

**CITY OF PEORIA, ARIZONA
COUNCIL COMMUNICATIONS**

CC: 7C
Amend No. _____

Date prepared: December 14, 2009

Council Meeting Date: January 5, 2010

TO: Carl Swenson, City Manager
THROUGH: Susan Thorpe, Deputy City Manager *ST*
FROM: Brent D. Mattingly, Finance Director *BDM*
SUBJECT: Amended Lease – Arizona Broadway Theatre

RECOMMENDATION: Discussion and possible action to authorize the City of Peoria to enter into an amended lease with KLOS Enterprises, LLC (Arizona Broadway Theatre) for the approximately four acres of real property owned by the City located at 7701 West Paradise Lane and authorize the City Manager to execute the lease documents.

SUMMARY:

The City entered into a 25 year ground lease with KLOS Enterprises, LLC (Arizona Broadway Theatre) in May 2003. The lease provides for 3 five year extensions for a possible total lease term of 40 years. The project is a 40,000 square foot facility on approximately four acres of land. The use is a quality dinner theatre with ancillary meeting and conference room space. Arizona Broadway Theatre is current in all sales tax payments to the city.

The theatre owner is currently working with advisors to create a successful business plan for the operation. The theatre owner has agreed to develop and submit a copy of his business plan to the city. An outline of the plan is due by the end of January 2010 with the actual business plan due in March 2010. The business plan will include financial projections of revenues and expenses, a fundraising campaign program with benchmarks, a marketing plan to reach new customers, and discussion of organizational and staff resources needed for successful operations. Periodic meetings will be held with city staff to discuss progress of the theatre in terms of the business plan.

The deferral of the lease payments to future years is in the city's financial and economic development interests. Based upon the above, staff is recommending an amendment to the existing lease incorporating the following.

CITY CLERK USE ONLY:

- Consent Agenda
- Carry Over to Date: _____
- Approved
- Unfinished Business (Date heard previous: _____)
- New Business
- Public Hearing: No Action Taken

ORD. # _____ RES. # _____
A/CON# 1903D LIC. # _____
Action Date: _____

January 5, 2010

Amended Lease – Arizona Broadway Theatre

Page 2

- KLOS will provide up to 4 dates per year, at no cost to the city, for rental of the conference room facilities. These dates will be scheduled so as to not conflict with revenue producing events of the theatre.
- KLOS will provide up to 4 dates per year, at no cost to the city, for rental of the theatre facilities. These dates will be scheduled so as to not conflict with revenue producing events of the theatre.
- The net present value of the revised lease payments will reflect interest earnings to the city.
- Amend the lease agreement to reflect the deferral of the monthly rent due in 2010 as follows:

25 year term of lease

- 2008 thru 2010 - no lease payments due
- 2011 thru 2012 – \$ 3,950 per month
- 2013 thru 2017 – \$ 4,950 per month
- 2018 thru 2022 – \$ 5,700 per month
- 2023 thru 2027 – \$ 6,500 per month
- 2028 thru 2032 – \$ 7,400 per month

Possible 3 five year extensions

- 2033 thru 2037 – \$ 7,700 per month
- 2038 thru 2042 – \$ 8,500 per month
- 2043 thru 2047 – \$ 9,100 per month

The proposed amendment would be the fourth amendment to the lease agreement. The first two amendments clarified language to facilitate financing of the property and waived certain excess insurance requirements. The third amendment adjusted the lease payment obligations to reflect market conditions and deferred the initial lease payments during the theatre's early years of operation. This fourth amendment further defers the lease payments due in 2010 under the current lease, reflects interest earnings to the city, and provides for a limited free use of the facility by the city.

ATTACHMENT: Lease Amendment

When recorded return to:
City of Peoria, Arizona
Office of the City Clerk
8401 West Monroe Street
Peoria, AZ 85345

FOURTH AMENDMENT TO AND RESTATEMENT OF LEASE AGREEMENT

THIS Fourth Amendment to and 1st Restatement of Lease Agreement (the "Lease") is made on the ___ day of January 2010 (the "Revision Date"), and made effective as of the Effective Date by and between the City of Peoria, AZ, an Arizona municipal corporation ("Lessor"), and KLOS Enterprises, LLC, an Arizona limited liability company ("Tenant"). For all actions occurring or required to occur after the Revision Date, this Lease supersedes, replaces in their entirety, and renders of no further force or effect the following documents (collectively, the "Original Agreements"): that certain Lease Agreement dated May 15, 2003, City ACON 17903, recorded in the Maricopa County Recorder's Office as document number lease 2003-0770253; that certain First Amendment to Lease executed by Lessor on October 8, 2003, and executed by the Tenant on November 10, 2003, City ACON 17903A, recorded in the Maricopa County Recorder's Office as document number 2003-1594776; that certain Second Amendment to Lease Agreement dated December 1, 2003, City ACON 17903B, recorded in the Maricopa County Recorder's Office as document number 2004-0305094; and that certain Third Amendment to Lease Agreement dated December 20, 2007, City ACON 17903C, recorded in the Maricopa County Recorder's Office as document number 2007-1345576.

WITNESSETH:

This Lease is predicated upon the following facts:

- A. Tenant's financial projections indicate that, for some time, operating revenues from the Demised Premises will be insufficient to make the monthly payments required under the Original Agreements.
- B. Lessor believes that the economic effect of a material default and subsequent enforcement of the Original Agreements would significantly damage the health and safety of the City in the vicinity of the Demised Premises.
- C. Lessor further believes that Tenant's business activities significantly improve the welfare and quality of life of the City.
- D. Given the above-mentioned, Lessor, in the best interest of the City is willing to defer the lease payments due in 2010 and Tenant agrees to provide Lessor with use of the theatre and conference room facilities, at no cost, up to four dates per year for such deferral. Lessor's use of the theatre and conference room facilities will be scheduled so as to not conflict with revenue producing events of the theatre.

E. Lessor's deferral of the lease payments includes interest earnings to Lessor on the deferred payments.

AGREEMENT:

SECTION 1-FUNDAMENTAL LEASE PROVISIONS

Effective Date: May 15, 2003

Lessor: CITY OF PEORIA, an Arizona municipal corporation

Tenant: KLOS Enterprises, LLC, an Arizona limited liability company

Trade Name: Arizona Broadway Theatre

Lease Term: An original term of twenty-five (25) years, with three (3) five (5) year extension options.

Demised Premises: The real property located in Peoria, Arizona, exclusive of the Building and Improvements, more particularly described on Exhibit A attached hereto and incorporated herein by this reference, together with the easements, rights, privileges and appurtenances thereto.

Address of Lessor: City of Peoria
8401 W. Monroe
Peoria, Arizona 85345

Address of Tenant: Ronald L. Klaphake, CEO
KLOS Enterprises, L.L.C.
Arizona Broadway Theatre
7701 West Paradise Lane
Peoria, Arizona 85382

Permitted Use: Restaurant and Theatre Use

Building: The structure to be constructed upon the Demised Premises for the Project.

Improvements: The Building and all other improvements and structures at any time hereafter erected or situated upon the Demised Premises during the Term, and any and all renewals, replacements, additions and substitutions thereto.

Development Agreement: That certain Development Agreement executed by and between the Lessor and Tenant governing the construction of the Project, together with any modifications, amendments, restatements and supplements thereto.

- Project:** The term "Project" shall have the meaning ascribed thereto in the Development Agreement.
- Leasehold Mortgage:** A mortgage on Lessor's interest in the Demised Premises which shall be deemed to include a deed of trust and such other types of security instruments as are commonly given to secure loans or advances on real property and the permanent leasehold financing of improvements under the laws of the State of Arizona and the note or other credit instrument secured thereby.
- Mortgagee:** A mortgagee under a Leasehold Mortgage which shall be deemed to include the beneficiary under a deed of trust and the parties secured by any other security instrument constituting a Leasehold Mortgage.
- Removable Personal Property:** All personal property, signage and trade fixtures of every kind and nature, belonging to Tenant.
- Leasehold Estate:** All of the estate, rights and interest of the Tenant in and to the Demised Premises.

The foregoing Fundamental Lease Provisions are an integral part of this Lease, and each reference in the body of the lease agreement to any Fundamental Lease Provision shall be construed to incorporate all of the terms set forth above with respect to such provisions.

SECTION 2-DEMISED PREMISES

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and subject to the promises, terms and conditions contained herein in this Ground Lease Agreement (the "lease agreement"), Lessor hereby leases to Tenant the Demised Premises. Said real property shall hereinafter be referred to as the "Demised Premises." Tenant acknowledges that it has inspected the Demised Premises, is familiar with its condition and accepts the same "as is" in its present condition. Lessor hereby acknowledges that all prior leases, rentals or other grant of possession of the Demised Premises, if any, shall terminate and be of no further force or effect as of the Effective Date of this Lease. Should such prior lease(s) exist, and any tenant rights thereunder be in a third party, Lessor covenants and warrants that the same shall be terminated as provided for in this section.

SECTION 3-TERM

3.1 The lease term shall commence on the Effective Date and continue thereafter for a period of twenty-five (25) years from the Commencement Date, unless such lease term shall be sooner terminated or extended as hereinafter provided. Provided Tenant is not then in default hereunder, Tenant shall have the option, subject to approval by the Peoria City Council if the City is still the Lessor, which approval shall not unreasonably be withheld, to extend the lease term for three (3) successive terms of five (5) years each, upon the same terms and conditions

contained herein. In order to exercise any such extension option, Tenant shall give to Lessor written notice of its election to do so not less than six (6) months prior to the commencement date of the applicable extension period. Failure to exercise any extension right shall terminate Tenant's rights to exercise all subsequent extension rights. The lease term, as well as any extension hereunder is hereafter referred to as the "Term".

3.2 The "Effective Date" shall mean May 15, 2003.

3.3 The "Commencement Date" shall mean the date upon which the Lessor has issued a Certificate of Occupancy for the Improvements.

SECTION 4-RENT

4.1 Rent. Tenant shall pay Rent to Lessor during each Lease Year, payable in twelve (12) equal monthly installments, in advance, on the first day of each calendar month, commencing on the Commencement Date of the lease agreement, in accordance with the following schedule:

<i>Lease Year</i>	<i>Rent due per month</i>
Effective Date thru 2007	As provided by the Original Agreements
2008 thru 2010	No lease payments due
2011 thru 2012	\$ 3,950
2013 thru 2017	\$ 4,950
2018 thru 2022	\$ 5,700
2023 thru 2027	\$ 6,500
2028 thru 2032	\$ 7,400
If extended:	
2033 thru 2037	\$ 7,700
2038 thru 2042	\$ 8,500
2043 thru 2047	\$ 9,100

4.2 As used in this Lease, "Lease Year" shall mean each period of twelve (12) consecutive months commencing on each January 1st and ending at midnight on the next succeeding December 31st, except that the first Lease Year shall begin on the Commencement Date hereunder and shall end at midnight on the next succeeding December 31, and except that the last Lease Year shall end upon the expiration of twenty five (25) years from the Commencement Date of the lease agreement.

4.3 [Intentionally Deleted].

4.4 [Intentionally Deleted].

4.5 Tenant shall furnish or cause to be furnished to Lessor a City of Peoria Transaction Privilege Tax Return within twenty (20) days after the close of each calendar month. The receipt by Lessor of any tax return for any period shall not bind Lessor as to the correctness of the tax return. Within three (3) years after the receipt of any such tax return, Lessor at any time shall be entitled to an audit of Tenant's books and records, either by Lessor or by a Certified Public Accountant to be designated by Lessor. Such audit shall be limited to the determination of the correct amount which Tenant was to have paid pursuant to the Transaction Privilege Tax Return and shall be conducted during normal business hours at the principal place of business of Tenant. Any information gained from such tax returns or inspection shall be confidential and shall not be disclosed other than to carry out the purposes hereof; provided, however, that Lessor shall be permitted to disclose the contents of any such tax returns in connection with any administrative or judicial proceedings in which Lessor is involved and where Lessor may be required to divulge such information.

4.6 [Intentionally Deleted].

4.7 [Intentionally Deleted].

4.8 The Rent and Additional Charges, hereinafter provided for in Section 5, shall be paid in lawful money of the United States of America to the "City of Peoria, Arizona" payable at 8401 W. Monroe, Peoria, Arizona 85345 and should be delivered to the attention of the City of Peoria Financial Services Manager, or to such other place or person as Lessor may from time to time designate in writing.

4.9 If Tenant shall fail or neglect to pay any amount due and payable to Lessor hereunder, and the delinquency shall continue for five (5) days, then beginning on the sixth (6) day, Tenant shall pay to Lessor a late payment charge in the amount of Twenty Five Dollars (\$25.00) per day for each and every day any amount remains due and payable to Lessor hereunder; said late payment charge shall be in addition to, and not in lieu of, any other rights Lessor may have.

SECTION 5-ADDITIONAL CHARGES

All taxes, including the City transaction privilege tax, assessments, charges, costs and expenses which Tenant assumes, agrees or is obligated by law to pay hereunder, together with all interest and penalties that may accrue thereon in the event of Tenant's failure to pay the same as herein provided, and all other damages, costs and expenses which Lessor may suffer or incur, and any and all other sums which may become due, by reason of any default of Tenant or failure on Tenant's part to comply with the agreements, terms, covenants and conditions of this Lease on Tenant's part to be performed, shall be referred to herein as Additional Charges and, in the event of their nonpayment, Lessor shall have, with respect thereto, all rights and remedies herein provided in the event of nonpayment of Rent. All Rent and Additional Charges due Lessor shall accrue interest at fifteen percent (15%) per annum from their due date until paid.

SECTION 6—NO COUNTERCLAIM OR ABATEMENT OF RENT

Except as expressly provided herein, Rent and Additional Charges and all other sums payable by Tenant hereunder shall be paid without notice, demand, counterclaim, setoff, recoupment, deduction or defense of any kind or nature and without abatement, suspension, deferment, diminution or reduction.

SECTION 7—TAXES, ASSESSMENTS AND UTILITIES

7.1 Tenant shall pay and discharge, as and when the same shall become due and payable without penalty, all real estate, personal property, business, transaction privilege, occupation and occupational license taxes, assessments (but not assessments for any presently existing public improvements or benefits in effect, including but not limited to, any and all City of Peoria Improvement District assessment as of the Effective Date); and all other governmental taxes, impositions and charges of every kind and nature, general or special, unforeseen or foreseen, whether similar or dissimilar to any of the foregoing, which at any time during the term of the lease agreement shall be or become due and payable by Lessor or Tenant and which shall be levied, assessed or imposed:

- a. Upon or with respect to, or shall be or become liens upon, the Demised Premises, or any portion thereof or any interest of Lessor or Tenant therein or under this Lease.
- b. Upon or with respect to the possession, operation, management, maintenance, alteration, repair, rebuilding, use or occupancy of the Demised Premises, or any portion thereof;
- c. Upon this transaction or any document to which Tenant is a party or is bound, creating or transferring an interest or an estate in the Demised Premises, under or by virtue of any present or future law, statute, charter, ordinance, regulation, or other requirement of any governmental authority. It is the intention of the parties hereto that, insofar as the same may be lawfully done, Lessor shall be free from all costs, expenses, obligations and all such taxes, assessments and all such other governmental impositions and charges, and that this Lease shall yield net to Lessor not less than the Minimum Annual Rental and Percentage of Gross Sales Rental reserved hereunder, throughout the term of this Lease.

Notwithstanding the foregoing, or any other provision to the contrary, Tenant's obligation to pay real estate taxes on the Demised Premises, and any Improvements located thereon, shall be limited to the real estate taxes owed as long as the City of Peoria remains the owner of the Demised Premises. Should a sale of the Demised Premises result in any increase in real estate taxes from that which may otherwise be owed if the City of Peoria remained the owner, such increase in real estate taxes shall be paid by the successor Lessor, and Tenant may deduct such additional taxes from the Minimum Annual Rental payments provided herein.

7.2 Tenant, upon Lessor's written request, shall furnish to Lessor, within twenty (20) days thereafter, proof of the payment of any taxes, impositions or charges which Tenant and not Lessor shall have the obligation to pay under the provisions of Section 7.

7.3 Tenant shall be solely responsible for, and shall pay the cost of, constructing or installing utility hookups from existing utility installations to the Demised Premises and shall be solely responsible for, and shall pay the cost of, all utility services consumed by Tenant on the Demised Premises.

SECTION 8—USE OF PREMISES

Tenant shall use the Demised Premises solely for the Permitted Use and, except as set forth in Section 17 herein below, under the Trade Name as set forth in the Fundamental Lease Provisions and not for any other purpose without the prior written consent of Lessor. Tenant shall not use or permit the Demised Premises to be used in violation of the laws, ordinances, regulations and requirements of the United States of America, the State of Arizona, the County of Maricopa, the City of Peoria or any subdivision or department thereof or any other authority or agency having jurisdiction over the Demised Premises. Tenant agrees, at its sole expense, to comply with and conform to all requirements of any governmental entity having jurisdiction over the Demised Premises, throughout the entire term, including any applicable extensions, of this Lease. Use of the Demised Premises in violation of the terms of Section 8 shall cause Tenant to be in default hereunder; provided, however, Tenant shall have the right to cure said default pursuant to the provisions of Section 19 of this Lease. Tenant shall not use the Demised Premises for the uses prohibited in Section 6.4 of the Development Agreement.

SECTION 9—TENANT'S CONSTRUCTION OF BUILDINGS AND IMPROVEMENTS

9.1 Tenant, at its sole expense, shall cause the Improvements to be constructed and installed in compliance with the City of Peoria zoning laws, which are consistent with the Permitted Use. Tenant shall commence said construction in accordance with the terms and provisions of the Development Agreement. Lessor acknowledges and agrees that Tenant shall have the right at anytime after the Effective Date to enter upon the Demised Premises for the purposes of constructing Improvements, provided, however, Tenant acknowledges and agrees that it shall maintain the insurance required in Section 14.3 from the date it enters upon the Demised Premises to commence construction of the Improvements.

9.2 The construction required by Section 9.1, as well as any subsequent construction or any additions or alterations which affect the exterior of any Improvements shall be subject to the prior written approval of Lessor, through its designated representative, the City Manager or his designee ("Lessor's Representative"), which shall include, but not be limited to, approval by Lessor's Representative of all site plans, grading, landscaping and building materials.

9.3 Tenant shall be allowed to landscape and utilize non permanent fixtures in and on the Demised Premises, subject to complying with City regulations and obtaining City approval as required pursuant to the provisions of Section 9.2. Tenant acknowledges that should Lessor conduct any repair work in these areas, Tenant shall be responsible, at its sole expense, for all repairs to the landscape following the City's repair work.

9.4 Prior to completion of the construction required in Section 9.1, Tenant shall install landscaping after first obtaining written approval from Lessor's Representative of Tenant's landscape plans as required pursuant to Section 9.2.

9.5 Subject to the provisions of Section 9.2, Tenant shall have the right to make alterations and additions to any Improvements included within the Demised Premises, provided that (i) whether in connection with alterations and additions or otherwise, no substantial portion of any Improvements may be demolished or removed without the prior written approval of Lessor's Representative, and (ii) the general character of the Demised Premises shall not be changed nor the fair market value and fair rental value reduced below their value immediately before such alterations or additions without the prior written approval of Lessor's Representative.

9.6 Tenant, or its designated contractors, subcontractors and employees, shall perform the construction and installation on the Demised Premises in a good and workmanlike manner under the supervision of a licensed architect or engineer and in all respects in accordance with all applicable legal requirements, permits or approvals, as the case may be.

SECTION 10-LESSOR'S IMPROVEMENTS

10.1 Tenant shall be allowed to construct fencing or screening walls along the boundaries of the Demised Premises so long as Tenant is in compliance with City zoning and building regulations.

10.2 Lessor acknowledges and agrees that:

(a) Tenant shall have the right to two entry access points for vehicular traffic to the Demised Premises (each, an "Access Point"): (i) one Access Point on the eastern boundary side of the Demised Premises; and (ii) one Access Point on the western boundary of the Demised Premises, each such Access Point to be at a location mutually satisfactory to Lessor and Tenant;

(b) In order to provide the Access Points, Tenant shall construct at its sole cost and expense except as set forth in clause 10.2(c) below) two access roads extending south from Paradise Lane (each, an "Access Road"): (i) One Access Road bordering the eastern boundary of the Demised Premises; and (ii) one Access Road bordering the western boundary of the Demised Premises (provided that with respect to each Access Road, Lessor shall construct or cause the same to be constructed without the necessity of using as a portion of each such Access Road any of the land comprising the Demised Premises;

(c) Tenant shall contribute to the cost of the construction of the Access Road an amount not greater than the actual construction costs, engineering, permitting and other soft costs allocable for each Access Road on a proportionate share equal to Tenant's proportionate share of the length of the portion of each Access Road abutting the Demised Premises to the aggregate length of each Access Road; and

(d) Lessor shall have the right to elect whether each such Access Road is a dedicated public highway or a private driveway, provided, however, that throughout the Term Lessor shall maintain the Access Roads at its sole cost and expense.

10.3 Intentionally Deleted.

SECTION 11—MAINTENANCE AND REPAIRS

11.1 Tenant at all times during the term of the lease agreement shall keep and maintain in good order and repair and in a clean and sanitary condition the real property, buildings, structures and improvements included within the Demised Premises, and all equipment and appurtenances, both interior and exterior, structural and non-structural, ordinary or extraordinary, howsoever the necessity or desirability of repairs may occur. All repairs, replacements and renewals shall be made promptly and be equal in quality and class to the original work. Tenant waives any right created by any law now or hereafter in force to make repairs to the Demised Premises at Lessor's expense, it being understood that Lessor shall in no event be required to make any alterations, improvements or repairs during the Term, except that if any damage to the buildings, structures, or improvements on the Demised Premises, or to any equipment or appurtenances located thereon, shall have been as a result of Lessor's negligent or intentional actions, Lessor shall pay the cost therefor to Tenant.

11.2 Tenant at all times during the Term shall (i) keep and maintain in good order and repair all landscaped areas and the exterior painted surfaces of all buildings, structures and improvements included within the Demised Premises; and (ii) keep and maintain in good order and repair Tenant's customer parking lot located within the Demised Premises.

11.3 Tenant shall provide and maintain trash dumpsters, with covers thereon, about the Demised Premises in which to place any trash, and cause such trash to be removed as often as is required to maintain a sanitary condition but in no instance less than twice weekly.

SECTION 12—REGULATORY REQUIREMENTS

12.1 Tenant shall promptly observe and comply with all present and future laws, ordinances, requirements, rules and regulations of all governmental authorities having or claiming jurisdiction over the Demised Premises or any part thereof and of all insurance companies writing policies covering the Demised Premises or any part thereof. Without limiting the generality of the foregoing, Tenant shall also procure each and every permit, license, certificate or other authorization required in connection with the lawful and proper use of the Demised Premises or required in connection with any building, structure or improvement now or hereafter erected thereon. Notwithstanding the foregoing, nothing contained herein shall be deemed to grant either Lessor or Tenant the right to alter the terms of the lease agreement without the express written consent of both parties.

12.2 Tenant covenants and agrees not to use, generate, release, manage, treat, manufacture, store, or dispose of, on, under or about, or transport to or from (any of the foregoing hereinafter described as "Use") the Demised Premises any Hazardous Materials (other than De Minimis Amounts). Tenant further covenants and agrees to pay all costs and expenses associated with enforcement, removal, remedial or other governmental or regulatory actions, agreements or orders threatened, instituted or completed pursuant to use of any Hazardous Materials in any amount by Tenant, its employees, agents, invitees, subtenants, licensees,

assignees or contractors. For purposes of this Lease (1) the term "Hazardous Materials" shall include but not be limited to asbestos, urea formaldehyde, polychlorinated biphenyls, oil, petroleum products, pesticides, radioactive materials, hazardous wastes, toxic substances and any other related or dangerous, toxic or hazardous chemical, material or substance defined as hazardous or regulated or as a pollutant or contaminant in, or the Use of or exposure to which is prohibited, limited, governed or regulated by, any Hazardous Materials Laws; (2) the term "De Minimis Amounts" shall mean, with respect to any given level of Hazardous Materials, that such level or quantity of Hazardous Materials in any form or combination of form (i) does not constitute a violation of any Hazardous Materials Laws and (ii) is customarily employed in, or associated with, similar operations of a dinner theatre; and (3) the term "Hazardous Materials Laws" shall mean any federal, state, county, municipal, local or other statute, law, ordinance or regulation now or hereafter enacted which may relate to or deal with the protection of human health or the environment, including but not be limited to the Comprehensive Environment Response, Compensation and Liability Act of 1980, 42 U.S.C. Section 9601, et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901; the Federal Water Pollution Control Act, 33 U.S.C. Section 1251, et seq.; the Toxic Substances Control Act of 1976, 15 U.S.C. Section 2601, et seq.; Ariz. Rev. Stat. Ann., Title 49 (the "Arizona Environmental Quality Act of 1986"); and any rules, regulations or guidelines adopted or promulgated pursuant to any of the foregoing as they may be amended or replaced from time to time. The foregoing notwithstanding, Tenant shall have no liability for any claims or damages arising from or in connection with conditions existing on, under or about the Demised Premises prior to the Effective Date.

12.3 Lessor agrees to join in the execution of any instruments which may reasonably be required in order for Tenant to procure the issuance of any licenses, occupational permits, building permits or other government approvals required by Tenant in its use, occupancy or construction of the Demised Premises. Tenant shall indemnify and save Lessor harmless from any expense or loss whatsoever occasioned by Lessor's presence as a party to any such instrument, application or permit.

12.4 As set forth in the Development Agreement, Lessor agrees to provide Tenant with a copy of Lessor's most recent Phase I Environmental Report for the real property.

12.5 Lessor shall indemnify, defend and hold Tenant, its successors and assigns, employees, agents, boards, commissions, representatives, and attorneys harmless, on demand, for, from and against any and all liabilities, obligations, damages, charges and expenses, penalties, suits, fees, claims, legal and investigation fees or costs, arising from or related to any claim or action for injury, liability, breach of warranty or representation, or damage to persons, property, the environment or the Demised Premises and any and all claims or actions brought by any person, entity or governmental body, alleging or arising in connection with contamination of, or adverse effects on, human health, property or the environment pursuant to any Hazardous Materials Laws, the common law, or other statute, ordinance, rule, regulation, judgment or order of any governmental agency or judicial entity, which are incurred or assessed as a result, whether in part or in whole, of the presence of any Hazardous Materials on, at or under the Demised

Premises prior to the Effective Date or after the Effective Date to the extent the same arise out of any actions of Lessor.

SECTION 13—LIENS

13.1 Tenant shall have no authority to do any act or make any contract which may create or be the basis for any lien, mortgage or other encumbrance upon any interest of Lessor in the real property included within the Demised Premises. Should Tenant cause any construction, alterations, rebuilding, restorations, replacements, changes, additions, improvements or repairs to be made on the Demised Premises, or cause any labor to be performed or material to be furnished thereon, therein or thereto, neither Lessor nor the real property included within the Demised Premises shall under any circumstances be liable for the payment of any expense incurred or for the value of any work done or material furnished, and Tenant shall be solely and wholly responsible to contractors, laborers and materialmen performing such labor and furnishing such material.

13.2 If, because of any error, act, or omission (or alleged error, act or omission) of either Tenant or Lessor, any mechanics', materialmen's or other lien, charge or order for the payment of money shall be filed or recorded against the real property included within the Demised Premises or against Lessor (whether or not such lien, charge or order is valid or enforceable as such), Tenant or Lessor, as the case may be, shall, at its own expense, either cause the same to be discharged of record pursuant to A.R.S. § 33-1004, or otherwise cause such discharge, within thirty (30) days after either shall have received from the other a written notice requesting such discharge.

SECTION 14—PROPERTY AND PUBLIC LIABILITY INSURANCE

14.1 Tenant shall at all times, throughout the term of this Lease, keep the Demised Premises insured against perils. Tenant shall ensure that all insurance policies in effect for the Demised Premises name the City of Peoria as an additional insured.

14.2 The insurance policies required by this Section shall be written by insurance companies with an A.M. Best's Key Rating Guide of A- [minus] or better, authorized to do business in the State of Arizona, and shall be written on an occurrence basis or in a form satisfactory to Lessor. As often as any such policy shall expire or otherwise terminate, renewal or additional policies shall be procured and maintained by Tenant and its contractor(s) to provide uninterrupted coverage. Tenant agrees and shall cause its contractor(s) to agree to provide Lessor with certified copies of all insurance policies providing coverage for the Demised Premises upon Lessor's request.

14.3 Tenant, during the entire term of this Lease, shall provide, secure, pay for and maintain the following insurance coverage, indemnification and waivers as set forth in subsections a through e (inclusive) immediately below.

- a. Statutory workers' compensation insurance, in an amount required by the State of Arizona and any and all applicable insurance required by any employee benefit acts or other statutes as will protect Tenant's employees from any and all liability

under the aforementioned acts and statutes for work performed at the Demised Premises.

- b. Commercial general liability insurance in an amount not less than \$1,000,000.00 combined single limit per occurrence and not less than \$3,000,000.00 general aggregate, including but not limited to coverage for explosion, collapse, and underground work as well as contractual liability coverage and including Lessor as an additional insured on a primary non-contributory basis with respect to any other insurance available to Lessor. If the permitted use permits the sale of alcoholic beverages on the Demised Premises, then during any period that Tenant offers alcoholic beverages for sale on the Demised Premises, Tenant shall obtain a liquor liability endorsement to said commercial general liability policy in an amount not less than \$1,000,000.00 combined single limit per occurrence and not less than \$3,000,000.00 general aggregate.
- c. Tenant (including also anyone holding under Tenant and any and all subtenants and other occupants of the Demised Premises), as the case may be, shall: (i) provide waivers of liability in favor of Lessor, its agents, representatives, officers, directors, elected and appointed officials, and employees releasing the same from any and all liability for any and all bodily injury, personal injury and loss of or damage to property (including also any and all loss of use resulting therefrom); (ii) require any and all insurers for the Demised Premises to name the Lessor, its agents, representatives, officers, directors, elected and appointed officials, and employees as Additional Insureds in all insurance policies required under this Section 14.3.; and, (iii) require that Tenant (including also anyone holding under Tenant and any and all sub-tenants and other occupants of the Demised Premises) and all insurers providing policies of insurance under this Section 14.4 waive their rights of subrogation against Lessor, its agents, representatives, officers, directors, elected and appointed officials, and employees.

The above-referenced waivers of liability and subrogation shall not apply to Lessor's negligent or intentional acts but said waivers of liability and subrogation shall be applicable to any negligence imputed to Lessor, its agents, representatives, officers, directors, elected and appointed officials, and employees by operation of law as a result of the action or non-action of Tenant (including anyone holding under Tenant and any and all sub-tenants and other occupants of the Demised Premises) and their respective insurers for work performed on, or services provided to, the Demised Premises).

- d. [Reserved].
- e. Should Tenant utilize any steam or pressure boilers, or other similar apparatus on the Demised Premises, Tenant shall maintain boiler and machinery coverage, to include explosion insurance, with respect to any steam or pressure boilers and similar apparatus located on the Demised Premises in an amount not less than \$1,000,000.00 combined single limit per occurrence and not less than

\$3,000,000.00 general aggregate and insurance against such other hazards and in such amounts as Lessor may reasonably require for its protection.

14.4 During the entire term of this Lease, Tenant shall require any and all contractor(s) performing work or services to the Demised Premises with Tenant's consent or approval, to provide, secure, pay for and maintain the following insurance coverage, indemnification and waivers as set forth in subsections a through g (inclusive) immediately below.

- a. Statutory workers' compensation insurance, with limits of not less than \$100,000.00 on an occurrence basis, and any and all insurance required by any employee benefit acts or other statutes applicable where the work is to be performed as will protect Tenant's employees, contractors and subcontractors from any and all liability under the aforementioned acts and statutes.
- b. Commercial general liability insurance in an amount not less than \$3,000,000.00 combined single limit per occurrence and not less than \$5,000,000.00 general aggregate, including but not limited to coverage for explosion, collapse, and underground work as well as contractual liability coverage and including Lessor as an additional insured on a primary non-contributory basis with respect to any other insurance available to Lessor.
- c. Comprehensive automobile liability insurance, including coverage for the ownership, maintenance and operation of any automobile equipment owned, hired or non-owned, which is assigned to or used by the contractor(s) in the performance of work on, or services provided to, the Demised Premises, in an amount not less than \$1,000,000.00 combined single limit per accident.
- d. Either of the following: (I) owner's and contractor's protective liability insurance with limits of not less than \$1,000,000.00 combined single limit per occurrence and not less than \$5,000,000.00 general aggregate as will insure Lessor as named insured against any and all claims for bodily injury, including death resulting therefrom, personal injury or damage to the property of others, arising from or in any way connected to Tenant's contractor(s) performance of work on, or services provided to, the Demised Premises or (ii) in lieu of the foregoing owner's and contractor's protective liability insurance specified in this Subsection 14.4 (d), an endorsement to the commercial general liability insurance specified in subsection b above of this paragraph providing for a separate general aggregate limit of insurance of not less than \$5,000,000.00 on an occurrence basis.
- e. Tenant shall cause the above-referenced contractor(s) and sub-contractor(s) (and their respective insurers) to: (i) provide waivers of liability in favor of Lessor, its agents, representatives, officers, directors, elected and appointed officials, and employees releasing and holding harmless the same from any and all liability for any and all bodily injury, including death resulting therefrom, personal injury and loss of or damage to property (including also any and all loss of use resulting therefrom); (ii) require the above-referenced contractor(s) and sub-contractor(s) to name the Lessor, its agents, representatives, officers, directors, elected and

appointed officials, and employees as Additional Insureds in all insurance policies required under this Section 14.4; and (iii) require that the contractor(s), sub-contractor(s) and all insurers providing policies of insurance under this Section 14.4 waive their rights of subrogation against Lessor, its agents, representatives, officers, directors, elected and appointed officials, and employees.

The above-referenced waivers of liability and subrogation shall not apply to Lessor's negligent or intentional acts but shall be applicable to any negligence imputed to Lessor, its agents, representatives, officers, directors, elected officials and employees by operation of law as a result of the action or non-action of Tenant's contractor(s), sub-contractor(s) and their respective insurers for work performed on, or services provided to, the Demised Premises.

- f. Tenant's contractor(s) and sub-contractor(s) performing work on, or providing services to, the Demised Premises shall maintain Errors & Omissions coverage in an amount not less than \$1,000,000.00 combined single limit per occurrence and not less than \$3,000,000.00 general aggregate.

14.5 At Tenant's election, the insurance required by this Section may be provided under a blanket policy.

14.6 Certificates of insurance evidencing all of the coverages required in this Section shall be delivered to Lessor prior to the start of construction of any buildings, structures or improvements on or in the Demised Premises and renewal certificates of insurance shall be delivered to Lessor at least thirty (30) days prior to the expiration dates of the respective policies. Such certificates shall also provide that Lessor will receive written notice at least ten (10) days prior to any cancellation, non-renewal or reduction in coverage. Lessor reserves the right to require Tenant to furnish proof, satisfactory to Lessor, that any and all insurance policies for the Demised Premises remain in full force and effect.

14.7 Tenant further covenants and agrees to increase the required insurance hereunder to such additional commercially reasonable and available amounts as Lessor may from time to time require.

14.8 In the event of loss or destruction under any such policy or policies, Tenant shall promptly proceed with the repair and restoration of the damaged or destroyed Improvements in accordance with and subject to the provisions of Section 15 of this Lease. The insurance proceeds shall, subject to the rights of any Leasehold Mortgagee in and to any such insurance proceeds, be paid to Tenant and thereafter held in trust by a bank or title companies designated by Lessor and approved by Tenant (the "Escrowee"), to be paid out upon architect's certificates and contractors', subcontractors' and materialmen's waivers of lien for the cost and expense of repairing or restoring the Improvements damaged or destroyed; provided, however, that in the event that such insurance proceeds shall be insufficient to pay fully the cost of completion of such repair or restoration (or in the event any Leasehold Mortgagee has required that any such insurance proceeds be paid to such Leasehold Mortgagee and not used by Tenant for the repair and restoration of the damaged or destroyed Improvements), Tenant shall have deposited with the Escrowee the balance of such costs before any such repair and restoration are commenced so

that it shall appear to the satisfaction of Lessor that the amount of insurance money in the hands of said Escrowee shall at all times be sufficient to pay for the completion of said repairs or restoration free and clear of liens. Upon the completion of said repair or restoration, free and clear of all liens, any surplus of insurance monies shall be paid to Tenant, provided that Tenant is not then in default under this Lease. In the event that this Lease shall have been terminated for any default of Tenant under any of the terms and provisions contained in this Lease, all insurance proceeds in the hands of said Escrowee and all claims against insurers shall be and become the absolute property of Lessor. The rights of Leasehold Mortgagees with respect to insurance proceeds shall be paramount to any other party, including Lessor.

SECTION 15-DAMAGE OR DESTRUCTION

15.1 In the event of damage to or destruction of any of the Improvements by fire or other casualty, Tenant shall give Lessor and any Leasehold Mortgagee immediate notice thereof and shall at its own expense and whether or not the insurance proceeds are sufficient for the purpose, promptly commence and thereafter diligently pursue completion of the repair, restoration or rebuilding of the same so that upon completion of such repairs, restoration or rebuilding, the value and rental value of the Improvements shall be substantially equal to the value and rental value thereof immediately prior to the occurrence of such fire or other casualty.

15.2 Notwithstanding anything to the contrary contained herein, if the Improvements should be rendered untenable by fire or other casualty during the last five (5) years of the lease agreement, or the last two (2) years of any option, to the extent of fifty percent (50%) or more of the replacement cost of said Improvements, Tenant may, at Tenant's option, terminate this Lease; provided, however, that, subject to the rights of any Leasehold Mortgagee in and to any such insurance proceeds, Tenant shall pay over to Lessor all casualty insurance proceeds received or receivable by reason of the destruction of said buildings, structures or improvements. Tenant's option to terminate shall be evidenced by a written notice given to Lessor within sixty (60) days after the occurrence of such damage or destruction. The rights of Leasehold Mortgagees with respect to insurance proceeds shall be paramount to any other party, including Lessor.

15.3 Notwithstanding anything to the contrary contained herein, if the Improvements should be rendered untenable by fire or other casualty to the extent of fifty percent (50%) or more of the replacement cost of said Improvements, during a Lease Year other than that referred to in Section 15.2, Tenant and Lessor, subject to the approval of the Peoria City Council if the City of Peoria is still the Lessor, may mutually agree in writing that Tenant is relieved of any obligation to rebuild on the real property included within the Demised Premises and is further relieved of all obligations under the lease agreement. Tenant shall pay over to Lessor all casualty proceeds received or receivable by reason of the destruction of said buildings, structures or improvements under this provision.

SECTION 16-INDEMNIFICATION

16.1 Tenant shall protect, indemnify and hold Lessor, its agents, representatives, officers, directors, elected and appointed officials and employees harmless from and against all liabilities, obligations, claims, suits, damages, penalties, causes of action, costs and expenses (including without limitation, reasonable attorneys' fees and expenses) imposed upon or asserted

against Lessor, its agents, representatives, officers, directors, elected or appointed officials, and employees, by reason of the following: (the "Claims") (i) any use, nonuse or condition of the Demised Premises or any part thereof, (ii) any accident, injury to or death of persons (including workmen) or loss of or damage to property occurring on or about the Demised Premises or any part thereof, (iii) any failure on the part of Tenant to perform or comply with any of the terms of this Lease, (iv) performance of any labor or services or the furnishing of any materials or other property with respect to the Demised Premises or any part thereof, or (v) any failure on the part of Tenant to comply with any of the matters set forth in Section 12 of the lease agreement, including but not limited to any failure by Tenant to clean up any Hazardous Materials.

16.2 In the event Lessor, its agents, representatives, officers, directors, elected and appointed officials, and employees should be made a defendant in any action, suit or proceeding brought by reason of any such occurrence, Tenant shall at its own expense resist and defend such action, suit or proceeding or cause the same to be resisted and defended by counsel designated by Tenant and reasonably approved by Lessor. Except for the negligence of Lessor, its agents, representatives, officers, directors, elected and appointed officials, and employees if any such action, suit or proceeding should result in a final judgment against Lessor, Tenant shall promptly satisfy and discharge such judgment or shall cause such judgment to be promptly satisfied and discharged. The obligations of Tenant under this Section arising by reason of any such occurrence taking place while this Lease is in effect shall survive any termination or other form of cancellation of this Lease.

16.3 Notwithstanding the terms and conditions contained in Section 16.2 above, Tenant shall be required to protect, defend, indemnify, satisfy or hold harmless Lessor, its agents, representatives, officers, directors, elected and appointed officials, and employees in the event negligence is imputed against by operation of law against Lessor, its agents, representatives, officers, directors, elected and appointed officials, and employees as a result of the actions or non-action of Tenant, its agents, servants, employees, directors, representatives, officials, customers, vendors, guests, licensees or invitees on the Demised Premises.

16.4 Lessor shall indemnify and hold Tenant and its agents, representatives, officers, directors, employees and invitees (collectively, the "Tenant Indemnitees") harmless from and against all liabilities, obligations, claims, suits, damages, penalties, causes of action, costs and expenses (including without limitation, reasonable attorneys' fees and expenses) imposed upon or asserted against the Tenant Indemnitees by Lessor or its employees, agents, representatives, directors, officials, customers, vendors, guests, licensee and invitees (collectively, the "Lessor Parties") with respect to any Claims arising out of the acts or omissions of the Lessor Parties.

16.5 Except for any responsibility alleged or allocated to Lessor by reason of its failure to enforce the terms of this Lease, Lessor shall protect, indemnify and hold Tenant harmless from and against all liabilities, obligations, claims, suits, damages, penalties, causes of action, costs and expenses (including reasonable attorney's fees and expenses) imposed upon or asserted against Tenant by reason of the negligence of Lessor, its agents, representatives, officers, directors, elected and appointed officials, or employees. In the event Tenant should be made a defendant in any action, suit or proceeding brought by reason of Lessor's, its agents', representatives', officers', directors', elected and appointed officials', and employees' negligence,

Lessor shall at its own expense resist and defend such action, suit or proceeding or cause the same to be resisted and defended by counsel designated by Lessor. Except to the extent of Tenant's negligence, if any such action, suit or proceeding should result in a final judgment against Tenant, Lessor shall promptly satisfy and discharge such judgment or shall cause such judgment to be promptly satisfied and discharged. The obligations of Lessor under this Section arising by reason of any such occurrence taking place while this Lease is in effect shall survive any termination or other form of cancellation of this Lease.

16.6 Notwithstanding the obligations imposed upon Lessor pursuant to Section 16.4 above, Lessor, its agents, representatives, officers, directors, elected and appointed officials, and employees shall not be required to protect, defend, indemnify, satisfy any judgment or hold Tenant harmless for any negligence imputed against Lessor, its agents, representatives, officers, directors, elected and appointed officials, and employees by operation of law as a result of the action or non-action of Tenant, its agents, servants, employees, directors, representatives, officials, customers, vendors, guests, licensees or invitees on the Demised Premises.

SECTION 17—ASSIGNMENT AND SUBLETTING

17.1 Tenant shall not transfer or assign this Lease or any interest in this Lease or sublet the Demised Premises or any portion thereof without first obtaining the written consent of Lessor, which consent shall not be unreasonably withheld. Any attempted transfer, assignment or subletting, including any involuntary transfers or assignments by operation of law, without such written consent shall be void and confer no rights upon any third person, and at the option of Lessor, shall cause a termination of this Lease, in which event said third person shall occupy the Demised Premises as a tenant at sufferance. No such transfer, assignment or subletting shall relieve Tenant of its liability for the full performance of all of the terms, agreements, covenants and conditions of this Lease. A consent by Lessor to one transfer, assignment or subletting shall not operate as a waiver of this Section as to any future transfer, assignment or subletting, and this Section shall apply to any transferee, assignee or subtenant. The provisions of this Section, however, shall not preclude Tenant's mortgaging or otherwise hypothecating its leasehold estate in accordance with the provisions of Section 18.

Notwithstanding the foregoing, Lessor recognizes and agrees that Tenant may: (i) I assign the Lease agreement to, or may otherwise merge or consolidate its operation with, another entity which desires to conduct the Permitted Use at the Demised Premises; and/or (ii) sublease the Demised Premises to another entity which desires to conduct the Permitted Use at the Demised Premises or use all or any portion of the Demised Premises for offices and/or a warehouse (each, a "Permitted Transfer"). Such assignment, merger, consolidation or sublease shall be permitted provided: (i) Tenant provides to Lessor a copy of the assignment, merger, consolidation or sublease instruments evidencing any such Permitted Transfer; and (ii) the Demised Premises continues to be used for the Permitted Use from and after the effective date of any such Permitted Transfer, provided, however, that the Permitted Use may be operated under a trade name different than the trade name set forth in Section 1 hereinabove.

Lessor recognizes that from time to time Tenant may not operate on its own certain elements of the Project, such as a gift shop (the operator of any such elements, a "Kiosk Operator"). Accordingly, notwithstanding the terms of this Section, Tenant shall be entitled to

enter into licenses, concession agreements, management agreements, employment and other similar agreements and arrangements with a Kiosk Operator for the purpose of implementing any use, operation or activity permitted under this Lease without the consent of Lessor. By way of example (and not limitation), Tenant may enter into a separate license, concession or operating agreement with a Kiosk Operator for the purpose of operating a gift shop without the consent of Lessor, so long as the agreement governing the relationship of Tenant and such Kiosk Operator: (i) automatically terminates if this Lease is terminated for any reason; (ii) requires such Kiosk Operator to carry insurance customary for similar operators and operations and shall list Lessor as Additional Insureds; (iii) is subordinate to this Lease; and (iv) provides a service expressly permitted under this Lease. If requested by Lessor, Tenant shall provide to Lessor copies of all sublease agreements, licenses, concession agreements, management agreements, employment and other similar agreements, and amendments thereto.

17.2 Each transfer, assignment, and subletting to which there has been consent shall be by an instrument in writing in a form satisfactory to Lessor, and shall be executed by the transferor, assignor or sublessor; and the transferee, assignee, or subtenant shall agree in writing, for the benefit of Lessor, to assume, be bound by, and to perform the terms, covenants and conditions of this Lease to be done, kept and performed by Tenant. One executed copy of such written instrument shall be delivered to Lessor. A consent to any transfer, assignment or subletting shall not constitute a waiver or discharge of the provisions of this paragraph with respect to a subsequent transfer, assignment or subletting from becoming effective. The acceptance of Rent or Additional Charges from any other person shall not be deemed to be a waiver of any of the provisions of this Lease or consent to the transfer, assignment or subletting of the Demised Premises.

17.3 Tenant agrees to reimburse Lessor for Lessor's reasonable costs (including but not limited to attorneys' fees) in conjunction with the processing of any request for consent under this Section 17.

SECTION 18—HYPOTHECATION OF LEASEHOLD ESTATE

18.1 Tenant shall have the right to mortgage its Leasehold Estate (but in no event the Demised Premises, which may be assigned, encumbered and mortgaged only by Lessor) to a Leaseholder provided that any such Leasehold Mortgagee shall acknowledge that its security is the Leasehold Estate and not Lessor's fee simple ownership of the Demised Premises. As used in this Section and throughout this Lease, the noun "Mortgage" shall include a deed of trust, the verb "mortgage" shall include the creation of a deed of trust, and the word "Leasehold Mortgagee" shall include the beneficiary under a deed of trust.

18.2 If Tenant shall mortgage this Lease in accordance with Section 18.1 and shall have furnished Lessor the name and mailing address of the Leasehold Mortgagee, then Lessor shall not be empowered to terminate this Lease by reason of the occurrence of any default hereunder, unless:

- a. Lessor shall have given the Leasehold Mortgagee under such Leasehold Mortgage a copy of its notice to Tenant of such default; and in case Tenant shall default in respect of any of the provisions of this Lease, any Leasehold Mortgagee shall

have the right, but not the obligation, to cure such default whether the same consists of the failure to pay Rent or the failure to perform any other covenant which Tenant is required to perform under this Lease, and Lessor shall accept performance by or on behalf of such Leasehold Mortgagee as though, and with the same effect as if, the same had been done or performed by Tenant. A Leasehold Mortgagee will have a period of time after the service of such notice upon it within which to cure the default specified in such notice, or cause it to be cured, which is the same period for cure, if any, as is given to Tenant under this Lease in respect of the specified default after the giving of such notice to Tenant, plus an additional period of thirty (30) days. In the event of a default (or in the event that Lessor is seeking to terminate this Lease by reason of a default) which is curable without Leasehold Mortgagee being in possession and control of the Building, but cannot reasonably be cured within said period, the period of time for cure shall be extended for so long as any Leasehold Mortgagee is diligently and continuously proceeding to attempt to cure such default, provided that the Leasehold Mortgagee has begun proceedings to cure the default within the said period. In no event shall a default due to a failure to pay Rent be deemed a default which cannot be reasonably cured within such additional period of thirty (30) days.

- b. With respect to any nonmonetary default by Tenant under this Lease that is not susceptible of being cured by the Leasehold Mortgagee without being in possession and control of the Improvements, Lessor shall take no action to terminate this Lease on account of such default if, within ninety (90) days after notice of the default from Lessor (subject to any bankruptcy stays) or the Leasehold Mortgagee has cured Tenant's default within the aforesaid ninety (90) day period, the Leasehold Mortgagee shall have commenced appropriate proceedings to obtain possession of the Demised Premises (including possession by a receiver) or to foreclose the Leasehold Mortgage or otherwise to acquire Tenant's interest under this Lease and the Demised Premises, and shall thereafter be prosecuting the same to completion in good faith, with diligence and continuity (subject to any bankruptcy stays); provided, however, that: (i) the Leasehold Mortgagee shall not be obligated to continue any such possession or to continue such foreclosure proceedings or other action after the default shall have been cured; (ii) Lessor shall not be precluded from exercising any rights or remedies with respect to any other default by Tenant under this Lease during the pendency of such foreclosure proceedings; (iii) during the period of Lessor's forbearance, the Leasehold Mortgagee shall comply with such of the terms, covenants and conditions of this Lease as are then susceptible of compliance by the Leasehold Mortgagee; (iv) if and after the Leasehold Mortgagee obtains possession of the Demised Premises or acquires Tenant's interest under this Lease, the Leasehold Mortgagee shall promptly commence and diligently pursue the curing of all defaults under this Lease then susceptible of being cured by the Leasehold Mortgagee, and all other defaults of Tenant not then susceptible of being cured by the Leasehold Mortgagee shall be deemed to have been waived by Lessor upon completion of such foreclosure proceedings or acquisition by the Leasehold

Mortgagee; and (v) if a third party acquires Tenant's interest under this Lease at the foreclosure sale, such party shall promptly commence and diligently pursue the curing of all defaults under this Lease then susceptible of being cured by such party, and all other defaults of Tenant not then susceptible of being cured by such party shall be deemed to have been waived by Lessor upon such acquisition.

18.3 Lessor agrees that in the event of termination of this Lease for any reason (other than a default by Tenant beyond the applicable cure period, for which Leasehold Mortgagee was provided notice and an opportunity to cure in accordance with this Article), that Lessor will enter into a new lease of the Demised Premises with Leasehold Mortgagee or its designee for the remainder of the Term, effective as of the date of such termination, at the rent and upon the terms, provisions, covenants and agreements as herein contained, provided:

(i) Leasehold Mortgagee, or its designee, shall make written request upon Lessor for such new lease within thirty (30) days after Lessor has given Leasehold Mortgagee notice of such termination.

(ii) Said written request shall be accompanied by payment of all past due rents and other charges owing to Lessor hereunder of which Leasehold Mortgagee shall have been given notice, and, thereafter such monetary obligations shall be maintained current through the time of the execution and delivery of said new lease.

(iii) The Tenant under such new lease shall automatically have the same right, title and interest in and to the Demised Premises as Tenant had under the terminated lease agreement.

18.4 Notwithstanding any contrary provision of this Lease, the Leasehold Mortgagee shall not be liable or responsible in any respect for any of Tenant's obligations under this Lease unless and until the Leasehold Mortgagee becomes the owner and holder of this Lease through foreclosure or bankruptcy proceedings, or assignment in lieu thereof.

18.5 The Leasehold Mortgagee may become the legal owner and holder of the Leasehold Estate under this Lease by foreclosure of its Leasehold Mortgage or as a result of the assignment of this Lease in lieu of foreclosure. Upon becoming the owner and holder of the Leasehold Estate, the Leasehold Mortgagee shall have all rights, privileges, obligations and liabilities of the original Tenant, except that the Leasehold Mortgagee shall have the right to assign its interest under this Lease and, provided the assignee shall assume and agree to perform and be bound by all of the terms hereof, to be relieved of further liability hereunder.

18.6 In the event the Leasehold Mortgagee either becomes the legal owner and holder of the Leasehold Estate by foreclosure of its Leasehold Mortgage, if a third party acquires Tenant's interest under this Lease at the foreclosure sale or if any other third party becomes the Tenant under this Lease as a result of an exercise by the Leasehold Mortgagee of its rights under the Leasehold Mortgage (all of the foregoing, a "Successor Tenant"), such Successor Tenant shall have the right to use the Demised Premises for commercial use other than the Permitted Use provided the City approves the same, which approval shall not be unreasonably withheld and complies with all applicable zoning ordinances.

18.7 Any notice or other communication which Lessor shall desire or is required to give to or serve upon Leasehold Mortgagee shall be in writing and shall be served personally or by overnight courier service (such as Federal Express or UPS) addressed to such Leasehold Mortgagee at its address as set forth in the notice to Lessor, or at such other address as shall be designated from time to time by such holder by notice in writing given to Lessor. Any notice or other communication which any Leasehold Mortgagee shall desire or is required to give to or serve upon Lessor shall be deemed to have been given or served if sent as set forth in the provisions of this Lease providing for notices to Lessor.

18.8 Lessor will not modify, amend or accept a surrender of this Lease without the prior written consent of the Leasehold Mortgagee. Any such modification, amendment or surrender without the written consent of the Leasehold Mortgagee, which consent shall not be unreasonably delayed or withheld, of which Lessor has been given notice shall be void and of no force or effect.

SECTION 19—DEFAULTS BY TENANT

19.1 Each of the following occurrences shall be an event of default hereunder:

- a. If Tenant shall fail to pay any Rent or Additional Charges or any sum due hereunder promptly when due and such failure shall continue for ten (10) days after notice thereof in writing to Tenant.
- b. If default shall be made by Tenant in any of the other covenants, agreements, conditions or undertakings herein to be kept, observed and performed by Tenant (not including the occurrence of any event referred to in subparagraphs (c) through (h) of this Section 19.1) and such default shall continue for thirty (30) days after notice thereof in writing to Tenant (which notice shall specify the respects in which Lessor contends that Tenant has failed to perform any of the covenants, conditions and agreements) from Lessor to Tenant, unless with respect to any default which cannot be cured within thirty (30) days, Tenant, or any person holding by, through or under Tenant, in good faith, promptly after receipt of written notice, shall have commenced and continued diligently to reasonably prosecute all action necessary to cure the default.
- c. If Tenant shall voluntarily file any petition, or have an involuntary petition filed on its behalf, under any chapter or section of the Federal Bankruptcy Code or any similar law, state or federal, whether now or hereafter existing, or shall file an answer admitting insolvency or inability to pay its debts; provided however, that Tenant shall not remain in default if Tenant shall continue to pay all Rent and Additional Charges and comply with all other terms and conditions of the lease agreement.
- d. If a trustee or receiver shall be appointed for Tenant or for a major portion of its property or for any portion of the Demised Premises.

- e. If any court shall have taken jurisdiction of a major portion of the property of Tenant or any portion of the Demised Premises in any involuntary proceeding for dissolution, liquidation or winding up of Tenant and such jurisdiction shall not be relinquished or vacated within sixty (60) days.
- f. If Tenant shall make an assignment for the benefit of its creditors.
- g. A default under that certain First Amendment to Lease executed by the City on October 8, 2003, and executed by the Tenant on November 10, 2003, City ACON 17903A, recorded in the Maricopa County Recorder's Office as document number 2003-1594776; a default under that certain Second Amendment to Lease Agreement dated December 1, 2003, City ACON 17903B, recorded in the Maricopa County Recorder's Office as document number 2004-0305094; or a default under that certain Development Agreement dated December 17, 2002, City ACON 11302, recorded in the Maricopa County Recorder's Office as document number 2004-1135645.

19.2 Upon the occurrence of any default that is not cured within the applicable cure period, and at any time after the expiration of the applicable cure period, Lessor shall have the right, at its election, to reenter the Demised Premises and the buildings, structures and improvements then situated thereon, or any part thereof, either with or without process of law, and to expel, remove and put out Tenant and all persons occupying or upon the same under Tenant, using such force as may be necessary in so doing, and again to possess the premises and enjoy the same as in their former estate and to take full possession of and control over the Demised Premises and the buildings, structures and improvements thereon and to have, hold and enjoy the same and to receive all rental income of and from the same. No reentry by Lessor shall be deemed an acceptance of a surrender of this Lease, nor shall it absolve or discharge Tenant from any liability under this Lease. Upon such reentry, all rights of Tenant to occupy or possess the Demised Premises shall cease and terminate.

19.3 Upon the occurrence of any default and at any time thereafter, Lessor shall have the right, at its election, with or without reentry as provided in Section 19.2, to give written notice to Tenant stating that this Lease and the real property hereby demised shall terminate on the date specified by such notice, and upon the date specified in such notice this Lease and the real property hereby demised and all rights of Tenant hereunder shall terminate. Upon such termination, Tenant shall quit and peacefully surrender to Lessor the Demised Premises and the buildings, structures and improvements then situated thereon.

19.4 At any time and from time to time after such reentry, Lessor may relet the Demised Premises and the buildings, structures and improvements thereon, or any part thereof, in the name of Lessor or otherwise, for such term or terms (which may be greater or less than the period which would otherwise have constituted the balance of the term of this Lease), and on such conditions (which may include concessions or free rental) as Lessor, in its reasonable discretion, may determine and may collect and receive the rental therefor. However, in no event shall Lessor be under any obligation to relet the Demised Premises and the buildings, structures and improvements thereon, or any part thereof, and Lessor shall in no way be responsible or liable for any failure to relet or for any failure to collect any rental due upon any such reletting.

Even though it may relet the Demised Premises, Lessor shall have the right thereafter to terminate this Lease and all of the rights of Tenant in or to the Demised Premises.

19.5 Unless Lessor shall have notified Tenant in writing that it has elected to terminate this Lease, no such reentry or action in lawful detainer or otherwise to obtain possession of the Demised Premises shall relieve Tenant of its liability and obligations under this Lease; and all such liability and obligations shall survive any such reentry. In the event of any such reentry, whether or not the Demised Premises and the buildings, structures and improvements thereon, or any part thereof, shall have been relet, Tenant shall pay to Lessor the entire Rent and all other Additional Charges required to be paid by Tenant up to the time of such reentry under this Lease, and thereafter Tenant, until the end of what would have been the term of this Lease in the absence of such reentry, shall be liable to Lessor and shall pay to Lessor, as and for liquidated and agreed damages for Tenant's default:

- a. The amount of Minimum Annual Rental and Additional Charges which would be payable under this Lease by Tenant if this Lease were still in effect, less
- b. The net proceeds of any reletting, after deducting all of Lessor's reasonable expenses in connection with such reletting, including without limitation all reasonable repossession costs, brokerage commissions, legal expenses, attorneys' fees, alteration costs and expenses of preparation for such reletting.

19.6 In the event of any breach by Tenant of any of the terms, covenants or agreements contained in this Lease, Lessor shall have, in addition to any specific remedies provided in this Lease, the right to invoke any right or remedy allowed by law or in equity or by statute or otherwise, including the right to enjoin such breach.

19.7 Each right and remedy of Lessor provided for in this Lease shall be cumulative and in addition to every other right or remedy provided for in this Lease now or hereafter existing at law or in equity or by statute or otherwise; and the exercise or beginning of the exercise by Lessor of any one or more of such rights or remedies shall not preclude the simultaneous or later exercise by Lessor of any or all other rights or remedies provided for in this Lease or now or hereafter existing at law or in equity or by statute or otherwise.

19.8 Any violation of any covenant or provision of this Lease, whether by act or omission, by any sub-Tenant or any other persons occupying any portion of the Demised Premises or any buildings, structures or improvements thereon under the rights of Tenant shall be deemed a violation of such provision by Tenant and a default under this Lease. Any such violation shall not be deemed to be a default hereunder if and so long as Tenant in good faith and at its own expense takes and diligently pursues any and all steps it is entitled to take and which steps if completed will cure said default.

19.9 If in any one period of twelve (12) consecutive months, Tenant shall have been in default in the payment of Rent or Additional Charges herein more than three (3) times and Lessor, because of such defaults, shall have served upon Tenant within said twelve (12) month period three (3) or more notices, then the fourth default shall be deemed to be a noncurable default and Lessor shall be entitled to immediate possession of the Demised Premises.

19.10 Notwithstanding any other provision of this Section, Lessor agrees that if the default complained of, other than for the payment of monies, is of such a nature that the same cannot be rectified or cured within the thirty (30) day period for rectification or curing as specified in the written notice relating thereto, then such default shall be deemed to be rectified or cured if Tenant, within such period of thirty (30) days, shall have commenced the rectification and curing thereof and shall continue thereafter with all due diligence to effect such rectification and curing and does so complete the same with the use of such diligence as aforesaid.

19.11 Notwithstanding any other provision of this Section, any dispute by Tenant, during the time that the City of Peoria remains the Lessor, regarding a default under this Lease or Lessor's Representative's failure to provide approval as may be required herein, shall be submitted in writing to Lessor's Representative within ten (10) business days of Lessor's written notification to Tenant of the event giving rise to the default under this Lease. After receipt of such written notice of dispute from Tenant, Lessor shall schedule a formal or informal hearing to allow Tenant the opportunity to explain the nature of the dispute and seek resolution. If Lessor's Representative, after the hearing with Tenant, issues a decision upholding the default, Tenant may, within five (5) business days after receipt of the written decision by Tenant, file a written appeal of the decision to the Mayor and City Council for the City of Peoria. If however, Tenant shall fail to give Lessor's Representative written notice of the disputed default within the required time frame or fail to file a written appeal of the decision of Lessor's Representative to the Mayor and City Council within the required time frame, the default shall be deemed admitted by Tenant.

SECTION 20—OPERATING COVENANT

20.1 Tenant covenants and agrees that during the term of this Lease, except for holidays and Customary Dark Periods (as such term is herein below defined), it will continuously and without interruption, operate and conduct within the Demised Premises, the business which it is permitted to operate and conduct under the provisions of this Lease, except while the Demised Premises are untenable by reason of fire or other casualty ("Operating Covenant"). Tenant shall fully utilize the Demised Premises for its business and shall at all times during normal business hours keep and maintain upon the Demised Premises competent personnel and trade fixtures to service and supply the ordinary demands and requirements of its customers. Lessor expressly acknowledges and agrees that the dinner theatre business requires periods of time during which a theatrical production and the accompanying sit-down restaurant services are not Open for Business to the general public as a result of rehearsals and seasonal production dark periods between theatrical presentations (the "Customary Dark Periods") and that the occurrence of Customary Dark Periods shall not mean the failure of Tenant to comply with the Operating Covenant.

SECTION 21—ASSIGNMENT OF RENTS, INCOME AND PROFITS

Tenant hereby absolutely and irrevocably assigns to Lessor all rents, income and profits accruing to Tenant from permitted subtenants of all or a portion of the Demised Premises and the buildings, structures or improvements thereon, together with the right to collect and receive the same; provided that so long as Tenant is not in default hereunder, Tenant shall have the right to collect and retain such rents, income and profits. Lessor shall apply to rent and other monies due

hereunder the net amount (after deducting all costs and expenses incident to the collection thereof and the operation and maintenance, including repairs, of the Demised Premises) of any rents, income and profits so collected and received by it. Notwithstanding the foregoing, if Tenant mortgages its Leasehold Estate pursuant to Section 18.1 and the Leasehold Mortgagee(s) require an assignment of rents, income and profits as part of its security, then during the Term of the lease agreement, the assignment herein shall be junior to the assignment in favor of all such Leasehold Mortgagees.

SECTION 22—CORPORATE STATUS OF TENANT

Tenant covenants that it is a valid and existing limited liability company organized under the laws of the State of Arizona, that it is duly qualified to do business in the State of Arizona, and that it has full right and authority to enter into this Lease.

SECTION 23—TENANT'S STATUTORY RIGHTS

In the event of any termination of the Term of this Lease (or any repossession of the Demised Premises pursuant to Section 19) Tenant, so far as permitted by law, waives any notice of reentry with or without the institution of legal proceedings to that end.

SECTION 24—WAIVER OF PERFORMANCE

No failure by Lessor or Tenant to insist upon the strict performance of any term or condition hereof or to exercise any right, power or remedy consequent upon a breach thereof and no submission by Tenant or acceptance by Lessor of full or partial Rent or Additional Charges during the continuance of any such breach shall constitute a waiver of any such breach or of any such term. No waiver of any breach shall affect or alter this Lease, which shall continue in full force and effect, nor the respective rights of Lessor or Tenant with respect to any other then existing or subsequent breach.

SECTION 25—REMEDIES CUMULATIVE

Each right, power and remedy provided for in this Lease or now or hereafter existing at law, in equity or otherwise shall be cumulative and concurrent and shall be in addition to every other right, power or remedy provided for in this Lease or now or hereafter existing at law, in equity or otherwise; and the exercise or beginning of the exercise of any one or more of the rights, powers or remedies provided in this Lease shall not preclude the simultaneous or later exercise of any or all such other rights, powers or remedies.

SECTION 26—CONVEYANCE BY LESSOR

26.1 In the event that Lessor (or any successor Lessor) shall intend to list or market for sale, or shall otherwise intend to sell, convey or dispose of the Demised Premises, Tenant shall be given prompt written notice of such intent. Tenant, within ninety (90) days after receipt of the written notice from Lessor (or successor Lessor), shall have first right to offer to purchase the Demised Premises at the prevailing market rate for the real property. If Tenant is unable or unwilling to purchase the Demised Premises within the ninety (90) day time period, Lessor (or

any successor Lessor) may proceed to solicit and accept other offer(s) to purchase the Demised Premises or otherwise sell, convey or dispose of the Demised Premises without further notice to Tenant. In the event Lessor or any successor Lessor shall accept on offer to purchase or otherwise sell, convey or dispose of the Demised Premises it shall thereupon be released from all liabilities and obligations imposed upon Lessor under this Lease (except those accruing prior to such conveyance or other disposition) and such liabilities and obligations shall be binding solely on the then owner of the Demised Premises, which owner shall be deemed to have assumed the same.

26.2 If Tenant does not exercise its option to purchase the Demised Premises, Tenant may, within ninety (90) days after the transfer of ownership of the Demised Premises, provide written notice to the successor Lessor of Tenant's intent to terminate the lease agreement. In such event, Tenant shall have twelve (12) months from the date of the written notice to vacate and terminate the lease agreement to remove any Improvements and return the Demised Premises to its original condition, normal wear accepted. During the twelve (12) month period, all other terms and conditions of the lease agreement shall remain in effect.

SECTION 27—TITLE TO BUILDINGS AND IMPROVEMENTS

Provided that Tenant is not in default of this Lease, and specifically excluding the Demised Premises, title to the Improvements, shall be and remain in Tenant until the expiration of the Term of the lease agreement, unless sooner terminated as herein provided. As long as the City of Peoria remains the owner of the Demised Premises, the Improvements shall become the property of the City of Peoria upon termination of Tenant's Leasehold Estate. If, prior to the termination of Tenant's Leasehold Estate, the City of Peoria transfers ownership of the Demised Premises (a "Lessor Transfer"), then upon the expiration or sooner termination of the lease agreement and provided that Tenant is not in default of this Lease, title to the Improvements shall automatically pass to, vest in and belong to Tenant without further action on the part of either party, without cost or charge to Lessor, and without further conveyance or transfer to Lessor; provided, however, that Tenant shall repair and replace, at its sole cost and expense, any portion of the Demised Premises which is damaged by said removal and shall deliver to Lessor quiet and peaceable possession of the Demised Premises, cleared of all persons and property not belonging to Lessor, in substantially the same condition as the Demised Premises as of the date of a Lessor Transfer. In addition: (i) if requested by Lessor, Tenant shall execute any instruments or documents reasonably required by Lessor to evidence the vesting of title to such property in Lessor, and (ii) if requested by Tenant and if applicable pursuant to this Lease, Lessor shall execute any instruments or documents reasonably required by Tenant to evidence the vesting of title to the Improvements in Tenant. While this Lease remains in effect, Tenant alone shall be entitled to claim depreciation on the Improvements for all taxation purposes.

SECTION 28—ATTORNEYS FEES

In the event Lessor should bring suit for possession of the Demised Premises, for the recovery of any sum due hereunder, or for any other relief against Tenant, declaratory or otherwise, arising out of a breach of any term or condition of this Lease, or in the event Tenant should bring any action for any relief against Lessor, declaratory or otherwise, arising out of this Lease, the prevailing party shall be entitled to receive from the other party reasonable attorneys'

fees and reasonable costs and expenses, which shall be deemed to have accrued on the commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

SECTION 29—PROVISIONS SUBJECT TO APPLICABLE LAW

All rights, powers and remedies provided herein shall be exercised only to the extent that the exercise thereof shall not violate any applicable law and are intended to be limited to the extent necessary so that they shall not render this Lease invalid or unenforceable under any applicable law. If any term or condition of this Lease shall be held to be invalid, illegal or unenforceable or against public policy, such provision shall be deemed stricken from this Lease and the validity of the other terms of this Lease shall in no way be affected thereby and this Lease, absent the stricken provision, shall otherwise remain in full force and effect.

SECTION 30—RIGHT TO CURE TENANT'S DEFAULTS

Except with respect to Tenant's failure to operate its business, in the event Tenant shall be in default of this Lease, which default remains uncured during any applicable cure period provided herein, Lessor may at any time, without further notice, cure such breach for the account and at the expense of Tenant. If Lessor at any time, by reason of such breach, is compelled to pay or elects to pay any sum of money or to do any act that will require the payment of any sum of money, or is compelled to incur any expense, including reasonable attorneys' fees, in instituting, prosecuting or defending any actions or proceedings to enforce Lessor's rights under this Lease or otherwise, the sum or sums so paid by Lessor, with all interest, costs and damages, shall be deemed to be Additional Charges and shall be due from Tenant to Lessor on the first day of the month following the incurring of such expenses or the payment of such sums.

SECTION 31—NOTICES

All notices, demands, requests, consents, approvals and other communications required or permitted hereunder shall be in writing and shall be deemed to have been given within three (3) days after the same has been mailed by registered or certified mail, postage prepaid, or within two (2) days after delivery by a nationally recognized overnight courier service (e.g., UPS, Federal Express) or personally delivered to the respective party, at the address shown below:

To TENANT: Ronald L. Klaphake, CEO
 KLOS Enterprises, L.L.C.
 1412 Creekside Drive,
 Stevensville, Montana 59870

With a copy to: Terry Mead
 Mead & Associates, P.C.
 6670 West Cactus Road, Suite A-105
 Phoenix, Arizona 85304-1656

To LESSOR: City Manager
City of Peoria
8401 W. Monroe
Peoria, Arizona 85345

With a Copy to: City Attorney
Office of the Peoria City Attorney
8401 W. Monroe
Peoria, Arizona 85345

or at such other address as either party shall from time to time designate in writing to the other.

SECTION 32– SIGNS AND ADVERTISING

Any exterior signs or insignia placed, erected or installed on the Demised Premises shall conform to City of Peoria requirements. If Tenant conducts any print, radio, television or billboard advertising to publicize Tenant's business at the Demised Premises, Tenant agrees to include "Peoria, Arizona" or "near the Peoria Sports Complex" in at least fifty percent (50%) of such advertising. In the event Tenant has any questions as to the manner in which the terms and provisions of this Section 32 are required to be implemented by Tenant, Lessor shall promptly upon Tenant's request advise and clarify the manner in which any such specific proposed advertising and/or sign shall be composed in order to comply with the terms and provisions of this Section 32.

SECTION 33–WARRANTIES OF LESSOR

33.1 Lessor hereby makes the following representations and warranties, each of which (i) is material and is being relied upon by Tenant in entering into this Lease, and (ii) is true in all respects as of the date hereof:

- a. Lessor owns the real property included within the Demised Premises.
- b. Lessor has the full right, power and authority to enter into and perform Lessor's obligations pursuant to this Lease and to lease the real property included within the Demised Premises to Tenant in the manner contemplated in this Lease subject only to the consent and approval of the Peoria City Council.
- c. No other person or entity has a right to possession of all or any part of the real property included within the Demised Premises.
- d. To the extent of Lessor's actual knowledge, there are no existing, proposed or contemplated assessments for or plans to widen, modify or realign any street or highway or any existing, proposed or contemplated eminent domain proceeding which would affect the Demised Premises or Tenant's use thereof in any way whatsoever.

- e. Lessor is not now involved in or aware of any pending or threatened proceeding, claim or controversy, which affects or may affect the real property included within the Demised Premises in any way whatsoever.
- f. Except as provided elsewhere herein, to the extent of Lessor's actual knowledge, there are no agreements, contracts, leases or restrictions that would limit, restrict, impair or prevent the construction of Tenant's buildings, structures or improvements on the real property included within the Demised Premises or Tenant's contemplated use of the Demised Premises.
- g. To the extent of Lessor's actual knowledge, neither this Lease nor Tenant's contemplated use of the Demised Premises, as contemplated by this Lease, violates any contract, agreement or instrument to which Lessor is a party, or any law, regulation, order or decree to which Lessor is subject to by which Lessor is bound.
- h. To the extent of Lessor's actual knowledge, there are no contracts or employment, management, maintenance, service or supply and no union contracts which affect the Demised Premises or Tenant's contemplated use thereof.

33.2 Upon Tenant performing all covenants of this Lease to be performed by Tenant, Tenant shall have quiet possession of the Demised Premises, without hindrance or ejection by any person lawfully claiming by, through or under Lessor, subject, however, to the provisions of this Lease and to the provisions of any (a) covenants, conditions and restrictions of record, and (b) any mortgage or other lien of record which this Lease is or may be subordinated.

SECTION 34—NONSUBORDINATED GROUND LEASE

This is a nonsubordinated Ground Lease Agreement. Lessor is not and shall not be obligated to subordinate its rights and ownership interest in the Demised Premises to any loan or money encumbrance that Tenant shall place against Tenant's Leasehold Estate.

SECTION 35—ESTOPPEL CERTIFICATE

- a. Tenant will execute, acknowledge and deliver to Lessor, within fifteen (15) days following request therefor, a certificate certifying (a) that this Lease is unmodified and in full force (or, if there have been modifications, that the lease agreement is in full force and effect, as modified, and stating the modifications), and (b) the dates, if any, to which Rent, Additional Charges and other sums payable hereunder have been paid, and c) that no notice has been received by Tenant of any default which has not been cured, except as to defaults specified in said certificate. Any such certificate may be relied upon by any prospective purchaser or encumbrancer of the Demised Premises or any part thereof. Tenant's failure to deliver such certificate within the time permitted hereby shall be conclusive upon Tenant that this Lease is in full force and affect, except to the extent any modification has been represented by Lessor, and that there are no uncured

defaults in Lessor's performance, and that not more than one month's rent has been paid in advance.

- b. Lessor will execute, acknowledge and deliver to any requesting Leasehold Mortgagee, within fifteen (15) days following request therefor, a certificate certifying (a) that this Lease is unmodified and in full force (or, if there have been modifications, that the lease agreement is in full force and effect, as modified, and stating the modifications), and (b) the dates, if any, to which Rent, Additional Charges and other sums payable hereunder have been paid, and c) that no notice has been received by Lessor of any default which has not been cured, except as to defaults specified in said certificate. Any such certificate may be relied upon by any such Leasehold Mortgagee. Lessor's failure to deliver such certificate within the time permitted hereby shall be conclusive upon Lessor that this Lease is in full force and affect, except to the extent any modification has been represented by Tenant, and that there are no uncured defaults in Tenant's performance, and that not more than one month's rent has been paid in advance.

SECTION 36-NET LEASE

As long as the City of Peoria shall remain the Lessor, it is the intention of the parties hereto that this Lease shall be a net lease and that Lessor shall receive the rents herein reserved and all sums which shall or may become payable hereunder by Tenant free from all taxes, charges, expenses, damages and deductions of every kind or sort whatsoever and that Tenant shall and will and hereby expressly agrees to pay all such sums which, except for the execution and delivery of this Lease, would have been chargeable against the Demised Premises and payable by Lessor. Tenant, however, shall not be under any obligation to pay any principal or interest on any mortgage or mortgages which may be placed by Lessor on the real property included within the Demised Premises, nor shall Tenant be under any obligation to pay any income taxes which may become payable by Lessor by reason of the income derived hereunder. Nothing provided in this Section shall be inconsistent with Tenant's obligations as provided in Section 7 with regard to any increase in taxes from those that would be owed as long as the City of Peoria remains the Lessor to those which would otherwise be owed if the City of Peoria transfers ownership of the real property included within the Demised Premises.

SECTION 37- RECORDING

Within ten (10) days after the Effective Date of the lease agreement, Lessor and Tenant shall execute and cause this Lease to be placed of record with the Maricopa County Recorder's Office.

SECTION 38-PARTIES BOUND

This Lease shall be binding upon and inure to the benefit of and be enforceable by the parties hereto, their personal representatives, their respective successors in office and permitted assigns of the parties hereto for the entire term of this Lease.

SECTION 39–TIME OF ESSENCE

Time is declared to be of the essence of this Lease.

SECTION 40–SECTION HEADINGS; REFERENCES; INTERPRETATION

The section headings contained in this Lease are for purposes of convenience and reference only and shall not limit, describe or define the meaning, scope or intent of any of the terms or provisions hereof. All grammatical usage herein shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the context may require. If the last day of any time period stated herein shall fall on a Saturday, Sunday or legal holiday in the State of Arizona, then the duration of such time period shall be extended to the next succeeding day which is not a Saturday, Sunday or legal holiday in the State of Arizona.

SECTION 41–LESSOR DEFINED

The word "Lessor" shall include not only the original Lessor but also any person or entity hereafter acquiring the Lessor's interest in this Lease.

SECTION 42–SEVERABILITY

If any provision of this Lease is declared void, unenforceable or against public policy, such provision shall be deemed stricken and severed from this Lease, with the remainder of the lease agreement remain in full force and effect.

SECTION 43–GOVERNING LAW AND CHOICE OF FORUM

This Lease shall be governed by and construed in accordance with the substantive laws of the State of Arizona without giving effect to the principles of conflict of laws. Any action brought to interpret, enforce or construe any provision of this Lease shall be commenced and maintained in the Superior Court of Maricopa County, Arizona (or, as may be appropriate, in the Justice Courts of Maricopa County or in the United States District Court for the District of Arizona if, and only if, the Maricopa County Superior Court lacks or declines jurisdiction over such action.)

SECTION 44–PAYMENT OF COSTS AND EXPENSES

Whenever, in this Lease, anything is to be done or performed by Tenant or Lessor, unless otherwise expressly provided to the contrary, it shall be done or performed at the sole cost and expense of Tenant or Lessor as the case may be.

SECTION 45–NO WARRANTIES

Tenant acknowledges and covenants to Lessor that it has made a complete investigation of the real property included within the Demised Premises, the surface and sub-surface conditions thereof, the present and proposed uses thereof, and agrees to accept all the same "as is" improvements which Lessor has agreed to make pursuant to this Lease. Tenant further agrees that, except as expressly provided herein, no representation or warranty, expressed or implied, in

fact or by law, has been made by Lessor or anyone else, as to any matter, fact, condition, prospect or anything else of any kind or nature.

SECTION 46-BROKERS OR AGENTS

Tenant represents and warrants to Lessor that Tenant has had no dealings or discussions with any broker or agent (licensed or otherwise) In connection with this Lease and Tenant covenants to pay, hold harmless and indemnify Lessor from and against any and all losses, liabilities, damages, costs and expenses (including reasonable legal fees) arising out of or in connection with any breach of this representation and warranty.

SECTION 47-CONSENT OR APPROVAL

Except as otherwise expressly provided herein, any consent or approval required in this Lease shall not be unreasonably withheld or delayed. The requesting party shall be entitled to seek specific performance at law and shall have such other remedies as are reserved to it under the lease agreement, but in no event shall Lessor or Tenant be responsible for damages to anyone for such failure to give consent or approval.

SECTION 48-DELAY OF PERFORMANCE

Any prevention, delay or stoppage due to strikes, lockouts, labor disputes, acts of God, inability to obtain labor or materials or reasonable substitutes therefor, governmental restrictions, governmental regulations, governmental controls, enemy or hostile governmental action, civil commotion, fire or other casualty, and other causes beyond the control of the party obligated to perform, shall excuse the performance by such party for a period equal to any such prevention, delay or stoppage, except the obligations imposed with regard to rental and other monies to be paid by Tenant pursuant to this Lease.

SECTION 49-INTENDED AGREEMENT

This Lease is the result of arms-length negotiations between parties of roughly equivalent bargaining power and expresses the complete, actual and intended agreement of the parties. This Lease shall not be construed for or against either party as a result of its participation, or the participation of its counsel, in the preparation and/or drafting of this Lease or of any exhibits or documents prepared to carry out the intent of this Lease.

SECTION 50-RELATIONSHIP

This is a ground lease agreement. This Lease shall not be construed as creating a joint venture, partnership or any other cooperative or joint arrangement between Lessor and Tenant, and it shall be construed strictly in accordance with its terms and conditions. Nothing contained herein is intended to confer a benefit upon any third parties.

SECTION 51-FURTHER INSTRUMENTS AND DOCUMENTS

Lessor and Tenant shall, upon request from the other, promptly acknowledge and deliver to the other any and all further documents, instruments or assurances reasonably requested or appropriate to evidence or give effect to the provisions of this Lease.

SECTION 52-INTEGRATION CLAUSE; NO ORAL MODIFICATION

This Lease represents the entire agreement of the parties with respect to its subject matter, and all previous agreements, whether oral or written, entered into prior to this Lease are hereby revoked and superseded by this Lease. No representations, warranties, inducements or oral agreements have been made by any of the parties except as expressly set forth herein, or in any other contemporaneous written agreement executed for the purposes of carrying out the provisions of this Lease. This Lease may not be changed, modified or rescinded, except as provided for herein, absent a written agreement signed by Lessor and Tenant and any Leasehold Mortgagees then of record. Any attempt at oral modification of this Lease shall be void and of no effect.

SECTION 53-LIQUOR LICENSE

This Lease is contingent upon Tenant obtaining a Series Twelve (12) Liquor License from the State of Arizona for the business to be located on the Demised Premises. If Tenant is unable to obtain said liquor license for the business to be located on the Demised Premises, this Lease shall, at Tenant's option by written notice to Lessor, be null and void and of no force and effect; provided, however, that Lessor shall be entitled to retain all Rent and Additional Charges previously paid to it by Tenant.

SECTION 54-CONFLICT OF INTEREST

This Lease shall be subject to cancellation pursuant to the provisions of A.R.S. § 38-511 relating to conflicts of interest.

SECTION 55-SATISFACTION OF CONDITIONS PRECEDENT

The parties hereby acknowledge that all liabilities, obligations and covenants of the Tenant and the Lessor under this Lease are contingent upon the satisfaction of the Conditions Precedent set forth in the Development Agreement. In the event that the Tenant terminates the Development Agreement for any reason, then this Lease shall automatically terminate and be of no further force or effect, and the parties shall be released from all further obligations hereunder. The Lessor and the Tenant agree to execute a written certification confirming the termination of this Lease under the foregoing provision upon the request of either party to do so.

SECTION 56- ESTOPPEL

Tenant agrees that, as of the Revision Date, it has received the equal protection of the laws, has received due process of all of its claims and requests, and has not suffered from a compensable regulatory taking (as those terms and their related claims are defined by Arizona

state and federal constitutional jurisprudence). Tenant agrees that Lessor has not breached the Original Agreements. Tenant agrees that it has no any litigable claim against Lessor as of the Revision Date.

[Signature Pages Follow]

TENANT SIGNATURE PAGE

IN WITNESS WHEREOF, the Parties have executed this Lease as of the day and year first written above.

"TENANT"

KLOS ENTERPRISES, L.L.C., an Arizona limited liability company

By: _____
Name: Ronald L. Klaphake
Title: Chief Executive Officer

STATE OF _____)
) ss.
County of _____)

SUBSCRIBED AND SWORN to before me this ____ day of _____, ____, by _____ of KLOS ENTERPRISES, L.L.C., an Arizona limited liability company, on behalf of the company.

Notary Public

My commission expires:

LEASEHOLD MORTGAGEE CONSENT PAGE

Leasehold Mortgagee hereby unconditionally consents to the Parties' execution this Lease as of the day and year first written above.

"LEASEHOLD MORTGAGEE"

**CIENA CAPITAL, LLC, a _____
limited liability company**

By: _____

Name: Steve Wilson

Title: Surveillance & Monitoring Officer

Address: One Independence Pointe, Suite 102
Greenville, SC 29615

STATE OF _____)
) ss.
County of _____)

SUBSCRIBED AND SWORN to before me this ___ day of _____, ____, by Steve Wilson, a Surveillance & Monitoring Officer of CIENA CAPITAL, LLC, a _____ limited liability company, on behalf of the company.

My commission expires: _____

Notary Public

**SOUTHWESTERN BUSINESS FINANCE
CORPORATION, a(n) _____
corporation**

By: _____

Name: Bill Brice

Title: _____

Address: 3200 N. Central Avenue, Suite 1550
Phoenix, AZ 85012

STATE OF _____)
) ss.
County of _____)

SUBSCRIBED AND SWORN to before me this ___ day of _____, ____, by Bill Brice, the _____ of Southwestern Business Finance Corporation, a(n) _____ corporation, on behalf of the company.

My commission expires: _____

Notary Public

EXHIBIT A

LEGAL DESCRIPTION OF DEMISED PREMISES

A parcel of land located within the Southwest quarter of the Northeast quarter of Section 2, Township 3 North, Range 1 East of the Gila and Salt River base and meridian, Maricopa County, Arizona, being more particularly described as follows:

Commencing at the Northeast corner of said Southwest quarter of the Northeast quarter of Section 2;

Thence S 02°08'50" E, along the East line of said Southwest quarter of the Northeast quarter of Section 2, a distance of 35.01 feet to the TRUE POINT OF BEGINNING;

Thence continuing S 02°08'50" E, along said East line, a distance of 466.00 feet;

Unofficial Document

Thence S 89°21'02" W, a distance of 452.91 feet;

Thence N 00°38'58" W, a distance of 465.84 feet to a point located 35.00 feet south of the North line of said Southwest quarter of the Northwest quarter of Section 2;

Thence N 89°21'02" E, parallel to and 35.00 feet south of the North line of said Southwest quarter of the Northeast quarter of Section 2, a distance of 440.73 feet to the TRUE POINT OF BEGINNING.

EXCEPT that portion of the above described parcel lying east of the following described line:

Commencing at the Northeast corner of said Southwest quarter of the Northeast quarter of Section 2;

Thence S 02°08'50" E, along the east line of said Southwest quarter of the Northeast quarter of Section 2, a distance of 501.01 feet;

Thence S 89°21'02" W, a distance of 40.01 feet to the TRUE POINT OF BEGINNING;

Thence N 02°08'50" W, parallel to and 40.00 feet west of the East line of the above described parcel, a distance of 411.00 feet;

Thence N 46°23'54" W, a distance of 57.30 feet to a point located 15.00 feet south of the North line of said above described parcel;

Thence S 89°21'02" W, parallel to and 15.00 feet south of the North line of the above described parcel, a distance of 361.11 feet to the point on the West line of the above described parcel and terminus of the herein described line.

The above described parcel having an area of 182,694 square feet (4.194 acres.)