which is acknowledged by the Agency), which shall constitute the entire amount of Base Rent payable hereunder.

(b) Throughout the term of this Agreement, the Lessee shall pay to the Agency (except as otherwise provided in Section 5.1) any additional amounts required to be paid by the Lessee to or for the account of the Agency hereunder, and any such additional amounts shall be paid as, and shall represent payment of, Additional Rent.

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

**Section 4.4. Rental Payments Payable Absolutely Net.** The obligation of the Lessee to pay Rental Payments shall be absolutely net to the Agency without any abatement, recoupment, diminution, reduction, deduction, counterclaim, set-off or offset whatsoever, so that this Agreement shall yield, net, to the Agency, the Rental Payments provided for herein, and all costs, expenses and charges of any kind and nature relating to the Facility, arising or becoming due and payable during or after the term of this Agreement, shall be paid by the Lessee and the Indemnified Parties shall be indemnified by the Lessee for, and the Lessee shall hold the Indemnified Parties harmless from, any such costs, expenses and charges.

**Section 4.5. Nature of Lessee's Obligation Unconditional.** The Lessee's obligations under this Agreement to pay Rental Payments shall be absolute, unconditional and general obligations, irrespective of any defense or any rights of set-off, recoupment or counterclaim or deduction and without any rights of suspension, deferment, diminution or reduction it might otherwise have against the Agency or any other Person. Such obligations of the Lessee shall arise whether or not the Project has been completed as provided in this Agreement and whether or not any Mortgagee shall be honoring its obligations under the related financing documents. The Lessee will not suspend or discontinue payment of any Rental Payment due and payable hereunder or terminate this Agreement (other than such termination as is provided for hereunder) or suspend the performance or observance of any covenant or agreement required on the part of the Lessee hereunder for any cause whatsoever, and the Lessee waives all rights now or hereafter conferred by statute or otherwise to quit, terminate, cancel or surrender this

Agreement or any obligation of the Lessee under this Agreement except as provided in this Agreement or to any abatement, suspension, deferment, diminution or reduction in the Rental Payments hereunder.

**Section 4.6. Assignment of Sublease Agreement.**

(a) In order to secure the payment and performance of the obligations of the Lessee under this Agreement, the Lessee does hereby assign, transfer and set over to the Agency all of the Lessee's right, title and interest in and to the Sublease Agreement, including all sublease rentals, revenues and receipts therefrom (except for those rentals payable under Section 5(d) of the Sublease Agreement), and the right to enforce all of the Lessee's rights and remedies thereunder.

(b) The Lessee agrees not to terminate, modify or amend the Sublease Agreement or any of the terms thereof, or grant any concessions in connection therewith, either orally or in writing, or to accept a surrender thereof, without the prior written consent of the Agency in accordance with the provisions of Section 8.9(d) and any attempted termination, modification or amendment of the Sublease Agreement without such written consent shall be null and void.

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

**Section 4.7. Advances by Agency.** In the event the Lessee fails to make any payment or to perform or to observe any obligation required of it under this Agreement, the Agency, after first notifying the Lessee in writing of any such failure on its part (except that no prior notification of the Lessee shall be required in the event of an emergency condition that, in the reasonable judgment of the Agency, necessitates immediate action), may (but shall not be obligated to), and without waiver of any of the rights of the Agency under this Agreement or any other Project Document to which the Agency is a party, make such payment or otherwise cure any failure by the Lessee to perform and to observe its other obligations hereunder. All amounts so advanced therefor by the Agency shall become an additional obligation of the Lessee to the Agency, which amounts, together with interest thereon at the rate of twelve percent (12%) per annum, compounded daily, from the date advanced, the Lessee will pay upon demand therefor by the Agency. Any remedy herein vested in the Agency for the collection of Rental Payments or other amounts due hereunder shall also be available to the Agency for the collection of all such amounts so advanced.

**Section 4.8. No Warranty of Condition or Suitability.** THE AGENCY HAS MADE AND MAKES NO REPRESENTATION OR WARRANTY WHATSOEVER, EITHER EXPRESS OR IMPLIED, WITH RESPECT TO THE MERCHANTABILITY, CONDITION, FITNESS, DESIGN, OPERATION OR WORKMANSHIP OF ANY PART OF THE FACILITY, ITS FITNESS FOR ANY PARTICULAR PURPOSE, THE QUALITY OR CAPACITY OF THE MATERIALS IN THE FACILITY, OR THE SUITABILITY OF THE FACILITY FOR THE PURPOSES OR NEEDS OF THE LESSEE OR THE SUBLESSEE OR THE EXTENT TO WHICH FUNDS AVAILABLE TO THE LESSEE WILL BE SUFFICIENT TO PAY THE COST OF COMPLETION OF THE PROJECT. THE LESSEE ACKNOWLEDGES THAT THE AGENCY IS NOT THE MANUFACTURER OF THE FACILITY PERSONALTY NOR THE MANUFACTURER'S AGENT NOR A DEALER THEREIN. THE LESSEE, ON BEHALF OF ITSELF AND THE SUBLESSEE, IS SATISFIED THAT THE FACILITY IS SUITABLE AND FIT FOR PURPOSES OF THE LESSEE AND THE SUBLESSEE. THE AGENCY SHALL NOT BE LIABLE IN ANY MANNER WHATSOEVER TO THE LESSEE OR ANY OTHER PERSON FOR ANY LOSS, DAMAGE OR EXPENSE OF ANY KIND OR NATURE CAUSED, DIRECTLY OR INDIRECTLY, BY THE PROPERTY OF THE FACILITY OR THE USE

OR MAINTENANCE THEREOF OR THE FAILURE OF OPERATION THEREOF, OR THE REPAIR, SERVICE OR ADJUSTMENT THEREOF, OR BY ANY DELAY OR FAILURE TO PROVIDE ANY SUCH MAINTENANCE, REPAIRS, SERVICE OR ADJUSTMENT, OR BY ANY INTERRUPTION OF SERVICE OR LOSS OF USE THEREOF OR FOR ANY LOSS OF BUSINESS HOWSOEVER CAUSED.

## ARTICLE V

### AGENCY FINANCIAL ASSISTANCE (PAYMENTS IN LIEU OF TAXES, SALES TAX EXEMPTION AND MORTGAGE RECORDING TAX DEFERRAL); RECAPTURE OF PUBLIC BENEFITS

#### Section 5.1. Payments in Lieu of Real Estate Taxes.

(a) Definitions. The following terms shall have the meaning specified below:

**Additional Improvements** shall have the meaning provided in Article I.

**Adjusted CRET** shall mean CRET as reduced by any applicable as-of-right benefit (if permitted by law and as such benefit may decrease over its prescribed term), other than an as-of-right benefit whose application arises from the eligibility and acceptance of the Project Improvements under the as-of-right program in question.

**Adjusted Initial CRET** shall mean Initial CRET as reduced by any applicable as-of-right benefit (if permitted by law and as such benefit may decrease over its prescribed term), other than an as-of-right benefit whose application arises from the eligibility and acceptance of the Project Improvements under the as-of-right program in question.

**Cessation Date** shall mean the date on which the Facility Realty is no longer exempt from Real Estate Taxes by operation of law including, but not limited to by means of the expiration (on the Expiration Date) or sooner termination of the Company Lease and the demise conveyed thereunder; and/or the expiration (on the Expiration Date) or sooner termination of this Agreement and the demise conveyed hereunder.

**City Tax Fiscal Year** shall mean each annual period commencing on July 1, and ending on the immediately succeeding June 30, or such other annual period as shall be established by lawful authority as the City's "tax fiscal year" or its equivalent.

**CRET** or Current Real Estate Taxes shall mean an amount equal to Real Estate Taxes applicable to Improvements at a point in time without reduction for any applicable as-of-right or discretionary benefit.

**Initial CRET** shall mean CRET applicable to the Existing Improvements on the Commencement Date.

**NYCDOF** shall mean the New York City Department of Finance.

**PILOT Commencement Date** shall mean next July 1 following the January 5 immediately succeeding the last to occur of the following events:

- (1) delivery by the Lessee to the Agency of evidence reasonably satisfactory to the Agency of the creation of new permanent tax lot(s) with respect to the Land;
- (2) delivery by the Lessee to the Agency of Project Completion Certificate in a form acceptable to the Agency; and



(3) delivery by the Agency to the Tax Assessor at the Department of Finance of the City of New York a letter which shall state that the Facility is eligible to receive PILOT benefits.

**PILOT Payment Default** shall mean that particular Event of Default described and set forth in Section 9.1(a).

**PILOT Bill** shall mean the semi-annual statement of account sent by NYCDOF for the payment of PILOT in respect of the Facility Realty.

**PILOT Term** shall mean the period commencing on the PILOT Commencement Date and ending on the Expiration Date.

**Project Improvements** shall have the meaning provided in Article I.

**Real Estate Taxes** shall mean the real property taxes levied by the City on real property within the City.

**Zone** shall mean any area within the City which has been defined by statute, or created pursuant to statute, for economic development purposes or for community renewal and improvement or for neighborhood and landmark preservation.

(b) Description and Address of Project; Representation

The Project consists of the construction, furnishing and equipping of an approximately 500,000 square foot industrial, manufacturing and distribution facility, the acquisition and/or leasing and installation of Acquired Assets and Facility Personalty, including machinery, equipment, furniture, fixtures and other tangible personal property for use at such Facility, all to be located on the Land and used by the Lessee and the Sublessee in connection with their food manufacturing and distribution business. The Facility Realty is located between East 132<sup>nd</sup> Street and the Harlem River, and between Willis Avenue Bridge to the west and the Robert F. Kennedy bridge to the east in the Harlem River Yard, in Bronx, New York, and known by the street address of 2 St. Ann's Avenue, in Bronx, New York, constituting part of Lot 1 in Block 2543 and part of Lot 62 in Block 2260. The Lessee represents that the Facility Realty is not located in a Zone.

(c) Payments Prior to PILOT Commencement Date. Until the PILOT Commencement Date, or such later date as the Facility Realty is determined to be exempt from Real Estate Taxes, the Lessee shall pay to the City all Real Estate Taxes with respect to the Facility Realty at such times, in such manner and in such amounts as would be applicable if the Facility Realty were not leased to the Agency.

(d) PILOT Generally.

(i) It is recognized that under the provisions of the Act the Agency is required to pay no Real Estate Taxes upon any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities. The Agency and the Lessee agree, however, that the Lessee shall be required to pay PILOT with respect to the Improvements in accordance with the provisions of this Section 5.1.

(ii) The Agency makes no representation as to the availability of an exemption or abatement from Real Estate Taxes for the Facility Realty. The Lessee acknowledges that the Agency has not represented the availability of any such exemption or

abatement for the Facility Realty, and the Lessee hereby releases the Agency from any claim arising from any loss of the Financial Assistance that was contemplated hereunder.

(iii) The Agency shall have no obligation to take any action to correct any defect or deficiency that may prevent the Facility Realty from being recognized as exempt from Real Estate Taxes by the City.

(iv) The Agency, in its sole discretion and in furtherance of the purposes of the Act, may waive, in whole or in part, the payment of PILOT for good cause shown.

(e) Reserved.

(f) PILOT with Respect to the Improvements.

(i) During the PILOT Term, but subject to Sections 5.1(d) and (i), PILOT with respect to the Improvements shall be payable in accordance with Section 5.1(g) in the amounts described below.

(1) Existing Improvements. From the PILOT Commencement Date through June 30, of the 21st year following the PILOT Commencement Date, PILOT payable with respect to the Existing Improvements shall equal Adjusted Initial CRET.

(2) Project Improvements. From the PILOT Commencement Date through June 30, of the 21st year following the PILOT Commencement Date, PILOT payable with respect to the Project Improvements shall equal zero. Upon completion of the Project Improvements (and notwithstanding the foregoing sentence), the Lessee shall promptly request the appropriate officer of the City to reassess the Improvements.

(3) Additional Improvements. From the PILOT Commencement Date through and including June 30, of the 21st year following the PILOT Commencement Date, PILOT payable with respect to the Additional Improvements, if any, shall equal the Adjusted CRET applicable to such Additional Improvements. Upon completion of Additional Improvements, if any, the Lessee shall promptly comply with the requirements of Section 3.5 and request the appropriate officers of the City to reassess the Improvements.

(4) From July 1, of the 21st year following the PILOT Commencement Date, through June 30, of the 25th year following the PILOT Commencement Date, PILOT payable with respect to the Improvements shall equal the amounts respectively indicated for the periods set forth below. (Assume that, for purposes of the following, "Adjusted Initial CRET" applies only to the Existing Improvements.)

21 <sup>st</sup> City Tax Fiscal Year following the PILOT Commencement Date	$[\text{Adjusted Initial CRET}] + [(\text{Adjusted CRET} - \text{Adjusted Initial CRET}) \times (0.2)]$
22 <sup>nd</sup> City Tax Fiscal Year following the PILOT Commencement	$[\text{Adjusted Initial CRET}] + [(\text{Adjusted CRET} - \text{Adjusted Initial CRET}) \times (0.4)]$

Date	
23 <sup>rd</sup> City Tax Fiscal Year following the PILOT Commencement Date	$[\text{Adjusted Initial CRET}] + [(\text{Adjusted CRET} - \text{Adjusted Initial CRET}) \times (0.6)]$
24 <sup>th</sup> City Tax Fiscal Year following the PILOT Commencement Date	$[\text{Adjusted Initial CRET}] + [(\text{Adjusted CRET} - \text{Adjusted Initial CRET}) \times (.0.8)]$

(ii) Notwithstanding anything that may be to the contrary in this Section 5.1, PILOT with respect to the Improvements shall never exceed Adjusted CRET.

(g) Payment Provisions.

(i) The Lessee agrees to pay all PILOT required to be paid under this Section 5.1, seven (7) Business Days prior to July 1 or January 1 (as the case may be), in the amounts specified in PILOT Bills. The Agency agrees to request appropriate officers of NYCDOF to provide the Lessee with PILOT Bills. The Lessee understands and agrees that the failure of NYCDOF to send the Lessee a PILOT Bill shall not relieve the Lessee of its obligation hereunder to pay the amount of PILOT required in accordance with this Section 5.1. The Lessee may send all inquiries concerning PILOT Bills to [pilot@finance.nyc.gov](mailto:pilot@finance.nyc.gov) or: **PILOT Unit, NYC Department of Finance, 59 Maiden Lane, 22<sup>nd</sup> floor, New York, New York 10038.**

(ii) Until such time the Agency may in writing require otherwise, the Lessee shall pay PILOT to the PILOT Depository and the Lessee shall make such payments by certified check, or bank draft payable at a bank in New York, New York, wire transfer or electronic funds transfer; *provided, however,* that any single semi-annual payment of \$150,000 (i.e. \$300,000 or more annually) must be made by either wire transfer or electronic funds transfer.

(iii) Upon the occurrence of a PILOT Payment Default, the amount of PILOT so in default shall continue as an obligation of the Lessee and the Lessee agrees to pay same to the PILOT Depository, together with the lesser of (aa) the maximum amount of interest permitted by law, and (bb) the greater of (i) interest thereon at the same rate per annum and compounded at the same frequency as is charged from time to time by the City with respect to the delinquent payment Real Estate Taxes, and (ii) a late payment fee of 5% of the amount of PILOT that was not paid when due and, for each month or part thereof that a payment is delinquent beyond the first month, an additional late payment fee of 1% per month on the original amount or portion thereof that was not paid when due that remains unpaid during such month or part thereof.

(iv) Nothing contained herein shall limit or impair the Lessee's right, to the extent permitted by law, to do the following:

- (1) to obtain reductions in the valuation of the Facility Realty; or
- (2) to apply for as-of-right benefits that would reduce Real Estate Taxes with respect to the Facility Realty (as if the Facility Realty were not exempt from

Real Estate Taxes); *provided, however*, that the foregoing shall not be construed to reduce PILOT payable under this Section 5.1 when the reduction arises from the eligibility and acceptance of the Project Improvements under the as-of-right program in question.

(h) Apportionment of Payments after Transfer.

(i) The Agency shall cause the appropriate officer or officers of the City to return the Improvements to the tax rolls as of the Cessation Date. During the City Tax Fiscal Year in which the Cessation Date occurs, the Lessee and/or other subsequent owner of the Improvements shall be responsible for paying the Real Estate Taxes due for the portion of such City Tax Fiscal Year that remains from and after the Cessation Date.

(ii) With respect to the semi-annual period of the City Tax Fiscal Year during which the Cessation Date occurs, the Agency shall cause the appropriate officer or officers of the City to apportion that part of PILOT previously remitted for such semi-annual period (if any), which is attributable to the period commencing on the Cessation Date and ending on the June 30 or December 31 following (as the case may be), as a credit against the Real Estate Taxes owed for such semi-annual period.

(i) Reduction or Withdrawal of Financial Assistance; Loss of Exemption.

(i) *Sublettings.* If any portion of the Facility Realty is occupied by any Person other than the Lessee or the Sublessee, for so long as such use and/or occupancy continues, Lessee shall pay or cause to be paid additional PILOT in an amount which, as prorated to such used and/or occupied space, shall equal Adjusted CRET.

(ii) *Events of Default.* Upon the occurrence of an Event of Default, including but not limited to a PILOT Payment Default, the Agency may increase PILOT (without notice other than the prior notice required for certain Events of Default) in an amount equal to Adjusted CRET as to the Improvements.

(iii) *Loss of Exemption.* Upon the occurrence of a Cessation Date, the Improvements shall be deemed automatically restored to the tax rolls, whether or not procedurally such restoration has in fact occurred, and the Lessee shall pay Real Estate Taxes with respect to the Improvements from and after such Cessation Date.

**Section 5.2. Sales Tax Exemption.**

(a) Any exemption from Sales Taxes resulting from or occasioned by the Agency's involvement with the Project shall be limited to purchases and leases of Exempt Property effected by (i) the Lessee or the Sublessee, as agent for the Agency pursuant to the Sales Tax Letter or (ii) by any Agent, as agent pursuant to a Sales Tax Agent Authorization Letter, it being the intent of the parties hereto that no operating expenses of the Lessee, the Sublessee and any Agent and no purchases of other personal property (other than Exempt Property) shall be subject to an exemption from Sales Taxes because of the Agency's title to or leasehold interest in the Facility or involvement with the Project Work.

(b) The Lessee, the Sublessee and any Agent shall include language which is substantially in the form of paragraph 6 of the Sales Tax Letter (through an attached rider or otherwise) in and as part of each contract, agreement, invoice, bill or purchase order entered into by the Lessee, the Sublessee or any Agent as agent for the Agency in connection with the Project. If the Lessee, the

Sublessee or any Agent shall fail to include, incorporate by reference or otherwise cause the contract, agreement, invoice, bill or purchase order to be, together with the vendor or contractor, subject to the above referenced language in substantially the form thereof, such contract, agreement, invoice, bill or purchase order, shall not be an undertaking on behalf of the Agency and shall not be entitled to any of the Benefits that the Agency can confer, and the Lessee shall not claim any sales or use tax benefits or exemptions with respect to any such contract, agreement, invoice, bill or purchase order, and the Lessee shall return to the Agency or pay at its direction any such benefits or exemptions so taken, together with interest on such amount at the annual rate of twelve percent (12%) per annum, compounded daily from the date of such taking.

(c) On the Commencement Date, the Agency shall make the Sales Tax Letter available to the Lessee in substantially the form of Exhibit H – “Form of Sales Tax Letter”. The Agency, at the sole cost and expense of the Lessee, shall also execute such other authorizations, letters and documents (and such amendments to the Sales Tax Letter) as may be reasonably necessary to permit the Lessee to obtain the intended benefits hereunder. Subject to the terms of this Agreement, it is intended that the aggregate scope of the sales and use tax benefits received by the Lessee pursuant to this Agreement and the Sales Tax Letter shall be limited in both duration and amount as follows:

(i) The Sales Tax Letter shall be dated the Commencement Date and shall be effective for a term commencing on its date and expiring upon the earliest of (A) the termination of this Agreement, (B) the Completion Date, (C) the completion of the Project Work as provided in Section 3.3, or (D) the termination of the Sales Tax Letter pursuant to Section 9.2.

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

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

(A) shall not be available for any items of personalty or payment of any costs other than the costs of the Exempt Property,

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

(C) shall not be available for any date after the Sales Tax Letter shall have been suspended as provided in Section 5.2(c)(ii), provided, however, that in the event the Lessee shall thereafter cure any defaults under this Agreement, or the Agency shall thereafter waive such suspension, as applicable, the sales and use tax exemption shall again be available from the date of such cure or such waiver,

(D) shall not be available for any item the acquisition or leasing of which would otherwise be exempt from Sales Tax absent the involvement by the Agency,

(E) shall not be available for any cost of utilities, cleaning service or supplies or other costs of operation, and

(F) shall not be available subsequent to the expiration of the Sales Tax Letter.

(iv) In the event that the Lessee and the Sublessee shall utilize the sales or use tax exemption authorization provided pursuant to the Sales Tax Letter in violation of the provisions of Section 5.2 (c)(iii), the Lessee shall promptly deliver notice of same to the Agency, and the Lessee shall, upon demand by the Agency, pay to or at the direction of the Agency a return of sales or use tax exemptions in an amount equal to all such unauthorized sales or use tax exemptions together with interest at the rate of twelve percent (12%) per annum compounded daily from the date and with respect to the dollar amount for which each such unauthorized sales or use tax exemption was availed of by the Lessee, the Sublessee or any Agent (as applicable).

(v) Upon request by the Agency with reasonable notice to the Lessee, the Lessee and the Sublessee shall make available at reasonable times to the Agency and/or the Independent Accountant all such books, records, contracts, agreements, invoices, bills or purchase orders of the Lessee or the Sublessee, and require all appropriate officers and employees of the Lessee or the Sublessee to respond to reasonable inquiries by the Agency and/or the Independent Accountant, as shall be necessary (y) to indicate in reasonable detail those costs for which the Lessee, the Sublessee or any Agent shall have utilized the Sales Tax Letter and the dates and amounts so utilized, and (z) to permit the Agency to determine any amounts owed by the Lessee or the Sublessee under this Section 5.2.

(d) Procedures for Appointing Agents. If the Lessee or the Sublessee desires to seek the appointment of a contractor, subcontractor or other party to act as the Agency's agent (an "Agent") for the purpose of effecting purchases exempt from sales or use tax pursuant to authority of the Sales Tax Letter it must complete the following steps:

(i) Section 874(9) of the Enabling Act and New York State Department of Taxation and Finance Form ST-60 "IDA Appointment of Project or Agent" ("Form ST-60") require that within thirty (30) days of the date that the Agency or its agent directly or indirectly appoint a project operator or other person or entity to act as agent of the Agency for purposes of extending a sales or use tax exemption to such person or entity, the Agency must file a completed Form ST-60 with respect to such person or entity. Accordingly, for each Agent, the Lessee or the Sublessee must complete and submit Form ST-60 to the Agency. The Agency requires Form ST-60 to be electronically submitted. Please download Form ST-60 via the internet by typing [http://www.tax.ny.gov/pdf/current\\_forms/st/st60\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st60_fill_in.pdf) into the address bar of your internet browser and saving the "fill-in" PDF of the form (using adobe acrobat). The downloaded form may then be completed electronically, saved and transmitted to the Agency by emailing it to [Compliance@nycedc.com](mailto:Compliance@nycedc.com).

(ii) The appointment of such Agent as an agent for the Agency shall be effective only upon execution by the Agency and the Agent of a Sales Tax Agent Authorization Letter in the form attached hereto as Exhibit I, following receipt of the completed Form ST-60 by the Agency. The determination whether or not to approve the appointment of an Agent shall be made by the Agency, in its sole discretion. If executed, a completed copy of the Sales Tax Agent Authorization Letter shall be sent to the Lessee within five (5) business days following such execution. The Lessee shall provide a copy of such executed Sales Tax Agent Authorization

Letter together with a copy of the Sales Tax Letter to the Agent within five (5) business days after receipt thereof by the Lessee.

(iii) The Lessee and the Sublessee shall ensure that each Agent shall observe and comply with the terms and conditions of each Sales Tax Agent Authorization Letter and the Sales Tax Letter, and upon the termination, expiration or cancellation of the Sales Tax Agent Authorization Letter or the Sales Tax Letter, the Lessee shall retrieve and promptly surrender the same to the Agency.

(iv) The Lessee and the Sublessee each acknowledges that the executed Form ST-60 shall not serve as a sales or use tax exemption certificate or document. No agent or project operator may tender a copy of the executed Form ST-60 to any person required to collect sales tax as a basis to make such purchases exempt from tax. No such person required to collect sales or use taxes may accept the executed Form ST-60 in lieu of collecting any tax required to be collected. THE CIVIL AND CRIMINAL PENALTIES FOR MISUSE OF A COPY OF FORM ST-60 AS AN EXEMPTION CERTIFICATE OR DOCUMENT OR FOR FAILURE TO PAY OR COLLECT TAX SHALL BE AS PROVIDED IN THE TAX LAW. IN ADDITION, THE USE BY AN AGENT, PROJECT OPERATOR, OR OTHER PERSON OR ENTITY OF SUCH FORM ST-60 AS AN EXEMPTION CERTIFICATE OR DOCUMENT SHALL BE DEEMED TO BE, UNDER ARTICLES TWENTY EIGHT AND THIRTY SEVEN OF THE TAX LAW, THE ISSUANCE OF A FALSE OR FRAUDULENT EXEMPTION CERTIFICATE OR DOCUMENT WITH THE INTENT TO EVADE TAX.

(e) Reference is made to Section 8.16(c) pursuant to which the Lessee has agreed to file (y) Form ST-340 (or any successor or additional mandated form) with regard to use of the each Sales Tax Agent Authorization Letter and the Sales Tax Letter, and (z) a completed Sales Tax Exemption Report.

(f) No later than August 1<sup>st</sup> of each year, the Lessee shall file with the Agency a completed Sales Tax Registry which accounts for all Sales Tax Savings realized by the Lessee, the Sublessee and each Agent during the prior annual period ending on June 30<sup>th</sup> (or such shorter period beginning on the Commencement Date and ending on the preceding June 30th), unless the Termination Date occurred prior to such June 30th. Within ten (10) days after the Termination Date, the Lessee shall file with the Agency a completed Sales Tax Registry which accounts for all Sales Tax Savings realized by the Lessee, the Sublessee and each Agent during the period from preceding July 1st to the Termination Date.

(g) Special Provisions Relating to State Sales Tax Savings. The Lessee and the Sublessee agree to comply, and to cause each Agent to comply, with the obligations, terms and conditions of Section 875(1) and (3) of the General Municipal Law attached hereto as Exhibit J, as the same may be amended from time to time (the "Special Provisions"). In the event of a conflict between the other provisions of this Agreement and the Special Provisions, the Special Provisions shall control.

**Section 5.3. Mortgage Recording Tax Deferral.**

(a) For purposes of this Section 5.3, the following terms shall have the meanings specified below:

**Exempt Mortgage** shall mean a Mortgage the recording of which is exempt from Mortgage Recording Taxes by reason of the Agency being a mortgagor thereunder.

**Gap Mortgage** shall mean, upon any refinancing of the outstanding principal balance of the indebtedness secured by an existing Exempt Mortgage, the separate mortgage that will initially secure the New Money.

**Modified Exempt Mortgage** shall mean an Exempt Mortgage as assigned, modified, extended, consolidated and/or otherwise amended

**Mortgage Recording Taxes** shall mean those taxes imposed by the City and the State upon the recording of mortgages against real property in the City.

**New Money** shall mean, upon any refinancing of the outstanding principal balance of the indebtedness secured by an existing Exempt Mortgage, any additional loan proceeds that may be advanced as part of such mortgage refinancing.

**Non-Exempt Principal** shall mean that portion of the indebtedness secured by an existing Exempt Mortgage that may be outstanding on the Expiration Date (as may be reasonably calculated by the Agency at a given point in time) or on any earlier termination of this Agreement, as the context requires.

**NPV** shall mean a net-present-value calculation of an amount due at a future date using such discount rate as may be required by the Agency from time to time.

**NPV-PILOMRT** shall mean the net-present-value calculation of a PILOMRT due at the Expiration Date using such discount rate as may be required by the Agency from time to time.

**PILOMRT** shall mean payment(s) in lieu of mortgage recording taxes as such payments are calculated using the mortgage recording tax rate in effect at time of payment.

(b) The Lessee acknowledges that the Agency has deferred the payment of Mortgage Recording Taxes on each Exempt Mortgage for a term, such term to commence on the date of recording of such Exempt Mortgage and to end on the earliest to occur of (i) the Expiration Date, (ii) the Termination Date, (iii) the maturity or sooner termination of such Exempt Mortgage, or (iv) an Event of Default.

(c) The Lessee acknowledges and agrees that the Agency is not obligated to defer the payment of Mortgage Recording Taxes for the recording of any mortgage other than an Exempt Mortgage; nor is the Agency obligated to defer the payment of Mortgage Recording Taxes on any extension, modification or other amendment to, or any assignment, consolidation or restatement of, an Exempt Mortgage.

(d) The Agency agrees that if, in connection with the refinancing of an Exempt Mortgage, the Lessee (i) causes the mortgagee of the Exempt Mortgage to assign the Exempt Mortgage to a new mortgagee, and/or (ii) causes the Exempt Mortgage to be modified, extended, consolidated or



otherwise amended, the Agency will not object to any resulting continuation of the deferral of the Mortgage Recording Taxes originally applicable to the Exempt Mortgage; *provided, however, that* the following conditions are satisfied: (aa) the Agency is made a party to the Modified Exempt Mortgage; and (bb) the Modified Exempt Mortgage has provisions reasonably acceptable to the Agency; and (cc) a Gap Mortgage is concurrently delivered to secure New Money, if any; and (dd) if applicable, at the time the refinancing is closed and the Modified Exempt Mortgage is executed and delivered, the Lessee shall make the following payments to NYCDOF:

(x) Mortgage Recording Taxes with respect to any Gap Mortgage; and

(y) NPV-PILOMRT with respect to any Non-Exempt Principal less the amount of any principal for which Mortgage Recording Taxes and/or PILOMRT and/or NPV-PILOMRT have already been paid or are being concurrently paid.

(e) If this Agreement terminates prior to the Expiration Date and, as a result there is Non-Exempt Principal for which Mortgage Recording Taxes, PILOMRT, NPV-PILOMRT and/or a payment under Section 5.4 has not been paid, the Lessee shall either pay PILOMRT with respect to such Non-Exempt Principal or deliver in-lieu thereof a satisfaction of the Exempt Mortgage to the Agency.

(f) The Lessee agrees that, notwithstanding delivery by the Lessee of a satisfaction of an Exempt Mortgage on the Expiration Date or on any earlier date when this Agreement may be terminated, or evidence of any reduction in the anticipated amount of Non-Exempt Principal outstanding as of the Expiration Date, the Agency shall not be obligated to refund to the Lessee any amounts of PILOMRT or NPV-PILOMRT previously paid.

(g) After the Commencement Date, the Lessee intends to enter into one or more Exempt Mortgages with respect to the Project which Exempt Mortgages shall be in a form satisfactory to the Agency and shall contain provisions substantially in the form set forth on Exhibit M attached hereto; provided, however, that (i) such Exempt Mortgages must be entered into by the Agency and the Lessee within five (5) years of the Commencement Date, and (ii) the aggregate principal amount of the Exempt Mortgages shall not exceed \$60,000,000. Prior to the execution and delivery of such Mortgages, the Lessee shall deliver to the Agency a certificate executed by an Authorized Representative of the Lessee certifying, as of the date of such certificate, the amount of Project costs incurred and the amount of Project costs to be incurred in connection with the Facility, together with budgets and cost breakdowns or other similar evidence to support such certification. To the extent permitted by law, the Agency shall use good faith efforts to provide documentation in order to exempt such Mortgages from mortgage recording taxes; provided that the Agency makes no representation as to the future availability of such exemption and the Lessee hereby releases the Agency from any liability in the event that such exemption is not realized.

**Section 5.4. Recapture of Public Benefits.** It is understood and agreed by the parties to this Agreement that the Agency is entering into this Agreement in order to provide financial assistance to the Lessee for the Project and to accomplish the public purposes of the Act. In consideration therefor, the Lessee hereby agrees as follows:

(a) For purposes of this Section 5.4, the following terms shall have the meanings specified below:

**Benefits** shall mean, collectively:

(i) all real estate tax benefits that have accrued to the benefit of the Lessee during such time as the Agency had a leasehold or controlling interest in the Facility Realty, such tax benefits to be computed by subtracting PILOT paid from those payments that the Lessee would have paid during the term of this Agreement (i.e., Adjusted CRET) had the Agency not had a leasehold or controlling interest in the Facility Realty during such term; and

(ii) the Purchase Commitment; and

(iii) all miscellaneous benefits derived from the Agency's participation in the Straight-Lease Transaction contemplated by this Agreement, including any deferral from any applicable mortgage recording taxes, Sales Taxes, and filing and recording fees.

**Operations Commencement Date** shall mean the date on which the Agency receives from the Lessee in completed form the certificate of an Authorized Representative of the Lessee delivered to the Agency pursuant to Section 3.3(f).

**Recapture Event** shall mean any one of the following events:

(i) The Lessee shall have failed to complete, or caused to be completed, the Project Improvements by the Completion Date.

(ii) Except as permitted by written consent of the Agency pursuant to and in accordance with Section 8.20, the Lessee or the Sublessee shall have liquidated all or substantially all of its operating assets or shall have ceased all or substantially all of its operations.

(iii) The Lessee or the Sublessee shall have transferred all or substantially all of its employees to a location outside of the City.

(iv) The Facility has ceased to be the Approved Facility and/or the Lessee or the Sublessee shall have substantially changed the scope and nature of its operations at the Facility Realty.

(v) Except as permitted by written consent of the Agency pursuant to and in accordance with Section 8.20, the Lessee and/or the Sublessee shall have sold, leased or otherwise disposed of all or substantially all of the Facility Realty.

(vi) The Lessee or the Sublessee shall have subleased all or part of the Facility Realty in violation of Section 8.9.

(vii) The Lessee or the Sublessee shall have relocated all or substantially all of its operations at the Facility Realty to another site; provided, however, and notwithstanding the foregoing, such relocation shall not be a Recapture Event if (A) the Lessee and the Sublessee have relocated their operations at the Facility Realty and at least 90% of their employees employed at the Facility Realty prior to the relocation, to another site within the City, (B) the Lessee and the Sublessee maintains, for the remaining balance of the Recapture Period, an employment level equal to at least 90% of the number of employees employed by the Lessee and the Sublessee at the Facility Realty prior to relocation, and (C) the Lessee and/or the Sublessee shall satisfy such other additional conditions as the Agency may from time to time impose provided such additional conditions are reasonable and uniformly imposed, at the time, to other similar transactions under similar circumstances. There shall arise another Recapture Event upon

the failure of the Lessee and/or the Sublessee to satisfy continuously the foregoing requirements for the remaining balance of the Recapture Period. Upon the occurrence of such subsequent Recapture Event, the Agency shall have the right to demand payment of all amounts due under Section 5.4(b) or (c), and the calculation of interest pursuant to Section 5.4(c)(iii) shall assume that the subsequent Recapture Event replaces the original Recapture Event for purposes of that computation. The determination of the pre-relocation, 90%-employment level shall be done in a manner, and in respect of a date or period of time, that the Agency deems appropriate in its sole discretion. For purposes of this Section 5.4, individuals who are employed by each of the Lessee and the Sublessee shall not be counted twice.

Notwithstanding the foregoing, a Recapture Event shall not be deemed to have occurred if the Recapture Event:

(A) shall have arisen as a direct, immediate result of (x) force majeure as defined in Section 11.1, (y) a taking or condemnation by governmental authority of all or substantially all of the Facility Realty, or (z) the inability at law of the Lessee to rebuild, repair, restore or replace the Facility Realty after the occurrence of a Loss Event to substantially its condition prior to such Loss Event, which inability shall have arisen in good faith through no fault on the part of the Lessee, the Sublessee, or any Affiliate, or

(B) is deemed, in the sole discretion of the Agency, to be (y) minor in nature, or (z) a cause of undue hardship to the Lessee and/or the Sublessee were the Agency to recapture any Benefits.

**Recapture Period** shall mean the period of time commencing on the Commencement Date, and expiring on the date which is the tenth anniversary of the Operations Commencement Date.

(b) If there shall occur a Recapture Event during the Recapture Period, but such Recapture Event is prior to the Operations Commencement Date, the Lessee shall pay to the Agency as a return of Financial Assistance conferred by the Agency, the following amounts upon demand by the Agency: (i) all Benefits; and (ii) interest described in Section 5.4(c)(iii).

(c) If there shall occur a Recapture Event during the Recapture Period, but such Recapture Event occurs after the Operations Commencement Date, the Lessee shall pay to the Agency as a return of Financial Assistance conferred by the Agency, the following amounts (as applicable) upon demand by the Agency:

(i) If the Recapture Event occurs within the first six (6) years after the Operations Commencement Date, one hundred percent (100%) of the Benefits.

(ii) If the Recapture Event occurs within any month during any one of the seventh, eighth, ninth or tenth years after the Operations Commencement Date, X percent of the Benefits (where "X" is a percent equal to 100% less Y, and where "Y" equals the product of 1.666% and the number of months elapsed commencing with the first month of the seventh year through and including the month in which the Recapture Event occurs).

(iii) The principal of the Benefits to be recaptured, whether pursuant to clause (i) or (ii) above, shall bear interest at a rate equal to the lesser of (x) the maximum amount of interest permitted by law, and (y) the statutory judgment rate, compounded daily, commencing from the date that any amount of Benefit principal has accrued to the Lessee, through and

including the date such principal is repaid in full; such that (x) Benefit principal comprising mortgage recording taxes, or filing and recording fees, shall be deemed to have accrued to the Lessee on the Commencement Date, and (y) Benefit principal comprising real estate tax benefits shall be deemed to have accrued to the Lessee on each date upon which the Lessee shall make a payment of PILOT, and (z) Benefit principal comprising Sales Tax Savings shall be deemed to have accrued to the Lessee on each date upon which such Sales Tax Saving shall have been received by reason of the use by the Lessee of the Sales Tax Letter, provided, however, that if the Lessee cannot establish to the Agency's satisfaction the applicable date of receipt, the Agency shall deem the date of receipt (and therefore the date on which the Benefit principal accrued) to be the first day of the calendar year for which exemption was reported by the Lessee to the State Department of Taxation and Finance on Form ST-340, or, if the Lessee shall have failed to file Form ST-340, the Commencement Date. The "statutory judgment rate" shall be the statutory judgment rate in effect on the date of the Agency's demand.

(iv) Notwithstanding the foregoing, with respect to "State sales and use taxes" as such term is defined in subdivision 875(1) of Article 18-A of the General Municipal Law, the computation of the amount of State sales and use tax savings to be recaptured shall equal the greater of the amount determined pursuant to this Section 5.4 and the amount due to the State pursuant to the Special Provisions.

For purposes of this Section 5.4, demand for payment by the Agency shall be made in accordance with the notice requirements of this Agreement and the due date for payment shall be not less than seven (7) Business Days from the date of the notice.

(d) The Lessee shall furnish the Agency with written notification of any Recapture Event within ten (10) days of its occurrence and shall subsequently provide to the Agency in writing any additional information that the Agency may request.

(e) The provisions of this Section 5.4 shall survive the termination of this Agreement for any reason whatsoever, notwithstanding any provision of this Agreement to the contrary.

## ARTICLE VI

### DAMAGE, DESTRUCTION AND CONDEMNATION

**Section 6.1. Damage, Destruction and Condemnation.** In the event that at any time during the term of this Agreement the whole or part of the Facility shall be damaged or destroyed, or taken or condemned by a competent authority for any public use or purpose, or by agreement to which the Lessee and those authorized to exercise such right are parties, or if the temporary use of the Facility shall be so taken by condemnation or agreement (a "Loss Event"):

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

(ii) there shall be no abatement, postponement or reduction in the Rental Payments payable by the Lessee under this Agreement or any other Project Document to which it is a party, and the Lessee hereby waives the provisions of Section 227 of the New York Real Property Law or any law of like import now or hereafter in effect, and

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

### **Section 6.2. Loss Proceeds.**

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

(b) The Lessee shall be entitled to the Net Proceeds of any insurance proceeds or condemnation award, compensation or damages attributable to the Lessee's Property, provided that nothing contained in this Agreement shall be deemed to modify the obligations of the Lessee pursuant to any Mortgage with respect to property insurance proceeds and condemnation awards. The obligations of the Lessee hereunder shall be independent of any such other obligations relating to insurance proceeds and condemnation awards.

### **Section 6.3. Election to Rebuild or Terminate.**

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

(i) at its own cost and expense (except to the extent paid from the Net Proceeds), within one (1) year of the Loss Event, promptly and diligently rebuild, replace, repair or restore the Facility to substantially its condition immediately prior to the Loss Event, or to a condition of at least equivalent value, operating efficiency and function, regardless of whether or not the Net Proceeds derived from the Loss Event shall be sufficient to pay the cost thereof, and the Lessee shall not by reason of payment of any such excess costs be entitled to any reimbursement from the Agency, or

(ii) exercise its option to terminate this Agreement as provided in Section 10.1;

provided that if all or substantially all of the Facility shall be taken or condemned, or if the taking or condemnation renders the Facility unsuitable for use by the Lessee or the Sublessee as contemplated hereby, the Lessee shall exercise its option to terminate this Agreement as provided in Section 10.1.

(b) As soon as practicable but no later than ninety (90) days after the occurrence of the Loss Event, the Lessee shall advise the Agency in writing of the action to be taken by the Lessee under this Section 6.3, a failure to advise the Agency timely being deemed an election in favor of Section 6.3(a)(ii).

**Section 6.4. Effect of Election to Build.**

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

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

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

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

(iv) restore the Facility to substantially its condition immediately prior to the Loss Event, or to a condition of at least equivalent value, operating efficiency and function, and to a state and condition that will permit the Lessee and the Sublessee to use and operate the Facility as the Approved Facility that will qualify as a qualified "project" as defined in the Act, and

(v) be effected only if the Lessee shall have complied with Section 8.1(c).

(b) The date of completion of the rebuilding, replacement, repair or restoration of the Facility shall be evidenced to the Agency by a certificate of an Authorized Representative of the Lessee stating (i) the date of such completion, (ii) that all labor, services, machinery, equipment, materials and supplies used therefor and all costs and expenses in connection therewith have been paid for or arrangement for payment, reasonably satisfactory to the Agency, has been made (iii) that the Facility has been rebuilt, replaced, repaired or restored to substantially its condition immediately prior to the Loss Event, or to a condition of at least equivalent value, operating efficiency and function, (iv) that the Agency has a good and valid leasehold interest in all property constituting the Facility, and all property of the Facility is subject to the Company Lease, this Agreement and the Sublease Agreement, subject to Permitted Encumbrances, and (v) that the restored Facility is ready for occupancy, use and operation for its intended purposes. Notwithstanding the foregoing, such certificate may state (x) that it is given without prejudice to any rights against third parties by the Lessee or the Sublessee that exist at the date of such certificate or that may subsequently come into being, (y) that it is given only for the purposes of this Section and (z) that no Person other than the Agency may benefit therefrom.

(c) The certificate delivered pursuant to Section 6.4(b) shall be accompanied by (i) a certificate of occupancy (either temporary or permanent, provided that if it is a temporary certificate of

occupancy, the Lessee will proceed with due diligence to obtain a permanent certificate of occupancy and obtain renewals of such temporary certificate of occupancy as needed), if required, and any and all permissions, licenses or consents required of governmental authorities for the occupancy, operation and use of the Facility for the purposes contemplated by this Agreement; (ii) a certificate of an Authorized Representative of the Lessee that all costs of rebuilding, repair, restoration and reconstruction of the Facility have been paid in full, together with releases of mechanics' liens by all contractors and materialmen who supplied work, labor, services, materials or supplies in connection with the rebuilding, repair, restoration and reconstruction of the Facility (or, to the extent that any such costs shall be the subject of a bona fide dispute, evidence to the Agency that such costs have been appropriately bonded or that the Lessee shall have posted a surety or security at least equal to the amount of such costs); and (iii) a search prepared by a title company, or other evidence satisfactory to the Agency, indicating that there has not been filed with respect to the Facility any mechanic's, materialmen's or any other lien in connection with the rebuilding, replacement, repair and restoration of the Facility and that there exist no encumbrances or those encumbrances consented to by the Agency.

## ARTICLE VII

### COVENANT OF THE AGENCY

**Section 7.1. Quiet Enjoyment.** The Agency covenants and agrees that, subject to the terms and provisions of the Permitted Encumbrances (and any other impairments of title whether or not appearing on the title insurance policy referred to in Section 3.8), so long as the Lessee shall pay the Rental Payments payable by it under this Agreement and shall duly observe all the covenants, stipulations and agreements herein contained obligatory upon it and an Event of Default shall not exist hereunder, the Agency shall take no action to disturb the peaceful, quiet and undisputed possession of the Facility by the Lessee under this Agreement, and the Agency (at the sole cost and expense of the Lessee) shall from time to time take all necessary action to that end.



## ARTICLE VIII

### COVENANTS OF THE LESSEE

#### Section 8.1. Insurance.

(a) Definitions. For purposes of this Section 8.1, the following terms shall have the meanings specified below:

**Certificate** means an ACORD certificate evidencing insurance.

**CGL** means commercial general liability insurance.

**CM** means a construction manager providing construction management services in connection with any Construction.

**Contractor(s)** means, individually or collectively, a contractor or subcontractor providing materials and/or labor and/or other services in connection with any Construction, but not including a GC, CM or any architect or engineer providing professional services.

**Construction** means any construction, reconstruction, restoration, renovation, alteration and/or repair on, in, at or about the Facility Realty, including the Project Work or any other construction, reconstruction, restoration, alteration and/or repair required under this Agreement in connection with the Facility.

**GC** means any general contractor providing general contracting services in connection with any Construction.

**Insured(s)** means, collectively or individually, the Lessee and the Sublessee.

**Insurer** means any entity writing issuing a Policy.

**ISO** means the Insurance Services Office or its successor.

**ISO Form CG-0001** means the CGL form published by ISO at the Commencement Date.

**Policy(ies)** means, collectively or individually, the policies required to be obtained and maintained pursuant to Section 8.1(b) and (c).

**SIR** means self-insured retention.

**U/E** means Umbrella or Excess Liability insurance.

**Workers' Compensation** means Workers' Compensation, disability and employer liability insurance.

(b) Required Insurance. Throughout the term of this Agreement, except during periods of Construction, each Insured shall obtain and maintain for itself as a primary insured the following insurance:

(i) CGL with \$1,000,000 minimum per occurrence and \$2,000,000 minimum in the aggregate, per-location aggregate, and on a per occurrence basis. This Policy shall contain coverage for contractual liability, premises operations, and products and completed operations.

(ii) U/E with \$4,000,000 minimum per occurrence on terms consistent with CGL. The excess coverage provided under U/E shall be incremental to the CGL to achieve minimum required coverage of \$5,000,000 per occurrence; such incremental coverage must also apply to auto liability (when such coverage applies; see Section 8.1(b)(iii)), whether auto liability coverage is provided by endorsement to the Insured's CGL or by a stand-alone policy.

(iii) Auto liability insurance with \$1,000,000 combined single limit and \$1,000,000 for uninsured or under-insured vehicles. If neither of the Insureds owns any vehicles, each shall obtain auto liability insurance in the foregoing amounts for hired and non-owned vehicles. Notwithstanding, in the event that the Authorized Representatives for the Lessee and the Sublessee delivers certificates to the Agency certifying that neither owns, hires, rents or uses a vehicle of any sort, the Agency shall deem such certifications to satisfy the requirements of this subsection "iii."

(iv) Workers Compensation satisfying State statutory limits. Coverage for employer liability shall be in respect of any work or operations in, on or about the Facility Realty.

(c) Required Insurance During Periods of Construction. In connection with any Construction and throughout any period of such Construction, the Lessee shall cause the following insurance requirements to be satisfied:

(i) Each Insured shall obtain and maintain for itself Policies in accordance with all requirements set forth in Section 8.1(b).

(ii) Any GC or CM shall obtain and maintain for itself as a primary insured the following Policies:

(A) CGL and U/E in accordance with the requirements in Section 8.1(b), subject to the following modifications: (x) coverage shall be in an aggregate minimum amount of \$10,000,000 per project aggregate, and (y) completed operations coverage shall extend (or be extended) for an additional five (5) years after completion of the Construction as such completion is evidenced by delivery, pursuant to Sections 3.3(f) and 8.14(g), of a Project Completion Certificate; *provided, however,* that for purposes of delivery under this paragraph "A", neither a certificate of occupancy nor a temporary certificate of occupancy or an amended certificate of occupancy or a letter of no objection need be attached to the Project Completion Certificate;

(B) Auto liability insurance in accordance with the requirements in Section 8.1(b); and

(C) Workers' Compensation in accordance with the requirements in Section 8.1(b).

(iii) Notwithstanding preceding subsections "i" and "ii", during Construction aggregate minimum coverage in the amount of \$15,000,000 (combined CGL and U/E as required

by Sections 8.1(b) and 8.1(c)) may be achieved by any combination of coverage amounts among the Insureds and the GC or CM.

(iv) Each Contractor shall obtain and maintain for itself as a primary insured the following insurance:

(A) CGL and U/E in accordance with the requirements in Section 8.1(b) except that, in addition, completed operations coverage shall extend (or be extended) for an additional five (5) years after completion of the Construction as such completion is evidenced by delivery, pursuant to Sections 3.3(f) and 8.14(g), of a Project Completion Certificate; *provided, however*, that for purposes of this paragraph A only, the delivered Project Completion Certificate need not have attached to it a certificate of occupancy or a temporary certificate of occupancy or an amended certificate of occupancy or a letter of no objection;

(B) Auto Liability insurance in accordance with the requirements in Section 8.1(b); and

(C) Workers' Compensation in accordance with the requirements in Section 8.1(b).

(d) Required Policy Attributes. Except as the Agency shall expressly otherwise agree in writing in its sole and absolute discretion:

(i) The Lessee shall cause each Policy (other than Worker's Compensation insurance and auto liability insurance) to name the Agency as an additional insured on a primary and non-contributory basis as more particularly required in Section 8.1(f)(i).

(ii) No Policy shall have a deductible.

(iii) CGL shall not be subject to SIR.

(iv) CGL and Auto Liability shall be written on, respectively, ISO Form CG-0001 and ISO Form CA-0001, or on such other equivalent forms as same may be reasonably acceptable to the Agency but only if the substitute form being proposed as equivalent is provided to the Agency sixty (60) days prior to the intended effective date.

(v) The Lessee acknowledges that the Agency is materially relying upon the content of ISO Form CG-0001 (or its equivalent if applicable) to implement the Agency's insurance requirements under this Section 8.1; accordingly, the Lessee agrees that non-standard exclusions and other modifications to ISO Form CG-0001 (or to its equivalent if applicable) are prohibited under the terms and conditions of this Section 8.1. By way of example and not limitation, no Policy delivered hereunder shall limit (whether by exception, exclusion, endorsement, script or other modification) any of the following coverage attributes:

(A) contractual liability coverage insuring the contractual obligations of the Insureds;

(B) the right of the Insureds to name additional insureds including the Agency;

(C) the applicability of CGL coverage to the Agency as an additional insured in respect of liability arising out of any of the following claims: (x) claims against the Agency by employees of an Insured, or (y) claims against the Agency by any GC, CM, Contractor, architect or engineer or by the employees of any of the foregoing, or (z) claims against the Agency arising out of any work performed by a GC, CM, Contractor, architect or engineer.

(vi) U/E shall follow the form of CGL except that U/E may be broader.

(vii) The Policies for CGL and U/E shall each provide primary insurance and the issuing Insurer shall not have a right of contribution from any other insurance policy insuring the Agency.

(viii) In each Policy, the Insurer shall waive, as against any Person insured under such Policy including any additional insured, the following: (x) any right of subrogation, (y) any right to set-off or counterclaim against liability incurred by a primary insured or any additional insured, and (z) any other deduction, whether by attachment or otherwise, in respect of any liability incurred by any primary insured or additional insured.

(ix) The Agency shall not be liable for any insurance premium, commission or assessment under or in connection with any Policy.

(e) Required Insurer Attributes. All Policies must be issued by Insurers satisfying the following requirements:

(i) Insurers shall have a minimum AM Best rating of A minus.

(ii) Each Insurer must be an authorized insurer in accordance with Section 107(a) of the New York State Insurance Law.

(iii) Insurers must be admitted in the State; provided, however, that if an Insured requests the Agency to accept a non-admitted Insurer, and if the Agency reasonably determines that for the kind of operations performed by the Insured an admitted Insurer is commercially unavailable to issue a Policy or is non-existent, then the Agency shall provide its written consent to a non-admitted Insurer. For purposes of this paragraph, an "admitted" Insurer means that the Insurer's rates and forms have been approved by the State Insurance Department and that the Insurer's obligations are entitled to be insured by the State's insurance guaranty fund.

(f) Required Evidence of Compliance. The Lessee shall deliver or cause to be delivered, throughout the term of this Agreement, evidence of all Policies required hereunder as set forth in this Section 8.1(f):

(i) All Policies. With respect to all Policies on which an Insured is to be a primary insured, the Insured shall deliver to the Agency a Certificate or Certificates evidencing all Policies required by this Section 8.1: (x) at the Commencement Date, (y) prior to the expiration or sooner termination of Policies, and (z) prior to the commencement of any Construction. If the Certificate in question evidences CGL, such Certificate shall name the Agency as an additional insured in the following manner:

*New York City Industrial Development Agency is an additional insured on a primary and non-contributory basis for both CGL and*

*Umbrella/Excess. The referenced CGL is written on ISO Form CG-0001 without modification to the contractual liability or waiver-of-subrogation provisions therein, covering the following premises: 2 St. Ann's Avenue, in Bronx, New York, constituting part of Lot 1 in Block 2543 and part of Lot 62 in Block 2260 in the County of Bronx, City and State of New York;*

(ii) CGL. With respect to CGL on which an Insured is to be a primary insured, such Insured shall additionally deliver to the Agency the following:

(A) Prior to the Commencement Date the Insured shall deliver to the Agency the declarations page and the schedule of forms and endorsements pertinent thereto.

(B) Upon the expiration or sooner termination of any CGL, the Insured shall deliver to the Agency a declarations page and schedule of forms and endorsements pertinent to the new or replacement CGL.

(C) Prior to the commencement of any Construction, the Insured shall deliver to the Agency a declarations page and a schedule of forms and endorsements pertinent to the CGL under which the Insured is to be the primary insured during the period of such Construction.

(iii) Insurance to be obtained by GCs and CMs. Prior to the commencement of any Construction that entails the services of a GC or CM, the Lessee shall provide to the Agency, in a form satisfactory to the Agency, evidence that the GC or CM (as the case may be) has obtained the Policies that it is required to obtain and maintain in accordance with Section 8.1(c).

(iv) Insurance to be obtained by Contractors. In connection with any Construction, the Lessee shall, upon the written request of the Agency, cause any or all Contractors to provide evidence satisfactory to the Agency, that such Contractors have obtained and maintain the Policies that they are required to obtain and maintain in accordance with the requirements of Section 8.1(c).

(g) Required Notices. (i) The Lessee shall immediately give the Agency notice of each occurrence that is reasonably probable to give rise to a claim under the insurance required to be maintained by this Section 8.1. (ii) The Lessee shall in writing immediately notify the Agency of the cancellation of any Policy. (iii) In the event that any of the Policies pertain to and cover properties (other than the Facility Realty that are not disclosed in Sub-Section (h)(i) of this Section 8.1, the Lessee shall in writing notify the Agency of such additional properties.

(h) Miscellaneous.

(i) The Lessee represents that the Policies pertain to and cover Facility Realty and the following additional properties: 23-30 Borden Avenue, Long Island City, New York 11101, 25-50 Borden Avenue, Long Island City, New York 11101, 75 Broad Street, New York, New York 10004, 53-01 11<sup>th</sup> Street, Long Island City, New York 11101, 38-20 Review Avenue, Long Island City, New York 11101, 4233-4235 Richmond Street, Philadelphia, Pennsylvania 19137, 101 Commerce Way, Hackensack, New Jersey 07601, 53-01 Vernon Boulevard, Long Island City, New York 11101, 23-23 Borden Avenue, Long Island City, New

York 11101, 53-02 11<sup>th</sup> Street, Long Island City, New York 11101, Arch Street, aka 46-26 Carne Streets, Long Island City, New York 11101, 44 Hall Street, Brooklyn, New York 11205.

(ii) In the event that any of the Policies pertain to and cover properties (other than the Facility Realty) that are not set forth in subsection "i" preceding, the Agency shall have the right to demand higher Policy amounts therefor provided that the incremental coverage demanded by the Agency is reasonably related to such additional or substitute properties and the operations carried out or to be carried out thereon.

(iii) If, in accordance with the terms and conditions of this Section 8.1, an Insured is required to obtain the Agency's consent, the Lessee shall request such consent in a writing provided to the Agency at least thirty (30) days in advance of the commencement of the effective period (or other event) to which the consent pertains.

(iv) Throughout the term of this Agreement, delivery by an Insured of a Certificate evidencing auto liability insurance for hired and non-owned vehicles shall, unless otherwise stated by the Lessee to the contrary, constitute a representation and warranty from the Insured to the Agency that the Insured does not own vehicles.

(v) An Insured shall neither do nor omit to do any act, nor shall it suffer any act to be done, whereby any Policy would or might be terminated, suspended or impaired.

(vi) If, throughout the term of this Agreement, insurance industry standards applicable to properties similar to the Facility Realty and/or operations similar to the operations of the Lessee and/or the Sublessee, materially change; and if, as a consequence of such change, the requirements set forth in this Section 8.1 become inadequate in the reasonable judgment of the Agency for the purpose of protecting the Agency against third-party claims, then the Agency shall have the right to supplement and/or otherwise modify such requirements, provided, however, that such supplements or modifications shall be commercially reasonable.

(vii) Nothing contained in this Agreement shall be deemed to modify the obligations of the Lessee pursuant to any Mortgage with respect to property insurance or the application of proceeds thereof and said Mortgage. The obligations of the Lessee hereunder shall be independent of any such other obligations relating to insurance.

(viii) The Agency, in its sole discretion and without obtaining the consent of any Mortgagee or any Guarantor or any other party to the transactions contemplated by this Agreement, may waive particular requirements under this Section 8.1. Notwithstanding, the Lessee shall be estopped from claiming that the Agency has made any such waiver unless the Agency has executed and delivered a written instrument for the purpose of effectuating such waiver.

(ix) THE AGENCY DOES NOT REPRESENT THAT THE INSURANCE REQUIRED IN THIS SECTION 8.1, WHETHER AS TO SCOPE OR COVERAGE OR LIMIT, IS ADEQUATE OR SUFFICIENT TO PROTECT THE INSURED AND THEIR OPERATIONS AGAINST CLAIMS AND LIABILITY.

**Section 8.2. Indemnity.**

(a) The Lessee shall at all times indemnify, defend, protect and hold the Agency, and any director, member, officer, employee, servant, agent (excluding for this purpose the Lessee, which is

not obligated hereby to indemnify its own employees, Affiliates or affiliated individuals) thereof and persons under the Agency's control or supervision, and the PILOT Depository (collectively, the "Indemnified Parties" and each an "Indemnified Party") harmless of, from and against any and all claims (whether in tort, contract or otherwise), taxes (of any kind and by whomsoever imposed), demands, penalties, fines, liabilities, lawsuits, actions, proceedings, settlements, costs and expenses, including attorney and consultant fees, investigation and laboratory fees, court costs, and litigation expenses (collectively, "Claims") of any kind for losses, damage, injury and liability (collectively, "Liability") of every kind and nature and however caused (except, with respect to any Indemnified Party, Liability arising from the gross negligence or willful misconduct of such Indemnified Party), arising during the period commencing on the Indemnification Commencement Date, and continuing throughout the term of this Agreement, arising upon, about, or in any way connected with the Facility, the Project, or any of the transactions with respect thereto, including:

- (i) the financing of the costs of the Facility or the Project,
  - (ii) the planning, design, acquisition, site preparation, Project Work, construction, renovation, equipping, installation or completion of the Project or any part thereof or the effecting of any work done in or about the Facility, or any defects (whether latent or patent) in the Facility,
  - (iii) the maintenance, repair, replacement, restoration, rebuilding, construction, renovation, upkeep, use, occupancy, ownership, leasing, subletting or operation of the Facility or any portion thereof,
  - (iv) the execution and delivery by an Indemnified Party, the Lessee, the Sublessee or any other Person of, or performance by an Indemnified Party, the Lessee or any other Person, as the case may be, of, any of their respective obligations under, this Agreement or any other Project Document, or other document or instrument delivered in connection herewith or therewith or the enforcement of any of the terms or provisions hereof or thereof or the transactions contemplated hereby or thereby,
  - (v) any damage or injury to the person or property of any Person in or on the premises of the Facility,
  - (vi) any imposition arising from, burden imposed by, violation of, or failure to comply with any Legal Requirement, including failure to comply with the requirements of the City's zoning resolution and related regulations, or
  - (vii) the presence, disposal, release, or threatened release of any Hazardous Materials that are on, from, or affecting the Facility; any personal injury (including wrongful death) or property damage (real or personal) arising out of or related to such Hazardous Materials; any lawsuit brought or threatened, settlement reached, or government order relating to such Hazardous Materials, and/or any violation of Legal Requirements, including demands of government authorities, or any policies or requirements of the Agency, which are based upon or in any way related to such Hazardous Materials.
- (b) The Lessee releases each Indemnified Party from, and agrees that no Indemnified Party shall be liable to the Lessee or its Affiliates for, any Claim or Liability arising from or incurred as a result of action taken or not taken by such Indemnified Party with respect to any of the matters set forth in Section 8.2(a) including any Claim or Liability arising from or incurred as a result of the negligence or

willful misconduct of such Indemnified Party, or at the direction of the Lessee, the Sublessee or any Guarantor with respect to any of such matters above referred to.

(c) An Indemnified Party shall promptly notify the Lessee in writing of any claim or action brought against such Indemnified Party in which indemnity may be sought against the Lessee pursuant to this Section 8.2; such notice shall be given in sufficient time to allow the Lessee to defend or participate in such claim or action, but the failure to give such notice in sufficient time shall not constitute a defense hereunder nor in any way impair the obligations of the Lessee under this Section 8.2.

(d) Anything to the contrary in this Agreement notwithstanding, the covenants of the Lessee contained in this Section 8.2 shall be in addition to any and all other obligations and liabilities that the Lessee may have to any Indemnified Party in any other agreement or at common law, and shall remain in full force and effect after the termination of this Agreement until the later of (i) the expiration of the period stated in the applicable statute of limitations during which a claim or cause of action may be brought and (ii) payment in full or the satisfaction of such claim or cause of action and of all expenses and charges incurred by the Indemnified Party relating to the enforcement of the provisions herein specified.

**Section 8.3. Compensation and Expenses of the Agency and Agency Administrative and Project Fees.**

(a) The Lessee shall pay the fees, costs and expenses of the Agency together with any fees and disbursements incurred by lawyers or other consultants in performing services for the Agency in connection with this Agreement or any other Project Document.

(b) On the Commencement Date, the Lessee shall pay to the Agency the following amounts: (i) the Initial Annual Administrative Fee, and (ii) the Project Fee.

(c) The Lessee further agrees to pay the Annual Administrative Fee to the Agency on each July 1 following the Commencement Date until the earlier of the Expiration Date or the Termination Date. In the event the Lessee shall fail to pay the Annual Administrative Fee on the date due, the Agency shall have no obligation to deliver notice of such failure to the Lessee.

**Section 8.4. Current Facility Personalty Description.** The Lessee covenants and agrees that throughout the term of this Agreement, including upon the completion of the Project or of any replacement, repair, restoration or reconstruction of the Facility pursuant to Article VI, it will cause Exhibit B – “Description of the Facility Personalty”, together with the “Description of the Facility Personalty” attached as part of the exhibits to the Sublease Agreement, to be an accurate and complete description of all current items of Facility Personalty. To this end, the Lessee covenants and agrees that (y) no item of Facility Personalty shall be substituted or replaced by a new item of machinery, equipment or other tangible personal property except pursuant to Section 3.6(a) or Article VI, and (z) no item of Facility Personalty shall be delivered and installed at the Facility Realty as part of the Facility, unless in each case such item of machinery, equipment or other item of tangible personal property shall be accurately and sufficiently described in Exhibit B — “Description of the Facility Personalty”, and in the “Description of the Facility Personalty” attached as part of the exhibits to the Sublease Agreement, and the Lessee shall from time to time prepare and deliver to the Agency supplements to such Appendices in compliance with the foregoing. Such supplements shall be executed and delivered by the appropriate parties.

**Section 8.5. Signage at Facility Site.** Upon commencement of the Project renovations and/or construction of the Project Improvements at the Facility (including the commencement of any demolition and/or excavation), the Lessee shall erect on the Facility site, at its own cost and



expense, within easy view of passing pedestrians and motorists, a large and readable sign with the following information upon it (hereinafter, the "Sign"):

*FINANCIAL ASSISTANCE PROVIDED  
THROUGH THE  
NEW YORK CITY INDUSTRIAL  
DEVELOPMENT AGENCY  
Mayor \_\_\_\_\_*

In addition, the Sign shall satisfy the following requirements: (x) format and appearance generally shall be as stipulated by the Agency in writing or electronically; (y) the minimum size of the Sign shall be four (4) feet by eight (8) feet; and (z) the Sign shall have no other imprint upon it other than that of the Agency. The Sign shall remain in place at the Facility until completion of the renovations and/or construction. The Lessee may erect other signs in addition to the Sign.

**Section 8.6. Environmental Matters.**

(a) On or before the Commencement Date, the Lessee shall provide to the Agency a letter from the Environmental Auditor addressed to the Agency, stating that the Agency may rely upon the Environmental Audit as if it was prepared for the Agency in the first instance.

(b) The Lessee shall not cause or permit the Facility or any part thereof to be used to generate, manufacture, refine, transport, treat, store, handle, dispose, transfer, produce or process Hazardous Materials, except in compliance with all applicable Legal Requirements, nor shall the Lessee cause or permit, as a result of any intentional or unintentional act or omission on the part of the Lessee or any occupant or user of the Facility, a release of Hazardous Materials onto the Facility or onto any other property.

(c) The Lessee shall comply with, and require and enforce compliance by, all occupants and users of the Facility with all applicable Legal Requirements pertaining to Hazardous Materials, whenever and by whomever triggered, and shall obtain and comply with, and ensure that all occupants and users of the Facility obtain and comply with, any and all approvals, registrations or permits required thereunder.

(d) The Lessee shall conduct and complete all investigations, studies, sampling, and testing, and all remedial, removal and other actions necessary to clean up and remove all Hazardous Materials, on, from, or affecting the Facility in accordance with all applicable Legal Requirements.

(e) The parties hereto agree that the reference in Section 2.2(o) to the Environmental Audit is not intended, and should not be deemed to intend, to modify, qualify, reduce or diminish the Lessee's obligations to carry out and perform all of the covenants stated throughout this Section 8.6 and in Section 8.2.

**Section 8.7. Employment Matters.**

(a) Except as is otherwise provided by collective bargaining contracts or agreements, new employment opportunities created as a result of the Project shall be listed with the New York State Department of Labor Community Services Division, and with the administrative entity of the service delivery area created by the Workforce Investment Act of 1998 (29 U.S.C. §2801) in which the Facility Realty is located. Except as is otherwise provided by collective bargaining contracts or agreements, the Lessee agrees, where practicable, to consider first, and cause each of its Affiliates (including the

Sublessee) at the Facility to consider first, persons eligible to participate in the Workforce Investment Act of 1998 (29 U.S.C. §2801) programs who shall be referred by administrative entities of service delivery areas created pursuant to such Act or by the Community Services Division of the New York State Department of Labor for such new employment opportunities.

(b) Upon the Agency's written request, the Lessee shall provide to the Agency any employment information in the possession of the Lessee or the Sublessee which is pertinent to the Lessee and the Sublessee and the employees of the Lessee and the Sublessee to enable the Agency and/or NYCEDC to comply with its reporting requirements required by City Charter §1301 and any other applicable laws, rules or regulations.

(c) The Lessee (on behalf of itself and the Sublessee) hereby authorizes any private or governmental entity, including The New York State Department of Labor ("DOL"), to release to the Agency and/or NYCEDC, and/or to the successors and assigns of either (collectively, the "Information Recipients"), any and all employment information under its control and pertinent to the Lessee or the Sublessee and the employees of the Lessee or of the Sublessee to enable the Agency and/or NYCEDC to comply with its reporting requirements required by City Charter §1301 and any other applicable laws, rules or regulations. Information released or provided to Information Recipients by DOL, or by any other governmental entity, or by any private entity, or by the Lessee or by the Sublessee, or any information previously released as provided by all or any of the foregoing parties (collectively, "Employment Information") may be disclosed by the Information Recipients in connection with the administration of the programs of the Agency, and/or NYCEDC, and/or the successors and assigns of either, and/or the City, and/or as may be necessary to comply with law; and, without limiting the foregoing, the Employment Information may be included in (x) reports prepared by the Information Recipients pursuant to City Charter §1301, (y) other reports required of the Agency, and (z) any other reports required by law. This authorization shall remain in effect throughout the term of this Agreement.

(d) Upon the request of the Agency, the Lessee shall cooperate with the Agency in the development of programs for the employment and/or training of members of minority groups in connection with performing work at the Facility.

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

#### **Section 8.8. Non-Discrimination.**

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

(b) The Lessee shall, in all solicitations or advertisements for employees placed by or on behalf of the Lessee or the Sublessee state that all qualified applicants will be considered for employment without regard to race, color, creed or national origin, age or sex.

(c) The Lessee shall furnish to the Agency all information required by the Agency pursuant to this Section and will cooperate with the Agency for the purposes of investigation to ascertain compliance with this Section.

**Section 8.9. Assignment or Sublease.**

(a) The Lessee shall not at any time (y) except as permitted by Section 8.20, assign or transfer this Agreement, or (z) sublet the whole or any part of the Facility except to Sublessee pursuant to the Sublease Agreement without (1) providing the Agency written notice of such intended use and/or occupancy before such use and/or occupancy actually occurs and (2) the prior written consent of the Agency (such consent to be requested by the Lessee of the Agency in the form prescribed by the Agency, and such consent of the Agency not to be unreasonably withheld or delayed except that such consent shall take into consideration the Agency's policies as in effect from time to time), and provided that:

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

(ii) except as otherwise consented to by the Agency, any assignee or transferee of the Lessee or the Sublessee in whole or substantially in whole of the Facility shall have assumed in writing (and shall have executed and delivered to the Agency an instrument in form for recording) and have agreed to keep and perform all of the terms of this Agreement and each other Project Document on the part of the Lessee to be kept and performed, shall be jointly and severally liable with the Lessee for the performance thereof, shall be subject to service of process in the State, and, if a corporation, shall be qualified to do business in the State;

(iii) any assignee or transferee of the Sublessee shall utilize the Facility as the Approved Facility and a qualified "project" within the meaning of the Act;

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

(v) with respect to any subletting in part of the Facility, no more than an aggregate of twenty percent (20%) of the Completed Improvements Rentable Square Footage shall be subleased by the Lessee or the Sublessee;

(vi) such sublease shall in no way diminish or impair the Lessee's obligation to carry the insurance required under Section 8.1 and the Lessee shall furnish written evidence satisfactory to the Agency that such insurance coverage shall in no manner be diminished or impaired by reason of such assignment, transfer or sublease;

(vii) any such assignee or transferee or sublessee shall deliver to the Agency the Required Disclosure Statement in form and substance satisfactory to the Agency, provided that if any modification to the form of such Required Disclosure Statement is not acceptable to the Agency acting in its sole discretion, then the Lessee shall be in default under this Agreement;

(viii) each such sublease shall contain such other provisions as the Agency may reasonably require; and

(ix) the Lessee shall furnish or cause to be furnished to the Agency a copy of any such assignment, transfer or sublease in substantially final form at least thirty (30) days prior to the date of execution thereof.

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

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

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

(e) The limitations in this Section 8.9 on assignment or transfer of this Agreement and subletting in whole or in part of the Facility shall have equal application to any assignment or transfer of the Sublease Agreement or sub-subletting in whole or in part of the Facility.

(f) For purposes of this Section 8.9, any license or other right of possession or occupancy granted by the Lessee or the Sublessee with respect to the Facility shall be deemed a sublease subject to the provisions of this Section 8.9.

**Section 8.10. Retention of Title to or of Interest in Facility; Grant of Easements; Release of Portions of Facility.**

(a) Neither the Lessee nor the Agency shall sell, assign, encumber (other than Permitted Encumbrances), convey or otherwise dispose of its respective title to or leasehold estate in the Facility, including the Improvements, or any part of the Facility or interest therein during the term of this Agreement, except as set forth in Sections 3.6, 3.9, Article VI, 8.9, 8.20 and 9.2 or in this Section, without the prior written consent of the other, and any purported disposition without such consent shall be void.

(b) The Lessee may, upon prior written notice to the Agency, so long as there exists no Event of Default hereunder, grant such rights of way or easements over, across, or under, the Facility Realty, or grant such permits or licenses in respect to the use thereof, free from the leasehold estate of the Company Lease and of this Agreement and of the Sublease Agreement as shall be necessary or convenient in the opinion of the Lessee for the operation or use of the Facility, or required by any utility company for its utility business, provided that, in each case, such rights of way, easements, permits or licenses shall not adversely affect the use or operation of the Facility as the Approved Facility. The Agency agrees, at the sole cost and expense of the Lessee, to execute and deliver any and all instruments necessary or appropriate to confirm and grant any such right of way or easement or any such permit or

license and to release the same from the leasehold estate of the Company Lease, of this Agreement and of the Sublease Agreement.

(c) So long as there exists no Event of Default hereunder, the Lessee may from time to time request in writing to the Agency the release of and removal from the leasehold estate of the Company Lease, of this Agreement and of the Sublease Agreement of any unimproved part of the Land (on which none of the Improvements, including the buildings, structures, major appurtenances, fixtures or other property comprising the Facility Realty, is situated) provided that such release and removal will not adversely affect the use or operation of the Facility as the Approved Facility. Upon any such request by the Lessee, the Agency shall, at the sole cost and expense of the Lessee, execute and deliver any and all instruments necessary or appropriate to so release and remove such unimproved Land from the leasehold estates of the Company Lease, of this Agreement and of the Sublease Agreement, subject to the following: (i) any liens, easements, encumbrances and reservations to which title to said property was subject on the Commencement Date, (ii) any liens, easements and encumbrances created at the request of the Lessee or the Sublessee or to the creation or suffering of which the Lessee or the Sublessee consented; (iii) any liens and encumbrances or reservations resulting from the failure of the Lessee or the Sublessee to perform or observe any of the agreements on its respective part contained in this Agreement or any other Project Document; (iv) Permitted Encumbrances (other than the liens of the Company Lease, of this Agreement and of the Sublease Agreement); and (v) any liens for taxes or assessments not then delinquent; provided, however, no such release shall be effected unless there shall be delivered to the Agency a certificate of an Authorized Representative of the Lessee, dated not more than sixty (60) days prior to the date of the release, stating that, in the opinion of the Person signing such certificate, the unimproved Land and the release thereof so proposed to be made is not needed for the operation of the Facility, will not adversely affect the use or operation of the Facility as the Approved Facility and will not destroy the means of ingress thereto and egress therefrom.

(d) No conveyance or release effected under the provisions of this Section 8.10 shall entitle the Lessee to any abatement or diminution of the Rental Payments payable under Section 4.3 or any other payments required to be made by the Lessee under this Agreement or any other Project Document to which it shall be a party.

#### **Section 8.11. Discharge of Liens.**

(a) If any lien, encumbrance or charge is filed or asserted (including any lien for the performance of any labor or services or the furnishing of materials), or any judgment, decree, order, levy or process of any court or governmental body is entered, made or issued or any claim (such liens, encumbrances, charges, judgments, decrees, orders, levies, processes and claims being herein collectively called "**Liens**"), whether or not valid, is made against the Facility or any part thereof or the interest therein of the Agency, the Lessee or the Sublessee or against any of the Rental Payments payable under the Company Lease, under this Agreement or under the Sublease Agreement or the interest of the Agency, the Lessee or the Sublessee under the Company Lease, under this Agreement or under the Sublease Agreement, other than Liens for Impositions not yet payable, Permitted Encumbrances, or Liens being contested as permitted by Section 8.11(b), the Lessee forthwith upon receipt of notice of the filing, assertion, entry or issuance of such Lien (regardless of the source of such notice) shall give written notice thereof to the Agency and take all action (including the payment of money and/or the securing of a bond) at its own cost and expense as may be necessary or appropriate to obtain the discharge in full thereof and to remove or nullify the basis therefor. Nothing contained in this Agreement shall be construed as constituting the express or implied consent to or permission of the Agency for the performance of any labor or services or the furnishing of any materials that would give rise to any Lien against the Agency's interest in the Facility.

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

**Section 8.12. Recording and Filing.** This Agreement, as originally executed, or a memorandum hereof, shall be recorded by the Lessee at its sole cost and expense in the appropriate office of the Register of The City of New York, or in such other office as may at the time be provided by law as the proper place for the recordation thereof.

**Section 8.13. No Further Encumbrances Permitted.** The Lessee shall not create, permit or suffer to exist any mortgage, encumbrance, lien, security interest, claim or charge against the Facility or any part thereof, or the interest of the Agency, the Lessee or the Sublessee in the Facility or the Company Lease, this Agreement or the Sublease Agreement, except for Permitted Encumbrances. Notwithstanding the foregoing, in no event shall the lien of any Mortgage include the rights of the Lessee under this Agreement or the Sublease Agreement or any rentals or other amounts paid or payable hereunder or thereunder, except for rentals directly related to the payment of amounts due under any Mortgage Notes.

**Section 8.14. Automatically Deliverable Documents.**

(a) The Lessee shall immediately notify the Agency of the occurrence of any Event of Default, or any event that with notice and/or lapse of time would constitute an Event of Default under any Project Document. Any notice required to be given pursuant to this subsection shall be signed by an Authorized Representative of the Lessee and set forth a description of the default and the steps, if any, being taken to cure said default. If no steps have been taken, the Lessee shall state this fact on the notice.

(b) The Lessee shall promptly provide written notice to the Agency if any representation or warranty made by the Lessee pursuant to Section 2.2(w) would, if made on any date during the term of the Agreement and deemed made as of such date, be false, misleading or incorrect in any material respect.

(c) Within five (5) Business Days after receipt from the Agency of any subtenant survey and questionnaire pertaining to the Facility, the Lessee shall complete and execute such survey and questionnaire and return the same to the Agency.

(d) The Lessee shall deliver all insurance-related documents required by Sections 8.1(f) and 8.1(g).

(e) Within 120 days after the close of each Fiscal Year during which action was taken by the Lessee pursuant to Section 3.5, the Lessee shall deliver written notice of the Additional Improvement(s) to the Agency.

(f) If a removal involving property having a value in the aggregate exceeding \$250,000 was taken by the Lessee pursuant to Section 3.6(a), the Lessee shall deliver written notice of such removal to the Agency within five (5) Business Days following such removal.

(g) Promptly following completion of the Project, but no later than five (5) Business Days following the receipt of a temporary or permanent certificate of occupancy with respect to the Facility, the Lessee shall deliver to the Agency the certificate as to Project completion in substantially the form set forth in Exhibit G – “Form of Project Completion Certificate”, together with all attachments required thereunder, and the original of the Sales Tax letter and all copies thereof.

(h) Prior to the appointment of an Agent in connection with the use of the Sales Tax Agent Authorization Letter as provided in Section 5.2(d), the Lessee shall submit Form ST-60 electronically to the Agency as provided therein.

(i) If the Lessee shall request the consent of the Agency under Section 8.9 to any sublease in whole or in part of the Facility, or to any assignment or transfer of this Agreement, the Lessee shall submit such request to the Agency in the form prescribed by the Agency.

(j) No later than August 1<sup>st</sup> of each year, the Lessee shall file with the Agency a completed Sales Tax Registry which accounts for all Sales Tax Savings realized by the Lessee, the Sublessee and each Agent during the prior annual ending on the preceding June 30th (or such shorter period beginning on the Commencement Date and ending on the preceding June 30th).

(k) Within 10 days after the Termination Date, the Lessee shall (x) file with the Agency a completed Sales Tax Registry which accounts for all Sales Tax Savings realized by the Lessee, the Sublessee and each Agent during the period from the preceding July 1<sup>st</sup> to the Termination Date; and (y) deliver and surrender to the Agency the original of the Sales Tax Letter, each Sales Tax Agent Authorization Letter and all copies thereof for cancellation.

**Section 8.15. Requested Documents.** Upon request of the Agency, the Lessee shall deliver or cause to be delivered to the Agency within five (5) Business Days of the date so requested:

(a) a copy of the most recent annual audited financial statements of the Lessee and of the Sublessee and of its subsidiaries, if any (including balance sheets as of the end of the Fiscal Year and the related statement of revenues, expenses and changes in fund balances and, if applicable, income, earnings, and changes in financial position) for such Fiscal Year, prepared in accordance with GAAP and certified by an Independent Accountant;

(b) a certificate of an Authorized Representative of the Lessee that the insurance the Lessee maintains complies with the provisions of Section 8.1, that such insurance has been in full force and effect at all times during the preceding Fiscal Year, and that duplicate copies of all policies or certificates thereof have been filed with the Agency and are in full force and effect and the evidence required by Section 8.1(f);

(c) copies of any (x) bills, invoices or other evidences of cost as shall have been incurred in connection with the Project Work, and (y) permits, authorizations and licenses from appropriate authorities relative to the occupancy, operation and use of the Facility;

(d) if no action was taken by the Lessee pursuant to Section 3.5 or no action involving the removal of property having a value in the aggregate exceeding \$250,000 was taken by the Lessee pursuant to Section 3.6(a), a certificate of an Authorized Representative of the Lessee certifying to

the fact that no such action was taken by the Lessee pursuant to such Section 3.5 or 3.6(a) during such preceding Fiscal Year;

(e) if action was taken by the Lessee pursuant to Section 3.5 or involving the removal of property having a value in the aggregate exceeding \$250,000 pursuant to Section 3.6(a), a written report of an Authorized Representative of the Lessee summarizing the action taken by the Lessee and stating that, in his/her opinion, such action complied with the provisions of Section 3.5 or 3.6(a), as applicable.

(f) a certificate of an Authorized Representative of the Lessee as to whether or not, as of the close of the immediately preceding Fiscal Year, and at all times during such Fiscal Year, the Lessee was in compliance with all the provisions that relate to the Lessee in this Agreement and in any other Project Document to which it shall be a party, and if such Authorized Representative shall have obtained knowledge of any default in such compliance or notice of such default, he shall disclose in such certificate such default or defaults or notice thereof and the nature thereof, whether or not the same shall constitute an Event of Default hereunder, and any action proposed to be taken by the Lessee with respect thereto;

(g) upon twenty (20) days prior request by the Agency, a certificate of an Authorized Representative of the Lessee either stating that to the knowledge of such Authorized Representative after due inquiry there is no default under or breach of any of the terms hereof that, with the passage of time or the giving of notice or both, would constitute an Event of Default hereunder, exists or specifying each such default or breach of which such Authorized Representative has knowledge;

(h) employment information requested by the Agency pursuant to Section 8.7(b);  
and

(i) information regarding non-discrimination requested by the Agency pursuant to Section 8.8.

**Section 8.16. Periodic Reporting Information for the Agency.**

(a) The Lessee shall not assert as a defense to any failure of the Lessee to deliver to the Agency any reports specified in this Section 8.16 that the Lessee shall not have timely received any of the forms from or on behalf of the Agency unless, (i) the Lessee shall have requested in writing such form from the Agency not more than thirty (30) days nor less than fifteen (15) days prior to the date due, and (ii) the Lessee shall not have received such form from the Agency at least one (1) Business Day prior to the due date. For purposes of this Section 8.16, the Lessee shall be deemed to have "received" any such form if it shall have been directed by the Agency to a website at which such form shall be available. In the event the Agency, in its sole discretion, elects to replace one or more of the reports required by this Agreement with an electronic or digital reporting system, the Lessee shall make its reports pursuant to such system.

(b) Annually, by August 1 of each year, commencing on the August 1 immediately following the Commencement Date, until the termination of this Agreement, the Lessee and the Sublessee shall submit to the Agency the Annual Employment and Benefits Report in a form approved by the Agency relating to the period commencing July 1 of the previous year and ending June 30 of the year of the obligation of the filing of such report, in the form prescribed by the Agency, certified as to accuracy by an officer of the Lessee and the Sublessee. Upon termination of this Agreement, the Lessee and the Sublessee shall submit to the Agency the Annual Employment and Benefits Report relating to the period commencing the date of the last such Report submitted to the Agency and ending on the last payroll date



of the preceding month in the form prescribed by the Agency, certified as to accuracy by the Lessee and the Sublessee. Nothing herein shall be construed as requiring the Lessee and the Sublessee to maintain a minimum number of employees on its respective payroll.

(c) If and for so long as the same shall be required by law, the Lessee shall annually (currently, by each February 28 with respect to the prior calendar year) file a statement with the New York State Department of Taxation and Finance, on a form and in a manner and consistent with such regulations as is or may be prescribed by the Commissioner of the New York State Department of Taxation and Finance (Form ST-340 or any successor or additional mandated form), of the value of all Sales Tax Savings claimed by the Lessee, the Sublessee and all Agents in connection with the Project and the Facility as required by Section 874(8) of the New York State General Municipal Law (as the same may be amended from time to time), under the authority granted pursuant to this Agreement. The Lessee shall furnish a copy of such annual statement to the Agency at the time of filing with the Department of Taxation and Finance. Should the Lessee fail to comply with the foregoing requirement, the Lessee shall immediately cease to be the agent for the Agency in connection with the Project (such agency relationship being deemed to be immediately revoked) without any further action of the parties, each of the Lessee, the Sublessee and any Agent shall be deemed to have automatically lost its authority as agent of the Agency to purchase and/or lease Exempt Property in the Agency's behalf, and shall desist immediately from all such activity, and shall immediately and without demand return to the Agency the Sales Tax Letter issued to the Lessee and the Sublessee by the Agency that is in the Lessee's possession and any Sales Tax Agent Authorization Letter in the possession of any Agent. Nothing herein shall be construed as a representation by the Agency that any property acquired as part of the Project is or shall be exempt from Sales Taxes under the laws of the State. To the extent that the Lessee, the Sublessee and any Agent shall have received Sales Tax Savings, the Lessee agrees to include information with respect thereto in its Sales Tax Exemption Report required to be filed pursuant to Section 8.16(e).

(d) If there shall have been a subtenant other than the Lessee or the Sublessee, with respect to all or part of the Facility, at any time during the immediately preceding calendar year, the Lessee shall file with the Agency by the next following February 1, a certificate of an Authorized Representative of the Lessee with respect to all subtenancies in effect at the Facility, in the form prescribed by the Agency.

(e) If the Sales Tax Letter shall have been in effect at any time during the twelve-month period terminating on the immediately preceding June 30, the Lessee shall file with the Agency by the next following August 1, a certificate of an Authorized Representative of the Lessee with respect to Sales Tax Savings with respect to such twelve-month period, in the form prescribed by the Agency.

(f) If there shall have a subtenant, other than the Lessee or the Sublessee, with respect to all or part of the Facility, at any time during the twelve-month period terminating on the immediately preceding June 30, the Lessee shall deliver to the Agency by the next following August 1, a completed Subtenant's Employment and Benefits Report with respect to such twelve-month period, in the form prescribed by the Agency.

(g) If the Lessee or the Sublessee shall have had the benefit of a Business Incentive Rate at any time during the twelve-month period terminating on the immediately preceding June 30, the Lessee shall deliver to the Agency by the next following August 1, a completed report required by the Agency in connection with the Business Incentive Rate program with respect to such twelve-month period, in the form prescribed by the Agency.

(h) The Lessee shall deliver to the Agency on August 1 of each year, commencing on the August 1 immediately following the Commencement Date, a completed location and contact information report in the form prescribed by the Agency.

**Section 8.17. Taxes, Assessments and Charges.** (a) The Lessee shall pay when the same shall become due all taxes (other than those taxes for which PILOT is payable) and assessments, general and specific, if any, levied and assessed upon or against the Facility Realty, the Company Lease, this Agreement, the Sublease Agreement, any ownership estate or interest of the Agency or the Lessee or the Sublessee in the Facility, or the Rental Payments or other amounts payable under the Company Lease, hereunder or under the Sublease Agreement during the term of this Agreement, and all water and sewer charges, special district charges, assessments and other governmental charges and impositions whatsoever, foreseen or unforeseen, ordinary or extraordinary, under any present or future law, and charges for public or private utilities or other charges incurred in the occupancy, use, operation, maintenance or upkeep of the Facility Realty, all of which are herein called "**Impositions**". The Lessee may pay any Imposition in installments if so payable by law, whether or not interest accrues on the unpaid balance. The Agency shall forward, as soon as practicable, to the Lessee any notice, bill or other statement received by the Agency concerning any Imposition.

(b) In the event the Facility Realty is exempt from Impositions (other than real estate taxes in respect of PILOT is payable) solely due to the Agency's leasehold estate in the Facility Realty, the Lessee shall pay all Impositions to the appropriate taxing authorities equivalent to the Impositions that would have been imposed on the Facility Realty if the Lessee were the owner of record of the Facility Realty and the Agency had no leasehold estate in the Facility Realty.

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

**Section 8.18. Compliance with Legal Requirements.**

(a) The Lessee shall not occupy, use or operate the Facility, or allow the Facility or any part thereof to be occupied, used or operated, for any unlawful purpose or in violation of any certificate of occupancy affecting the Facility or for any use which may constitute a nuisance, public or private, or make void or voidable any insurance then in force with respect thereto.

(b) Throughout the term of this Agreement and at its sole cost and expense, the Lessee shall promptly observe and comply with all applicable Legal Requirements, whether foreseen or unforeseen, ordinary or extraordinary, that shall now or at any time hereafter be binding upon or applicable to the Lessee, the Facility, any occupant, user or operator of the Facility or any portion thereof, and will observe and comply with all conditions, requirements, and schedules necessary to preserve and extend all rights, licenses, permits (including zoning variances, special exception and non-conforming uses), privileges, franchises and concessions. The Lessee will not, without the prior written consent of the

Agency (which consent shall not be unreasonably withheld or delayed), initiate, join in or consent to any private restrictive covenant, zoning ordinance or other public or private restrictions limiting or defining the uses that may be made of the Facility or any part thereof.

(c) The Lessee may at its sole cost and expense contest in good faith the validity, existence or applicability of any of the matters described in Section 8.18(b) if (i) such contest shall not result in the Facility or any part thereof or interest therein being in any danger of being sold, forfeited or lost, (ii) such contest shall not result in the Lessee, the Sublessee or the Agency being in any danger of any civil or any criminal liability for failure to comply therewith, and (iii) the Lessee or the Sublessee shall have furnished such security, if any, as may be reasonably requested by the Agency for failure to comply therewith.

**Section 8.19. Operation as Approved Facility and as a "Project".**

(a) The Lessee will not take any action, or suffer or permit any action, if such action would cause the Facility not to be the Approved Facility or a qualified "project" within the meaning of the Act,

(b) The Lessee will not fail to take any action, or suffer or permit the failure to take any action, if such failure would cause the Facility not to be the Approved Facility or a qualified "project" within the meaning of the Act.

(c) The Lessee will permit the Agency, or its duly authorized agent, upon reasonable notice, at all reasonable times, to enter the Facility, but solely for the purpose of assuring that the Lessee is operating the Facility, or is causing the Facility to be operated, as the Approved Facility and a qualified "project" within the meaning of the Act consistent with the Approved Project Operations and with the public purposes of the Agency.

**Section 8.20. Restrictions on Dissolution and Merger.**

(a) The Lessee covenants and agrees that at all times during the term of this Agreement, it will

(i) maintain its existence as the type of Entity set forth on the cover page of this Agreement,

(ii) continue to be subject to service of process in the State,

(iii) continue to be organized under the laws of, or qualified to do business in, the State,

(iv) not, as transferor, liquidate, wind-up, dissolve, transfer or otherwise dispose of to another Entity all or substantially all of its property, business or assets ("**Transfer**") remaining after the Commencement Date, except as provided in Section 8.20(b),

(v) not, as transferee, take title to all or substantially all of the property, business or assets (also "**Transfer**") of and from another Entity, except as provided in Section 8.20(b),

(vi) not consolidate with or merge into another Entity or permit one or more Entities to consolidate with or merge into it ("Merge"), except as provided in Section 8.20(b), and

(vii) not change or permit the change of any Principal of the Lessee and/or the Sublessee, or a change in the relative ownership and/or Control of the Lessee and/or the Sublessee of any of the existing Principals, except in each case as provided in Section 8.20(b) or 8.20(c).

(b) With the prior written consent of the Agency, the Lessee may Merge or participate in a Transfer. Such consent, if requested after the Operations Commencement Date, may not be unreasonably withheld or delayed. In any case, the following conditions shall be satisfied on or prior to the Merger or Transfer as applicable:

(i) when the Lessee is the surviving, resulting or transferee Entity,

(1) the Lessee shall have a net worth (as determined by an Independent Accountant in accordance with GAAP) at least equal to that of the Lessee immediately prior to such Merger or Transfer, and

(2) the Lessee shall deliver to the Agency a Required Disclosure Statement with respect to itself as surviving Entity in form and substance satisfactory to the Agency; or

(ii) when the Lessee is not the surviving, resulting or transferee Entity (the "Successor Lessee"),

(1) the predecessor Lessee (the "Predecessor Lessee") shall not be in default under this Agreement or under any other Project Document immediately prior to such Merger or Transfer;

(2) the Successor Lessee shall be solvent and subject to service of process in the State and organized under the laws of the State, or under the laws of any other state of the United States and duly qualified to do business in the State,

(3) the Successor Lessee shall have assumed in writing all of the obligations of the Predecessor Lessee contained in this Agreement and in all other Project Documents to which the Predecessor Lessee shall have been a party,

(4) the Successor Lessee shall have delivered to the Agency a Required Disclosure Statement in form and substance acceptable to the Agency acting in its sole discretion,

(5) each Principal of the Successor Lessee shall have delivered to the Agency a Required Disclosure Statement in form and substance acceptable to the Agency acting in its sole discretion,

(6) the Successor Lessee shall have delivered to the Agency, in form and substance acceptable to the Agency, an Opinion of Counsel to the effect that the Project Documents to which the Successor Lessee shall be a party will constitute the

legal, valid and binding obligations of the Successor Lessee, and that such Project Documents are enforceable in accordance with their terms,

(7) the Successor Lessee shall have delivered to the Agency, in form and substance acceptable to the Agency, an opinion of an Independent Accountant to the effect that the Successor Lessee has a net worth (as determined in accordance with GAAP) after the Merger or Transfer at least equal to that of the Predecessor Lessee immediately prior to such Merger or Transfer, and

(8) the Successor Lessee shall have delivered to the Agency, in form and substance acceptable to the Agency, a written statement describing its intended use of the Facility and the number of employees to be employed at the Facility following such Merger or Transfer.

(c) If there is a change in Principals of the Lessee and/or the Sublessee or the relative ownership and/or Control of the Lessee and/or the Sublessee (i) prior to the Operations Commencement Date, before the effective date of any such change, the Lessee and/or Sublessee shall first deliver to the Agency prompt written notice thereof (including all details that would result in a change to Exhibit D – “Principals of Lessee and Sublessee”) together with a Required Disclosure Statement in form and substance acceptable to the Agency acting in its sole discretion, except that prior to any change in the relative ownership and/or Control of the Lessee and/or the Sublessee, the Lessee shall obtain the prior written consent of the Agency; (ii) after the Operations Commencement Date, the Lessee shall deliver to the Agency prompt written notice thereof (including all details that would result in a change to Exhibit D – “Principals of Lessee and Sublessee”) to the Agency together with a Required Disclosure Statement in form and substance acceptable to the Agency acting in its sole discretion.

**Section 8.21. Affiliation of Sublessee.** Except as otherwise provided in Sections 8.9 or 8.20 hereof or Section 8 of the Sublease Agreement, the Lessee is and, throughout the term of this Agreement, will continue to be an Affiliate of the Sublessee.

**Section 8.22. Further Assurances.** The Lessee will do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered such further acts, instruments, conveyances, transfers and assurances, at the sole cost and expense of the Lessee, as the Agency deems reasonably necessary or advisable for the implementation, effectuation, correction, confirmation or perfection of this Agreement and the Sublease Agreement and any rights of the Agency hereunder and under any other Project Document.

## ARTICLE IX

### REMEDIES AND EVENTS OF DEFAULT

**Section 9.1. Events of Default.** Any one or more of the following events shall constitute an “**Event of Default**” hereunder:

(a) Failure of the Lessee to pay PILOT in accordance with Section 5.1 on or before the due date provided in a PILOT Bill and in the amount required in a PILOT Bill;

(b) Failure of the Lessee to pay any Rental Payment (except as set forth in Section 9.1(a)) within fifteen (15) days of the due date thereof;

(c) The occurrence of a Recapture Event;

(d) Failure of the Lessee to observe and perform any covenant or agreement on its part to be performed under Section 8.9;

(e) Failure of the Lessee to observe and perform any covenant or agreement on its part to be performed under Section 8.1, and continuance of such failure for a period of ten (10) days after receipt by the Lessee of written notice specifying the nature of such default from the Agency;

(f) Failure of the Lessee to observe and perform any covenant, condition or agreement on its part to be performed under Sections 5.1 (except as set forth in Section 9.1(a)), 5.2, 5.3, 5.4, 8.2, 8.3, 8.8, 8.9, 8.11, 8.13, 8.17, 8.18, 8.20, 9.8, 11.2 or 11.3 or Article VI, and continuance of such failure for a period of thirty (30) days after receipt by the Lessee of written notice specifying the nature of such default from the Agency;

(g) Failure of the Lessee to observe and perform any covenant or agreement on its part to be performed under Section 4.7 or 9.7, and continuance of such failure for a period of fifteen (15) days after receipt by the Lessee of written notice specifying the nature of such default from the Agency;

(h) Failure of the Lessee to observe and perform any covenant, condition or agreement hereunder on its part to be performed (except as set forth in Section 9.1(a), (b), (c), (d), (e), (f) or (g)) and (i) continuance of such failure for a period of thirty (30) days after receipt by the Lessee of written notice specifying the nature of such failure from the Agency, or (ii) if by reason of the nature of such failure the same can be remedied, but not within the said thirty (30) days, the Lessee fails to commence and thereafter proceed with reasonable diligence after receipt of said notice to cure such failure or fails to continue with reasonable diligence its efforts to cure such failure or fails to cure such failure within sixty (60) days of receipt of said notice;

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

(j) A proceeding or case shall be commenced, without the application or consent of the Lessee, the Sublessee or any other Guarantor in any court of competent jurisdiction, seeking, (i) liquidation, reorganization, dissolution, winding up or composition or adjustment of debts, (ii) the appointment of a trustee, receiver, liquidator, custodian or the like of the Lessee, the Sublessee or any other Guarantor or of all or any substantial part of its respective assets, or (iii) similar relief under any law relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts, and such proceeding or case shall continue undismissed, or an order, judgment or decree approving or ordering any of the foregoing shall be entered and continue unstayed and in effect, for a period of ninety (90) days; or any order for relief against the Lessee, the Sublessee or any other Guarantor shall be entered in an involuntary case under the Federal Bankruptcy Code; the terms "dissolution" or "liquidation" of the Lessee, the Sublessee or any other Guarantor as used above shall not be construed to prohibit any action otherwise permitted by Section 8.20, Section 8 of the Sublease Agreement or Section 3.6 of the Guaranty Agreement;

(k) Any representation or warranty made by the Lessee, the Sublessee or any other Guarantor (i) in the application and related materials submitted to the Agency for approval of the Project or the transactions contemplated by this Agreement, (ii) herein or in any other Project Document, or (iii) by or on behalf of the Lessee, the Sublessee or any other Person in any Required Disclosure Statement, or (iv) in any report, certificate, financial statement or other instrument furnished pursuant hereto or any of the foregoing, shall in any case prove to be false, misleading or incorrect in any material respect as of the date made;

(l) The commencement of proceedings to appoint a receiver or to foreclose any mortgage lien on or security interest in the Facility;

(m) Any loss of the leasehold estate of the Agency in the Facility Realty;

(n) If any Required Disclosure Statement delivered to the Agency under any Project Document is not acceptable to the Agency acting in its sole discretion; or

(o) An "Event of Default" under the Sublease Agreement, the Guaranty Agreement or any other Permitted Encumbrance, including any Mortgage, shall occur and be continuing.

**Section 9.2. Remedies on Default.** (a) Whenever any Event of Default referred to in Section 9.1 shall have occurred and be continuing, the Agency may take any one or more of the following remedial steps:

(i) The Agency may terminate this Agreement (with the effect that the term of this Agreement shall be deemed to have expired on such date of termination as if such date were the original Expiration Date of this Agreement) in which case this Agreement and all of the estate, right, title and interest herein granted or vested in the Lessee shall cease and terminate, and convey all of the Agency's right, title and interest in the Facility to the Lessee, which the Agency may accomplish by executing and recording, at the sole cost and expense of the Lessee, lease termination agreements to terminate the Company Lease and this Agreement of record as required by law. The Lessee hereby waives delivery and acceptance of such termination agreements as a condition to their validity, and appoints the Agency its true and lawful agent and attorney-in-fact (which appointment shall be deemed to be an agency coupled with an interest) with full power of substitution to file on its behalf all affidavits, questionnaires and other documentation necessary to accomplish the recording of such termination agreements;

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

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

(iv) The Agency may suspend or terminate the Sales Tax Letter or require the Lessee to surrender the Sales Tax Letter to the Agency for cancellation.

(v) The Agency may require the Lessee to pay, as if the date of demand by the Agency were the Expiration Date, any NPV-PILOMRT that may be due under and in accordance with Section 5.3(d)(y).

(vi) The Agency may repossess any or all of the Acquired Assets or bring an action for damages to seek reimbursement therefor.

(b) No action taken pursuant to this Section 9.2 (including termination of this Agreement pursuant to this Section 9.2 or by operation of law or otherwise) shall, except as expressly provided herein, relieve the Lessee from the Lessee's obligations hereunder, including the obligations of the Lessee under Sections 5.1 (until such time as a Cessation Date occurs and, by reason thereof, the Lessee shall again pay Real Estate Taxes with respect to the Facility Realty), 5.2, 5.3, 5.4, 8.2, 9.2, 9.6, 9.7, 9.8, 11.4, 11.5, 11.6, 11.11, 11.13 and 11.14, all of which shall survive any such action.

**Section 9.3. Remedies Cumulative.** The rights and remedies of the Agency under this Agreement shall be cumulative and shall not exclude any other rights and remedies of the Agency allowed by law with respect to any default under this Agreement. Failure by the Agency to insist upon the strict performance of any of the covenants and agreements herein set forth or to exercise any rights or remedies upon default by the Lessee hereunder shall not be considered or taken as a waiver or relinquishment for the future of the right to insist upon and to enforce by mandatory injunction, specific performance or other appropriate legal remedy a strict compliance by the Lessee with all of the covenants and conditions hereof, or of the rights to exercise any such rights or remedies, if such default by the Lessee be continued or repeated.

**Section 9.4. No Additional Waiver Implied by One Waiver.** In the event any covenant or agreement contained in this Agreement should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder. No waiver shall be binding unless it is in writing and signed by the party making such waiver. No course of dealing between the Agency and the Lessee or any delay or omission on the part of the Agency in exercising any rights hereunder or under any other Project Document shall operate as a waiver.

**Section 9.5. Effect on Discontinuance of Proceedings.** In case any proceeding taken by the Agency under this Agreement or under any other Project Document on account of any Event of Default hereunder or thereunder shall have been discontinued or abandoned for any reason or shall have been determined adversely to the Agency, then, and in every such case, the Agency shall be restored to its former position and rights hereunder and thereunder, and all rights, remedies, powers and duties of the Agency shall continue as in effect prior to the commencement of such proceedings.

**Section 9.6. Agreement to Pay Fees and Expenses of Attorneys and Other Consultants.** In the event the Lessee should default under any of the provisions of this Agreement and



the Agency should employ outside attorneys or other consultants or incur other out of pocket expenses for the collection of the Rental Payments payable hereunder or the enforcement of performance or observance of any obligation or agreement on the part of the Lessee herein contained or contained in any other Project Document, the Lessee agrees that it will on demand therefor pay to the Agency the reasonable fees and disbursements of such attorneys or other consultants and such other expenses so incurred.

**Section 9.7. Certain Continuing Representations.** If at any time during the term of this Agreement, any representation or warranty made by the Lessee pursuant to Section 2.2(w) would, if made on any date during the term of this Agreement and deemed made as of such date, be false, misleading or incorrect in any material respect, then, the Lessee shall be deemed to be in default under this Agreement unless the Agency shall, upon written request by the Lessee, either waive such default in writing or consent in writing to an exception to such representation or warranty so that such representation or warranty shall no longer be false, misleading or incorrect in a material respect.

**Section 9.8. Late Delivery Fees.**

(a) In the event the Lessee shall fail:

(i) to pay the Annual Administrative Fee on the date required under Section 8.3,

(ii) to file and/or deliver any of the documents required of the Lessee under Section 8.14 or Section 8.16 by the date therein stated (collectively, the "**Fixed Date Deliverables**"); or

(iii) to deliver to the Agency any of the documents as shall have been requested by the Agency of the Lessee under Section 8.15 within five (5) Business Days of the date so requested (collectively, the "**Requested Document Deliverables**"),

then the Agency may charge the Lessee on a daily calendar basis commencing with the day immediately following the date on which the payment, filing or delivery was due (the "**Due Date**"), the Per Diem Late Fee.

(b) If the Agency shall deliver written notice (a "**Notification of Failure to Deliver**") to the Lessee of such failure to deliver on the Due Date the Annual Administrative Fee, a Fixed Date Deliverable and/or a Requested Document Deliverable, and such payment or document shall not be delivered to the Agency within ten (10) Business Days following delivery by the Agency to the Lessee of the Notification of Failure to Deliver, then, commencing from and including the eleventh (11<sup>th</sup>) Business Day following the delivery by the Agency to the Lessee of the Notification of Failure to Deliver, the Agency may charge the Lessee on a daily calendar basis the Per Diem Supplemental Late Fee in respect of each noticed failure which shall be in addition to, and be imposed concurrently with, the applicable Per Diem Late Fee.

(c) The Per Diem Late Fee and the Per Diem Supplemental Late Fee shall each, if charged by the Agency, (i) accrue until the Lessee delivers to the Agency the Annual Administrative Fee, the Fixed Date Deliverable(s) and/or the Requested Document Deliverable(s), as the case may be, and (ii) be incurred on a daily basis for each such Annual Administrative Fee, Fixed Date Deliverable and/or Requested Document Deliverable as shall not have been delivered to the Agency on the Due Date.

(d) No default on the part of the Lessee under Section 8.3, 8.14, 8.15 or 8.16 to deliver to the Agency an Annual Administrative Fee, a Fixed Date Deliverable or a Requested Document Deliverable shall be deemed cured unless the Lessee shall have delivered same to the Agency and paid to the Agency all accrued and unpaid Per Diem Fees in connection with the default.

## ARTICLE X

### TERMINATION

#### **Section 10.1. Lessee's Option to Terminate Company Lease and this Agreement.**

The Lessee shall have the option to terminate the Company Lease and this Agreement by paying all Rental Payments and any other amounts due and payable under this Agreement (collectively, the "Project Payments"). The Lessee shall exercise such option by delivering to the Agency a written notice of an Authorized Representative of the Lessee to the Agency stating that the Lessee has elected to exercise its option under this Section 10.1 and the date on which such termination is to be effective (which date shall not be earlier than forty-five (45) days after the date of such notice). On a scheduled termination date, the Lessee shall take the actions required by Section 10.3(a). Such termination shall become effective on such scheduled termination date, subject, however, to Section 10.4.

#### **Section 10.2. Termination of Company Lease and this Agreement on Agency**

##### **Notice.**

(a) On or after the Expiration Date, upon receipt of ten (10) days prior written notice from the Agency directing termination of the Company Lease and this Agreement, the Lessee shall take the actions described in Section 10.3(a) and terminate the Company Lease and this Agreement.

(b) In the event the Lessee does not terminate the Company Lease and this Agreement (including taking all actions required to be taken by the Lessee pursuant to Section 10.3(a) within such ten (10) day period), then, commencing on the eleventh (11<sup>th</sup>) day after transmittal of the notice directing termination as provided in Section 10.2(a), the Lessee shall, in addition to all other payment obligations due to the Agency hereunder, make rental payments to the Agency in the amount of the Per Diem Holdover Rental Amount until the Lessee shall have terminated the Company Lease and this Agreement in accordance with the provisions thereof and hereof.

#### **Section 10.3. Actions Upon Termination.**

(a) On the termination date provided for pursuant to Section 10.1 or 10.2, the Lessee shall:

(i) pay to NYCDOF any amounts due and payable pursuant to Section 5.1(i);

(ii) pay any and all other Project Payments then due plus one dollar (\$1.00),

(iii) perform all accrued obligations hereunder,

(iv) surrender the Sales Tax Letter to the Agency for cancellation, if applicable, and

(v) deliver or cause to be delivered to the Agency (x) with respect to any Exempt Mortgage or Modified Exempt Mortgage (as the case may be), an executed satisfaction of such Mortgage in recordable form, executed by the Mortgagee, and (y) with respect to any Mortgage on the Facility to which the Agency shall be a party and intended to continue beyond the termination of this Agreement but with respect to which Mortgage the Agency shall not have granted any deferral of Mortgage Recording Taxes, a release of the Agency from such Mortgage in recordable form executed by all other parties to such Mortgage.

(b) On the date of the termination of the Agency's interest in the Facility pursuant to Section 10.1 or 10.2, the Agency will, upon Lessee's performance of its obligations pursuant to Section 10.3(a), deliver or cause to be delivered to the Lessee:

(i) termination agreements and all other necessary documents confirming the release of the Agency's right, title and interest in and to the Facility Realty and terminating the Company Lease and this Agreement, and

(ii) all necessary documents releasing all of the Agency's rights and interests in and to any rights of action (other than as against the Lessee or any insurer of the insurance policies under Section 8.1), or any insurance proceeds (other than liability insurance proceeds for the benefit of the Agency) or condemnation awards, with respect to the Facility or any portion thereof.

(c) Upon termination of the Company Lease and this Agreement, the Agency, upon the written request and at the sole cost and expense of the Lessee, shall execute such instruments as the Lessee may reasonably request or as may be necessary to discharge this Agreement and the Company Lease as documents of record with respect to the Facility Realty, subject to Section 10.4.

**Section 10.4. Survival of Lessee Obligations.** Upon release of the Agency's interest in the Facility pursuant to Section 10.2 or 10.3, this Agreement and all obligations of the Lessee hereunder shall be terminated except the obligations of the Lessee under Sections 5.1 (until such time as the Agency shall cease to have a leasehold estate in the Facility and, by reason thereof, the Lessee shall again pay Real Estate Taxes to the Facility Realty), 5.2, 5.3, 5.4, 8.2, 9.2, 9.6, 9.7, 9.8, 11.4, 11.5, 11.6, 11.11, 11.13 and 11.14 shall survive such termination.

## ARTICLE XI

### MISCELLANEOUS

**Section 11.1. Force Majeure.** In case by reason of *force majeure* either party hereto shall be rendered unable wholly or in part to carry out its obligations under this Agreement, then except as otherwise expressly provided in this Agreement, if such party shall give notice and full particulars of such *force majeure* in writing to the other party within a reasonable time after occurrence of the event or cause relied on, the obligations of the party giving such notice (other than (i) the obligations of the Lessee to make the Rental Payments required under the terms hereof, or (ii) the obligations of the Lessee to comply with Sections 5.1, 5.4, 8.1 or 8.2), so far as they are affected by such *force majeure*, shall be suspended during the continuance of the inability then claimed, which shall include a reasonable time for the removal of the effect thereof, but for no longer period, and such party shall endeavor to remove or overcome such inability with all reasonable dispatch. The term "*force majeure*" shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, orders of any kind of the Government of the United States or of the State or any civil or military authority, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, hurricanes, storms, floods, washouts, droughts, arrest, restraining of government and people, war, terrorism, civil disturbances, explosions, partial or entire failure of utilities, shortages of labor, material, supplies or transportation, or any other similar or different cause not reasonably within the control of the party claiming such inability. Notwithstanding anything to the contrary herein, in no event shall the Lessee's financial condition or inability to obtain financing constitute a *force majeure*. It is understood and agreed that the requirements that any *force majeure* shall be reasonably beyond the control of the party and shall be remedied with all reasonable dispatch shall be deemed to be satisfied in the event of a strike or other industrial disturbance even though existing or impending strikes or other industrial disturbances could have been settled by the party claiming a *force majeure* hereunder by acceding to the demands of the opposing person or persons.

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

**Section 11.2. Priority.** The Company Lease, this Agreement and the Sublease Agreement shall be subject and subordinate to any Mortgage and to the mortgage liens and security interests so created thereby; provided, however, that nothing in any Mortgage shall impair the Agency's ability to enforce its rights against the Lessee, the Sublessee or any other Guarantor.

**Section 11.3. Amendments.** This Agreement may only be amended by a written instrument executed and delivered by the parties hereto.

**Section 11.4. Service of Process.** The Lessee represents that it is subject to service of process in the State and covenants that it will remain so subject until all obligations, covenants and agreements of the Lessee under this Agreement shall be satisfied and met. If for any reason the Lessee should cease to be so subject to service of process in the State, the Lessee hereby irrevocably consents to the service of all process, pleadings, notices or other papers in any judicial proceeding or action by designating and appointing the General Counsel of the Lessee, at 23-30 Borden Avenue, Long Island City, New York 11101, as its agent upon whom may be served all process, pleadings, notices or other papers which may be served upon the Lessee as a result of any of its obligations under this Agreement. If such appointed agent shall cease to act or otherwise cease to be subject to service of process in the State, the Lessee hereby irrevocably designates and appoints the Secretary of State of the State of New York as

its agent upon whom may be served all process, pleadings, notices or other papers which may be served upon the Lessee as a result of any of its obligations under this Agreement; provided, however, that the service of such process, pleadings, notices or other papers shall not constitute a condition to the Lessee's obligations hereunder.

For such time as any of the obligations, covenants and agreements of the Lessee under this Agreement remain unsatisfied, the Lessee's agent(s) designated in this Section 11.4 shall accept and acknowledge on the Lessee's behalf each service of process in any such suit, action or proceeding brought in any such court. The Lessee agrees and consents that each such service of process upon such agents and written notice of such service to the Lessee in the manner set forth in Section 11.5 shall be taken and held to be valid personal service upon the Lessee whether or not the Lessee shall then be doing, or at any time shall have done, business within the State and that each such service of process shall be of the same force and validity as if service were made upon the Lessee according to the laws governing the validity and requirements of such service in the State, and waives all claim of error by reason of any such service.

Such agents shall not have any power or authority to enter into any appearance or to file any pleadings in connection with any suit, action or other legal proceedings against the Lessee or to conduct the defense of any such suit, action or any other legal proceeding except as expressly authorized by the Lessee.

**Section 11.5. Notices.** All notices, certificates or other communications hereunder shall be sufficient if sent (i) by registered or certified United States mail, return receipt requested and postage prepaid, (ii) by a nationally recognized overnight delivery service for overnight delivery, charges prepaid or (iii) by hand delivery, addressed, as follows:

- (1) if to the Agency, to

New York City Industrial Development Agency  
110 William Street  
New York, New York 10038  
Attention: General Counsel (with a copy to the  
Executive Director of the Agency at the  
same address)

- (2) if to the Lessee, to

Fresh Property Bronx, LLC  
23-30 Borden Avenue,  
Long Island City, New York 11101  
Attention: President (with a copy to the General Counsel at the same address)

with a copy to

Nixon Peabody LLP  
437 Madison Avenue  
New York, New York 10022  
Attention: Scott Singer, Esq.

The Agency shall deliver to any Mortgagee (to the extent that the Lessee shall have delivered to the Agency the written notice address for such Mortgagee) a copy of any notice of default or notice of its intent to convey its leasehold interest in the Facility to the Lessee that the Agency delivers to

the Lessee. Such copies shall be delivered at the same time and in the same manner as such notice is required to be given to the Lessee.

The Agency and the Lessee may, by like notice, designate any further or different addresses to which subsequent notices, certificates or other communications shall be sent. Any notice, certificate or other communication hereunder shall, except as may expressly be provided herein, be deemed to have been delivered or given (i) three (3) Business Days following posting if transmitted by mail, (ii) one (1) Business Day following sending if transmitted for overnight delivery by a nationally recognized overnight delivery service, or (iii) upon delivery if given by hand delivery, with refusal by an Authorized Representative of the intended recipient party to accept delivery of a notice given as prescribed above to constitute delivery hereunder.

**Section 11.6. Consent to Jurisdiction.** The Lessee irrevocably and unconditionally (i) agrees that any suit, action or other legal proceeding arising out of this Agreement or any other Project Document, the Facility, the Project, the relationship between the Agency and the Lessee, the Lessee's ownership, use or occupancy of the Facility and/or any claim for injury or damages may be brought in the courts of record of the State in New York County or the United States District Court for the Southern District of New York; (ii) consents to the jurisdiction of each such court in any such suit, action or proceeding; (iii) waives any objection which it may have to the venue of any such suit, action or proceeding in such courts; and (iv) waives and relinquishes any rights it might otherwise have (w) to move to dismiss on grounds of forum non conveniens, (x) to remove to any federal court other than the United States District Court for the Southern District of New York, and (y) to move for a change of venue to a New York State Court outside New York County.

If the Lessee commences any action against the Agency in a court located other than the courts of record of the State in New York County or the United States District Court for the Southern District of New York, the Lessee shall, upon request from the Agency, either consent to a transfer of the action or proceeding to a court of record of the State in New York County or the United States District Court for the Southern District of New York, or, if the court where the action or proceeding is initially brought will not or cannot transfer the action, the Lessee shall consent to dismiss such action without prejudice and may thereafter reinstitute the action in a court of record of the State in New York County or the United States District Court for the Southern District of New York.

**Section 11.7. Prior Agreements Superseded.** This Agreement shall completely and fully supersede all other prior understandings or agreements, both written and oral, between the Agency and the Lessee relating to the Facility, other than the Company Lease or any other Project Document.

**Section 11.8. Severability.** If any one or more of the provisions of this Agreement shall be ruled illegal or invalid by any court of competent jurisdiction, the illegality or invalidity of such provision(s) shall not affect any of the remaining provisions hereof, but this Agreement shall be construed and enforced as of such illegal or invalid provision had not been contained herein.

**Section 11.9. Effective Date; Counterparts.** The date of this Agreement shall be for reference purposes only and shall not be construed to imply that this Agreement was executed on the date first above written. This Agreement was delivered on the Commencement Date. This Agreement shall become effective upon its delivery on the Commencement Date. It may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

**Section 11.10. Binding Effect.** This Agreement shall inure to the benefit of the Agency, the Lessee and the Indemnified Parties, and shall be binding upon the Agency and the Lessee and their respective successors and assigns.

**Section 11.11. Third Party Beneficiaries.** It is the intention of the parties hereto that nothing contained herein is intended to be for, or to inure to, the benefit of any Person other than the parties hereto and the Indemnified Parties.

**Section 11.12. Law Governing.** This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of New York, without regard or giving effect to the principles of conflicts of laws thereof.

**Section 11.13. Waiver of Trial by Jury.** The Lessee does hereby expressly waive all rights to a trial by jury on any cause of action directly or indirectly involving the terms, covenants or conditions of this Agreement or any matters whatsoever arising out of or in any way connected with this Agreement, the Lessee's obligations hereunder, the Facility, the Project, the relationship between the Agency and the Lessee, the Lessee's ownership, use or occupancy of the Facility and/or any claim for injury or damages.

The provision of this Agreement relating to waiver of a jury trial and the right of re-entry or re-possession shall survive the termination or expiration of this Agreement.

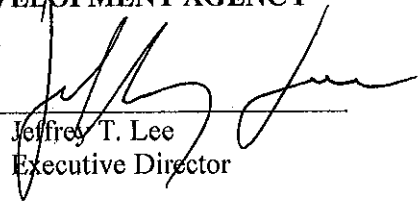
**Section 11.14. Recourse Under This Agreement.** All covenants, stipulations, promises, agreements and obligations of the Agency contained in this Agreement shall be deemed to be the covenants, stipulations, promises, agreements and obligations of the Agency, and not of any member, director, officer, employee or agent of the Agency or any natural person executing this Agreement on behalf of the Agency in such person's individual capacity, and no recourse shall be had for any reason whatsoever hereunder against any member, director, officer, employee or agent of the Agency or any natural person executing this Agreement on behalf of the Agency. In addition, in the performance of the agreements of the Agency herein contained, any obligation the Agency may incur for the payment of money shall not subject the Agency to any pecuniary or other liability or create a debt of the State or the City, and neither the State nor the City shall be liable on any obligation so incurred and any such obligation shall be payable solely out of amounts payable to the Agency by the Lessee hereunder.



**IN WITNESS WHEREOF**, the Agency has caused its corporate name to be subscribed unto this Agency Lease Agreement by its duly authorized Chairman, Vice Chairman, Executive Director, Deputy Executive Director, General Counsel or Vice President for Legal Affairs and the Lessee has caused its name to be hereunto subscribed by its duly Authorized Representative, all being done as of the year and day first above written.

**NEW YORK CITY INDUSTRIAL  
DEVELOPMENT AGENCY**

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

  
Jeffrey T. Lee  
Executive Director

**FRESH PROPERTY BRONX, LLC**

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

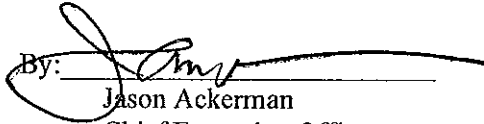
Jason Ackerman  
Chief Executive Officer

**IN WITNESS WHEREOF**, the Agency has caused its corporate name to be subscribed unto this Agency Lease Agreement by its duly authorized Chairman, Vice Chairman, Executive Director, Deputy Executive Director, General Counsel or Vice President for Legal Affairs and the Lessee has caused its name to be hereunto subscribed by its duly Authorized Representative, all being done as of the year and day first above written.

**NEW YORK CITY INDUSTRIAL  
DEVELOPMENT AGENCY**

By: \_\_\_\_\_  
Jeffrey T. Lee  
Executive Director

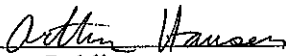
**FRESH PROPERTY BRONX, LLC**

By:  \_\_\_\_\_  
Jason Ackerman  
Chief Executive Officer

STATE OF NEW YORK     )  
                                      :  
COUNTY OF NEW YORK    )     ss.:

On the 12<sup>th</sup> day of December, in the year 2013, before me, the undersigned, personally appeared Jeffrey T. Lee, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Arthur Hauser  
Notary Public, State of New York  
NO. 01HA6276327  
Qualified in Kings County  
Certificate Filed in New York County  
Commission Expires 2/11/2017

  
\_\_\_\_\_  
Notary Public

STATE OF NEW YORK     )  
                                      :  
COUNTY OF NEW YORK    )     ss.:

On the 18<sup>th</sup> day of December, in the year 2013, before me, the undersigned, personally appeared Jason Ackerman, personally known to me or proved to me on the basis of satisfactory evidence to me the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.



---

Notary Public

**TEEPOO RIAZ**  
NOTARY PUBLIC, State of New York  
No. 02RI0279355  
Qualified in Queens County  
Commission Expires April 06, 2017

**APPENDICES**

**EXHIBIT A**

**DESCRIPTION OF THE LAND**

## SCHEDULE A - ITEM 4

### Parcel 1 - Tract 1:

ALL that certain plot, piece or parcel of land, situate, lying and being in the County of Bronx, City and State of New York, bounded and described as follows:

COMMENCING at the point of the intersection of the southerly line of East 132nd Street with the prolongation of the easterly line of Saint Anns Avenue;

THENCE along the easterly line of a New York City Utility Right of Way the following two courses and distances:

1. South 0 degrees 01 minutes 39 seconds West, a distance of 318.67 feet to a point of tangency;
2. Southerly along a curve to the right, having a radius of 270 feet and an arc length of 5.29 feet to the point of Beginning.

THENCE North 89 degrees 57 minutes 39 seconds East and parallel to the southerly line of E 132nd Street, a distance of 923.05 feet to a point;

THENCE North 0 degrees 01 minutes 39 seconds East, a distance of 32.97 feet to a point;

THENCE along a curve to the right, having a radius of 1,483.92 feet and an arc length of 43.01 feet to a point;

THENCE South 83 degrees 18 minutes 40 seconds East, a distance of 71.70 feet to a point on the easterly line of the Triborough Bridge Right of Way;

THENCE South 0 degrees 01 minutes 39 seconds West along the easterly line of the Triborough Bridge Right of Way, a distance of 360.72 feet to a point;

THENCE North 89 degrees 58 minutes 21 seconds West, a distance of 114.00 feet to a point on the westerly line of the Triborough Bridge Right of Way;

THENCE South 0 degrees 01 minutes 39 seconds West along the westerly line of the Triborough Bridge Right of Way, a distance of 300.54 feet to a point;

THENCE North 89 degrees 58 minutes 21 seconds West, a distance of 185.31 feet to a point;

THENCE northwesterly along a curve to the right, having a radius of 600.00 feet and an arc length of 186.80 feet to a point;

THENCE continuing northwesterly along a curve to the right having a radius of 828.66 feet and an arc length of 327.32 feet to a point;

THENCE North 49 degrees 30 minutes 09 seconds West, a distance of 310.21 feet to a point;

**SCHEDULE A - ITEM 4**  
**Continued**

THENCE northwesterly along a curve to the left, having a radius of 2,288.91 feet and an arc length of 120.24 feet to a point on the easterly line of a New York City Utility Right of Way;

THENCE along said easterly line of a New York City Utility Right of Way the following two courses and distance;

1. North 27 degrees 20 minutes 39 seconds East, a distance of 64.23 feet to a point;
2. Along a curve to the left having a radius of 270.00 feet and an arc length of 123.44 feet to the point of BEGINNING.

**Parcel 2 - Tract 2:**

ALL that certain plot, piece or parcel of land, situate, lying and being in the County of Bronx, City and State of New York, bounded and described as follows:

COMMENCING at the corner formed by the intersection of the southerly side of East 132nd Street with the easterly side of former St. Anns Avenue.

THENCE the following three courses and distances:

1. Along the easterly side of former St. Anns Avenue, South 00 degrees 01 minutes 39 seconds West, 124.00 feet;
2. North 89 degrees 57 minutes 39 seconds East, 87.40 feet;
3. South 00 degrees 02 minutes 21 seconds East, 50.54 feet to the point or place of beginning.

RUNNING THENCE North 89 degrees 57 minutes 39 seconds East, 700.00 feet;

THENCE South 00 degrees 02 minutes 21 seconds East, 20.00 feet;

THENCE South 89 degrees 57 minutes 39 seconds West, 700.00 feet;

THENCE North 00 degrees 02 minutes 21 seconds West, 20.00 to the point or place of BEGINNING.



**EXHIBIT B**

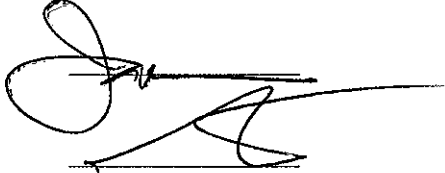
**DESCRIPTION OF THE ACQUIRED ASSETS AND FACILITY PERSONALTY**

Those items of machinery, equipment and other items of personalty to be acquired for installation and use at the Facility including, but not limited to, the following: boilers; air compressors; electric equipment including, but not limited to, service gear, distribution gear, and back-up generators; HVAC equipment; a fire compression pump house; and a plant refrigeration system including, but not limited to, compressors, condensers, hot gas defrost air units, hygienic process air units, mini penthouse units, temperature vessels, receivers, auto purge, programmable controller, graphics package, support steel, dispersion tank, refrigeration piping, lot insulation, refrigeration power wiring, motor control center, control wiring, ductwork and blast chill unit.

**EXHIBIT C**

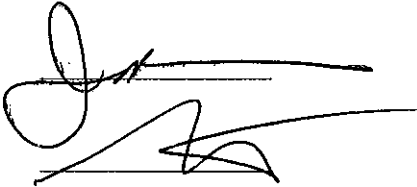
**AUTHORIZED REPRESENTATIVE**

(i) of the Lessee:


<u>Name</u>	<u>Title</u>	<u>Signature</u>
Jason Ackerman	Chief Executive Officer	
Gerald Bennett	Chief Financial Officer	

(ii) of the Sublessee:

**Fresh Direct, LLC**

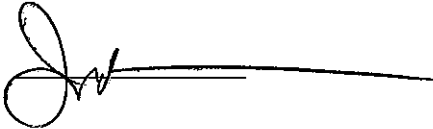
<u>Name</u>	<u>Title</u>	<u>Signature</u>
Jason Ackerman	Chief Executive Officer	
Gerald Bennett	Chief Financial Officer	

**U.T.F. Trucking, Inc.**

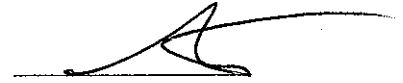
<u>Name</u>	<u>Title</u>	<u>Signature</u>
Jason Ackerman	Chief Executive Officer	
Gerald Bennett	Chief Financial Officer	

(iii) of the Guarantor:

**Fresh Direct Holdings, Inc.**

<u>Name</u>	<u>Title</u>	<u>Signature</u>
Jason Ackerman	Chief Executive Officer	

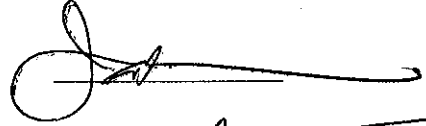
Gerald Bennett Chief Financial Officer



**FD Property Holding, Inc.**

<u>Name</u>	<u>Title</u>
Jason Ackerman	Chief Executive Officer
Gerald Bennett	Chief Financial Officer

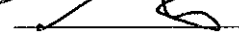
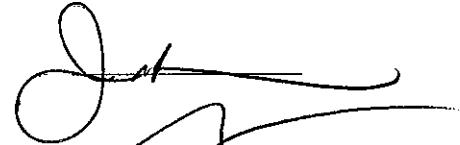
Signature



**Fresh Direct, LLC**

<u>Name</u>	<u>Title</u>
Jason Ackerman	Chief Executive Officer
Gerald Bennett	Chief Financial Officer

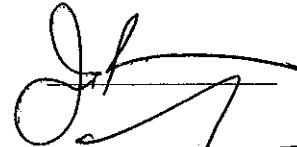
Signature



**U.T.F. Trucking, Inc.**

<u>Name</u>	<u>Title</u>
Jason Ackerman	Chief Executive Officer
Gerald Bennett	Chief Financial Officer

Signature



**EXHIBIT D-1**

**Principals**

**Lessee:**

<u>Name</u>	<u>Title</u>
Jason Ackerman	Chief Executive Officer
David McInerney	Executive Vice President and Co-Founder
Adrian Williams	Senior Vice President and Chief Operating Officer
FD Property Holding, Inc.	Sole Member

**Sublessee:**

**Fresh Direct, LLC:**

<u>Name</u>	<u>Title</u>
Jason Ackerman	Chief Executive Officer
David McInerney	Executive Vice President and Co-Founder
Adrian Williams	Senior Vice President and Chief Operating Officer
FD Property Holding, Inc.	Sole Member

**U.T.F. Trucking, Inc.:**

<u>Name</u>	<u>Title</u>
Jason Ackerman	Chief Executive Officer
David McInerney	Executive Vice President and Co-Founder
Adrian Williams	Senior Vice President and Chief Operating Officer
Fresh Direct Holdings, Inc.	Sole Shareholder

**OWNERS OF THE LESSEE**

<b>INDIVIDUAL OWNERS</b>	
<b>Name</b>	<b>% Ownership or Control of the Lessee</b>

<b>ENTITY OWNERS</b>	
<b>Name</b>	<b>% Ownership or Control of the Lessee</b>
FD Property Holding, Inc.	100%

<b>OWNERS of those ENTITIES that own or control more than 10% of the Lessee ("10% Entities")</b>		
<b>10% ENTITY (name and actual %)</b>	<b>INDIVIDUAL AND ENTITY OWNERS</b>	<b>% Ownership or Control</b>
Fresh Direct Holdings, Inc. 100%	Wm. Morrison Supermarkets plc.	11.7%
	Crown Entities	55.9%

**EXHIBIT D-3**

**OWNERS OF THE SUBLESSEE – U.T.F. Trucking, Inc.**

<b>INDIVIDUAL OWNERS</b>	
<b>Name</b>	<b>% Ownership or Control of the Sublessee</b>

<b>ENTITY OWNERS</b>	
<b>Name</b>	<b>% Ownership or Control of the Sublessee</b>
Fresh Direct Holdings, Inc.	100%

<b>OWNERS of those ENTITIES that own or control more than 10% of the Sublessee ("10% Entities")</b>		
<b>10% ENTITY (name and actual %)</b>	<b>INDIVIDUAL AND ENTITY OWNERS</b>	<b>% Ownership or Control</b>
Wm. Morrison Supermarkets plc.. 11.7%	Publicly traded.	
Crown Entities 55.9%	Crown Capital Group, Inc.	0.1%
	Crown Fresh Direct Management, LLC	1.6%
	Crown Fresh Direct, LLC	46.2%
	Jason Ackerman Voting Trust	7.4%
	P.A. Consulting LLC	0.2%
	Somerville, LLC	0.3%

**EXHIBIT D-3**

**OWNERS OF THE SUBLESSEE – Fresh Direct, LLC.**

<b>INDIVIDUAL OWNERS</b>	
<b>Name</b>	<b>% Ownership or Control of the Sublessee</b>

<b>ENTITY OWNERS</b>	
<b>Name</b>	<b>% Ownership or Control of the Sublessee</b>
FD Property Holding, Inc.	100%

<b>OWNERS of those ENTITIES that own or control more than 10% of the Sublessee ("10% Entities")</b>		
<b>10% ENTITY (name and actual %)</b>	<b>INDIVIDUAL AND ENTITY OWNERS</b>	<b>% Ownership or Control</b>
Fresh Direct Holdings, Inc.	Wm. Morrison Supermarkets plc	11.7%
	Crown Entities	55.9%

**EXHIBIT E**

**PROJECT COST BUDGET**

See Attached.



# Summary Sources and Uses - Harlem River Yards Build

In \$000s

	<u>Mortgage/Loan Financings</u>	<u>Grant Funds</u>	<u>Funds of Lessee</u>	<u>Total</u>
Building Construction	\$56,752,000	\$10,500,000	\$18,877,000	\$86,129,000
Refrigeration Equipment	\$4,650,000	\$10,500,000		\$15,150,000
Other Machinery & Equipment	\$28,500,000			\$28,500,000
Fees & Other Soft Costs	\$1,098,000		\$11,577,000	\$12,675,000
<b>Total</b>	<b>\$91,000,000</b>	<b>\$21,000,000</b>	<b>\$30,454,000</b>	<b>\$142,454,000</b>

**Fresh Direct - Harlem River Yards Build**

**USES**

**CORE AND SHELL COSTS (\$000s)**

Cost Analysis	Total
Lease Rent Payments	\$ 2,195
Permits & Fees	175
General Conditions	7,208
Site Construction Costs	15,000
Shell Construction Costs	57,213
Refrigeration Costs	15,150
Hard Cost Contingency	4,338
<b>TOTAL HARD COST</b>	<b>101,279</b>
Design Cost	3,378
Commissions	690
Construction Interest Carry	2,800
Other Financing Costs	1,610
Administration	2,250
All Other Soft Costs	850
<b>TOTAL SOFT COST</b>	<b>11,577</b>
<b>TOTAL CORE AND SHELL COSTS</b>	<b>\$ 112,857</b>

**EQUIPMENT COSTS (\$000s)**

Cost Analysis	Total
Material Handling	\$ 20,000
Food Processing	3,000
IT	2,000
FF&E	2,500
Miscellaneous	1,000
<b>TOTAL HARD COSTS</b>	<b>28,500</b>
Equipment Financing Costs	998
Other Soft Costs	100
<b>TOTAL SOFT COSTS</b>	<b>1,098</b>
<b>TOTAL EQUIPMENT COSTS</b>	<b>\$ 29,598</b>

**TOTAL PROJECT** \$ 142,454

**SOURCES**

	EB-5 Financing	Line of Credit	Equipment Leasing	BOEDC		ESDC MERF Loan	Fresh Direct Cash	NYC		New Market		Total
				Empowerment Zone Loan	Loan			IDA Grant	ESDC Grant	BOEDC Grant	NYS DOT Grant	
	137	7,363		3,000	1,000		\$ 2,195					\$ 2,195
	45,213						175					175
	4,650						7,208					7,208
								10,500				10,500
									9,000			9,000
										500	1,000	1,500
												15,000
												57,213
												15,150
												4,338
												101,279
												3,378
												690
												2,800
												1,610
												2,250
												850
												11,577
												\$ 112,857
												\$ 20,000
												3,000
												2,000
												2,500
												1,000
												28,500
												998
												100
												1,098
												\$ 29,598

\$ 50,000 \$ 30,000 \$ 7,000 \$ 3,000 \$ 1,000 \$ 25,454 \$ 10,500 \$ 9,000 \$ 500 \$ 1,000 \$ 5,000 \$ 142,454

**[FORM OF REQUIRED DISCLOSURE STATEMENT]**

The undersigned, an authorized representative of \_\_\_\_\_, a \_\_\_\_\_ organized and existing under the laws of the State of \_\_\_\_\_, DOES HEREBY CERTIFY, REPRESENT AND WARRANT to the New York City Industrial Development Agency (the "Agency") pursuant to [Section 8.20] [Section 8.9] of that certain Agency Lease Agreement, dated as of December 1, 2013, between the Agency and Fresh Property Bronx, LLC, a limited liability company organized and existing under the laws of the State of Delaware (the "Lease Agreement") THAT:

**[if being delivered pursuant to 8.20 of the Lease Agreement]** None of the surviving, resulting or transferee Entity, any of the Principals of such Entity, or any Person that directly or indirectly Controls, is Controlled by, or is under common Control with such Entity:

**[if being delivered pursuant to 8.9 of the Lease Agreement]** Neither the above-referenced Entity, nor any of the Principals of such Entity, nor any Person that directly or indirectly Controls, is Controlled by, or is under common Control with such Entity:

1. is in default or in breach, beyond any applicable grace period, of its obligations under any written agreement with the Agency or the City, unless such default or breach has been waived in writing by the Agency or the City, as the case may be;
2. has been convicted of a misdemeanor related to truthfulness and/or business conduct in the past five (5) years;
3. has been convicted of a felony in the past ten (10) years;
4. has received formal written notice from a federal, state or local governmental agency or body that such Person is currently under investigation for a felony criminal offense; or
5. has received written notice of default in the payment to the City of any taxes, sewer rents or water charges, which have not been paid, unless such default is currently being contested with due diligence in proceedings in a court or other appropriate forum.

As used herein, the following capitalized terms shall have the respective meanings set forth below:

"City" shall mean The City of New York.

"Control" or "Controls" shall mean the power to direct the management and policies of a Person (x) through the ownership, directly or indirectly, of not less than a majority of its voting securities, (y) through the right to designate or elect not less than a majority of the members of its board of directors or trustees or other Governing Body, or (z) by contract or otherwise.

"Entity" shall mean any of a corporation, general partnership, limited liability company, limited liability partnership, joint stock company, trust, estate, unincorporated organization, business association,

tribe, firm, joint venture, governmental authority or governmental instrumentality, but shall not include an individual.

“Governing Body” shall mean, when used with respect to any Person, its board of directors, board of trustees or individual or group of individuals by, or under the authority of which, the powers of such Person are exercised.

“Person” shall mean an individual or any Entity.

“Principal(s)” shall mean, with respect to any Entity, the most senior three officers of such Entity, any Person with a ten percent (10%) or greater ownership interest in such Entity, and any Person as shall have the power to Control such Entity, and “principal” shall mean any of such Persons.

IN WITNESS WHEREOF, the undersigned has hereunto set its hand this \_\_\_\_ day of \_\_\_\_\_, 201\_.

**[NAME OF CERTIFYING ENTITY]**

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

**PROJECT COMPLETION CERTIFICATE OF LESSEE AS  
REQUIRED BY SECTIONS 3.3(f) AND 8.14(g) OF THE LEASE AGREEMENT**

The undersigned, an Authorized Representative (as defined in the Lease Agreement referred to below) of **FRESH PROPERTY BRONX, LLC**, a limited liability company organized and existing under the laws of the State of New York (the "Lessee"), HEREBY CERTIFIES that this Certificate is being delivered in accordance with the provisions of Section 3.3(f) and 8.14(g) of that certain Agency Lease Agreement, dated as of December 1, 2013 (the "Lease Agreement"), between the New York City Industrial Development Agency (the "Agency") and the Lessee, and FURTHER CERTIFIES THAT (capitalized terms used but not defined herein shall have the respective meanings assigned to such terms in the Lease Agreement):

(i) the Project Work is finished and the Project Improvements have been completed substantially in accordance with the plans and specifications therefor and the date of completion of the Project Improvements was \_\_\_\_\_; and

(ii) the Agency has good and valid leasehold estate in the Facility, and all property constituting the Facility is subject to the Company Lease, the Lease Agreement and the Sublease Agreement, subject only to Permitted Encumbrances; and

(iii) attached hereto is one of the following (check only one and attach the indicated document):

- certificate of occupancy, or
- temporary certificate of occupancy, or
- amended certificate of occupancy, or
- letter of no objection;

(iv) other than as provided pursuant to "iii" preceding, there is no certificate, license, permit, written approval or consent, or other document required to permit the occupancy, operation and use of the Facility as contemplated under the Lease Agreement; and

(v) in accordance with all applicable laws, regulations, ordinances and guidelines, the Facility is ready for occupancy, use and operation for its intended purpose under the Lease Agreement and such occupancy, use and operation has in fact commenced; and

(vi) check as applicable:

- all costs for Project Work have been paid, or
- all costs for Project Work have been paid except for
  - amounts not yet due and payable (attach itemized list) and/or
  - amounts the payments for which are being contested in good faith (attach itemized list with explanations; and

(vi) releases of mechanics' liens have been obtained from the general contractor and from all contractors and materialmen who supplied work, labor, services, machinery, equipment, materials or supplies in connection with the Project Work, except for releases-of-liens pertinent to (y) amounts not yet due and payable, or (z) any amount the payment of which is being contested in in good faith; and

[ATTACH to this Certificate copies of all such releases of liens.]

(ix) attached to this Certificate is evidence that all real property taxes and assessments, and payments in lieu of taxes, if any, due and payable under Sections 5.1 and 8.17 of the Lease Agreement in respect of the Facility have been paid in full.

*Notwithstanding anything herein or elsewhere that may be inferred to the contrary, the undersigned hereby understands and agrees on behalf of the Lessee as follows:* (i) the Agency does not waive its right to require delivery of releases-of-liens in connection with the Cost of Work; and (ii) the Agency does not waive its right under the Lease Agreement to demand the discharge of mechanics' and materialmens' liens encumbering the Facility Realty, whether by bond or otherwise; and (iii) this Certificate shall be deemed incomplete if costs of the Project Work are due, unpaid, and not being contested in good faith; and (iv) this Certificate shall be deemed incomplete if, in the Agency's sole discretion, the Lessee is not contesting in good faith the payment of the Cost of Work when such payment is otherwise due; and (v) the Certificate shall be deemed incomplete if, in the Agency's sole discretion, the Lessee has unreasonably failed to bond or otherwise discharge the Cost of Work when payment for same is due.

This Certificate is given without prejudice to any rights of the Lessee against third parties existing on the date hereof or which may subsequently come into being and no Person other than the Agency may benefit from this Certificate.

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

**FRESH PROPERTY BRONX, LLC**

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

[FORM OF SALES TAX LETTER]

**LETTER OF AUTHORIZATION FOR SALES TAX EXEMPTION**

**EXPIRATION DATE: December 1, 2016**

**ELIGIBLE LOCATION FOR CAPITAL IMPROVEMENTS  
AND FACILITY PERSONALTY:**

2 ST. ANN'S AVENUE, IN BRONX, NEW YORK,  
CONSTITUTING PART OF LOT 1 IN BLOCK 2543  
AND PART OF LOT 62 IN BLOCK 2260

December 19, 2013

TO WHOM IT MAY CONCERN

Re: New York City Industrial Development Agency  
(2013 Fresh Direct, LLC/Fresh Property Bronx, LLC Project)

Ladies and Gentlemen:

The New York City Industrial Development Agency (the "Agency"), by this notice, hereby advises you as follows:

1. The Agency constitutes a corporate governmental agency and a public benefit corporation under the laws of the State of New York, and therefore, in the exercise of its governmental functions, is exempt from the imposition of any New York State or New York City sales and use tax. As an exempt governmental entity, no exempt organization identification number has been issued to the Agency nor is one required.

2. Pursuant to a resolution adopted by the Agency on July 23, 2013, and a certain Agency Lease Agreement, dated as of December 1, 2013 (the "Lease Agreement"), between the Agency and Fresh Property Bronx, LLC, a limited liability company organized and existing under the laws of the State of Delaware (the "Company"), the Agency has authorized each of the Company and the Sublessee (as defined below) to act as its agent for the acquisition, construction, renovation and equipping a commercial facility (the "Facility"), consisting of the construction, furnishing and equipping of an approximately 500,000 square foot industrial, manufacturing and distribution facility, including without limitation the acquisition and/or leasing and installation of Acquired Assets and Facility Personalty, including machinery, equipment, furniture, fixtures and other tangible personal property for use at such Facility by the Company and the Sublessee in connection with their food manufacturing and distribution business.

3. In connection with such resolution, the Lease Agreement and this Letter of Authorization for Sales Tax Exemption and pursuant to the authority therein and herein granted, the Agency authorizes each of the Company and the Sublessee to act as its agent in connection with the construction, renovation and equipping of the Project and authorizes each of the Company and the Sublessee to use this Letter of Authorization for Sales Tax Exemption as its agent only for purpose of (a) purchasing or leasing materials, equipment, machinery, goods and supplies and (b) purchasing certain services, solely in connection with the Project, and subject to the scope and limitations described in Annex A attached hereto.

4. If upon the Company's or the Sublessee's request, the Agency appoints a contractor, subcontractor or other party to act as the Agency's agent for the purpose of effecting purchases exempt from sales or use tax pursuant to authority of this Letter of Authorization for Sales Tax Exemption (each party so appointed, hereinafter an "Agent"), this Sales Tax Letter must be attached to the Sales Tax Agent Authorization Letter provided to such Agent.

5. Each of the Company and the Sublessee agrees to comply, and to cause each of its contractors, subcontractors, Agents, persons or entities to comply, with the terms and conditions of Section 875(1) and (3) of the General Municipal Law, attached hereto as Annex B, as such provisions may be amended from time to time.

**6. VENDORS MUST IDENTIFY THE PROJECT ON EACH BILL AND INVOICE FOR PURCHASES AND LEASES OF ELIGIBLE ITEMS OR SERVICES AND INDICATE ON THE BILL OR INVOICE THAT SUCH ITEMS OR SERVICES WERE PURCHASED BY THE COMPANY OR THE AGENT AS AGENT FOR THE AGENCY.** Accordingly as agent for the Agency, the Company and each Agent agrees that each contract, agreement, invoice, bill or purchase order entered into by the Company or by an Agent, as agent for the Agency for the construction, renovation and equipping of the Project, shall include language in substantially the following form:

"This [contract, agreement, invoice, bill or purchase order] is being entered into by Fresh Property Bronx, LLC, a limited liability company organized and existing under the laws of the State of Delaware (the "Agent"), as agent for and on behalf of the New York City Industrial Development Agency (the "Agency") in connection with a certain project consisting of the construction, renovation and equipping of a commercial facility (the "Facility"), consisting of the construction, furnishing and equipping of an approximately 500,000 square foot industrial, manufacturing and distribution facility, including without limitation the acquisition and/or leasing and installation of Acquired Assets and Facility Personalty, including machinery, equipment, furniture, fixtures and other tangible personal property for use at such Facility by the Company and the Sublessee in connection with their food manufacturing and distribution business (the "Project"). The [purchase, lease, rental, use] of the [materials, machinery, equipment, goods, services and supplies] which are the subject of this [contract, agreement, invoice, bill or purchase order], which has been entered into with or presented to [*insert name and address of vendor* (the "Vendor")] shall be exempt from the sales and use tax levied by the State of New York and The City of New York subject to and in accordance with the terms and conditions set forth in the attached Letter of Authorization for Sales Tax Exemption of the Agency, and the Agent hereby represents that this [contract, agreement, invoice, bill or purchase order] is in compliance with the terms of the Letter of Authorization for Sales Tax Exemption.

The [Company or Agent] has provided the Vendor with a copy of, in the case of the Company, the Letter of Authorization for Sales Tax Exemption, an in the case of any other Agent, the Sales Tax Agent Authorization Letter, together with a copy of the Letter of Authorization for Sales Tax Exemption to evidence that the Agency has appointed the Agent as its agent. The Vendor must retain in its records a copy of the Letter of Authorization for Sales Tax Exemption and the [contract, agreement, invoice, bill or purchase



order] as evidence that the Vendor is not required to collect sales or use tax in connection with this [contract, agreement, invoice, bill or purchase order].

This [contract, agreement, invoice, bill or purchase order] is nonrecourse to the Agency, and the Agency shall not be directly or indirectly or contingently liable or obligated hereunder in any manner or to any extent whatsoever, and the Agent shall be the sole party liable hereunder. By execution or acceptance of this [contract, agreement, invoice, bill or purchase order], the Vendor hereby acknowledges and agrees to the terms and conditions set forth in this paragraph.”

7. The Agency shall have no liability or performance obligations under any contract, agreement, invoice, bill or purchase order entered into by the Company, the Sublessee or any Agent as agent for the Agency hereunder. The Agency shall not be liable, either directly or indirectly or contingently, upon any such contract, agreement, invoice, bill or purchase order in any manner and to any extent whatsoever, and the Company, the Sublessee or any Agent, shall be the sole party liable thereunder.

8. By execution of this Letter of Authorization for Sales Tax Exemption, the Company and the Sublessee agree to accept the terms hereof and warrant to the Agency that the use of this Letter of Authorization for Sales Tax Exemption by the Company, the Sublessee or by any Agent is strictly for the purposes above stated.

9. Accordingly, until the earlier of (i) the Expiration Date referred to above, (ii) the completion of the Project as provided in Section 3.3 of the Lease Agreement, (iii) the termination of the Lease Agreement, or (iv) the receipt by the Company of notice from the Agency of the termination of this Letter of Authorization for Sales Tax Exemption (in each case as so terminated, the “Termination Date”), all Vendors are hereby authorized to rely on this Letter of Authorization for Sales Tax Exemption (or on a photocopy or fax of this Letter of Authorization for Sales Tax Exemption) as evidence that purchases of the Project property, to the extent effected by the Company or by an Agent as agent for the Agency, are exempt from all New York State and New York City sales and use taxes. Upon the Termination Date, the agency relationship appointed between the Agency and the Company, the Sublessee and each Agent shall terminate, and (i) the Company shall immediately notify each Agent in writing of such termination; (ii) the Company shall surrender, and cause each Agent to surrender, this Letter of Authorization for Sales Tax Exemption (including any copy or facsimile hereof) and each Sales Tax Agent Authorization Letter to the Agency for cancellation.

10. Notwithstanding any contrary provisions in the Lease Agreement, ten (10) days prior to the Expiration Date of this Letter of Authorization for Sales Tax Exemption, the Company and the Sublessee shall surrender, and cause each Agent to surrender, this letter to the Agency for renewal. The Company, the Sublessee and any Agent may continue to use a facsimile copy of this Letter of Authorization for Sales Tax Exemption until its stated Expiration Date. Within ten (10) days of receipt of this Letter of Authorization for Sales Tax Exemption, the Agency shall provide such annual renewal of the letter to the Company and the Sublessee if and to the extent required under the Lease Agreement.

The signature of a representative of the Company and the Sublessee where indicated below will indicate that the Company and the Sublessee has accepted the terms hereof.

**NEW YORK CITY INDUSTRIAL  
DEVELOPMENT AGENCY**

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

ACCEPTED AND AGREED TO BY:

**FRESH PROPERTY BRONX, LLC**

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

**FRESH DIRECT, LLC**

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

**U.T.F. TRUCKING, INC.**

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

**ANNEX A  
TO  
LETTER OF AUTHORIZATION FOR SALES TAX EXEMPTION**

The Lessee and each Agent appointed directly or indirectly by the Agency in connection with the Project shall be entitled to claim an exemption from sales or use tax levied by the State of New York and The City of New York in connection with the following transactions:

- (i) purchases of materials, goods, machinery, equipment and supplies that will be incorporated into and made an integral component part of the Facility Realty;
- (ii) purchases or leases of any item of materials, goods, machinery, equipment, furniture, furnishings, trade fixtures and other tangible personal property having a useful life of one year or more, including the following items:
  - a. **[List the personal property]**
- (iii) with respect to the eligible items identified in (ii) above: purchases of freight, installation, maintenance and repair services required in connection with the shipping, installation, use, maintenance or repair of such items; provided that maintenance shall mean the replacement of parts or the making of repairs;
- (iv) purchases of materials, goods, machinery, equipment and supplies that are to be used and substantially consumed in the course of construction or renovation of the Facility Realty (but excluding fuel, materials or substances that are consumed in the course of operating machinery and equipment or parts containing fuel, materials or substances where such parts must be replaced whenever the substance is consumed);
- (v) leases of machinery and equipment solely for temporary use in connection with the construction or renovation of the Facility Realty; and
- (vi) Notwithstanding the foregoing, purchases or leases of the following items and the services described below are **NOT ELIGIBLE** for a sales and use tax exemption using this Sales Tax Letter:
  - a. vehicles of any sort, watercraft and rolling stock;
  - b. fine art, plants (whether potted or landscaped), artwork and other similar decorative items;
  - c. ordinary office supplies such as pencils, paper clips and paper;
  - d. any cost of utilities, cleaning service or supplies or other ordinary operating cost;
  - e. any materials or substances that are consumed in the operation of machinery;
  - f. equipment or parts containing materials or substances where such parts must be replaced whenever the substance is consumed; and
  - g. maintenance of the type as shall constitute janitorial services.

**ANNEX B  
TO  
LETTER OF AUTHORIZATION FOR SALES TAX EXEMPTION**

**SPECIAL PROVISIONS RELATING TO STATE SALES TAX SAVINGS  
General Municipal Law, Section 875(1) and (3)**

“Section 875. Special provisions applicable to State sales and compensating use taxes and certain types of facilities.

1. For purposes of this Section: “State sales and use taxes” means sales and compensating use taxes and fees imposed by Article twenty-eight or twenty-eight-A of the tax law but excluding such taxes imposed in a City by Section eleven hundred seven or eleven hundred eight of such Article twenty-eight. “IDA” means an industrial development agency established by this Article or an industrial development authority created by the public authorities law. “Commissioner” means the Commissioner of taxation and finance.

3. (A) An IDA shall include within its resolutions and project documents establishing any project or appointing an agent or project operator for any project the terms and conditions in this subdivision, and every agent, project operator or other person or entity that shall enjoy State sales and use tax exemption benefits provided by an IDA shall agree to such terms as a condition precedent to receiving or benefiting from such State sales and use exemptions benefits.

(B) The IDA shall recover, recapture, receive, or otherwise obtain from an agent, project operator or other person or entity State sales and use exemptions benefits taken or purported to be taken by any such person to which the person is not entitled or which are in excess of the amounts authorized or which are for property or services not authorized or taken in cases where such agent or project operator, or other person or entity failed to comply with a material term or condition to use property or services in the manner required by the person’s agreement with the IDA. Such agent or project operator, or other person or entity shall cooperate with the IDA in its efforts to recover, recapture, receive, or otherwise obtain such State sales and use exemptions benefits and shall promptly pay over any such amounts to the IDA that it requests. The failure to pay over such amounts to the IDA shall be grounds for the Commissioner to assess and determine State sales and use taxes due from the person under article twenty-eight of the tax law, together with any relevant penalties and interest due on such amounts.

(C) If an IDA recovers, recaptures, receives, or otherwise obtains, any amount of State sales and use tax exemption benefits from an agent, project operator or other person or entity, the IDA shall, within thirty days of coming into possession of such amount, remit it to the Commissioner, together with such information and report that the Commissioner deems necessary to administer payment over of such amount. An IDA shall join the Commissioner as a party in any action or proceeding that the IDA commences to recover, recapture, obtain, or otherwise seek the return of, State sales and use tax exemption benefits from an agent, project operator or other person or entity.

(D) An IDA shall prepare an annual compliance report detailing its terms and conditions described in paragraph (A) of this subdivision and its activities and efforts to recover, recapture, receive, or otherwise obtain State sales and use exemptions benefits described in paragraph (B) of this subdivision, together with such other information as the Commissioner and the Commissioner of economic development may require. The report required by this subdivision shall be filed with the Commissioner, the Director of the division of the budget, the

Commissioner of economic development, the State Comptroller, the governing body of the municipality for whose benefit the agency was created, and may be included with the Annual financial statement required by paragraph (B) of subdivision one of Section eight hundred fifty-nine of this Title. Such report required by this subdivision shall be filed regardless of whether the IDA is required to file such financial statement described by such paragraph (B) of subdivision one of Section eight hundred fifty-nine. The failure to file or substantially complete the report required by this subdivision shall be deemed to be the failure to file or substantially complete the statement required by such paragraph (B) of subdivision one of such section eight hundred fifty-nine, and the consequences shall be the same as provided in paragraph (E) of subdivision one of such Section eight hundred fifty-nine.

(E) This subdivision shall apply to any amounts of State sales and use tax exemption benefits that an IDA recovers, recaptures, receives, or otherwise obtains, regardless of whether the IDA or the agent, project operator or other person or entity characterizes such benefits recovered, recaptured, received, or otherwise obtained, as a penalty or liquidated or contract damages or otherwise. The provisions of this subdivision shall also apply to any interest or penalty that the IDA imposes on any such amounts or that are imposed on such amounts by operation of law or by judicial order or otherwise. Any such amounts or payments that an IDA recovers, recaptures, receives, or otherwise obtains, together with any interest or penalties thereon, shall be deemed to be State sales and use taxes and the IDA shall receive any such amounts or payments, whether as a result of court action or otherwise, as trustee for and on account of the State.”

**EXHIBIT I**

[FORM OF SALES TAX AGENT AUTHORIZATION LETTER]

**EXPIRATION DATE: December 1, 2016**

**ELIGIBLE LOCATION FOR CAPITAL IMPROVEMENTS  
AND FACILITY PERSONALTY:  
2 ST. ANN'S AVENUE, IN BRONX, NEW YORK,  
CONSTITUTING PART OF LOT 1 IN BLOCK 2543  
AND PART OF LOT 62 IN BLOCK 2260**

\_\_\_\_\_, 2013

TO WHOM IT MAY CONCERN

Re: New York City Industrial Development Agency  
(2013 Fresh Direct, LLC/Fresh Property Bronx, LLC Project)

Ladies and Gentlemen:

The New York City Industrial Development Agency (the "Agency"), by this notice, hereby advises you as follows:

1. Pursuant to the Letter of Authorization of Sales Tax Exemption attached here to as Exhibit A (the "Sales Tax Letter"), issued pursuant to a certain Agency Lease Agreement, dated as of December 1, 2013 (the "Lease Agreement"), between the Agency and Fresh Property Bronx, LLC, a limited liability company organized and existing under the laws of the State of Delaware (the "Company"), the Agency has authorized each of the Company and the Sublessee (as defined below) to act as its agent for the construction, renovation and equipping of a commercial facility (the "Facility"), consisting of the construction, furnishing and equipping of an approximately 500,000 square foot industrial, manufacturing and distribution facility, including without limitation the acquisition and/or leasing and installation of Acquired Assets and Facility Personalty, including machinery, equipment, furniture, fixtures and other tangible personal property for use and occupancy by the Company and Fresh Direct, LLC a limited liability company organized and existing under the laws of the State of Delaware and U.T.F. Trucking, Inc., a corporation organized and existing under the laws of the State of Delaware (collectively, the "Sublessee") in connection with their food manufacturing and distribution business (collectively, the "Project").

2. Upon the Company's or the Sublessee's request, the Agency has appointed [**insert name of Agent**] (the "Agent"), pursuant to this Sales Tax Agent Authorization Letter (the "Sales Tax Agent Authorization Letter") to act as the Agency's agent for the purpose of effecting purchases exempt from sales or use tax in accordance with the terms, provisions of this Sales Tax Agent Authorization Letter and the Sales Tax Letter, which is deemed incorporated herein by reference.

3. The effectiveness of the appointment of the Agent as an agent of the Agency is expressly conditioned upon the execution by the Agency of New York State Department of Taxation and Finance Form ST-60 "IDA Appointment of Project or Agent" ("Form ST-60") to evidence that the Agency has appointed the Agent as its agent (the form of which to be completed by Agent and the Company. Pursuant to the exemptions from sales and use taxes available to the Agent under this Sales Tax Agent Authorization Letter and the Sales Tax Letter, the Agent shall avail itself of such exemptions when

purchasing eligible materials and services in connection with the Project and shall not include such taxes in its contract price, bid or reimbursable costs, as the case may be.

4. The Agent acknowledges that the executed Form ST-60 shall not serve as a sales or use tax exemption certificate or document. No agent or project operator may tender a copy of the executed Form ST-60 to any person required to collect sales tax as a basis to make such purchases exempt from tax. No such person required to collect sales or use taxes may accept the executed Form ST-60 in lieu of collecting any tax required to be collected. THE CIVIL AND CRIMINAL PENALTIES FOR MISUSE OF A COPY OF FORM ST-60 AS AN EXEMPTION CERTIFICATE OR DOCUMENT OR FOR FAILURE TO PAY OR COLLECT TAX SHALL BE AS PROVIDED IN THE TAX LAW. IN ADDITION, THE USE BY AN AGENT, PROJECT OPERATOR, OR OTHER PERSON OR ENTITY OF SUCH FORM ST-60 AS AN EXEMPTION CERTIFICATE OR DOCUMENT SHALL BE DEEMED TO BE, UNDER ARTICLES TWENTY EIGHT AND THIRTY SEVEN OF THE TAX LAW, THE ISSUANCE OF A FALSE OR FRAUDULENT EXEMPTION CERTIFICATE OR DOCUMENT WITH THE INTENT TO EVADE TAX.

5. The Agent agrees to comply with the terms and conditions of the Sales Tax Letter, including but not limited to Section 875(1) and (3) of the General Municipal Law, attached to the Sales Tax Letter as Annex B, as such provisions may be amended from time to time. The Agent must retain for at least six (6) years from the date of expiration of its Contract copies of (a) the Agency Agreement, (b) all contracts, agreements, invoices, bills or purchases entered into or made by such Agent using the Letter of Authorization for Sales Tax Exemption, and (c) the executed Form ST-60 appointing the Agent as an agent of the Agency and to make such records available to the Agency upon reasonable notice. This provision shall survive the expiration or termination of the Agency Agreement.

6. In order to assist the Company in complying with its obligation to file New York State Department of Taxation and Finance Form ST-340 "Annual Report of Sales and Use Tax Exemptions Claimed by Project Operator of Industrial Development Agency/Authority" ("Form ST-340"), the Agent covenants and agrees that it shall file annually with the Company (no later than January 15th following each calendar year in which it has claimed sales and use tax exemptions in connection with the Project) a written statement of all sales and use tax exemptions claimed by such Agent for the preceding calendar year in connection with the Project and the Facility by completing and submitting to the Company the **Sales Tax Registry** attached hereto as **Exhibit B**. If the Agent fails to comply with the foregoing requirement, the Agent shall immediately cease to be the agent for the Agency in connection with the Project (such agency relationship being deemed to be immediately revoked) without any further action of the parties, the Agent shall be deemed to have automatically lost its authority to make purchases as agent for the Agency, and shall desist immediately from all such activity, and shall immediately and without demand return to the Company or the Agency its copy of the Sales Tax Agent Authorization Letter and the Sales Tax Letter.

7. The Agent agrees that if it fails to comply with the requirements for sales and use tax exemptions, as described in this Sales Tax Agent Authorization Letter and the Sales Tax Letter, it shall pay any and all applicable New York State sales and use taxes, and no portion thereof shall be charged or billed to the Agency or to the Company directly or indirectly, the intent of the Agency Agreement being that neither the Agency nor the Company shall be liable for any of the sales or use taxes described above. This provision shall survive the expiration or termination of this Sales Tax Agent Authorization Letter.

8. The Agent represents and warrants that, except as otherwise disclosed to the Agency, none of the Agent, the Principals of the Agent, or any Person that directly or indirectly Controls, is Controlled by, or is under common Control with the Agent:

- a) is in default or in breach, beyond any applicable grace period, of its obligations under any written agreement with the Agency or The City of New York (the "City"), unless such default or breach has been waived in writing by the Agency or the City, as the case may be;
- b) has been convicted of a felony and/or any crime involving moral turpitude in the preceding ten (10) years;
- c) has received written notice of default in the payment to the City of any taxes, sewer rents or water charges in excess of \$5,000 that has not been cured or satisfied, unless such default is then being contested with due diligence in proceedings in a court or other appropriate forum; or
- d) has, at any time in the three (3) preceding years, owned any property which, while in the ownership of such Person, was acquired by the City by in rem tax foreclosure, other than a property in which the City has released or is in the process of releasing its interest to such Person pursuant to the Administrative Code of the City.

As used herein, the following capitalized terms shall have the respective meanings set forth below:

"City" shall mean The City of New York.

"Control" or "Controls" shall mean the power to direct the management and policies of a Person (x) through the ownership, directly or indirectly, of not less than a majority of its voting securities, (y) through the right to designate or elect not less than a majority of the members of its board of directors or trustees or other Governing Body, or (z) by contract or otherwise.

"Entity" shall mean any of a corporation, general partnership, limited liability company, limited liability partnership, joint stock company, trust, estate, unincorporated organization, business association, tribe, firm, joint venture, governmental authority or governmental instrumentality, but shall not include an individual.

"Governing Body" shall mean, when used with respect to any Person, its board of directors, board of trustees or individual or group of individuals by, or under the authority of which, the powers of such Person are exercised.

"Person" shall mean an individual or any Entity.

9. By execution of this Sales Tax Agent Authorization Letter, the Agent agrees to accept the terms hereof and warrant to the Agency that the use of this Sales Tax Agent Authorization Letter and the Sales Tax Letter by the Agent is strictly for the purposes stated herein and in the Sales Tax Letter.

10. The Agent acknowledges and a that this Sales Tax Agent Authorization Letter will terminate expire on the date (the "Termination Date") that is the earlier of (i) the Expiration Date referred to above, and (ii) the expiration or termination of the Sales Tax Letter. Upon the Termination Date, the agency relationship between the Agency and the Agent shall terminate, and the Agent shall surrender this Sales Tax Agent Authorization Letter to the Agency for cancellation.

11. Notwithstanding any contrary provisions in the Lease Agreement, ten (10) days prior to the Expiration Date of this Sales Tax Agent Authorization Letter the Agent shall surrender this letter to the Agency for renewal or cancellation. The Agent may continue to use a facsimile copy of this Sales Tax Agent Authorization Letter until its stated Expiration Date. Within ten (10) days of receipt of this



Sales Tax Agent Authorization Letter, the Agency shall provide such annual renewal of the letter to the Agent if and to the extent it is required to renew the Sales Tax Letter under the Lease Agreement.

The signature of a representative of the Agent where indicated below will indicate that the Agent accepted the terms hereof.

**NEW YORK CITY INDUSTRIAL  
DEVELOPMENT AGENCY**

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

ACCEPTED AND AGREED TO BY:

\_\_\_\_\_ [AGENT] \_\_\_\_\_

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

**EXHIBIT A  
TO  
SALES TAX AGENT AUTHORIZATION LETTER**

LETTER OF AUTHORIZATION FOR SALES TAX EXEMPTION [ATTACHED]

**EXHIBIT B  
TO  
SALES TAX AGENT AUTHORIZATION LETTER**

**Sales Tax Registry**

Please Complete: **REPORTED PERIOD:** \_\_\_\_\_, 201\_\_ to \_\_\_\_\_, 201\_\_

<b>Description of Item (Incl. Serial #, if applicable)</b>	<b>Location of Item</b>	<b>Dollar Amount</b>	<b>Vendor Description</b>	<b>Date of Payment</b>	<b>Purchase order or invoice number</b>	<b>Sales Tax Savings</b>

<b>TOTAL SALES TAX SAVINGS REALIZED DURING THE REPORTED PERIOD:</b>	
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Certification: I, the undersigned, an authorized officer or principal owner of the Lessee, hereby certify to the best of my knowledge and belief that all information contained in this report is true and complete. The information reported in this form includes all Sales Tax Savings realized by the Lessee below and its principals, affiliates, tenants, subtenants, contractors, subcontractors and any other person or entity pursuant to the LETTER OF AUTHORIZATION FOR SALES TAX EXEMPTION issued to the Lessee by New York City Industrial Development Agency. This form and information provided pursuant hereto may be disclosed to the New York City Economic Development Corporation ("NYCEDC"), and may be disclosed by NYCEDC in connection with the administration of the programs by NYCEDC; and, without limiting the foregoing, such information may be included in reports or disclosure required by law.

**Company Name:** \_\_\_\_\_

**Signature By:** \_\_\_\_\_

**Name (print):** \_\_\_\_\_

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

**Date:** \_\_\_\_\_

**SPECIAL PROVISIONS RELATING TO STATE SALES TAX SAVINGS  
General Municipal Law, Section 875(1) and (3)**

“Section 875. Special provisions applicable to State sales and compensating use taxes and certain types of facilities.

1. For purposes of this Section: “State sales and use taxes” means sales and compensating use taxes and fees imposed by Article twenty-eight or twenty-eight-A of the tax law but excluding such taxes imposed in a City by Section eleven hundred seven or eleven hundred eight of such Article twenty-eight. “IDA” means an industrial development agency established by this Article or an industrial development authority created by the public authorities law. “Commissioner” means the Commissioner of taxation and finance. ...
3. (A) An IDA shall include within its resolutions and project documents establishing any project or appointing an agent or project operator for any project the terms and conditions in this subdivision, and every agent, project operator or other person or entity that shall enjoy State sales and use tax exemption benefits provided by an IDA shall agree to such terms as a condition precedent to receiving or benefiting from such State sales and use exemptions benefits.

(B) The IDA shall recover, recapture, receive, or otherwise obtain from an agent, project operator or other person or entity State sales and use exemptions benefits taken or purported to be taken by any such person to which the person is not entitled or which are in excess of the amounts authorized or which are for property or services not authorized or taken in cases where such agent or project operator, or other person or entity failed to comply with a material term or condition to use property or services in the manner required by the person’s agreement with the IDA. Such agent or project operator, or other person or entity shall cooperate with the IDA in its efforts to recover, recapture, receive, or otherwise obtain such State sales and use exemptions benefits and shall promptly pay over any such amounts to the IDA that it requests. The failure to pay over such amounts to the IDA shall be grounds for the Commissioner to assess and determine State sales and use taxes due from the person under article twenty-eight of the tax law, together with any relevant penalties and interest due on such amounts.

(C) If an IDA recovers, recaptures, receives, or otherwise obtains, any amount of State sales and use tax exemption benefits from an agent, project operator or other person or entity, the IDA shall, within thirty days of coming into possession of such amount, remit it to the Commissioner, together with such information and report that the Commissioner deems necessary to administer payment over of such amount. An IDA shall join the Commissioner as a party in any action or proceeding that the IDA commences to recover, recapture, obtain, or otherwise seek the return of, State sales and use tax exemption benefits from an agent, project operator or other person or entity.

(D) An IDA shall prepare an annual compliance report detailing its terms and conditions described in paragraph (A) of this subdivision and its activities and efforts to recover, recapture, receive, or otherwise obtain State sales and use exemptions benefits described in paragraph (B) of this subdivision, together with such other information as the Commissioner and the Commissioner of economic development may require. The report required by this subdivision shall be filed with the Commissioner, the Director of the division of the budget, the Commissioner of economic development, the State Comptroller, the governing body of the municipality for whose benefit the agency was created, and may be included with the Annual financial statement required by paragraph (B) of subdivision one of Section eight hundred fifty-

nine of this Title. Such report required by this subdivision shall be filed regardless of whether the IDA is required to file such financial statement described by such paragraph (B) of subdivision one of Section eight hundred fifty-nine. The failure to file or substantially complete the report required by this subdivision shall be deemed to be the failure to file or substantially complete the statement required by such paragraph (B) of subdivision one of such section eight hundred fifty-nine, and the consequences shall be the same as provided in paragraph (E) of subdivision one of such Section eight hundred fifty-nine.

(E) This subdivision shall apply to any amounts of State sales and use tax exemption benefits that an IDA recovers, recaptures, receives, or otherwise obtains, regardless of whether the IDA or the agent, project operator or other person or entity characterizes such benefits recovered, recaptured, received, or otherwise obtained, as a penalty or liquidated or contract damages or otherwise. The provisions of this subdivision shall also apply to any interest or penalty that the IDA imposes on any such amounts or that are imposed on such amounts by operation of law or by judicial order or otherwise. Any such amounts or payments that an IDA recovers, recaptures, receives, or otherwise obtains, together with any interest or penalties thereon, shall be deemed to be State sales and use taxes and the IDA shall receive any such amounts or payments, whether as a result of court action or otherwise, as trustee for and on account of the State.”

**EXHIBIT K**

**Sales Tax Registry**

Please Complete: **REPORTED PERIOD:** \_\_\_\_\_, 201\_\_ to \_\_\_\_\_, 201\_\_

Description of Item (Incl. Serial #, if applicable)	Location of Item	Dollar Amount	Vendor Description	Date of Payment	Purchase order or Invoice number	Sales Tax Savings

**TOTAL SALES TAX SAVINGS REALIZED DURING THE REPORTED PERIOD:** \_\_\_\_\_

Certification: I, the undersigned, an authorized officer or principal owner of the Lessee, hereby certify to the best of my knowledge and belief that all information contained in this report is true and complete. The information reported in this form includes all Sales Tax Savings realized by the Lessee below and its principals, affiliates, tenants, subtenants, contractors, subcontractors and any other person or entity pursuant to the LETTER OF AUTHORIZATION FOR SALES TAX EXEMPTION issued to the Lessee by New York City Industrial Development Agency. This form and information provided pursuant hereto may be disclosed to the New York City Economic Development Corporation ("NYCEDC"), and may be disclosed by NYCEDC in connection with the administration of the programs by NYCEDC; and, without limiting the foregoing, such information may be included in reports or disclosure required by law.

**Company Name:** \_\_\_\_\_

**Signature By:** \_\_\_\_\_

**Name (print):** \_\_\_\_\_

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

**Date:** \_\_\_\_\_

**PROJECT FINANCE PLAN**

The plan for financing the cost of the Project Work, which the Lessee estimates to be \$142,454,000, from the following sources:

(i) one or more loans in the aggregate principal amount of \$60,000,000 to be made by one or more financial institutions or other Persons (collectively, the "Mortgagee") to the Lessee (the "Mortgage Loan") after the Commencement Date, and to be evidenced by certain mortgage notes (as the same may be amended or supplemented, collectively, the "Mortgage Note") dated the date of delivery thereof and in the principal amount of the applicable Mortgage Loan, and to be secured by a mortgage on the Facility Realty pursuant to a certain mortgage and security agreement dated the date of delivery thereof (as the same may be amended or supplemented, collectively, the "Mortgage") from the Lessee and the Agency to the applicable Mortgagee;

(ii) other loans not constituting Mortgage Loans in the amount of \$31,000,000 from one or more financial institutions or other Persons;

(iii) grants in the amount of \$21,000,000; and

(iv) equity from the Lessee and/or the Sublessee in the amount of \$30,454,000.



## EXHIBIT M

### AGENCY MORTGAGE REQUIREMENTS

1. The assignment to the mortgagee of leases and rents shall not include an assignment of the Lease Agreement; (the Agency however will subordinate the Lease Agreement to the lien of the Mortgage);

2. There shall be no recourse, pecuniary or otherwise, to the Agency, its officers, directors, employees or agents;

3. Except for ministerial actions taken at the Lessee's expense, the Agency will undertake no obligations;

4. the Agency's consent shall be required for all modifications and assignments of the Mortgage, and the Agency must be a party to the Mortgage as amended and/or assigned; and

5. The Mortgage shall contain the following provisions:

Section \_\_\_\_\_. Representations and Warranties of the Agency. The Agency represents and warrants that it has power to enter into and perform this Mortgage, to create, pledge and grant the Mortgage, pledge, assignment and security interest in the [Premises], to the extent of the Agency's interest therein, as provided in this Mortgage and to own its property and assets, has duly authorized the execution and delivery of this Mortgage by proper corporate action and neither this Mortgage, the authorization, execution, delivery and performance hereof, the performance of the agreements herein contained nor the consummation of the transactions herein contemplated will violate any provision of law, any order of any court or agency of government or any agreement, indenture or other instrument to which the Agency is a party or by which it or any of its property is subject to or bound, or be in conflict with or result in a breach of or constitute (with due notice and/or lapse of time) a default under any indenture, agreement or other instrument or any provision of its by-laws or any other requirement of law. The Agency further represents and warrants that this Mortgage constitutes the legal, valid and binding obligation of the Agency enforceable against the Agency in accordance with its terms, except as the enforceability thereof may be limited by bankruptcy, moratorium or insolvency or other laws affecting creditors' rights generally and is subject to general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

Section \_\_\_\_\_. Limitation on Agency Liability. With respect to the Agency, it is agreed that the Agency, its officers, members, employees, agents and directors, shall have no personal liability hereunder, nor in their capacity as officers, members, employees, agents and directors. The Agency has executed this Mortgage to subject its interest in the [Premises] to the lien of this Mortgage; however, the Mortgagee shall have no recourse to the Agency but shall have recourse against the [Premises]. No provision, covenant or agreement contained in this Mortgage or any obligations herein imposed upon the Agency or the breach thereof, shall constitute or give rise to or impose upon the Agency a pecuniary liability or a charge upon its general credit. In making the agreements, provisions and covenants set forth in this Mortgage, the Agency has not obligated itself except with respect to the [Premises]. All covenants, stipulations, promises, agreements and obligations of the Agency contained herein shall be deemed to be covenants, stipulations, promises, agreements and obligations of the Agency and not of any member, director, officer, employee or agent of the Agency in his or her individual capacity, and no recourse shall be had for the payment of the principal of any debt or interest thereon or any of the Obligations or for any claim based thereon or hereunder against any member, director, officer, employee or agent of the Agency

or any natural person executing this Mortgage. No covenant herein contained shall be deemed to constitute a debt of the State of New York or of The City of New York and neither the State of New York nor The City of New York shall be liable on any covenant herein contained, nor shall the obligations secured by this Mortgage be payable out of any funds of the Agency, other than those pledged therefor.

Section \_\_\_\_\_. Agency is Executing Mortgage at Lessee's Direction. Lessee hereby directs the Agency to execute and deliver this Mortgage to the Mortgagee, and further agrees to indemnify the Agency (and its members, officers, directors, agents, servants and employees) in connection with the execution, delivery, recording, performing and enforcing of this Mortgage.

Section \_\_\_\_\_. Termination of Lease Agreement. Upon the termination of the Lease Agreement for any reason whatsoever and at the sole cost and expense of the Lessee, the Mortgagee shall prepare and deliver to the Agency and the Lessee, and the Agency and the Lessee shall execute, any documents necessary to amend and restate the Mortgage and this Mortgage, in order to remove the Agency as a party thereto and hereto.



**EXHIBIT O**

**FORM OF CONSTRUCTION CERTIFICATE**

[Date]

New York City Industrial  
Development Agency  
110 William Street  
New York, NY 10038

Re: New York City Industrial Development Agency Project to assist in the construction, improvement and equipping of the premises described in Schedule A hereto (the "Premises")

To Whom It May Concern:

The undersigned "Construction Manager" understands that New York City Industrial Development Agency is providing financial assistance to Fresh Property Bronx, LLC (the "Lessee") on behalf of Fresh Direct, LLC and U.T.F. Trucking, Inc. (collectively, the "Sublessee") in connection with the construction and equipping of an approximately 500,000 square foot building (the "Improvements") on the Premises (the "Project"). Construction Manager has been engaged to act as the construction manager in connection with the construction the Improvements pursuant to the provisions of a certain contract between the Lessee and the Construction Manager dated \_\_\_\_\_, 20\_\_ (the "Contract"). The Construction Manager has reviewed certain plans and specifications (the "Plans and Specifications") for use in connection with the construction of the Improvements, as more particularly described in the Architect's Certification, dated December \_\_, 2013, by \_\_\_\_\_, the architect for the Project.

The undersigned Construction Manager does hereby certify and represent to you as follows:

1. All permits, licenses, certificates, consents and approvals required in connection with the commencement of construction of the Improvements, including but not limited to, curb-cut permits, building permits and permits relating to utilities, have been duly, validly and unconditionally issued by the appropriate governmental agencies (federal, state and local) and private authorities and agencies.
2. The following are the approvals, authorizations, permits or licenses currently issued that are necessary to construct and operate the Improvements, pursuant to any law, rule, ordinance or regulation affecting the Premises, including environmental laws, rules, ordinances or regulations:

- |                            |  |
|----------------------------|--|
| • Zoning                   | Department of Buildings                |
| • New Building             | Department of Buildings                |
| • Sewer Permit             | Department of Environmental Protection |
| • Sprinklers               | Department of Buildings                |
| • Standpipe                | Department of Buildings                |
| • Generator                | Department of Buildings                |
| • Paving Plan              | Department of Buildings                |
| • Street Opening           | Department of Transportation           |
| • Asbestos Control Program | Department of Environmental Protection |

3. The following are the only other approvals, authorizations, permits or licenses necessary to construct and operate the Improvements, pursuant to any law, rule, ordinance or regulation affecting the

Premises, including environmental laws, rules, ordinances or regulations, which have not been obtained as of this date and which are necessary for the construction of the Improvements:

- Fire Alarm                      Department of Buildings
- Tenant Work                    Department of Buildings
- Electrical                        Department of Buildings

[List all other applicable items]

4. The undersigned is familiar with the process for obtaining the approvals, authorizations, permits and licenses necessary to construct and occupy the Improvements, and as to those approvals, authorizations, permits and licenses not yet obtained, the undersigned knows of no reason why the same should not be issued when required by the Lessee upon the payment of the approved fee so as to not delay the construction and occupancy of the Improvements. Such approvals can be obtained in the ordinary course of business so as to not delay the construction of the Improvements, and the issuance of such permits by the applicable government authority is ministerial and not discretionary.

5. The Plans and Specifications for the construction of the Improvements on the Premises have been approved by all necessary agencies of the City of New York.

6. To my knowledge, there is no petition, action or proceeding known to the undersigned pending before the court, agency or official, threatened with respect to the validity of any statutes, ordinances, regulations, restrictions, codes, rules, permits, certificates or any permits or approvals thereunder relating to the Improvements, or to revoke, rescind, alter or declare any of the same.

7. Construction Manager duly licensed and in good standing in the State of New York to perform all work described in the Contract.

The statements contained in this letter are an expression of the undersigned's opinion, are made to the best of the undersigned's knowledge, information and belief, and are based on the undersigned's performance of services under its Contract with the Lessee in accordance with generally accepted standards of construction industry practice.

Very truly yours,

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

**SCHEDULE A**

**DESCRIPTION OF THE PREMISES**

Those certain lots, pieces or parcels of land generally known as:

			<b><u>STREET ADDRESS</u></b>
Tract 1	Part of Lot 1 Part of Lot 62	Tentative New Tax Lot -- Block 2543, Lot 1	2 St. Ann's Avenue Bronx, New York 10454
Tract 2	Part of Lot 1	Tentative New Tax Lot -- Block 2543, Lot 71	

all as more particularly described in the legal description attached hereto.