

A Somewhat-Barebones Contract Example

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INITIAL NOTES:

This hypothetical agreement introduces some important contract-drafting concepts. For pedagogical purposes, this agreement is overly-simplified in some respects and overly-detailed in others.

The contract provisions are shaded in gray. Some text is presented in a different color to signal that the text is discussed in the commentary following the provision.

Some provisions are written in very-short form (“See Spot. See Spot run”) for easier annotation and study. In a real agreement, some such provisions likely would be combined. ¶ I’m starting to think, though, that the See-Spot-See-Spot-run approach might well speed up The Other Side’s legal review — and that’s a key consideration in drafting.

The paragraph numbering and formatting of this Agreement are not necessarily the way you’d draft a contract; I’ve done them this way for simplicity.

Purchase and Sale Agreement – 2012 MacBook Air Computer

[A] The title of this agreement is worded to make the title easier to spot in a list of documents (e.g., an index of files) and to make the title more descriptive when referred to in other documents (e.g., another agreement, or a pleading, brief, or court opinion).

[B] For some agreements, it might make sense to list the parties’ names in the title as well. See, for example, the [merger agreement](#) between United Airlines and Continental Airlines (which we’ll be studying), whose title is:

23 AGREEMENT AND PLAN OF MERGER Among UAL Corporation ¶
24 Continental Airlines, Inc. ¶ and JT Merger Sub Inc. ¶ Dated as of
25 May 2, 2010 [we'll talk about the "Dated as of" part later].

26 [C] Another title style is that seen in a [real-estate purchase agreement](#) involving Rick's Cab-
27 aret (which we'll also be studying):

28 REAL ESTATE PURCHASE AND SALE AGREEMENT BY AND
29 BETWEEN WIRE WAY, LLC, a Texas limited liability company
30 ("Seller") and RCI HOLDINGS, INC., a Texas corporation
31 ("Purchaser").

32 [D] By putting the abbreviations "Seller" and "Buyer" in the title itself, the drafter usefully
33 eliminated the need to define those terms later in the contract, thus following the D.R.Y. princi-
34 ple ("Don't Repeat Yourself").

35 THIS AGREEMENT [A] [B] ("**Agreement**") [C] is between [D] **Betty's Used Computers, LLC**, a lim-
36 ited liability company [E] organized under [F] the laws of the State of Texas ("**Buyer**") [G], with its
37 principal place of business [H] and its initial address for notice [I] at 1234 Main Street, Houston,
38 Texas 77002; and **Sam Smith**, a resident [J] of Houston, Harris County, Texas, whose initial ad-
39 dress for notice is 2450 River Oaks Boulevard, Texas 77019 ("**Seller**"). This Agreement is effec-
40 tive [K] the last date written on the signature page

41 [A] Unlike the provisions below, this opening paragraph doesn't have a section number.
42 That's merely a convention (as is true for many contract-drafting practices) and not a require-
43 ment; sometimes I do number the opening paragraph.

44 [B] Many drafters would start this paragraph by repeating the title of the agreement in all-
45 caps: "THIS PURCHASE AND SALE AGREEMENT ..." I prefer the shorter approach shown here,
46 because (1) it should be obvious what agreement is referred to in this opening paragraph; and
47 (2) the shorter version reduces the risk that a future editor might (i) revise the large-type title at
48 the very top of the document but (ii) forget to change the all-caps title in the preamble. ¶ Note

49 how I broke up the previous sentence with parenthetical “[romanettes](#),” that is, lower-case Ro-
50 man numerals, to make the sentence easier for a contract reviewer to skim.

51 [C] The words “Agreement,” “Buyer,” and “Seller” are in bold-faced type and surrounded by
52 quotation marks and parentheses. When “defined terms” such as these have their definitions
53 stated “in-line” in this fashion, it’s a good idea to billboard them in this way. That makes it eas-
54 ier for a reader to spot a desired definition quickly when scanning the document to find it. (*Im-*
55 *agine the reader running across a reference to some other defined term and starting to flip*
56 *through the document, wondering to herself, “OK, what does ‘Affiliate’ mean again?”*) ¶ If you
57 have a separate definitions section, it’s a good idea to include cross-references to the in-line
58 definitions as well.

59 [D] Many drafters say “by and between” instead of just “between.” I prefer the latter, which
60 sounds less legalese-y.

61 [E] This sample agreement is set up to be between an individual and an LLC so that the sig-
62 nature blocks will illustrate how organizational signature blocks should be done.

63 [F] Stating the type of organization and, importantly, its state of organization, has two ben-
64 efits: (i) It reduces the chance of confusion in case there are (let’s say) an “Acme Supplies, Inc.”
65 in different states; and (ii) it helps to nail down at least one jurisdiction where the named party
66 is subject to personal jurisdiction. ¶ Note how at the beginning of item (i) in this paragraph,
67 I capitalized the first letter of the word “It” – that’s the conventional usage when you use a
68 number before the colon, which in this case is in the introductory phrase, “has two benefits:”.

69 [G] The terms “Buyer” and “Seller” are used, and presented the way they are, because it’s
70 very often a good idea to use **functional** short-form names for the parties, e.g., Buyer and Seller
71 instead of Betty and Sam. That can make it easier on future readers (e.g., a judge) to keep track
72 of who’s who. It also makes it easier to re-use the document for another deal by just changing
73 the names at the front, instead of having to change each occurrence within the document.
74 (Global search-and-replace is convenient but often over-inclusive.)

75 [H] Stating the principal place of business of an organization is another aid to help trial
76 counsel nail down personal jurisdiction – for example, a Delaware corporation whose principal
77 place of business was in Houston would almost certainly be subject to suit in Houston.

78 [I] I like to put the initial address for notice in the preamble – that way, a later reader won't
79 need to go paging through the agreement looking for it, and it makes it easy for reviewer(s) to
80 verify that the information is correct.

81 [J] Stating Sam's residence helps establish personal jurisdiction *and the proper venue* for
82 a lawsuit. ¶ Just saying that Sam lives in "Houston" won't be enough to establish venue, be-
83 cause the city of Houston per se extends into multiple counties, and Texas's venue statutes typ-
84 ically require that a lawsuit against an individual be brought in the *county* in which the individ-
85 ual resides.

86 [K] The "effective date" sentence is usually unnecessary, but many drafters like to include
87 it. I prefer the "last date signed" approach that's shown here; we'll discuss that in more detail
88 later.

89 **1. The transaction:** [A] [B] [C] [D] At the Closing, as defined below, Seller will sell [E] [F] to Buyer,
90 and Buyer will buy [F], Seller's 2012 MacBook Air computer, serial number [G] 123456789, and
91 its factory-supplied power supply (collectively, the "**Computer**"), for USD [H] \$800 (the "**Pur-**
92 **chase Price**").

93 [A] Putting the basic terms of the contract "up front" in this manner helps the reviewer(s)
94 to see at a glance what the deal is all about; it also provides a convenient place to make
95 changes to the basic terms without having to hunt through the document. ¶ This section could
96 be a one-sentence contract all by itself if the phrase "At the Closing" were replaced by a specific
97 time and place. See my essay about short contracts, at [http://www.oncontracts.com/a-con-](http://www.oncontracts.com/a-contract-can-often-be-short-and-simple/)
98 [tract-can-often-be-short-and-simple/](http://www.oncontracts.com/a-contract-can-often-be-short-and-simple/).

99 [B] For relatively-short contracts like this, I like to use bold-faced descriptive headings, not
100 capitalized (except for the first letter), and ending with a colon. That saves a line or two.

101 [C] I've skipped the "recitals" here (sometimes worded archaically as "Whereas" clauses)
102 because the body of the agreement is pretty much self-explanatory.

103 [D] For the same reason, I've also skipped what Stark calls the "words of agreement,"
104 namely, "The parties agree as follows."

105 [E] "Seller will sell" and "Buyer will buy": These phrases obligate each party; otherwise, the
106 agreement might be an option contract—a "call" option if Seller must sell to Buyer but only if
107 she chooses to buy, or a "put" option if it's the other way around.

108 [F] Some drafters would prefer "shall sell"; I like "will sell" because it's a tad less harsh,
109 which I think can be a nice touch in a supplier-customer relationship, where the sales people
110 would like for the seller corporation to be just a bit deferential to the customer. ¶ Also, I've
111 read that in some other countries the term "shall" refers to something that's optional, not man-
112 datory. ¶ I might well use, e.g., "Seller is to sell" instead of "Seller will sell."

113 [G] Serial number: It's often a good idea to be very specific in identifying the exact goods to
114 be sold (or whatever); that wouldn't be the case if the goods were fungible.

115 [H] USD is the conventional abbreviation for U.S. dollars – see [Wikipedia](#) for a list of other
116 currency abbreviations.

117 **1.1 Closing Time:** 10:00 a.m. on May 10, 20XX.

118 Some drafters might end this sentence with "subject to possible change as provided below" as
119 a "comfort clause." For a short agreement with this, I probably wouldn't bother. ¶ Notice how
120 this is not a complete sentence, but it's perfectly understandable.

121 **1.2 Closing Location:** The parking lot of the Wal-Mart store at 9555 South Post Oak Road in
122 Houston, Texas.

123 This is a separate paragraph in the "See Spot run" vein described above. In many contracts this
124 information would normally be folded into the provision stating the Closing Time.

125 1.3 The parties may agree in writing to change one or more of the Closing Time and the Closing
126 Location.

127 This is a “comfort” clause; technically, it isn’t necessary, at least in the U.S. – because even
128 without this clause, the parties would of course be free to agree in writing as stated here — but
129 the cause can reassure an individual participant (e.g., a business person or an unsophisticated
130 reviewer) who doesn’t know this.

131 1.4 [A] For the avoidance of doubt [B], an agreement under section 1.3 may take the form of, for
132 example [C], an exchange of emails.

133 [A] This provision is an example of a “**safe harbor**” clause that should preclude any attempt
134 to assert that email was *not* sufficient to form an agreement under section 1.3. (See generally
135 [Wikipedia](#) for a discussion of what the term “safe harbor” means in the context of a statute or
136 regulation.)

137 [B] The term “for the avoidance of doubt” seems to be something British lawyers use. Some
138 U.S. drafters loathe it. I find it useful, as long as it’s not overdone, because it can provide trial
139 counsel with a “sound bite” to use in a lawsuit or arbitration, e.g., by quoting it in a brief or
140 showing it on a PowerPoint slide or poster board. See generally the Common Draft definition.

141 [C] Some drafters insist on writing “including without limitation,” every time. That can be a
142 pain — and what if you forgot to do it in a particular instance: would the term then mean “in-
143 cluding only”? Of course, in a longer contract, it might be a good idea to specify that the term
144 “for example” is not intended to be limiting (see the [Common Draft definition](#) for sample lan-
145 guage). Absent such a definition, a “creative” lawyer might try to argue that, under the doctrine
146 of [ejusdem generis](#), this language means that **only** emails and similar communications, e.g., text
147 messages and Internet chat messages, could be used to reschedule the Closing – this is a silly
148 example but it gets the point across.

149 **2. Restrictions on Seller’s subsequent use:** Between now and the Closing, Seller will not use
150 the Computer [A] [B] without using up-to-date anti-malware software.

151 [A] This is an example of what could be called a “lockdown” clause or “keep everything the
152 way it is until we can get this deal closed” clause. (It could be referred to as a “standstill” clause,
153 but that term is normally used for a different purpose; you can see the Wikipedia [Standstill](#)
154 [agreements](#) page if you’re interested.) Such provisions are often seen in purchase-and-sale
155 agreements of all kinds, e.g., real estate deals and M&A deals. (Such “thou shalt not” obliga-
156 tions are sometimes referred to as “**negative covenants.**”)

157 [B] Another way to phrase this obligation would be to say that “Seller may not use the Com-
158 puter” or “Seller must not use the Computer”; that’s a stylistic choice.

159 **2.1 EXCEPTION:** Seller need not run anti-virus software on the Computer when the computer is
160 not connected to the Internet.

161 Re “EXCEPTION:” I like to use all-caps (sparingly) to flag things that I want to catch the eye of
162 a reader, e.g., as a guide through the text. I’ll also do that sometimes with “IF: ...; THEN:”

163 **3. Required upgrades:** Seller will cause [A] [B] the Computer, as delivered to Buyer, to have a
164 clean install of the latest release of the Mac OS X operating system.

165 [A] “Seller will cause ...”: Seller might not be the one actually to do the clean install. (In this
166 case it almost certainly doesn’t matter who does it, but in other situations it might well matter.)

167 [B] This an example of an “**affirmative covenant,**” i.e., one that requires Seller to take some
168 specific action.

169 **4. Upgrade as prerequisite** [A] [B]: Seller’s performance of **the obligation stated in section 3** [C] is
170 a prerequisite to Buyer’s obligation to **buy** [A] the Computer.

171 [A] Most drafters would phrase this prerequisite as, e.g., “a **condition** of Buyer’s obligation
172 **to close.**” In this context, I prefer the former term because it’s plainer. ¶ See section 5 for
173 a still-plainer “need not” phrasing.

174 [B] Because of this “prerequisite” provision, Seller’s obligation in section 3 is not merely
175 a promise, i.e., a covenant, but also a condition. ¶ If Seller’s obligation in section 3 were *only* a
176 covenant, then Buyer’s remedy for a breach of that section by Buyer might be only a suit for
177 damages (unless the breach were found to be “material,” in which case Buyer likely would have
178 the right, by law, to terminate the Agreement). ¶ But this “prerequisite/condition” provision is
179 included; consequently, if Seller were to fail to provide a clean install as required by section 3,
180 then Buyer would have the right to choose between: (i) buying the Computer anyway — i.e.,
181 waiving the prerequisite/condition and going forward with the deal — then suing Seller for
182 damages for breach of section 3; or (ii) invoking this section 4 and walking away from the
183 deal. ¶ These are tricky concepts; we will return to them in the semester.

184 [C] This phrasing, i.e., “obligation stated,” is another example of the D.R.Y. principle: In-
185 stead of repeating the text of section 3, I’ve drafted a cross-reference to that section. That way,
186 if the parties were to change the substance of the obligation stated in section 3, there’d be little
187 or no danger of an inconsistency — which is good, because inconsistencies can cause real prob-
188 lems in litigation.

189 **5. Decal clean-up as prerequisite:** Buyer **need not buy** [A] the Computer if, at the Closing Time,
190 the Grateful Dead decals that are currently affixed to the Computer have not been removed,
191 along with all glue residue. [B]

192 [A] This “need not buy” phrasing is a plainer way of stating a condition to closing.

193 [B] Unlike section 3, this provision is a prerequisite but not a promise; in legalese terms, this
194 provision is a condition but not a covenant. As a result:

- 195 ○ if Seller were to fail to get the Grateful Dead decals off the Computer, then Buyer
196 could refuse to buy the Computer (because that prerequisite wasn't satisfied);
- 197 ○ but Buyer wouldn't have the option of buying the Computer anyway and forcing
198 Seller to pay damages for his failure, as she would under section 4.

199 **6. Seller's representations:** [A] Seller represents that, *so far as he knows, without having made*
200 *any particular investigation* [B]:

- 201 (a) the Computer is in good working order; [C] and
202 (b) the Computer is [D] free from malware.

203 [A] These are **representations**, not **warranties**. We'll spend some time studying the differ-
204 ences, which can be significant, as explained in [this essay](#) (of mine). ¶ See also the Common
205 Draft definitions of [misrepresentation](#) and [warranty](#). ¶ Representations and warranties — and,
206 importantly, the negotiated exceptions to them — are often the subject of intense discussion in
207 deal-making.

208 [B] The phrase, "so far as he knows, without any particular investigation," is a hedge by
209 Seller against Buyer's later claiming that Seller had implicitly represented that Seller had used
210 due care in making the representation. ¶ When representing someone like Seller, I strongly pre-
211 fer "so far as he knows" to the ambiguous phrase, "to Seller's knowledge," which *arguably*
212 means "Seller knows what he's talking about" — and under the principle of **contra**
213 **proferentem**, if Seller (or his attorney) drafted the contract, then such an ambiguity might very
214 well be resolved against him and in favor of Buyer.

215 [C] Note that the two items in this list of representations are set forth as separate subdivi-
216 sions, each starting on a new line. That makes it quicker and easier for others — such as the
217 drafter's supervisor, the drafter's client, and the other side's contract reviewer — to scan down
218 the list of items to be sure that all (and only) desired items are listed.

219 [D] Note that the term "the Computer is" is repeated. Some purists might insist on rear-
220 ranging the wording so that the provision would read as follows: "Seller represents that, so far

221 as he knows, the Computer is: (a) in good working order; and (b) free from malware.” This
222 would slavishly follow the D.R.Y. (Don’t Repeat Yourself) principle to an extreme. In contrast,
223 I’ve drafted this provision in the way shown above. Other things things being equal, I like to
224 have “sayable” phrases, and it’s not as though there’s a lot of repetition here in any case.

225 **7. Buyer’s right to inspect:** [A] Buyer **need not buy the Computer** [B] if Seller does not allow
226 Buyer to perform **commercially-reasonable** [C] testing for malware on the Computer before the
227 Closing.

228 [A] This is a “due diligence” clause allowing Buyer to get at least some assurance that the
229 Computer is as Seller says it is. ¶ In this course you will hear me use a saying from the U.S.
230 Navy’s nuclear-propulsion program, in which I served: “You get what you inspect, not what you
231 expect.”

232 [B] As with section 5, this is a **condition, not a covenant** (that is, it’s a prerequisite,
233 not a promise). Thus, if Seller were to fail to allow Buyer to perform malware testing, then
234 Buyer’s only remedy would be to walk away, because Seller does not commit here to allow
235 Buyer to do such testing.

236 [C] The term “commercially reasonable” is often used as an alternative to defining specific
237 standards. Some purists might say it’s a cop-out, because it’s vague and thus likely would re-
238 quire a trial to determine the facts. In proper circumstances, though, the **business risk** of using
239 the term might well be worth taking — and ultimately a contract is not about doctrinal purity,
240 but about getting business done in a manner that the client judges to involve acceptable risk.

241 **8. Buyer’s obligation to close:** [A] At the **Closing**, [B] **IF:** [C] All prerequisites to Buyer’s obligation
242 to buy the Computer have been either (i) [D] satisfied, or (ii) waived by Buyer; **THEN:** Buyer will
243 deliver the Purchase Price to Seller.

244 [A] This provision affirmatively obligates Buyer to go through with the deal in the stated cir-
245 cumstances. That distinguishes this agreement from a “call” option.

246 [B] Note how “At the Closing” leads off this section so that it forms part of both the “IF:”
247 clause and the “THEN:” clause.

248 [C] IF: and THEN: This is an example of using judicious capitalization to make it easier for
249 contract reviewers and other readers to spot the key pieces of the sentence.

250 [D] (i) and (ii): When doing a list of things “in-line,” as opposed to in separate paragraphs,
251 it’s often helpful to delimit the list items using romanettes.

252 8.1 [A] The Purchase Price **must be paid** [B] [C] by **cashier’s check** [D].

253 [A] Many drafters won’t assign a subdivision number (which in this case is 8.1) if there’s
254 only a single subdivision, but I don’t see a problem with doing so — the goal is clarity, not slav-
255 ish conformity to an arbitrary convention.

256 [B] Normally, active voice is preferred (yes, this sentence itself “violates” that guideline).
257 This provision, though, is one of those instances in which we care more about the action (pay-
258 ment) than about who performs the action (in this case, Buyer).

259 [C] Even a cashier’s check might carry nonpayment risk, because the check might be coun-
260 terfeit – see [Wikipedia](#). Alternative forms of payment might include ACH, which stands for Au-
261 tomated Clearing House; wire transfer; personal checks; currency; credit cards; or even Bitcoin.
262 The parties will generally opt for the one that strikes a balance between convenience, cost, and
263 safety.

264 **9. Seller’s obligation to close** [A]: At the Closing: IF: All prerequisites to Seller’s obligation to sell
265 the Computer to Buyer have been either (i) satisfied, or (ii) waived by Seller; THEN: Seller will
266 **deliver the following** [B] to Buyer:

267 (a) the Computer; and

268 (b) a signed and **notarized** [C] bill of sale for the Computer in substantially the form of **Ex-**
269 **hibit 9(b)** [D].

270 [A] This is the counterpart to Buyer’s delivery obligation under section 8.

271 [B] In a more-complex deal, Seller might be required to deliver other things, e.g., (i) a signed
272 certificate that the Computer has been used only in compliance with the requirements of the
273 agreement, or perhaps (ii) a certificate, signed by a reputable computer consultant, that the
274 computer consultant had checked the Computer for malware. (Opinions of counsel are often
275 delivered in, e.g., M&A deals.)

276 [C] The requirement for notarization doesn't specify what kind of notary certificate is to be
277 used. It's important to remember the distinction between:

278 ○ an "**acknowledgement**," which is a certificate that the signer personally ap-
279 peared before the notary public (or other authorized official) and acknowledged
280 that he or she indeed signed the document — this makes the original, notarized
281 document self-authenticating in litigation (which can be an important considera-
282 tion), and would be the kind of notary certificate to use for the bill of sale here;
283 versus:

284 ○ a "**jurat**," which is a certificate that the signer personally appeared before the
285 notary public (or other authorized official) and stated, under oath or penalty of
286 perjury, that the document's contents were true — that wouldn't be useful here.

287 [D] In subdivision (b)* of this provision, the exhibit number matches the section number in
288 the body of the agreement. That way, a reader who looks at the exhibit will immediately know
289 where to find the agreement's primary reference to the exhibit. * *I use the term "subdivision"*
290 *instead of "subparagraph" or "subclause"; that's also what the Uniform Commercial Code does.*

291 **10. DISCLAIMER OF OTHER WARRANTIES, ETC.:** [Omitted]

292 See, e.g., the Common Draft disclaimer of implied warranties, representations, terms of quality,
293 etc., at <http://www.commondraft.org/#ImpliedWarrantyDisclaimer>.

294 **11. Termination for material breach:** [Omitted]

295 See the Common Draft provision at <http://www.commondraft.org/#Termination> and its anno-
296 tations. (I'm in the process of re-revising this Common Draft provision; I previously rewrote it as
297 an experiment but really don't like how it turned out.)

298 Also possible: A provision allowing one or both parties to terminate **without cause** (“**at will**”).
299 That would allow the specified party or parties to walk away from the transaction. There might
300 be prerequisites for doing so, e.g., paying a breakup fee.

301 **12. General provisions:** [Omitted]

302 [A] See the various Common Draft “general” provisions, e.g., at [http://www.com-](http://www.com-
303 mondraft.org/#GenProvBasic)

304 [B] A “**redlining representation**” provision can be very useful – see [http://www.com-](http://www.com-
305 mondraft.org/#RedliningRep)

306 [C] For contracts where one party might later make a claim of misrepresentation, consider
307 including a “**no-reliance**” provision; see, e.g., the Common Draft provision at [http://www.com-](http://www.com-
308 mondraft.org/#EntireAgrmtRelianceDiscl)

309 *[IF APPLICABLE:] (Signature page follows)*

310 [A] I like to keep all of the text of a signature block together on the same page (which might
311 or might have other text on it). That looks more professional, in my view, than having a signa-
312 ture block spill over from one page onto the next. This can be done using Microsoft Word's
313 paragraph formatting option, “Keep with Next.”

314 [B] Sometimes drafters put the signatures on a separate page to make it easier to FAX just
315 the signed signature pages back and forth. If that's to be done, I don't like leaving significant
316 blank space on the last page before the signature page, because it might tempt a fraudster to

317 add provisions in the blank space and claim they were part of the signed contract. Hence, the
318 “Signature page follows” parenthetical on the last line.

319 [C] If signatures are on a separate page, then someday The Other Side might claim that it
320 signed a different version of the contract than the one you claim it signed. One way to try to
321 forestall such a claim would be to include, at the top of every page of every draft, a running
322 header with a version date and time, such as that shown at the top right of this page. (Don’t use
323 Microsoft Word’s automatic date fields – you don’t want the date field automatically updating
324 itself every time the document is printed.) ¶ See also the “PAGE X of Y” running footer below,
325 which can be done by inserting Microsoft Word’s PAGE and NUMPAGES fields.

| | |
|--|-----------------|
| AGREED: [A] | AGREED: |
| BUYER: [B] Betty’s Used Computers, LLC, by: [C] | SELLER: |
| _____ | _____ |
| Betty Boop, Manager [C] | Sam Smith |
| _____ | _____ |
| Date signed [D] | Date signed [D] |

326 [A] Concerning “AGREED:” Stark says to use a concluding paragraph such as “To evidence
327 the parties’ agreement to this Agreement, each party has executed and delivered it on the date
328 indicated under that party’s signature.” See Stark § 17.3. I don’t like that approach, for two
329 reasons: (i) First, it’s overkill; there are other ways of proving up that The Other Side in fact de-
330 livered a signed contract to you — for starters, the copy in your possession that bears The
331 Other Side’s signature. (ii) Second, *at the instant of signature*, a past-tense statement that each
332 party “has delivered” the signed contract is technically inaccurate — even more so at the mo-
333 ment when the first party to sign the document affixes (his / her / its) signature.

334 [B] Including the parties’ shorthand names in their respective signature blocks is a conven-
335 ience for the reader.

336 [C] The word “by:” and the title of an organizational signer are included for two reasons:
337 First, they give the other side at least some assurance that the signer has at least “apparent au-
338 thority” to commit the organization. (An individual representation of signing authority can also
339 be used for that purpose; see the [Common Draft signature-authority provision](#). ¶ Second, in-
340 cluding the signer’s title protects the individual signer from being held *personally* liable.

341 [D] Note that I left a blank “Date **signed:**” line for each signer to fill in. I don’t like the way
342 Stark does it, namely saying just “Date” (see the second shaded example on page 242). In some
343 circumstances, that could contribute to landing the client in prison, for reasons we’ll discuss
344 later. (*Preview*: The CEO, general counsel, and other officials of a giant software company, Com-
345 puter Associates [now known as CA] were sent to prison, and the general counsel was dis-
346 barred, in large part for backdating software-license agreements as part of a scheme to falsify
347 the company’s quarterly earnings reports filed with the SEC.)

348 — END OF DOCUMENT —

1 EX-10.20 21 dex1020.htm COMMERCIAL LEASE -
 2 THE BOARD OF TRUSTEES OF THE LELAND STAN-
 3 FORD JR. UNIVERSITY

4 **Exhibit 10.20**

5 **COMMERCIAL LEASE**

6 THIS LEASE is entered into as of July 25, 2007 (the
 7 “*Effective Date*”), by and between THE BOARD OF TRUS-
 8 TEES OF THE LELAND STANFORD JUNIOR UNIVER-
 9 SITY, a body having corporate powers under the laws of the
 10 State of California (“*Landlord*”), and TESLA MOTORS,
 11 INC., a Delaware corporation (“*Tenant*”).

12 **1. BASIC LEASE INFORMATION.** The following is
 13 a summary of basic lease information.

14 Each item in this Article 1 incorporates all of the terms
 15 set forth in this Lease pertaining to such item

16 and to the extent there is any conflict between the provi-
 17 sions of this Article 1 and any other provisions of this Lease,
 18 the other provisions shall control.

19 Any capitalized term not defined in this Lease shall have
 20 the meaning set forth in the Glossary that appears at the end of
 21 this Lease.

22

| | |
|--|--|
| Address of Premises: | 300 El Camino Real, Menlo Park, California |
| Term: | Five (5) years |
| Sched- uled Date for Delivery of Premises: | August 1, 2007 |
| Commencement Date: | August 1, 2007 |
| Expiration Date: | July 31, 2012 |
| Base Rent: | Year One: \$60,000 (\$5,000 per month) |
| | Year Two: \$90,000 (\$7,500 per month) |
| | Year Three: \$120,000 (\$10,000 per |

D. C. Toedt 4/7/14 9:13 PM

Comment [1]: This lease agreement is on file with the SEC at <http://goo.gl/JscaVm>

D. C. Toedt 4/7/14 9:14 PM

Comment [2]: This would be better titled “Commercial Lease AGREEMENT” – why?

D. C. Toedt 4/22/14 6:46 AM

Comment [3]: QUESTION: BASIC LEASE INFORMATION: What are some of the pros and cons of having such a section in a contract?

D. C. Toedt 4/7/14 9:16 PM

Comment [4]: INCORPORATES: Is this worth bothering with?

D. C. Toedt 4/22/14 6:48 AM

Comment [5]: QUESTION: What could go wrong here? Does this defeat the purpose of having a Basic Lease Information section?

D. C. Toedt 4/22/14 6:48 AM

Comment [6]: GLOSSARY: This is a variation of having the Definitions section just after the introductory paragraphs – note that it’s at the end of the document. **QUESTION:** Which works better – at the beginning, or at the end?

D. C. Toedt 4/22/14 9:21 AM

Comment [7]: NOTE: At this writing, the Tesla dealership has moved to Palo Alto (also on ECR) – see <http://www.teslamotors.com/paloalto>

D. C. Toedt 4/22/14 6:46 AM

Comment [8]: QUESTION: BASE RENT: What other kinds of rent might there be? (Hint: Look up “percentage rent.”)

month)

Year Four: \$165,000
(\$13,750 per month)

Year Five: \$165,000
(\$13,750 per month)

Security Deposit: \$5,000

23 Use: A dealership for the retail sales of new electric pas-
24 senger automobiles, with ancillary automobile repair work, au-
25 tomobile displays, sales offices and storage.

26 Addresses for Notice:

Landlord: Stanford University - Real
Estate Office
2755 Sand Hill Road, Suite
100
Menlo Park, CA 94025
Attention: Director, Property
Services

with a copy to: Carol K. Dillon, Esq.
Bingham McCutchen LLP
1900 University Avenue
East Palo Alto, CA 94303

Tenant: Craig Harding Legal Dept.
Tesla Motors
1050 Bing St.
San Carlos, CA 94070

27 Brokers: None

28

29 2. PREMISES

30 Subject to the terms, covenants and conditions set
31 forth in this Lease,

32 Landlord hereby leases to Tenant

33 and Tenant hereby leases from Landlord

34 those premises (the "**Premises**") comprised of an
35 existing automobile showroom and automobile repair facility,
36 together with all other buildings and improvements,

37 including without limitation parking areas, side-

38 walks, driveways and landscaping located on that certain real

39 property described on the attached **Exhibit A**. A site plan gen-

40 erally depicting the Premises is attached as **Exhibit B**.

D. C. Toedt 4/22/14 6:46 AM

Comment [9]: QUESTION: Is this the best way to set this up?

D. C. Toedt 4/22/14 6:46 AM

Comment [10]: QUESTION: Why specifically say "no brokers"?

D. C. Toedt 4/22/14 6:50 AM

Comment [11]: QUESTION: LANDSCAPING LOCATED ON: Could this be improved to make it more clear?

41 **3. ACCEPTANCE**

42 The Premises as furnished by Landlord consist of
 43 the improvements as they exist as of the Effective Date
 44 and Landlord shall have no obligation for con-
 45 struction work or improvements on or to any portion of the
 46 Premises.

47 Prior to entering into this Lease, Tenant has made
 48 a thorough and independent examination of the Premises and
 49 all matters related to Tenant's decision to enter into this Lease.

50 Tenant is thoroughly familiar with all aspects of
 51 the Premises and is satisfied that it is in an acceptable condi-
 52 tion and meet Tenant's needs.

53 Tenant does not rely on, and Landlord does not
 54 make, any express or implied representations or warranties as
 55 to any matters including, without limitation,

56 (a) the physical condition of the Premises
 57 including without limitation the structural compo-
 58 nents of any improvements or any building systems within or
 59 serving the improvements (including without limitation indoor
 60 air quality),

61 (b) the existence, quality, adequacy or availability
 62 of utilities serving the Premises or any portion thereof,

63 (c) the use, habitability, merchantability, fitness or
 64 suitability of the Premises for Tenant's intended use,

65 (d) the likelihood of deriving business from Ten-
 66 ant's location or the economic feasibility of Tenant's business,

67 (e) Hazardous Materials on, in, under or around
 68 the Premises,

69 (f) zoning, entitlements or any laws, ordinances or
 70 regulations which may apply to Tenant's use of the Premises
 71 or business operations, or

D. C. Toedt 4/22/14 6:51 AM

Comment [12]: QUESTION: What's the purpose of this recital? Does it matter that it doesn't say "Tenant represents that it has made"?

D. C. Toedt 4/22/14 6:52 AM

Comment [13]: Note the express disclaimer of reliance.

D. C. Toedt 4/22/14 6:54 AM

Comment [14]: QUESTION: Why include such a laundry list?

D. C. Toedt 4/22/14 6:53 AM

Comment [15]: QUESTION: Given where the premises are located (that is, very close to the San Andreas Fault), might Stanford want to include any other language concerning its disclaimer of reps or warranties about the physical condition of the premises?

D. C. Toedt 4/22/14 6:54 AM

Comment [16]: QUESTION: Should Stanford be thinking about any particular laws, etc., given the nature of Tesla's business?

72 (g) any other matter whatsoever.

73 Tenant has satisfied itself as to such suitability
74 and other pertinent matters by Tenant's own inquiries and tests
75 into all matters relevant in determining whether to enter into
76 this Lease.

77 Tenant accepts the Premises in their existing "AS-
78 IS", "WHERE-IS" condition, and "WITH ALL FAULTS".

79 Tenant shall, by entering into and occupying the
80 Premises, be deemed to have accepted the Premises and to
81 have acknowledged that the same are in good order, condition
82 and repair in all respects.

83 Upon the Commencement Date, tenant shall exe-
84 cute and deliver to Landlord the **Acceptance Form attached**
85 hereto as **Exhibit C**.

86

87 4. TERM

88 4.1 Term. **The Premises are leased for a term (the**
89 **"Term")** commencing on the Commencement Date and expir-
90 ing on the Expiration Date.

91 Notwithstanding the foregoing, in the event this
92 Lease is executed prior to the stated Commencement Date, the
93 actual Commencement Date shall occur on such earlier date
94 that Landlord delivers possession of the Premises to Tenant.

95 The Term shall end on the Expiration Date, or
96 such earlier date on which this Lease terminates pursuant to its
97 terms.

98 The date upon which this Lease actually termi-
99 nates, whether by expiration of the Term or earlier termination
100 pursuant to the terms of this Lease, is sometimes referred to in
101 this Lease as the "Termination Date".

102

D. C. Toedt 4/22/14 6:55 AM

Comment [17]: QUESTION: Why attach the Acceptance Form?

D. C. Toedt 4/22/14 6:56 AM

Comment [18]: Note that this is not phrased as the term of the Agree-
ment, but rather as the term of the lease of the Premises.

103 **4.2 Failure to Deliver Possession.** If for any rea-
 104 son Landlord cannot deliver possession of the Premises to
 105 Tenant on or prior to the Scheduled Date for Delivery of the
 106 Premises,

107 then the validity of this Lease and the obligations
 108 of Tenant under this Lease shall not be affected

109 and Tenant shall have no claim against Landlord
 110 arising out of Landlord's failure to deliver possession of the
 111 Premises on the Scheduled Date for Delivery of the Premises.

112 Notwithstanding the foregoing, if Landlord fails to
 113 deliver the Premises within thirty (30) days after the Com-
 114 mencement Date, Tenant shall have the option to terminate
 115 this Lease,

116 whereupon neither party shall have any further
 117 rights or obligations hereunder.

118
 119 **4.3 Extension Option.** In the event that Landlord
 120 determines in its sole discretion

121 that Landlord does not intend to redevelop the
 122 Premises or to use it for Landlord's own purposes after the
 123 Termination Date,

124 and that therefore the Premises will be available
 125 for lease,

126 [then] Landlord shall provide Tenant with written
 127 notice of such determination, setting forth the period of time
 128 that Landlord has determined the Premises will remain availa-
 129 ble for lease by Tenant (the "**Extension Period**").

130 Tenant shall have the option (the "**Extension Op-
 131 tion**") to extend the Term for the Extension Period by deliver-
 132 ing written notice to Landlord within thirty (30) days after re-
 133 ceipt of Landlord's notice.

D. C. Toedt 4/22/14 6:57 AM

Comment [19]: QUESTION: How would you summarize the basic busi-
 ness concept of this section 4.2? (Be sure to read the rest of this section.)

D. C. Toedt 4/22/14 8:57 AM

Comment [20]: QUESTION: "Any" further rights? What about forum se-
 lection, etc.? Does this override the survival clause?

D. C. Toedt 4/22/14 6:57 AM

Comment [21]: QUESTION: Why not call this a "Renewal Option"?
 (Hint: See the commentary to
<http://www.commondraft.org/#TermExtendCls>.)

D. C. Toedt 4/22/14 8:57 AM

Comment [22]: QUESTION: What if Landlord just forgets about the
 property and doesn't provide Tenant with the notice? What effect does
 that have on the Extension Option? **QUESTION:** As a practical matter,
 what could Tenant do if it wanted to extend the lease term? **COMMENT:**
 This sentence would have been clearer if the drafter had included "then"
 before "Landlord shall provide Tenant"

134 The Extension Option shall be void if an **Event of**
 135 **Default** by Tenant exists, either at the time of exercise of the
 136 Extension Option or the time of commencement of the Extension
 137 Term.

D. C. Toedt 4/22/14 6:59 AM

Comment [23]: QUESTION: What exactly is an Event of Default?

138 The terms of this Lease during the Extension Pe-
 139 riod shall be the same terms and conditions as during the orig-
 140 inal Term, **except** that the Base Rent applicable to the Extension
 141 Period shall be equal to the Prevailing Market Rent as of
 142 the commencement of the Extension Period, as determined
 143 pursuant to **Exhibit D**.

144 The Extension Option is personal to Tenant and
 145 shall be inapplicable and **null and void if Tenant assigns** its in-
 146 terest under this Lease,

147 or if either party exercises its termination right
 148 under Section 4.4.

149 The Extension Option (if not previously exer-
 150 cised) shall expire as of the Termination Date.

D. C. Toedt 4/22/14 8:58 AM

Comment [24]: This seems to be a leave-no-loose-ends provision.

151 **4.4 Termination Right.**

152 **(a)** Either party shall have the right to ter-
 153 minate this Lease during the initial Term (but not the Extension
 154 Period) by providing written notice thereof to the other
 155 party not less than six (6) months prior to the desired termina-
 156 tion date (the "**Early Termination Date**").

D. C. Toedt 4/22/14 9:00 AM

Comment [25]: QUESTION: Why might the drafters have drafted this to give each party an early-termination right?

157 The Early Termination **Date must be a**
 158 **date later than** the **second anniversary** of the Commencement
 159 Date.

D. C. Toedt 4/22/14 8:58 AM

Comment [26]: QUESTION: EARLY TERMINATION EARLIEST DATE: Why do you think this provision is in the agreement?

160 In the event either party exercises the ter-
 161 mination right, the **Right of First Offer** shall terminate and
 162 have no further force or effect.

D. C. Toedt 4/7/14 9:51 PM

Comment [27]: RIGHT OF FIRST OFFER: It'd be helpful if the agreement had a cross-reference to the section (which is § 4.5).

164 (b) If Landlord elects to terminate this
 165 Lease and the Early Termination Date occurs during months
 166 25 through 36 of the Term, inclusive, then Landlord shall re-
 167 imburse Tenant the unamortized cost of any Alterations made
 168 by Tenant in the Premises, less the sum of \$90,000.

169 If the Early Termination Date occurs dur-
 170 ing months through 37 through 48 of the Term, inclusive, then
 171 Landlord shall reimburse Tenant the unamortized cost of any
 172 Alterations made by Tenant in the Premises, less the sum of
 173 \$45,000.

174 If the Early Termination Date occurs dur-
 175 ing months through 49 through 60 of the Term, inclusive, then
 176 Landlord shall have no obligation to compensate Tenant for
 177 such termination.

178 The reimbursement payment obligation of
 179 Landlord hereunder is referred to as the “*Termination Fee*”.

180 (c) If Tenant elects to terminate this Lease,
 181 then Landlord shall have no obligation to pay the Termination
 182 Fee to Tenant.

183 (d) All Alterations made by Tenant in the
 184 Premises shall comply with any and all requirements of Sec-
 185 tion 9 below.

186 Additionally and not by way of limitation
 187 of the foregoing, Landlord’s obligation to pay the Termination
 188 Fee shall be subject to the following conditions:

189 (i) the cost of the Alterations shall not ex-
 190 ceed a total aggregate sum of \$300,000, and any costs incurred
 191 by Tenant in performing Alterations which exceed \$300,000
 192 shall not be included in determining the Termination Fee;

D. C. Toedt 4/22/14 8:59 AM

Comment [28]: QUESTION: Is there a better way to present the infor-
 mation in this subdivision (b), instead of a prose narrative?

D. C. Toedt 4/22/14 9:01 AM

Comment [29]: QUESTION: Why is this first sentence here? How could
 this whole section be better phrased? (Hint: Consider the immediatly-
 following sentence.)

193 (ii) the Termination Fee shall be based on
 194 hard costs of construction only, as demonstrated by paid in-
 195 voices provided by Tenant,

196 and shall not include any soft costs in-
 197 curred by Tenant in performing the Alterations, such as archi-
 198 tect fees or the Landlord's review and supervision fee; and

199 (iii) the term "*unamortized costs*" used
 200 herein shall be based on a straight-line accounting calculation
 201 based on the then-remaining balance of the Term in accord-
 202 ance with generally accepted accounting principles.

203

204 **4.5 Right of First Offer for New Lease.** If at any
 205 time during the Term Landlord determines in its sole discre-
 206 tion that Landlord's redevelopment plans for the Premises will
 207 include a retail car dealership, then Landlord shall offer to
 208 Tenant the opportunity to lease the Premises (the "*Right of*
 209 *First Offer*"), as provided in this Section.

210 At such time as the redevelopment planning has
 211 proceeded to the point that Landlord is prepared to negotiate a
 212 new lease of the Premises, Landlord shall deliver written no-
 213 tice to Tenant of the material terms upon which Landlord
 214 would be willing to lease the Premises to Tenant (the "*Offer*
 215 *Notice*").

216 Tenant shall have ten (10) days after receipt in
 217 which to accept the Offer by written notice to Landlord.

218 If Tenant does not give Landlord written notice
 219 accepting the Offer within the 10-day period, Landlord shall
 220 have the right to market and lease the Premises to a third party
 221 without reoffering the interest to Tenant.

222 The Right of First Offer is **personal** to Tenant and
 223 shall be inapplicable and null and void if Tenant assigns its in-

D. C. Toedt 4/22/14 9:02 AM

Comment [30]: QUESTION: What's the difference between a "right of first offer" and a "right of first refusal"? (Hint: See generally <http://smallbusiness.chron.com/right-first-offer-vs-right-first-refusal-26182.html>)

224 terest under this Lease, or if Tenant’s anticipated use of the
 225 Premises will no longer be as set forth in the Basic Lease In-
 226 formation.

227

228 5. RENT

229 5.1 **Base Rent.** Commencing upon the Com-
 230 mencement Date, and thereafter during the Term, Tenant shall
 231 pay to Landlord the monthly Base Rent specified in Article 1
 232 on or before the first day of each month,
 233 in advance,
 234 at the address specified for Landlord in Article 1,
 235 or at such other place as Landlord designates in writing,
 236 without any prior notice or demand
 237 and without any deductions or setoff whatsoever
 238 (except as otherwise expressly provided in this Lease).

239 If the Commencement Date occurs on a day other
 240 than the first day of a calendar month, or the Termination Date
 241 occurs on a day other than the last day of a calendar month,
 242 then the Base Rent for such fractional month will be prorated
 243 on the basis of the actual number of days in such month.

244

245 5.2 **Rent Adjustment.** On each anniversary of the
 246 Commencement Date (each, an “*Adjustment Date*”), the Base
 247 Rent shall be increased as set forth in Article 1.

248

249 5.3 **Additional Rent.** All sums due from Tenant
 250 to Landlord or to any third party under the terms of this Lease
 251 (other than Base Rent) shall be additional rent (“*Additional*
 252 *Rent*”),
 253 including all sums incurred by Landlord due to
 254 Tenant’s failure to perform its obligations under this Lease.

D. C. Toedt 4/22/14 9:03 AM

Comment [31]: QUESTION: How will this “if-then” condition be deter-
 mined?

D. C. Toedt 4/22/14 9:04 AM

Comment [32]: COMMENT: Many lease agreements contain automatic
 rent escalation clauses.

D. C. Toedt 4/22/14 9:04 AM

Comment [33]: QUESTION: What if any consequences might there be
 fore characterizing these various sums as “Rent”? (Hint: See lines 257-
 59.)

255 All Additional Rent that is payable to Landlord
256 shall be paid at the time and place that Base Rent is paid.

257 Landlord will have the same remedies for a de-
258 fault in the payment of any Additional Rent as for a default in
259 the payment of Base Rent.

260 Together, Base Rent and Additional Rent are
261 sometimes referred to in this Lease as “Rent”.

262
263 **5.4 Late Payment.** Any unpaid Rent shall bear in-
264 terest from the date due until paid at the maximum interest rate
265 allowed by law (the “Interest Rate”).

266 In addition, Tenant recognizes that late payment
267 of any Rent will result in administrative expense to Landlord,
268 the extent of which expense is difficult and economically im-
269 practicable to determine.

270 Therefore, Tenant agrees that if Tenant fails to
271 pay any Rent within five (5) days after its due date, an addi-
272 tional late charge of five percent (5%) of the sums so overdue
273 shall become immediately due and payable.

274 Tenant agrees that the late payment charge is a
275 reasonable estimate of the additional administrative costs and
276 detriment that will be incurred by Landlord as a result of such
277 failure by Tenant.

278 In the event of nonpayment of interest or late
279 charges on overdue Rent, Landlord shall have, in addition to
280 all other rights and remedies, the rights and remedies provided
281 in this Lease and by law for nonpayment of Rent.

282
283 **6. USE OF PREMISES AND CONDUCT OF BUSI-**
284 **NESS**

D. C. Toedt 4/22/14 9:05 AM

Comment [34]: COMMENT: Many provisions concerning interest also include “savings” clauses designed to limit the possible effects of usury statutes.

D. C. Toedt 4/22/14 9:05 AM

Comment [35]: QUESTION: Why is this cast as “administrative costs” and not as something else?

285 **6.1 Permitted Use.** Tenant may use and occupy
 286 the Premises during the Term solely for the uses specified and
 287 permitted in Article 1 and for no other purpose without the
 288 prior written consent of Landlord,

289 such consent to be granted or withheld in Land-
 290 lord's **sole and unfettered** discretion.

291 Tenant's use of the Premises shall in all respects
 292 comply with **all** **Applicable Laws** (as defined in Section 11.1).

293

294 **6.2 Prohibited Uses.** Tenant shall not use the
 295 Premises or allow the Premises to be used for any illegal or
 296 **immoral** purpose,

297 or so as to create waste,

298 or constitute a private or public nuisance.

299 Tenant shall not place any loads upon the floors,
 300 walls, or ceiling which endanger the structure,

301 or place any Hazardous Material in the drainage
 302 system of the Premises,

303 or overload existing electrical or other mechanical
 304 systems.

305 Tenant shall not use any machinery or equipment
 306 which causes any unreasonable noise or vibration.

307 No waste materials or refuse shall be dumped up-
 308 on or permitted to remain upon any part of the Premises ex-
 309 cept in trash containers placed inside exterior enclosures for
 310 that purpose.

311 No loudspeaker **or other device, system or appa-**
 312 **ratus** shall be used at the Premises without the prior written
 313 consent of Landlord.

314 No explosives or firearms shall be brought onto
 315 the Premises without the prior written consent of Landlord,

D. C. Toedt 4/22/14 9:06 AM

Comment [36]: QUESTION: Is this UTTERLY within Landlord's discre-
 tion?

D. C. Toedt 4/22/14 9:06 AM

Comment [37]: Note that "Applicable laws" is defined very broadly.

D. C. Toedt 4/22/14 9:07 AM

Comment [38]: QUESTION: So, no computers? No cell phones?

316 which Landlord may withhold in its sole and ab-
 317 solute discretion.

318

319 **7. NET LEASE; NO COUNTERCLAIM OR**

320 **ABATEMENT**

321 **7.1 Net Lease.** The Rent due hereunder shall be
 322 absolutely net to Landlord

323 and shall be paid without assertion of any coun-
 324 terclaim, offset, deduction or defense

325 and without abatement, suspension,, deferment or
 326 reduction (except as otherwise provided in this Lease).

327 Landlord shall not be expected or required under
 328 any circumstances or conditions whatsoever, whether now ex-
 329 isting or hereafter arising, and whether now known or un-
 330 known to the parties, to make any payment of any kind what-
 331 soever with respect to the Premises

332 or be under any obligation or liability hereunder,
 333 except if and solely to the extent expressly so pro-
 334 vided elsewhere in this Lease.

335

336 **7.2 Real Property Taxes.** Without limiting the
 337 foregoing, Additional Rent shall include, and Tenant agrees to
 338 bear, discharge and pay

339 as the same become due, and before delinquency,
 340 all taxes, assessments, rates, charges, license fees,
 341 municipal liens, levies, excises or imposts, whether general or
 342 special, or ordinary or extraordinary,

343 of every name, nature and kind whatsoever,

344 including all governmental charges of every name,
 345 nature or kind that may be levied, assessed, charged or im-
 346 posed or maybe or become a lien or charge

D. C. Toedt 4/22/14 9:08 AM

Comment [39]: QUESTION: What does "net to Landlord" mean?

D. C. Toedt 4/22/14 9:09 AM

Comment [40]: QUESTION: Are the drafters mixing different concepts here?

347 upon the Premises or any part thereof;
 348 or upon the rent or income of Tenant;
 349 or upon the use or occupancy of the Premises;
 350 or any document creating or transferring an estate
 351 or interest in the Premises;
 352 upon any of the buildings or improvements exist-
 353 ing at any time during the Term upon the Premises;
 354 or upon the leasehold of Tenant;
 355 or upon Landlord by reason of its ownership of
 356 the Premises
 357 (but not including any franchise, transfer, inher-
 358 itance, or capital stock taxes or income taxes measured by the
 359 net income of Landlord
 360 unless, due to a change in the method of
 361 taxation, any of such taxes is levied or assessed
 362 against Landlord as a substitute for, in whole or in
 363 part, any other tax that would otherwise be the re-
 364 sponsibility of Tenant).

365 If at any time during the Term, under any Appli-
 366 cable Laws, any tax is levied or assessed against Landlord di-
 367 rectly, in substitution in whole or in part for real property tax-
 368 es,

369 [then] Tenant covenants and agrees to pay and
 370 discharge such tax. All of the foregoing taxes, assessments and
 371 other charges which are the responsibility of Tenant are herein
 372 referred to as "**Property Taxes**."

373 Notwithstanding the foregoing, Tenant shall have
 374 no obligation to pay

375 (a) any portion of an increase in Property
 376 Taxes, if any, attributable to a reassessment for assessment

D. C. Toedt 4/22/14 9:10 AM

Comment [41]: How about just "will pay"?

377 year 2007-2008 as a result of Landlord's recent acquisition of
378 the ground lease interest in the Premises; or

379 (b) any environmental assessment, charges
380 or liens arising in connection with the remediation of Hazard-
381 ous Materials from the Premises, the causation of which arose
382 prior to the delivery of the Premises to Tenant, or to the extent
383 caused by Landlord or any of Landlord's agents,

384 (c) costs or fees (other than general real
385 property taxes) payable in connection with Landlord's right to
386 further develop the Premises, and

387 (d) property transfer taxes, stamp or record-
388 ing taxes attributable to Landlord's transfer of ownership of
389 the Premises or any interest of Landlord therein.

390 **7.3 Project Costs.** In addition to Minimum Rent,
391 Tenant shall pay or fund when due all Property Taxes, insur-
392 ance premiums and deductibles, debt service, permit and li-
393 cense fees, costs of utilities and services, maintenance, repair,
394 replacement, rebuilding, restoration, management, marketing
395 and leasing services, operations and other costs
396 of any type whatsoever
397 accruing at any time during the Term
398 in connection with the ownership, marketing, leas-
399 ing, operation, management, maintenance, repair, replacement,
400 restoration, use, occupancy or enjoyment of the Premises
401 (collectively, "**Project Costs**").

402 Tenant shall pay all Project Costs directly,
403 and shall contract directly for all required ser-
404 vices, utilities

405 (including without limitation water, gas, electrici-
406 ty, sewer service, waste pick-up, telephone and other electron-

407 ic telecommunication services) and other items described
 408 herein;
 409 **provided, however,** that Landlord shall have the
 410 right to contract for any such services, utilities or other items
 411 if Tenant has failed to do so,
 412 or has failed to make any payment of Project
 413 Costs which is due and owing.

414 Tenant shall provide Landlord, upon written re-
 415 quest, with copies of invoices, receipts, canceled checks
 416 and/or other documentation reasonably substantiating Tenant's
 417 payment of all Project Costs.

418 **7.4 Taxes on Tenant's Property and Business.**

419 Tenant shall pay prior to delinquency all taxes levied or as-
 420 sessed by any local, state or federal authority upon the conduct
 421 of Tenant's business in the Premises or upon Tenant's Proper-
 422 ty (as defined in Section 9.4)

423 and shall deliver satisfactory evidence of such
 424 payment to Landlord.

425 **If the assessed value of the Premises is increased**
 426 **by the inclusion of a value placed upon Tenant's Property,**

427 Tenant shall pay to Landlord, upon written demand, the taxes
 428 so levied against Landlord, or the portion of Landlord's taxes
 429 resulting from said increase in assessment, **as determined from**
 430 **time to time by Landlord.**

431

432 **8. REPAIRS, MAINTENANCE AND SERVICES**

433 **8.1 Maintenance and Repairs.** During the Term,
 434 Tenant shall, at its own cost and expense and without any cost
 435 or expense to Landlord, keep and maintain the Premises and
 436 all improvements and appurtenant facilities thereon or related
 437 thereto,

D. C. Toedt 4/22/14 9:13 AM

Comment [42]: QUESTION: Is there any way to bypass litigation if the parties get into a dispute about this?

438 including without limitation the structural compo-
 439 nents, roof, fixtures and building systems of the improve-
 440 ments, grounds, sidewalks, parking and landscaped areas, in
 441 good condition and repair.

442 Tenant shall promptly make all repairs, replace-
 443 ments and alterations (whether structural or nonstructural,
 444 foreseen or unforeseen, or ordinary or extraordinary) neces-
 445 sary to maintain the Premises and the improvements in good
 446 condition and repair,

447 and in compliance with all Applicable Laws
 448 and to avoid any structural damage or injury to the
 449 Premises or the improvements.

450 **8.2 No Obligation Of Landlord To Repair.**

451 Landlord shall not be obligated to make any repairs, replace-
 452 ments or renewals of any kind, nature or description whatso-
 453 ever to the Premises or the improvements

454 (except to the extent caused by Landlord's willful
 455 misconduct or gross negligence),

456 and Tenant hereby expressly waives any right to
 457 terminate this Lease and any right to make repairs at Land-
 458 lord's expense under Sections 1932(1), 1941 and 1942 of the
 459 California Civil Code, or any amendments thereof, or any sim-
 460 ilar law, statute or ordinance now or hereafter in effect.

461 **8.3 Security.** Tenant shall be solely responsible
 462 for the security of the Premises and of Tenant, its employees,
 463 agents, contractors and invitees (collectively, "*Tenant's*
 464 *Agents*") while in or about the Premises.

465 Any security services provided to the Premises by
 466 Landlord shall be at Landlord's sole discretion

467 and Landlord shall not be liable to Tenant or Ten-
 468 ant's Agents for any failure to provide security services or any

D. C. Toedt 4/22/14 9:14 AM

Comment [43]: QUESTION: What might this clause contemplate?

D. C. Toedt 4/22/14 9:14 AM

Comment [44]: QUESTION: "Willful misconduct or gross negligence" – are these terms at all precise?

D. C. Toedt 4/22/14 9:15 AM

Comment [45]: NOTE that state law might well prescribe certain repair duties for a landlord. QUESTION: Can these duties be waived?

469 loss, injury or damage suffered as a result of a failure to pro-
470 vide security services.

471 **8.4 Tenant's Failure to Repair.** If Tenant fails
472 for any reason to repair or maintain the Premises as required
473 by this Lease to Landlord's reasonable satisfaction,

474 and does not cure such failure

475 (a) within thirty (30) days after receipt of
476 Landlord's written notice, or

477 (b) if the nature of the cure will reasonably
478 require more than thirty (30) days to perform, within a reason-
479 able time so long as Tenant promptly commences and diligent-
480 ly prosecutes such cure to completion,

481 then Landlord shall have the right, but not the ob-
482 ligation, to enter onto the Premises and perform such repairs

483 or maintenance

484 without liability to Tenant (except to the extent of

485 Landlord's gross negligence or willful misconduct) for any
486 loss or damage to Tenant's furnishings, fixtures, equipment or
487 other personal property or for interference with Tenant's busi-
488 ness arising therefrom.

489 If Landlord performs such repairs or maintenance,
490 Tenant shall pay all costs thereof to Landlord upon demand as
491 Additional Rent.

492 9. ALTERATIONS

493 **9.1 Alterations by Tenant.** Tenant shall not make
494 or permit any alterations to the building systems,

495 and shall not make or permit any alterations, in-
496 stallations, additions or improvements, structural or otherwise
497 (collectively, "*Alterations*")

498 in or to the Premises

499 without Landlord's prior written consent,

D. C. Toedt 4/22/14 9:22 AM

Comment [46]: QUESTION: Why might the Landlord want the right to barge in and fix things?

D. C. Toedt 4/22/14 9:24 AM

Comment [47]: QUESTION: Suppose the Landlord barges in during the middle of a busy Saturday and shuts off the water – does Tenant have any recourse? **QUESTION:** Practically speaking, what could Tenant do to avoid having this happen?

500 which Landlord shall not unreasonably withhold,
 501 condition or delay.

D. C. Toedt 4/22/14 9:17 AM

Comment [48]: QUESTION: What if there's a disagreement about whether Landlord's withholding is "unreasonable"?

502 Landlord shall respond to any request by Tenant
 503 to make any Alteration within ten (10) business days after re-
 504 ceipt of such request for consent from Tenant.

505 Notwithstanding the foregoing, Landlord's con-
 506 sent shall not be required

507 (a) in the case of interior, cosmetic non-structural
 508 Alterations that do not require a permit, or affect any building
 509 systems, or

510 (b) in the case of other Alterations that do not ex-
 511 ceed a total price of Twenty-Five Fifty Thousand Dollars
 512 (\$25,000) per project and do not affect any building systems
 513 or the structural integrity of the buildings.

D. C. Toedt 4/22/14 9:18 AM

Comment [49]: Note the subtle difference in wording between this exception and the exception in subdivision (b).

514 All Alterations shall be done at Tenant's sole cost
 515 and expense,

D. C. Toedt 4/22/14 9:18 AM

Comment [50]: "Cost and expense" is redundant.

516 including without limitation the cost and expense
 517 of obtaining all permits and approvals required for any Altera-
 518 tions.

519 Tenant shall reimburse Landlord within ten
 520 (10) days after written demand as additional Rent for any out-

D. C. Toedt 4/22/14 9:24 AM

Comment [51]: NOTE: Failure to capitalize a defined term could lead to a court's holding that the term was intended to mean something else. (There's a recent case to that effect but I can't locate a cite.)

521 of-pocket expenses incurred by Landlord in connection with
 522 Alterations elected to be made and/or any repairs or replace-
 523 ments required to be made by Tenant,

524 including, without limitation, any reasonable fees
 525 charged by Landlord's contractors and/or consultants to re-
 526 view plans and specifications prepared by Tenant.

D. C. Toedt 4/22/14 9:25 AM

Comment [52]: QUESTION: Do Landlord's contractors have any incentives to keep their fees reasonable?

527 **9.2 Project Requirements.** The following provi-
 528 sions of this Section 9.2 shall apply to all Alterations, whether
 529 or not requiring Landlord's approval (unless otherwise noted):

530 (a) Prior to entering into a contract for Al-
 531 terations requiring Landlord's approval,
 532 Tenant shall obtain Landlord's written ap-
 533 proval,
 534 which approval shall not be unreasonably
 535 withheld, conditioned or delayed,
 536 of the identity of each of the design archi-
 537 tect and the general contractor.

538 (b) Before commencing the construction
 539 of any Alterations, Tenant shall procure or cause to be pro-
 540 cured the insurance coverage described below

541 and provide Landlord with certificates of
 542 such insurance in form reasonably satisfactory to Landlord.

543 All such insurance shall comply with the
 544 following requirements of this Section and of Section 13.2.

545 (i) During the course of construc-
 546 tion, to the extent not covered by property insurance main-
 547 tained by Tenant pursuant to Section 13.2,

548 comprehensive "all risk" builder's
 549 risk insurance, including vandalism and malicious mischief,
 550 excluding earthquake and flood,

551 covering all improvements in place
 552 on the Premises, all materials and equipment stored at the site
 553 and furnished under contract,

554 and all materials and equipment that
 555 are in the process of fabrication at the premises of any third
 556 party or that have been placed in transit to the Premises when
 557 such fabrication or transit is at the risk of, or when title to or
 558 an insurable interest in such materials or equipment has passed
 559 to, Tenant or its construction manager, contractors or subcon-
 560 tractors (excluding any contractors', subcontractors' and con-

D. C. Toedt 4/22/14 9:26 AM

Comment [53]: QUESTION: What exactly does "approval ... of the identity of each of the design architects" mean?

D. C. Toedt 4/22/14 9:28 AM

Comment [54]: QUESTION: What's the concern here, as in, why require builder's risk insurance? (Hint: Can you think of any recent events in Houston that might provide an object lesson?)

561 struction managers' tools and equipment, and property owned
562 by the employees of the construction manager, any contractor
563 or any subcontractor),

564 such insurance to be written on a
565 completed value basis in an amount not less than the full esti-
566 mated replacement value of Alterations.

567 (ii) Commercial general liability in-
568 surance covering Tenant, Landlord and each construction
569 manager, contractor and subcontractor engaged in any work
570 on the Premises,

571 which insurance may be effected by
572 endorsement, if obtainable, on the policy required to be carried
573 pursuant to Section 13.2,

574 including insurance for completed
575 operations, elevators, owner's, construction manager's and
576 contractor's protective liability,

577 products completed operations for
578 one (1) year after the date of acceptance of the work by Ten-
579 ant,

580 broad form blanket contractual lia-
581 bility,

582 broad form property damage and
583 full form personal injury (including but not limited to bodily
584 injury),

585 covering the performance of all
586 work at or from the Premises by Tenant, its construction man-
587 ager, contractors and subcontractors,

588 and in a liability amount not less
589 than the amount at the time carried by prudent owners of com-
590 parable construction projects,

D. C. Toedt 4/22/14 9:28 AM

Comment [55]: COMMENT: This looks like a drafting error.

591 but in any event not less than Three
 592 Million Dollar (\$3,000,000) combined single limit,
 593 which policy shall include thereun-
 594 der for the mutual benefit of Landlord and Tenant, bodily inju-
 595 ry liability and property damage liability, and automobile in-
 596 surance on any non-owned, hired or leased automotive equip-
 597 ment used in the construction of any work.

598 (iii) Workers' Compensation Insur-
 599 ance approved by the State of California, in the amounts and
 600 coverages required under workers' compensation, disability
 601 and similar employee benefit laws applicable to the Premises,
 602 and Employer's Liability Insurance with limits not less than
 603 One Million Dollars (\$1,000,000) or such higher amounts as
 604 may be required by law.

605
 606 (c) All construction and other work in
 607 connection with any Alterations shall be done at Tenant's sole
 608 cost and expense and in a prudent and first class manner.

609 Tenant shall construct the Alterations in
 610 accordance with all Applicable Laws, and with plans and
 611 specifications that are in accordance with the provisions of this
 612 Article 9 and all other provisions of this Lease.

613 (d) Prior to the commencement of any Al-
 614 teration in excess of Ten Thousand Dollars (\$10,000), Land-
 615 lord shall have the right to post in a conspicuous location on
 616 the Premises and to record in the public records a notice of
 617 Landlord's nonresponsibility. Tenant covenants and agrees to
 618 give Landlord at least ten (10) days prior written notice of the
 619 commencement of any such Alteration in order that Landlord
 620 shall have sufficient time to post such notice.

D. C. Toedt 4/22/14 9:29 AM

Comment [56]: COMMENT: This should have been its own subpara-
 graph to avoid possible confusion about the required amount.

621 (e) Tenant shall take all necessary safety
622 precautions during any construction.

D. C. Toedt 4/22/14 9:31 AM

Comment [57]: QUESTION: To what extent might 20-20 hindsight be an issue in interpreting this clause?

623 (f) Tenant shall prepare and maintain
624 (i) on a current basis during construction,

625 annotated plans and specifications showing clearly all chang-
626 es, revisions and substitutions during construction, and

627 (ii) upon completion of construction of the
628 Alterations, as-built drawings showing clearly all changes, re-
629 visions and substitutions during construction,

630 including, without limitation, field chang-
631 es and the final location of all mechanical equipment, utility
632 lines, ducts, outlets, structural members, walls, partitions and
633 other significant features.

D. C. Toedt 4/22/14 9:31 AM

Comment [58]: QUESTION: Is it immediately obvious whether this "including" clause applies to the as-built plans and specs, or to ALL plans and specs?

634 These as-built drawings and annotated
635 plans and specifications shall be kept at the Premises
636 and Tenant shall update them as often as
637 necessary to keep them current.

638 The as-built drawings and annotated plans
639 and specifications shall be made available for copying and in-
640 spection by Landlord at all reasonable times.

D. C. Toedt 4/22/14 9:32 AM

Comment [59]: QUESTION: What about the architects' copyright?

641 (g) Upon completion of the construction of
642 any Alterations in excess of Ten Thousand Dollars (\$10,000)
643 during the Term, Tenant shall file for recordation, or cause to
644 be filed for recordation, a notice of completion and shall de-
645 liver to Landlord evidence satisfactory to Landlord of payment
646 of all costs, expenses, liabilities and liens arising out of or in
647 any way connected with such construction (except for liens
648 that are contested in the manner provided herein).

649 **9.3 Ownership of Improvements.** Except as pro-
650 vided in Section 9.4, all Alterations, and any other appurte-
651 nances, fixtures, improvements, equipment, additions and

652 property permanently attached to or installed in or on the
653 Premises at the commencement of or during the Term,
654 shall at the end of the Term become Landlord's
655 property without compensation to Tenant,
656 **or** be removed in accordance with this Section.

657 Upon written request by Tenant, Landlord shall
658 notify Tenant in writing at the time of Landlord's approval of
659 the Alterations whether or not the proposed Alterations will be
660 required to be removed by Tenant at the end of the Term
661 and Tenant shall have no obligation to remove any
662 Alterations that Landlord has not designated in writing for re-
663 moval.

664 Tenant shall repair or pay the cost of repairing any
665 damage to the Premises caused by the removal of Alterations.

666 If Tenant fails to perform its repair obligations,
667 without limiting any other right or remedy, Landlord may on
668 five (5) business days prior written notice to Tenant perform
669 such obligations at Tenant's expense and Tenant shall reim-
670 burse Landlord within twenty (20) days after demand for all
671 out-of-pocket costs and expenses incurred by Landlord in
672 connection with such repair. Tenant's obligations under this
673 Section shall survive the termination of this Lease.

674
675 **9.4 Tenant's Personal Property.** All inventory,
676 furniture, trade fixtures, furnishings, equipment and articles of
677 movable personal property installed in or on the Premises by
678 or for the account of Tenant (except for ceiling and related fix-
679 tures, HVAC equipment and floor coverings, which shall be-
680 come the property of Landlord at the end of the Term), and
681 which can be removed without structural or other material
682 damage to the Premises (collectively, "*Tenant's Property*")

683 shall be and remain the property of Tenant and may be re-
684 moved by it at any time during the Term.

685 Tenant shall remove from the Premises all Ten-
686 ant's Property on or before the Termination Date,

687 except such items as the parties have agreed pur-
688 suant to the provisions of this Lease or by separate agreement
689 are to remain and to become the property of Landlord.

690 Tenant shall repair or pay the cost of repairing any
691 damage to the Premises resulting from such removal, and the
692 provisions of Section 9.3 above shall apply in the event Tenant
693 fails to do so.

694 Any items of Tenant's Property which remain in
695 the Premises after the Termination Date may, on five
696 (5) business days prior written notice to Tenant, at the option
697 of Landlord, be deemed abandoned and in such case may ei-
698 ther be retained by Landlord as its property or be disposed of,
699 without accountability, at Tenant's expense in such manner as
700 Landlord may see fit.

701 **10. LIENS**

702 Tenant shall keep the Premises free from any liens
703 arising out of any work performed, material furnished or obli-
704 gations incurred by or for Tenant.

705 If Tenant shall not, within ten (10) days following
706 notice of the imposition of any such lien, cause the lien to be
707 released of record by payment or posting of a proper bond,
708 Landlord shall have, in addition to all other remedies provided
709 in this Lease and by law, the right but not the obligation to
710 cause any such lien to be released by such means as it shall
711 deem proper, including payment of the claim giving rise to
712 such lien.

D. C. Toedt 4/22/14 6:37 AM

Comment [60]: Not the best plain-English phrasing here

713 All such sums paid by Landlord and all expenses
 714 incurred by it in connection therewith (including, without limi-
 715 tation, reasonable counsel fees) shall be payable to Landlord
 716 by Tenant upon demand with interest from the date incurred at
 717 the Interest Rate.

718 Landlord shall have the right at all times to post
 719 and keep posted on the Premises any notices permitted or re-
 720 quired by law or that Landlord shall deem proper for the pro-
 721 tection of Landlord and the Premises from mechanics' and
 722 materialmen's liens.

723 **11. COMPLIANCE WITH LAWS AND INSUR-**
 724 **ANCE REQUIREMENTS**

725 **11.1 Applicable Laws.** Tenant, at Tenant's cost
 726 and expense, shall comply with all applicable laws, statutes,
 727 codes, ordinances,
 728 orders,
 729 rules, regulations,
 730 conditions of approval,
 731 and requirements,
 732 of all federal, state, county, municipal and other
 733 governmental authorities and the departments, commissions,
 734 boards, bureaus, instrumentalities,
 735 and officers thereof,
 736 and all administrative or judicial orders or decrees
 737 and all permits, licenses, approvals and other enti-
 738 tlements issued by governmental entities,
 739 and rules of common law,
 740 relating to or affecting the Premises or the use,
 741 operation or occupancy of the Premises, whether now existing
 742 or hereafter enacted (collectively, "***Applicable Laws***"). With-

D. C. Toedt 4/22/14 6:38 AM

Comment [61]: Landlords' counsel rightly pay attention to the prospect of having tenants' contractors file M&M liens and thereby cloud title to the rented premises.

D. C. Toedt 4/22/14 6:39 AM

Comment [62]: Notice how broadly this is stated.

743 out limiting the foregoing, Tenant shall be solely responsible
744 for compliance with

745 and shall make or cause to be made all such im-
746 provements and alterations to the Premises (including, without
747 limitation, removing barriers and providing alternative ser-
748 vices)

749 as shall be required to comply with all applicable
750 building codes, laws and ordinances relating to public accom-
751 modations, including the **Americans with Disabilities Act** of
752 1990, 42 U.S.C. §§ 12111 et seq. (the “**ADA**”), and the ADA
753 Accessibility Guidelines promulgated by the Architectural and
754 Transportation Barriers Compliance Board, the public ac-
755 commodation title of the Civil Rights Act of 1964, 42 U.S.C.
756 §§ 2000a et. seq., the Architectural Barriers Act of 1968, 42
757 U.S.C. §§ 4151 et. seq., as amended, Title V of the Rehabilita-
758 tion Act of 1973, 29 U.S.C. §§ 790 et. seq., the Minimum
759 Guidelines and Requirements for Accessible Design, 36
760 C.F.R. Part 1190, the Uniform Federal Accessibility Stand-
761 ards, and Title 24 of the California Code of Regulations,
762 as the same may be amended from time to time,
763 or any similar or successor laws, ordinances and
764 regulations, now or hereafter adopted.

765 Tenant’s liability shall be primary and Tenant
766 shall indemnify Landlord in accordance with Section 13.1 in
767 the event of any failure or alleged failure of Tenant to comply
768 with Applicable Laws.

769 Any work or installations made or performed by
770 or on behalf of Tenant or any person or entity claiming
771 through or under Tenant pursuant to the provisions of this Sec-
772 tion shall be made in conformity with and subject to the provi-
773 sions of Article 9.

774 **11.2 Insurance Requirements.** Tenant shall not
775 do anything, or permit anything to be done, in or about the
776 Premises that would:

777 (a) invalidate or be in conflict with the provisions
778 of or cause any increase in the applicable rates for any fire or
779 other insurance policies covering the Premises or any property
780 located thereon (unless Tenant pays for such increased costs),
781 or

782 (b) result in a refusal by fire insurance companies
783 of good standing to insure the Premises or any such property
784 in amounts reasonably satisfactory to Landlord, or

785 (c) subject Landlord to any liability or responsibil-
786 ity for injury to any person or property by reason of any busi-
787 ness operation being conducted in the Premises.

788 Tenant, at Tenant's expense, shall comply with all
789 rules, orders, regulations or requirements of the American In-
790 surance Association (formerly the National Board of Fire Un-
791 derwriters) and with any similar body that shall hereafter per-
792 form the function of such Association.

793 **12. HAZARDOUS MATERIALS**

794 **12.1 Definitions.** As used in this Lease, the fol-
795 lowing terms shall have the following meanings:

796 (a) "***Environmental Activity***" means any
797 use, treatment, keeping, storage, holding, release, emission,
798 discharge, manufacturing, generation, processing, abatement,
799 removal, disposition, handling, transportation, deposit, leak-
800 ing, spilling, injecting, dumping or disposing of any Hazard-
801 ous Materials from, into, on or under the Premises, and shall
802 exclude the mere discovery of a pre-existing contamination,
803 but include the exacerbation of any pre-existing contamination
804 by Tenant or any of Tenant's Agents.

805 (b) “*Environmental Laws*” mean all Ap-
806 plicable Laws, now or hereafter in effect, relating to environ-
807 mental conditions, industrial hygiene or Hazardous Materials
808 on, under or about the Premises, including without limitation
809 the Comprehensive Environmental Response, Compensation
810 and Liability Act of 1980, as amended, 42 U.S.C. Sec-
811 tion 9601, et seq., the Hazardous Materials Transportation
812 Act, 49 U.S.C. Section 1801, et seq., the Solid Waste Disposal
813 Act, 42 U.S.C. Section 6901, et seq., the Clean Water Act, 33
814 U.S.C. Section 1251, et seq., the Clean Air Act, 42 U.S.C.
815 Section 7401, et seq., the Toxic Substances Control Act, 15
816 U.S.C. Section 2601 through 2629, the Safe Drinking Water
817 Act, 42 U.S.C. Sections 300f through 300j, and any similar
818 state and local laws and ordinances and the regulations now or
819 hereafter adopted and published and/or promulgated pursuant
820 thereto.

821 (c) “*Hazardous Material*” means any
822 chemical, substance, medical or other waste, living organism or
823 combination thereof which is or may be hazardous to the envi-
824 ronment or human or animal health or safety- due to its radio-
825 activity, ignitability, corrosivity, reactivity, explosivity, toxic-
826 ity, carcinogenicity, mutagenicity, phytotoxicity, infectiousness
827 or other harmful or potentially harmful properties or effects.
828 Hazardous Materials shall include, without limitation, petrole-
829 um hydrocarbons, including MTBE, crude oil or any fraction
830 thereof, asbestos, radon, polychlorinated biphenyls (PCBs),
831 methane, lead, urea, formaldehyde foam insulation, microbial
832 matter (including mold) and all substances which now or in
833 the future may be defined as “hazardous substances,” “hazard-
834 ous wastes,” “extremely hazardous wastes,” “hazardous mate-
835 rials,” “toxic substances,” “infectious wastes,” “biohazardous

836 wastes,” “medical wastes,” “radioactive wastes” or which are
 837 otherwise listed, defined or regulated in any manner pursuant
 838 to any Environmental Laws.

839 (d) “*Tenant’s Hazardous Materials*”

840 means any Hazardous Materials resulting from the Environ-
 841 mental Activity by Tenant or any of Tenant’s Agents.

842 **12.2 Environmental Release.** Landlord hereby
 843 informs Tenant that detectable amounts of Hazardous Materi-
 844 als may have come to be located on, beneath and/or in the vi-
 845 cinity of the Premises.

846 Tenant has made such investigations and inquiries
 847 as it deems appropriate to ascertain the effects, if any, of such
 848 substances and contaminants on its operations and persons us-
 849 ing the Premises.

850 Landlord makes no representation or warranty
 851 with regard to the environmental condition of the Premises.

852 Tenant hereby releases Landlord and Landlord’s
 853 officers, directors, trustees, agents and employees

854 from any and all claims, demands, debts, liabili-
 855 ties, and causes of action of whatever kind or nature,

856 whether known or unknown or suspected or un-
 857 suspected

858 which Tenant or any of Tenant’s Agents may
 859 have, claim to have, or which may hereafter accrue against the
 860 released parties or any of them,

861 arising out of or relating to or in any way connect-
 862 ed with Hazardous Materials presently in, on or under, or now
 863 or hereafter emanating from or migrating onto the Premises

864 (except to the extent caused by the willful mis-
 865 conduct or gross negligence of Landlord or Landlord’s Agents
 866 during the Term.

D. C. Toedt 4/22/14 9:36 AM

Comment [63]: COMMENT: “Hereby informs” – that’s a nice way to forestall a later “you didn’t tell me about X” claim.

D. C. Toedt 4/22/14 9:37 AM

Comment [64]: QUESTION: Is an advance release enforceable? How else might this be phrased?

867 In connection with such release, Tenant hereby
 868 waives any and all rights conferred upon it by the provisions
 869 of Section 1542 of the California Civil Code, which reads as
 870 follows:

871 A general release does not extend to claims which the cred-
 872 itor does not know or suspect to exist in his favor at the
 873 time of executing the release, which if known by him must
 874 have materially affected his settlement with the debtor.

875 **12.3 Use of Hazardous Materials.** Tenant shall
 876 not cause or permit any Hazardous Materials to be used,
 877 stored, discharged, released or disposed of in the Premises or
 878 cause any Hazardous Materials to be used, stored, discharged,
 879 released or disposed of in, from, under or about, the Premises,
 880 or any other land or improvements in the vicinity of the Prem-
 881 ises, excepting only the types and minor quantities of Hazard-
 882 ous Materials which are normally used in connection with
 883 Tenant's permitted use of the Premises and then only in strict
 884 accordance with all Applicable Laws, including all Environ-
 885 mental Laws.

886 As of the Commencement Date, Tenant shall pro-
 887 vide Landlord a complete list of all Hazardous Materials (in-
 888 cluding MSDS sheets for all such Hazardous Materials) used
 889 or stored by Tenant or any of Tenant's Agents or subtenants at
 890 the Premises, excluding standard janitorial and office prod-
 891 ucts.

892 Throughout the Term, Tenant shall continue to
 893 update this list so that it remains current.

894 Without limiting the foregoing, Tenant shall, at its
 895 own expense, procure, maintain in effect and comply with all
 896 conditions of any and all permits, licenses, and other govern-

D. C. Toedt 4/22/14 9:38 AM

Comment [65]: QUESTION: Will this waiver be enforceable?

D. C. Toedt 4/22/14 9:39 AM

Comment [66]: QUESTION: How likely is it that Tenant will actually comply?

897 mental and regulatory approvals required for Tenant's use of
 898 Hazardous Materials at the Premises,
 899 including, without limitation, discharge of appro-
 900 priately treated materials or wastes into or through any sani-
 901 tary sewer serving the Premises.

902 Tenant shall in all respects handle, treat, deal with
 903 and manage any and all Tenant's Hazardous Materials **in total**
 904 **conformity** with all Environmental Laws and prudent industry
 905 practices regarding management of such Hazardous Materials.

D. C. Toedt 4/22/14 9:39 AM

Comment [67]: QUESTION: Is "total conformity" a realistic standard?

906 **12.4 Remediation of Hazardous Materials.** Tenant
 907 shall, upon demand of Landlord, and at Tenant's sole cost and
 908 expense, promptly take all actions to remediate the Premises
 909 from the effects of any Tenant's Hazardous Materials.

910 Such actions shall include, but not be limited to, the
 911 investigation of the environmental condition of the Premises,
 912 the preparation of any feasibility studies, reports or remedial
 913 plans, and the performance of any cleanup, remediation, con-
 914 tainment, operation, maintenance, monitoring or restoration
 915 work, whether on or off of the Premises, Tenant shall take all
 916 actions necessary to remediate the Premises from the effects of
 917 such Tenant's Hazardous Materials to a condition allowing the
 918 current use of the Premises, notwithstanding any lesser stand-
 919 ard of remediation allowable. under Applicable Laws.

D. C. Toedt 4/22/14 9:40 AM

Comment [68]: COMMENT: Looks like this comma should be a period.

920 All work shall be performed by one or more contrac-
 921 tors selected by Tenant and reasonably approved in advance
 922 and in writing by Landlord.

923 Tenant shall proceed **continuously** and diligently with
 924 such investigatory and remedial actions, **provided that** in all
 925 cases such actions shall be in accordance with all Applicable
 926 Laws.

D. C. Toedt 4/22/14 9:40 AM

Comment [69]: QUESTION: What exactly does "continuously" mean – does it require 24x7x365 work?

927 Any such actions shall be performed in a good, safe
928 and **workmanlike** manner.

929 Tenant shall pay all costs in connection with such in-
930 vestigatory and remedial activities, including but not limited to
931 all power and utility costs, and any and all taxes or fees that
932 may be applicable to such activities.

933 Tenant shall promptly provide to Landlord copies of
934 testing results and reports that are generated in connection
935 with the above activities and any that are submitted to any
936 governmental entity.

937 Promptly upon completion of such investigation and
938 remediation, Tenant shall permanently seal or cap all monitor-
939 ing wells and test holes in accordance with sound engineering
940 practice and in compliance with Applicable Laws, remove all
941 associated equipment, and restore the Premises to the maxi-
942 mum extent possible, which shall include, without limitation,
943 the repair of any surface damage, including paving, caused by
944 such investigation or remediation.

945 **12.5 Indemnity.** Tenant shall indemnify, defend
946 (by counsel reasonably acceptable to Landlord), protect and
947 hold Landlord and Landlord's trustees, directors, officers,
948 agents and employees and their respective successors and as-
949 signs (collectively, "**Landlord's Agents**"), free and harmless
950 from and against any and all claims, liabilities, penalties, for-
951 feitures, losses or expenses (including reasonable attorneys'
952 and consultants' fees and oversight and response costs) to the
953 extent arising from (a) Environmental Activity by Tenant or
954 Tenant's Agents; or (b) failure of Tenant or Tenant's Agents
955 to comply with any Environmental Law with respect to Ten-
956 ant's Environmental Activity; or (c) Tenant's failure to re-

957 move Tenant's Hazardous Materials as required in Sec-
958 tion 12.4.

959 **Tenant's obligations hereunder shall include,** but
960 not be limited to,

961 the burden and expense of defending all claims,
962 suits and administrative proceedings (with counsel reasonably
963 approved by Landlord), even if such claims, suits or proceed-
964 ings are groundless, false or fraudulent;

965 conducting all negotiations of any description;

966 and promptly paying and discharging when due

967 any and all judgments, penalties, fines or other sums due

968 against or from Landlord or the Premises.

969 Prior to retaining counsel to defend such claims,
970 suits or proceedings, Tenant shall obtain Landlord's written
971 approval of the identity of such counsel, which approval shall
972 not be unreasonably withheld, conditioned or delayed. In the
973 event Tenant's failure to surrender the Premises at the expira-
974 tion or earlier termination of this Lease free of Tenant's Haz-
975 ardous Materials prevents Landlord from reletting the Premis-
976 es, or reduces the fair market and/or rental value of the Prem-
977 ises or any portion thereof, Tenant's indemnity obligations
978 shall include all losses to Landlord arising therefrom.

979 **12.6 No Lien.** Tenant shall not suffer any lien to
980 be recorded against the Premises as a consequence of any
981 Tenant's Hazardous Materials, including any so-called state,
982 federal or local "super fund" lien related to the remediation of
983 any Tenant's Hazardous Materials in or about the Premises.

984 **12.7 Investigation.** Landlord shall have the right to
985 enter and conduct an inspection of the Premises, including in-
986 vasive tests, at any reasonable time and upon reasonable ad-
987 vance notice, to determine whether Tenant is complying with

988 the terms of this Lease, including but not limited to the com-
989 pliance of the Premises and the activities thereon with Envi-
990 ronmental Laws (the “*Environmental Investigation*”). Land-
991 lord shall have the right, but not the obligation, to retain at its
992 expense an independent professional consultant to enter the
993 Premises to conduct such an inspection, and to review any re-
994 port prepared by or for Tenant concerning such compliance. In
995 the event the Environmental Investigation identifies any defi-
996 ciencies in the compliance of the Premises with Environmen-
997 tal Laws due to any Environmental Activity by Tenant or Ten-
998 ant’s Agents, Tenant shall promptly correct any such deficien-
999 cies identified in the Environmental Investigation, and docu-
1000 ment to Landlord that corrective action has been taken. In such
1001 event, Tenant shall also reimburse Landlord for the reasonable
1002 cost of the Environmental Investigation. If the Environmental
1003 Investigation identifies any such deficiency in compliance of
1004 the Premises with Environmental Laws due to any Environ-
1005 mental Activity by Tenant or Tenant’s Agents, then, within
1006 nine (9) months of the date of the Environmental Investiga-
1007 tion, Landlord may request a detailed review of the status of
1008 such violation by a consultant selected by Landlord (the “*Sup-*
1009 *plemental Investigation*”). Tenant shall pay for the reasonable
1010 cost of any Supplemental Investigation. A copy of the Sup-
1011 plemental Investigation shall be promptly supplied to Land-
1012 lord and Tenant when it becomes available.

1013 **12.8 Right to Remediate.** Should Tenant fail to
1014 perform or observe any of its obligations or agreements per-
1015 taining to Hazardous Materials or Environmental Laws, then
1016 Landlord shall have the right, but not the obligation, without
1017 limitation of any other rights of Landlord hereunder, to enter
1018 the Premises personally or through Landlord’s agents, em-

1019 ployees and contractors and perform the same. Tenant agrees
1020 to indemnify Landlord for the costs thereof and liabilities
1021 therefrom as set forth above in this Article 12.

1022 **12.9 Notices.** Tenant shall immediately notify
1023 Landlord of any inquiry, test, claim, investigation or enforce-
1024 ment-proceeding by or against Tenant or the Premises known
1025 to Tenant concerning any Hazardous Materials. Tenant shall
1026 immediately notify Landlord of any release or discharge of
1027 Hazardous Materials on, in under or about the Premises. Ten-
1028 ant acknowledges that Landlord, as the owner of the Premises,
1029 shall have the sole right at its election and at Tenant's ex-
1030 pense, to negotiate, defend, approve and appeal any action
1031 taken or order issued with regard to Tenant's Hazardous Mate-
1032 rials by any applicable governmental authority.

1033 **12.10 Surrender.** Tenant shall surrender the
1034 Premises to Landlord, upon the expiration or earlier termina-
1035 tion of the Lease, free of Tenant's Hazardous Materials in ac-
1036 cordance with the provisions of this Article 12.

1037 **12.11 Survival; Insurance.** The provisions of this
1038 Article 12 shall survive the expiration or earlier termination of
1039 this Lease. The provisions of Article 13 (insurance) shall not
1040 limit in any way Tenant's obligations under this Article 12.

1041
1042 **13. INDEMNITY; INSURANCE**

1043 **13.1 Indemnity.** Tenant shall indemnify, protect,
1044 defend and save and hold Landlord and Landlord's Agents
1045 harmless from and against any and all losses, costs, liabilities,
1046 claims, judgments, liens, damages (including consequential
1047 damages) and expenses, including, without limitation, reason-
1048 able attorneys' fees and costs, and reasonable investigation
1049 costs, incurred in connection with or arising from:

1050 (a) any default by Tenant in the observance or per-
1051 formance of any of the terms, covenants or conditions of this
1052 Lease on Tenant's part to be observed or performed, or

1053 (b) the use or occupancy or manner of use or oc-
1054 cupancy of the Premises by Tenant and Tenant's Agents,

1055 (c) the condition of the Premises, and any occur-
1056 rence on the Premises (including injury to or death of any per-
1057 son, or damage to property) from any cause whatsoever, and

1058 (d) any acts or omissions or negligence of Tenant
1059 or of Tenant's Agents, in, on or about the Premises.

1060 In case any action or proceeding be brought, made
1061 or initiated against Landlord relating to any matter covered by
1062 Tenant's indemnification obligations under this Section or un-
1063 der Section 12.5,

1064 Tenant, upon notice from Landlord, shall at its
1065 sole cost and expense, resist or defend such claim, action or
1066 proceeding by counsel reasonably approved by Landlord.

1067 Notwithstanding the foregoing, Landlord may re-
1068 tain its own counsel to defend or assist in defending any claim,
1069 action or proceeding involving potential liability of Five Mil-
1070 lion Dollars (\$5,000,000) or more,

1071 and Tenant shall pay the reasonable fees and dis-
1072 bursements of such counsel.

1073 Tenant's obligations under this Section shall sur-
1074 vive the expiration or earlier termination of this Lease.

1075 Notwithstanding anything to the contrary con-
1076 tained in this Lease, Landlord shall not be indemnified for any
1077 losses, damages, liabilities, judgments, actions, claims, attor-
1078 neys' fees, costs and expenses arising from the gross negli-
1079 gence or willful misconduct of Landlord and Landlord's
1080 Agents.

D. C. Toedt 4/22/14 9:58 AM

Comment [70]: QUESTION: What are the economic incentives for Land-
lord's separate counsel?

1081 **13.2 Insurance.** Tenant shall procure at its sole
 1082 cost and expense and keep in effect during the Term:
 1083 (a) all risk, fire, earthquake, flood and oth-
 1084 er perils, including extended coverage insurance on all build-
 1085 ings and other improvements.

1086 The amount of such insurance shall be the
 1087 Full Insurable **Replacement** Value.

1088 Each such policy shall specify that pro-
 1089 ceeds shall be payable whether or not any improvements are
 1090 actually rebuilt.

1091 Each such policy shall include an en-
 1092 dorsement protecting the named **and additional insureds**
 1093 **against becoming a co- insured** under the policy.

1094 Tenant hereby waives as against Landlord
 1095 any and all claims and demands, of whatever nature, for dam-
 1096 ages, loss or injury to the improvements and to the property of
 1097 Tenant in, upon or about the Premises caused by or resulting
 1098 from fire and/or other insured perils.

1099 **“Full Insurable Replacement Value”**
 1100 means 100% of the actual costs to replace the building and
 1101 improvements (without deduction for depreciation but with
 1102 standard exclusions such as foundations, excavations, paving
 1103 and landscaping, as applicable to specific perils),

1104 including the costs of demolition and de-
 1105 bris removal and including materials and equipment not in
 1106 place but in transit to or delivered to the Premises.

1107 The Full Insurable Replacement Value
 1108 shall be determined by Landlord.

1109 Tenant shall maintain coverage at the cur-
 1110 rent Full Insurable Replacement Value throughout the Term,

D. C. Toedt 4/22/14 9:59 AM

Comment [71]: QUESTION: What if the parties get into a dispute about this?

1111 subject to reasonable deductibles approved by Landlord in
1112 writing.

1113 (b) commercial general liability insurance
1114 covering Tenant's operations in the Premises and the use and
1115 occupancy of the Premises and any part thereof by Tenant.

1116 Such insurance shall include broad form
1117 contractual liability insurance coverage insuring Tenant's ob-
1118 ligations under this Lease.

1119 Such coverage shall be written on an "oc-
1120 currence" form

1121 and shall have a minimum combined sin-
1122 gle limit of liability of not less than five million dollars
1123 (\$5,000,000.00).

1124 Tenant's policy shall be written to apply to
1125 all bodily injury, property damage, personal injury and other
1126 covered loss (however occasioned) occurring during the policy
1127 term,

1128 with at least the following endorsements to
1129 the extent such endorsements are generally available:

1130 (i) deleting any employee exclusion on
1131 personal injury coverage,

1132 (ii) including employees as additional in-
1133 sureds,

1134 (iii) providing broad form property dam-
1135 age coverage and products completed operations coverage
1136 (where applicable), and

1137 (iv) deleting any liquor liability exclu-
1138 sions.

1139 Such insurance shall name Landlord and
1140 any other party designated by Landlord as an additional in-
1141 sured,

1142 shall specifically include the liability as-
1143 sumed hereunder by Tenant,
1144 shall provide that it is primary insurance,
1145 shall provide for severability of interests,
1146 shall further provide that an act or omis-
1147 sion of one of the named insureds which would void or other-
1148 wise reduce, coverage shall not reduce or void the coverage as
1149 to any insured,
1150 shall afford coverage for claims based on
1151 acts, omissions, injury or damage which occurred or arose (or
1152 the onset of which occurred or arose in whole or in part during
1153 the policy period),
1154 and shall provide that Landlord will re-
1155 ceive thirty (30) days' written notice from the insurer prior to
1156 any cancellation or material change of coverage;
1157 (c) commercial property insurance, includ-
1158 ing sprinkler leakages, vandalism and malicious mischief and
1159 plate glass damage covering all the items specified as Tenant's
1160 Property and all other property of every description including
1161 stock-in-trade, furniture, fittings, installations, alterations, ad-
1162 ditions, partitions and fixtures or anything in the nature of a
1163 leasehold improvement made or installed by or on behalf of
1164 the Tenant in the Premises
1165 in an amount of not less than one hundred
1166 percent (100%) of the full replacement cost thereof as shall
1167 from time to time be determined by Tenant in form reasonably
1168 satisfactory to Landlord;
1169 (d) Worker's Compensation Insurance in
1170 the amounts and coverages required under worker's compen-
1171 sation, disability and similar employee benefit laws applicable
1172 to Tenant and/or the Premises from time to time, and Employ-

1173 er's Liability Insurance, with limits of not less than one mil-
1174 lion dollars (\$1,000,000) or such higher amounts as may be
1175 required by law;

1176 (e) business income insurance with extra
1177 expense insurance in an amount sufficient to insure payment
1178 of Rent for a period of not less than twelve (12) months during
1179 any interruption of Tenant's business by reason of the Premis-
1180 es or Tenant's Property being damaged by casualty; and

1181 (f) any other form or forms of insurance as
1182 Landlord may reasonably require from time to time in
1183 amounts and for insurable risks against which a prudent tenant
1184 would protect itself to the extent landlords of comparable
1185 buildings in the vicinity of the Premises require their tenants
1186 to carry such other form(s) of insurance.

1187 **13.3 Policies.** All policies of insurance required of
1188 Tenant shall be issued by insurance companies with general
1189 policyholders' rating of not less than A, as rated in the most
1190 current available "Best's Insurance Reports," and not prohibit-
1191 ed from doing business in the State of California, and shall,
1192 with the exception of Workers Compensation Insurance, in-
1193 clude as additional insureds Landlord, and such other persons
1194 or entities as Landlord specifies from time to time. Such poli-
1195 cies, with the exception of Worker's Compensation Insurance,
1196 shall be for the mutual and joint benefit and protection of
1197 Landlord, Tenant and others specified by Landlord. Executed
1198 copies of Tenant's policies of insurance or certificates thereof
1199 shall be delivered to Landlord within ten (10) days prior to the
1200 delivery of possession of the Premises to Tenant and thereafter
1201 within thirty (30) days prior to the expiration of the term of
1202 each such policy. All commercial general liability and proper-
1203 ty damage policies shall contain a provision that Landlord and

1204 any other additional insured, although named as additional in-
1205 sureds, shall

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1208

1209 nevertheless be entitled to recover under said policies for a
1210 covered loss occasioned by it, its servants, agents and employ-
1211 ees, by reason of Tenant's negligence. As often as any policy
1212 shall expire or terminate, renewal or additional policies shall
1213 be procured and maintained by Tenant in like manner and to
1214 like extent. All such policies of insurance shall provide that
1215 the company writing said policy will give to Landlord thirty
1216 (30) days notice in writing in advance of any cancellation or
1217 lapse or of the effective date of any reduction in the amounts
1218 of insurance. All commercial general liability, property dam-
1219 age and other casualty policies shall be written on an occur-
1220 rence basis. Landlord's coverage shall not be contributory.

1221 **13.4 Landlord's Rights.** Should Tenant fail to
1222 take out and keep in force each insurance policy required un-
1223 der this Article 13, or should such insurance not be approved
1224 by Landlord and should the Tenant not rectify the situation
1225 within two (2) business days after written notice from Land-
1226 lord to Tenant, Landlord shall have the right, without assum-
1227 ing any obligation in connection therewith, to purchase such
1228 insurance at the sole cost of Tenant, and all costs incurred by
1229 Landlord shall be payable to Landlord by Tenant within twen-
1230 ty (20) days after demand as Additional Rent and without
1231 prejudice to any other rights and remedies of Landlord under
1232 this Lease.

1233 **13.5 Waiver of Subrogation.** Notwithstanding
1234 anything to the contrary contained herein, to the extent permit-

1235 ted by their respective policies of insurance and to the extent
1236 of insurance proceeds received (or which would have been re-
1237 ceived had the party carried the insurance required by this
1238 Lease) with respect to the loss, Landlord and Tenant each
1239 hereby waive any right of recovery against the other party and
1240 against any other party maintaining a policy of insurance with
1241 respect to the Premises or any portion thereof or the contents
1242 of the Premises or the buildings located thereon for any loss or
1243 damage sustained by such other party with respect to the
1244 Premises or the buildings or other improvements thereon, or
1245 any portion thereof, or the contents of the same or any opera-
1246 tion therein, whether or not such loss is caused by the fault or
1247 negligence of such other party. Either party shall notify the
1248 other party if the policy of insurance carried by it does not
1249 permit the foregoing waiver.

1250 **13.6 No Liability.** No approval by Landlord of
1251 any insurer, or the terms or conditions of any policy, or any
1252 coverage or amount, of insurance, or any deductible amount
1253 shall be construed as a representation by Landlord of the sol-
1254 vency of the insurer or the sufficiency of any policy or any
1255 coverage or amount of insurance or deductible and Tenant as-
1256 sumes full risk and responsibility for any inadequacy of insur-
1257 ance coverage or any failure of insurers.

1258 **14. ASSIGNMENT AND SUBLETTING**

1259 **14.1 Consent Required.** Tenant shall not directly
1260 or indirectly, voluntarily or by operation of law, sell, assign,
1261 encumber, pledge or otherwise transfer or hypothecate all or
1262 any part of its interest in or rights with respect to the Premises
1263 or its leasehold estate (collectively, "*Assignment*"), or permit
1264 all or any portion of the Premises to be occupied by anyone
1265 other than itself or sublet all or any portion of the Premises

1266 (collectively, "***Sublease***") without Landlord's prior written
1267 consent, which consent may be withheld in Landlord's sole
1268 and absolute discretion.

1269 **14.2 Notice.** If Tenant desires to enter into a Sub-
1270 lease of all or any portion of the Premises or Assignment of
1271 this Lease (except as provided in Section 14.8), it shall give
1272 written notice (the "***Transfer Notice***") to Landlord of its inten-
1273 tion to do so, which notice shall contain (a) the name and ad-
1274 dress of the proposed assignee, subtenant or occupant (the
1275 "***Transferee***"), (b) the nature of the proposed Transferee's
1276 business to be carried on in the Premises, (c) the terms and
1277 provisions of the proposed Assignment or Sublease, and
1278 (d) such financial information as Landlord may reasonably re-
1279 quest concerning the proposed Transferee.

1280

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1283 **14.3** approval within fifteen (15) business days af-
1284 ter receipt of the Transfer Notice. If Landlord approves the
1285 proposed Assignment or Sublease, Tenant may, not later than
1286 thirty (30) days thereafter, enter into the Assignment or Sub-
1287 lease with the proposed Transferee upon the terms and condi-
1288 tions set forth in the Transfer Notice.

1289 **14.4 Excess Rent.** For any Assignment or Sub-
1290 lease (other than a Permitted Transfer under Section 14.7), fif-
1291 ty percent (50%) of the Excess Rent received by Tenant shall
1292 be paid to Landlord as and when received by Tenant. "***Excess***
1293 ***Rent***" means the gross revenue received from the Transferee
1294 during the Sublease term or with respect to the Assignment,
1295 less (a) the gross revenue received by Landlord from Tenant
1296 during the period of the Sublease term or concurrently with or

1297 after the Assignment; (b) any reasonably documented tenant
1298 improvement allowance or other economic concession (plan-
1299 ning allowance, moving expenses, etc.), paid by Tenant to or
1300 on behalf of the Transferee; (d) customary and reasonable ex-
1301 ternal brokers' commissions to the extent paid and document-
1302 ed; (e) reasonable attorneys' fees; and (f) reasonable costs of
1303 advertising the space for Sublease or Assignment (collective-
1304 ly, "**Transfer Costs**"). Tenant shall not be required to pay to
1305 Landlord any Excess Rent until Tenant has recovered its
1306 Transfer Costs.

1307 **14.5 Right of First Refusal.** Except for Permitted
1308 Transfers, if Tenant desires to assign Tenant's interest in the
1309 Premises or to sublease any portion of the Premises (collec-
1310 tively, a "**Transfer**"), Tenant's Transfer Notice shall also in-
1311 clude a written offer that includes all of the substantial busi-
1312 ness terms that Tenant has offered to a Transferee and shall of-
1313 fer to Transfer to Landlord, Tenant's interest in the portion of
1314 the Premises offered to the Transferee on such terms and con-
1315 ditions (the "**Offer**"). Landlord shall have fifteen (15) days
1316 from Landlord's receipt of the Offer to accept the Offer by
1317 written notice to Tenant or to approve or disapprove the
1318 Transfer as provided in Section 14.3. If Landlord accepts the
1319 Offer, Landlord and Tenant shall consummate the Transfer
1320 within fifteen (15) days after Landlord's written notice of ac-
1321 ceptance. The Transfer shall be consummated by Tenant's de-
1322 livery to Landlord of a good and sufficient assignment of lease
1323 or sublease. If Landlord does not accept the Offer, but ap-
1324 proves the Transfer, then in the event the terms of the Transfer
1325 are materially changed during subsequent negotiations to be
1326 more favorable to the Transferee, Tenant shall again deliver to
1327 Landlord an Offer in accordance with this Section, offering

1328 the interest to Landlord on such more favorable terms. Land-
1329 lord shall then have another period of fifteen (15) days after
1330 receipt of such Offer to accept such Offer.

1331 **14.6 No Release.** No Sublease or Assignment by
1332 Tenant nor any consent by Landlord thereto shall relieve Ten-
1333 ant of any obligation to be performed by Tenant under this
1334 Lease.

1335 Any Sublease or Assignment that is not in com-
1336 pliance with this Article shall be null and void

1337 and, at the option of Landlord, shall constitute an
1338 Event of Default by Tenant under this Lease,

1339 and Landlord shall be entitled to pursue any right
1340 or remedy available to Landlord under the terms of this Lease
1341 or under the laws of the State of California.

1342 The acceptance of any Rent or other payments by
1343 Landlord from a proposed Transferee shall not constitute con-
1344 sent to such Sublease or Assignment by Landlord or a recogni-
1345 tion of any Transferee, or a waiver by Landlord of any failure
1346 of Tenant or other Transferor to comply with this Article.

1347 **14.7 Assumption of Obligations.** Any Transferee
1348 shall, from and after the effective date of the Assignment, as-
1349 sume all obligations of Tenant under this Lease with respect to
1350 the Transferred Space and shall be and remain liable jointly
1351 and severally with Tenant for the

1352

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1354

1355 payment of Base Rent and Additional Rent, and for the per-
1356 formance of all of the terms, covenants, conditions and agree-
1357 ments herein contained on Tenant's part to be performed for
1358 the Term. No Assignment shall be binding on Landlord unless

1359 Tenant delivers to Landlord a counterpart of the Assignment
1360 and an instrument that contains a covenant of assumption rea-
1361 sonably satisfactory in substance and form to Landlord, and
1362 consistent with the requirements of this Section.

1363 **15. DEFAULT**

1364 **15.1 Event of Default.** The occurrence of any of
1365 the following shall be an “*Event of Default*” on the part of
1366 Tenant:

1367 (a) Failure to pay any part of the Base
1368 Rent or Additional Rent, or any other sums of money that
1369 Tenant is required to pay under this Lease

1370 where such failure continues for a period
1371 of five (5) days after written notice of default from Landlord
1372 to Tenant.

1373 Landlord’s notice to Tenant pursuant to
1374 this subsection shall be deemed to be the notice required under
1375 California Code of Civil Procedure Section 1161.

1376 (b) Failure to perform any other covenant,
1377 condition or requirement of this Lease

1378 when such failure shall continue for a pe-
1379 riod of thirty (30) days after written notice thereof from Land-
1380 lord to Tenant;

1381 provided that if the nature of the default is
1382 such that more than thirty (30) days are reasonably required
1383 for its cure, then an Event of Default shall not be deemed to
1384 have occurred if Tenant shall commence such cure within said
1385 thirty (30) day period and thereafter diligently and continuous-
1386 ly prosecute such cure to completion.

1387 Landlord’s notice to Tenant pursuant to
1388 this subsection shall be deemed to be the notice required under
1389 California Code of Civil Procedure Section 1161.

D. C. Toedt 4/22/14 7:05 AM

Comment [72]: COMMENT: This is conventionally known as a “notice and cure” provision.

D. C. Toedt 4/22/14 7:01 AM

Comment [73]: “Provided that” is poor phrasing.

D. C. Toedt 4/22/14 7:01 AM

Comment [74]: COMMENT: This is repetitive of the same language in subdivision (a).

1390 (c) The abandonment or vacating of the
 1391 Premises by Tenant.

1392 (d) Tenant shall admit in writing its inabil-
 1393 ity to pay its debts generally as they become due,
 1394 file a petition in **bankruptcy**, insolvency,
 1395 reorganization, dissolution or liquidation under any law or
 1396 statute of any government or any subdivision thereof either
 1397 now or hereafter in effect,
 1398 or Tenant shall make an assignment for
 1399 the benefit of its creditors,
 1400 consent to or acquiesce in the appointment
 1401 of a receiver of itself or of the whole or any substantial part of
 1402 the Premises.

1403 (e) A court of competent jurisdiction shall
 1404 enter an order, judgment or decree appointing a receiver of
 1405 Tenant or of the whole or any substantial part of the Premises
 1406 and such order, judgment or decree shall
 1407 not be vacated, set aside or stayed within thirty (30) days after
 1408 the date of entry of such order, judgment, or decree,
 1409 or a stay thereof shall be thereafter set
 1410 aside.

1411 (f) A court of competent jurisdiction shall
 1412 enter an order, judgment or decree approving a petition filed
 1413 **against** Tenant under any bankruptcy, insolvency, reorganiza-
 1414 tion, dissolution or liquidation law or statute of the federal or
 1415 state government or any subdivision of either now or hereafter
 1416 in effect,
 1417 and such order, judgment or decree shall
 1418 not be vacated, set aside or stayed within thirty (30) days from
 1419 the date of entry of such order, judgment or decree,

D. C. Toedt 4/22/14 7:02 AM

Comment [75]: QUESTION: Is this term enforceable? Why or why not?
 (Careful)

D. C. Toedt 4/22/14 7:03 AM

Comment [76]: This refers to an involuntary petition in bankruptcy,
 which can be filed by creditors in certain circumstances.

1420 or a stay thereof shall be thereafter set

1421 aside.

1422 **15.2 Remedies.** Upon the occurrence of an Event of

1423 Default, Landlord shall have the following rights and reme-

1424 dies:

1425 (a) The right to terminate this Lease upon
1426 written notice to Tenant,

1427 in which event Tenant shall immediately
1428 surrender possession of the Premises in accordance with Arti-
1429 cle 20.

1430 (b) The right to bring a summary action
1431 for possession of the Premises.

1432 (c) The rights and remedies described in
1433 California Civil Code Section 1951.2, pursuant to which
1434 Landlord may recover from Tenant upon a termination of the
1435 Lease,

1436 (i) the worth at the time of award of the
1437 unpaid rent which has been earned at the time of termination;

1438 (ii) the worth at the time of award of the
1439 amount by which the unpaid rent which would have been
1440 earned after termination until the time of award Exceeds the

1441 amount of such rental loss that Tenant proves could have been
1442 reasonably avoided;

1443 (iii) the worth at the time of the award of
1444 the amount by which the unpaid rent for the balance of the
1445 term after the time of award exceeds the amount of such rental
1446 loss that Tenant proves could be reasonably avoided; and

1447 (iv) any other amount necessary to com-
1448 pensate Landlord for all the detriment proximately caused by
1449 Tenant's failure to perform its obligations under this Lease or

D. C. Toedt 4/22/14 7:06 AM

Comment [77]: QUESTION: Are these Landlord's *exclusive* rights?

D. C. Toedt 4/22/14 7:06 AM

Comment [78]: QUESTION: Is "Exceeds" really a defined term? (I haven't looked for the definition.)

1450 which in the ordinary course of events would be likely to re-
1451 sult therefrom.

1452 The “worth at the time of award” of the
1453 amounts referred to in (i) and (ii) above is computed by allow-
1454 ing interest at the rate of ten percent (10%) per annum.

1455 The “worth at the time of award” of the
1456 amount referred to in (iii) above shall be computed by dis-
1457 counting such amount at the discount rate of the Federal Re-
1458 serve Bank of San Francisco at the time of award plus one
1459 percent (1%).

1460 The detriment proximately caused by Ten-
1461 ant’s failure to perform its obligations under this Lease or
1462 which in the ordinary course of events would be likely to re-
1463 sult therefrom includes, without limitation,

1464 (1) the unamortized portion of any broker-
1465 age or real estate agent’s commissions paid in connection with
1466 the execution of this Lease,

1467 (2) any direct costs or expenses incurred
1468 by Landlord in recovering possession of the Premises, main-
1469 taining or preserving the Premises after such default,

1470 (3) preparing the Premises for reletting to
1471 a new tenant (excluding the costs of any tenant improve-
1472 ments),

1473 (4) any repairs or alterations to the Prem-
1474 ises for such reletting,

1475 (5) leasing commissions, architect’s fees
1476 and any other costs necessary or appropriate either to relet the
1477 Premises or, if reasonably necessary in order to relet the Prem-
1478 ises, to adapt them to another beneficial use by Landlord and

1479 (6) such amounts in addition to or in lieu
1480 of the foregoing as may be permitted from time to time by

D. C. Toedt 4/22/14 7:07 AM

Comment [79]: Note the sky-high interest rate.

1481 Applicable Law to the extent that such payment would not re-
 1482 sult in a duplicative recovery.

1483 (d) The rights and remedies described in
 1484 California Civil Code Section 1951.4 which allow Landlord to
 1485 continue this Lease in effect and to enforce all of Landlord's
 1486 rights and remedies under this Lease, including the right to re-
 1487 cover Base Rent, **Additional Rent** and other charges payable
 1488 hereunder as they become due.

1489 Acts of maintenance or preservation, ef-
 1490 forts to relet the Premises or the appointment of a receiver up-
 1491 on Landlord's initiative to protect its interest under this Lease
 1492 shall not constitute a termination of Tenant's right to posses-
 1493 sion.

1494 (e) The right and power, as attorney-in-
 1495 fact for Tenant, to sublet the Premises, to collect rents from all
 1496 subtenants and to provide or arrange for the provision of all
 1497 services and fulfill all obligations of Tenant under any permit-
 1498 ted subleases. Landlord is hereby authorized on behalf of Ten-
 1499 ant, but shall have absolutely no obligation, to provide such
 1500 services and fulfill such obligations and to incur all such ex-
 1501 penses and costs as Landlord deems necessary. Landlord is
 1502 hereby authorized, but not obligated, to relet the Premises or
 1503 any part

1504

1505 -20-

1506

1507 thereof on behalf of Tenant, to incur such expenses as may be
 1508 necessary to effect a relet and make said relet for such term or
 1509 terms, upon such conditions and at such rental as Landlord in
 1510 its reasonable discretion may deem proper. Tenant shall be li-
 1511 able immediately to Landlord for all costs and expenses Land-

D. C. Toedt 4/22/14 7:08 AM

Comment [80]: Here's "Additional Rent" again.

1512 lord incurs in reletting the Premises including, without limita-
1513 tion, brokers' commissions, expenses of remodeling the Prem-
1514 ises required by the reletting, and the cost of collecting rents
1515 and fulfilling the obligations of Tenant to any subtenant. If
1516 Landlord relets the Premises or any portion thereof, such relet-
1517 ting shall not relieve Tenant of any obligation hereunder, ex-
1518 cept that Landlord shall apply the rent or other proceeds actu-
1519 ally collected by it as a result of such reletting against any
1520 amounts due from Tenant hereunder to the extent that such
1521 rent or other proceeds compensate Landlord for the nonper-
1522 formance of any obligation of Tenant hereunder. Such pay-
1523 ments by Tenant shall be due at such times as are provided
1524 elsewhere in this Lease, and Landlord need not wait until the
1525 termination of this Lease, by expiration of the Term or other-
1526 wise, to recover them by legal action or in any other manner.
1527 Landlord may execute any sublease made pursuant to this Sec-
1528 tion in its own name, and the tenant thereunder shall be under
1529 no obligation to see to the application by Landlord of any rent
1530 or other proceeds, nor shall Tenant have any right to collect
1531 any such rent or other proceeds. Landlord shall not by any
1532 reentry or other act be deemed to have accepted any surrender
1533 by Tenant of the Premises or Tenant's interest therein, or be
1534 deemed to have otherwise terminated this Lease, or to have re-
1535 lieved Tenant of any obligation hereunder, unless Landlord
1536 shall have given Tenant express written notice of Landlord's
1537 election to do so as set forth herein.

1538 (f) The right to enjoin, and any other rem-
1539 edy or right now or hereafter available to a Landlord against a
1540 defaulting tenant under the laws of the State of California or
1541 the equitable powers of its courts, and not otherwise specifi-
1542 cally reserved herein.

1543 (g) If this Lease provides for a postpone-
1544 ment of deferral of any Rent, or for commencement of pay-
1545 ment of Rent to a date later than the Commencement Date, or
1546 for a period of “free” Rent or any other Rent concession (col-
1547 lectively, “*Abated Rent*”), the right upon an Event of Default
1548 to demand immediate payment of the value of the Abated
1549 Rent.

1550 **15.3 Cumulative Remedies.** The various rights
1551 and remedies reserved to Landlord, including those not specif-
1552 ically described herein, shall, to the extent that the exercise of
1553 such right and/or remedy does not result in a duplicative re-
1554 covery, be cumulative and shall be in addition to every other
1555 right or remedy provided for in this Lease or now or hereafter
1556 existing at law or in equity and the exercise of the rights or
1557 remedies provided for in this Lease or now or hereafter exist-
1558 ing at law or in equity shall not preclude the simultaneous or
1559 later exercise by Landlord of any or all other rights and reme-
1560 dies.

1561 **15.4 Waiver of Redemption by Tenant.** Tenant
1562 hereby waives any right to relief against forfeiture of this
1563 Lease pursuant to California Code of Civil Procedure Sec-
1564 tion 1179.

1565 **15.5 Landlord’s Right to Cure.** If Tenant shall
1566 fail or neglect to do or perform any covenant or condition re-
1567 quired under this Lease and such failure shall not be cured
1568 within any applicable grace period, Landlord may, on five
1569 (5) business days written notice to Tenant, but shall not be re-
1570 quired to, make any payment payable by Tenant hereunder,
1571 discharge any lien, take out, pay for and maintain any insur-
1572 ance required hereunder, or do or perform or cause to be done
1573 or performed any such other act or thing (entering upon the

1574 Premises for such purposes, if Landlord shall so elect), and
1575 Landlord shall not be or be held liable or in any way responsi-
1576 ble for any loss, disturbance, inconvenience, annoyance or
1577 damage resulting to Tenant on account thereof. Tenant shall
1578 repay to Landlord within twenty (20) days after demand the
1579 entire out-of-pocket cost and expense incurred by Landlord in
1580 connection with the cure, including,

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1583

1584 without limitation, compensation to the agents, consultants
1585 and contractors of Landlord and reasonable attorneys' fees and
1586 expenses. Landlord may act upon shorter notice or no notice at
1587 all if necessary in Landlord's reasonable judgment to meet an
1588 emergency situation or governmental or municipal time limita-
1589 tion or to protect Landlord's interest in the Premises. Landlord
1590 shall not be required to inquire into the correctness of the
1591 amount of validity or any tax or lien that may be paid by
1592 Landlord and Landlord shall be duly protected In paying the
1593 amount of any such tax or lien claimed and in such event
1594 Landlord also shall have the full authority, in Landlord's sole
1595 judgment and discretion and without prior notice to or approv-
1596 al by Tenant, to settle or compromise any such lien or tax.
1597 Any act or thing done by Landlord pursuant to the provisions
1598 of this Section shall not be or be construed as a waiver of any
1599 such failure by Tenant, or as a waiver of any term, covenant,
1600 agreement or condition herein contained or of the performance
1601 thereof.

1602 **15.6 Landlord's Default.** Landlord shall be in de-
1603 fault under this Lease if Landlord fails to perform obligations
1604 required of Landlord within thirty (30) days after written no-

1605 tice by Tenant to Landlord and to the holder of any first mort-
1606 gage or deed of trust covering the Premises whose name and
1607 address shall have heretofore been furnished to Tenant in writ-
1608 ing, specifying wherein Landlord has failed to perform such
1609 obligations; provided, however, that if the nature of Land-
1610 lord's obligations is such that more than thirty (30) days are
1611 required for performance, then Landlord shall not be in default
1612 if Landlord commences performance within such thirty
1613 (30) day period and thereafter diligently prosecutes the same
1614 to completion. Tenant shall be entitled to actual (but not con-
1615 sequential) damages in the event of an uncured default by
1616 Landlord, but the provisions of Article 17 shall apply to any
1617 Landlord default and Tenant shall not have the right to termi-
1618 nate this Lease as a result of a Landlord default.

1619 **16. LANDLORD'S RESERVED RIGHTS**

1620 **16.1 Alterations to Premises.** Landlord reserves
1621 the right, at any time and from time to time, to make altera-
1622 tions, additions, repairs, replacements or improvements to all
1623 or any part of the Premises, for any reasonable purpose, and
1624 no such change shall entitle Tenant to any abatement of rent or
1625 damages; provided, however, that Landlord shall use reasona-
1626 ble efforts not to materially adversely affect Tenant's use of
1627 the Premises.

1628 **16.2 Access.** Landlord reserves (for itself and its
1629 agents, consultants, contractors and employees) the right to
1630 enter the Premises at all reasonable times and, except in cases
1631 of emergency, after giving Tenant reasonable notice, to in-
1632 spect the Premises (including, without limitation, environmen-
1633 tal testing); to supply any service to be provided by Landlord
1634 hereunder; to show the Premises to prospective purchasers or
1635 mortgagees; to show the Premises to prospective tenants dur-

1636 ing the last year of the Term; to post notices of nonresponsibil-
1637 ity; and to repair or maintain the Premises in the event Land-
1638 lord so elects as a result of Tenant's failure to do so, without
1639 abatement of , Rent, and may for that purpose erect, use and
1640 maintain necessary structures in and throughout the Premises
1641 where reasonably required by the character of the work to be
1642 performed. Tenant hereby waives any claim for damages for
1643 any injury or inconvenience to or interference with Tenant's
1644 business, any loss of occupancy or quiet enjoyment of the
1645 Premises or any other loss occasioned thereby, except to the
1646 extent caused by the gross negligence or willful misconduct of
1647 Landlord in the exercise of its rights and provided that Land-
1648 lord shall use reasonable efforts not to materially adversely af-
1649 fect Tenant's use of the Premises. All locks for all of the doors
1650 in, upon and about the Premises, excluding Tenant's vaults
1651 and safes or special security areas (designated in advance in
1652 writing by Tenant) shall at all times be keyed to a master sys-
1653 tem and Landlord shall at all times have and retain a key with
1654 which to unlock all of said doors. Landlord shall have the right
1655 to use any and all

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1657 -22-

1658

1659 means that Landlord may deem necessary or proper to open
1660 said doors in an emergency in order to obtain entry to any por-
1661 tion of the Premises, and any such entry to the Premises or
1662 portions thereof obtained by Landlord by any of said means,
1663 or otherwise, shall not under any circumstances be construed
1664 or deemed to be a forcible or unlawful entry into, or a detainer
1665 of, the Premises, or an eviction, actual or constructive, of Ten-
1666 ant from the Premises or any portion thereof.

1667 **16.3 Easements.** Landlord reserves the right to
1668 grant or relocate all easements and rights of way which Land-
1669 lord in its sole discretion may deem necessary or appropriate;
1670 provided that Tenant's rights to use the Premises is not mate-
1671 rially impeded.

1672 **16.4 Use of Additional Areas.** Landlord reserves
1673 the exclusive right to use any air space above the Premises,
1674 and the land beneath the Premises; provided that such use
1675 shall not materially impede Tenant's use of and access to the
1676 Premises.

1677 **16.5 Subordination.** This Lease shall be subject
1678 and subordinate at all times to: (a) all reciprocal easement
1679 agreements, and any ground leases or underlying leases which
1680 may now exist or hereafter be executed affecting the Premises,
1681 and (b) the lien of any mortgage or deed of trust which may
1682 now exist or hereafter be executed in any amount for which
1683 the Premises, or any ground leases or underlying leases, or
1684 Landlord's interest or estate in any of said items, is specified
1685 as security. Notwithstanding the foregoing, Landlord shall
1686 have the right to subordinate or cause to be subordinated to
1687 this Lease any of the items referred to in clause (a) or
1688 (b) above, subject to compliance with the condition precedent
1689 set forth below. In the event that any ground lease or underly-
1690 ing lease terminates for any reason or any mortgage or deed of
1691 trust is foreclosed or a conveyance in lieu of foreclosure is
1692 made for any reason, (i) no person or entity which as a result
1693 of the foregoing succeeds to the interest of Landlord under this
1694 Lease, (a "**Successor**") shall be liable for any default by Land-
1695 lord or any other matter that occurred prior to the date the
1696 Successor succeeded to Landlord's interest in this Lease, and
1697 (ii) Tenant shall, notwithstanding any subordination, attorn to

1698 and become the tenant of the Successor, at the option of the
1699 Successor. Tenant covenants and agrees, however, to execute
1700 and deliver, upon demand by Landlord and in the form rea-
1701 sonably requested by Landlord, any additional documents evi-
1702 dencing the priority or subordination of this Lease with respect
1703 to any such ground leases, underlying leases, reciprocal ease-
1704 ment agreements or similar documents or instruments, or with
1705 respect to the lien of any such mortgage or deed of trust and
1706 Tenant's failure to execute and deliver any such document
1707 within ten (10) business days after such demand by Landlord
1708 shall constitute an Event of Default without further notice.
1709 Landlord shall obtain the written agreement of the mortgagee
1710 or trustee named in any mortgage, deed of trust or other en-
1711 cumbrance, and any landlord under any ground lease or under-
1712 lying lease, that so long as an Event of Default by Tenant is
1713 not in existence, neither this Lease nor any of Tenant's rights
1714 hereunder shall be terminated or modified, nor shall Tenant's
1715 possession of the Premises be disturbed or interfered with, by
1716 any trustee's sale or by an action or proceeding to foreclose
1717 said mortgage, deed of trust or other encumbrance.

1718 **17. LIMITATION OF LANDLORD'S LIABILITY**

1719 **17.1 Limitation.** Landlord shall not be responsi-
1720 ble for or liable to Tenant and Tenant hereby releases Land-
1721 lord, waives all claims against Landlord and assumes the risk
1722 for any injury, loss or damage to any person or property in or
1723 about the Premises by or from any cause whatsoever (other
1724 than Landlord's gross negligence or willful misconduct) in-
1725 cluding, without limitation, (a) acts or omissions of persons
1726 occupying adjoining premises, (b) theft or vandalism,
1727 (c) burst, stopped or leaking water, gas, sewer or steam pipes,
1728 (d) loss of utility

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1732 service, (e) accident, fire or casualty, (f) nuisance, and
1733 (g) work done by Landlord on the Premises. There shall be no
1734 abatement of Rent and no liability of Landlord by reason of
1735 any injury to or interference with Tenant's business arising
1736 from the making of any repairs, alterations or improvements to
1737 any portion of the Premises or to fixtures, appurtenances and
1738 equipment in the Premises. If, as a result of the gross negli-
1739 gence or willful misconduct of Landlord, the Premises should
1740 become untenable for Tenant's use as a consequence of the
1741 cessation of utilities or other services, interference with access
1742 to the Premises, legal restriction or the presence of any Haz-
1743 ardous Materials that are not located on, in or under the Prem-
1744 ises as of the Commencement Date, and In the event any of
1745 the foregoing prevents Tenant's intended use of the Premises
1746 for a period of seven (7) days or more, Tenant shall be entitled
1747 to an equitable abatement of Base Rent and Additional Rent
1748 from the date of the first occurrence through the time in which
1749 the Premises are again tenantable for Tenant's intended use. If
1750 such interruption continues for a period of thirty
1751 (30) consecutive days or more, Tenant shall be entitled to ter-
1752 minate this Lease, upon written notice to Landlord, whereupon
1753 the parties shall have no further rights or obligations under this
1754 Lease.

1755

1756 **17.2 Sale of Property.** It is agreed that Landlord
1757 may at any time sell, assign or transfer its interest as landlord
1758 in and to this Lease, and may at any time sell, assign or trans-
1759 fer its interest in and to the Premises. In the event of any trans-
fer of Landlord's interest in this Lease or in the Premises, the

1760 transferor shall be automatically relieved of any and all of
1761 Landlord's obligations and liabilities accruing from and after
1762 the date of such transfer; provided that the transferee assumes
1763 all of Landlord's obligations under this Lease. Tenant hereby
1764 agrees to attorn to Landlord's assignee, transferee, or purchas-
1765 er from and after the date of notice to Tenant of such assign-
1766 ment, transfer or sale, in the same manner and with the same
1767 force and effect as though this Lease were made in the first in-
1768 stance by and between Tenant and the assignee, transferee or
1769 purchaser.

1770 **17.3 No Personal Liability.** In the event of any
1771 default by Landlord hereunder, Tenant shall look only to
1772 Landlord's interest in the Premises and rents therefrom and
1773 any available insurance proceeds for the satisfaction of Ten-
1774 ant's remedies, and no other property or assets of Landlord or
1775 any trustee, partner, member, officer or director thereof, dis-
1776 closed or undisclosed, shall be subject to levy, execution or
1777 other enforcement procedure for the satisfaction of Tenant's
1778 remedies under or with respect to this Lease.

1779 **18. DESTRUCTION**

1780 **18.1 Damage or Destruction; Duty to Restore.**
1781 If the Premises or the improvements, or any portion thereof,
1782 are damaged or destroyed at any time during the Term and this
1783 Lease is not terminated by either party pursuant to and in ac-
1784 cordance with this Section 18, Tenant, as promptly as practi-
1785 cable and with all due diligence (given the time required to ob-
1786 tain insurance proceeds and to obtain construction permits),
1787 shall cause the repair, reconstruction and replacement of the
1788 improvements as nearly as possible given the circumstances
1789 and then-Applicable Law to their condition immediately prior
1790 to such damage or destruction and, except as otherwise ap-

1791 proved in writing by Landlord or precluded by then-
1792 Applicable Law, to their same general appearance.

1793 **18.2 Performance of Repairs and Restoration.**

1794 All repairs and restoration shall be performed in accordance
1795 with the provisions of Section 9 of this Lease (as applicable).
1796 Except as otherwise provided herein, all insurance proceeds,
1797 less actual costs and expenses incurred in connection with the
1798 collection thereof, shall be applied to the costs of repair and
1799 restoration of the Premises and the improvements in accord-
1800 ance with the provisions of this

1801

1802 -24-

1803

1804 Section 18 and in compliance with Section 9 (as applicable).

1805 All such insurance proceeds shall be held by Landlord, or at
1806 the request of the holder of any mortgagor, by a trust company
1807 reasonably satisfactory to Landlord and such holder. Insurance
1808 proceeds shall be made available to Tenant in monthly draws
1809 during the repair of the Premises, which shall be available up-
1810 on submission by Tenant of written request accompanied by
1811 reasonably detailed invoices and customary lien releases from
1812 Tenant's contractor. Tenant shall pay any amount by which
1813 the insurance proceeds received as a result of such damage,
1814 less the costs and expenses incurred in connection with the
1815 collection thereof, are insufficient to pay the entire cost of
1816 such repair and restoration.

1817 **18.3 Option to Terminate Upon Damage or De-**

1818 **struction.** In the event of (a) any damage to or destruction of
1819 the Premises or the improvements or any portion thereof at
1820 any time during the Term and the cost to repair and restore the
1821 same to substantially the same condition as existed immediate-

1822 ly prior to such occurrence is reasonably estimated to exceed
1823 twenty-five percent (25%) of full replacement cost of all im-
1824 provements on the Premises and is not covered by any insur-
1825 ance obtained or required to be obtained by Tenant pursuant to
1826 Article 13, or (b) any damage to or destruction of the Premises
1827 or the improvements occurring during the last twelve months
1828 of the Term, then Tenant shall have the option to terminate
1829 this Lease, exercisable as provided below.

1830 **18.4 Termination; Tenant's Obligation to Re-**
1831 **store; Arbitration.** Tenant may exercise its option to termi-
1832 nate this Lease pursuant to this Section 18 by giving written
1833 notice to Landlord within ninety (90) days after the occurrence
1834 of the event of damage or destruction. If Tenant elects to ter-
1835 minate this Lease pursuant to this Section 18, Tenant shall sur-
1836 render the Premises to Landlord in accordance with the provi-
1837 sions of Section 20, except to the extent the damage or de-
1838 struction prevents Tenant from so doing. Tenant's obligations
1839 under this Section 18 shall survive the termination of this
1840 Lease. All proceeds of insurance payable with respect to dam-
1841 age to, or destruction of the improvements and other property
1842 located on the Premises, after payment of costs and expenses
1843 of collection thereof, shall first be applied to the costs of dem-
1844 olition, removal, restoration, and remediation, as appropriate,
1845 depending on the extent of the damage or destruction, with the
1846 balance, if any, of such insurance proceeds, to be distributed
1847 as provided in Section 18.5.

1848 **18.5 Excess Proceeds.** If there are proceeds of in-
1849 surance in excess of that required to repair, restore, reconstruct
1850 or demolish the Premises and the improvements as required
1851 herein, upon receipt by Landlord of satisfactory evidence that
1852 the work of repair, restoration, reconstruction or demolition

1853 required has been fully completed and paid for in accordance
1854 with the provisions of this Lease, and that the last day for fil-
1855 ing any mechanic's or materialmen's liens has passed without
1856 the filing of any, or if filed, any such lien has been released,
1857 any remaining insurance proceeds shall be paid to Landlord
1858 and the holders of mortgages as their interest may appear.

1859 **18.6 Right to Participate in Settlement.** Land-
1860 lord and Tenant shall both have the right to participate in the
1861 settlement or compromise of any insurance proceeds.

1862 **18.7 No Damages.** If Landlord is required or
1863 elects to make any repairs, reconstruction or restoration of any
1864 damage or destruction to the Premises under any of the provi-
1865 sions of this Article 18, Tenant shall not be entitled to any
1866 damages by reason of any inconvenience or loss sustained by
1867 Tenant as a result thereof. There shall be no reduction, change
1868 or abatement of any rental or other charge payable by Tenant
1869 to Landlord hereunder, or in the method of computing, ac-
1870 counting for or paying the same. Tenant hereby waives the
1871 provisions of Section 1932(2) and Section 1933(4) of the Cali-
1872 fornia Civil Code, or any other statute or law that may be in
1873 effect at the time of a casualty under which a lease is automat-
1874 ically terminated or a tenant is given the right to terminate a
1875 lease due to a casualty.

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1877 -25-

1878

1879 **19. EMINENT DOMAIN**

1880 **19.1 Taking.** If all or any part of the Premises
1881 shall be taken as a result of the exercise, of the power of emi-
1882 nent domain or any transfer in lieu thereof, this Lease shall
1883 terminate as to the part so taken as of the date of taking or as

1884 of the date of final judgment, whichever is earlier, and, in the
1885 case of a partial taking if at least twenty-five percent (25%) of
1886 the Premises, or if the extent and nature of such taking sub-
1887 stantially handicaps, impedes or impairs Tenant's use of the
1888 balance of the Premises, either Landlord or Tenant shall have
1889 the right to terminate this Lease as to the balance of the Prem-
1890 ises by written notice to the other within thirty (30) days after
1891 such date.

1892 **19.2 Award.** In the event of any taking, Landlord
1893 shall be entitled to any and all compensation, damages, in-
1894 come, rent, awards, or any interest therein whatsoever which
1895 may be paid or made in connection therewith, and Tenant shall
1896 assign to Landlord any right to compensation or damages for
1897 the condemnation of its leasehold interest; provided that Ten-
1898 ant may file a claim for (a) Tenant's relocation expenses, and
1899 (b) the taking of Tenant's Property.

1900 (a) In the event of a partial taking of the
1901 Premises which does not result in a termination of this Lease,
1902 Landlord shall repair, restore or reconstruct the Premises to a
1903 useable state; provided that Landlord shall not be required to
1904 expend any sums other than those received pursuant to Sec-
1905 tion 19.2.

1906 (b) During the period between the date of
1907 the partial taking and the completion of any necessary repairs,
1908 reconstruction or restoration, Tenant shall be entitled to a re-
1909 duction of Base Rent by a proportionate amount based upon
1910 the extent of interference with Tenant's operations in the
1911 Premises.

1912 **19.3 Temporary Taking.** Notwithstanding any
1913 other provision of this Article, if a taking occurs with respect
1914 to all or any portion of the Premises for a period of six

1915 (6) months or less, this Lease shall remain unaffected thereby
1916 and Tenant shall continue to pay Base Rent and Additional
1917 Rent and to perform all of the terms, conditions and covenants
1918 of this Lease, provided that Tenant shall have the right to ter-
1919 minate this Lease if the taking continues beyond twelve
1920 (12) months. In the event of any such temporary taking, and if
1921 this Lease is not terminated, Tenant shall be entitled to receive
1922 that portion of any award which represents compensation for
1923 the use or occupancy of the Premises during the Term up to
1924 the total Base Rent and Additional Rent owing by Tenant for
1925 the period of the taking, and Landlord shall be entitled to re-
1926 ceive the balance of any award.

1927 **19.4 Sale in Lieu of Condemnation.** A voluntary
1928 sale by Landlord of all or any part of the Premises to any pub-
1929 lic or quasi-public body, agency or person, corporate or oth-
1930 erwise, having the power of eminent domain, either under
1931 threat of condemnation or while condemnation proceedings
1932 are pending, shall be deemed to be a taking under the power of
1933 eminent domain for the purposes of this Article.

1934 **19.5 Waiver.** Except as provided in this Article,
1935 Tenant hereby waives and releases any right it may have under
1936 any Applicable Law to terminate this Lease as a result of a
1937 taking, including without limitation Sections 1265.120 and
1938 1265.130 of the California Code of Civil Procedure, or any
1939 similar law, statute or ordinance now or hereafter in effect.

1940
1941 -26-

1942
1943 **20. SURRENDER**

1944 **20.1 Surrender.** Upon the Termination Date,
1945 Tenant shall surrender the Premises to Landlord in as good or-

1946 der and repair as on the Commencement Date, reasonable
1947 wear and tear and damage by casualty excepted, free and clear
1948 of all letting and occupancies and free of Hazardous Materials
1949 as required pursuant to Article 12. Subject to Article 9, upon
1950 any termination of this Lease all improvements, except for
1951 Tenant's Property, shall automatically and without further act
1952 by Landlord or Tenant, become the property of Landlord, free
1953 and clear of any claim or interest therein by Tenant, and with-
1954 out payment therefore by Landlord.

1955 **20.2 Holding Over.** Any holding over after the
1956 expiration of the Term with the consent of Landlord shall be
1957 construed to automatically extend the Term on a month-to-
1958 month basis at a Base Rent equal to the greater of (a) 150% of
1959 the then-current Base Rent, and (b) prevailing rate at which
1960 Landlord is then offering space in buildings reasonably deter-
1961 mined by Landlord to be comparable to the Premises, and
1962 shall otherwise be on the terms and conditions of this Lease to
1963 the extent applicable. Any holding over without Landlord's
1964 consent shall entitle Landlord to exercise any or all of its rem-
1965 edies provided in Article 15, notwithstanding that Landlord
1966 may elect to accept one or more payments of Base Rent and
1967 Operating Expenses from Tenant.

1968 **20.3 Quitclaim.** At the expiration or earlier termi-
1969 nation of this Lease, Tenant shall execute, acknowledge and
1970 deliver to Landlord, within ten (10) days after written demand
1971 from Landlord to Tenant, any quitclaim deed or other docu-
1972 ment required by any reputable title company, licensed to op-
1973 erate in the State of California, to remove the cloud or encum-
1974 brance created by this Lease from the Premises.

1975 **21. FINANCIAL STATEMENTS**

1976 Tenant shall tender to Landlord within ten (10) business
1977 days after receipt of a written request any information reason-
1978 ably requested by Landlord regarding the financial stability,
1979 credit worthiness or ability of Tenant to pay the Rent due un-
1980 der this Lease. Landlord shall be entitled to rely upon the in-
1981 formation provided in determining whether or not to enter into
1982 this Lease or for the purpose of any financing or other transac-
1983 tion subsequently undertaken by Landlord. Tenant hereby rep-
1984 resents and warrants to Landlord the following: (a) that all
1985 documents provided by Tenant to Landlord in connection with
1986 the negotiation of this Lease are true and correct copies of the
1987 originals, (b) Tenant has not withheld any information from
1988 Landlord that is material to Tenant's credit worthiness, finan-
1989 cial condition or ability to perform its obligations hereunder,
1990 (c) all information supplied by Tenant to Landlord is true, cor-
1991 rect and accurate, and (d) no part of the information supplied
1992 by Tenant to Landlord contains any misleading or fraudulent
1993 statements. A default under this Article shall be a non-curable
1994 default by Tenant and Landlord shall be entitled to pursue any
1995 right or remedy available to Landlord under the terms of this
1996 Lease or available to Landlord under the laws of the State of
1997 California. Landlord shall a be entitled to disclose Tenant's fi-
1998 nancial information to (1) its agents, employees and consult-
1999 ants, (2) potential purchasers of an interest in the Premises,
2000 and (3) lenders contemplating making a loan to the Landlord
2001 to be secured by the Premises, provided that such recipients
2002 are advised of the confidential nature of such information and
2003 agree to maintain such confidentiality.

2004

2005

-27-

2006

2007 22. TENANT CERTIFICATES

2008 Tenant, at any time and from time to time within
2009 ten (10) business days after receipt of written notice from
2010 Landlord, shall execute, acknowledge and deliver to Landlord
2011 or to any party designated by Landlord (including prospective
2012 lenders, purchasers, ground lessees and others similarly situat-
2013 ed), a certificate of Tenant stating, to the best of Tenant's
2014 knowledge: (a) that Tenant has accepted the Premises, (b) the
2015 Commencement Date and Expiration Date of this Lease,
2016 (c) that this Lease is unmodified and in full force and effect
2017 (or, if there have been modifications, that same is in full force
2018 and effect as modified and stating the modifications),
2019 (d) whether or not there are then existing any defenses against
2020 the enforcement of any of the obligations of Tenant under this
2021 Lease (and, if so, specifying same), (e) whether or not there
2022 are then existing any defaults by Landlord in the performance
2023 of its obligations under this Lease (and, if so, specifying
2024 same), (f) the dates, if any, to which the Base Rent and Oper-
2025 ating Expenses have been paid, and (g) any other factual in-
2026 formation relating to the rights and obligations under this
2027 Lease that may reasonably be required by any of such persons.
2028 Failure to deliver such certificate when due shall constitute an
2029 Event of Default. At the request of Tenant, Landlord shall ex-
2030 ecute, acknowledge and deliver to Tenant a certificate with
2031 similar types of information and in the time period set forth
2032 above. Failure by either Landlord or Tenant to execute,
2033 acknowledge and deliver such certificate shall be conclusive
2034 evidence that this Lease is in full force and effect and has not
2035 been modified except as may be represented by the requesting
2036 party.

2037 23. SIGNS

2038 Tenant shall have the right, at Tenant's sole cost
2039 and expense, to install signage on the Premises, subject to the
2040 prior written consent of Landlord, not to be unreasonably
2041 withheld, and, if required, the approval of the City of Menlo
2042 Park. Any signage shall be removed by Tenant at the expira-
2043 tion or earlier termination of this Lease if so required by Land-
2044 lord.

2045 **24. INABILITY TO PERFORM**

2046 If Landlord is unable to fulfill or is delayed in ful-
2047 filling any of Landlord's obligations under this Lease, by rea-
2048 son of acts of God, accidents, breakage, repairs, strikes, lock-
2049 outs, other labor disputes, inability to obtain utilities or mate-
2050 rials or by any other reason beyond Landlord's reasonable
2051 control (and excluding failure or delay as a result of Land-
2052 lord's willful misconduct or gross negligence), then no such
2053 inability or delay by Landlord shall constitute an actual or
2054 constructive eviction, in whole or in part, or entitle Tenant to
2055 any abatement or diminution of Base Rent or Additional Rent,
2056 or relieve Tenant from any of its obligations under this Lease,
2057 or impose any liability upon Landlord or Landlord's Agents
2058 by reason of inconvenience, annoyance, interruption, injury or
2059 loss to or interference with Tenant's business or use and occu-
2060 pancy or quiet enjoyment of the Premises or any loss or dam-
2061 age occasioned thereby. If Tenant is unable to fulfill or is de-
2062 layed in fulfilling any of Tenant's obligations under this Lease
2063 (other than the payment of Rent), by reason of acts of God,
2064 accidents, breakage, repairs, strikes, lockouts, other labor dis-
2065 putes, inability to obtain utilities or materials or by any other
2066 reason beyond Tenant's reasonable control, then such inability
2067 or delay by Tenant shall excuse the performance of Tenant for
2068 a period equal to the duration of such prevention, delay or

2069 stoppage. Tenant hereby waives and releases any right to ter-
2070 minate this Lease under Section 1932(1) of the California Civ-
2071 il Code, or any similar law, statute or ordinance now or hereaf-
2072 ter in effect.

2073

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2075

2076 **25. NOTICES**

2077 Notices or other communications given or re-
2078 quired to be given under this Lease shall be effective only if
2079 rendered or given in writing, sent by certified mail with a re-
2080 turn receipt requested, or delivered in person or by reputable
2081 overnight courier (e.g., Federal Express, DHL, etc.): (a) to
2082 Tenant (i) at Tenant's address set forth in Article 1, if sent pri-
2083 or to the Commencement Date, or (ii) at the Premises and at
2084 the "copy to" address specified in Article 1 if sent subsequent
2085 to the Commencement Date, or (iii) at the place where Tenant
2086 designates subsequent to Tenant's vacating, deserting, aban-
2087 doning or surrendering the Premises; or (b) to Landlord at
2088 Landlord's address set forth in Article 1; or (c) to such other
2089 address as either Landlord or Tenant may designate as its new
2090 address for such purpose by notice given to the other in ac-
2091 cordance with the provisions of this Article. Any such notice
2092 or other communication shall be deemed to have been ren-
2093 dered or given five (5) days after the date mailed, if sent by
2094 certified mail, or upon the date of delivery in person or by
2095 courier, or when delivery is attempted but refused.

2096 **26. QUIET ENJOYMENT**

2097 Landlord covenants that so long as an Event of
2098 Default by Tenant is not in existence, upon paying the Base
2099 Rent and Additional Rent and performing all of its obligations

2100 under this Lease, Tenant shall peaceably and quietly enjoy the
2101 Premises, subject to the terms and provisions of this Lease.

2102 **27. AUTHORITY**

2103 If Tenant is a corporation, limited liability compa-
2104 ny or a partnership, Tenant represents and warrants as follows:
2105 Tenant is an entity as identified in Article 1, duly formed and
2106 validly existing and in good standing under the laws of the
2107 state of organization specified in Article 1 and qualified to do
2108 business in the State of California. Tenant has the power, legal
2109 capacity and authority to enter into and perform its obligations
2110 under this Lease and no approval or consent of any person is
2111 required in connection with the execution and performance
2112 hereof. The execution and performance of Tenant's obliga-
2113 tions under this Lease will not result in or constitute any de-
2114 fault or event that would be, or with notice or the lapse of time
2115 would be, a default, breach or violation of the organizational
2116 instruments governing Tenant or any agreement or any order
2117 or decree of any court or other governmental authority to
2118 which Tenant is a party or to which it is subject. Tenant has
2119 taken all necessary action to authorize the execution, delivery
2120 and performance of this Lease and this Lease constitutes the
2121 legal, valid and binding obligation of Tenant. Upon Land-
2122 lord's request, Tenant shall provide Landlord with evidence
2123 reasonably satisfactory to Landlord confirming the foregoing
2124 representations and warranties.

2125 Landlord represents and warrants as follows:
2126 Landlord has the power, legal capacity and authority to enter
2127 into and perform its obligations under this Lease and no ap-
2128 proval or consent of any person is required in connection with
2129 the execution and performance hereof. The execution and per-
2130 formance of Landlord's obligations under this Lease will not

2131 result in or constitute any default or event that would be, or
2132 with notice or the lapse of time would be, a default, breach or
2133 violation of the organizational instruments governing Land-
2134 lord or any agreement or any order or decree of any court or
2135 other governmental authority to which Landlord is a party or
2136 to which it is subject. Landlord has taken all necessary action
2137 to authorize the execution, delivery and performance of this
2138 Lease and this Lease constitutes the legal, valid and binding
2139 obligation of Landlord.

2140

2141 -29-

2142

2143 28. BROKERS

2144 Landlord and Tenant each warrant that no broker
2145 has been involved in the procurement of this Lease; and each
2146 party hereby agrees to indemnify, defend and hold the other
2147 harmless from and against any and all liabilities arising from
2148 any breach of the foregoing warranty or any claims by a third
2149 party for a brokerage commission or finder's fee arising out of
2150 this transaction.

2151 29. MISCELLANEOUS

2152 **29.1 Entire Agreement.** This Lease, including the
2153 exhibits which are incorporated herein and made a part of this
2154 Lease, contains the entire agreement between the parties and
2155 all prior negotiations and agreements are merged herein. Ten-
2156 ant hereby acknowledges that neither Landlord nor Landlord's
2157 Agents have made any representations or warranties with re-
2158 spect to the Premises or this Lease except as expressly set
2159 forth herein, and no rights, easements or licenses are or shall
2160 be acquired by Tenant by implication or otherwise unless ex-
2161 pressly set forth herein.

2162 **29.2 No Waiver.** No failure by Landlord or Ten-
2163 ant to insist upon the strict performance of any obligation of
2164 Tenant or Landlord under this Lease or to exercise any right,
2165 power or remedy consequent upon a breach thereof, no ac-
2166 ceptance of full or partial Base Rent or Additional Rent during
2167 the continuance of any such breach by Landlord, or payment
2168 of Base Rent or Additional Rent by Tenant to Landlord, and
2169 no acceptance of the keys to or possession of the Premises pri-
2170 or to the expiration of the Term by any employee or agent of
2171 Landlord shall constitute a waiver of any such breach or of
2172 such term, covenant or condition or operate as a surrender of
2173 this Lease. No waiver of any breach shall affect or alter this
2174 Lease, but each and every term, covenant and condition of this
2175 Lease shall continue in full force and effect with respect to any
2176 other then-existing or subsequent breach thereof. The consent
2177 of Landlord or Tenant given in any instance under the terms of
2178 this Lease shall not relieve Tenant or Landlord, as applicable,
2179 of any obligation to secure the consent of the other in any oth-
2180 er or future instance under the terms of this Lease.

2181 **29.3 Modification.** Neither this Lease nor any
2182 term or provisions hereof may be changed, waived, discharged
2183 or terminated orally, and no breach thereof shall be waived, al-
2184 tered or modified, except by a written instrument signed by the
2185 party against which the enforcement of the change, waiver,
2186 discharge or termination is sought.

2187 **29.4 Successors and Assigns.** The terms, cove-
2188 nants and conditions contained in this Lease shall bind and in-
2189 ure to the benefit of Landlord and Tenant and, except as oth-
2190 erwise provided or limited herein, their respective personal
2191 representatives and successors and assigns.

2223 reclaim brought by either against the other on any matter
2224 whatsoever arising out of or in any way connected with this
2225 Lease, the relationship of Landlord with Tenant, or Tenant's
2226 use or occupancy of the Premises, including any claim of inju-
2227 ry or damage, and any emergency and other statutory remedy
2228 with respect thereto.

2229 **29.9 (Reserved).**

2230 **29.10 Light and Air.** Tenant covenants and
2231 agrees that no diminution of light, air or view by any structure
2232 that may hereafter be erected (whether or not by Landlord)
2233 shall entitle Tenant to any reduction of the Base Rent or Addi-
2234 tional Rent under this Lease, result in any liability of Landlord
2235 to Tenant, or in any other way affect this Lease or Tenant's
2236 obligations hereunder.

2237 **29.11 Lease Memorandum.** Neither Landlord or
2238 Tenant shall record this Lease or a short form memorandum
2239 hereof without the consent of the other.

2240 **29.12 Confidentiality.** The parties agree that nei-
2241 ther of them shall make public the terms and conditions of this
2242 Lease to any person other than a party's accountants, attor-
2243 neys, lenders, brokers, prospective ground lessees, investors,
2244 consultants or financial advisors without first obtaining the
2245 written permission from the other party, except to the extent
2246 otherwise required by Applicable Law.

2247 **29.13 Terms.** The words "Landlord" and "Ten-
2248 ant" as used herein shall include the plural as well as the sin-
2249 gular. If there is more than one Tenant or Landlord, the obliga-
2250 tions under this Lease imposed on Tenant or Landlord shall be
2251 joint and several. The captions preceding the articles of this
2252 Lease have been inserted solely as a matter of convenience

2253 and such captions in no way define or limit the scope or intent
2254 of any provision of this Lease.

2255 **29.14 Review and Approval.** The review, ap-
2256 proval, inspection or examination by Landlord of any item to
2257 be reviewed, approved, inspected or examined by Landlord
2258 under the terms of this Lease or the exhibits attached hereto
2259 shall not constitute the assumption of any responsibility by
2260 Landlord for either the accuracy or sufficiency of any such
2261 item or the quality of suitability of such item for its intended
2262 use. Any such review, approval, inspection or examination by
2263 Landlord is for the sole purpose of protecting Landlord's in-
2264 terests in the Premises and under this Lease, and no third par-
2265 ties, including, without limitation, Tenant or any person or en-
2266 tity claiming through or under Tenant, or the contractors,
2267 agents, servants, employees, visitors or licensees of Tenant or
2268 any such person or entity, shall have any rights hereunder with
2269 respect to such review, approval, inspection or examination by
2270 Landlord.

2271

2272 -31-

2273

2274 **29.15 No Beneficiaries.** This Lease shall not con-
2275 fer or be deemed to confer upon any person or entity other
2276 than the parties hereto, any right or interest, including without
2277 limitation, any third party status or any right to enforce any
2278 provision of this Lease.

2279 **29.16 Time of the Essence.** Time is of the es-
2280 sence in respect of all provisions of this Lease in which a defi-
2281 nite time for performance is specified.

2282 **29.17 Modification of Lease.** In the event of any
2283 ruling or threat by the Internal Revenue Service, or opinion of

2284 counsel, that all or part of the Rent paid or to be paid to Land-
2285 lord under this Lease will be subject to the income tax or unre-
2286 lated business taxable income, Tenant agrees to modify this
2287 Lease to avoid such tax; provided that such modifications will
2288 not result in any increase in Rent, or any increased obligations
2289 of Tenant under this Lease. Landlord will pay all Tenant's rea-
2290 sonable costs incurred in reviewing and negotiating any such
2291 lease modification, including reasonable attorneys' and ac-
2292 countants' fees.

2293 **29.18 Construction.** This Lease has been negoti-
2294 ated extensively by Landlord and Tenant with and upon the
2295 advice of their respective legal counsel, all of whom have par-
2296 ticipated in the drafting hereof. Consequently, Landlord and
2297 Tenant agree that no party shall be deemed to be the drafter of
2298 this Lease and in the event this Lease is ever construed by a
2299 court of law, such court shall not construe this Lease or any
2300 provision of this Lease against any party as the drafter of the
2301 Lease.

2302 **29.19 Use of Name.** Tenant acknowledges and
2303 agrees that the names "*The Leland Stanford Junior Universi-*
2304 *ty*," "*Stanford*" and "*Stanford University*," and all variations
2305 thereof, are proprietary to Landlord. Tenant shall not use any
2306 such name or any variation thereof or identify Landlord in any
2307 promotional advertising or other promotional materials to be
2308 disseminated to the public or any portion thereof or use any
2309 trademark, service mark, trade name or symbol of Landlord or
2310 that is associated with it, without Landlord's prior written con-
2311 sent, which may be given or withheld in Landlord's sole dis-
2312 cretion.

2313 **29.20 Survival.** The obligations of this Lease
2314 shall survive the expiration of the Term to the extent necessary

2315 to implement any requirement for the performance of obliga-
 2316 tions or forbearance of an act by either party hereto which has
 2317 not been completed prior to the termination of this Lease.
 2318 Such survival shall be to the extent reasonably necessary to
 2319 fulfill the intent thereof, or if specified, to the extent of such
 2320 specification, as same is reasonably necessary to perform the
 2321 obligations and/or forbearance of an act set forth in such term,
 2322 covenant or condition. Notwithstanding the foregoing, in the
 2323 event a specific term, covenant or condition is expressly pro-
 2324 vided for in such a clear fashion as to indicate that such per-
 2325 formance of an obligation or forbearance of an act is no longer
 2326 required, then the specific shall govern over this general pro-
 2327 visions of this Lease.

2328 **29.21 Counterparts.** This Lease may be executed
 2329 in counterparts, each of which shall be an original, and all of
 2330 which together shall constitute one original of the Lease.

2331

2332 -32-

2333 _____

2334 IN WITNESS WHEREOF, Landlord and Tenant
 2335 have executed this Lease as of the date first above written.

2336

LANDLORD:

TENANT:

THE BOARD OF TRUS-
 TEES OF THE LELAND
 STANFORD JUNIOR UNI-
 VERSITY

TESLA MOTORS, INC., a
 Delaware corporation

By: /s/ Leonie F. Batkin

By: /s/ Elon Musk

 Its: Director, Property Ser-

 Its: CEO

vices

By: /s/ Darryl Siry

Its: VP, Sales Marketing

2337

2338

-33-

2339

2340

GLOSSARY

2341

DEFINITIONS

2342 As used In this Lease, the following terms shall have the

2343 following meanings, applicable, as appropriate, to both the

2344 singular and plural form of the terms defined below:

2345 “**Abated Rent**” is defined in Section 15.2(g).

2346 “**ADA**” is defined in Section 11.1.

2347 “**Additional Rent**” is defined in Section 5.3.

2348 “**Alterations**” is as defined in Section 9.3.

2349 “**Applicable Laws**” are defined in Section 11.1.

2350 “**Assignment**” is defined in Section 14.1.

2351 “**Base Rent**” means the amount stated in Article 1, to be

2352 adjusted and payable in accordance with Article 5.

2353 “**Business Days**” means Monday through Friday, ex-

2354 cluding Saturdays, Sundays and federal and state legal holi-

2355 days.

2356 “**Commencement Date**” means the date specified in Ar-

2357 ticle 1.

2358 “**Early Termination Date**” is defined in Section 4.4.

2359 “**Effective Date**” is defined in the introductory para-

2360 graph of this Lease.

2361 “**Environmental Activity**” is defined in Section 12.1(a).

2362 “**Environmental Investigation**” is defined in Sec-

2363 tion 12.7.

2364 “*Environmental Laws*” are defined in Section 12.1(b).
2365 “*Event of Default*” is defined in Section 15.1.
2366 “*Excess Rent*” is defined in Section 14.4.
2367 “*Expiration Date*” means the date specified in Article 1.
2368 “*Extension Option*” is defined in Section 4.3.
2369 “*Extension Period*” is defined in Section 4.3.
2370 “*Hazardous Material*” is defined In Section 12.1(c).
2371 “*Initial Base Rent*” is defined in Article 1.
2372
2373 -34-
2374
2375 “*Interest Rate*” is defined in Section 5.4.
2376 “*Landlord*” is defined in the introductory paragraph to
2377 this Lease.
2378 “*Landlord’s Agents*” is defined in Section 12.4.
2379 “*Offer*” is defined in Section 14.5.
2380 “*Offer Notice*” is defined in Section 4.5.
2381 “*Premises*” is defined in Section 2.1.
2382 “*Property Taxes*” is defined in Section 7.2.
2383 “*Rent*” means Base Rent, Additional Rent, and all other
2384 sums due from Tenant under this Lease.
2385 “*Right of First Offer*” is defined in Section 4.5.
2386 “*Scheduled Date for Delivery of the Premises*” is speci-
2387 fied in Article 1.
2388 “*Security Deposit*” is defined in Article 1.
2389 “*Sublease*” is defined in Section 14.1.
2390 “*Successor*” is defined in Section 16.5.
2391 “*Supplemental Investigation*” is defined in Sec-
2392 tion 12.7.
2393 “*Tenant*” Is defined in the introductory paragraph to this
2394 Lease.

2395 “*Tenant’s Agents*” is defined in Section 8.3.

2396 “*Tenant’s Hazardous Materials*” is defined in Sec-
2397 tion 12.1(d).

2398 “*Tenant’s Property*” is defined in Section 9.6.

2399 “*Term*” is defined in Article 1 and Section 4.1.

2400 “*Termination Date*” is defined in Section 4.1.

2401 “*Termination Fee*” is defined in Section 4.4.

2402 “*Termination Notice*” is defined in Section 4.2.

2403 “*Transfer*” is defined in Section 14.5.

2404 “*Transfer Costs*” is defined in Section 14.4.

2405 “*Transfer Notice*” is defined in Section 14.2.

2406 “*Transferee*” is defined in Section 14.2.

2407

2408 -35-

2409

2410 **Exhibit A**

2411 A tract of land situated in the State of California, County of
2412 San Mateo, City of Menlo Park and is described as follows:

2413 PARCEL I:

2414 Portion of that certain 14.80 acre tract of land as described in
2415 that certain Deed from Charles Crocker, et al, to Leland Stan-
2416 ford, dated October 19, 1885 and recorded in Book 39 of
2417 Deeds at page 354 Records of San Mateo County, California,
2418 more particularly described as follows:

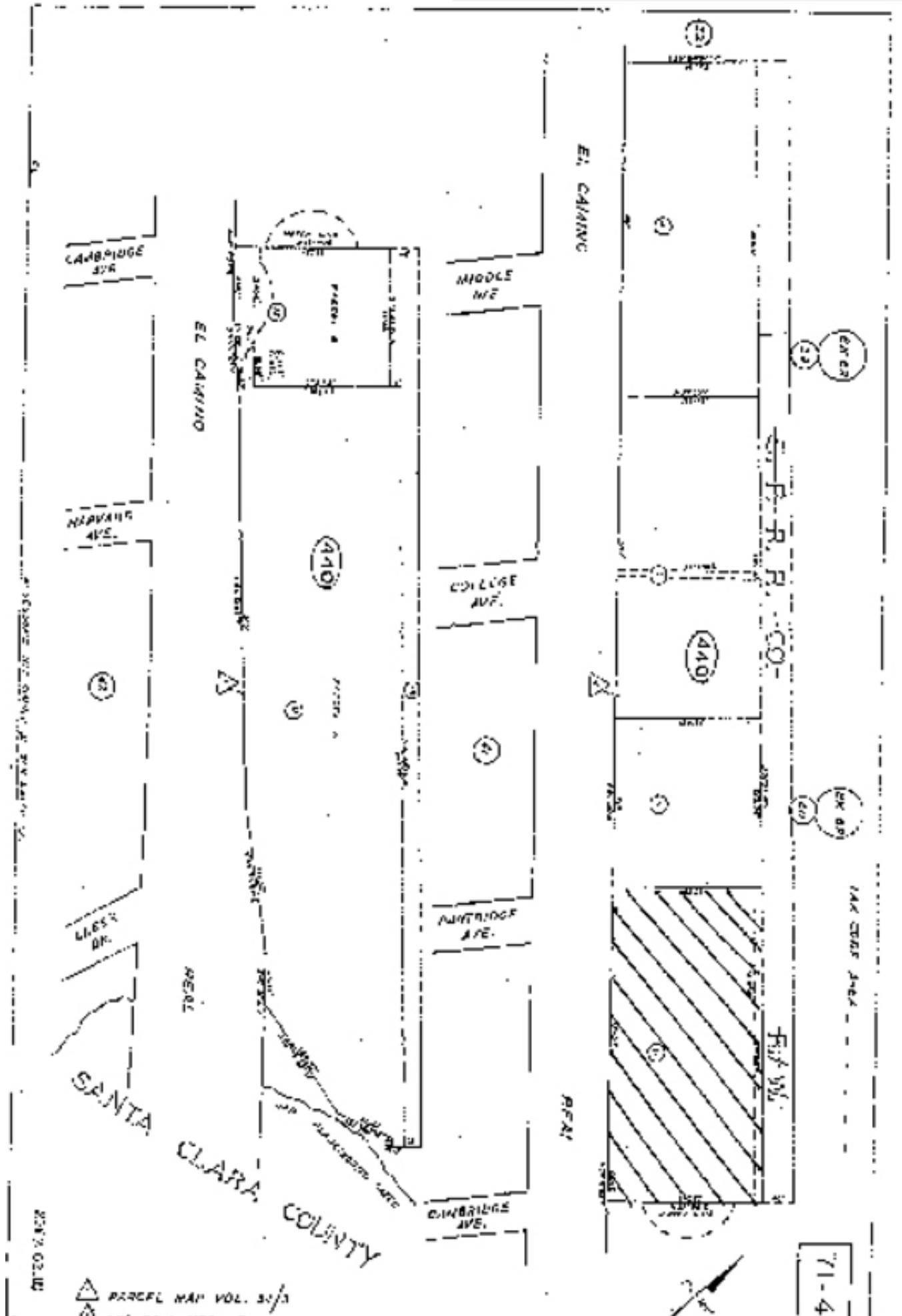
2419 BEGINNING at a point on the Northeasterly line of El
2420 Camino Real, which point is distant 50 feet measured at right
2421 angles, Northeasterly from the center line Station 593+50.00,
2422 said point of beginning being marked by an iron pipe monu-
2423 ment; thence from said point of beginning, along the said
2424 Northeasterly line of El Camino Real, North 50° 17’ 53” West
2425 87.63 feet to the true point of beginning at the lands to be de-

2426 scribed herein; thence from said true point of beginning, along
2427 the said Northeasterly line of El Camino Real, North 50° 17'
2428 53" West 62.43 feet and North 50° 25' West 337.57 feet;
2429 thence leaving said line of El Camino Real, North 39° 35' 00"
2430 East 188.83 feet to the Southwesterly boundary line of that
2431 certain 40 foot wide strip of land containing 2.33 acres, as de-
2432 scribed in that certain Deed from The Board of Trustees of
2433 The Leland Stanford Junior University to the Southern Pacific
2434 Railroad Company, dated March 26, 1902 and recorded in
2435 Book 92 of Deeds at page 374, Records of San Mateo County,
2436 California; thence South 51° 35' 10" East along said last men-
2437 tioned line, 400.08 feet; thence South 39° 35' 00" West
2438 197.12 feet to the point of beginning.

2439

2440

Exhibit B



2442

2443

2444

Exhibit C

2445

ACCEPTANCE FORM

2446

This Acceptance form is executed with reference

2447

to that certain Lease dated as of _____, 2007 by and between

2448

THE BOARD OF TRUSTEES OF THE LELAND STAN-

2449

FORD JUNIOR UNIVERSITY ("*Landlord*"), and TESLA

2450

MOTORS, a _____ ("*Tenant*"). Terms defined in the Lease

2451

and the exhibits thereto shall have the same meaning when

2452

used herein.

2453

Tenant hereby certifies to Landlord that Tenant

2454

has inspected the Premises as of _____ (the "*Date of Inspec-*

2455

tion"). Tenant further acknowledges that Tenant hereby ac-

2456

cepts the Premises in its existing "AS-IS", "WHERE-IS" con-

2457

dition, and "WITH ALL FAULTS".

2458

The person executing this Acceptance Form on

2459

behalf of Tenant represents and warrants to Landlord that such

2460

person is duly authorized to execute this Acceptance Form and

2461

that this Acceptance Form has been duly authorized, executed

2462

and delivered on behalf of Tenant.

2463

THIS ACCEPTANCE FORM is executed by

2464

Tenant as of the Date of Inspection.

2465

TENANT:

By:

Its:

By:

Its:

2466

2467

Exhibit D

2468 DETERMINATION OF PREVAILING MARKET RENT

2469 The term "*Prevailing Market Rent*" means the base
2470 monthly rent (net of all expenses) for space of comparable size
2471 and location to the Premises and in buildings similar in age
2472 and quality to the Building, taking into account any additional
2473 rent and all other payments or escalations then being charged
2474 and allowances and economic concessions being given in the
2475 for such comparable space over a comparable term. The Pre-
2476 vailing Market Rent shall be determined by Landlord and
2477 Landlord shall give Tenant written notice of such determina-
2478 tion not later than thirty (30) days after delivery by Tenant of
2479 Tenant's notice of exercise of the Option. If Tenant disputes
2480 Landlord's determination of the Prevailing Market Rent, Ten-
2481 ant shall so notify Landlord within ten (10) days following
2482 Landlord's notice to Tenant of Landlord's determination and,
2483 in such case, the Prevailing Market Rent shall be determined
2484 as follows:

2485 (a) Within thirty (30) days following Landlord's
2486 notice to Tenant of the Prevailing Market Rent, Landlord and
2487 Tenant shall meet no less than two (2) times, at a mutually
2488 agreeable time and place, to attempt to agree upon the Prevail-
2489 ing Market Rent.

2490 (b) If within this 30-day period Landlord and Ten-
2491 ant cannot reach agreement as to the Prevailing Market Rent,
2492 they shall each select one appraiser to determine the Prevailing
2493 Market Rent. Each such appraiser shall arrive at a determina-
2494 tion of the Prevailing Market Rent and submit his or her con-

2495 clusions to Landlord and Tenant within thirty (30) days after
2496 the expiration of the 30-day consultation period described in
2497 (a) above.

2498 (c) If only one appraisal is submitted within the
2499 requisite time period, it shall be deemed to be the Prevailing
2500 Market Rent. If both appraisals are submitted within such time
2501 period, and if the two appraisals so submitted differ by less
2502 than ten (10) percent of the higher of the two, the average of
2503 the two shall be the Prevailing Market Rent. If the two ap-
2504 praisals differ by more than ten (10) percent of the higher of
2505 the two, then the two appraisers shall immediately select a
2506 third appraiser who will within thirty (30) days of his or her
2507 selection make a determination of the Prevailing Market Rent
2508 and submit such determination to Landlord and Tenant. This
2509 third appraisal will then be averaged with the closer of the two
2510 previous appraisals and the result shall be the Prevailing Mar-
2511 ket Rent.

2512 (e) All appraisers specified pursuant hereto shall
2513 be members of the American Institute of Real Estate Apprais-
2514 ers with not less than five (5) years experience appraising of-
2515 fice, research and development and industrial properties in
2516 California. Each party shall pay the cost of the appraiser se-
2517 lected by such party and one-half of the cost of the third ap-
2518 praiser plus one-half of any other costs incurred in the deter-
2519 mination.
2520

1 [EX-10.7 14 d287954dex107.htm](#)

2 Facebook / Sheryl K. Sandberg

3 Amended & Restated Employment Agreement

4 EXHIBIT 10.7

5 EXECUTION COPY

6 January 27, 2012

7
8 Sheryl Sandberg
9 Facebook, Inc.
10 1601 Willow Road
11 Menlo Park, CA 94025
12

Re: EMPLOYMENT AGREEMENT

13 Dear Sheryl:

14 This letter agreement amends and restates that certain
15 offer letter entered into between you and Facebook, Inc. (the
16 “Company”) on February 20, 2008.

17 You began your employment with the Company on
18 March 24, 2008 (your “Start Date”).

19 Your continued employment by the Company shall be
20 governed by the following terms and conditions (this “Agree-
21 ment”).

23 1. Duties and Scope of Employment.

24 (a) Position. For the term of your employment
25 (your “Employment”), the Company agrees to employ you in
26 the position of Chief Operating Officer (“COO”).

27 You will report to Mark Zuckerberg
28 and you will be working out of the Company’s of-
29 fice in Menlo Park.

30 You will be responsible for managing sales, busi-
31 ness development, marketing, communications and policy,
32 human resources, and user operations.

Commented [DT1]: The original, unannotated agreement is available at the SEC’s Web site at <http://www.sec.gov/Archives/edgar/data/1326801/000119312512046715/d287954dex107.htm>

Commented [DT2]: Date of agreement: The Facebook IPO was in May 2012; Sandberg’s employment agreement was probably amended in anticipation of that event.

Commented [DT3]: Amended and restated: Amending and restating an agreement is a conventional (and convenient) way of making a lot of changes — without indicating what the original provisions were. (The latter could be a consideration if the company knew it would have to file the amended version with the SEC but could keep the original provisions confidential.)

Commented [DT4]: Offer letter: Some companies do their employment agreements in the form of an offer letter, which the prospective employee accepts by countersigning it.

Commented [DT5]: You and Facebook: Some drafters like to use the third person instead of the second person, e.g., *the Executive or Sandberg*, instead of *you*. (Po-TAY-toh, po-TAH-toh)

Commented [DT6]: Start Date: This is a convenient way of documenting Sandberg’s start date, which could come into play in various ways such as vesting for stock incentive awards. ¶ NOTE: If Sandberg signs the agreement (which presumably she did), arguably she gives up the right to claim that she actually started on a different date.

Commented [DT7]: Reporting: Nailing down the fact that Sandberg reports directly to Facebook’s founder and CEO can be important in establishing Sandberg’s authority inside the company. (It’s also a potential boost for her professional reputation.)

Commented [DT8]: Office location: Senior executives sometimes want to move to more congenial locations (CEOs have been known to move corporate headquarters to other cities). This clause can carve it in stone that Sandberg will work in Menlo Park, or within 50 miles of it (see [Involuntary Termination](#), below) unless the company agrees otherwise. (In some contracts, relocation expenses for the executive might have to be addressed.)

Commented [DT9]: Responsibilities: This recital of Sandberg’s responsibilities is a double-edged sword: It helps establish the scope of her authority, but it also establishes what she’ll be held accountable for.

33 You understand and agree that the Company is a
 34 rapidly growing and changing organization and the precise na-
 35 ture of the work you do for the Company as COO may be ad-
 36 justed from time to time

Commented [DT10]: Adjusted duties: As time goes on, internal corporate politics can often lead to an executive's duties and authority being increased – or decreased.

37 but, in any event, your duties and responsibilities
 38 always will be at least commensurate with those duties and re-
 39 sponsibilities normally associated with and appropriate for
 40 someone in the position of COO.

Commented [DT11]: At least as commensurate: This is typical for an executive's employment agreement – Sandberg doesn't want the duties of his or her office to be stripped away and given to someone else, and to be assigned to sweep the floors, without being able to "resign for good reason" (in this contract it's called Involuntary Termination) and collect a severance package.

41 (b) **Obligations to the Company.** While you ren-
 42 der services to the Company,

Commented [DT12]: While you render services: This language might be phrased this way so that it can be plugged into a consulting contract as well as an employment agreement.

43 (1) you may deliver lectures, fulfill speaking en-
 44 gagements and teach at educational institutions provided that
 45 such activities do not materially interfere with the perfor-
 46 mance of your duties to the Company, and

Commented [DT13]: Lectures, etc.: It's usually considered a good thing for a company to have its senior executives doing these things (and senior execs usually like the beneficial effect on their own careers).

Commented [DT14]: Materially interfere: The materiality qualifier is vague but it's the standard way of phrasing this concept.

47 (2) you agree that you will not engage in any other
 48 employment, consulting, or other business activity except as
 49 authorized by the Conflicts Committee or other written con-
 50 sent of the Company.

Commented [DT15]: No other employment, etc.: This is a no-moonlighting clause. **QUESTION:** Would this clause prohibit Sandberg from writing *Lean In*, the best-selling book she just published, without permission?

Commented [DCT16]: "Or other written consent of the Company": In theory, Sandberg could get one of her fellow Facebook officers to sign off on her outside employment. As a practical matter, though, she's likely to go either to the CEO (Mark Zuckerberg) or perhaps to the company's general counsel.

51 The Company has reviewed the activities that you
 52 are conducting at the time of this Agreement and agrees that
 53 they, and any substitute activities that are similar in nature and
 54 scope, will not significantly interfere with your performance
 55 of the responsibilities of your Employment under this Agree-
 56 ment.

Commented [DT17]: Similar in nature: There might be a proof problem down the road – what exactly were Sandberg's existing activities that Facebook reviewed at the time the Agreement was signed? For that reason, in some cases a drafter might want to include an exhibit containing a brief summary of those existing activities.

57 In addition, while you render services to the Com-
 58 pany, you will not assist any person or entity in competing
 59 with the Company, in preparing to compete with the Company
 60 or in hiring any employees or consultants of the Company.

Commented [DT18]: In-term non-competition clause: Under longstanding California law, *post-employment* non-competition clauses are essentially per se illegal.

61 As an employee, you will also be expected to
 62 comply with the Company's policies and procedures.

Commented [DT19]: Hiring employees, etc.: Under California law, Facebook can't prevent its employees from moving to a competitor except in extremely limited circumstances. Here, Facebook seems to be trying to prevent Sandberg from taking any of her colleagues with her, which could make her less appealing to a Facebook competitor wanting to hire her. Whether this type of provision is enforceable under California law is unclear; see generally [this article](#) by lawyers from Silicon Valley law firm Wilson Sonsini (August 2012).

63 (c) **No Conflicting Obligations.** You represent
 64 and warrant to the Company that you are under no obligations
 65 or commitments, whether contractual or otherwise, that are
 66 materially inconsistent with your obligations under this
 67 Agreement.

Commented [DT20]: No conflicting obligations: Facebook doesn't want to be sued by one of Sandberg's former employers, claiming that she stole trade secrets and brought them with her to Facebook. (Facebook also presumably hopes that this provision will give them some political cover in case they ever do get so sued by a former employer.) As a practical matter, though, if a former employer were going to sue Sandberg and/or Facebook, in all likelihood it would have happened by now, given how long Sandberg has been at Facebook.

68 In connection with your Employment, you shall
 69 not use or disclose any trade secrets or other proprietary in-
 70 formation or intellectual property in which you or any other
 71 person has any right, title or interest

Commented [DT21]: No use of others' trade secrets, etc.: What might Facebook's practical remedies be if Sandberg were to breach this obligation? (Hint: Consider whether such a breach might constitute "Cause.")

72 and your Employment will not infringe or violate
 73 the rights of any other person.

Commented [DT22]: Your Employment will not infringe: Who has what obligation? How could this phrase be improved? (Consider what the drafter might be trying to say in the context of this entire section.)

74 You represent and warrant to the Company that
 75 you have returned all property and confidential information
 76 belonging to any prior employer, other than confidential in-
 77 formation that has become generally known to the public or
 78 within the relevant trade industry.

Commented [DT23]: All property of prior employers returned: This representation pins down Sandberg – if later it turns out that she brought confidential documents with her from a former employer, then Facebook will have reason to terminate her for Cause – see [Section 6\(d\)\(iii\)](#) on page 7 below.

80 2. **Cash and Incentive Compensation.**

81 (a) **Salary.** The Company shall pay you as com-
 82 pensation for your services a base salary at a gross annual rate
 83 of \$300,000. Such salary shall be payable in accordance with
 84 the Company's standard payroll procedures.

Commented [DT24]: Annual salary: The drafter wants to be clear that Sandberg's salary is \$300K *per year*, not per month. The latter isn't unheard of in some industries, although it'd certainly be unusual in the tech industry.

85 (b) **Bonus.** You are eligible to receive a semi-
 86 annual discretionary bonus of up to a target of 45 % of your
 87 Base Eligible Earnings as defined in the Company's bonus
 88 plan. Based on your performance, you can over-achieve your
 89 bonus target pursuant to the Company's bonus plan.

Commented [DT25]: Payroll procedures: Facebook doesn't want to have to separately manage special payroll procedures for particular employees.

90 (c) **Restricted Stock Units.** The Company has
 91 granted you certain restricted stock units ("RSUs") under its
 92 2005 Stock Plan (the "Plan"), pursuant to that Notice of RSU

Commented [DT26]: Bonus plans are typically set by the compensation committee of a company's board of directors. (For public companies this may be a requirement.) Bonuses are often a big deal for senior executives because they can represent a major portion of the executives' compensation. (Try Google-searching "executive bonus plan.")

Commented [DT27]: Stock incentive plans, under which employees can be awarded stock options, restricted stock, restricted-stock units, etc., can be complicated, or straightforward, or somewhere in between. ¶ Interestingly, Sandberg seems to have been granted only RSUs, not stock options (which are available under the [Facebook 2005 Stock Plan](#)).

93 Award (Grant Number RS000300) dated August 1, 2008 (your
94 “RSU Award”).

95

96 3. **Vacation/PTO, Employee Benefits and other In-**

97 **centive Compensation.** During your Employment you shall

98 be eligible to accrue paid vacation / paid time off in accord-

99 ance with the Company’s vacation / paid time off policy, as it

100 may be amended from time to time, and at the rate equal to

101 other similarly situated executives.

102 During your Employment, you shall be eligible to par-

103 ticipate in the employee benefit and incentive compensation

104 plans maintained by the Company and generally available to

105 similarly situated employees of the Company,

106 subject in each case to the generally applicable terms

107 and conditions of the plan in question and to the determina-

108 tions of any person or committee administering such plan.

109

110 4. **Business Expenses.** The Company will reimburse

111 you for your necessary and reasonable business expenses in-

112 curred in connection with your duties hereunder

113 upon presentation of an itemized account and appropri-

114 ate supporting documentation,

115 all in accordance with the Company’s generally applica-

116 ble policies.

117

118 5. **Termination.**

119 (a) **Employment at Will.** Your Employment shall

120 be “at will,” meaning that either you or the Company shall be

121 entitled to terminate your Employment at any time and for any

122 reason, with or without Cause (as defined below).

Commented [DT28]: PTO stands for paid time off (also for the U.S. Patent and Trademark Office).

Commented [DT29]: **Vacation policy:** Just as with payroll procedures, Facebook won’t want to separately manage a special vacation policy just for Sandberg.

Commented [DT30]: “**Similarly situated executives**” is arguably ambiguous but it’s a widely-used drafting approach.

Commented [DT31]: **Benefit plans** typically refers to things such as health insurance.

Commented [DT32]: **Subject in each case:** Facebook presumably wants it to be clear that this agreement doesn’t create any special rights for Sandberg under Facebook’s benefit plans, for example any sort of right to “Cadillac” health-insurance coverage. As another example, suppose that Facebook had a health-insurance plan that required employees to pay part of the monthly premium. Facebook wouldn’t want Sandberg to try to claim that her employment agreement implicitly required the company to pay all of the premium for her coverage, so that she paid nothing for her health insurance.

Commented [DT33]: **Business expense reimbursement:** This is a very compactly-worded provision; it bears study.

Commented [DT34]: **Generally applicable policies:** Note that this clause does not use the phrase “as amended from time to time,” unlike the Vacation policy paragraph immediately above, which does use that phrase. An aggressive trial counsel might try to argue that this means the only Business Expenses policies that count are those that were in effect when the agreement was signed, under the doctrine of *expressio unius est exclusio alterius* (“the mention of one thing excludes others”). I don’t think the argument should work, but that might not prevent the parties from having to litigate it.

Commented [DT35]: **At-will employment** is the norm in most U.S. jurisdictions (subject to various public-policy and statutory exceptions), but not so in many non-U.S. jurisdictions.

123 Any contrary representations that may have been
124 made to you shall be superseded by this Agreement.

Commented [DT36]: Contrary representation disclaimer: Former employees sometimes claim that they were *orally* promised continued employment by an interviewer, by HR, etc. In some jurisdictions, such a claim, if supported by the employee's sworn testimony, might create a genuine issue of material fact, precluding summary judgment and requiring a burdensome and expensive trial. This clause is an attempt to nip any such claim in the bud, to help Facebook get a such claim by Sandberg thrown out on summary judgment.

125 This Agreement shall constitute the full and complete agreement between you and the Company on the "at-will" nature of your Employment, which may only be changed in an express written agreement signed by you and a duly authorized officer of the Company.

Commented [DT37]: Entire agreement: This is a separate and very-specific "entire agreement" clause, distinct from the one found in most general-provisions sections. **Which may only be changed . . .** : Courts sometimes don't enforce provisions like this.

126
127
128
129
130 (b) **Rights Upon Termination.** Except as expressly provided in Sections 6 and 9(b), (c) and (d), upon the termination of your Employment, you shall only be entitled to the compensation and benefits earned and the reimbursements described in this Agreement for the period preceding the effective date of the termination.

Commented [DT38]: Only entitled to compensation and benefits earned: This is a sound-bite clause, designed to put Facebook in a better position to move for a quick summary judgment without the need for a trial (or even judgment on the pleadings) if Sandberg were to sue for additional compensation.

136
137 6. **Termination Benefits.**

Commented [DT39]: Termination benefits: Interestingly, there's no provision for Sandberg to get a cash severance payment.

138 (a) **General Release.** Any other provision of this Agreement notwithstanding, subsections (b) and (c) below shall not apply unless and until

Commented [DT40]: General release: It's a widespread practice for companies to require a departing employee to sign a release of any claims the employee might have against the company before getting any severance benefits. (Note that it would probably be illegal for a company to require the employee to sign a release before paying wages and benefits that the employee had already earned.)

141 (i) you have executed a full and complete general release of all claims substantially in the form attached hereto as Exhibit A within twenty-one (21) days of your termination

Commented [DT41]: Substantially in the form attached hereto: Any time a party to a contract might later have to sign a type of document (such as a release), it's always helpful to include the exact language of the document as an exhibit to the contract. ¶ Another possibility is to say in the contract that the document must be reasonably acceptable to each party's counsel. That, though, could invite future disputes — especially if at the time in question the parties are no longer on friendly terms.

144 (and you do not revoke such general release in accordance with its terms) and

Commented [DT42]: Revocation of general release: Under federal law, a release of certain claims (for example, claims of age discrimination or racial discrimination) must be able to be revoked for a certain period of time, so that the employee can mull over whether she really wants to give up her right to assert the claim.

146 (ii) you have returned all Company property (other than property of inconsequential value, but the parties agree that among other things, any property capable of containing the Company's confidential trade secret or proprietary information is material and must be returned) within twenty-one (21) days of your termination.

Commented [DT43]: Returned all Company property: If Facebook found out that Sandberg hadn't returned (say) company papers, electronic files, etc., that could give Facebook a putative reason for withholding severance, or for trying to claw back severance compensation already paid.

152 (b) **Vesting Acceleration.** If the Company termi-
 153 nates your Employment for any reason other than Cause, death
 154 or Disability, then you shall be eligible to vest in the number
 155 of RSUs you would have vested in had your Continuous Ser-
 156 vice Status (as defined in the Plan) continued for the first half
 157 of the months remaining between the date of your termination
 158 and the fifth (5th) anniversary of your Start Date.

159 If the Company terminates your Employment as a
 160 result of your death or Disability, you will be eligible to vest
 161 in the number of additional shares you would have vested in
 162 had your Continuous Service Status continued for an addition-
 163 al twelve (12) months from your death or Disability.

164 *[Language omitted.]*

165 Any RSUs that vest pursuant to this Section 6(b)
 166 shall be settled within (30) days following the date of vesting
 167 but in no event later than March 15 of the calendar year fol-
 168 lowing the calendar year in which the later of the Initial Vest-
 169 ing Event or your termination of Employment occurs.

170 Any vesting acceleration related to termination of
 171 your Employment in connection with a Change of Control will
 172 be governed by Section 6(c) of this Agreement and will not re-
 173 sult in the vesting acceleration provided for in this subsection.

174 (c) **Change of Control Vesting Acceleration.** If
 175 you are Involuntarily Terminated by the Company, other than
 176 as a result of your death or Disability and within one
 177 (1) month prior to or within six (6) months following a
 178 Change of Control (as defined in the Plan), then you shall be
 179 eligible to receive accelerated vesting of the RSUs so that you
 180 will become vested in 100% of the RSUs.

Commented [DT44]: Vesting acceleration: Stock options and grants of restricted stock typically [vest over time](#); executive employment agreements often provide (as does this one) for at least some acceleration of vesting in various circumstances such as death, disability, or a corporate takeover.

Commented [DT45]: No later than March 15: This likely is a [Section 409A](#) provision designed to reduce the chance of having a severe tax penalty imposed on “deferred compensation.”

Commented [DT46]: “Change of Control”: This term typically relates to a corporate merger, acquisition, leveraged buy-out, etc. The term usually is defined in great detail somewhere; in Facebook’s case the definition is in section 2(g) of the [2005 Stock Plan](#).

Commented [DT47]: Double trigger: This is an example of a “double trigger” acceleration of vesting – for vesting to accelerate, both a Change of Control event and an Involuntary Termination must occur.

Commented [DT48]: Within one month prior, etc.: This gives Sandberg at least some protection if Facebook ever decided to do a corporate “housecleaning” prior to a Change of Control.

181 Any RSUs that vest pursuant to this Section 6(c)
 182 shall vest upon the later of the date the release of claims speci-
 183 fied in subsection (a) becomes effective and the Initial Vesting
 184 Event.

Commented [DT49]: Vest upon the later of the date: Sandberg would not be entitled to accelerated vesting unless and until (A) she signed the release and (B) she'd been at Facebook long enough for her stock options or RSUs have their initial vesting (often a one-year "cliff" vesting, as is the case with [the 2005 Facebook stock plan](#) mentioned in this agreement. Sandberg started at Facebook in 2008, so she presumably already satisfied requirement B.

185 Any RSUs that are eligible to vest pursuant to this
 186 Section 6(c) shall be settled within thirty (30) days following
 187 the date of vesting but in no event later than March 15 of the
 188 calendar year following the calendar year in which the later of
 189 the Initial Vesting Event and your Involuntary Termination
 190 occurs.

Commented [DT50]: No later than March 15: This likely is a [Section 409A](#) provision designed to reduce the chance of having a severe tax penalty imposed on "deferred compensation."

191 Notwithstanding any provision of this Agreement
 192 to the contrary,

193 if you sign and do not revoke the release
 194 mentioned herein

195 and thereafter file a lawsuit claiming you are
 196 entitled to additional RSUs or additional shares of the Compa-
 197 ny's common stock,

198 the Company, at its option, may unilaterally
 199 cancel any shares of the Company's common stock that you
 200 obtained in connection with the vesting acceleration provided
 201 for in this Section 6(c).

Commented [DT51]: Cancellation of shares: This creates a disincentive for Sandberg to sue claiming that she's entitled to more shares or RSUs. It's sort of like a provision in a will saying that anyone who challenges the will in court is automatically disinherited.

202 Notwithstanding the foregoing, if in connection with a
 203 Change of Control, the RSUs are not assumed or substituted
 204 for an equivalent award (within the meaning of Section 15(c)
 205 of the Plan), then you shall be eligible to receive accelerated
 206 vesting of the RSUs effective immediately prior to the Change
 207 of Control in accordance with the preceding paragraph.

Commented [DT52]: Assumed or substituted: A merger or acquisition transaction will sometimes include arrangements for employees of the target company to swap out their existing stock options (and/or restricted stock) for equivalent options in the acquiring company.

208 Any such RSUs shall be settled within thirty (30) days
 209 following the date of the Change of Control but in no event
 210 later than March 15 of the calendar year following the calen-
 211 dar year in which the Change of Control occurs.

Commented [DT53]: Not later than March 15: This is probably another clause designed to avoid problems with [Section 409A](#).

212 (d) **Definition of “Cause”**. For all purposes under
 213 this Agreement, “Cause” shall mean a determination by the
 214 CEO that any of the following have occurred:

215 (i) you committed an act of material dishon-
 216 esty in connection with your responsibilities as an employee;

217 (ii) you failed to comply with the material
 218 terms of any written Company policy or rule as they may be in
 219 effect from time to time during your employment and such
 220 failure is materially and demonstrably injurious to the Compa-
 221 ny;

222 (iii) you breached any material term of this
 223 Agreement, of the Confidential Information and Invention As-
 224 signment Agreement between you and the Company, or any of
 225 other written agreement between you and the Company and
 226 such breach is materially and demonstrably injurious to the
 227 Company;

228 (iv) you were convicted of, or entered a plea
 229 of guilty or *nolo contendere* to, a felony or crime of moral tur-
 230 pitude; or

231 (v) you engaged in gross misconduct or
 232 gross neglect of your duties and such misconduct or neglect is
 233 materially and demonstrably injurious to the Company.

234 The cessation of your Employment shall not be deemed
 235 to be for Cause unless and until you are sent a written notice
 236 of the ground for the termination for “Cause” by the CEO
 237 finding that, in the good faith opinion of the CEO, you are
 238 guilty of the conduct described above, and specifying the par-
 239 ticulars thereof in detail.

240 If the CEO does not deliver to you a notice of termina-
 241 tion within ninety (90) days after the later of the date the CEO
 242 has knowledge that an event constituting Cause has occurred

Commented [DT54]: Definition of “Cause”: The term “Cause” could have significant economic implications for Sandberg in case of an unfriendly termination. The term is usually defined in some detail in executive employment agreements, and sometimes is carefully negotiated by the company and the executive.

Commented [DT55]: Determination by CEO: There’s no provision here for Sandberg to appeal, for example to Facebook’s board of directors. ¶ As a practical matter, though, Facebook’s CEO isn’t likely to fire a senior executive like Sandberg for Cause without first lining up the support of the board. Not least, this is because the termination would have to be promptly disclosed in a [Form 8-K](#) filed with the SEC (because Facebook’s stock is publicly traded), and that could affect the company’s stock price.

Commented [DT56]: “Material dishonesty”: Note that the dishonesty must be in connection with Sandberg’s responsibilities as an employee,” and also that there’s a materiality qualifier. ¶ In a senior executive, even minor examples of workplace dishonesty could arguably be characterized as material in that they had the potential to do bad things to the [ethical] [“tone at the top.”](#)

Commented [DT57]: “Materially and demonstrably injurious”: This requirement is seen in several of the subparagraphs of this definition. It puts fences around Facebook’s ability to fire Sandberg for Cause.

Commented [DT58]: Felony: This excludes misdemeanors, but a given misdemeanor might come under the alternate category of “crime of moral turpitude.”

Commented [DT59]: Gross misconduct: Facebook could use this as a kind of morals clause, terminating Sandberg for Cause if her actions resulted in bad PR for Facebook. Note that there’s no specific requirement that the gross misconduct relate to Sandberg’s duties.

Commented [DT60]: Good faith opinion: This phrase could give Sandberg’s counsel an opening to explore possible *bad*-faith reasons for the CEO to terminate her. That might lead to expensive depositions, document production, etc.; it also could complicate the process for Facebook to try to get a claim by Sandberg dismissed on summary judgment.

243 and, where applicable, the date the CEO has knowledge of the
 244 materiality of the injury to the Company, the event will no
 245 longer constitute Cause.

246 You will have fifteen (15) days to cure from the date the
 247 notice is received by you.

248 (e) **Definition of “Involuntary Termina-**
 249 **tion”**. For purposes of this Agreement, “**Involuntary Termina-**
 250 **tion**” shall mean the termination of your Employment with the
 251 Company by reason of:

252 (i) Your involuntary dismissal or discharge by
 253 the Company, or by any acquiring or successor entity (or par-
 254 ent or any subsidiary thereof employing you) for reasons other
 255 than Cause, or

256 (ii) Your **voluntary resignation** after the occur-
 257 rence of one of the following conditions without your prior
 258 written consent:

259 (A) a **material** diminution in your base
 260 salary;

261 (B) a material change in geographic loca-
 262 tion at which you must perform services

263 (a change in location of your office will
 264 be considered material only if it increases your current one-
 265 way commute by more than fifty (50) miles);

266 (C) any **material failure** of the successors
 267 to the Company after a Change of Control to perform or cause
 268 the Company to perform the obligations of the Company un-
 269 der this Agreement;

270 (D) any action or inaction of the Company
 271 that constitutes a material breach of the terms of this Agree-
 272 ment; or

Commented [DT61]: Involuntary Termination: This definition comes into play in the severance provisions below.

Commented [DT62]: Voluntary resignation: This provision entitles Sandberg to “pull the plug” herself in certain events, yet still get the agreed severance benefits as though she had been terminated without Cause.

Commented [DT63]: Material: The materiality qualifiers in this and succeeding subdivisions can easily give rise to arguments, and possibly litigation, over whether Sandberg is entitled to the agreed severance benefits if she resigns.

Commented [DT64]: Material failure of successor: One such failure might be for a successor company to fail to give Sandberg a written assumption of Facebook’s obligations, as required by [Section 8\(a\)](#) below. That could allow Sandberg to resign voluntarily yet still be entitled to severance benefits.

273 (E) any other material adverse change in
274 your duties, authorities or responsibilities as specified in Sec-
275 tion l(a), above,

276 in each case, **only if you**
277 provide notice to the Company of the ex-
278 istence of the applicable condition described in Section 6(e)(ii)
279 within 90 days of the initial existence of the condition,
280 the Company fails to remedy the condi-
281 tion within 30 days thereafter, and
282 within the 30 day period immediately fol-
283 lowing such failure to remedy, you elect to terminate your
284 Employment.

285 The parties intend that this trigger qualify as
286 an involuntary separation from service trigger under Treasury
287 Regulation Section 1.409A-1(n)(2).

288 (f) **Definition of “Disability”**. For all purposes
289 under this Agreement, “Disability” shall mean your inability
290 to perform the essential functions of your position with or
291 without reasonable accommodation for a period of 120 con-
292 secutive days because of your **physical or mental impairment**.

294 **7. Confidentiality Agreement.** You hereby reaffirm
295 your obligations under the Confidential Information and In-
296 vention Assignment Agreement between you and the Compa-
297 ny, dated February 20, 2008, a copy of which is attached here-
298 to as Exhibit B (the “Confidentiality Agreement”).

300 **8. Successors.**

301 (a) **Company’s Successors.** This Agreement shall
302 be binding upon any successor (whether direct or indirect and
303 whether by purchase, lease, merger, consolidation, liquidation

Commented [DT65]: Notice and cure provision: Facebook doesn’t want Sandberg to be able to resign voluntarily and collect severance benefits without first giving Facebook a chance to fix whatever the problem was that led to Sandberg’s claim that she was entitled to do so.

Commented [DT66]: Section 409A is an IRS regulation that imposes severe tax penalties on certain forms of deferred compensation regarded by the government as tax dodges.

Commented [DT67]: Definition of Disability: This is another provision that is sometimes carefully negotiated.

Commented [DT68]: Physical or mental impairment: It’s not unthinkable that an executive might claim that (let’s say) alcoholism or cocaine use was a “mental impairment” that qualified as a Disability.

304 or otherwise) to all or substantially all of the Company's busi-
 305 ness and/or assets.

Commented [DT69]: All or substantially all of the Company's business assets: In some cases Sandberg or Facebook or both might want this to apply to a sale, etc., of all or substantially all of Facebook's assets *associated with a particular line of business*, e.g., a particular corporate division.

306 Any such successor will within a reasonable peri-
 307 od of becoming the successor assume in writing and be bound
 308 by all of the Company's obligations under this Agreement.

Commented [DT70]: Assume in writing: A successor company's failure to provide Sandberg with a written assumption of Facebook's obligations could lead to her being able to resign for good reason and collect severance benefits, [as discussed above](#).

309 For all purposes under this Agreement, the term
 310 "Company" shall include any successor to the Company's
 311 business or assets that becomes bound by this Agreement.

312 (b) **Your Successors.** This Agreement and all of
 313 your rights hereunder shall inure to the benefit of, and be en-
 314 forceable by, your personal or legal representatives, executors,
 315 administrators, successors, heirs, distributees, devisees and
 316 legatees.

317 9. **Miscellaneous Provisions.**

318 (a) **Indemnification.** The Company agrees that
 319 if you are made a party or threatened to be made a
 320 party to any action, suit or proceeding, whether civil, criminal,
 321 administrative or investigative (other than an action brought
 322 against you by the Company)

Commented [DT71]: Indemnification: Senior executives often insist on getting the broadest possible indemnification from their companies. Securities plaintiffs' lawyers typically sue everyone in sight when they bring a claim against a company; executives don't relish the prospect of having their personal net worth take a serious hit (from the legal fees alone).

323 by reason of the fact that you are or were
 324 an employee of the Company

325 or are or were serving at the request of
 326 the Company, as a director, officer, member, employee or
 327 agent of another corporation or a partnership, joint venture,
 328 trust or other enterprise,

Commented [DT72]: Another corporation, etc.: A company might ask one of its executives to serve as an officer or board member of an affiliate company or of a joint venture in which the company is participating.

329 you shall be indemnified by the Company
 330 to the fullest extent permitted by applicable law
 331 and the Company's certificate of incorporation and by-laws, as
 332 the same exists or may hereafter be amended,

Commented [DT73]: To the fullest extent: This is fairly typical language for a corporate indemnification provision.

333 against all reasonably and actually incurred legal
 334 expenses and related costs incurred or suffered by you in con-
 335 nection therewith

336 provided that you cooperate with the Company in
 337 connection with such actual or threatened action, suit, pro-
 338 ceeding or investigation,

339 and such indemnification shall continue even if
 340 you have ceased to be an officer or are no longer employed by
 341 the Company

342 and shall inure to the benefit of your heirs, execu-
 343 tors and administrators.

344 The Company shall provide you with

345 directors' and officers' liability insurance

346 at least as favorable as the insurance coverage provided to

347 other senior executive officers and directors of the Company
 348 respecting liabilities, and

349 reasonable legal fees and costs, charges
 350 and expenses incurred or sustained by you (or your legal rep-
 351 resentative or other successors) in connection with any such
 352 proceeding.

353 Unless otherwise provided in an indemnification
 354 agreement with the Company, no indemnity shall be paid by
 355 the Company

356 (i) if it shall be determined by a final judgment
 357 or other final adjudication that such remuneration was in vio-
 358 lation of law;

359 (ii) if it is finally determined that, in connection
 360 with the above action, suit or proceeding, that your conduct
 361 was finally adjudged to have been knowingly fraudulent, de-
 362 liberately dishonest or willful; or

Commented [DT74]: Indemnification shall continue: If an officer is terminated or resigns, for example after losing a corporate power struggle, the officer won't want to be thrown under the bus in a lawsuit and risk being financially ruined.

Commented [DT75]: D&O insurance is often a *sine qua non* for corporate officers, that is, they won't serve without it.

Commented [DT76]: At least as favorable: This tells Sandberg that she will get the same level of D&O insurance as Facebook's board of directors does — and it's *extremely* unlikely that the board members will allow the company to skimp on *their* insurance coverage.

Commented [DT77]: No indemnity in certain circumstances: This might be required by corporate law and/or by a company's articles of incorporation.

363 (iii) if a final decision by a Court having juris-
 364 diction in the matter shall determine that such indemnification
 365 is not lawful.

366 Unless otherwise provided in an indemnification
 367 agreement with the Company, you agree to reimburse the
 368 Company for all reasonable expenses paid by the Company in
 369 defending any civil or criminal action suit or proceeding
 370 against you

371 in the event and only to the extent that it
 372 shall be ultimately determined that you are not entitled to be
 373 indemnified by the Company for such expenses under the pro-
 374 visions of applicable law, the Company's bylaws, this Agree-
 375 ment or otherwise.

376 (b) **Legal Fees.** Following a Change of Control
 377 only, the Company shall pay the legal fees incurred by you to
 378 enforce the terms of this Agreement
 379 or to dispute the legality of your termination.

380 (c) **Parachute Payments.** If any payment or bene-
 381 fit you would receive pursuant to a Change of Control from
 382 the Company or otherwise ("Payment") would

383 (i) constitute a "parachute payment" within
 384 the meaning of Section 280G of the Internal Revenue Code of
 385 1986, as amended (the "Code"), and

386 (ii) but for this sentence, be subject to the
 387 excise tax imposed by Section 4999 of the Code (the "Excise
 388 Tax"),

389 then such Payment shall be reduced to the Re-
 390 duced Amount. [*Definition of "Reduced Amount" omitted.*]

Commented [DT78]: Agree to reimburse the Company: This agree-
 ment allows a company to front the money for an executive's litigation de-
 fense, even if it were to turn out later that the executive wasn't entitled to
 it.

Commented [DT79]: Parachute payments: The U.S. tax code imposes
 what amount to penalties on certain executive "golden parachutes."

391 Reduction in either cash payments or equity com-
 392 pensation benefits shall be made pro rata between and among
 393 benefits which are subject to Section 409A
 394 of the Code
 395 and benefits which are exempt from Sec-
 396 tion 409A of the Code.

397 The accounting firm engaged by the Company for
 398 general audit purposes as of the day prior to the effective date
 399 of the Change of Control shall perform the foregoing calcula-
 400 tions.

401 The Company shall bear all expenses with respect
 402 to the determinations by such accounting firm required to be
 403 made hereunder.

404 Any good faith determination of the accounting
 405 firm made hereunder shall be final, binding and conclusive
 406 upon the Company and you.

407 (d) **Compliance with Section 409A.** You and the
 408 Company intend to structure and operate
 409 the payments and benefits described in this
 410 Agreement,
 411 and your other compensation,
 412 to be exempt from or to comply with the require-
 413 ments of Section 409A of the Code to the extent applicable.

414 The Company and you intend that your RSUs and
 415 RSU Award have been structured to be exempt from or to
 416 comply with the requirements of Section 409A of the Code to
 417 the extent applicable.

418 The Company agrees not to take any action (or
 419 omit to take any action that is required to be taken) in respect
 420 of the RSUs (or any other similar award) that is materially in-

Commented [DT80]: Determination by Company's accounting firm:

Sometimes an executive might negotiation to require a different account-
 ing firm to make the determination, but usually the company will hold out
 for having its regular accounting firm do so (because the cost of bringing in
 another accounting firm could be significant compared to the amount like-
 ly to be at stake).

Commented [DT81]: Section 409A: As noted above, this is a provision
 of the U.S. tax regulations that

421 consistent with, contrary to or in material breach of the terms
422 of the RSUs (or any similar award),
423 other than as required by applicable law,
424 that causes you to incur tax in respect of a viola-
425 tion of Section 409A of the Code with respect to such RSUs
426 unless you request the action (or omission).

427 For the avoidance of doubt, the Company agrees
428 that any failure to follow the payment terms under the RSUs
429 (or any other similar award granted to you) will be considered
430 a material breach.

431 If you or the Company believes, at any time, that
432 any feature of your compensation or benefits (including your
433 RSUs) does not comply with (or is not exempt from) Sec-
434 tion 409A of the Code

435 or that any action taken or contemplated to
436 be taken (including any failure to take action) in regards to
437 your compensation or benefits caused or might cause a viola-
438 tion of Section 409A of the Code,

439 you or the Company will promptly advise the
440 other

441 and will reasonably negotiate in good faith to
442 amend the terms of the payments or benefits or alter the action
443 or contemplated action

444 in order that your payments or benefit ar-
445 rangements comply with (or are exempt from) the require-
446 ments of Section 409A of the Code

447 or in order to mitigate any additional taxes that
448 may apply under Section 409A of the Code if compliance or
449 exemption is not practicable.

450 For the avoidance of doubt, the Company is not re-
451 sponsible for the payment of any taxes, including income and

Commented [DT82]: Material breach: This means that a failure by Facebook under this section would allow Sandberg to resign voluntarily yet still collect severance benefits, as provided in [Section 6](#).

452 excise taxes, that you may incur under Section 409A of the
453 Code,

454 nor will the Company indemnify you for any
455 such liability,

456 unless the Company breaches a material term of this
457 Agreement or of any compensatory program in which you par-
458 ticipate

459 and that breach is the cause of the 409A taxa-
460 tion/penalties.

461 Notwithstanding the foregoing, the Company will in-
462 demnify you to the greatest extent that it has indemnified or
463 agrees to indemnify any current or former employee who has
464 incurred or incurs the additional taxes under Section 409A in
465 connection with an RSU or similar type of award due to the
466 same or similar circumstances.

Commented [DT83]: Greatest extent: This expressly forces Facebook to avoid disparate treatment (which can be a source of claims in employee lawsuits). The provision is diluted somewhat, though, by the end of the sentence.

467 (e) **Notice.** Notices and all other communications
468 contemplated by this Agreement shall be in writing
469 and shall be deemed to have been duly given
470 when personally delivered

Commented [DT84]: Similar, etc.: This qualifier leaves considerable room for dispute, but it's a widely-used way of doing things.

471 or when mailed by U.S. registered or certi-
472 fied mail, return receipt requested and postage prepaid.

Commented [DT85]: Notice by mail: Companies generally like to be able to give notice to their employees by doing a mass mailing.

Commented [DT86]: Certified mail provides proof of receipt of the notice. (Many notice provisions also allow notice by established overnight delivery service [e.g., FedEx] with trackable delivery.)

473 In your case, mailed notices shall be addressed to you
474 at the home address that you most recently communicated to
475 the Company in writing.

Commented [DT87]: Employee's address for notice: Some provisions like this say that Facebook can send notice to the employee's address as stated in Facebook's then-current payroll records.

476 In the case of the Company, mailed notices shall be
477 addressed to its corporate headquarters, and all notices shall be
478 directed to the attention of its Secretary.

479 (f) **Modifications and Waivers.** No provision of
480 this Agreement shall be modified, waived or discharged unless
481 the modification, waiver or discharge is agreed to in writing

Commented [DT88]: Waivers must be in writing: Courts don't always give effect to this kind of clause.

482 and signed by you and by an authorized officer of the Compa-
483 ny (other than you).

484 No waiver by either party of any breach of, or of
485 compliance with, any condition or provision of this Agreement
486 by the other party shall be considered a waiver of any other
487 condition or provision or of the same condition or provision at
488 another time.

489 (g) **Whole Agreement.** No other agreements, rep-
490 resentations or understandings (whether oral or written and
491 whether express or implied) which are not expressly set forth
492 in this Agreement have been made or entered into by either
493 party with respect to the subject matter hereof.

Commented [DT89]: Whole agreement: The conventional heading for this clause is *entire* agreement.

494 This Agreement (including, for the avoidance of
495 doubt, its Exhibits) and the Confidentiality Agreement contain
496 the entire understanding of the parties with respect to the sub-
497 ject matter hereof.

498 (h) **Withholding Taxes.** All payments made un-
499 der this Agreement shall be subject to reduction to reflect tax-
500 es or other charges required to be withheld by law.

501 (i) **Choice of Law and Severability.** This
502 Agreement shall be interpreted in accordance with the laws of
503 the State of California without giving effect to provisions gov-
504 erning the choice of law.

Commented [DT90]: Choice of law exclusion: Without this proviso, conceivably choosing California law might trigger a separate choice-of-law rule requiring the application of another state's law.

505 If any provision of this Agreement becomes or is
506 deemed invalid, illegal or unenforceable in any applicable ju-
507 risdiction by reason of the scope, extent or duration of its cov-
508 erage, then such provision shall be deemed amended to the
509 minimum extent necessary to conform to applicable law so as
510 to be valid and enforceable

511 or, if such provision cannot be so amended with-
512 out materially altering the intention of the parties, then such

Commented [DT91]: Without materially altering the parties' intention: Of course this proviso is ripe for dispute.

513 provision shall be stricken and the remainder of this Agree-
 514 ment shall continue in full force and effect.

515 If any provision of this Agreement is rendered il-
 516 legal by any present or future statute, law, ordinance or regula-
 517 tion (collectively, the “Law”) then that provision shall be cur-
 518 tailed or limited only to the minimum extent necessary to
 519 bring the provision into compliance with the Law. All the oth-
 520 er terms and provisions of this Agreement shall continue in
 521 full force and effect without impairment or limitation.

522 (j) **No Assignment.** This Agreement and all of
 523 your rights and obligations hereunder are personal to you and
 524 may not be transferred or assigned by you at any time.

Commented [DT92]: No assignment by employee: Under the general law, an employee probably wouldn't be able to assign an employment agreement anyway, but including this provision should remove any doubt.

525 The Company may assign its rights under this
 526 Agreement to any entity that assumes the Company's obliga-
 527 tions hereunder in connection with any sale or transfer of all or
 528 a substantial portion of the Company's assets to such entity.

529 (k) **Authority.** The Company represents and war-
 530 rants that

531 (i) the execution of this Agreement has been
 532 duly authorized by the Company, including action of the
 533 Board,

534 (ii) the execution, delivery and performance
 535 of this Agreement by the Company does not and will not vio-
 536 late any law, regulation, order, judgment or decree or any
 537 agreement, plan or corporate governance document of the
 538 Company and

539 (iii) upon the execution and delivery of this Agree-
 540 ment, this Agreement shall be the valid and binding obligation
 541 of the Company, enforceable in accordance with its terms,
 542 except to the extent enforceability may be limited by

543 bankruptcy, insolvency or similar laws af-
544 fecting the enforcement of creditors' rights generally
545 and by the effect of general principles of eq-
546 uity (regardless of whether enforceability is considered in a
547 proceeding in equity or at law).

548 (1) **Counterparts**. This Agreement may be exe-
549 cuted in two or more counterparts; each of which shall be
550 deemed an original, but all of which together shall constitute
551 one and the same instrument.

552 To indicate your acceptance of the mutual promises con-
553 tained in this letter agreement, please sign and date this letter
554 in the space provided below and return it to me.

555 *[Signature block omitted]*

EXHIBIT A**FORM OF GENERAL RELEASE****General Release of Claims**

This General Release of Claims (this “Release”), dated as of _____, 20__, confirms the following understandings and agreements between Facebook, Inc., a Delaware corporation (the “Company”) and Sheryl Sandberg (hereinafter referred to as “you” or “your”).

In consideration of the promises set forth in that certain employment agreement between you and the Company dated February 20, 2008[, as amended] (the “Employment Agreement”) as well as any promises set forth in this Release, you agree as follows:

(1) Opportunity for Review and Revocation. [to be included if employee is age 40 or older].

You have twenty-one (21) days to review and consider this Release.

Notwithstanding anything contained herein to the contrary, this Release will not become effective or enforceable for a period of seven (7) calendar days following the date of its execution, during which time you may revoke your acceptance of this Release by notifying the General Counsel of the Company, in writing.

To be effective, such revocation must be received by the Company no later than 5:00 p.m. on the seventh (7th) calendar day following its execution.

Provided that the Release is executed and you do not revoke it, the eighth (8th) day following the date on which this Release is executed shall be its effective date (the “Effective Date”).

31 In the event of your revocation of this Release pursuant
32 to this Section 1, this Release will be null and void and of no
33 effect, and the Company will have no obligations hereunder.

34 (2) Employee Release and Waiver of Claims.

35 (a) Notwithstanding the provisions of sec-
36 tion 1542 of the Civil Code of California, and in accordance
37 with Section 2(c) and Section 7(a) of the Employment Agree-
38 ment,

39 you and your representatives, agents, estate, heirs,
40 successors and assigns, absolutely and unconditionally hereby
41 release, remise, discharge, indemnify and hold harmless

42 the Company Releasees ("Company Re-
43 leasees" defined to include the Company and/or any of its par-
44 ents, subsidiaries or affiliates, predecessors, successors or as-
45 signs, and its and their respective current and/or former part-
46 ners, directors, shareholders/stockholders, officers, employees,
47 attorneys and/or agents, all both individually and in their offi-
48 cial capacities),

49 from any and all legally waivable actions or caus-
50 es of action, suits, claims, complaints, contracts, liabilities,
51 agreements, promises, contracts, torts, debts, damages, con-
52 troversies, judgments, rights and demands,

53 whether existing or contingent, known or un-
54 known, suspected or unsuspected,

55 which arise out of your employment with, change
56 in employment status with, and/or separation of employment
57 from, the Company.

58 This release is intended by you to be all encom-
59 passing and to act as a full and total release of any legally
60 waivable claims, whether specifically enumerated herein or
61 not,

62 that you may have or have had against the Com-
63 pany Releasees
64 arising from conduct occurring up to and through
65 the date of this Release,
66 including, but not limited to, any legally waivable
67 claims arising from any federal, state or local law, regulation
68 or constitution dealing with either employment, employment
69 benefits or employment discrimination
70 such as those laws or regulations concerning dis-
71 crimination on the basis of race, color, creed, religion, age,
72 sex, sex harassment, sexual orientation, national origin, ances-
73 try, genetic carrier status, handicap or disability, veteran sta-
74 tus, any military service or application for military service, or
75 any other category protected under federal or state law;
76 including any claims or causes of action you have
77 or may have relating to discrimination under federal, state or
78 locate statutes (whether before a court or an administrative
79 agency)
80 including, but not limited to,
81 the Age Discrimination in Employment Act of
82 1967,
83 Title VII of the Civil Rights Act of 1964,
84 the Employee Retirement Income Security Act
85 of 1974 (excluding all claims for accrued, vested benefits un-
86 der any employee benefit or pension plan of the Company
87 subject to the terms and conditions of such plan and applicable
88 law),
89 the Americans with Disabilities Act,
90 the Family and Medical Leave Act,
91 the Fair Labor Standards Act,
92 the National Labor Relations Act,

93 the California Fair Employment and Housing
94 Act,
95 the California Constitution,
96 the California Labor Code,
97 and the California Civil Code,
98 all as amended from time to time;
99 any contract, whether oral or written, express or
100 implied; any tort;
101 any claim for equity or other benefits;
102 or any other statutory and/or common law claim.

103 (b) You acknowledge that your execution of this
104 Agreement shall be effective as a bar to each and every claim
105 specified in Sections 4(a) and 5 of this Agreement.

106 Accordingly, you hereby expressly waive any and
107 all rights and benefits conferred upon you by the provisions of
108 Section 1542 of the California Civil Code
109 and expressly consent that this Agreement
110 shall be given full force and effect with respect to each and all
111 of its express terms and provisions,
112 including those related to unknown and/or unsus-
113 pected claims, if any,
114 as well as those relating to any other claims speci-
115 fied in Sections 4(a) and 5 of this Agreement.

116 Section 1542 provides as follows:

117 **“A general release does not extend to claims**
118 **which the creditor does not know or suspect**
119 **to exist in his or her favor at the time of ex-**
120 **ecuting the release, which if known by him**
121 **or her must have materially affected his or**
122 **her settlement with the debtor.”**

123 You further represent that you understand and
124 acknowledge the significance and consequence of such release
125 as well as the specific waiver of Section 1542.

126 (c) This Release does not include any claim
127 which, as a matter of law, cannot be released by private
128 agreement.

129 Nor does this Release prohibit or bar you from
130 providing truthful testimony in any legal proceeding or from
131 cooperating with, or making truthful disclosures to, any gov-
132 ernmental agency.

133 Notwithstanding the foregoing, with respect to
134 any claim that cannot be released by private agreement,

135 you agree to release and waive your right (if any)
136 to any monetary damages or other recovery as to such claims,
137 including any claims brought on your behalf,
138 either individually or as part of a collective action,
139 by any governmental agency or other third party.

140 (d) Notwithstanding any provision of this Release
141 to the contrary, by executing this Release, you are not releas-
142 ing any claims relating to

143 (i) your rights or any other benefits express-
144 ly provided under the Employment Agreement including, but
145 not limited to, those provided for in Sections 11(b), 11(c) and
146 11(d),

147 (ii) any rights relating to the restricted stock
148 units (the "RSUs") granted to you pursuant to the Employment
149 Agreement or otherwise or any rights relating to any other
150 outstanding equity awards or

151 (iii) any indemnification or similar rights
152 you may have as a current or former officer or director of the
153 Company,

154 including, without limitation, any and all
155 rights thereto referenced in the Employment Agreement, the
156 Company's bylaws, plan of reorganization or liquidation, oth-
157 er governance documents, or any rights with respect to the
158 Company's directors' and officers' insurance policies.

159 (3) Company Release and Waiver of Claims. The
160 Company covenants that,

161 except for any claim that could be asserted by the
162 Company or its shareholders against you

163 (1) for fraud, breach of fiduciary duty, embez-
164 zlement, breach of trust, theft, violation of state or federal se-
165 curities laws, conversion, misuse or unauthorized disclosure of
166 the Company's confidential, proprietary or trade secret infor-
167 mation;

168 (2) brought to enforce the terms and provisions
169 of this Release or the Employment Agreement (including the
170 Exhibits thereto); or

171 (3) based upon a claim that conduct in which you
172 engaged constituted grounds for termination of your employ-
173 ment for "Cause", as defined in the Employment Agreement,
174 it hereby waives any non-excluded claims and
175 releases you from such non-excluded claims.

176 (4) No Suit. You represent that you have not filed any
177 complaints or charges against the Company with any federal,
178 state, or local administrative agency arising out of your em-
179 ployment with the Company on or prior to the Effective Date.

180 (5) Prior Agreement. You understand and agree that you
181 have continuing obligations under the Confidential Infor-
182 mation and Inventions Assignment Agreement between you
183 and the Company dated as of February 20, 2008 (hereinafter,

184 the "CIIAA"). A copy of the CIIAA is attached hereto as Ex-
185 hibit A and incorporated herein by reference.

186 You reaffirm your commitment under the CIIAA in this
187 Release, and agree that, as part of this Release, you will com-
188 ply fully with the terms of the CIIAA.

189 You also confirm that you have not violated the CIIAA.

190 (6) Restricted Stock Units. The Company previously
191 granted you RSUs under the Company's 2005 Stock Plan (the
192 "Stock Plan"). Pursuant to the Employment Agreement, as of
193 the Effective Date you will be vested in [NUMBER] of the
194 RSUs. All of your rights and obligations with respect to the
195 RSUs are governed by the terms and conditions of the Re-
196 stricted Stock Unit Agreement.

197 (7) Confidentiality. You agree that you will not disclose
198 to others the fact or terms of this Release, except that you may
199 disclose such information to your attorney or accountant in or-
200 der for such individuals to render services to you.

201 (8) Successors and Assigns. The provisions hereof shall
202 inure to the benefit of your heirs, executors, administrators,
203 legal personal representatives and assigns and shall be binding
204 upon your heirs, executors, administrators, legal personal rep-
205 resentatives and assigns.

206 (9) Severability. If any provision of this Release, or part
207 thereof, is held invalid, void or voidable as against public pol-
208 icy or otherwise, the invalidity shall not affect other provi-
209 sions, or parts thereof, which may be given effect without the
210 invalid provision or part. To this extent, the provisions and
211 parts thereof of this Release are declared to be severable.

212 Any waiver of any provision of this Release shall not
213 constitute a waiver of any other provision of this Release un-
214 less expressly so indicated otherwise.

Commented [DT93]: Language: This clause represents an attempt to negate the *contra proferentem* rule, under which (other things being equal) an ambiguity in contract language is construed against the party that drafted the language.

215 The language of all parts of this Release shall in all cas-
216 es be construed according to its fair meaning and not strictly
217 for or against either of the parties.

218 (10) Governing Law. Any claims arising out of this Re-
219 lease (or any other claims arising out of the relationship be-
220 tween the parties) shall be governed by and construed in ac-
221 cordance with the laws of the state of California

222 and shall in all respects be interpreted, enforced and
223 governed under the internal and domestic laws of California,
224 without giving effect to the principles of conflicts of
225 laws of such state.

226 Any claims or legal actions by one party against the oth-
227 er shall be commenced and maintained in a court of competent
228 jurisdiction in Santa Clara County, California,

229 and you hereby submit to the jurisdiction and venue of
230 any such court.

231 (11) Counterparts. This Agreement may be executed in
232 two or more counterparts, each of which will be deemed an
233 original, but all of which taken together will constitute one and
234 the same instrument.

235 (12) This Agreement shall not be construed as an admis-
236 sion by you or the Company of any wrongful act, unlawful
237 discrimination, or breach of contract.

238 IN WITNESS WHEREOF, the undersigned parties have exe-
239 cuted this Release as of the date first written above.

240 *[Signature block for Mark Zuckerberg omitted]*

241

242 I REPRESENT THAT I HAVE READ THE FOREGOING
243 RELEASE,

244 THAT I FULLY UNDERSTAND THE TERMS

245 AND CONDITIONS OF SUCH RELEASE

246 AND THAT I AM KNOWINGLY AND VOLUN-
247 TARILY EXECUTING THE SAME
248 WITHOUT DURESS OR COERCION FROM ANY
249 SOURCE.

250 IN ENTERING INTO THIS RELEASE, I DO NOT
251 RELY ON ANY REPRESENTATION, PROMISE OR IN-
252 DUCEMENT MADE BY THE COMPANY OR ITS REPRE-
253 SENTATIVES WITH THE EXCEPTION OF THE CON-
254 sideration DESCRIBED IN THIS DOCUMENT.

255 *[Sheryl Sandberg signature block omitted]*

Commented [DT94]: Non-reliance clauses are typically included in contracts to try to preclude later claims that the other side induced the signing party to sign the document by fraud, e.g., by lying about facts or by making promises the inducing party had no intention of keeping.

EXHIBIT B

**CONFIDENTIAL INFORMATION AND
INVENTION ASSIGNMENT AGREEMENT**

EXECUTION COPY

FACEBOOK, INC.

**CONFIDENTIAL INFORMATION AND
INVENTION ASSIGNMENT AGREEMENT**

FOR EMPLOYEES

As a condition of my becoming employed (or my employment being continued) by or retained as a consultant (or my consulting relationship being continued) by Facebook, Inc., a Delaware corporation ("Facebook") or any of its current or future subsidiaries, affiliates, successors or assigns (collectively, the "Company"),

and in consideration of my employment or consulting relationship with the Company and my receipt of the compensation now and hereafter paid to me by the Company,

I agree to the following:

1. Employment or Consulting Relationship. I understand and acknowledge that this Agreement does not alter, amend or expand upon any rights I may have to continue in the employ of, or in a consulting relationship with, or the duration of my employment or consulting relationship with, the Company under any existing agreements between the Company and me or under applicable law.

Any employment or consulting relationship between the Company and me, whether commenced prior to or upon or after the date of this Agreement, shall be referred to herein as the "Relationship."

32

33 2. **At-Will Relationship.** I understand and acknowledge
 34 that my Relationship with the Company is and shall continue
 35 to be at-will, as defined under applicable law, meaning that ei-
 36 ther I or the Company may terminate the Relationship at any
 37 time for any reason or no reason,

38 without further obligation or liability, except as set forth
 39 in the employment agreement between me and the Company,
 40 dated February 20, 2008.

41

42 3. **Confidential Information.**

43 (a) **Company Information.** I agree at all times
 44 during the term of my Relationship with the Company and
 45 thereafter,

46 to hold in strictest confidence,

47 and not to use,

48 except for the benefit of the Company to the ex-
 49 tent necessary to perform my obligations to the Company un-
 50 der the Relationship,

51 or to disclose to any person, firm, corporation or
 52 other entity

53 without written authorization of the Board of Di-
 54 rectors of the Company,

55 any Confidential Information of the Company
 56 which I obtain or create.

57 I further agree not to make copies of such Confi-
 58 dential Information except as authorized by the Company.

59 I understand that "Confidential Information"
 60 means any Company proprietary information, technical data,
 61 trade secrets or know-how,

Commented [DT95]: Without written authorization of the Board:
 Huh??? Company executives and employees routinely disclose confiden-
 tial information to other companies without board approval.

62 including, but not limited to, research, product
63 plans, products, services, suppliers, customer lists and custom-
64 ers (including, but not limited to, customers of the Company
65 on whom I called or with whom I became acquainted during
66 the Relationship), prices and costs, markets, software, devel-
67 opments, inventions, laboratory notebooks, processes, formu-
68 las, technology, designs, drawings, engineering, hardware con-
69 figuration information, marketing, licenses, finances, budgets
70 or other business information disclosed to me by
71 the Company
72 either directly or indirectly
73 in writing, orally or by drawings or observation of
74 parts or equipment
75 or created by me
76 during the period of the Relationship,
77 whether or not during working hours.

78 I understand that Confidential Information in-
79 cludes, but is not limited to, information pertaining to any as-
80 pect of the Company's business,
81 which is either information not known by actual
82 or potential competitors of the Company or other third parties
83 not under confidentiality obligations to the Company,
84 or is otherwise proprietary information of the
85 Company or its customers or suppliers,
86 whether of a technical nature or otherwise.

87 I further understand that Confidential Information
88 does not include any of the foregoing items which has become
89 publicly and widely known and made generally available
90 through no wrongful act of mine or of others who were under
91 confidentiality obligations as to the item or items involved.

Commented [DT96]: Publicly and widely known, etc.: This is a pretty limited carve-out.

Commented [DT97]: Prior confidentiality obligations: Companies don't want to be sued by former employers for misappropriation of trade secrets or other confidential information. (Some prior employers' executives might secretly relish the prospect of making mischief for a former employee's new company, especially if the new company is a competitor.)

92 (b) **Prior Obligations.** I represent that my per-
93 formance of all terms of this Agreement as an employee or
94 consultant of the Company has not breached and will not
95 breach any agreement to keep in confidence proprietary in-
96 formation, knowledge or data acquired by me prior or subse-
97 quent to the commencement of my Relationship with the
98 Company,

99 and I will not disclose to the Company or use any
100 inventions, confidential or non-public proprietary information
101 or material belonging to any current or former client or em-
102 ployer or any other party.

103 I will not induce the Company to use any inven-
104 tions, confidential or non-public proprietary information, or
105 material belonging to any current or former client or employer
106 or any other party. I acknowledge and agree that I have listed
107 on Exhibit A all agreements (e.g., non-competition agree-
108 ments, non-solicitation of customers agreements, non-
109 solicitation of employees agreements, confidentiality agree-
110 ments, inventions agreements, etc.) with a current or former
111 employer, or any other person or entity, that may restrict my
112 ability to accept employment with the Company or my ability
113 as an employee or consultant to recruit or engage customers or
114 service providers on behalf of the Company, or otherwise re-
115 late to or restrict my ability to perform my duties as an em-
116 ployee of the Company or any obligation I may have to the
117 Company.

118 (c) **Third Party Information.** I recognize that the
119 Company has received and in the future will receive confiden-
120 tial or proprietary information from third parties subject to a
121 duty on the Company's part to maintain the confidentiality of
122 such information and to use it only for certain limited purpos-

123 es. I agree to hold all such confidential or proprietary infor-
124 mation in the strictest confidence and not to disclose it to any
125 person, firm or corporation or to use it except as necessary in
126 carrying out my work for the Company consistent with the
127 Company's agreement with such third party.

128 **4. Inventions.**

129 (a) **Inventions Retained and Licensed.** I have at-
130 tached hereto, as Exhibit A, a list describing with particularity
131 all inventions, original works of authorship, developments,
132 improvements, and trade secrets which were made by me prior
133 to the commencement of the Relationship (collectively re-
134 ferred to as "Prior Inventions"), which belong solely to me or
135 belong to me jointly with another, which relate in any way to
136 any of the Company's proposed businesses, products or re-
137 search and development, and which are not assigned to the
138 Company hereunder; or, if no such list is attached, I represent
139 that there are no such Prior Inventions. If, in the course of my
140 Relationship with the Company, I incorporate into a Company
141 product, process or machine a Prior Invention owned by me or
142 in which I have an interest, the Company is hereby granted
143 and shall have a non-exclusive, royalty-free, irrevocable, per-
144 petual, worldwide license (with the right to sublicense) to
145 make, have made, copy, modify, make derivative works of,
146 use, sell and otherwise distribute such Prior Invention as part
147 of or in connection with such product, process or machine.

148

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150

151 (b) **Assignment of Inventions.** I agree that I will
152 promptly make full written disclosure to Facebook, will hold
153 in trust for the sole right and benefit of Facebook, and hereby

154 assign to Facebook, or its designee, all my right, title and in-
155 terest throughout the world in and to any and all inventions,
156 original works of authorship, developments, concepts, know-
157 how, improvements or trade secrets, whether or not patentable
158 or registrable under copyright or similar laws, which I may
159 solely or jointly conceive or develop or reduce to practice, or
160 cause to be conceived or developed or reduced to practice,
161 during the period of my Relationship with the Company (col-
162 lectively referred to as “Inventions”), except as provided in
163 Section 4(e) below. I further acknowledge that all Inventions
164 which are made by me (solely or jointly with others) within
165 the scope of and during the period of my Relationship with the
166 Company are “works made for hire” (to the greatest extent
167 permitted by applicable law) and are compensated by my sala-
168 ry (if I am an employee) or by such amounts paid to me under
169 any applicable consulting agreement or consulting arrange-
170 ments (if I am a consultant), unless regulated otherwise by the
171 mandatory law of the state of California.

172 (c) **Maintenance of Records**. I agree to keep and
173 maintain adequate and current written records of all Inventions
174 made by me (solely or jointly with others) during the term of
175 my Relationship with the Company. The records may be in the
176 form of notes, sketches, drawings, flow charts, electronic data
177 or recordings, laboratory notebooks, and any other format. The
178 records will be available to and remain the sole property of the
179 Company at all times. I agree not to remove such records from
180 the Company’s place of business except as expressly permit-
181 ted by Company policy which may, from time to time, be re-
182 vised at the sole election of the Company for the purpose of
183 furthering the Company’s business. I agree to return all such
184 records (including all copies thereof) to Facebook at the time

185 of termination of my Relationship with the Company as pro-
186 vided for in Section 5.

187 (d) **Patent and Copyright Rights.** I agree to as-
188 sist Facebook, or its designee, at its expense, in every proper
189 way to secure Facebook's, or its designee's, rights in the In-
190 ventions and any copyrights, patents, trademarks, mask work
191 rights, moral rights, or other intellectual property rights relat-
192 ing thereto in any and all countries, including the disclosure to
193 Facebook or its designee of all pertinent information and data
194 with respect thereto, the execution of all applications, specifi-
195 cations, oaths, assignments, recordations, and all other instru-
196 ments which Facebook or its designee shall deem necessary in
197 order to apply for, obtain, maintain and transfer such rights, or
198 if not transferable, waive such rights, and in order to assign
199 and convey to Facebook or its designee, and any successors,
200 assigns and nominees the sole and exclusive rights, title and
201 interest in and to such Inventions, and any copyrights, patents,
202 mask work rights or other intellectual property rights relating
203 thereto. I further agree that my obligation to execute or cause
204 to be executed, when it is in my power to do so, any such in-
205 strument or papers shall continue after the termination of this
206 Agreement until the expiration of the last such intellectual
207 property right to expire in any country of the world. If Face-
208 book or its designee is unable because of my mental or physi-
209 cal incapacity or unavailability or for any other reason to se-
210 cure my signature to apply for or to pursue any application for
211 any United States or foreign patents, copyright, mask works or
212 other registrations covering Inventions or original works of
213 authorship assigned to Facebook or its designee as above, then
214 I hereby irrevocably designate and appoint Facebook and its
215 duly authorized officers and agents as my agent and attorney

216 in fact, to act for and in my behalf and stead to execute and
217 file any such applications and to do all other lawfully permit-
218 ted acts to further the application for, prosecution, issuance,
219 maintenance or transfer of

220

221 -3-

222

223 letters patent, copyright or other registrations thereon with the
224 same legal force and effect as if originally executed by me. I
225 hereby waive and irrevocably quitclaim to Facebook or its de-
226 signee any and all claims, of any nature whatsoever, which I
227 now or hereafter have for infringement of any and all proprie-
228 tary rights assigned to Facebook or such designee.

229 (e) **Exception to Assignments.** I understand that
230 the provisions of this Agreement requiring assignment of In-
231 ventions to Facebook do not apply to any invention which
232 qualifies fully under the provisions of California Labor Code
233 Section 2870 (attached hereto as Exhibit B). I will advise the
234 Company promptly in writing of any inventions that I believe
235 meet such provisions and are not otherwise disclosed
236 on Exhibit A.

237 **5. Company Property; Returning Company Docu-**
238 **ments.** I acknowledge and agree that I have no expectation of
239 privacy with respect to the Company's telecommunications,
240 networking or information processing systems (including,
241 without limitation, stored company files, e-mail messages and
242 voice messages) and that my activity and any files or messag-
243 es on or using any of those systems may be monitored at any
244 time without notice. I further agree that any property situated
245 on the Company's premises and owned by the Company, in-
246 cluding disks and other storage media, filing cabinets or other

247 work areas, is subject to inspection by Company personnel at
248 any time with or without notice. I agree that, at the time of
249 termination of my Relationship with the Company, I will de-
250 liver to the Company (and will not keep in my possession, rec-
251 reate or deliver to anyone else) any and all devices, records,
252 data, notes, reports, proposals, lists, correspondence, specifica-
253 tions, drawings, blueprints, sketches, laboratory notebooks,
254 materials, flow charts, equipment, other documents or proper-
255 ty, or reproductions of any of the aforementioned items devel-
256 oped by me pursuant to the Relationship or otherwise belong-
257 ing to the Company, its successors or assigns. In the event of
258 the termination of the Relationship, I agree to sign and deliver
259 the "Termination Certification" attached hereto as Exhibit C;
260 however, my failure to sign and deliver the Termination Cer-
261 tificate shall in no way diminish my continuing obligations
262 under this Agreement.

263 **6. Notification to Other Parties.**

264 (a) **Employees.** In the event that I leave the em-
265 ploy of the Company, I hereby consent to notification by the
266 Company to my new employer about my rights and obliga-
267 tions under this Agreement.

268 (b) **Consultants.** I hereby grant consent to notifi-
269 cation by the Company to any other parties besides the Com-
270 pany with whom I maintain a consulting relationship, includ-
271 ing parties with whom such relationship commences after the
272 effective date of this Agreement, about my rights and obliga-
273 tions under this Agreement.

274 **7. Solicitation of Employees, Consultants and Other**

275 **Parties.** I agree that during the term of my Relationship with
276 the Company, and for a period of twenty-four (24) months
277 immediately following the termination of my Relationship

278 with the Company for any reason, whether with or without
279 cause, I shall not either directly or indirectly solicit, induce,
280 recruit or encourage any of the Company's employees or con-
281 sultants to terminate their relationship with the Company, or
282 attempt to solicit, induce, recruit, encourage or take away em-
283 ployees or consultants of the Company, either for myself or
284 for any other person or entity. Further, during

285

286

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287

288 my Relationship with the Company and at any time following
289 termination of my Relationship with the Company for any rea-
290 son, with or without cause, I shall not use any Confidential In-
291 formation of the Company to attempt to negatively influence
292 any of the Company's clients or customers from purchasing
293 Company products or services or to solicit or influence or at-
294 tempt to influence any client, customer or other person either
295 directly or indirectly, to direct his or its purchase of products
296 and/or services to any person, firm, corporation, institution or
297 other entity in competition with the business of the Company.

298

8. Representations and Covenants.

299

(a) **Facilitation of Agreement.** I agree to execute

300

promptly any proper oath or verify any proper document re-

301

quired to carry out the terms of this Agreement upon the

302

Company's written request to do so.

303

(b) **Conflicts.** I represent that my performance of

304

all the terms of this Agreement does not and will not breach

305

any agreement I have entered into, or will enter into with any

306

third party, including without limitation any agreement to keep

307

in confidence proprietary information acquired by me in con-

308

fidence or in trust prior to commencement of my Relationship

309 with the Company. I agree not to enter into any written or oral
310 agreement that conflicts with the provisions of this Agree-
311 ment.

312 (c) **Voluntary Execution.** I certify and
313 acknowledge that I have carefully read all of the provisions of
314 this Agreement and that I understand and will fully and faith-
315 fully comply with such provisions.

316 9. **General Provisions.**

317 (a) **Governing Law.** The validity, interpretation,
318 construction and performance of this Agreement shall be gov-
319 erned by the laws of the State of California, without giving ef-
320 fect to the principles of conflict of laws.

321 (b) **Entire Agreement.** This Agreement sets forth
322 the entire agreement and understanding between the Company
323 and me relating to the subject matter herein and merges all
324 prior discussions between us. No modification or amendment
325 to this Agreement, nor any waiver of any rights under this
326 Agreement, will be effective unless in writing signed by both
327 parties. Any subsequent change or changes in my duties, obli-
328 gations, rights or compensation will not affect the validity or
329 scope of this Agreement.

330 (c) **Severability.** If one or more of the provisions
331 in this Agreement are deemed void by law, then the remaining
332 provisions will continue in full force and effect.

333 (d) **Successors and Assigns.** This Agreement will
334 be binding upon my heirs, executors, administrators and other
335 legal representatives, and my successors and assigns, and will
336 be for the benefit of the Company, its successors, and its as-
337 signs.

338 (e) **Survival.** The provisions of this Agreement
339 shall survive the termination of the Relationship and the as-

340 signment of this Agreement by the Company to any successor
341 in interest or other assignee.

342

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344

345 (f) **Remedies.** I acknowledge and agree that viola-
346 tion of this Agreement by me may cause the Company irrepa-
347 rable harm, and therefore agree that the Company will be enti-
348 tled to seek extraordinary relief in court, including but not lim-
349 ited to temporary restraining orders, preliminary injunctions
350 and permanent injunctions without the necessity of posting a
351 bond or other security and in addition to and without prejudice
352 to any other rights or remedies that the Company may have for
353 a breach of this Agreement.

354 (g) **ADVICE OF COUNSEL.** I
355 ACKNOWLEDGE THAT, IN EXECUTING THIS AGREE-
356 MENT, I HAVE HAD THE OPPORTUNITY TO SEEK THE
357 ADVICE OF INDEPENDENT LEGAL COUNSEL,
358 AND I HAVE READ AND UNDERSTOOD
359 ALL OF THE TERMS AND PROVISIONS OF THIS
360 AGREEMENT.

361 THIS AGREEMENT SHALL NOT BE CON-
362 STRUED AGAINST ANY PARTY BY REASON OF THE
363 DRAFTING OR PREPARATION HEREOF.

364 [Signature Page Follows]

365

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367

368 The parties have executed this Agreement on the respec-
369 tive dates set forth below:

370

COMPANY:

EMPLOYEE:

FACEBOOK, INC. _____, an Individual:

By: /s/ Mark Zuckerberg

Name: Mark Zuckerberg /s/ Sheryl Sandberg

Signature

Title: CEO

Date: Feb. 20, 2008 Date: 2/20/08

371

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373 _____

374 EXHIBIT A

375 **LIST OF PRIOR INVENTIONS**

376 **AND ORIGINAL WORKS OF AUTHORSHIP**

377 **EXCLUDED UNDER SECTION 5**

378

| | | Identifying Number |
|-------|------|----------------------|
| Title | Date | or Brief Description |

379 No inventions or improvements

380 Additional Sheets Attached

381

Signature of Employee/Consultant: /s/ Sheryl Sandberg

Print Name of Employee/Consultant: Sheryl Sandberg

Date: 2/20/08

383 _____

384 EXHIBIT B

385 Section 2870 of the California Labor Code is as follows:

386 (a) Any provision in an employment agreement which
387 provides that an employee shall assign, or offer to assign, any
388 of his or her rights in an invention to his or her employer shall
389 not apply to an invention that the employee developed entirely
390 on his or her own time without using the employer's equip-
391 ment, supplies, facilities, or trade secret information except for
392 those inventions that either:

393 (1) Relate at the time of conception or reduction to
394 practice of the invention to the employer's business, or actual
395 or demonstrably anticipated research or development of the
396 employer; or

397 (2) Result from any work performed by the em-
398 ployee for the employer.

399 (b) To the extent a provision in an employment agree-
400 ment purports to require an employee to assign an invention
401 otherwise excluded from being required to be assigned under
402 subdivision (a), the provision is against the public policy of
403 this state and is unenforceable.

404

32 or take away employees or consultants of the Company, either
33 for myself or for any other person or entity. Further, I shall not
34 at any time use any Confidential Information of the Company
35 to negatively influence any of the Company’s clients or cus-
36 tomers from purchasing Company products or services or to
37 solicit or influence or attempt to influence any client, customer
38 or other person either directly or indirectly, to direct his or its
39 purchase of products and/or services to any person, firm, cor-
40 poration, institution or other entity in competition with the
41 business of the Company.

42

Date:

43

(Employee’s Signature)

(Type/Print Employee’s

Name)

44

45

Common Draft™ Model Provisions: Employment Agreement

WORKING DRAFT 2012-12-13

WARNING: These Model Provisions may not meet your specific needs; it should not be relied on as a substitute for legal advice from a licensed attorney, and is provided **AS IS, WITH ALL FAULTS**. Without the advice and help of an attorney, you could be putting your money and property at risk. To be referred to an attorney, call the State Bar of Texas Lawyer Referral Information Service at 1-800-252-9690, or a legally-authorized lawyer referral service in your state.

Precedence: To the extent that the Agreement Document (defined below) conflicts with these Model Provisions, the Agreement Document will control.

Provisions marked with an asterisk * apply only if so stated in the Agreement Document.

Table of Contents

1. General definitions
2. Employee's duties
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12. Mandatory arbitration
13. General provisions

1. General definitions

When used in this Agreement, the following terms have the meanings set forth below.

Affiliate: An "Affiliate" of a Person is any other Person that controls or is controlled by or is under common control with that Person. For this purpose, "control" refers to the direct or indirect ownership of at least fifty percent (50%) of the equity or beneficial interest in such Person or the right to vote for or appoint a majority of the board of directors or other governing body of such Person.

Agreement: The terms "this Agreement" refers to, collectively:

- (1) the Agreement Document (*see below*);
- (2) any exhibit, schedule, appendix, addendum, or other document identified in the Agreement Document as being part of this Agreement; and
- (3) any other document expressly incorporated by reference into the Agreement Document.

Agreement Document refers to a document signed by the parties (manually, electronically, or otherwise) that incorporates these Model Provisions by reference or otherwise states that the parties are making the signed document subject to these Model Provisions.

Company refers to the corporation or other organization, identified in the Agreement Document, that is entering into this Agreement with the Employee, but not to any other Company Group Member except as expressly stated in this Agreement.

Company Business refers to the following:

- (1) any business engaged in by the Company or any other Company Affiliate during the Employment Relationship, and
- (2) any other business as to which, **during the Employment Relationship, Company or any other Company Group Member made demonstrable preparation to engage in the business, IF** either or both of the following is true: (i) The Employee materially participated in that preparation; and/or (ii) in connection with that preparation, the Employee had access to Confidential Information.

Company Group Member refers to the Company and its Affiliates.

Company Innovation refers to any *Innovation* that is made, created, conceived, or reduced to practice by any person if any of the following is true about the Innovation:

- (1) any equipment, supplies, facilities, or confidential information of Company or any other Company Group Member were used in any phase of the conception or development of the Innovation; or
- (2) the Innovation was made at least in part using time for which the person was compensated by Company or any other Company Group Member; or
- (3) the Innovation relates to any Company Business; or
- (4) the Innovation resulted, in whole or in part, from work which the person performed for Company or any other Company Group Member.

The previous sentence applies whether the person worked alone or jointly with others, and whether or not during regular working hours; it also applies whether or not the Innovation is potentially patentable or copy-rightable in the U.S. or elsewhere.

Company Materials refers to any and all Materials for which any of the following is true:

- (1) the Employee received the Materials from Company or any other Company Group Member, or
- (2) the Employee *created*, or help to create, the Materials during the Employment Relationship AND the Materials relate to any Company Business; or
- (3) the Materials contain, or reflect, Confidential Information.

Confidential Information refers to confidential information of Company or any other Company Group Member that the Employee learns in the course of the Employment Relationship — whether or not the information is marked as confidential[†] — **except for information that the Employee can show, with reasonable corroborating evidence, that:**

- (1) the information was in the Employee's possession or knowledge before the Employment Relationship began; or
- (2) the information is or becomes generally known to persons who could take economic advantage of it without breach of an obligation to a Company Group Member; or
- (3) the Employee obtained the information from a party having the right to disclose it to the Employee without violation of an obligation to a Company Group Member.

No combination of information will be deemed to be within any of the exceptions (1) through (3) in the previous sentence, however — even if one or more component parts of the combination are within one or more exceptions — unless the combination itself and its economic value and principles of operation are themselves within one or more of those exceptions.

Create and **Creation**, whether or not capitalized, (i) in respect of an invention, trade secret, or business idea, refer to the conception or reduction to practice thereof; (ii) in respect of a work of authorship, refer to fixation of the work, in whole or in part, in a tangible medium of expression.

Designated Owner refers to (i) the Company or (ii) if from time to time **the Company designates another Company Group Member, or one or more other organizations, to own certain inventions or other intellectual-property rights, the designated other organization.**

Employment Relationship refers to the Employee's employment with the Company.

[†] Marking requirements for confidential information are often found in nondisclosure agreements between companies, but for an employment agreement, such a requirement would likely be unwieldy for the Company to comply with.

Examples (and corresponding terms such as for example), whether or not capitalized, are used in the Agreement for purposes of illustration, not of limitation, unless another meaning is clear from the context. For the avoidance of doubt, if in some places the Agreement uses longer expressions such as "by way of example and not of limitation," such usage does not mean that the parties intend for shorter expressions such as "for example" to serve as limitations unless expressly stated otherwise.

Include and like words (for example, includes, included, and including), whether or not capitalized, are to be deemed followed by the phrase "without limitation" if not followed literally by that phrase. For the avoidance of doubt, if in some places the Agreement uses longer expressions such as "including but not limited to" or "including without limitation," such usage does not mean that the parties intend for other, shorter expressions such as "including" to serve as limitations unless expressly stated otherwise.

Innovation refers to each of the following: (1) an invention, whether or not patentable or patented; (2) a work of authorship copyrightable in the U.S. or elsewhere, whether or not registered or registrable; (3) a trade secret; and (4) an idea that could be used in any Company Business.

Materials refers to reports, notes, emails, manuals, computer programs or data, photographs, and all other recorded, written, or printed matter, in any format, including but not limited to electronic, magnetic, optical, and hard-copy formats.

Person refers to a natural person, corporation, partnership, or other legal entity, or a joint venture of two or more of any of them.

Tribunal refers to an arbitration panel, court, or other body of competent jurisdiction that is deciding a matter arising out of or relating to this Agreement.

2. Employee's duties

(a) **Position:** The Employee is being initially hired for a particular position; the Company may change the Employee's position, title, and specific job responsibilities from time to time in its discretion.

(b) **Best efforts:** The Employee will perform all the duties and such other functions as the Company may require, to the best of the Employee's ability, giving the Company the full benefit of the Employee's knowledge, expertise and technical skill, and will comply with all lawful directions given by or with the authority of the Company.

(c) **Work hours:** Whenever so required for the proper fulfillment of the Employee's duties, the Employee will work such hours as the Company may prescribe, with additional compensation if and to the extent required by applicable law.

(d) **Travel:** The Employee will attend and work at any premises of the Company Group Members wherever situated, and travel and work both in this country and abroad, as may be required for the proper fulfillment of the Employee's duties.

(e) **Compliance with policies, etc.:** The Employee will comply with all lawful rules, regulations, policies, procedures, ethical standards, and special instructions that may be adopted by the Company from time to time, except that if such policies conflict with the express provisions of this Agreement, then the terms of this Agreement will govern.

(f) **Full-time work:** The Employee will devote his or her full productive time, ability and attention and his or her best efforts to the business of the Company, except to the extent otherwise authorized in writing by the Company.

(g) **Knowledge:** The Employee will make available to the Company any and all information of which the Employee has knowledge and which the Employee has a reasonable belief is or would be relevant to the Company's business, to the extent that this is possible without violating any obligation of confidentiality that the Employee may have to a former employer.

3. Restrictions on activities

(a) **No conflicting activities:** The Employee will not engage, directly or indirectly, in the planning, operation or management of any activity that competes with the Company or otherwise conflicts with the Company's business interests.

(b) **Other work:** The Employee will not work on a full- or part-time or independent-contracting basis for any other Person without the Company's prior written consent.

(c) **Company property:** The Employee will not remove or assist in removing any Company Materials or other property of Company or any other Company Group Member from such company's premises under any circumstances, either during the Employment Relationship or after its termination, except as authorized by the Company.

4. Compensation and benefits

(a) **Compensation:** For all the services rendered by the Employee to Company or any

other Company Group Member during the Employment Relationship, and for so long as the Employee remains employed by the Company, the Employee will receive the compensation offered to and accepted by him or her, less withholding that is either required by law or agreed to by the Employee.

(b) **Pay schedule:** The Employee's compensation will be payable in installments at such times as the Company customarily pays its other employees, but in any event no less often than monthly or the minimum frequency required by applicable law for comparably-situated employees, whichever is more often.

(c) **Benefits (if applicable):** The Employee will be entitled to participate in any group medical, dental, disability, and life insurance plans, 401(k) plans, pension or profit-sharing plans, stock option plans, and similar benefits that may be offered by the Company — if any — on the same or similar basis as comparably-situated employees. The Employee also understands that these benefits may change or be eliminated at the sole discretion of the Company.

(d) **Bonus (if applicable):** In addition to the compensation and benefits referred to above, the Employee may receive bonus compensation at such intervals and frequency as determined appropriate in the sole discretion of the Company. The Company will not be obligated to the Employee for any bonus compensation not otherwise so authorized. The Employee acknowledges that he or she must be employed by the Company at the time the bonus is authorized in order to be eligible for a bonus.

(e) **Vacation (if applicable):** The Employee will be entitled to vacations of a duration (1) consistent with the Company's policies as promulgated from time to time, or (2) if longer, as required by applicable law for comparably-situated employees.

(f) **Tax responsibility:** The Employee alone, and not the Company, will be responsible for the payment of all taxes required by applicable law in respect of the payments to be made and benefits to be provided under this Agreement or otherwise (except to the extent withheld by the Company).

(g) **Expense reimbursement:** (1) The Company will cause the Employee to be reimbursed for reasonable business expenses actually incurred by him or her, with the Company's authorization, in connection with the Employment Relationship.

(2) All such reimbursement will be done in accordance with the Company's then-current travel policies and applicable tax-authority requirements or guidelines.

(h) **No other compensation or benefits:**² For the avoidance of doubt, the compensation and other benefits described in this "Compensation and benefits" section represent all, and the only, compensation and benefits to which the Employee is entitled from the Company or any other Company Group Member.

(i) **Withholding:** Except to the extent otherwise prohibited by law, the Company is authorized to withhold — from cash compensation or other payment of any kind, if any, which the Employee may be due — any past-due amounts, of any kind, that the Employee owes to the Company, if any.

5. At-will employment

For the avoidance of doubt, to the greatest extent not prohibited by law, the parties intend that the Employee will be an "at-will" employee during the entire time of the Employment Relationship.

6. Company policies

(a) **Policy documents:** The Company may in its sole discretion establish, amend, maintain and distribute (including but not limited to publication on an internal Web site) policies, employee manuals and/or personnel policy manuals.

(b) **Policies are not contractual:** (1) The Employee will adhere to and follow all rules, regulations and policies of the Company set forth in those policies and manuals as they now exist or may later be amended or modified.

(2) The Employee acknowledges and agree that those policies and manuals are not part of the contractual terms of this Agreement and do not constitute a separate contract, but instead are only general policies and guidelines of the Company's employees.

7. Innovations

(a) **Ownership:** The Designated Owner will be the sole owner of any and all Company Innovations and any Company Materials that the Employee may create during the Employment Relationship; the same will be a "work made for hire" to the greatest extent permitted by law.

(b) **Disclosure to Company:** The Employee will promptly disclose to the Company, without additional compensation, any such Company Innovation and Company Materials.

² This is a "vaccination" clause, intended to forestall employee claims of implied promises to additional compensation or employee benefits.

(c) **IP protection:** (1) The Employee will assist one or both of the Company and the Designated Owner, at the Company's or the Designated Owner's expense, in protecting any intellectual property rights that may be available anywhere in the world for Company Innovations and Company Materials.

(2) Such assistance will include, for example, signing U.S. or foreign patent applications; copyright registration applications; oaths or declarations relating to such patent- or copyright-registration applications; assignments of ownership of such applications; and similar documents.

(d) **Moral rights:** To the extent that the Employee retains any so-called "moral rights" or similar rights in a Company Innovation or in any Company Materials as a matter of law, the Employee authorizes the Company and its successors, assigns, and licensees —

(1) to make any desired changes to any part of the Company Innovation or Company Materials;

(2) to combine any such part with other materials; and

(3) to withhold the Employee's identity in connection with any business operations relating to that Company Innovation or Company Materials;

in each case without additional compensation to the Employee.

8. Confidential Information

(a) **Confidentiality obligation:** Both during and after the Employment Relationship, the Employee will not disclose to anyone, directly or indirectly, nor will the Employee use —

(1) any Confidential Information of the Company or any other Company Group Member except (i) as required in the course of the Employment Relationship or (ii) with the prior written consent of the Company or the other Company Group Member, as applicable; nor

(2) any information of a Person as to which the Company is under an obligation of confidence, except as directed by the Company or with the prior consent of the owner of that information.³

(b) **Exception for subpoenas, etc.:** Notwithstanding subdivision (a), the Employee may

³ This provision can help the Employee in an indirect way: Sometimes a business partner of the Company will ask for the Company's employees to sign a confidentiality agreement directly with the business partner. If the Company decides to push back against such a request, it will help if the Company can point to specific language in the Employment Agreement that requires employees to preserve business partners' confidential information in confidence.

disclose Confidential Information if, and to the extent, required by legal process (e.g., a subpoena), provided that the Employee notifies the Company immediately upon receiving or becoming aware of the legal process in question.

(c) **Confidential information of others:**⁴

(1) The Employee will strictly adhere to any obligations that he or she may have to former employers, consulting clients, or other Persons, insofar as the Employee's use or disclosure of confidential information of any such other Person is concerned.

(2) The Employee represents that to the best of his or her knowledge, the Employment Relationship duties for the Company will not violate any such obligation.

(3) The Employee will promptly advise his or her supervisor if it appears to the Employee that his or her duties for the Company may call for him or her to use confidential information of a former employer or any other Person in breach of an obligation of confidence of the Employee.

(d) **Continued applicability:** For the avoidance of doubt, the requirements of this "Confidential Information" section will apply after termination of this Agreement without regard to whether the "Noncompetition covenant" section of this Agreement is in effect at the time in question.

9. Personnel data

(a) **Employee consent:** The Employee consents for the Company to hold computer records and personnel files relating to the Employee.⁵ These may include, but are not limited to, the Employee's employment application, references, bank details, performance appraisals, holiday and sickness records, salary reviews and remuneration details and other records, (which may, where necessary, include sensitive data relating to the Employee's health, and data held for ethnic monitoring purposes).

(1) The Employee acknowledges that the Company requires such personal data for personnel administration and management purposes and to comply with its obligations regarding the keeping of employee/worker records.

(2) The Employee will have a right of access to this data as prescribed by law.

⁴ This clause could give the Company at least some help if a former employer of the Employee were to make a claim that the Employee stole the former employer's confidential information.

⁵ This consent may be required in some jurisdictions such as the members of the European Union.

(b) Data processing, disclosure, and cross-border-transfer: The Employee consents for the Company to process personal data relating to the Employee for personnel administration and management purposes, and when necessary for those purposes, make such data available to its advisors, to parties providing products and/or services to the Company (such as IT systems suppliers, pension, benefits and payroll administrators), to regulatory authorities (including tax authorities) and as required by law; and

(c) To transfer any and all such data to and from the Company or any other Company Group Member, including outside the European Economic Area.

10. Termination

(a) **Termination by either party:** Either the Company or the Employee can terminate the Employment Relationship at any time, for any reason, with cause (sometimes referred to as "for cause") or without cause.

(b) **Waiver of notice period:** If the Employee tenders his or her resignation from the Employment Relationship effective after a stated notice period, **the Company may in its discretion waive the notice period** (orally or in writing), in which case the Employment Relationship will end immediately upon the waiver.

(c) **Final compensation:** IF: The Employment Relationship is terminated for any reason; THEN:

(1) The Employee will be entitled only to the Employee's **earned compensation**, as well as any other benefits earned and due prior to termination.

(2) The Company will then have **no further obligations to the Employee** except as may be expressly provided otherwise in the Agreement Document or in a separate authorized written agreement with the Company.

(d) **Property return:** Upon any termination of the Employment Relationship for any reason, the Employee will preserve intact and promptly deliver to the Company all originals and all copies of all Company Materials, as well as all other property of Company or any other Company Group Member, that are in the Employee's possession, custody, or control.

(e) **Exit interview:** Upon any termination of the Employment Relationship for any reason, the Employee will participate in an exit interview at a time and place reasonably determined by the Company. In connection with the exit interview, the Employee will provide the Company with such information as it may reasonably request about the Employee's

reasons for leaving; his or her future employment plans, if any; and any Company Innovations and/or Company Materials that the Employee may have created or may have in his or her possession.

(f) **Continued enforceability:** Termination of the Employment Relationship for any reason will not affect the continued enforceability of this Agreement of those provisions that by their nature are intended to continue in effect after termination.

(g) **No false identification:** After termination of the Employment Relationship, the Employee will not identify or hold out him- or herself as being connected with or employed by the Company, nor any other Company Group Member, in any capacity, unless the Employee is in fact so connected or employed at the time in question.⁶

11. Noncompetition covenant *

(a) **Confidential information access:** The Company intends to provide the Employee, during the Employment Relationship, with access to pre-existing and new Confidential Information on an as-needed basis commensurate with the Employee's duties, including but not limited to access to appropriate portions of the Company's computer network.

(b) **Post-termination restrictions:** To aid in the protection of the Company's legitimate interests in such Confidential Information, the Employee agrees that, beginning on the date that the Company first provides him or her with such access in any form, and ending on the date set forth in the Agreement Document — **one year** after the termination of the Employment Relationship if not otherwise specified in the Agreement Document — unless the Company in its **sole** discretion gives its prior written consent, the Employee will not, directly or indirectly, (1) participate, for the benefit of the Employee or any other Person, in any business that competes with any Company Business anywhere in the world, where the Employment Relationship materially related to such Company Business during the Employment

⁶ This provision addresses the possible situation in which, say, a sales employee's employment is terminated, after which the (former) employee begins holding himself out as an authorized reseller, dealer, etc., of his former company.

* Not applicable unless so stated in the Agreement Document. **CAUTION:** California law basically prohibits employers from requiring employees to agree to post-employment noncompetition covenants; an employer that includes such a covenant in its employment agreement might be liable for damages.

Relationship; nor

(2) without limiting clause (1), entice, induce or encourage any customer or prospective customer of Company or any other Company Group Member to transfer or remove its business from that company if the Employee had any material involvement with the business in question during the Employment Relationship; nor

(3) interfere, directly or indirectly, with the relationship between the Company or any other Company Group Member and that company's employees by inducing any such employee to terminate his or her employment, whether or not such employee would thereby breach his or her employment agreement with that company; nor

(4) solicit for employment, directly or indirectly, on behalf of the Employee or any other Person, any employee of the Company or any other Company Group Member; nor

(5) induce or assist any other Person to engage in any of the activities described in subdivisions (1) through (4).

(c) **Materiality of noncompetition covenant:** The Employee acknowledges that the Company would not permit him or her to have, or to continue to have, access to Confidential Information without the Employee's agreement to the provisions of this "Non-competition covenant" section.

(d) **Release from covenant:** IF: The Employee has never been provided with any such access to Confidential Information in any way at the time the Employment Relationship is terminated — including but not limited to never having been provided access to an email account or other access to a computer network of Company or any other Company Group Member — THEN: The Employee will be automatically released from the restrictions in subdivision (a).⁷

(e) **Tolling:** (1) The parties intend that, if the Employee violates the post-termination restrictions set forth in subdivision (b), the Company shall not be deprived of the benefit of those restrictions due to the time required to enforce those restrictions.

(2) Accordingly, the restrictions in subdivision (b) will end the agreed length of time after the later of (i) the date of termination of the Employment Relationship for any reason, and (ii) the date of entry by a court of competent jurisdiction of a final judgment enforcing the restrictions in subdivision (b), as written or as modified by the court.

⁷ This release provision is intended to try to make the non-competition covenant more "saleable" to a judge or arbitration panel.

(f) **Consent to competitive employment:**⁸ The Company will not unreasonably withhold its consent to the Employee's taking a job at a company that competes with one or more of the Company Group Members, BUT ONLY IF, before starting the new job, the Employee provides the Company with a document reasonably satisfactory to the Company, signed by both the Employee and an authorized representative of the competing company, containing a written description of (1) the Employee's duties in the new job, and (2) the specific ways by which the competing company will ensure that the Employee will neither use nor disclose trade secrets or other Confidential Information of Company or any other Company Group Member.

(g) **Exception:** The Employee may acquire a direct or indirect ownership interest of not more than 5% of the outstanding securities of any corporation which is engaged in activities prohibited by subdivision (a) IF such securities are listed on any recognized securities exchange or traded in the over-the-counter market in the United States, PROVIDED THAT such investment is of a totally passive nature and does not involve the Employee's devoting time to the management or operations of such corporation.

(h) **Modification of restrictions:** IF: A Tribunal determines that any of the restrictions set forth in this "Noncompetition covenant" section is unreasonably broad or otherwise unenforceable under applicable law; THEN: (1) the Tribunal's determination shall be binding only within the geographic area in which the Tribunal has jurisdiction; and (2) the restriction will not be terminated or rendered unenforceable; instead, the Tribunal is hereby authorized and requested restriction — solely for purposes of enforcement within the geographic area of the Tribunal's jurisdiction — to reform the to the minimum extent required to render it enforceable.

12. Mandatory arbitration *

(a) Except to the extent affirmatively prohibited by law or as otherwise agreed in writing between the parties, any dispute, controversy or claim that in any way arises out of or relates to this Agreement or the Employment

⁸ This consent provision is intended to try to help the parties amicably resolve any dispute involving the non-competition provision.

* Not applicable unless so stated in the Agreement Document. NOTE: The validity of mandatory-arbitration clauses in employment contracts is the subject of no small controversy.

Relationship will be submitted to binding arbitration.

(b) Any such arbitration will be conducted in English-language arbitration, in the city of the Company's office in which the Employee is principally employed, in accordance with the **National Rules for the Resolution of Employment Disputes of the American Arbitration Association** in effect on the date of the demand for arbitration, available on the Web at <http://www.adr.org>.

(c) Notwithstanding subdivision (a), to protect Innovations or Confidential Information, or other proprietary rights, the Company or any Company Group Member may seek temporary or preliminary injunctive relief in a court of competent jurisdiction without waiving its right to arbitration.

(d) Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction.

13. General provisions

(a) **Amendments:** Except as otherwise provided in this Agreement, any amendment or modification of this Agreement must be in writing and **signed by an authorized officer** of the Company, and any other attempt to amend or modify this Agreement, orally or in writing, will be void.

(b) **Amendments – unilateral (going forward):** (1) The Company may unilaterally amend this Agreement, or any exhibit, schedule, or appendix of this Agreement, on a going-forward basis, by giving at least five business days' notice to the Employee. EXCEPT AS STATED in subdivisions (2) and (3), if the Employee does not resign before the end of the time specified in the notice, then the amendment will go into effect automatically without further action by the parties. (2) For the avoidance of doubt, without the Employee's express written agreement, a unilateral amendment by the Company will not retroactively eliminate or modify any right already exercised by the Employee under this Agreement. (3) For the avoidance of doubt, **no unilateral amendment will retroactively modify any binding dispute-resolution provisions** of this Agreement for then-pending disputes (for example, binding-arbitration provisions) unless the parties expressly agree otherwise.

(c) **Assignment:** All of the terms and provisions of this Agreement will be binding upon and inure to the benefit of and be enforceable by the respective heirs, executors, administrators, legal representatives, successors and assigns of the parties hereto, except that the Employee's duties and responsibilities

under this Agreement are of a personal nature and **will not be assignable or delegable by the Employee in whole or in part.**

(d) **Entire agreement:** (1) This Agreement sets forth the final, complete, exclusive, and binding statement of the agreement of its signatory parties concerning the subject matter of the Agreement; it supersedes all prior agreements and undertakings, both written and oral, between or on behalf of the signatory parties with respect to that subject matter. (2) Except as stated in this Agreement, there are no promises, understandings, representations, or warranties of any kind between the parties concerning its subject matter. **Neither party is entitled to rely on any representation by the other party, or in the case of the Employee, by any other Company Group Member, concerning the same.**

(e) **Equitable relief:** (1) The Employee acknowledges and agrees that if he or she materially violates this Agreement's provisions concerning Confidential Information (or, if applicable, the "Noncompetition covenant" section" of this Agreement), it would result in harm to the Company, or to one or more other Company Group Members, that was not capable of being redressed by an award of money damages alone. (2) In any such event, the Company may seek one or more of a preliminary injunction, a temporary restraining order, a permanent injunction, or comparable equitable relief, in any court of competent jurisdiction, to restrain any further or continued violation, to order that the Employee comply with this Agreement, or both.⁹

(2) Any other affected Company Group Member, if any, will have the same right as the Company to seek equitable relief against the Employee. (3) The right to seek such equitable relief will be in effect even if this Agreement requires arbitration of disputes.

(f) **Governing law:** The laws that apply in the location specified in the Agreement Document will govern any claim, controversy, or other dispute arising out of **or relating to** (i) this Agreement, or (ii) the interpretation or enforcement of this Agreement, **without regard to conflicts-of-law or choice-of-law rules.**

(i) this Agreement, or (ii) the interpretation or enforcement of this Agreement, **without regard to conflicts-of-law or choice-of-law rules.**

(ii) the interpretation or enforcement of this Agreement, **without regard to conflicts-of-law or choice-of-law rules.**

(iii) the interpretation or enforcement of this Agreement, **without regard to conflicts-of-law or choice-of-law rules.**

⁹ Unlike some agreement forms, **this injunction provision does not include a waiver by the Employee of any requirement that the Company post a bond as a prerequisite to obtaining a preliminary injunction.**

(g) **Job change.** If the Employee changes jobs from one Company Group Member to another, this Agreement will be deemed automatically assigned by the first Company Group Member to the other Company Group Member.

(h) **Non-exclusive remedies:** Except as otherwise stated in this Agreement, each remedy provided in this Agreement shall be in addition to any other remedy provided by this Agreement or by law.

(i) **Non-U.S. supplemental terms:** IF: The Company is organized under the laws of a country or other jurisdiction outside the United States of America and its territories and possessions; THEN: The terms of any country-specific addendum signed by the parties, if any, will be deemed part of this Agreement and will take precedence over any inconsistent provision(s) in these Model Provisions.

(j) **Notices:** All notices and statements with respect to this Agreement must be in writing.

(1) Notices to the Company are to be addressed to the Employee's supervisor at the Company, with a copy to the Company's counsel, its human-resources manager, or both.

(2) Notices to the Employee may be delivered to him or her in person or by email, **or may be delivered to the Employee's then-current address as indicated in the Company's payroll records.**

(k) **Section headings:** The section and subsection headings of this Agreement are for convenience only and are not intended to define, limit, or expand its provisions.

(l) **Severability.** IF: A Tribunal determines that any provision of this Agreement, or its application to anyone or under any circumstances, is invalid or unenforceable and declines to reform such provision; THEN: For purposes of the dispute being decided by the Tribunal:

(1) except as otherwise provided in this Agreement, the provision(s) in question are to be deemed struck from this Agreement and the remainder of this Agreement is to be fully enforced; and

(2) the invalidity or unenforceability of the provision(s) in question (i) are not to affect any other provision of this Agreement which can be given effect without the struck provision(s), and (ii) are not to be considered to invalidate or render unenforceable such provision in any other jurisdiction.

(m) **Signatures and delivery:** (1) The Agreement Document may be signed and delivered in **separate counterpart originals**; all such counterparts will be deemed to consti-

tute one and the same instrument.

(2) Any counterpart may comprise one or more duplicates, any of which may be signed by less than all of the parties provided that each party whose execution is required signs at least one of the same.

(3) Delivery of a counterpart may be effected (for example) by transmitting a signed signature page by FAX, by emailed PDF, or by other electronic transmission means.

(n) **Third-party beneficiaries:** (1) Each Company Group Member other than the Company (if any) is intended to be a third-party beneficiary of this Agreement to the extent stated in the Agreement.

(2) The parties do not intend for any other party to benefit from any right or obligation under this Agreement unless the Agreement Document expressly so states.

(o) **Waiver:** (1) No effect is to be given to any claim that a party waived a right, obligation, or condition (collectively, "term") stated in this Agreement, or that the party waived a breach of this Agreement, unless the alleged waiver (i) was in writing; and (ii) was signed by the waiving party or by an individual authorized to make binding commitments on behalf of that party.

(2) For the avoidance of doubt, a party's waiver of a term or breach of this Agreement will affect only that term or breach; it is not to be deemed a waiver of any other term or breach. Likewise, the fact that a party, at a given moment in time, did not enforce one or more terms is not to be deemed a waiver by that party of its right to enforce any term at any other time.

– END –

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