

**LEASE**

**BETWEEN**

**EPT CONCORD II, LLC,  
A DELAWARE LIMITED LIABILITY COMPANY**

**(“LANDLORD”)**

**AND**

**CONCORD HWP, LLC,  
A NEW YORK LIMITED LIABILITY COMPANY**

**(“TENANT”)**

**FOR THE LEASE OF**

**HOTEL AND WATERPARK RESORT  
SULLIVAN COUNTY, NEW YORK**

**SEPTEMBER 27<sup>th</sup>, 2013**

## TABLE OF CONTENTS

LEASE BETWEEN EPT CONCORD II, LLC, AS LANDLORD  
AND CONCORD HWP, LLC, AS TENANT,  
COVERING PREMISES IN  
SULLIVAN COUNTY, NEW YORK

	<u>Page</u>
ARTICLE 1. ATTACHMENTS TO LEASE; EXHIBITS .....	1
ARTICLE 2. DEFINITIONS .....	1
2.1    Definitions .....	1
ARTICLE 3. DEMISE OF PREMISES .....	7
3.1    Demise of Premises .....	7
3.2    Net Lease .....	7
3.3    Development Matters.....	8
3.4    Landlord’s Covenant.....	8
3.5    No Representations by Landlord .....	8
ARTICLE 4. TERM.....	9
4.1    Term.....	9
4.2    Options to Extend .....	9
4.3    Continued Possession of Tenant .....	9
4.4    Certain Landlord Rights on Termination for Reletting. ....	10
ARTICLE 5. RENT .....	10
5.1    Payment of Rent.....	10
5.2    Variable Rent; Additional Rent .....	10
5.3    Annual Fixed Rent; Escalation; Deferral.....	11
5.4    Percentage Rent .....	13
5.5    Letter of Credit; Cash Reserves .....	15
5.6    Capital Expense Reserve. ....	16
ARTICLE 6. EXPENSES .....	19
6.1    Payment of Expenses .....	19
6.2    Tenant’s Real Estate Taxes.....	20
6.3    Restrictive Agreements; Common Facilities .....	20
6.4    Utility Payments .....	22
ARTICLE 7. TITLE INSURANCE; TRANSFER OF TITLE.....	22
7.1    Leasehold Title Policy .....	22
7.2    Change of Ownership .....	22
ARTICLE 8. TENANT’S COVENANT TO OPERATE; USE OF PREMISES .....	23
8.1    Operating Covenant .....	23

8.2	Use and Operation of the Leased Premises .....	23
8.3	Continuing Use Restrictions .....	24
8.4	Prohibition of Use .....	24
8.5	Landlord Assistance .....	24
8.6	Tenant’s Right to Control Operations .....	24
ARTICLE 9. TENANT REPORTING .....		25
ARTICLE 10. SUBLETTING AND ASSIGNING .....		25
10.1	Landlord's Consent .....	25
10.2	Permitted Assignment, Subletting and Licenses .....	26
10.3	Continuation/Release of Liability .....	27
10.4	Default Notices After Assignments .....	27
10.5	Assignment of Rights in Sublease .....	27
10.6	Landlord’s Assignment .....	28
10.7	REIT Limitations .....	28
ARTICLE 11. TENANT’S PROPERTY .....		28
11.1	Tenant's Property .....	28
11.2	Grant of Security Interest .....	29
ARTICLE 12. GOVERNMENTAL COMPLIANCE .....		29
12.1	Tenant Responsibilities Generally .....	29
12.2	Parties; Environmental Knowledge .....	29
12.3	Tenant’s Environmental Responsibilities .....	29
12.4	Environmental Indemnities .....	30
12.5	Definition .....	30
12.6	Survival .....	30
ARTICLE 13. MAINTENANCE AND REPAIRS .....		30
13.1	Warranty .....	30
13.2	Maintenance and Repairs .....	31
13.3	Minor Alterations .....	31
13.4	Certain Limitations .....	31
ARTICLE 14. ALTERATIONS AND TENANT’S LIENS .....		31
14.1	Title to Tenant’s Alterations .....	31
14.2	No Tenant Liens .....	32
14.3	Landlord Elective Improvements .....	32
ARTICLE 15. DAMAGE CLAUSE .....		32
15.1	Damage .....	32
15.2	Right to Terminate on Certain Damage .....	33
15.3	Rights to Insurance Proceeds .....	33
ARTICLE 16. CONDEMNATION .....		33
16.1	In General .....	33

16.2	Temporary Taking Awards .....	34
ARTICLE 17. INSURANCE, INDEMNITY, WAIVER OF SUBROGATION AND FIRE PROTECTION 34		
17.1	Casualty Policy .....	34
17.2	DIC Policy Endorsement .....	35
17.3	Liability Insurance; Tenant Negligence.....	35
17.4	Liability Insurance; Landlord Negligence .....	36
17.5	Rental Loss/Business Interruption Insurance .....	36
17.6	Workers' Compensation Insurance.....	36
17.7	Release; Waiver of Subrogation .....	36
17.8	General.....	37
ARTICLE 18. INDEMNIFICATION GENERALLY..... 37		
ARTICLE 19. LEASEHOLD MORTGAGES .....		
19.1	Rights to Mortgage Lease .....	38
19.2	Leasehold Mortgagee Qualifications .....	38
19.3	Defaults .....	39
19.4	Continuation of Liability .....	43
ARTICLE 20. TENANT'S SIGNS..... 44		
20.1	Location and Type .....	44
20.2	Design .....	44
20.3	Interior Signs.....	44
ARTICLE 21. ESTOPPEL; ATTORNMENT AND SUBORDINATION .....		
21.1	Estoppel Certificate.....	44
21.2	Attornment by Tenant.....	45
21.3	Fee Mortgages/Subordination.....	45
21.4	Form of Documents .....	45
ARTICLE 22. DEFAULT .....		
22.1	Tenant Default .....	46
22.2	Remedies.....	47
22.3	Landlord Default, Cure Rights.....	48
22.4	Self Help .....	48
22.5	Remedies Cumulative .....	48
22.6	Limitation on Landlord's Liability .....	48
22.7	Interest on Past Due Obligations; Late Charges; Application of Payments to Past Due Obligations .....	49
ARTICLE 23. ACCESS TO PREMISES .....		
23.1	Ongoing Access and Inspection Rights .....	49
23.2	Landlord's Construction Inspection Rights .....	49



ARTICLE 24. FORCE MAJEURE .....	50
ARTICLE 25. MISCELLANEOUS .....	50
25.1 Lease Not to be Recorded .....	50
25.2 Notices .....	50
25.3 Waiver of Performance and Disputes .....	52
25.4 Modification of Lease .....	52
25.5 Captions .....	52
25.6 Lease Binding on Successors and Assigns, etc.....	52
25.7 Brokers .....	52
25.8 Landlord’s Status as a REIT .....	52
25.9 Governing Law .....	53
25.10 Estoppel .....	53
25.11 Joint Preparation .....	53
25.12 Interpretation.....	53
25.13 Inconsistencies .....	53
25.14 Severability .....	53
25.15 Landlord and Tenant.....	53
25.16 Authority.....	53
25.17 Time is of the Essence .....	54
25.18 Consent .....	54
25.19 Attorneys’ Fees .....	54
25.20 Further Assurances .....	54
25.21 Counterparts.....	54
25.22 Rules of Construction .....	54
ARTICLE 26. WAIVER OF TRIAL BY JURY .....	55
ARTICLE 27. EXHIBITS .....	55

## LEASE

THIS LEASE, dated as of September \_\_\_, 2013 (the "*Effective Date*"), is made by and between EPT CONCORD II, LLC, a Delaware limited liability company, with an office at c/o Entertainment Properties Trust, 909 Walnut Street, Suite 200, Kansas City, Missouri 64106 ("*Landlord*"), and CONCORD HWP, LLC, a New York limited liability company, with an office at 13 Green Mountain Drive, Cohoes, New York 12047 ("*Tenant*").

### ARTICLE 1. ATTACHMENTS TO LEASE; EXHIBITS

Attached to this Lease and hereby made a part hereof are the following:

EXHIBIT A – a description of the tract of land constituting the Leased Premises.

EXHIBIT B – a description of the tracts of land constituting the Resort Property.

EXHIBIT C – a site plan (the "*Site Plan*") of the Leased Premises and the Resort Property showing (i) the location of the Facility, and (ii) the Resort Property of which the Leased Premises are a part, and (iii) the location of any other buildings and improvements constructed or to be constructed, if known, within the Resort Property by any person or entity.

EXHIBIT D – a description of the Facility and the improvements to be constructed on the Leased Premises.

EXHIBIT E – a listing of the Master Declaration, exhibits thereto, and any Restrictive Agreements.

EXHIBIT F – Memorandum of Term Commencement.

### ARTICLE 2. DEFINITIONS

2.1 **Definitions.** The following terms for purposes of this Lease shall have the meanings hereinafter specified (additional terms may be defined elsewhere in the Lease):

"*ADA*" means the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. 12.101, *et seq.*

"*Additional Rent*" means Expenses, Taxes, and other obligations payable by Tenant with respect to the possession, use, occupancy and operation of the Leased Premises

"*Affiliate*" means as applied to a person or entity, any other person or entity directly or indirectly controlling, controlled by, or under common control with, that person or entity.

"*Annual Fixed Rent*" means the annual fixed rent payable under this Lease, as set forth in Section 5.3.

**"Authorized Institution"** means a bank, savings and loan institution, investment bank, trust or insurance company, credit corporation, real estate investment trust, pension, welfare or retirement fund, or any other entity regularly engaged in the making or purchase of loans acting either in its own capacity or as a trustee, and insured by the Federal Deposit Insurance Corporation with a minimum capital requirement of \$200,000,000.00.

**"Capital Expenditure(s)"** is defined in Section 5.6.

**"Capital Expense Reserve"** is defined in Section 5.6.

**"Code"** means the Internal Revenue Code of 1986, as the same may be amended or supplemented, and the rules and regulations promulgated thereunder.

**"Commencement Date"** is defined in Section 4.1.

**"Common Areas"** shall include, without limitation, all areas of the Resort Property, designated by the Master Association for the common use of the members, all as more particularly described in the Master Declaration.

**"Common Elements"** means the Common Facilities and Common Areas, within the Resort Property, all as more particularly defined in the Master Declaration and any other Restrictive Agreements, whether or not shown on the Site Plan, and regardless of by whom owned.

**"Common Expense"** means all costs, expenses contributions, fees, and assessments of every kind and nature paid or incurred by the Master Association in connection with fulfilling its duties, including, without limitation: (i) general administrative expenses incurred by the Master Association as set forth in an approved budget, including expenses relating to maintaining appropriate insurance and maintaining, repairing or replacing Common Elements; (ii) any fees or charges payable by the Master Association to any Governmental Authority with respect to any dedicated facilities; (iii) all administrative expenses and any amounts that must be raised and deposited by the Master Association in order to maintain operating reserves as required under the Master Declaration; (iv) all costs and expenses payable by the Master Association pursuant to the Master Declaration; and (v) the management fee paid to the Manager. Common Expenses shall not include Taxes.

**"Common Facilities"** shall include, without limitation, and as applicable, all parking areas, streets, driveways, curb cuts, access facilities, drive aisles, sidewalks, malls, landscaped areas, trails, paths, sanitary and storm sewer lines, and appurtenances, stormwater swales, water, gas, electric, telephone, cable, lighting, trunk lines, and other utility lines, systems, conduits and facilities and other common and service areas, whether located within or outside the Leased Premises, and serving the Leased Premises. Common Facilities shall not include land or Improvements, which are exclusively constructed and maintained for use by Tenant, solely within the Leased Premises, except to the extent covered by an easement or access rights in favor of the Master Association.

**"Construction Term"** is defined in Section 4.1.

“*CPF*” means the Consumer Price Index for all Urban Consumers, U.S. City Average, published by the Bureau of Labor Statistics of the United States Department of Labor (base year 1982-84=100), or any successor index thereto.

“*Default Rate*” means the lesser of (i) the per annum interest rate from time to time publicly announced by Citibank, N.A., New York, New York as its base rate (i.e., its Prime Rate) plus four percent (4%) or (ii) the highest rate of interest that may lawfully be charged to the party then required to pay interest under this Lease at the Default Rate. If Citibank, N.A. should cease to publicly announce its base rate, the Prime Rate hereunder shall be the prime, base or reference rate of the largest bank (based on assets) in the United States which announces such rate.

“*Delivery Date*” is the date upon which the Landlord obtains the Initial Tenant Approvals.

“*Development Agreement*” means that certain Development Agreement between Landlord and Tenant of even date herewith.

“*Effective Date*” is the date first above written.

“*Environmental Laws*” shall mean (i) whenever enacted or promulgated, any applicable federal, state, foreign and local law, statute, ordinance, rule, regulation, license, permit, authorization, approval, consent, court order, judgment, decree, injunction, code, requirement or agreement with any governmental entity, (x) relating to pollution (or the cleanup thereof), or the protection of air, water vapor, surface water, water, drinking water supply, land (including land surface or subsurface), plant, aquatic and animal life from injury caused by a Hazardous Substance, or (y) concerning exposure to, or the use, containment, storage, recycling, reclamation, reuse, treatment, generation, discharge, transportation, processing, handling, labeling, production, disposal or remediation of Hazardous Substances, as amended and as now or hereafter in effect, and (ii) any common law or equitable doctrine (including, without limitation, injunctive relief and tort doctrines such as negligence, nuisance, trespass and strict liability) that may impose liability or obligations or injuries or damages due to, or threatened as a result of, the presence of, exposure to, or ingestion of, any Hazardous Substance. The term Environmental Laws include, without limitation, the federal Comprehensive Environmental Response Compensation and Liability Act of 1980, the U.S. Environmental Protection Agency Regulations at 40 C.F.R., Part 261, the Superfund Amendments and Reauthorization Act, the federal Water Pollution Control Act, the federal Clean Air Act, the federal Clean Water Act, the federal Resources Conservation and Recovery Act of 1976 (including the Hazardous and Solid Waste Amendments to RCRA), the federal Solid Waste Disposal Act, the federal Toxic Substance Control Act, the federal Insecticide, Fungicide and Rodenticide Act, the federal Occupational Safety and Health Act of 1970, the federal National Environmental Policy Act and the federal Hazardous Materials Transportation Act, each as amended, and as now or hereafter in effect, and any similar state or local Law.

“*Facility*” means the following: (i) the hotel and waterpark complex to be located on the Leased Premises consistent with the prototypes of similar size, but not necessarily in layout, to facilities currently operated by Affiliates of Tenant or Waterpark Ventures Management Services-Poconos, LLC in the Wisconsin Dells, Wisconsin and in Sevierville, Tennessee, which hotel and waterpark complex shall contain approximately 380 hotel rooms; a spa; approximately



80,000 square feet of indoor waterpark; an outdoor waterpark; indoor amusement, family entertainment and dry play activities; a 250-seat dining facility; a 100-seat sports bar; snack bars and concessions; a 40,000 square foot (or more) conference and banquet facility; and up to 5,000 square feet of retail for sundries and gift shops; and (ii) outdoor activities and complexes including 25 to 30 resort condos and detached or duplex cabins; an outdoor zip-line and ropes course; a mountain coaster; a tubing facility at the former ski area; and hiking/biking/riding trails on the Common Elements, all as further described on Exhibit D, provided that the number of hotel rooms and total square footage may not be increased or decreased by more than ten percent (10%), without Landlord's prior consent and approval.

**"Final Plans"** means the final plans, drawings and specifications for the Facility approved by Landlord.

**"Fiscal Tax Year"** is defined in Section 6.2(a)(i).

**"Force Majeure"** is defined in Article 24.

**"Governmental Authorities"** means all federal, state, county, municipal and local departments, commissions, boards, bureaus, agencies and offices thereof, having or claiming jurisdiction over all or any part of the Resort Property (if applicable) and/or the Leased Premises, or the use thereof.

**"Gross Receipts"** is defined in Article 5.

**"Hazardous Substance"** is defined in Section 12.5.

**"Hotel Facility"** shall mean that part of the Facility designated on the Site Plan as the **"Hotel,"** to be operated as a hotel and to be erected by Tenant on the Leased Premises and to contain approximately 380 hotel rooms and approximately four hundred thousand (400,000) square feet of Floor Area, and which shall include the Waterpark.

**"Initial Fixed Term"** is defined in Section 4.1.

**"Initial Fixed Term Escalation Date"** is defined in Section 5.3(b).

**"Initial Tenant Approvals"** means the approvals establishing the Leased Premises as a separately platted tax and legal parcel, with the location configuration and boundaries of the Leased Premises, together with all zoning approvals, preliminary and final site plan approvals, and findings pursuant to the State Environmental Quality Review Act ("SEQRA") necessary to allow Tenant to obtain excavation and grading permits and/or authorization for the commencement of construction of the Facility.

**"Knowledge"** means the actual knowledge of an authorized representative of Landlord, designated by Landlord, without duty of inquiry or investigation.

**"Landlord Allowance"** is the total of the amounts paid or to be paid by Landlord pursuant to Section 2.2(a)(1) of the Development Agreement.

**"Laws"** means all present and future requirements, administrative and judicial orders, laws, statutes, ordinances, codes, rules and regulations of any Governmental Authority, including, but not limited to the ADA.

**"Lease Year"** means a period of twelve (12) full calendar months. The first Lease Year shall begin on the first day of the next occurring calendar month following the Commencement Date unless the Term commences on the first day of a calendar month, in which case the first Lease Year shall begin on the Commencement Date. Each succeeding Lease Year shall commence on the anniversary of the first Lease Year.

**"Leased Premises"** means the Facility, the land thereunder described on Exhibit A attached hereto, and all improvements, fixtures, appurtenances, rights, easements and privileges thereunto belonging or in any way appertaining, and all other rights, easements and privileges granted to Tenant in this Lease, excluding, however, Tenant's Property as defined below.

**"Letter of Credit"** shall mean that certain letter of credit in the amount of Five Million and 00/100 Dollars (\$5,000,000.00) to be provided by Tenant, or, in the event Tenant fails to provide the Letter of Credit, by Arthur Berry, Ken Ellis and Waterpark Ventures Management Services-Poconos, LLC ("**WVMS**"), jointly and severally, to be maintained, and renewed on an annual basis, during the Initial Fixed Term of the Lease.

**"Market Area"** means the greater Catskills area of New York situated in the counties of Delaware, Sullivan, Ulster and Greene.

**"Master Association"** means the Concord Resorts Master Association LLC formed on November 28, 2011, and its successors and assigns, or, upon merger or consolidation with another business entity or corporation, the entity surviving such merger or resulting from such consolidation.

**"Master Declaration"** means that certain Master Declaration of Covenants, Conditions, Easements and Restrictions, to be recorded against the Leased Premises and the Resort Property that shall contain provisions that: (i) provide for necessary easements for vehicular and pedestrian access, parking, storm water management, and utilities for the benefit of each of the Leased Premises and the Resort Property; (ii) obligate the occupant of the Leased Premises to maintain drive aisles, parking lots, lighting sidewalks, landscaping and other features of the Facility in first class condition and repair; (iii) obligate Landlord (or its designee) to develop and maintain Common Areas on the Resort Property in first class condition and repair; (iv) provide for payment by Tenant of its pro-rata share of all Common Expenses of the Resort Property; (v) regulate and restrict certain uses of the Resort Property consistent with a first class rural destination resort; and (vi) provide for other terms, agreements and conditions consistent with the operation and use of the Resort Property and the Leased Premises as a first-class multi-attraction rural destination resort.

**"Master Plan"** means that certain Master Plan approved by the Town of Thompson Town Board on January 16, 2013, for the development of the Resort Property as a master-planned, multi-attraction destination resort



“**Mortgage**” means any mortgage or deed of trust or other instrument in the nature thereof evidencing a security interest in the Leased Premises or any part thereof.

“**Option Period Escalation Date**” is defined in Section 5.3.

“**Option Periods**” is defined in Section 4.2

“**Percentage Rent**” is defined in Section 5.4.

“**Permitted Use**” is defined in Section 8.2.

“**Plans and Specifications**” is defined in the Development Agreement.

“**Related Agreement**” means any agreement between Landlord, or an Affiliate of Landlord, and Tenant, or an Affiliate of Tenant.

“**Rent**” means Annual Fixed Rent, Percentage Rent, Additional Rent, and any other charges, expenses or amounts payable by Tenant under this Lease.

“**Resort Property**” means the tract of land described on **Exhibit B** attached hereto and as shown on the Site Plan, together with any buildings, Common Facilities and other improvements thereon, as the Resort Property is constituted from time to time.

“**Restrictive Agreements**” means those certain reciprocal easement agreements, operating agreements, development agreements, easement agreements and/or other similar agreements and instruments that govern and regulate the development of the Leased Premises, other than contained within the Master Declaration, including, without limitation, all other agreements described on **Exhibit E** attached hereto and by this reference made a part hereof.

“**Standards**” shall mean the standards of quality of a hotel and waterpark similar to those currently operated by an Affiliate of WVMS in Sevierville, Tennessee, and the Wisconsin Dells, Wisconsin, consistent with past practices.

“**Taxes**” is defined in Section 6.2(a)(ii).

“**Taxes Applicable to Leased Premises**” is defined in Section 6.2(a)(iii).

“**Tenant’s Operating Covenant**” is defined in Section 8.1.

“**Tenant’s Property**” is defined in Article 11.

“**Tenant’s Signs**” is defined in Section 20.2.

“**Term**” and “**Term of this Lease**” means the Initial Fixed Term as provided in Article 4 and any renewal or extension thereof.

“**The Resort**” shall mean that certain multi-attraction destination resort being developed by Landlord on the Resort Property pursuant to the Master Plan, including the Facility on the Leased Premises.

"*Variable Rent*" shall mean the rent accruing during the Construction Term from the Effective Date until the expiration of the Construction Term, an amount equal to an annualized return on Landlord's Allowance advanced, paid or incurred by Landlord (as part of Landlord's Allowance) on or before the twentieth (20<sup>th</sup>) day of the preceding month, including sums accrued as Additional Rent, at a rate of interest equal to nine percent (9%) per annum. Variable Rent shall not be payable during the Construction Term but shall accrue during the Construction Term as herein provided and be added to the Landlord's Allowance on a monthly basis.

"*Waterpark*" shall mean a facility or component of a facility to have at least eighty thousand (80,000) net usable square feet of indoor water-related recreational amenities or activities and outdoor water-related recreation amenities or activities.

### **ARTICLE 3.** **DEMISE OF PREMISES**

3.1 **Demise of Premises.** Landlord hereby demises and leases the Leased Premises unto Tenant, and Tenant hereby leases the same from Landlord, for the consideration and upon the terms and conditions set forth in this Lease.

3.2 **Net Lease.** This Lease shall be deemed and construed to be a "net lease," and Tenant shall pay to Landlord, absolutely net throughout the Term of this Lease, the Rent, free of any charges, assessments, impositions or deductions or any kind and without abatement, deduction or set-off whatsoever. Under no circumstances or conditions, whether now existing or hereafter arising, or whether beyond the present contemplation of the parties, shall Landlord be expected or required to make any payment of any kind whatsoever or be under any other obligation or liability hereunder, except as herein otherwise expressly set forth. Tenant shall pay all costs, expenses and charges of every kind and nature relating to the Leased Premises, except debt service on any indebtedness of Landlord, which may arise or become due or payable prior to, during or after (but attributable to a period falling prior to or within) the Term of this Lease. Except as otherwise specifically provided in this Lease, Tenant's obligation to pay Rent hereunder shall not terminate prior to the date definitely fixed for the expiration of the Term, and, except as otherwise provided herein, the obligations of Tenant hereunder shall not be affected by reason of: any damage to or destruction of the Leased Premises or any part thereof, any taking of the Leased Premises or any part thereof or interest therein by condemnation or otherwise, any prohibition, limitation, restriction or prevention of Tenant's use, occupancy or enjoyment of the Leased Premises or any part thereof, or any interference with such use, occupancy or enjoyment by any person or for any reason, any matter affecting title to the Leased Premises, any default by Landlord hereunder, the impossibility, impracticability or illegality of performance by Landlord, Tenant or both, any action of any Governmental Authority, Tenant's acquisition of ownership of all or part of the Leased Premises (unless this Lease shall be terminated by a writing signed by all persons having an interest in the Leased Premises), any breach of warranty or misrepresentation, or any other cause whether similar or dissimilar to the foregoing and whether or not Tenant shall have notice or knowledge thereof and whether or not such cause shall be foreseeable. The parties intend that the obligations of Tenant under this Lease shall be separate and independent covenants and agreements and shall continue unaffected unless such obligations have modified or terminated pursuant to an express provision of this Lease.

3.3 **Development Matters.** Development and construction of the Facility shall be governed by the Development Agreement, which is incorporated herein and made a part hereof by this reference. In the event that the Development Agreement terminates pursuant to Section 1.3(h) thereof, this Lease shall terminate and be of no further force or effect (except as to those obligations which by their nature would survive the expiration or early termination of this Lease). In the event of termination under this Section 3.3, each party shall be responsible for its costs and expenses and shall have no further rights or claims against the other party.

3.4 **Landlord's Covenant.** Landlord represents and warrants to Tenant that: (i) Landlord has full right and lawful authority to enter into and perform Landlord's obligations under this Lease for the Term of this Lease, and Landlord has not suffered, incurred or entered into any contracts, leases, tenancies, agreements, restrictions, violations, encumbrances or defects in title of any nature whatsoever which materially adversely affect Landlord's right, title and interest in the Leased Premises or the fulfillment of its obligations under this Lease; (ii) except for any Mortgages which exist upon the Commencement Date, Tenant's rights under this Lease shall not be subject or subordinate to any Mortgage, except for such subordination as may be accomplished in accordance with the provisions of Article 21; and (iii) if Tenant fully discharges the obligations herein set forth to be performed by Tenant, Tenant shall have and enjoy, during the Term of this Lease, the quiet and undisturbed possession of the Leased Premises together with the right to use the Common Facilities, as in this Lease contemplated, free from interference by Landlord or any party claiming by, through or under Landlord but none other.

3.5 **No Representations by Landlord.** Tenant hereby accepts the Leased Premises in its "AS IS, WHERE IS" condition as of the Commencement Date. Tenant acknowledges that, except as expressly set forth herein, Landlord has not made, does not make, and specifically negates and disclaims any representations, warranties, promises, covenants, agreements or guaranties of any kind or character whatsoever, whether express or implied, oral or written, of, as to, concerning, or with respect to, (i) the value, nature, quality or condition of the Leased Premises, including, without limitation, the water, soil and geology; (ii) the suitability of the Leased Premises for any and all activities and/or uses which may be conducted thereon, including, without limitation, the Permitted Use; (iii) the compliance of or by the Leased Premises with any laws, rules, ordinances or regulations of any applicable Governmental Authorities; (iv) the habitability, merchantability, marketability, profitability or fitness for a particular purpose of the Leased Premises, or (v) any other matter with respect to the Leased Premises, and specifically, Landlord has not made, does not make and specifically negates and disclaims any representations or warranties regarding compliance of the Leased Premises with any Environmental Laws. Except as expressly set forth herein, Tenant shall rely solely on its own investigation of the Leased Premises and not on any information provided or to be provided by Landlord, its directors, contractors, agents, assigns, employees, attorneys or representatives. Landlord shall not be liable or bound in any manner whatsoever by any verbal or written statements, representations or information pertaining to the Leased Premises or the operation thereof, furnished by any party purporting to act on behalf of Landlord.



**ARTICLE 4.**  
**TERM**

4.1 **Term.**

(a) The construction term (the "***Construction Term***") of this Lease shall commence on the Delivery Date and shall expire on the earlier of the following: (a) the date that Tenant opens for business in the Leased Premises, (b) the date that a certificate of occupancy is issued for the Facility, and (c) the date that is twenty-four (24) months after the Landlord has delivered to Tenant notice to commence construction in accordance with Section 1.3 of the Development Agreement unless neither (a) or (b) above has occurred due to Force Majeure; provided, however, that in the event that the earlier of the dates set forth in (a), (b) and (c) is not the last day of the month, then the Construction Term expiration date shall be the last day of the month in which the earlier of such dates occurs. Landlord shall deliver notice to Tenant upon completion and satisfaction of the foregoing requirements to memorialize the Delivery Date.

(b) The initial fixed term (the "***Initial Fixed Term***") of this Lease shall commence on the expiration of the Construction Term (the "***Commencement Date***"), and shall expire, unless extended in accordance with Section 4.2, at midnight on the last day of the then applicable calendar month that is twenty (20) years after the Commencement Date. After the Commencement Date, Tenant shall promptly execute and deliver to Landlord a Memorandum of Term Commencement and Annual Fixed Rent in the form attached hereto as **Exhibit F**.

4.2 **Options to Extend.** Provided Tenant is not in default under this Lease, Tenant shall have the right to extend the Term of this Lease for two (2) successive periods of ten (10) years each, following by a successive period of eight (8) years (the "***Option Periods***") from the date upon which the Term would otherwise expire upon the same terms and conditions as those herein specified. If Tenant elects to exercise its option for any Option Period, it shall do so by giving Landlord written notice of such election at least nine (9) months before the beginning of the Option Period for which the Term of this Lease is to be extended by the exercise of such option. If Tenant gives such notice, the Term of this Lease shall be automatically extended for the Option Period covered by the option so exercised without execution of an extension or renewal lease. Failure to extend the Lease for any Option Period shall constitute waiver of any subsequent Option Periods.

4.3 **Continued Possession of Tenant.** Tenant acknowledges that if it does not exercise any applicable option to extend the Term of this Lease for an Option Period, then Tenant shall, in addition to the amounts hereinafter set forth, indemnify and hold Landlord harmless from and against any and all damages and expenses, including attorneys' fees, that Landlord may incur by reason of Tenant's holding over. Any holding over after the last day of the Term or any extension of the Term of this Lease shall be construed to be a month-to-month tenancy, on and subject to the terms of this Lease, terminable by either party on not less than one (1) month's notice, with the exception that Annual Fixed Rent shall be increased to (i) one hundred twenty-five percent (125%) (if such holdover by Tenant is done with Landlord's written consent), or (ii) one hundred fifty percent (150%) (if such holdover by Tenant is without Landlord's consent) of the Annual Fixed Rent that existed for the year prior to the expiration of the then current Term. Except in the case of default, Tenant shall have thirty (30) days after such

notice of termination by either party to remove Tenant's Property, and any of Tenant's Property not so removed shall be deemed abandoned. Tenant shall repair any structural damage to the Facility caused by the removal of Tenant's Property or any of its sublessees' or licensees' property.

#### 4.4 Certain Landlord Rights on Termination for Reletting.

(a) If Tenant has not exercised the applicable Option Period option to extend this Lease, then, Landlord or its agent shall thereafter have the right to enter the Leased Premises at all reasonable times for the purpose of exhibiting the Leased Premises to others, and to place upon the Leased Premises during the period commencing one hundred eighty (180) days prior to the expiration of the then current Term "for sale" or "for rent" notices or signs of such number and in such locations as Tenant reasonably approves. Tenant hereby waives all notice to vacate upon the expiration or other termination of this Lease.

(b) Upon the expiration or earlier termination of this Lease, Tenant shall, at the option of Landlord, transfer to and relinquish to Landlord or Landlord's nominee and reasonably cooperate with Landlord or Landlord's nominee in connection with the processing by Landlord or such nominee of all government licenses, operating permits, and other governmental authorization and all assignable service contracts, which may be necessary or appropriate for the operation by Landlord or such nominee of the Leased Premises; provided that the costs and expenses of any such transfer or the processing of any such application shall be paid by Landlord or Landlord's nominee. Notwithstanding anything to the contrary set forth herein, Tenant shall have no obligation to transfer, assign or relinquish any rights and interests of Tenant in any trademarks, licenses, logos or any other tangible or intangible intellectual property of Tenant or any of its Affiliates related to or associated with the occupancy and operation of the Leased Premises and Landlord shall have no right to use or benefit from any of same.

### ARTICLE 5.

#### RENT

5.1 **Payment of Rent.** Tenant shall timely pay all Rent when due under this Lease for such month to Landlord by check or electronic transfer payable to Landlord at Landlord's address first written above until Tenant receives other written instructions from Landlord.

5.2 **Variable Rent; Additional Rent.** From the Delivery Date through the end of the Construction Term, Tenant shall pay to Landlord Variable Rent at [REDACTED] percent [REDACTED]% per annum on all sums actually advanced or paid by Landlord, including: (a) sums paid as part of Landlord Allowance (as defined herein and in the Development Agreement), and (b) sums payable to Landlord as Additional Rent, on or before the twentieth (20<sup>th</sup>) day of said preceding month. Variable Rent shall not be payable during the Construction Term but shall accrue during the Construction Term as set forth and shall be added to the Landlord Allowance on a monthly basis. Upon payment of the final draw request by Landlord under the Development Agreement, Landlord shall provide Tenant a statement of accrued Variable Rent.

5.3 **Annual Fixed Rent; Escalation; Deferral.** Tenant shall pay a fixed rental amount per annum ("*Annual Fixed Rent*") as follows:

(a) From the Commencement Date through the fifth (5<sup>th</sup>) Lease Year, Tenant shall pay to Landlord Annual Fixed Rent in an amount equal to [REDACTED] Dollars (\$ [REDACTED]) together with (if applicable) an amount equal to [REDACTED] percent (%) multiplied by the total Landlord Allowance (as memorialized in the Memorandum of Term Commencement Date and Annual Fixed Rent) which exceeds [REDACTED] Dollars (\$ [REDACTED]). Such amount to be due and payable in equal monthly installments on or before the fifth (5<sup>th</sup>) day of each month, in advance during such Lease Year. In the event that the Commencement Date does not occur on the first day of a calendar month, then Tenant shall pay Landlord a pro rata installment of rent within five (5) days of the Commencement Date equal to the actual number of days from the Commencement Date to the start of the next occurring calendar month.

(b) On the first day of the sixth, eleventh and sixteenth Lease Years of the Initial Fixed Term of this Lease (each an "*Initial Fixed Term Escalation Date*"), Annual Fixed Rent shall be increased to an amount, per annum, equal to the sum of (i) the Annual Fixed Rent payable during the immediately preceding Lease Year, plus (ii) an amount equal to the Annual Fixed Rent payable during the immediately preceding Lease Year multiplied by the percentage increase in the CPI between the CPI in effect during the first month of the then-current Lease Year and the same month five years earlier; provided, however, the such percentage increase for any of such 5-year period shall in no event exceed ten percent (10%). Annual Fixed Rent, as increased on each Initial Fixed Term Escalation Date, shall remain in effect for the following five (5) Lease Years until the succeeding Initial Fixed Term Escalation Date or expiration of the Term of this Lease, as applicable.

(c) On the first day of each Option Period, if exercised, and on the sixth, Lease Years of each Option (each an "*Option Period Escalation Date*"), Annual Fixed Rent shall be increased to an amount, per annum, equal to the sum of (i) the Annual Fixed Rent payable during the immediately preceding Lease Year, plus (ii) an amount equal to the Annual Fixed Rent payable during the immediately preceding Lease Year multiplied by the percentage increase in the CPI between the CPI in effect during the first month of the then-current Lease Year and the same month five years earlier; provided, however, the such percentage increase for any of such 5-year period shall in no event exceed ten percent (10%). Annual Fixed Rent, as increased on each Option Period Escalation Date, shall remain in effect for the following five (5) Lease Years until the succeeding Option Period Escalation Date or expiration of the Term of this Lease, as applicable.

(d) If the Annual Fixed Rent is payable for a fraction of a calendar month, the amount payable shall be a pro rata share of a full calendar month's rent. Annual Fixed Rent shall be prorated for any partial Lease Year.

(e) Tenant shall have the right to defer payment of Annual Fixed Rent payable during the first (1<sup>st</sup>) and second (2<sup>nd</sup>) Lease Years as follows:

(i) If the total amount of Gross Receipts for the first (1<sup>st</sup>) or second (2<sup>nd</sup>) Lease Years are less than [REDACTED] Dollars (\$ [REDACTED]) but greater



than [REDACTED] Dollars (\$ [REDACTED]), Tenant shall pay Annual Fixed Rent in an amount equal to [REDACTED] percent ([REDACTED]%) of the Landlord Allowance, with the payment of the remainder of Annual Fixed Rent otherwise due under (a) above to be deferred and paid in accordance with subsections (f) and (g) below.

(ii) If the total amount of Gross Receipts for the first (1<sup>st</sup>) or second (2<sup>nd</sup>) Lease Years are less than [REDACTED] Dollars (\$ [REDACTED]) but greater than [REDACTED] Dollars (\$ [REDACTED]), Tenant shall pay Annual Fixed Rent in an amount equal to [REDACTED] percent ([REDACTED]%) of the Landlord Allowance, with the payment of the remainder of Annual Fixed Rent otherwise due under (a) above to be deferred and paid in accordance with subsections (f) and (g) below.

(iii) If the total amount of Gross Receipts for the first (1<sup>st</sup>) or second (2<sup>nd</sup>) Lease Years are less than [REDACTED] Dollars (\$ [REDACTED]) but greater than [REDACTED] Dollars (\$ [REDACTED]), Tenant shall pay Annual Fixed Rent in an amount equal to [REDACTED] percent ([REDACTED]%) of the Landlord Allowance due and payable under (a) above, with the payment of the remainder of Annual Fixed Rent otherwise due under (a) above to be deferred and paid in accordance with subsections (f) and (g) below.

(iv) If the total amount of Gross Receipts for the first (1<sup>st</sup>) or second (2<sup>nd</sup>) Lease Years are less than [REDACTED] Dollars (\$ [REDACTED]) but greater than [REDACTED] Dollars (\$ [REDACTED]), Tenant shall pay Annual Fixed Rent in an amount equal to [REDACTED] percent ([REDACTED]%) of the Landlord Allowance due and payable under (a) above, with the payment of the remainder of Annual Fixed Rent otherwise due under (a) above to be deferred and paid in accordance with subsections (f) and (g) below.

(v) If the total amount of Gross Receipts for the first (1<sup>st</sup>) or second (2<sup>nd</sup>) Lease Years are less than [REDACTED] Dollars (\$ [REDACTED]) Tenant shall pay Annual Fixed Rent in an amount equal to [REDACTED] percent ([REDACTED]%) of the Landlord Allowance due and payable under (a) above, with the payment of the remainder of Annual Fixed Rent otherwise due under (a) above to be deferred and paid in accordance with subsections (f) and (g) below.

(f) Any Annual Fixed Rent deferred by Tenant in the first (1<sup>st</sup>) Lease Year under (e) above shall be paid in ten (10) equal installments, commencing on the first day of the eleventh (11<sup>th</sup>) Lease Year and on the first day of each Lease Year thereafter, through the twentieth (20<sup>th</sup>) Lease Year.

(g) Any Annual Fixed Rent deferred by Tenant in the second (2<sup>nd</sup>) Lease Year under (e) above shall be paid in five (5) equal installments, commencing on the first day of the sixteenth (16<sup>th</sup>) Lease Year and on the first day of each Lease Year thereafter, through the twentieth (20<sup>th</sup>) Lease Year.

#### 5.4 Percentage Rent.

(a) In addition to the Variable Rent and the Annual Fixed Rent, Tenant shall pay Landlord as percentage rent (the "**Percentage Rent**") an amount for each Lease Year equal to [REDACTED] percent [REDACTED]%) of the Gross Receipts (defined below) for such Lease Year in excess of [REDACTED] Million Dollars (\$ [REDACTED]) (the "**Base Amount**").

(b) During each subsequent Lease Year, including during any Option Periods, the Base Amount shall be increased to an amount, per annum, equal to the sum of (i) the Base Amount payable during the immediately preceding Lease Year, plus (ii) an amount equal to the Base Amount payable during the immediately preceding Lease Year multiplied by percentage increase in the CPI between the CPI in effect during the first month of the then-current Lease Year and the same month one year earlier (provided that in no event shall the Base Amount decrease).

(c) For the purpose of computing the Percentage Rent for the first Lease Year, the Gross Receipts for the partial calendar month preceding the first Lease Year shall be included in the Gross Receipts for the first Lease Year. Within sixty (60) days following the end of each Lease Year, Tenant shall furnish Landlord with a statement, verified by a corporate officer of Tenant, showing the amount of Gross Receipts for the preceding Lease Year, which statement shall be accompanied by Tenant's payment of Percentage Rent, if any is due.

(d) Landlord shall have the right, not more often than once each year, to audit Tenant's records of Gross Receipts, but only for the purpose of ascertaining the amount of the Gross Receipts during the preceding Lease Year. Such audit shall be made on behalf of Landlord by a certified public accountant to be selected by Landlord. If Landlord wishes to audit Tenant's records for any Lease Year, Landlord shall notify Tenant and proceed with such audit within twelve (12) months after the end of the Lease Year in question. Should Landlord fail to exercise the right to audit the records of Tenant within twelve (12) months after the end of any Lease Year, then Landlord shall have no further right to audit the records of Tenant for such Lease Year, and Tenant's statement of Gross Receipts for such Lease Year shall conclusively be deemed to be correct. Any such audit by Landlord shall be at Landlord's own expense, except as hereinafter provided. If any such audit discloses that Tenant has understated the Gross Receipts for such Lease Year by more than three percent (3%) and Landlord is entitled to any additional Percentage Rent as a result of such understatement, then Tenant shall promptly pay to Landlord the cost of such audit. Tenant shall, in any event, pay Landlord the amount of any deficiency in Percentage Rent.

(e) The term "**Gross Receipts**" means all revenues, sales, fees, or income of any kind resulting from the operation of the Facility, including, but not limited to: (i) rental of rooms; (ii) rental and other payments from licensees, subtenants, assignees and concessionaires and other occupying space or rendering services at the Facility; (iii) food and beverage sales; (iv) rental of conference, meeting and banquet rooms, including related sales of food and beverages; (v) charges or fees for use of any other facilities within the Facility, including any work-out facility; (vi) goods and other merchandise sales in, at, on or from the Leased Premises, or any part thereof by Tenant, or any subtenant, licensee, assignee or concessionaire (unless Landlord expressly agrees in writing that such revenues of a subtenant, licensee, assignee or

concessionaire shall not be included in Gross Receipts); (vi) all charges for any and all services provided in, at on or from the Leased Premises, or any part thereof, by Tenant, or any subtenant, licensee, assignee or concessionaire (unless Landlord expressly agrees in writing that such revenues shall not be included); (vii) sales from vending machines; (vii) sales from orders accepted in, on or from the Facility for delivery from places other than the Facility, or orders filled from the Facility even though accepted from places other than the Facility, including orders via electronic, telephonic, video, computer or other technology-based systems now existing or developed in the future; (viii) the entire amount of the price charged, all revenues, fees, income, whether wholly or partially in cash or on credit, or otherwise, for all goods, services, wares, merchandise and chattels of any kind sold, leased, licensed or delivered, and all other charges for services sold or performed in, at, upon or from any part of or through the use of the Facility, or any other party (specifically, including, without limitation, admissions tickets, tickets for zip-line and ropes course, mountain coaster, tubing facility or any other recreational activity on the Leased Premises, camping and bicycle sales, rentals, lessons, conferences, competitions, races, food and beverages, rental or other payments from licenses and concessionaries, lodging, golf, mountain climbing, horseback riding, nature tours, concerts, weddings, and any other leisure and recreational equipment, activities, and events), or by means of any mechanical or other vending device (other than pay telephones, and those soft drink and other similar vending devices operated primarily for the convenience of Tenant's employees); (ix) rental and other payments from licensees, subtenants, assignees and concessionaires and other occupying space or rendering services at the Facility (unless the revenues from goods and other merchandise sales by such licensee, subtenant assignee or concessionaire are included in Gross Receipts as specified in (v) above), and (x) any and all gross income of Tenant and any other party from any operations in, at, upon or resulting from the operation of Facility which are neither included in, nor excluded from Gross Receipts by other provisions of this Lease. Gross Receipts shall include all sales and charges for cash, debit or credit, regardless of collections in the case of the latter.

(f) Gross Receipts shall not include, or if included, there shall be deducted (but only to the extent they have been included), as the case may be, (i) the net amount of cash or credit refunds upon Gross Receipts, where the merchandise sold or some part of it is returned by the purchaser to and accepted by Tenant (but not exceeding in any instance the selling price of the item in question); (ii) the amount of any sales tax, use tax or retail excise tax which is imposed by any duly constituted governmental authority directly on sales and which is added to the selling price (or absorbed therein) and is paid to the taxing authority by Tenant (but not any vendor of Tenant); (iii) exchanges of merchandise between the Leased Premises and other properties of Tenant or its Affiliates to the extent the same are made solely for the convenient operation of Tenant's business and not for the purpose of depriving Landlord of the benefit of Gross Receipts; (iv) returns of merchandise to shippers, suppliers or manufacturers; (v) proceeds from the sale of Tenant's Property; (vi) discount sales to Tenant's employees of merchandise not intended for resale; (vii) all receipts or proceeds from Tenant's financing; (viii) gift certificates or like vouchers, if not issued for value, until the time they have been converted into a sale or redemption; (ix) income, revenues, receipts or proceeds from Tenant's investment of any funds in the Capital Expense Reserve, or a deposit institution; (x) separately stated interest and service charges; (xi) credits or refunds made to customers; (xii) all federal state, county and city sales taxes or other similar taxes; (xiii) all occupational taxes, use taxes and other taxes which must be paid by Tenant or collected by Tenant, by whatever name they are known or assessed, and



regardless of whether or not they are imposed under any existing or future orders, regulations, laws or ordinances; (xiv) agency commissions paid to independent third parties for selling tickets and surcharges in excess of the standard ticket price for tickets purchased by use of credit cards, but only to the extent such commissions or surcharges are actually remitted to independent third parties; and (xv) revenues of licensees, subtenants, assignees and concessionaries and others occupying space or rendering services at the Facility (if Landlord has expressly agreed in writing that the foregoing shall not be included in Gross Receipts).

(g) Tenant shall, at all times, operate the Facility in a first-class manner consistent with past practices, fully stocked and staffed with trained personnel in order to maximize Tenant's Gross Receipts, except when Tenant reasonably determines that incremental Gross Receipts will generate losses. Notwithstanding the foregoing, it is understood and agreed by Landlord that Tenant has made no representation of any kind whatsoever as to the minimum or maximum amount of Gross Receipts which will be made in the Ski Facility during any Lease Year of the Term of this Lease.

(h) Landlord agrees not to divulge to any party the amount of Gross Receipts made by Tenant in the Facility, except to the taxing authorities with authority to inquire therein; to Landlord's accountants, attorneys, consultants and employees; to an existing or bona fide prospective mortgagee or bona fide prospective purchaser of the Leased Premises; or in connection with any action to collect Resort Annual Percentage Rent from Tenant.

5.5 **Letter of Credit; Cash Reserves.** Tenant shall deposit, or cause to be deposited and continuously maintained with Landlord, during the Initial Fixed Term of this Lease, the Letter of Credit (or cash reserves deposited with Landlord in the amount of Five Million Dollars (\$5,000,000.00)), which Letter of Credit shall be in form reasonably acceptable to Landlord and issued by an Authorized Institution. The term of the Letter of Credit deposited on the Commencement Date shall expire no earlier than December 31 of the year in which the Commencement Date occurs, and a replacement Letter of Credit shall be delivered to Landlord (in form reasonably approved by Landlord) at least thirty (30) days prior to the expiration of the existing Letter of Credit. Thereafter, the term of the Letter of Credit shall be on a calendar year basis, with the replacement Letter of Credit to be provided to Landlord no later than December 1 of each calendar year, and to expire no earlier than December 31 of the following calendar year, except for the year in which the Initial Fixed Term expires, in which case the Letter of Credit shall expire upon the end of the Initial Fixed Term. Upon a failure to pay Rent by Tenant hereunder, Landlord shall have the right to draw upon the Letter of Credit to satisfy any obligation of Tenant hereunder for payment of such Rent, and such failure by Tenant shall not constitute an Event of Default hereunder so long as the Letter of Credit has not been drawn down in its entirety by Landlord (provided that failure to pay any Rent thereafter in accordance with the terms of this Lease shall constitute an Event of Default as provided in this Lease). In the event that the Letter of Credit is drawn upon during the Initial Fixed Term of this Lease, the Letter of Credit shall be restored in full and or replaced within thirty (30) days prior to the expiration of the then-current calendar year except in the calendar year in which the Initial Fixed Term expires. The amount as to which Landlord may draw down on such Letter of Credit deposited with Landlord on the Commencement Date shall be pro-rated (*e.g.*, if the Commencement Date is May 1, 2016, the maximum amount that Landlord may draw down for with respect to the Letter of Credit in the 2016 calendar year shall be \$3,333,333.20). The

amount of the Letter of Credit to be deposited with Landlord on December 1 of the calendar year prior to the expiration date of the Initial Fixed Term shall be pro-rated based upon the number of days remaining in the Initial Fixed Term. In the event that Tenant fails to provide the Letter of Credit shall in accordance with the terms of this Section 5.5, [REDACTED] and WVMS shall be obligated to provide the Letter of Credit (or cash reserves deposited with Landlord in the amount of Five Million Dollars (\$5,000,000.00)), which obligation shall be secured by a pledge agreement in form attached hereto as Exhibit G attached hereto and by this reference made a part hereof, executed by the foregoing persons (either individually or in the capacity in which such person holds such partnership interest) and delivered on the Effective Date of this Lease.

#### 5.6 Capital Expense Reserve.

(a) Tenant shall establish an interest bearing reserve account in the name of both Tenant and Landlord for the Facility (the "*Capital Expense Reserve*") in a bank designated by Landlord. All interest earned on the Capital Expense Reserve shall be added to and remain a part of the Capital Expense Reserve and shall be available for Tenant's withdrawal and use in accordance with the provisions of this Section 5.6. The purpose of the Capital Expense Reserve shall be to cover the cost of repairs, renovations, renewals, additions, alterations, improvements or replacements to the Leased Premises located at the Facility, where the cost of such repair, renovation, addition, alteration, improvement, or replacement or maintenance exceeds One Thousand and No/100 Dollars (\$1,000.00) and has a "useful life" (as defined under GAAP) of not less than two (2) years (each a "*Capital Expenditure*" and collectively, the "*Capital Expenditures*"). Tenant assigns to Landlord the Capital Expense Reserve as additional security for all of Tenant's obligations under this Lease. Tenant shall make withdrawals from the Capital Expense Reserve in accordance with the terms of this Section 5.6. Landlord, at its expense, shall be entitled to review the necessary books and records of Tenant at all times, after giving reasonable notice, regarding Tenant's obligations under this Section 5.6.

(b) Commencing on or before December 31 of the Fourth (4<sup>th</sup>) Lease Year, and on or before December 31 of each year thereafter during the Term hereof, Tenant shall transfer into the Capital Expense Reserve an aggregate amount equal to three percent (3%) of the estimated Gross Receipts for the year, plus or minus an adjustment to account for any inaccuracy in the estimate of Gross Receipts for the prior period.

(c) All Capital Expenditures from the Capital Expense Reserve shall be (as to both the amount of each such expenditure and the timing thereof) (i) required, in Tenant's reasonable judgment, to keep the Leased Premises in a first-class, competitive, efficient and economical operating condition consistent with the standards of other comparable resort/hotel/waterpark/outdoor facilities currently operated by an Affiliate of WVMS in Sevierville, Tennessee, and in the Wisconsin Dells, Wisconsin and in accordance with the requirements of this Lease; or (ii) required by reason of any Laws imposed by any Government Authority or otherwise required (as determined by Tenant in its reasonable judgment) for the continued safe and orderly operation of the Leased Premises. Notwithstanding the foregoing, in no way shall the balances in the Capital Expense Reserve change or limit what Tenant has to spend on Capital Expenditures in order for

Tenant to comply with the terms and provision of this Section 5.6, and Landlord does not represent or warrant in any way that the Capital Reserves established pursuant to this Section 5.6 are sufficient enough for Tenant to comply with the requirements of this Section 5.6 concerning Capital Expenditures.

(d) Tenant shall maintain the following records when withdrawing from the Capital Expense Reserve:

(i) a list of the Capital Expenditures for which such disbursement is requested,

(ii) the quantity and price of each item purchased, if the Capital Expenditure includes the purchase or Capital Expenditure of specific items (such as appliances),

(iii) the price of all materials (grouped by type or category) used in any Capital Expenditure other than the purchase or Capital Expenditure of specific items,

(iv) the cost of all contracted labor or other services applicable to each Capital Expenditure for which such request for disbursement is made, and

(v) evidence of the payment of such items satisfactory to Landlord, and to the extent such items have not been paid by Tenant, copies of invoices for all items or materials purchased and all contracted labor or services in form satisfactory to Landlord, and, unless previously delivered to Landlord in accordance with the terms hereof, evidence satisfactory to Landlord that all contractors and other persons who were the subject of previous disbursements from the Capital Expense Reserve have been paid in full. To the extent disbursements from the Capital Expense Reserve are intended to pay contractors and other persons who have not yet been paid by Tenant, such disbursements shall constitute a trust fund in the possession of Tenant for the benefit of such persons and shall be promptly applied by Tenant to the payment of such persons. Except as herein provided, each request for disbursement from the Capital Expense Reserve shall be made only after completion of the Capital Expenditure for which such disbursement is requested. Tenant shall provide Landlord evidence satisfactory to Landlord, of completion. If (i) the time required to complete a Capital Expenditure exceeds one month, (ii) the contractor performing a Capital Expenditure requires periodic payments pursuant to terms of a written contract, (iii) the total cost of such Capital Expenditure exceeds One Hundred Thousand and No/100 Dollars (\$100,000.00), and (iv) Landlord has approved in writing in advance such periodic payments, a request for reimbursement from the Capital Expense Reserve may be made after completion of a portion of the work under such contract, provided (u) such contract requires payment upon completion of such portion of the work, (v) the materials for which the request is made are on site at the Property and are properly secured or have been installed in the Leased Premises, (w) all other conditions in this Lease for disbursement have been



satisfied, (x) funds remaining in the Capital Expense Reserve are, in Landlord's judgment, sufficient to complete such Capital Expenditure and the other Capital Expenditures when required, and (y) each contractor or subcontractor receiving payments under such contract shall provide a waiver of lien with respect to amounts which have been paid to that contractor or subcontractor. Tenant shall not make a request for disbursement from the Capital Expense Reserve in an amount less than the lesser of (i) Two Thousand Five Hundred and No/100 Dollars (\$2,500.00), or (ii) the total cost of the Capital Expenditure for which the disbursement is requested.

In connection with (i) any structural repair or improvement, or (ii) any Capital Expenditure or repair of a major component or element of any part of the Leased Premises, with the total cost of such Capital Expenditure exceeding in both cases One Hundred Thousand and No/100 Dollars (\$100,000.00), Landlord may require, at Landlord's election (either as a condition to, or following, any disbursement from the Capital Expense Reserve) and at Tenant's expense, one or more inspections and/or certificates of completion by an appropriate independent, qualified professional (e.g., architect, engineer, consultant) approved by Landlord.

(e) All funds in the Capital Expense Reserve, all interest earned thereon and all property purchased with funds from the Capital Expense Reserve shall be and remain the property of Landlord. Following expiration or earlier termination of this Lease, and payment in full on all contracts entered into prior to such expiration or termination for work to be done or furniture, furnishings, fixtures and equipment to be supplied in accordance with this Section 5.6 out of the Capital Expense Reserve, control over the Capital Expense Reserve shall be transferred from Tenant to Landlord.

(f) It is understood and agreed that the Capital Expense Reserve pursuant to this Lease shall be maintained and used solely in connection with the Leased Premises. Landlord and Tenant each hereby agree that it shall provide any and all signatures and consents required to authorize the Capital Expenditures from the Capital Expense Reserve. The Capital Expenditures from the Capital Expense Reserve shall, over time, and on average, equal the amount of the Capital Expense Reserve funded by the Tenant.

(g) If Landlord wishes to grant in favor of any holder of any Mortgage a security interest in or create another encumbrance on the Capital Expense Reserve, all or any part of the existing or future funds therein, or any general intangible in connection therewith, Tenant shall join in the instrument granting such security interest or creating such other encumbrance. The form and substance of such instrument shall be as reasonably required by the mortgagee, and Tenant shall not unreasonably withhold, delay or condition its execution of such security instrument.

(h) Upon the occurrence of an event of default (A) Tenant shall immediately lose all of its rights to receive any funds from the Capital Expense Reserve, unless and until all amounts owing under this Lease have been paid in full, and (B) Landlord may, in its sole and absolute discretion, use the Capital Expense Reserve (or any portion thereof) for any purpose, including, but not limited to, (1) payment of Rent; (2) reimbursement of

Landlord for all losses and expenses (including, without limitation, reasonable legal fees) suffered or incurred by Landlord as a result of such default; or (3) payment of any amount expended in exercising (and exercise) all rights and remedies available to Landlord at law or in equity or under this Lease.

(i) Tenant shall permit Landlord, or Landlord's representatives (including, without limitation, an independent person such as an engineer, architect, or consultant) or third parties making Capital Expenditures pursuant to this Lease to enter onto the Leased Premises during normal business hours (subject to the rights of tenants under their leases) (i) to inspect the condition of the Leased Premises, (ii) inspect the progress of any Capital Expenditures and all materials being used in connection therewith, and (iii) to examine all plans and shop drawings relating to such Capital Expenditures which are or may be kept at the Leased Premises. Tenant agrees to cause all contractors and subcontractors to cooperate with Landlord, or Landlord's representatives, or such other persons described above in connection with inspections described in this Section 5.6.

(j) Tenant covenants and agrees that each of the Capital Expenditures and all materials, equipment, fixtures, or any other item comprising a part of any Capital Expenditure shall be constructed, installed or completed, as applicable, free and clear of all mechanic's, materialman's or other liens (except for those liens existing on the date of this Lease, which have been approved in writing by Landlord). Prior to each disbursement from the Capital Expense Reserve, Landlord may require Tenant to provide Landlord with either (i) a search of title to the Leased Premises effective to the date of the disbursement, or (ii) an endorsement to the title insurance policy insuring Landlord's interest in the Leased Premises, which updates the effective date of the policy to the date of the disbursement, which search or title endorsement shows that no mechanic's or materialmen's liens or other liens of any nature have been placed against the Leased Premises since the Effective Date.

(k) Landlord shall at all times be entitled to a review of the books and records of the Capital Expense Reserve, at its expense, upon reasonable notice to Tenant. Tenant shall provide detailed quarterly reports to Landlord on the Capital Reserve Accounts, including, without limitation, draws and usage of the funds from such accounts.

## **ARTICLE 6.** **EXPENSES**

6.1 **Payment of Expenses.** Commencing on the Delivery Date, in addition to Tenant's obligation to pay Rent to Landlord under this Lease, Tenant shall timely pay all operating expenses, maintenance costs, governmental charges, capital expenditures, and any other expenses related to the Resort Property or the ownership and operation of the Leased Premises, which Tenant is legally or contractually obligated to pay and are not in dispute whether or not specifically mentioned in this Lease, including, but not limited to, Tenant's share of the Common Expenses in accordance with the Master Declaration (collectively, "***Expenses***"). For purposes of this Lease, Expenses shall be considered Additional Rent.

## 6.2 Tenant's Real Estate Taxes.

(a) As used in this Article, the following terms shall have the following meanings:

(i) "*Fiscal Tax Year*" means the twelve (12) month period established as the real estate tax year by the taxing authority having jurisdiction over the Resort Property.

(ii) "*Taxes*" means all ad valorem taxes and assessments and governmental charges (including sewer charges), general or special, ordinary or extraordinary, foreseen or unforeseen, of any kind or nature whatsoever, whether imposed by any Governmental Authorities, which are levied on or charged against the Leased Premises, the Facility, Tenant's Property, personal property or rents, or on the right or privilege of leasing real estate or collecting rents thereon, and any other taxes and assessments attributable to the Leased Premises or its operation or any tax or assessment or governmental charge imposed or collected in lieu of or in substitution for any such tax, assessment or governmental charge, including without limitation all special assessments, impact fees, development fees, traffic generation fees, parking fees in respect of any Fiscal Tax Year falling wholly within the Term of this Lease and a portion of any real estate taxes so imposed in respect of any Fiscal Tax Year falling partly within and partly without the Term of this Lease, equal to the proportion which the number of days of such Fiscal Tax Year falling within the Term of this Lease bears to the total number of days of such Fiscal Tax Year; excluding, however, any income, franchise, corporate, capital levy, capital stock, excess profits, transfer, revenue, estate, inheritance, gift, devolution or succession tax payable by Landlord or any other tax, assessment, charge or levy upon the Rent payable hereunder by Tenant, except to the extent any such tax, assessment, charge or levy is imposed in substitution for any ad valorem tax or assessment.

(iii) "*Taxes Applicable to Leased Premises*" means an amount equal to the Taxes levied against the land and improvements within the Leased Premises.

(b) Tenant shall pay the Taxes Applicable to the Leased Premises directly to the appropriate taxing authorities prior to their delinquency. Tenant shall have the right (but shall not be obligated) to contest the Taxes Applicable to the Leased Premises or the validity thereof by appropriate legal proceedings or in such other manner as it deems suitable, and Landlord shall join in such contest, protest or proceeding, but at Tenant's sole cost and expense. Landlord shall not, during the pendency of such legal or other proceeding or contest, pay or discharge any Taxes on the Leased Premises, or tax lien or tax title pertaining thereto, provided Landlord may do so in order to stay a sale of the Leased Premises through foreclosure of a tax lien thereon. Any refund obtained by Tenant shall be paid entirely to and be the property of Tenant except, after payment of Tenant's costs and expenses of such proceeding or contest, if and to the extent and in the amount that such Taxes were paid by Landlord on behalf of Tenant in order to stay a sale of the Leased Premises through foreclosure of a tax lien. For purposes of this Lease, Taxes Applicable to the Leased Premises shall be deemed Additional Rent.

6.3 Restrictive Agreements; Common Facilities. The Leased Premises constitute a part of the Resort Property, which is subject to the Master Declaration and other Restrictive



Agreements encumbering and benefiting all or any portion of the Resort Property. Landlord and Tenant hereby agree as follows:

(a) Notwithstanding anything contained in this Lease to the contrary, Landlord hereby reserves the right to cause the Master Declaration to be recorded against the Leased Premises, and Tenant agrees that this Lease shall automatically be subordinated to the Master Declaration by recording of the Master Declaration in the Office of the Clerk of Sullivan County, without the need for any additional documentation being provided to effectuate such subordination; provided, however, that Tenant shall, upon request by Landlord execute such document or instrument as may be required or necessary to effect such subordination.

(b) Except as may be otherwise provided in the Master Declaration, Landlord shall not approve or agree to any amendment of any Restrictive Agreements, which materially (i) derogates the rights enjoyed by Tenant thereunder, or (ii) increases the proportion of any expenses paid by Tenant thereunder without Tenant's prior consent, which shall not be unreasonably withheld, conditioned or delayed.

(c) Pursuant to the Master Declaration, the Landlord and the Master Association have the exclusive right to enforce the cross-easement rights, operating covenants and other rights and restrictions contained in the Master Declaration on behalf of the members. Tenant, as a member of the Master Association may seek enforcement of such rights in accordance with the Master Declaration.

(d) Tenant agrees to timely pay the Common Expense applicable to the Leased Premises directly to the appropriate party under the Master Declaration and any other applicable Restrictive Agreement for each Lease Year, which shall be computed and paid in accordance with the Master Declaration and other applicable Restrictive Agreement. Landlord shall not be liable for any Common Expense applicable to the Leased Premises.

(e) Tenant shall, during the Term of this Lease, comply with and promptly perform each and all of the terms and provisions of the Master Declaration and all other Restrictive Agreements insofar as they relate to the Facility and the Leased Premises. Without limiting the generality of the foregoing, Tenant agrees to pay any assessments, costs, common area maintenance and operating charges, lighting charges, common area cost contributions, and any and all other amounts that Landlord or the owner of the Leased Premises would otherwise be obligated to pay under the Master Declaration or any other Restrictive Agreement accruing with respect to the Facility and the Leased Premises.

(f) Landlord agrees to use commercially reasonable efforts, at Tenant's Expense, to cooperate with Tenant in the exercise of any rights or remedies pursuant to the Restrictive Agreements the exercise of which Tenant reasonably believes is necessary or prudent with respect to the Leased Premises. Tenant hereby covenants and agrees to indemnify and hold harmless Landlord from and against any and all claims, costs, demands, losses or liabilities (including attorneys' fees) which Landlord may suffer or incur by reason of any failure by Tenant to pay and perform all of the terms of, or any violation of or noncompliance with any of the covenants and agreements contained in, the Restrictive Agreements, or any of them, which are binding upon the Leased Premises or the holder of the tenant's interest in this Lease. If at

any time any claims, costs, demands, losses or liabilities are asserted against Landlord by reason of any failure by Tenant to pay and perform all of the terms of, or any violation of or noncompliance with any of the covenants and agreements contained in, the Restrictive Agreements, which are binding upon the holder of the tenant's interest in this Lease or the Leased Premises, Tenant will, upon notice from Landlord, defend any such claims, costs, demands, losses or liabilities at Tenant's sole cost and expense by counsel reasonably acceptable to Landlord. Landlord will promptly provide to Tenant a copy of any notice received by Landlord in connection with any Restrictive Agreement.

(g) A Restrictive Agreement applicable to the Resort Property shall restrict the following: the development of (i) a competing facility on the Resort Property, (ii) a convention center with greater than 25,000 square feet that is not otherwise a part of a casino located on the Resort Property, (iii) an indoor waterpark facility with greater than 10,000 square feet of waterpark area, and (iv) an outdoor waterpark facility with greater than 10,000 square feet of waterpark area; provided, however, that the restriction in (ii) shall be effective only for so long as, and on and subject to the condition that, Tenant has constructed and is operating at least a 40,000 square foot (or more) conference and banquet facility and the restrictions in (iii) and (iv) shall be effective only for so long as, and on and subject to the condition that, Tenant has constructed and is operating at least 80,000 square feet of indoor waterpark area and at least 10,000 square feet of outdoor waterpark area, respectively.

6.4 **Utility Payments.** Tenant shall pay all charges for gas, propane, electricity, water, sewer service and other utilities used in the Facility and the Leased Premises during the Term of this Lease, all such utilities to be separately metered and to be obtained by Tenant from the applicable utility company. Tenant also shall be solely responsible for the payment of any connection, tap, hookup or other fee(s) imposed by Governmental Authorities or by any utility company to connect or continue utility service to the Leased Premises, but not the costs to extend utility service to the boundaries of the Leased Premises in accordance with the approved Infrastructure Plans of Landlord as defined in the Development Agreement, which shall be paid by Landlord. Tenant shall pay for any drainage fees, utility connection charges, and the like, which are directly attributable to development of the Leased Premises after the Delivery Date.

## **ARTICLE 7.**

### **TITLE INSURANCE; TRANSFER OF TITLE**

7.1 **Leasehold Title Policy.** Landlord has furnished to Tenant, at Tenant's sole cost and expense, a binding commitment for the issuance of a leasehold owner's title insurance policy on the then-current policy form available in the state in which the Leased Premises is located. By executing this Lease, Tenant shall be deemed to have approved and accepted the status of title as reflected in such title commitment and title policy issued in accordance with this Section 7.1. The cost of any title policy, any supplemental endorsements issued to Tenant and the ALTA Survey to be provided to Tenant as described in Section 3.6(a)(iii) above shall be borne by Tenant.

7.2 **Change of Ownership.** Landlord shall promptly notify Tenant in writing of any change in the ownership of Landlord's interest in the Leased Premises, giving the name and address of the new owner and instructions regarding the payment of Rent, provided however,

that the failure to give notice of transfer to Tenant shall not be a default or give Tenant the right to terminate this Lease. In the event of any change in or transfer of title of Landlord in and to the Leased Premises or any part thereof, whether voluntary or involuntary, or by act of Landlord or by operation of Laws, Tenant shall continue to have all of its rights, titles and interests in the Leased Premises as provided by this Lease and shall have the right to continue to pay Rent to the party-Landlord to which Tenant was making such payments prior to such change in title until (i) Tenant is notified of such change in title and given satisfactory proof thereof (it being hereby agreed that a letter from the prior owner of the Leased Premises notifying Tenant of such transfer and the name and address of the new owner will be satisfactory proof of such change in title), and (ii) such new owner shall execute and deliver an agreement in recordable form whereby such new owner assumes and agrees with Tenant to discharge all obligations of Landlord under this Lease.

## **ARTICLE 8.**

### **TENANT'S COVENANT TO OPERATE; USE OF PREMISES**

8.1 **Operating Covenant.** So long as Landlord is not in default under this Lease, Tenant will, except when prevented from so doing by Force Majeure or by other causes beyond its reasonable control, and subject to the provisions of Article 15 and Article 16 hereof, operate or cause to be operated the Facility on the Leased Premises in a first-class condition in accordance with the terms of this Article 8, the Master Declaration, and comparable and consistent in design, use and operation with consistent with the prototypes facilities constructed by Tenant's Affiliates in the Wisconsin Dells and in Sevierville, Tennessee (such covenant being herein called "***Tenant's Operating Covenant***"). Management services, reservation services and licensing of the brand of the Facility and related intellectual property shall be consistent with the structures for the foregoing prototypes referenced above.

8.2 **Use and Operation of the Leased Premises.** For the Term of this Lease, the Facility shall not be used except (i) primarily as a first class waterpark and hotel, and for meetings and other public presentations and entertainment; (ii) for the incidental retail sale therein of food, beverages and refreshments and merchandise; (iii) for other hospitality facilities (condominiums and detached or duplex cabins); (iv) outdoor "wilderness" activities (*e.g.* zip lines, ropes courses, mountain coaster, tubing) and (iii) all other uses and purposes incidental thereto. In addition, Tenant shall continuously operate the Hotel Facility and Waterpark consistent with the Standards, and no other uses shall be permitted for the Hotel Facility and Waterpark other than uses that are ancillary to the operation of a hotel and waterpark consistent with the Standards, such as meeting and conference rooms, restaurants, work-out facilities and other incidental uses related to the use and operation of a hotel and waterpark consistent with the Standards on the Leased Premises. All the uses referenced in this paragraph are together referred to herein as the "***Permitted Use***". Except when prevented from so doing by Force Majeure or other temporary reductions, after the Commencement Date and during the Term of this Lease, Tenant shall employ not less than four hundred (400) full-time permanent employees at the Facility at all times. For the purposes of this section full time permanent employee shall mean an employee who has worked at the Facility for a minimum of 35 hours per week, for not less than four consecutive weeks and who is entitled to receive the usual and customary fringe benefits extended to other employees with comparable rank and duties ("***Full Time Permanent Employee***"). Tenant shall certify to Landlord the number of Full Time Permanent Employees



from time to time as may be required by the State of New York to verify such employment. Landlord shall have the right to audit and examine the records of Tenant in order to verify the employment information furnished by Tenant to Landlord.

8.3 **Continuing Use Restrictions.** Notwithstanding anything in this Lease to the contrary, Tenant shall not have the right to use the Leased Premises, or any part thereof, for any use or purpose which is not permitted by, or which results in a violation of, any agreement, covenant or restriction to which the Leased Premises is subject of, as of the date of this Lease, including, without limitation, the Restrictive Agreements. The Leased Premises shall not be used for any use inconsistent with the Permitted Use, including, without limitation, with the customary character of a first-class destination summer resort (as industry standards change from time to time) and a hotel and waterpark consistent with the Standards. Tenant agrees not to permit any unlawful practice to be carried on at or committed in the Leased Premises, or a use which would injure the reputation of the Leased Premises, or the local community.

8.4 **Prohibition of Use.** If at any time during the Term of this Lease, (i) any Law prohibits the use of the Facility for the purposes permitted in Section 8.2 of this Lease (the "***Prohibition***"), then immediately upon the earlier to occur of (a) Tenant becoming aware of any proposed Prohibition, or (b) Tenant's receipt of any notice from any Governmental Authorities of any Prohibition, Tenant shall promptly notify Landlord of such fact, and Tenant may proceed, in its or Landlord's name, and at Tenant's sole cost and expense, to take such action as Tenant determines to be necessary or desirable to contest or challenge the Prohibition. If a Prohibition should occur or be imposed, nothing in this Lease shall be deemed to impair Tenant's obligations to comply with all Laws and with Article 12 of this Lease at any time during which Tenant is not prohibited from using the Facility for the purposes permitted in this Lease by the Prohibition.

8.5 **Landlord Assistance.** Landlord agrees to execute, without cost to Landlord, such customary applications, consents and other instruments as are required by Governmental Authorities to permit the operation of the Facility as permitted by this Lease, so long as such applications, consents or other instruments do not impose or subject Landlord to any liability or claim, and Tenant hereby covenants and agrees to defend, indemnify and hold harmless Landlord from and against any and all claims, costs, demands, losses or liabilities (including attorneys' fees) which Landlord suffers or incurs by reason of Landlord's execution of any such applications, consents or other instruments as Tenant requests. If at any time any claims, costs, demands, losses or liabilities are asserted against Landlord by reason of Landlord's execution of any such applications, consents or other instruments as Tenant requests, Tenant will, upon notice from Landlord, defend any such claims, costs, demands, losses or liabilities at Tenant's sole cost and expense by counsel reasonably acceptable to Landlord.

8.6 **Tenant's Right to Control Operations.** Except as otherwise provided in the Master Declaration and in Section 8.2 relating to the minimum Full Time Permanent Employees of Tenant, nothing contained in this Lease or in rules or regulations (if any) promulgated by Landlord shall be deemed in any way to (i) regulate the manner of operation by Tenant of its business in the Facility and/or the hours and/or days of such operation, or (ii) require Tenant to operate at times or hours different than the majority of its Affiliate's resort properties.

**ARTICLE 9.**  
**TENANT REPORTING**

Tenant hereby covenants and agrees to deliver to Landlord the following: (a) within one hundred and twenty (120) days after the end of each fiscal year of Tenant consolidated statements of income, retained earnings and cash flows of Tenant for such fiscal year and the related consolidated balance sheets as at the end of such fiscal year, setting forth in each case in comparative form the corresponding consolidated figures for the preceding fiscal year, and accompanied by an opinion thereon of independent certified public accountants of recognized national standing, which opinion shall state that such consolidated financial statements fairly present the consolidated financial condition and results of operations of Tenant as at the end of, and for, such fiscal year in accordance with generally accepted accounting principles; (b) within ninety (90) days after the end of each fiscal year of Tenant, unaudited statements of income for such fiscal year and the related unaudited balance sheet as at the end of such fiscal year, setting forth in each case in comparative form the corresponding figures for the preceding fiscal year; (c) within twenty (20) days after the end of each calendar month, unaudited operating statements of Tenant's revenue and expenses for the Leased Premises demonstrating operating income for the preceding calendar month, the year to date, and the previous twelve months; and (d) within forty-five (45) days after the end of each interim quarterly fiscal period of each fiscal year of Tenant, unaudited consolidated statements of income, retained earnings and cash flows of Tenant for such period and for the period from the beginning of the respective fiscal year to the end of such period, and the related consolidated balance sheets as at the end of such period, setting forth in each case in comparative form the corresponding consolidated figures for the corresponding periods in the preceding fiscal year (except that, in the case of balance sheets, such comparison shall be to the last day of the prior fiscal year), accompanied by a certificate of a financial officer of Tenant, as applicable, which certificate shall state that such consolidated financial statements fairly present the consolidated financial condition and results of operations of Tenant in accordance with generally accepted accounting principles, consistently applied, as at the end of, and for, such period; (e) within forty-five (45) days after the end of each interim quarterly fiscal period of each fiscal year of Tenant, unaudited statements of income for such period and for the period from the beginning of the respective fiscal year to the end of such period in each case in comparative form the corresponding figures for the corresponding periods in the preceding fiscal year; (f) within twenty (20) days after the end of each calendar month, an income and expense statement detailing all sources of revenue, including, but not limited to, admission and lift ticket sales, food and beverage sales and other revenues, and all expenses relating to the Leased Premises, accompanied by a certificate of a financial officer of Tenant stating that such items are true, correct, accurate and completely and fairly present the financial condition and results of the operations of Tenant.

**ARTICLE 10.**  
**SUBLETTING AND ASSIGNING**

10.1 **Landlord's Consent.**

(a) Subject to the provisions of Article 19 of this Lease, and except as provided in this Section 10.1, Tenant shall not voluntarily, involuntarily or by operation of law assign, transfer, mortgage, sublet, hypothecate or otherwise transfer or encumber

the Leased Premises, or any interest therein, or the leasehold estate created by this Lease, in whole or in part, to anyone, without the consent of Landlord, which consent may be withheld by Landlord in its sole and absolute discretion. Without prior written consent of Landlord, which consent may be withheld by Landlord in its sole and absolute discretion, Tenant shall not incur a change in control of its ownership. Tenant acknowledges and agrees that Landlord is entering into this Lease and the Development Agreement with Tenant because of the expertise, reputation, high operating standards and financial capability of Tenant and of Kenneth L. Ellis and Arthur B. Berry III, principals of Tenant.

(b) Notwithstanding anything to the contrary contained in Section 10.1(a), Landlord's consent to (i) any transfer or assignment of Tenant's leasehold estate in the Leased Premises, whether in whole or in part, or (ii) any change in the capital ownership of either entity constituting Tenant such that Kenneth L. Ellis and Arthur B. Berry III will no longer in the aggregate own or control, directly or indirectly, the majority interest in such entities, shall not be unreasonably withheld, delayed or conditioned so long as any such transferee or assignee (hereinafter, a "*Permitted Assignee*") satisfies the following requirements: (a) the Permitted Assignee (or the guarantor of the Permitted Assignee's obligations under this Lease) has a tangible net worth, determined in accordance with generally accepted accounting principles, of at least One Hundred Million Dollars (\$100,000,000.00) as of the end of the calendar month preceding the month during which any such assignment becomes effective, as demonstrated to Landlord's reasonable satisfaction (e.g., by audited financial statements or the delivery of a 10-Q report, in the case of a public company); (b) either the Permitted Assignee or an entity engaged by such Permitted Assignee to manage the Leased Premises (pursuant to a management agreement in form and substance reasonably acceptable to Landlord), operates at least one first-tier destination resort hotel/recreation properties in North America, or alternatively operates a portfolio of either first-tier destination resort hotel/recreation properties, or first-tier destination entertainment properties, in North America; and (c) the Permitted Assignee, by written instrument, duly executed and acknowledged and delivered to Landlord, assumes and covenants and agrees with Landlord to perform all the terms, covenants and conditions of this Lease which by the terms hereof are binding on Tenant from and after such transfer or assignment.

## 10.2 **Permitted Assignment, Subletting and Licenses.**

(a) Notwithstanding the foregoing, Tenant may, without Landlord's prior approval, license or sublease portions of the Leased Premises to concessionaires or licensees to: (i) operate recreational equipment rentals, activities, and tours; (ii) sell food, beverages and refreshments; (iii) operate weddings, concerts, conferences, and entertainment events held at the Leased Premises. Each sublease will be subject and subordinate to the provisions of this Lease relating to the Leased Premises. The sublease will not affect or reduce any of the obligations of Tenant, nor will the sublease impose any additional obligations on Landlord. Tenant will, within ten (10) days after the execution and delivery of any sublease, deliver a duplicate original thereof to Landlord. Without Landlord's prior approval Tenant shall not enter into any sublease, license agreement or other arrangement which would have the effect of causing all or a portion of the amount received or accrued by Landlord under this Lease to be treated as other than "rents from



real property” within the meaning of Section 856(d) of the Code. Notwithstanding anything to the contrary herein, if Tenant subleases any portion of the Leased Premises to any concessionaire(s) or licensee(s), then the total Gross Receipts of such concessionaire(s) or licensee(s) shall be included in Tenant’s Gross Receipts for the purpose of determining the Annual Percentage Rent payable by Tenant for such Lease Year unless Landlord expressly agrees, in advance, in writing, that the Gross Receipts from any of the foregoing shall not be included in Gross Receipts. If Tenant enters into any subleases of any portion of the Leased Premises with any third party, Tenant shall notify Landlord if such third party is an Affiliate of Tenant, and Tenant shall obtain from such third party, and submit to Landlord, all information necessary to permit Landlord to determine Gross Receipts of such third party derived from operations conducted on the Leased Premises.

(b) For purposes of Article 10, “subleases” shall include any licenses, concession arrangements, management contracts or other arrangements relating to the possession, use, or occupancy of all or any part of the Leased Premises.

10.3 **Continuation/Release of Liability.** If Tenant requests, and Landlord consents, to an assignment of this Lease or a sublet of all or any part of the Leased Premises or if Tenant assigns this Lease or sublets all or part of the Leased Premises to an Affiliate, Tenant and Guarantor (if any) shall remain liable and responsible under this Lease except as provided in this Section 10.3. Tenant shall be released and relieved from further liability under this Lease only if Tenant requests and Landlord consents to an assignment or if Tenant assigns this Lease to an Affiliate and (i) the assignee, by written instrument, duly executed and acknowledged and delivered to Landlord, assumes and covenants and agrees with Landlord to perform all the terms, covenants and conditions of this Lease which by the terms hereof are binding on Tenant from and after such transfer, and (ii) such assignee (or the guarantor of such assignee’s obligations under this Lease) has a book net worth of not less than One Hundred Million Dollars (\$100,000,000.00) as of the end of the calendar month preceding the month during which any such assignment becomes effective, as demonstrated to Landlord’s reasonable satisfaction (e.g., by audited financial statements or the delivery of a 10-Q report, in the case of a public company).

10.4 **Default Notices After Assignments.** If Tenant assigns this Lease, other than to an Affiliate and remains liable hereunder, then Landlord, when giving notice to said assignee or any future assignee in respect of any default, shall also serve a copy of such notice in the manner provided herein upon the original tenant named in this Lease (“***Original Tenant***”). Original Tenant, at its sole option, shall have the same period that such assignee as Tenant under this Lease has to cure such default. The right of Original Tenant to receive notice as provided in this Section 10.4 is an accommodation only to and for the benefit of Original Tenant and Original Guarantor, and shall not be construed to grant the assignee Tenant any additional rights not specifically provided in this Lease.

10.5 **Assignment of Rights in Sublease.** As security for performance of its obligations under this Lease, Tenant hereby grants, conveys and assigns to Landlord all right, title and interest of Tenant in and to all subleases now in existence or hereinafter entered into for any or all of the Leased Premises, and all extensions, modifications and renewals thereof and all rents, issues and profits therefrom (“***Assignment of Subleases***”). Landlord hereby grants to Tenant a license to collect and enjoy all rents and other sums of money payable under any



sublease of any of the Leased Premises; provided, however, that Landlord shall have the absolute right at any time after the occurrence and continuance of an Event of Default as herein provided, upon notice to Tenant and any subtenants, to revoke said license and to collect such rents and sums of money and to retain the same. Tenant shall not (i) consent to, cause or allow any material modification or alteration of any of the terms, conditions or covenants of any of the subleases or the termination thereof, without the prior written approval of Landlord which shall not be unreasonably withheld or delayed, nor (ii) accept any rents (other than customary security deposits) more than thirty (30) days in advance of the accrual thereof nor (iii) permit anything to be done, the doing of which, nor omit or refrain from doing anything, the omission of which, will or could be a breach of or default in the terms of any of the subleases.

10.6 **Landlord's Assignment.** Anything in this Lease to the contrary notwithstanding, Landlord shall have the right, without Tenant's consent, to sell, transfer, or assign Landlord's interest in the Leased Premises and/or this Lease at any time and in such event, Landlord shall be relieved of Landlord's obligations under this Lease to the extent such obligations arise after the date of such sale, transfer, or assignment, provided that such transferee, or assignee agrees to assume all of the unaccrued obligations of Landlord under this Lease, and agrees to perform such obligations to the full extent required under the terms and conditions of this Lease.

10.7 **REIT Limitations.** At such time as the Landlord in this Lease is a real estate investment trust, this Section 10.7 shall apply. Anything contained in this Lease to the contrary notwithstanding, Tenant shall not: (i) sublet or assign or enter into other arrangements such that the amounts to be paid by the sublessee or assignee thereunder would be based, in whole or in part, on the income or profits derived by the business activities of the sublessee or assignee; (ii) sublet or assign the Leased Premises or this Lease to any person that Landlord owns, directly or indirectly (by applying constructive ownership rules set forth in Section 856(d)(5) of the Internal Revenue Code), a ten percent (10%) or greater interest within the meaning of Section 856(d)(2)(B) of the Code; or (iii) sublet or assign the Leased Premises or this Lease in any other manner or otherwise derive any income which could cause any portion of the amounts received by Landlord pursuant to this Lease or any sublease to fail to qualify as "rents from real property" within the meaning of Section 856(d) of the Code, or which could cause any other income received by Landlord to fail to qualify as income described in Section 856(c)(2) of the Code. The requirements of this Section 10.7 shall likewise apply to any further subleasing by any subtenant.

## **ARTICLE 11.** **TENANT'S PROPERTY**

11.1 **Tenant's Property.** Any and all trade fixtures and equipment, signs, appliances, furniture and other personal property of any nature installed in the Facility on the Commencement Date or at any time thereafter by Tenant (and not paid from Landlord's Allowance), including without limitation, waterslides, rides, attractions, trade fixtures and equipment, signs, furniture, appliances, lighting fixtures, concessions stands and related equipment (all of the foregoing being collectively referred to in this Lease as "***Tenant's Property***"), shall become Landlord's Property at the end of the Term. Tenant's Property may not be removed from the Facility by Tenant at any time during the Term of this Lease. Landlord shall have any and all rights at law or in equity, including, but not limited to, any and all liens,

claims, demands or rights, including rights of levy, execution, sale and distraint for unpaid rent, or any other right, interest or lien which Landlord has or may hereafter acquire in any of Tenant's Property.

11.2 **Grant of Security Interest.** Subject to Article 19 hereof, Tenant may grant to its lender(s) a security interest or other lien in, or enter into, an equipment lease for, Tenant's Property and Landlord will permit Tenant's lender(s) reasonable access to the Facility to inspect Tenant's Property or to remove Tenant's Property in connection with any action to enforce such security interest, lease or other lien. Upon expiration or termination of this Lease, if Tenant shall abandon any of Tenant's Property, unless agreed to otherwise in writing by Landlord and Tenant, such abandoned Tenant Property shall immediately become the property of Landlord, free and clear of all liens. Landlord hereby and at all times subordinates any lien it may have by statute or otherwise against Tenant's Property to the lien held by any Leasehold Mortgagee against Tenant's Property, and, if requested by Tenant, Landlord will execute and deliver a standard form of landlord's waiver to confirm such entity's security interest or ownership of Tenant's Property. Tenant shall not pledge any of Tenant's Property as collateral for any security interest, lease or other lien without first obtaining Landlord's written consent, which may not be unreasonably withheld or delayed.

## **ARTICLE 12.**

### **GOVERNMENTAL COMPLIANCE**

12.1 **Tenant Responsibilities Generally.** Tenant shall comply with the terms of the Restrictive Agreements and all Laws which affect the Leased Premises and the Facility located thereon and the use and occupancy thereof. If Tenant receives written notice of any violation of any governmental requirements applicable to the Leased Premises, Tenant shall give prompt notice thereof to Landlord.

12.2 **Parties; Environmental Knowledge.** The parties warrant and represent to each other that to their Knowledge: (i) no release leak, discharge, spill, storage, disposal or emission of "Hazardous Substances" (hereinafter defined) has occurred in, on or under the Leased Premises, and that the Leased Premises are free of Hazardous Substances as of the date hereof, (ii) there are no underground storage tanks under or adjacent to the Leased Premises, (iii) there has not been any notice of intent to sue, notice of violation, citation, warning or similar notification under any federal, state or local environmental laws or regulation regarding the Leased Premises or arising out of operations on the Leased Premises, and (iv) there is no investigation or inquiry by any Governmental Authority concerning the Leased Premises or the operations thereon; PROVIDED, HOWEVER, Tenant hereby acknowledges and agrees that Tenant is fully aware of the condition and historical uses of the Leased Premises, and Tenant accepts the Leased Premises AS IS and WHERE IS, that Landlord has not undertaken any investigation or inquiry with respect to environmental aspects of the Leased Premises, and the warranties and representations of Landlord set forth in this Section 12.2 are based solely upon Landlord's Knowledge.

12.3 **Tenant's Environmental Responsibilities.** During the Term of this Lease, Tenant shall not cause or permit any Hazardous Substances to be used, stored, generated or disposed of (collectively, "Used") on, in or under the Leased Premises by Tenant, Tenant's

agents, employees or contractors, or anyone claiming by, through or under Tenant, except in the ordinary course of business in the operation of Tenant's business as permitted by Article 8 of this Lease, or as reasonably required in performing the obligations of Tenant under this Lease, and then only to the extent no Laws in effect at such time are violated by Tenant.

12.4 **Environmental Indemnities.** Each party ("*Indemnifying Party*") shall indemnify, defend and hold the other party ("*Indemnified Party*") harmless from any and all claims of third parties, and damages, costs and losses owing to third parties or suffered by Indemnified Party, including court costs, reasonable attorneys' fees and consultants' fees, arising during or after the Term and reasonably incurred or suffered by the Indemnified Party as a result of any default or breach of any representation, warranty or covenant made by Indemnifying Party under Article 12. It is a condition of this indemnification and hold harmless obligation that the Indemnifying Party must receive notice of any such claim against the Indemnified Party promptly after Indemnified Party first has knowledge thereof, but no failure by the Indemnified Party to promptly notify the Indemnifying Party of any such claim shall adversely affect the Indemnified Party's right to indemnification except (and only to the extent) that the Indemnifying Party can prove prejudice as a result of the failure to receive prompt notice. This indemnification and hold harmless obligation includes any and all costs reasonably incurred by the Indemnified Party after notice to Indemnifying Party for any cleanup, removal or restoration mandated by any public official acting lawfully under applicable Laws if Indemnifying Party fails to timely perform such work.

12.5 **Definition.** As used herein, "*Hazardous Substance*" means any substance that is toxic radioactive, ignitable, flammable, explosive, reactive or corrosive and that is, in the form, quantity, condition and location then found upon or under the Leased Premises, regulated by any Governmental Authority. "Hazardous Substance" includes any and all materials and substances that are defined as "hazardous waste," "hazardous chemical," "pollutant," "contaminant" or "hazardous substance," in the form, quantity, condition and location then found upon the Leased Premises pursuant to Law. "Hazardous Substance" includes without limitation asbestos, polychlorinated biphenyls and petroleum-based substances.

12.6 **Survival.** The provisions of this Article 12 shall survive the expiration or sooner termination of this Lease.

### **ARTICLE 13. MAINTENANCE AND REPAIRS**

13.1 **Warranty.** Landlord will, so long as no Event of Default has occurred and is continuing, assign or otherwise make available to the Tenant any and all rights the Landlord may have under any vendor's or manufacturer's warranties or undertakings with respect to the Leased Premises, but Landlord does not warrant or represent that any such warranties or undertakings are or will be available to Tenant, and Landlord shall have no further obligations or responsibilities respecting such warranties or undertakings.

**TENANT HEREBY WAIVES ALL STATUTORY REPRESENTATIONS AND WARRANTIES ON THE PART OF LANDLORD, INCLUDING, WITHOUT LIMITATION, ALL WARRANTIES THAT THE LEASED PREMISES ARE FREE**



**FROM DEFECTS OR DEFICIENCIES, WHETHER HIDDEN OR APPARENT, AND ALL WARRANTIES THAT THEY ARE SUITABLE FOR TENANT'S USE.**

13.2 **Maintenance and Repairs.** Tenant shall pay all costs, expenses, fees and charges incurred in connection with the use or occupancy of the Leased Premises. Tenant shall at all times, at its own expense, operate and keep the Leased Premises in first class operating order, repair, condition and appearance, shall at all times comply with all maintenance requirements set forth in the Master Declaration, and shall allow no nuisances to exist or be maintained therein. With respect to the Leased Premises, the undertaking to maintain in first class repair shall include, without limitation, all interior and exterior repairs (including all replacements of components, systems or parts which are a part of, or are incorporated into, the Leased Premises or any part thereof), whether structural or nonstructural, foreseen or unforeseen, ordinary or extraordinary and all common area maintenance including, without limitation, removal of dirt, snow, ice, rubbish and other obstructions and maintenance of sidewalks and landscaping. In addition to the foregoing, Tenant shall, at Tenant's expense, furnish, install and maintain in good condition and repair, to points in the Leased Premises, all storm and sanitary sewers, and all gas, water, telephone, electrical facilities and other utilities of such size and type as may be required to provide adequate service for the Leased Premises.

13.3 **Minor Alterations.** So long as no Event of Default has occurred and is continuing, Tenant may, at its expense and with the prior written consent from Landlord, (i) make interior and exterior nonstructural additions and alterations to the Leased Premises, and other improvements on the Leased Premises; and (ii) make alterations to the land, grading, water courses, vegetation or forestation, or install any new ski runs, trails, or paths within the Leased Premises. In no event shall any alterations be made to the Leased Premises, except in strict compliance with the State Lease. Notwithstanding the foregoing, Landlord's consent shall not be required if the cost of such additions and alterations is less than One Hundred Thousand Dollars (\$100,000.00); provided, that (i) upon completion of such additions and alterations, neither the fair market value of the Leased Premises shall be lessened thereby nor the utility or condition of the Leased Premises impaired, below the value, utility or condition thereof immediately prior to such action, (ii) such additions and alterations shall not result in a change of use of the Leased Premises, and (iii) such work shall be completed in a good and workmanlike manner and in compliance with all applicable Laws and insurance requirements. Any and all such additions and alterations shall be and remain part of the Leased Premises and shall be subject to this Lease. In no event shall Landlord be obligated to reimburse or compensate Tenant or any other person or entity for any such additions, alterations or improvements to the Leased Premises and Tenant hereby waives any right to reimbursement or compensation for the same.

13.4 **Certain Limitations.** The obligations Tenant set forth in this Article 13 shall be subject to the provisions set forth in Article 15 and Article 16.

**ARTICLE 14.**  
**ALTERATIONS AND TENANT'S LIENS**

14.1 **Title to Tenant's Alterations.** Subject to the provisions of Article 11, any alterations, changes, improvements and additions to the Leased Premises made by Tenant shall immediately become the property of Landlord and shall be considered a part of the Facility, but



Landlord will not be obligated to compensate or reimburse Tenant or any other person or entity for any such alterations, changes, improvements or additions made by Tenant, and Tenant hereby waives all right to any such compensation or reimbursement.

14.2 **No Tenant Liens.** Tenant shall not permit any mechanic's, materialmen's or other similar lien to be foreclosed against the Leased Premises by reason of work, labor, services or materials performed by or furnished to Tenant or anyone holding any part of the Leased Premises under Tenant. If any such lien is filed, Tenant may contest the same in good faith but Tenant shall, prior to foreclosure thereof, cause such lien to be released of record by payment, bond, order of a court of competent jurisdiction or otherwise. Nothing contained in this Lease shall be construed as a consent on the part of Landlord to subject Landlord's estate in the Leased Premises to any lien or liability under the lien laws of the state in which the Leased Premises are located. Notwithstanding the foregoing, if any mechanics', materialmen's or other similar lien is filed against the Leased Premises, and the amount of such lien claim exceeds Fifty Thousand Dollars (\$50,000.00), then Tenant shall, within thirty (30) days after the filing thereof, provide to Landlord a bond in the amount of one hundred twenty-five percent (125%) of the amount of such lien claim, or other security satisfactory to Landlord, protecting Landlord from loss or liability by reason of such lien. Tenant hereby covenants and agrees to defend, indemnify and hold harmless Landlord from and against any and all claims, costs, demands, losses or liabilities (including attorneys' fees) which Landlord may suffer or incur by reason of any such mechanics', materialmen's or other similar lien.

14.3 **Landlord Elective Improvements.** During the Term of this Lease, Landlord shall not be required to build or rebuild any improvements to the Leased Premises or the Facility, or to make any repairs, replacements, alterations, restorations or renewals thereto. In the event that Landlord should, in its sole discretion elect to make capital improvements to the Leased Premises, it may only do so with Tenant's consent, which may be given or withheld in Tenant's sole discretion, and it is understood and agreed that Landlord will generally condition any such election on an increase in the Annual Fixed Rent to reflect such expenditures.

## **ARTICLE 15.** **DAMAGE CLAUSE**

15.1 **Damage.** If any parts or improvements of the Leased Premises are damaged or destroyed by fire, casualty or any cause whatsoever, either in whole or in part, and Tenant does not elect to terminate this Lease pursuant to the provisions of Section 15.2, Tenant shall, with due diligence, remove any resulting debris and repair or rebuild the damaged or destroyed structures and other improvements, including, without limitation, any improvements or betterments made by Landlord or Tenant, in accordance with the Final Plans (to the extent then permitted by law). Subject to Article 17.1 hereof, Landlord shall make all insurance proceeds available as a result of such fire, casualty or other destruction to Tenant for restoration. Tenant shall obtain Landlord's consent (which shall not be unreasonably withheld or delayed) to any material deviation from the Final Plans which Tenant is required to make to obtain approval from Governmental Authorities having jurisdiction for such restoration, except for those deviations that are necessary to comply with the requests by Governmental Authorities. Until the earlier of (i) the date that is ninety (90) days after the date the Leased Premises is repaired, rebuilt and put in good and tenantable order, or (ii) the date Tenant reopens the portions(s) of the

Leased Premises, so damaged or destroyed, the Annual Fixed Rent and other charges hereby reserved, or a fair and just proportion thereof according to the nature and extent of the damage sustained, shall be abated, but only to the extent of any proceeds of rental interruption insurance carried by Tenant that are actually received by Landlord.

15.2 **Right to Terminate on Certain Damage.** If during the final three (3) years of the Term the Leased Premises is damaged or destroyed by fire, casualty or any cause whatsoever to such an extent that all or a portion thereof is rendered unsuitable for use as an indoor waterpark hotel and the cost of restoration would exceed fifty percent (50.00%) of the amount it would cost to replace Leased Premises in its entirety at the time such damage or destruction occurred, and if Tenant has complied with its insurance obligations under this Lease (including, without limitation, maintaining insurance against loss of rents by Landlord), Tenant may terminate this Lease by notice to Landlord given within thirty (30) days after such damage or destruction. If Tenant elects to terminate this Lease as provided herein, Tenant shall pay to Landlord, as a condition upon the effectiveness of such termination, within sixty (60) days after such notice, an amount equal to all insurance proceeds for such damage or destruction (except any for Tenant's Property), together with an amount equal to the difference, if any, between the amount of insurance proceeds turned over to Landlord and the net book value of the Facility and all other improvements constituting a part of the Leased Premises as accurately reflected in Landlord's financial records as of the date of such damage or destruction. Upon the giving of such notice by Tenant to terminate, and Tenant's payment of all amounts provided for herein, this Lease shall automatically terminate and the Annual Fixed Rent and other charges hereunder shall be equitably adjusted as of the date of such destruction.

15.3 **Rights to Insurance Proceeds.** If this Lease is terminated as provided in this Article 15 following damage to or destruction of the Leased Premises, the proceeds of all hazard insurance on the Leased Premises which is maintained by Tenant or Landlord pursuant to Article 17 shall belong to Landlord, or Landlord's lender. Insurance proceeds with respect to Tenant's Property shall belong to Tenant.

## **ARTICLE 16.** **CONDEMNATION**

16.1 **In General.** If any material part of the Leased Premises (meaning any part of the Facility) is taken in any proceeding by any Governmental Authority by condemnation or otherwise, or be acquired for public or quasi-public purposes, or be conveyed under threat of such taking or acquiring (which Landlord shall not do without Tenant's prior written consent), and Tenant reasonably determines that the remaining portion will not permit Tenant to operate its business on the Leased Premises, Tenant shall have the option of terminating this Lease by notice to Landlord of its election to do so given on or before the date which is thirty (30) days after Tenant is deprived of possession of the condemned property, and upon the giving of such notice, this Lease shall automatically terminate and the Annual Fixed Rent and other charges hereunder shall be adjusted as of the date of such notice. If a material part of the Leased Premises (meaning any part of the Facility) is so taken and Tenant elects not to terminate this Lease, then Tenant shall, to the extent and making use of the condemnation award, restore the Leased Premises to a complete unit as similar as reasonably possible in design, character and quality to the building which existed before such taking. If the Facility is partially taken and this

Lease is not terminated, there shall be no reduction or adjustment in the Annual Fixed Rent and other charges thereafter payable hereunder. Any restoration work to be performed pursuant to this Article 16 shall be completed in accordance with plans and specifications which shall have been approved by Landlord and Tenant, which approvals shall not be unreasonably withheld. If all or part of the Leased Premises is taken and Tenant elects to terminate this Lease in accordance with this Article 16, each party shall be free to make claim against the condemning authority for the amount of the actual provable damage done to each of them by such taking. If the condemning authority refuses to permit separate claims to be made, then Landlord shall prosecute with counsel reasonably satisfactory to Tenant the claims of both Landlord and Tenant, and the proceeds of the award, after payment of Landlord's reasonable attorneys' fees and other costs incurred, shall be divided between Landlord and Tenant in a fair and equitable manner; provided, however, in the event of a condemnation which results in Tenant's election to terminate this Lease, Tenant shall be entitled to its portion of the condemnation award only so long as the amount of the award received by Landlord is equal to or greater than the net book value of the property taken, as reflected on the Landlord's financial statements on the date of the condemnation.

16.2 **Temporary Taking Awards.** If by reason of a taking Tenant is temporarily deprived in whole or in part of the use of the Leased Premises or any part thereof, the entire award made as compensation therefor shall belong to Tenant, and there shall be no abatement of the Annual Fixed Rent payable hereunder.

**ARTICLE 17.**  
**INSURANCE, INDEMNITY, WAIVER OF SUBROGATION**  
**AND FIRE PROTECTION**

17.1 **Casualty Policy.** During the Term of this Lease, Tenant shall at its expense keep the Leased Premises insured in the name of Landlord and Tenant (as their interests may appear with each as named insured, additional insured or loss payee, as applicable, to provide each with the best position) against damage or destruction by all risks of direct physical loss or damage including terrorism the perils commonly covered under a special form policy in an amount equal to the full replacement cost thereof (without deduction for physical depreciation), and shall have deductibles no greater than One Hundred Thousand and No/100 Dollars (\$100,000.00) (with higher deductibles for named storm coverage as the applicable insurer may require), and such other "additional coverage" insurance as Landlord or any holder of a Mortgage on the Leased Premises may reasonably require, which at the time is usual and commonly obtained in connection with properties similar in type of building size and use to the Facility located in the Market Area. Tenant shall be responsible for determining that the amount of property damage coverage insurance maintained complies with the requirements of this Lease. The proceeds of such insurance in case of loss or damage shall be held in trust and applied on account of the obligation of Tenant to repair and rebuild the Leased Premises pursuant to Article 15 to the extent that such proceeds are required for such purpose. The insurance required to be carried by Tenant under this Article 17 may be covered under a so-called "blanket" policy covering other operations of Tenant and Affiliates, so long as the amount of coverage available under said "blanket" policy with respect to the Leased Premises, or Tenant's liability under this Lease, at all times meets the requirements set forth in this Lease, and shall be evidenced by a certificate of insurance (issued on ACORD 28 or equivalent form) from Tenant's insurer, authorized agent or



broker. Upon request, Tenant shall name the holder of any Mortgage on the Leased Premises pursuant to a standard mortgagee, additional insured or loss payee clause as such holder shall elect with respect to the foregoing property insurance, provided such holder agrees with Tenant in writing to disburse such insurance proceeds to Tenant for, and periodically during the course of, repair and restoration of the Facility as set forth in this Lease. Any such insurance proceeds not required for the repair and restoration of the Leased Premises shall belong to Landlord.

17.2 **DIC Policy Endorsement.** Tenant shall, at its expense, keep the Leased Premises insured in the name of Landlord and Tenant (as their interests may appear with each as named insured, additional insured or loss payee, as applicable, to provide each with the best position) against the perils of flood and earthquake, under a so-called difference in conditions policy or endorsement ("***DIC Policy***") in the amount of which shall include the following endorsements: Agreed Value and Ordinance or Law – Coverage for loss to undamaged portion of building, demolition costs and increased cost of construction, rental loss/business income insurance. To the extent flood and earthquake perils not covered under the casualty or DIC policy and a separate policy must be obtained, Tenant shall insure the property against flood and earthquake perils by a separate policy at the maximum amount available in the marketplace, up to one hundred percent (100%) of replacement cost written with "per occurrence" and "annual aggregate" limits. The aggregate limit is the maximum amount the insurance carrier will pay in any one policy limit for all flood losses. This might include other locations the tenant insures. You will need to consider these factors when you set the limit for flood and earthquake. The proceeds of such insurance in case of loss or damage shall be held in trust and applied on account of the obligation of Tenant to repair and rebuild the Leased Premises pursuant to Article 15 to the extent that such proceeds are required for such purpose. The insurance required to be carried by Tenant under this Section 17.2 shall be evidenced by a certificate of insurance (issued on ACORD 28 or equivalent form) from Tenant's insurer, authorized agent or broker. Upon request, Tenant shall name the holder of any Mortgage on the Leased Premises pursuant to a standard mortgagee, additional insured or loss payee clause as such holder shall elect with respect to the DIC Policy, provided such holder agrees in writing to disburse such insurance proceeds to Tenant for, and periodically during the course of, repair and restoration of the Leased Premises as set forth in this Lease. Any such insurance proceeds not required for the repair and restoration of the Leased Premises shall belong to Landlord.

17.3 **Liability Insurance; Tenant Negligence.** Tenant will, subject to Section 17.7 and Section 12.4, defend, indemnify and hold Landlord, its trustees, directors, officers, agents and servants, harmless from and against any and all claims, actions, liability and expense: arising out of any occurrence in, upon or at the Facility, the Leased Premises or the Common Facilities, or the occupancy or use by Tenant of the Facility, the Leased Premises or the Common Facilities or any part thereof, except to the extent the same is caused by the willful or grossly negligent act or omission of Landlord, or occasioned wholly or in part by any negligent act or omission of Tenant, its agents, employees, contractors, licensees, servants, subtenants, lessees or concessionaires. If any action or proceeding is brought against Landlord, its officers, employees, agents or servants by reason of any of the aforementioned causes, Tenant, upon receiving notice thereof from Landlord, agrees to defend such action or proceeding by counsel reasonably acceptable to Landlord at Tenant's own expense. Tenant agrees to insure the foregoing obligation by contractual endorsement under a commercial general public liability policy (including personal injury and property damage, terrorism and liquor liability, if applicable) to be



maintained by Tenant with limits of not less than Twenty-Five Million Dollars (\$25,000,000.00) per occurrence/ Twenty-Five Million Dollars (\$25,000,000.00) products & completed operations aggregate/ Twenty-Five Million Dollars (\$25,000,000.00) general aggregate on a per location basis. The amounts required in this section may be satisfied by a combination of general liability and umbrella liability coverages. Tenant shall cause Landlord to be named as an additional insured on all policies of liability insurance maintained by Tenant (including excess liability and umbrella policies) on a primary basis and non-contributory with any other insurance coverage carried by the Landlord with respect to the Leased Premises. The insurance required to be carried by Tenant under this Section 17.3 shall be evidenced by a certificate of insurance (issued on ACORD 25 or equivalent form) from Tenant's insurer, authorized agent or broker.

17.4 **Liability Insurance; Landlord Negligence.** Landlord will, subject to Section 17.7 and Section 12.4, defend, indemnify and hold Tenant, its officers, agents and servants, harmless from and against any and all claims, actions, suits, judgments, decrees, orders, liability and expense in connection with loss of life, bodily injury and/or damage to property occasioned wholly or in part by any willful or grossly negligent act or omission of Landlord, its agents, employees, or servants. If any action or proceeding is brought against Tenant, its agents or servants by reason of any of the aforementioned causes, Landlord, upon receiving written notice thereof from Tenant in the manner provided herein, agrees to defend such action or proceeding by counsel reasonably acceptable to Tenant at Landlord's own expense.

17.5 **Rental Loss/Business Interruption Insurance.** During the Term of this Lease, Tenant shall, at its expense, keep and maintain for the benefit of Landlord, coverage for the loss of Rent payable hereunder for a period of at least the next succeeding eighteen (18) months. Rental loss insurance shall be equal to one hundred percent (100%) of the Rent, and insurance shall be carved out of Tenant's business interruption coverage for a separate rental loss insurance payable to Landlord, or if rental value insurance is included in Tenant's business interruption coverage, the insurer shall provide priority payment to any rent obligations, and such obligations shall be paid directly to Landlord. Such insurance is to follow the form of the real property "all risk" coverage, and is not to contain a co-insurance clause.

17.6 **Workers' Compensation Insurance.** Tenant shall maintain, with respect to its operations and all of its employees at the Leased Premises, a policy or policies of workers' compensation insurance in accordance with and in the amounts required by applicable Laws, protecting Tenant from and against any and all claims from any persons employed directly or indirectly on or about the Leased Premises for injury or death of such persons.

17.7 **Release; Waiver of Subrogation.** Anything in this Lease to the contrary notwithstanding, it is agreed that each party (the "***Releasing Party***") hereby releases the other (the "***Released Party***") from any liability which the Released Party would, but for this Section 17.7, have had to the Releasing Party during the Term of this Lease resulting from any accident or occurrence or casualty which is or would be covered by Tenant's insurance required under this Lease or by any insurance carried by or benefitting Landlord (including Property, DIC, Liability and Workers Compensation), including liability which is or would be covered by a fire or "all risk" property insurance policy in use in the state in which the Leased Premises is located, whether or not the Releasing Party is actually maintaining such an insurance policy, or which is covered by any other casualty or property damage insurance being carried by the Releasing Party

at the time of such occurrence, which casualty may have resulted in whole or in part from any act or omission of the Released Party, its officers, agents or employees. Notwithstanding anything to the contrary herein, Tenant agrees and acknowledges that Landlord shall have no responsibility or liability for any loss, damage or injury to Tenant's Property which is located in, on or about the Leased Premises or the Common Facilities or Common Areas at any time and from time to time, regardless of the cause of such loss, damage or injury, and that all of Tenant's Property is located in, on and about the Leased Premises and the Common Facilities and Common Areas at Tenant's sole risk. Tenant hereby releases and holds harmless Landlord from any and all claims with respect to loss, damage or injury to Tenant's Property located in, on and about the Leased Premises and the Common Facilities and Common Areas, regardless of the cause of such loss, damage or injury.

17.8 **General.** Tenant's insurance shall be primary, and any insurance maintained by Landlord or any other additional insured hereunder shall be excess and noncontributory. All policies of insurance required pursuant to this Article 17 shall be issued by companies approved by Landlord, with an A. M. Best Rating of A – X or better and authorized to do business in the state where the Leased Premises is located. Furthermore, any such insurance company shall have a claims paying ability rating of "AA" or better by Standard & Poor's (other than the issuer of any policy for earthquake insurance, which issuer shall have a claims paying ability rating of "A" or better by Standard & Poor's, and shall issue policies which include effective waivers by the insurer of all claims for insurance premiums against all loss payees, additional loss payee, additional insured or named insured; shall contain such provisions as Landlord deems reasonably necessary or desirable to protect its interest including any endorsements providing that neither Tenant, Landlord nor any other party shall be a co-insurer under said policies and that no modification, reduction, cancellation or termination in amount of, or material change (other than an increase) in, coverage of any of the policies required hereby shall be effective until at least thirty (30) days after receipt by each named insured, additional insured and loss payee of written notice thereof or ten (10) days after receipt of such notice with respect to nonpayment of premium; provisions which permit Landlord to pay the premiums and continue any insurance upon failure of Tenant to pay premiums when due; and provisions stating that the insurance shall not be impaired or invalidated by virtue of (A) any act, failure to act, negligence of, or violation of declarations, warranties or conditions contained in such policy by Tenant, Landlord or any other named insured, additional insured or loss payee, except for the willful misconduct of Landlord knowingly in violation of the conditions of such policy or (B) the occupation, use, operation or maintenance of the Leased Premises for purposes more hazardous than permitted by the terms of the policy.

## **ARTICLE 18.**

### **INDEMNIFICATION GENERALLY**

Except as provided in Section 12.4 and Section 17.4, and subject to Section 17.7, Tenant agrees to defend, indemnify and hold Landlord, its trustee, directors, officers, employees, agents and servants harmless from and against all liabilities, costs and expenses (including reasonable attorney's fees and expenses) and all direct actual damages imposed upon or asserted against the Landlord, as owner of the Leased Premises, including, without limitation, any liabilities, costs and expenses and actual or consequential damages imposed upon or asserted against Landlord, on account of (i) any use, misuse, non-use, condition, maintenance or repair by Tenant of the

Leased Premises, (ii) any Taxes, Common Facilities Expense, and other impositions which are the obligation of Tenant to pay pursuant to the applicable provisions of this Lease, (iii) any failure on the part of Tenant to perform or comply with any other of the terms of this Lease or any sublease, (iv) any liability Landlord may incur or suffer as a result of any environmental laws or the ADA affecting the Leased Premises, and (v) accident, injury to or death of any person or damage to property on or about the Leased Premises. If at any time any claims, costs, demands, losses or liabilities are asserted against Landlord by reason of any of the matters as to which Tenant indemnifies Landlord under this Lease, Tenant will, upon notice from Landlord, defend any such claims, costs, demands, losses or liabilities at Tenant's sole cost and expense by counsel reasonably acceptable to Landlord. Landlord agrees to indemnify and save harmless, Tenant from and against all liabilities, costs and expenses (including reasonable attorney's fees) imposed upon or asserted against Tenant solely as a result of any failure on the part of Landlord to perform or comply with any of the terms of this Lease after expiration of all applicable notice and cure periods hereunder.

## **ARTICLE 19.** **LEASEHOLD MORTGAGES**

19.1 **Rights to Mortgage Lease.** Tenant, and its permitted successors and assigns shall have the right to mortgage and pledge its interest in this Lease ("***Leasehold Mortgage***"), only in accordance with and subject to the terms, conditions, requirements and limitations of this Article 19. Any such mortgage or pledge shall be subject and subordinate to the rights of Landlord hereunder and to the Landlord's fee interest in the Leased Premises. Such Leasehold Mortgage shall in no event secure an amount in excess of \$25,000,000.00; provided, however, after eighteen (18) months after the Commencement Date, any such Leasehold Mortgage may secure an amount that is the greater of (i) \$25,000,000.00, or (ii) an amount that could be incurred without causing Tenant's leverage ratio (ratio of debt net of cash to earnings before interest, taxes, depreciation and amortization) to exceed 8.0x.

19.2 **Leasehold Mortgagee Qualifications.** No holder of a Leasehold Mortgage on this Lease shall have the rights or benefits mentioned in this Article 19, nor shall the provisions of this Article 19 be binding upon Landlord, unless and until each of the following terms, conditions and restrictions have been fully satisfied (and only upon all of the following terms, conditions and restrictions being fully satisfied shall the holder of a Leasehold Mortgage on this Lease be deemed a "***Leasehold Mortgagee***"):

(a) Until completion of construction, either the Leasehold Mortgagee or a Trustee thereof, or participant in the underlying loan secured by the Leasehold Mortgage must be an Authorized Institution or have and maintain a tangible net worth, determined in accordance with generally accepted accounting principles, of at least One Hundred Million Dollars (\$100,000,000.00);

(b) The Leasehold Mortgage shall contain provisions requiring that copies of all notices of default under said Leasehold Mortgage must be simultaneously sent to Landlord;

(c) Simultaneously with or promptly after the recording of the Leasehold Mortgage, Tenant shall, at its own expense, cause a copy of the Leasehold Mortgage to be



delivered to Landlord and, if so requested by Landlord, shall cause to be recorded in the office of the recorder of the county or township (as applicable) where the Leased Premises is located, a written request executed and acknowledged by Landlord for a copy of all notices of default and all notices of sale under the Leasehold Mortgage if and as provided by applicable Laws. Inclusion of a request for notice having the effect described above in the body of the recorded Leasehold Mortgage shall constitute compliance with this provision;

(d) The Leasehold Mortgage shall not encumber the Landlord's fee interest in the Leased Premises and shall be subject to the Landlord's rights under this Lease and shall not encumber any interest in any other real property of Landlord but may encumber the leasehold estate created by this Lease and any easements and other rights and interests of the Tenant contained in or arising pursuant to this Lease (including rights to use of the Common Facilities);

(e) The Leasehold Mortgage shall not permit or authorize, or be construed to permit or authorize, any Leasehold Mortgagee to devote the Leased Premises to any uses, or to construct any improvements thereon, other than those uses and improvements provided for or permitted by the terms of this Lease;

(f) The Leasehold Mortgage shall not contain terms which are inconsistent with the terms of this Lease or the Development Agreement, or the Master Declaration, and Tenant shall provide Landlord with a true and accurate copy of the documentation creating and evidencing the Leasehold Mortgage and the loan evidenced thereby promptly following execution of such documents by Tenant;

(g) The Leasehold Mortgage shall secure a bona fide extension of credit to Tenant or an Affiliate of Tenant and shall not be for the purpose of avoiding or extending any obligations of or restrictions on Tenant under this Lease, including restrictions on transfer or periods for curing defaults; and

(h) The Leasehold Mortgage shall provide that any proceeds from fire and other casualty insurance and extended coverage insurance shall be applied in accordance with the Lease.

19.3 **Defaults.** If Tenant, or Tenant's successors or assigns, mortgage this Lease in compliance with the provisions of this Article 19, then so long as any such mortgage shall remain unsatisfied of record, the following provisions shall apply:

(a) Tenant shall immediately provide Landlord with written notice that a Leasehold Mortgage has been filed, along with the name, facsimile, contact person, e-mail address, and address of the Leasehold Mortgagee. Tenant shall promptly give Landlord written notice of any change in any Leasehold Mortgagee and shall ensure that Landlord has current contact information for such Leasehold Mortgagee at all times. Landlord, upon serving any notice of default on Tenant pursuant to Article 22 or any other notice under the provisions of this Lease, shall also serve a copy of such notice upon Leasehold Mortgagee, at the address provided to Landlord in writing by Tenant and no notice shall be deemed to have been duly given as to the Leasehold Mortgagee unless and until a copy thereof has been so served upon the Leasehold Mortgagee. Landlord's furnishing a copy of such notice to Leasehold Mortgagee shall not in any



way affect or become a condition precedent to the effectiveness of any notice given or served upon Tenant, provided, that Landlord may not terminate this Lease or exercise any remedies against Tenant without first giving Leasehold Mortgagee notice and opportunity to cure. Any notice or other communication which Leasehold Mortgagee desires or is required to give to or serve upon Landlord shall be deemed to have been duly given or served if sent in accordance with Section 25.2.

(b) Any Leasehold Mortgagee, in case Tenant is in default under this Lease, shall have the right to remedy such default (or cause the same to be remedied) within the same period provided to Tenant hereunder and otherwise as herein provided, and Landlord shall accept such performance by or at the instance of Leasehold Mortgagee as if the same had been made by Tenant.

(c) For the purposes of this Article 19, no default shall be deemed to exist under Article 22 in respect of the performance of work required to be performed, or of acts to be done, or of conditions to be remedied, if steps shall, in good faith, have been commenced by Leasehold Mortgagee within the time permitted therefor to rectify the same and shall be prosecuted to completion with diligence and continuity and within the time periods provided therefor in Article 22.

(d) Notwithstanding anything in this Lease to the contrary, upon the occurrence of an event of default other than an event of default which can be cured by the payment of money ("**Monetary Default**"), Landlord shall take no action to effect a termination of this Lease without first giving Leasehold Mortgagee at least thirty (30) days written notice of its intent to terminate if Tenant's default is of any type other than a Monetary Default (a "**Non-Monetary Default**"), and Leasehold Mortgagee fails to cure such Non-Monetary Default within said thirty (30) day period. If such Non-Monetary Default cannot reasonably be cured within said thirty (30) day period (or is such that possession of the Leased Premises is necessary to remedy the Non-Monetary Default), the date for termination shall be extended for such period of time as may be reasonably required to remedy such Non-Monetary Default, if any only if (i) subject to Section 19.4, within thirty (30) days of Landlord's notice of its intent to terminate the Lease, Leasehold Mortgagee irrevocably agrees in writing to assume Tenant's obligations under the Lease following Leasehold Mortgagee's obtaining possession of the Leased Premises, (ii) Leasehold Mortgagee shall have fully cured any default in the payment of any monetary obligations of Tenant under this Lease within thirty (30) business days after its receipt of notice of Landlord's intent to terminate, and shall continue to pay currently such monetary obligations as and when the same are due, subject to the applicable notice and cure provisions provided in this Lease, and (iii) Leasehold Mortgagee continues its good faith and diligent efforts to remedy such Non-Monetary Default (including its acquisition of possession of the Leased Premises, if necessary to cure such Default); provided, however, that Leasehold Mortgagee shall not be obligated to pursue the cure of any Non-Monetary Default until it has obtained possession of the Leased Premises if, but only if, (x) Leasehold Mortgagee fully cures any Monetary Default of Tenant and keeps current all monetary obligations under this Lease as provided in, and within the time set forth in, subclause (d)(i) above, and (y) Leasehold Mortgagee is diligently pursuing such actions as are necessary to enable it to obtain possession of the Leased Premises; provided, however, that in no event shall this provision be applied to allow a defaulting Tenant to remain

on the Leased Premises following its failure to cure any default within the Tenant's prescribed cure period on more than once occasion in any consecutive twelve (12) month period.

(e) The rights granted Leasehold Mortgagee in this Section 19.3 are accommodations only to and for the benefit of Leasehold Mortgagee and shall not be construed to grant Tenant any additional rights not specifically provided in this Lease. Nothing in this Section 19.3 shall be construed to require a Leasehold Mortgagee to continue any foreclosure proceeding it may have commenced against Tenant after all defaults have been cured by Leasehold Mortgagee, and if such defaults are cured and the Leasehold Mortgagee discontinues such foreclosure proceedings, this Lease shall continue in full force and effect as if Tenant had not defaulted under this Lease. Notwithstanding anything herein to the contrary:

(i) Leasehold Mortgagee shall not be obligated to continue such possession or to continue such foreclosure proceedings after such defaults have been cured,

(ii) Landlord shall not be precluded from exercising any rights or remedies under this Lease with respect to any other default by Tenant during the pendency of such foreclosure proceedings;

(iii) if Leasehold Mortgagee is an entity or person other than an Authorized Institution or its affiliate, such Leasehold Mortgagee shall agree with Landlord in writing to comply with such of the terms, covenants and conditions of this Lease as are reasonably susceptible of being complied with by Leasehold Mortgagee during the period of forbearance by Landlord from taking action to effect a termination of this Lease; and

(iv) it is understood and agreed that Leasehold Mortgagee, or its designee, or any purchaser in foreclosure proceedings (including, without limitation, an entity formed by Leasehold Mortgagee or by the holder(s) of the bonds or obligations secured by the Leasehold Mortgage) may, subject to the following terms of this Section 19.3, become the legal owner and holder of this Lease through such foreclosure proceedings or by assignment of this Lease in lieu of foreclosure.

(f) Subject to Section 19.4, it shall be a condition precedent to any assignment or transfer of this Lease by foreclosure of any Leasehold Mortgage, deed in lieu thereof or otherwise that Leasehold Mortgagee, or its designee (including, without limitation, an entity formed by Leasehold Mortgagee or by the holder(s) of the bonds or obligations secured by the Leasehold Mortgage) or any purchaser in any such foreclosure proceedings (any such transferee of the Lease, a "*Transferee*"), (a) have a tangible net worth, determined in accordance with generally accepted accounting principles of at least One Hundred Million Dollars (\$100,000,000.00), (b) upon becoming the legal owner and holder of this Lease shall execute an agreement with Landlord, reasonably acceptable to Landlord, pursuant to which such Transferee agrees to assume all obligations of Tenant under this Lease, and (c) either the Transferee, affiliate of Transferee, or an entity engaged by such Transferee to manage the Leased Premises (pursuant to a management agreement in form and substance reasonably acceptable to Landlord), operates at least two (2) first class hotels, indoor waterparks, or other entertainment venues of substantially similar size in North America, and is otherwise reasonably acceptable to Landlord.

(g) Notwithstanding the foregoing, if a Leasehold Mortgagee forecloses or takes a deed in lieu of foreclosure, but at the time of such foreclosure or taking of a deed in lieu such Leasehold Mortgagee (if not an Authorized Institution) does not meet the requirements specified in the immediately preceding paragraph, such Leasehold Mortgagee shall have ninety (90) days from the date it acquires the demised premises to either transfer the Leasehold Mortgagee's interest in this Lease to a Transferee who complies with such requirements, or otherwise comes into compliance on its own. Failure to comply with this paragraph shall be a Default under this Lease.

(h) In the event of the termination of this Lease prior to the expiration of the Term, whether by summary proceedings to dispossess, service of notice to terminate, or otherwise, due to default of Tenant, Landlord shall serve upon Leasehold Mortgagee written notice that the Lease has been terminated together with a statement of any and all sums which would at that time be due under this Lease but for such termination, and of all other defaults, if any, under this Lease then known to Landlord. Leasehold Mortgagee shall thereupon have the option to obtain a new lease in accordance with and upon the following terms and conditions:

(i) Upon the written request of Leasehold Mortgagee, delivered to Landlord within thirty (30) days after service of such notice that the Lease has been terminated to Leasehold Mortgagee, Landlord shall enter into a new lease of the Leased Premises with Leasehold Mortgagee or its designee, or a guarantor having) a tangible net worth in accordance with generally accepted accounting principles of at least One Hundred Million Dollars (\$100,000,000.00).

(ii) Such new lease shall be entered into within thirty (30) days of such Leasehold Mortgagee's written request at the sole cost of Leasehold Mortgagee or such designee, shall be effective as of the date of termination of this Lease, shall be for the remainder of the Term of this Lease, and at the Rent and upon all the terms, covenants and conditions of this Lease, including any applicable Option Periods, provided that Leasehold Mortgagee or such designee shall contemporaneously with the delivery of such request pay to Landlord all the installments of Rent payable by Tenant hereunder which are then due.

(iii) Such new lease shall require the new tenant to perform any unfulfilled obligation of Tenant under this Lease.

(iv) Upon the execution of such new lease, the tenant named therein shall pay any and all Rent and other sums which would at the time of the execution thereof be due under this Lease but for such termination and shall pay all expenses, including counsel fees, court costs and disbursements incurred by Landlord in connection with such defaults and termination, the recovery of possession of the Leased Premises, and the costs associated with preparation, execution and delivery of such new lease.

Nothing in this Section 19.3 shall impose any obligation on the part of Landlord to deliver physical possession of the Leased Premises to the Leasehold Mortgagee, Transferee, or any designee unless Landlord at the time of the execution and delivery of such new lease has obtained physical possession thereof.



(i) If Tenant is not entitled to renew this Lease for any Option Period because Tenant is in default under this Lease beyond the expiration of any applicable cure period, or because Tenant fails to exercise any renewal option contained herein, or for any other reason, Landlord shall serve upon Leasehold Mortgagee written notice thereof and Leasehold Mortgagee shall have the option upon written request served upon Landlord to obtain from Landlord a new lease of the Leased Premises for such Option Period, provided that such written request is served upon Landlord no later than thirty (30) days after the service of the aforementioned notice by Landlord on Leasehold Mortgagee. Within thirty (30) days after the service of such written request from Leasehold Mortgagee, Landlord and Leasehold Mortgagee or its affiliate or designee having a tangible net worth in accordance with generally accepted accounting principles of at least One Hundred Million Dollars (\$100,000,000.00) and which (1) alone or with its Affiliates, operates at least two (2) first class indoor waterpark hotels of substantially similar size in North America and is otherwise reasonably acceptable to Landlord, or (2) causes the Leased Premises to be operated by an entity which operates at least two (2) first class indoor waterpark hotel of substantially similar size in North America and is otherwise reasonably acceptable to Landlord, or (3) if such new lease occurs prior to Substantial Completion (as defined in the Development Agreement), and Leasehold Mortgagee or its designee is not an Authorized Institution or its affiliate, then such Leasehold Mortgagee or its designee shall have (or have a guarantor having) a tangible net worth in accordance with generally accepted accounting principles of at least One Hundred Million Dollars (\$100,000,000.00), shall enter into a new lease of the Leased Premises as follows:

(i) Such new lease shall be entered into at the sole cost and expense of the tenant thereunder, shall be effective as of the date of termination of the then current Term of this Lease, and shall be for the renewal term next succeeding the then current Term of this Lease, and at the rent and upon all the terms, covenants and conditions of this Lease, including any applicable Option Periods.

(ii) Such new lease shall require tenant to perform any unfulfilled obligation of Tenant under this Lease which is reasonably susceptible of being performed by such tenant.

(iii) Upon the execution of such new lease the tenant therein named shall pay any and all sums remaining unpaid under this Lease, plus all expenses reasonably incurred by Landlord in connection with the preparation, execution and delivery of such new lease.

19.4 **Continuation of Liability.** If any Leasehold Mortgagee or its designee acquires title to Tenant's interest in this Lease, by foreclosure of a mortgage thereon or by assignment in lieu of foreclosure or by an assignment from a nominee or wholly owned subsidiary of such mortgagee, or under a new lease pursuant to this Article 19, such mortgagee or its designee may assign such Lease to a party (i) having a tangible net worth, or whose guarantor has a tangible net worth, determined in accordance with generally accepted accounting principles of at least One Hundred Million Dollars (\$100,000,000.00) and (ii) either (1) alone or with its Affiliates that operates at least two (2) first class hotels, indoor waterparks, or other entertainment venues of substantially similar size in North America and is otherwise reasonably acceptable to Landlord or (2) that causes the Leased Premises to be operated by an entity which operates at



least two (2) first class hotels, indoor waterparks, or other entertainment venues of substantially similar size in North America and is otherwise reasonably acceptable to Landlord, or (3) if such assignment occurs prior to Substantial Completion (as defined in the Development Agreement), and Leasehold Mortgagee or its designee is not an Authorized Institution or its affiliate, then to a party that has (or has a guarantor having) a tangible net worth in accordance with generally accepted accounting principles of at least One Hundred Million Dollars (\$100,000,000.00), and notwithstanding anything contained in Article 10, shall thereupon be released from all liability for the performance or observance of the terms, covenants and conditions in such Lease contained on Tenant's part to be performed and observed from and after the date of such assignment, provided that the assignee from such Leasehold Mortgagee or its designee shall have assumed such new lease in accordance with this Article 19. Furthermore, it is the intention of the parties that entering into a Leasehold Mortgage or other pledge or hypothecation by Tenant that does not comply with the provisions of this Article 19 shall constitute a default and shall otherwise be a non-permitted transfer under this Lease. The holder of such Leasehold Mortgage or other pledge or hypothecation shall not enjoy the rights granted to a Leasehold Mortgagee under this Article 19.

#### **ARTICLE 20.** **TENANT'S SIGNS**

20.1 **Location and Type.** Tenant shall have the right to erect and maintain signs on the Leased Premises that are not visible from off the Leased Premises and which are in accordance with, and subject to, any applicable provisions of the Site Plan, the Master Declaration, the Restrictive Agreements and Laws.

20.2 **Design.** The design of all signs presently located on the Leased Premises is hereby approved by Landlord with the design of all future signs which Tenant elects to construct pursuant to Section 20.1 (such present and future signs referred to as "***Tenant's Signs***") to be subject to the Master Declaration and the Commercial Design Guidelines of the Master Association, Tenant's standard signage and to all other applicable Laws. Tenant's Signs shall advertise Tenant's business in the Facility and shall be constructed and maintained in good repair at Tenant's expense. Tenant shall pay the cost of electricity consumed in illuminating Tenant's Signs.

20.3 **Interior Signs.** Nothing in this Lease shall restrict Tenant's unlimited right to maintain signs on the interior of the Facility.

#### **ARTICLE 21.** **ESTOPPEL; ATTORNMENT AND SUBORDINATION**

21.1 **Estoppel Certificate.** Each party agrees, within ten (10) days after request by the other party, to execute, acknowledge and deliver to and in favor of the proposed holder of any Mortgage or purchaser of the Leased Premises, the Common Facilities or the Resort Property, any Leasehold Mortgagee, or any proposed sublessee or assignee of Tenant, an estoppel certificate in such form as the requesting party may reasonably require, but stating no less than: (i) whether this Lease is in full force and effect; (ii) whether this Lease has been modified or amended and, if so, identifying and describing any such modification or amendment; (iii) the

date to which rent and any other charges have been paid; and (iv) whether such party knows of any default on the part of the other party or has any claim against the other party and, if so, specifying the nature of such default or claim.

21.2 **Attornment by Tenant.** Tenant shall, in the event any proceedings are brought for the foreclosure of, or in the event of the exercise of the power of sale under, any Mortgage prior in lien to this Lease made by Landlord, attorn to the purchaser upon any such foreclosure or sale and recognize such purchaser as Landlord under this Lease, provided such purchaser assumes in writing Landlord's obligations under this Lease.

21.3 **Fee Mortgages/Subordination.** Upon request of the holder of any Mortgage, Tenant will subordinate its rights under this Lease to the lien thereof and to all advances made or hereafter to be made upon the security thereof, and Tenant shall execute, acknowledge and deliver an instrument effecting such subordination; provided Tenant's obligation to (a) subordinate its rights under this Lease to the lien of any holder of a Mortgage and (b) execute and deliver such instrument shall be conditioned upon Landlord's obtaining and delivering to Tenant, in recordable form, from the holder of any Mortgage to which this Lease is to become subordinate, a non-disturbance agreement reasonably acceptable to Tenant containing a covenant binding upon the holder thereof to the effect that as long as Tenant is not in default under this Lease, this Lease shall not be terminated or modified in any respect whatsoever, nor shall the rights of Tenant hereunder or its occupancy of the Leased Premises be affected in any way by reason of such Mortgage or any foreclosure action or other proceeding that may be instituted in connection herewith, and that, except to the extent that the holder of such mortgage is required to do so to effectively foreclose such Mortgage, Tenant shall not be named as a defendant in any such foreclosure action or other proceeding. In the event of attornment, no lender shall be (i) liable for any act or omission of Landlord, or subject to any offsets or defenses which Tenant might have against Landlord (prior to such lender becoming Landlord under such attornment), (ii) liable for any security deposit or bound by any prepaid Rent not actually received by such lender, or (iii) bound by any future modification of this Lease not consented to by such lender. Tenant further agrees that if Landlord shall have failed to cure a default within the time permitted Landlord for cure under this Lease, if any, then any such lender whose address has been so provided to Tenant shall have an additional period of thirty (30) days in which to cure (or such additional time as may be required due to causes beyond such lender's control, including time to obtain possession of the Leased by power of sale or judicial action). The provisions of this Article shall be self-operative; however, Tenant shall execute such documentation as Landlord or any lender may reasonably request from time to time in order to confirm the matters set forth in this Article in recordable form.

21.4 **Form of Documents.** Landlord and Tenant, upon request of any party in interest, shall execute promptly such commercially reasonable instruments or certificates to carry out the provisions of this Article 21; provided, however, neither party shall be required to execute any such instruments or certificates that would in any way modify the terms and provisions of this Lease.

**ARTICLE 22.**  
**DEFAULT**

22.1 **Tenant Default.** An event of default shall exist under this Lease if:

(i) Tenant neglects or fails to pay any installment of Rent, including Annual Fixed Rent, Percentage Rent and any other charge under this Lease within ten (10) days after notice of default (but Landlord is not required to give more than two such default notices during any one Lease Year); or

(ii) Tenant neglects or fails to perform or observe any of the other covenants, terms, provisions or conditions on its part to be performed or observed under this Lease, within thirty (30) days after notice of default (or if more than thirty (30) days shall be reasonably required because of the nature of the default, if Tenant fails to proceed diligently to cure such default after such notice); or

(iii) Tenant fails to perform or observe any obligations pursuant to Article 8 hereof; or

(iv) upon the occurrence of any default under a Related Agreement or any guaranty of a Related Agreement that remains uncured after the expiration of the applicable cure period thereunder; or

(v) Tenant (a) admits in writing its inability to pay its debts generally as they become due, (b) commences any case, proceeding or other action seeking to have an order for relief entered on its behalf as debtor or to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, liquidation, dissolution or composition of it or its debts under any federal, state or local law relating to bankruptcy, insolvency, reorganization or relief of debtors, (c) makes an assignment for the benefit of its creditors, (d) is generally unable to pay its debts as they mature, (e) seeks or consents to the appointment of a receiver of itself or of the whole or any substantial part of its property, or (f) files a petition or answer seeking reorganization or arrangement under an order or decree appointing, without the consent of Tenant, a receiver of Tenant of the whole or substantially all of its property, and such case, proceeding or other action is not dismissed within ninety (90) days after the commencement thereof; or

(vi) the estate or interest of Tenant in the Leased Premises or any part thereof is levied upon or attached in any proceeding and the same is not vacated or discharged within the later of ninety (90) days after commencement thereof or thirty (30) days after receipt by Tenant of notice thereof from Landlord (unless Tenant is contesting such lien or attachment in accordance with this Lease); or

(vii) Tenant abandons or vacates the Leased Premises during the Term of this Lease.

(viii) Tenant fails to continuously maintain or cause to be maintained, the Letter of Credit as provided in Section 5.5 hereof.



22.2 **Remedies.** Upon an Event of Default under this Lease, Landlord may immediately or at any time thereafter, as permitted by law, give Tenant written notice of Landlord's termination of this Lease, and, upon such notice, Tenant's rights to possession of the Leased Premises shall cease and this Lease shall thereupon be terminated, and Landlord may re-enter and take possession of the Leased Premises as its own property; or Landlord may remain out of possession of the Leased Premises and treat the Term of the Lease as subsisting and in full force and effect, in which event Landlord shall have all rights and remedies available at law, in equity or hereunder; and as an alternative remedy Landlord may, at Landlord's election, without terminating the then current Term, or this Lease, re-enter the Leased Premises or take possession thereof pursuant to legal proceedings or pursuant to any notice provided for by law, and having elected to re-enter or take possession of the Leased Premises without terminating the Term, or this Lease, Landlord shall use reasonable diligence as Tenant's agent to relet the Leased Premises, or parts thereof, for such term (which may be greater or less than the remaining balance of the then current Term) or terms and at such rental and upon such other terms and conditions (which may include concessions or free rent) as Landlord may reasonably deem advisable, with the right to make alterations and repairs to the Leased Premises, and no such re-entry or taking of possession of the Leased Premises by Landlord shall be construed as an election on Landlord's part to terminate this Lease, and no such re-entry or taking of possession by Landlord shall relieve Tenant of its obligation to pay Rent (at the time or times provided herein), or of any of its other obligations under this Lease, all of which shall survive such re-entry or taking of possession, and Tenant shall continue to pay Rent as provided in this Lease until the end of the Term and whether or not the Leased Premises have been relet, less the net proceeds, if any, of any reletting of the Leased Premises after deducting all of Landlord's expenses in connection with such reletting, including without limitation all repossession costs, brokerage commissions, legal expenses, expenses of employees, alterations costs and expenses of preparation for reletting. If Landlord elects to terminate this Lease, then Landlord may release the Leased Premises for such price and on such terms as may be immediately obtainable, and Tenant will be and remain liable, not only for all Rent due and other obligations incurred up to the date on which the termination becomes effective, for all holdover damages that accrue under Section 4.3 until Tenant vacates or is removed from the Leased Premises, but also for stipulated or liquidated damages for its nonperformance equal to the sum of (i) all expenses that Landlord may reasonably incur in re-entering and repossessing the Leased Premises, putting the Leased Premises in proper repair and curing any default by Tenant, and removing Tenant's improvements, if Landlord has elected to require such removal, making any reasonable non-structural modifications that may be required for any new tenants, and reletting the Leased Premises, including reasonable attorneys' fees and disbursements, sheriff's fees and brokerage fees in doing so, plus (ii) twenty-four (24) months of the Annual Fixed Rent provided in this Lease. Having elected either to remain out of possession and treating this Lease as remaining in full force and effect or to re-enter or take possession of the Leased Premises without terminating the Term, or this Lease, Landlord may by notice to Tenant given at any time thereafter while Tenant is in default in the payment of Rent or in the performance of any other obligation under this Lease, elect to terminate this Lease and, upon such notice, this Lease shall thereupon be terminated. If in accordance with any of the foregoing provisions of this Article 22, Landlord shall have the right to elect to re-enter and take possession of the Leased Premises, Landlord may enter and expel Tenant and those claiming through or under Tenant and remove the effects of both or either (forcibly if necessary) without being guilty of any manner of trespass and without

prejudice to any remedies for arrears of Rent or preceding breach of covenant. Landlord shall also have the right, upon an Event of Default, to draw upon the Letter of Credit, to be applied against any amounts owed by, or other obligations of, Tenant hereunder. Pursuit of any of the foregoing remedies shall not preclude pursuit of any of the other remedies herein provided or any other remedies provided by law, nor shall pursuit of any remedy herein provided constitute a forfeiture or waiver of any Rent due to Landlord hereunder or of any damage accruing to Landlord by reason of the violation of any of the terms, provisions and covenants herein contained. Forbearance by Landlord to enforce one or more of the remedies herein provided upon the occurrence of an event of default shall not be deemed or construed to constitute a waiver of such default. Following an event of default, all amounts due from Tenant to Landlord pursuant to this Lease shall bear interest at the Default Rate.

22.3 **Landlord Default, Cure Rights.** Landlord shall be in default under this Lease if Landlord neglects or fails to perform or observe any of the material covenants, terms, provisions or conditions on its part to be performed or observed under this Lease, and such failure continues for a period of thirty (30) days after written notice thereof (or if more than thirty (30) days shall be reasonably required because of the nature of the default, if Landlord fails to proceed diligently to cure such default after such notice). In the event of a Landlord default, then Tenant may immediately or at any time thereafter, in addition to any other rights and remedies as may otherwise be provided in this Lease for a Landlord default, pursue all rights and remedies it may have at law and equity generally.

22.4 **Self Help.** If either party (the “*Defaulting Party*”) fails to perform any agreement or obligation on its part to be performed under this Lease, the other party (the “*Curing Party*”) shall have the right (i) if no emergency exists, to perform the same after giving thirty (30) days’ notice to the Defaulting Party, and (ii) in any emergency situation to perform the same immediately without notice or delay. For the purpose of rectifying a default of the Defaulting Party as aforesaid, the Curing Party shall have the right to enter the Leased Premises. The Defaulting Party shall on demand reimburse the Curing Party for the costs and expenses incurred by the Curing Party in rectifying defaults as aforesaid, including reasonable attorneys’ fees, together with interest thereon at the Default Rate, but nothing herein shall be deemed to permit either party to set off any costs of cure or other amounts against the amounts owing to the other party hereunder. Any act or thing done by the Curing Party pursuant to this Section 22.4 shall not constitute a waiver of any such default by the Curing Party or a waiver of any covenant, term or condition herein contained or the performance thereof.

22.5 **Remedies Cumulative.** The various rights and remedies given to or reserved to Landlord and Tenant by this Lease or allowed by law shall be cumulative, irrespective of whether so expressly stated.

22.6 **Limitation on Landlord’s Liability.** Notwithstanding anything to the contrary in this Lease, (A) Tenant will look solely to the interest of Landlord in the Leased Premises (or its successor as Landlord hereunder), for the satisfaction of any judgment or other judicial process requiring the payment of money as a result of (i) any negligence (including gross negligence) or (ii) any breach of this Lease by Landlord or its successor (including any beneficial owners, partners, shareholders, trustees or others affiliated or related to Landlord or such successors), and Landlord shall have no personal liability hereunder of any kind, and (B)

Tenant's sole right and remedy in any action concerning Landlord's reasonableness (where same is required hereunder) will be an action for declaratory judgment and/or specific performance, and in no event shall Tenant be entitled to claim or recover any damages in any such action.

**22.7 Interest on Past Due Obligations; Late Charges; Application of Payments to Past Due Obligations.** Except where another rate of interest is specifically provided for in this Lease, any amount due from either party to the other under this Lease which is not paid when due shall bear interest at the Default Rate from the date such payment was due to and including the date of payment. Tenant acknowledges that the late payment of any installment of Annual Fixed Rent, Percentage Rent or any other amounts due Landlord shall cause Landlord to incur certain costs and expenses, the exact amount of which are extremely difficult or impractical to fix. These costs and expenses may include, without limitation, administrative and collection costs and processing and accounting expenses. Therefore, if any installment of Rent, including annual Fixed Rent, Percentage Rent, and any other amount due Landlord is not received by Landlord from Tenant when due, Tenant shall immediately pay to Landlord a late charge equal to the lesser of (i) four percent (4%) of such delinquent amount, or (ii) One Thousand Dollars (\$1,000.00). Landlord and Tenant agree that this late charge represents a reasonable estimate of the costs and expenses Landlord will incur and is fair compensation to Landlord for the loss suffered by reason of late payment to Tenant. Upon accrual, all such late charges shall be deemed Additional Rent. Tenant further acknowledges that Landlord shall have the right to apply any payment of Rent, including Annual Fixed Rent, Percentage Rent or any other amounts due Landlord, in reduction of any amount due under this Lease, in such order and satisfaction as Landlord may elect in its sole discretion and regardless of whether Tenant has designated how such payment is to be applied.

## **ARTICLE 23.** **ACCESS TO PREMISES**

**23.1 Ongoing Access and Inspection Rights.** Tenant shall permit Landlord and its authorized representatives to enter the Facility at all reasonable times (upon 48 hours prior notice, except in the event of an emergency, in which no prior notice is required prior to entry) for the purposes of (i) serving or posting or keeping posted thereon notices required or permitted by Law, (ii) conducting periodic inspections, (iii) performing any work thereon required or permitted to be performed by Landlord pursuant to this Lease, and (iv) showing the Leased Premises to prospective purchasers or lenders during the final six (6) months of the Term (and only in the event that Tenant has not elected to extend the Term as provided herein). Any access or entry by Landlord upon the Leased Premises shall be conducted in such a manner as to minimize any disruption to, and disturbance of, Tenant's, and any of its subtenants, concessionaires, and licensees, use, occupancy and enjoyment of the Leased Premises.

**23.2 Landlord's Construction Inspection Rights.** During the Construction Term and any other period of Tenant's fixturing or construction in the Leased Premises, Landlord shall have the right to physically inspect, and to cause one or more engineers or other representatives of Landlord to physically inspect, the Leased Premises, as long as the same does not interfere with Tenant's operation of or construction activities on the Leased Premises. Such inspections shall include (without limitation) such tests, inspections and audits of environmental and soils conditions as Landlord deems necessary. Landlord shall make such inspections in good faith and



with due diligence. All inspection fees, appraisal fees, engineering fees, environmental fees and other expenses of any kind incurred by Landlord relating to the inspection of the Leased Premises will be solely Landlord's expense. Tenant shall cooperate with Landlord in all reasonable respects in making such inspections. Tenant reserves the right to have a representative present at the time Landlord conducts any such inspection of the Leased Premises. Landlord shall notify Tenant not less than two (2) business days in advance of making any such inspection. In making any inspection, Landlord will treat, and will cause any representative of Landlord to treat, all information obtained by Landlord pursuant to the terms of this Section 23.2 as strictly confidential. Landlord agrees to indemnify and hold Tenant, its Affiliates, and its and their directors, contractors, employees, agents and representatives harmless from any and all injuries, losses, liens, claims, judgments, liabilities, costs, expenses or damages (including reasonable attorneys' fees and court costs), actual or threatened, which result from or arise out of any inspections by Landlord or its authorized representatives pursuant to this Section 23.2. Notwithstanding any provision herein to the contrary, the indemnity contained in the preceding sentence shall survive the termination of this Lease.

#### **ARTICLE 24.** **FORCE MAJEURE**

If either party is delayed or hindered in or prevented from the performance of any act required under this Lease by reason of strikes, lockouts, labor troubles, inability to procure materials, failure of power, restrictive Laws (except as otherwise specifically provided herein), riots, insurrection, terrorist acts, war or other reason beyond the reasonable control of and not the fault of the party delayed in performing the work or doing the acts required under the terms of this Lease (collectively, "*Force Majeure*"), then performance of such act shall be excused for the period of the delay, and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. The provisions of this Article shall not (i) operate to excuse Tenant from prompt payment of Rent or any other payment required by Tenant under the terms of this Lease, or (ii) be applicable to delays resulting from the inability of a party to obtain financing or to proceed with its obligations under this Lease because of a lack of funds.

#### **ARTICLE 25.** **MISCELLANEOUS**

25.1 **Lease Not to be Recorded.** Upon request of Landlord or Tenant, the parties hereto shall promptly execute and deliver a memorandum of this Lease for recording purposes in mutually agreeable recordable form. If Tenant elects to record such memorandum, Landlord shall promptly cause the same to be recorded, at Tenant's expense. Neither party may record this Lease without the consent of the other party.

25.2 **Notices.** All notices, consents, requests, approvals and authorizations (collectively, "*Notices*") required or permitted under this Lease shall only be effective if in writing. All Notices (except Notices of default, which may only be sent pursuant to the methods described in (A) and (B) below) shall be sent (A) by registered or certified mail (return receipt requested), postage prepaid, or (B) by Federal Express, U.S. Post Office Express Mail, Airborne or similar nationally recognized overnight courier which delivers only upon signed receipt of the addressee, or (C) by facsimile transmission with original sent via U.S. Mail or overnight courier

and addressed as follows or at such other address, and to the attention of such other person, as the parties shall give notice as herein provided:

If intended for Landlord: EPT Concord II, LLC  
c/o EPR Properties  
Attention: Asset Management  
909 Walnut Street, Suite 200  
Kansas City, Missouri 64106  
Telephone: (816) 472-1700  
Facsimile: (816) 472-5794

With a copy to: EPR Properties  
Attention: General Counsel  
909 Walnut Street, Suite 200  
Kansas City, Missouri 64106  
Telephone: (816) 472-1700  
Facsimile: (816) 472-5794

Stinson Morrison Hecker LLP  
Attention: Kate Hauber, Esq.  
1201 Walnut Street, Suite 2900  
Kansas City, Missouri 64106  
Telephone: (816) 691-3207  
Facsimile: (816) 691-3495

If intended for Tenant: Concord HWP, LLC  
13 Green Mountain Drive  
Cohoes, New York 12047  
Attention: Ken Ellis  
Telephone: (518) 783-0038  
Facsimile: (518) \_\_\_\_\_

With a copy to: Ralph W. Bandel  
Counsel  
Aquatic Development Group, Inc.  
13 Green Mountain Drive  
Cohoes, New York 12047  
Telephone: (518) 783-0038  
Facsimile: (518) 783-0510

A notice, request and other communication shall be deemed to be duly received if delivered by a nationally recognized overnight delivery service, when delivered to the address of the recipient, if sent by mail, on the date of receipt by the recipient as shown on the return receipt card, or if sent by facsimile, upon receipt by the sender of an acknowledgment or transmission report generated by the machine from which the facsimile was sent indicating that the facsimile was sent in its entirety to the recipient's facsimile number; provided that if a notice, request or other

communication is served by hand or is received by facsimile on a day which is not a Business Day, or after 5:00 p.m. local time on any Business Day at the addressee's location, such notice or communication shall be deemed to be duly received by the recipient at 9:00 a.m. local time of the addressee on the first Business Day thereafter. Rejection or other refusal to accept or the inability to delivery because of changed address of which no Notice was given shall be deemed to be receipt of the Notice as of the date of such rejection, refusal or inability to deliver.

25.3 **Waiver of Performance and Disputes.** One or more waivers of any covenant, term or condition of this Lease by either party shall not be construed as a waiver of a subsequent breach of the same or any other covenant, term or condition, nor shall any delay or omission by either party to seek a remedy for any breach of this Lease or to exercise a right accruing to such party by reason of such breach be deemed a waiver by such party of its remedies or rights with respect to such breach. The consent or approval by either party to or of any act by the other party requiring such consent or approval shall not be deemed to waive or render unnecessary consent to or approval of any similar act.

25.4 **Modification of Lease.** The terms, covenants and conditions hereof may not be changed orally, but only by an instrument in writing signed by the party against whom enforcement of the change, modification or discharge is sought, or by such party's agent.

25.5 **Captions.** Captions throughout this instrument are for convenience and reference only and the words contained therein shall in no way be deemed to explain, modify, amplify or aid in the interpretation or construction of the provisions of this Lease.

25.6 **Lease Binding on Successors and Assigns, etc.** Except as herein otherwise expressly provided, all covenants, agreements, provisions and conditions of this Lease shall be binding upon and inure to the benefit of the parties hereto and their heirs, devisees, executors, administrators, successors in interest and assigns as well as grantees of Landlord, and shall run with the land. Without limiting the generality of the foregoing, all rights of Tenant under this Lease may be granted by Tenant to any permitted sublessee of Tenant, subject to the terms of this Lease.

25.7 **Brokers.** Landlord represents and warrants to Tenant that it has not incurred or caused to be incurred any liability for real estate brokerage commissions or finder's fees in connection with the execution or consummation of this Lease for which Tenant may be liable. Tenant represents and warrants to Landlord that it has not incurred or caused to be incurred any liability for real estate brokerage commissions or finder's fees in connection with the execution or consummation of this Lease for which Landlord may be liable. Each of the parties agrees to indemnify and hold the other harmless from and against any and all claims, liabilities or expense (including reasonable attorneys' fees) in connection with any breach of the foregoing representations and warranties.

25.8 **Landlord's Status as a REIT.** The following clause shall be applicable if the Landlord is a real estate investment trust: Tenant acknowledges that Landlord intends to elect to be taxed as a real estate investment trust ("**REIT**") under the Code. Tenant shall exercise its commercially reasonable efforts not do anything which Landlord has advised Tenant in writing would materially adversely affect Landlord's status as a REIT. Tenant agrees to enter into



reasonable modifications of this Lease which do not materially adversely affect Tenant's or its Affiliates, lenders, subtenants, licensees and concessionaires rights, obligations and liabilities if such modifications are required to retain or clarify Landlord's status as a REIT.

25.9 **Governing Law.** This Lease shall be governed by and construed in accordance with the laws of the State where the Leased Premises are located, but not including such State's conflict-of-laws rules, and venue shall be in Sullivan County.

25.10 **Estoppel.** Landlord and Tenant each confirm and agree that (a) it has read and understood all of the provisions of this Lease; (b) it is an experienced real estate investor and is familiar with major sophisticated transactions such as that contemplated by this Lease; (c) it has negotiated with the other party at arm's length with equal bargaining power; and (d) it has been advised by competent legal counsel of its own choosing.

25.11 **Joint Preparation.** This Lease (and all exhibits thereto) is deemed to have been jointly prepared by the parties hereto, and any uncertainty or ambiguity existing herein, if any, shall not be interpreted against any party, but shall be interpreted according to the application of the rules of interpretation for arm's-length agreements.

25.12 **Interpretation.** It is hereby mutually acknowledged and agreed that the provisions of this Lease have been fully negotiated between parties of comparable bargaining power with the assistance of counsel and shall be applied according to the normal meaning and tenor thereof without regard to the general rule that contractual provisions are to be construed narrowly against the party that drafted the same or any similar rule of construction.

25.13 **Inconsistencies.** This Lease and the Development Agreement are intended to be consistent with each other, and shall be interpreted to avoid any inconsistencies between the agreements.

25.14 **Severability.** If any provisions of this Lease are determined to be invalid by a court of competent jurisdiction, the balance of this Lease shall remain in full force and effect, and such invalid provision shall be construed or reformed by such court in order to give the maximum permissible effect to the intention of the parties as expressed therein.

25.15 **Landlord and Tenant.** Nothing contained in this Lease shall be deemed or construed by the parties hereto or by any third party to create the relationship of principal and agent or of partnership or of joint venture or of any association whatsoever between Landlord and Tenant, it being expressly understood and agreed that neither the computation of rent nor any other provision contained in this Lease nor any act or acts of the parties hereto shall be deemed to create any relationship between Landlord and Tenant other than the relationship of landlord and tenant.

25.16 **Authority.** The persons executing this Lease on behalf of Tenant and Landlord covenant and warrant to the other party that (a) they are duly authorized to execute this Lease on behalf of the party for whom they are acting, and (b) the execution of this Lease has been duly authorized by the party for whom they are acting.

25.17 **Time is of the Essence.** Time is of the essence with respect to the performance of each of the terms, provisions, covenants and conditions contained in this Lease.

25.18 **Consent.** The parties agree to act in good faith and with fair dealing with one another in the execution, performance and implementation of the terms and provisions of this Lease. Whenever the consent, approval or other action of a party is required under any provision of this Lease, such consent, approval or other action shall not be unreasonably withheld, delayed or conditioned by a party unless the provision in question expressly authorizes such party to withhold or deny consent or approval or decline to take action in accordance with a different standard, in which case the consent or approval or the decision to not take action may be withheld, delayed or conditioned in accordance with the different standard (any provision indicating that consent is not to be unreasonably withheld is to be interpreted to mean that consent shall not be unreasonably withheld, delayed or conditioned).

25.19 **Attorneys' Fees.** In case suit is brought because of the breach or alleged breach of any agreement or obligation contained in this Lease on the part of Tenant or Landlord to be kept or performed, the prevailing party shall be entitled to recover all expenses incurred in connection with such suit, including reasonable attorneys' fees. For purposes of this Section 25.19, the "prevailing party" shall mean the prevailing party as determined by the court.

25.20 **Further Assurances.** Each of the parties hereto shall execute and provide all additional documents and other assurances that are reasonably necessary to carry out and give effect to the intent of the parties reflected in this Lease.

25.21 **Counterparts.** This Lease may be executed at different times and in any number of counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of a signature page to this Lease by facsimile or e-mail shall be as effective as delivery of a manually executed counterpart of this Lease. In proving this Lease, it shall not be necessary to produce or account for more than one such counterpart signed by the party against whom enforcement is sought.

25.22 **Rules of Construction.** The following rules of construction shall be applicable for all purposes of this Lease, unless the context otherwise requires:

(a) The terms "hereby," "hereof," "hereto," "herein," "hereunder" and any similar terms shall refer to this Lease, and the term "hereafter" shall mean after, and the term "heretofore" shall mean before, the date of this Lease.

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

(c) The terms "include," "including" and similar terms shall be construed as if followed by the phrase "without being limited to."

**ARTICLE 26.**  
**WAIVER OF TRIAL BY JURY**

TO THE FULLEST EXTENT PERMITTED BY LAW, TENANT AND LANDLORD HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER OF THE PARTIES HERETO AGAINST THE OTHER IN ANY MATTERS ARISING OUT OF OR IN CONNECTION WITH THIS LEASE, THE RELATIONSHIP OF LANDLORD AND TENANT, TENANT'S USE AND OCCUPANCY OF THE RESORT FACILITY OR THE CONCORD PROPERTY, AND ANY CLAIM OF INJURY OR DAMAGE.

**ARTICLE 27.**  
**EXHIBITS**

Any exhibits referenced but not attached hereto shall be attached as such exhibits are completed by the applicable party hereto (but in no event later than the date by which the schematics are to be completed under 1.3(f) of the Development Agreement) and shall be attached by addendum executed by Landlord and Tenant.

*[signature page follows]*



IN WITNESS WHEREOF, Landlord and Tenant have caused this Lease to be duly executed as of the day and year first above written.

**LANDLORD:**

**EPT CONCORD II, LLC**, a Delaware limited liability company

By: 

Name: Gregory K. Silvers  
Vice President

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

**TENANT:**

**CONCORD HWP, LLC**,  
A New York limited liability company

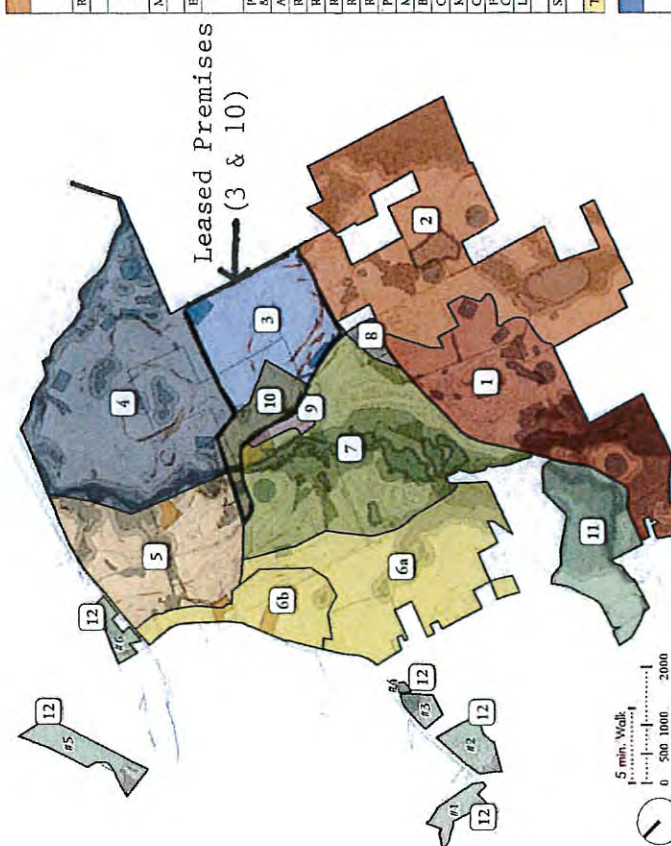
By: 

Ken Ellis, Managing Member

**EXHIBIT A**

**Description of the Leased Premises**

[INSERT]



Program	Bldg. Area (sf)	Estimated Annual Attendance	% Within 50 Miles	% Outside 50 Miles
Casino Resort	845,977	100.0 %		
Lobby	236,871	28.0 %		
Hotel Phase I - # of Rooms	549,885	65.0 %		
Hotel Phase II - # of Rooms	59,128	7.0 %		
Pool & Beverage	519,885	100.0 %		
Kitchen & BOH	318,303	61.5 %		
Event Space - # of Seats	82,928	15.0 %		
Spa	67,345	12.2 %		
Clubhouse - # of Seats	61,312	11.1 %		

Program	Bldg. Area (sf)	Estimated Annual Attendance	% Within 50 Miles	% Outside 50 Miles
Casino Resort	180,000	3,000		
Lobby	500	500		
Hotel Phase I - # of Rooms	500	500		
Hotel Phase II - # of Rooms	500	500		
Pool & Beverage	500	500		
Kitchen & BOH	500	500		
Event Space - # of Seats	500	500		
Spa	500	500		
Clubhouse - # of Seats	500	500		
On-Site Surface Parking	2,000	2,000		
Off-Site Surface Parking	500	500		
Casino Resort Back Side	500	500		
Public	500	500		
Track Parking	500	500		
Harness Track	500	500		
# - Maximum Rates per Day				
# - Average Rates per Day				
TOTAL	180,000	3,000		

Program	Bldg. Area (sf)	Estimated Annual Attendance	% Within 50 Miles	% Outside 50 Miles
RV Park	50.0	106,762	5%	95%
180 Spas	120,000			
Clubhouse, General Store, Food, Miniature Golf	40,000	360,000	50%	50%
Music Theater	5.0	76,500	65%	35%
Event Field				
22 Streets				
Programs 27 ac. Satellite Surface Parking (100,000)				
Permanent NY Wine & Market Components	20,000			
Activity Pavilion	7,000			
Restaurant 1	5,500			
Restaurant 2	5,500			
Restaurant 3	4,000			
Restaurant 4	3,000			
Restaurant 5	3,500			
Pub	3,500			
Music Venue	3,500			
Billiards	3,000			
Gallery	5,000			
Kids Quest	10,000			
Cowork Minuteman/Club	10,000			
Family Entertainment Center/ Bowling	35,000			
Lake Club & Tennis # Courts	5,000			
Surface Parking 255 Spas				
TOTAL	380,000	560	1,365,073	

Program	Bldg. Area (sf)	Estimated Annual Attendance	% Within 50 Miles	% Outside 50 Miles
Resort Conference Hotel	183,000	35,588	10%	90%
250-400 Rooms				
Event Conference Center	50,000	35,950	50%	50%
Spa Adventure	7,500	6,000	30%	70%
Tennis Center	13,228			
7 Courts				
Eventier Terraces	19,500			
Surface Parking	1.3			
125 Cars				
TOTAL	273,225	63	77,538	

Program	Bldg. Area (sf)	Estimated Annual Attendance	% Within 50 Miles	% Outside 50 Miles
Outdoor Leisure	122,880	64,000	10%	90%
128 Rooms				
Hilltop Club				
Putting Camp				
Sparring Club				
Perennial Residential Lot				
TOTAL	122,880	64,000		

Program	Bldg. Area (sf)	Estimated Annual Attendance	% Within 50 Miles	% Outside 50 Miles
Residential	119			
295 Units				
TOTAL	119			

Program	Bldg. Area (sf)	Estimated Annual Attendance	% Within 50 Miles	% Outside 50 Miles
Medical Home	90,000	62,660	10%	90%
Civic Center	35,000	365,000	100%	0%
Housing	360,000		100%	0%
400 Units				
TOTAL	485,000	427,660		

Program	Bldg. Area (sf)	Estimated Annual Attendance	% Within 50 Miles	% Outside 50 Miles
Residential @ 2.5 du/acre	108			
270 Units				
TOTAL	108			

Program	Bldg. Area (sf)	Estimated Annual Attendance	% Within 50 Miles	% Outside 50 Miles
Maintenance Building	9,000			
6-8 Employees				
TOTAL	9,000			

Program	Bldg. Area (sf)	Estimated Annual Attendance	% Within 50 Miles	% Outside 50 Miles
Golf Clubhouse	20,000			
6-70 Employees				
Golf Cottages	21,000			
10 Units @ 2,100sf ea.				
TOTAL	41,000			

Program	Bldg. Area (sf)	Estimated Annual Attendance	% Within 50 Miles	% Outside 50 Miles
Sports Zone				
Trailing/Hiking				
Existing Shelter	5,000			
TOTAL	5,000			

\* If build for development in Phase for temporary use.

Program	Bldg. Area (sf)	Estimated Annual Attendance	% Within 50 Miles	% Outside 50 Miles
Off-Road Vehicle Practice Track	6,500			
65' x 100'				
Kiosk & Staging Area	200			
Storage Barn	1,300			
TOTAL	8,000			

**DRAFT**

Thompson, Sullivan County, New York

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**EXHIBIT B**

**Description of the Resort Property**

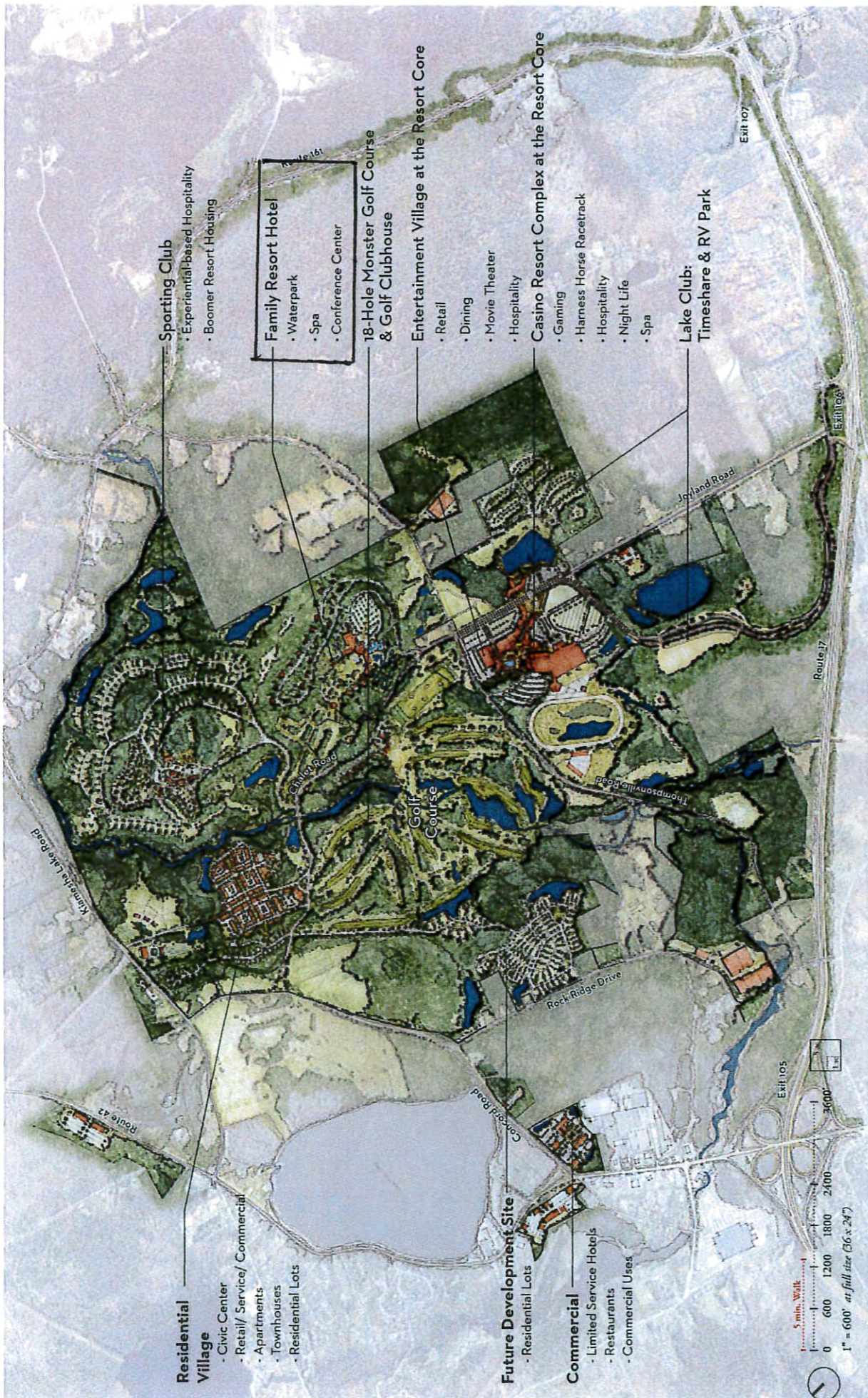
[INSERT]

**EXHIBIT C**

**Site Plan**

[INSERT]





- Sporting Club**
  - Experiential-based Hospitality
  - Boomer Resort Housing
- Family Resort Hotel**
  - Waterpark
  - Spa
  - Conference Center
- 18-Hole Monster Golf Course & Golf Clubhouse**
- Entertainment Village at the Resort Core**
  - Retail
  - Dining
  - Movie Theater
  - Hospitality
- Casino Resort Complex at the Resort Core**
  - Gaming
  - Harness Horse Racetrack
  - Hospitality
  - Night Life
  - Spa
- Lake Club: Timeshare & RV Park**

- Residential Village**
  - Civic Center
  - Retail/ Service/ Commercial
  - Apartments
  - Townhouses
  - Residential Lots

- Future Development Site**
  - Residential Lots
- Commercial**
  - Limited Service Hotels
  - Restaurants
  - Commercial Uses



HART HOWERTON

# EPT CONCORD RESORT

Thompson, Sullivan County, New York

Illustrative Master Plan

December 2012

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**EXHIBIT D**

**Facility Description**

**EXHIBIT E**

**Restrictive Agreement**

All matters of record or otherwise affecting the Resort Property or the Leased Premises, including but not limited to:

1. \_\_\_\_\_.
2. \_\_\_\_\_.
3. \_\_\_\_\_.

**EXHIBIT F**

**Memorandum of Term Commencement and Annual Fixed Rent**

THIS MEMORANDUM OF TERM COMMENCEMENT AND ANNUAL FIXED RENT (the "**Memorandum**") is made as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between EPT Concord II, LLC, a Delaware limited liability company, with an office at 909 Walnut Street, Suite 200, Kansas City, Missouri 64106 ("**Landlord**") and CONCORD HWP, LLC, a New York limited liability company, with an address of \_\_\_\_\_ ("**Tenant**").

**AGREEMENT**

1. Pursuant to that certain Lease dated as of \_\_\_\_\_, 20\_\_ (the "**Lease**"), between Landlord and Tenant, Landlord leased to Tenant and Tenant leased from Landlord certain premises located on certain real property in the City of \_\_\_\_\_, \_\_\_\_\_, as more particularly described in the Lease (the "**Premises**").

2. The Lease is for an initial term of \_\_\_\_ years commencing on \_\_\_\_\_, 20\_\_ and expiring on \_\_\_\_\_, 20\_\_ (the "**Expiration Date**"), unless extended in accordance with the Lease.

3. The total amount expended by Landlord as part of the Landlord Allowance (including the accrual of Variable Rent, if applicable) is \$\_\_\_\_\_. The amount of Annual Fixed Rent commencing of the Commencement Date shall be \$\_\_\_\_\_.

3. All of the other terms and conditions of the Lease are more fully set forth in the Lease and are incorporated herein by this reference.

4. This Memorandum shall inure to the benefit of and be binding upon Landlord and Tenant and their respective representatives, successors and assigns.

IN WITNESS WHEREOF, Landlord and Tenant have caused this Memorandum of Term Commencement to be duly executed as of the day and year first above written.

**LANDLORD:**

**TENANT:**

**EPT CONCORD II, LLC**  
a Delaware limited liability company

**CONCORD HWP, LLC,**  
A New York limited liability company

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

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

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

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

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

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



EXHIBIT G  
FORM OF PLEDGE AGREEMENT  
[attach]