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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

Case No.: 17-40284-ess

3073 EMMONS AVENUE CORP.,

Chapter 11

Debtor.

NOTICE OF MOTION

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To the Honorable Elizabeth S. Stong
United States Bankruptcy Judge
and other Parties in Interest:

PLEASE TAKE NOTICE THAT:

Upon the application of the Debtor, 3073 Emmons Avenue Corp., a hearing will be held before the Honorable Elizabeth S. Stong, United States Bankruptcy Judge of the United States Bankruptcy Court, Eastern District of New York, at the Conrad B. Duberstein Courthouse, located at 271-C Cadman Plaza East, Brooklyn, New York 11201, on **April 20, 2017 at 10:30 a.m.** or as soon thereafter as counsel may be heard for an order:

- (1) finding that the Debtor is not a Small Business as defined in 11 U.S.C. §101(51D);
- (2) the Automatic Stay was in effect on March 2, 2017;
- (3) Stabilis Master Fund III, LLC violated the automatic stay when it auctioned the Debtor's real property located at 3073 Emmons Avenue, Brooklyn, New York on March 2, 2017;
- (4) restraining Stabilis Master Fund III, LLC and its agents from transferring and otherwise conveying the property located at 3073 Emmons Avenue, Brooklyn, New York until further order of this Court;

- (5) awarding Debtor damages sustained as a result of Stabilis Master Fund III, LLC violation of the Automatic Stay;
- (6) authorizing the Debtor to convey its right, title, and interest in the real property located at 3070 Emmons Avenue, Brooklyn, NY pursuant to 11 U.S.C. §363; and
- (7) such other, further, and different relief this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that the terms of the sale are fully set forth in detail in the Debtor's application and as set forth in detail in the sale agreement annexed thereto.

PLEASE TAKE FURTHER NOTICE, that objections, if any, to the relief sought in the Debtor's application must be filed with the Clerk of the Court, and served upon Debtor's counsel, the Office of the United States Trustee, all parties who filed notices of appearances, no later than one (1) week prior to the return date.

PLEASE TAKE FURTHER NOTICE., that unless objections are timely interposed, the relief sought in the application may be granted.

Dated: Staten Island, New York
March 16, 2017

GABOR & MAROTTA LLC

/S/
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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

Case No.: 17-40284-ess

3073 EMMONS AVENUE CORP.,

Debtor.

Chapter 11

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DEBTOR’S MOTION FOR A DETERMINATION: THAT IT IS NOT A SMALL BUSINESS PURSUANT TO 11 U.S.C. §101 (51D); THAT STABILIS MASTER FUND III, LLC VIOLATED THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. §362, AWARDING DEBTOR DAMAGES AND RESTRAINING STABILIS FROM CONVEYING OR ENCUMBERING THE PROPERTY WITHOUT FURTHER ORDER OF THIS COURT; AUTHORIZING THE DEBTOR TO CONVEY ITS RIGHT, TITLE, AND INTEREST IN REAL PROPERTY PURSUANT TO 11 U.S.C. §363.

3073 EMMONS AVENUE CORP., Debtor and Debtor-in-Possession herein (“Debtor” or “DIP”), by and through undersigned counsel, hereby submits the within motion for an order: (1) finding that the Debtor is not a Small Business as defined in 11 U.S.C. §101(51D); (2) the Automatic Stay was in effect on March 2, 2017; (3) Stabilis Master Fund III, LLC violated the automatic stay when it auctioned the Debtor’s real property located at 3073 Emmons Avenue, Brooklyn, New York on March 2, 2017; (4) restraining Stabilis Master Fund III, LLC and its agents from transferring and otherwise conveying the property located at 3073 Emmons Avenue, Brooklyn, New York until further order of this Court; (5) awarding Debtor damages sustained as a result of Stabilis Master Fund III, LLC violation of the Automatic Stay; (6) authorizing the Debtor to convey its right, title, and interest in the real property located at 3070 Emmons

Avenue, Brooklyn, NY pursuant to 11 U.S.C. §363 (7) together with such other, further, and different relief this Court deems just and proper.

In support of its motion, the Debtor respectfully represents and alleges as follows:

SUMMARY AND BACKGROUND

1. The Debtor filed for Chapter 11 relief on January 25, 2017.
2. The Debtor manages, maintains and operates an Italian Restaurant doing business under the name Maria's in the Sheepshead Bay section of Brooklyn.
3. Maria's has been family owned and operated since 1932, although it has been reformatted over the years as family transformed.
4. The Debtor also owns the property that the restaurant operates in, located at 3073 Emmons Avenue, Brooklyn, NY (hereinafter the "Property").
5. The property is a small commercial property with the restaurant on the ground floor and two (2) residential tenants upstairs.
6. The Debtor had previously filed a Chapter 11 petition on July 24, 2015. That case was filed as a small business Debtor. The petition was dismissed on October 17, 2016.
7. The reason for the Debtor's filings was due to a default in its mortgage payments with National Bank of New York City (hereinafter "National").
8. The Debtor had been current in its mortgage payments until October 15, 2012, and then Super Storm Sandy struck, causing devastating damage.
9. The Sheepshead Bay section of Brooklyn, being surrounded by water, was devastated more so than other areas of New York. The Debtor was closed and unable to operate from October 2012 to May 2013 – when it opened for full operations.

10. Furthermore, since this was a neighborhood restaurant, the customers were unable to patronize the restaurant as they were also out of their homes and economically devastated due to the storm damage.

11. It took many months for the neighborhood to rebuild and to remove all the street closures preventing access to the Debtor's restaurant.

12. The subject mortgage was held by National, before it was assigned on May 7, 2014 to Stabilis Master Funds III, LLC ("Stabilis").

13. Stabilis is a hedge fund that purchases troubled debt for a fraction of the outstanding liability. That's what happened with the Debtor's mortgage in this case.

14. The Debtor missed its first mortgage payment in October, 2012, when Sandy devastated New York and Debtor was unable to operate. A mere five (5) months later, on March 27, 2013, before the Debtor was able to fully recover from the damage from Superstorm Sandy, National (Stabilis' predecessor in interest), declared the Debtor in default of its obligations under the mortgage and served a notice of default.

15. National assigned the mortgage to Stabilis on or about May 7, 2014.

16. Thereafter in 2014, Stabilis commenced a foreclosure action in the Supreme Court, Kings County styled, Stabilis Master Fund III, LLC v. 3073 Emmons Ave. Corp., Index No. 013428/2014.

17. Stabilis obtained a default judgment against the Debtor in the foreclosure action, and subsequently obtained an order of reference and judgment of foreclosure and sale in 2016.

18. On January 25, 2017, the Debtor filed its second bankruptcy petition with the Court.

19. On March 1, 2017, the Debtor amended its bankruptcy petition correcting an erroneous "small business debtor" designation.

20. On March 2, 2017, the Debtor's Property was auctioned by Stabilis at a judicial auction held in the Supreme Court, Kings County and a bid was accepted.

21. Despite Stabilis and its legal counsel being notified of the Debtor's second bankruptcy filing and the applicability of the automatic stay, it proceeded with the auction of the Property.

22. Stabilis did not file for relief from the automatic stay pursuant to 11 U.S.C. §362(d), nor did it seek judicial intervention objecting to the Debtor's status, thereby necessitating the instant motion.

DEBTOR'S SMALL BUSINESS STATUS

23. When preparing the instant petition for filing, this office used the first petition as a model, utilizing basic information from it for inclusion in the second filing.

24. Erroneously, the box for "small business debtor" was checked in the second petition. This was a clerical error which was immediately corrected upon discovery.

25. As evidenced by the schedules submitted with the second petition, the Debtor does not qualify as a small business.

26. The Debtor's liabilities exceed that required to be a small business, hence there was never an intention to file the second petition as a small business.

27. Debtor amended its petition on March 1, 2017, removing the small business designation.

28. Notwithstanding the fact that the automatic stay was in effect, and that Stabilis was notified both verbally and in writing from your affirmant not to move forward with the auction of the Property, Stabilis – over Debtor's objections, proceeded to auction the Property on March 2, 2017 at 2:30 p.m. and accepted a bid for the purchase of the property. Annexed hereto as Exhibit

“A” is the Supreme Court Case Appearance report confirming the auction was held on March 2, 2017.

29. Notably prior to the auction, your affirmant and counsel to Stabilis exchanged numerous letters on the issue of the Debtor’s status and the applicability of the automatic stay. Notwithstanding the Debtor’s good faith amendment to the second petition before the auction was held, Stabilis alleged that the Debtor’s amendment “is of no effect and there remains no stay in this Chapter 11 case.” Annexed hereto as Exhibit “B” are true copies of correspondence dated March 1, 2017 and March 2, 2017 between counsel for the parties.

30. Stabilis alleges that the automatic stay was not in effect under 11 U.S. C. §362, arguing that the Debtor was a small business case and not entitled to same.

31. The issues before this Court are (i) the Debtor’s status as a small business debtor, and (ii) whether the automatic stay was in effect on March 2, 2017, thereby precluding Stabilis from auctioning Debtor’s Property.

32. As of March 2, 2017, the 341 meeting of creditors, the initial debtor interview, nor the initial case conference had been held on Debtor’s second petition. Remarkably, despite these facts, Stabilis never filed a motion for relief from the automatic stay or objected to the Debtor’s status, nor sought Court intervention before auctioning the Debtor’s Property. Stabilis merely asserted that it had the authority to do so and alleged that the Debtor was acting in bad faith and proceeded with the auction in total disregard of the Debtor’s rights and applicable law.

APPLICABLE LAW & ARGUMENT

33. Under 11 U.S.C. §101(51D), a small business debtor is defined as “... a person engaged in a commercial or business activities ... that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition... in an amount not more than

\$2,566,050.00... for a case in which the United States Trustee has not appointed a committee of unsecured creditors or where the court has determined that the committee is not sufficiently active...” See 11 U.S.C. §101(51D) (as amended).

34. The Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005 (“BAPCPA”), amended former Bankruptcy Code §101 (51C) by eliminating a Chapter 11 debtor discretion to elect to be treated as a small business. See generally, In re Roots Rents Inc., 420 B.R. 28 (Bankr. D. Idaho 2009). The reference to such election was deleted from Chapter 11 and therefore the debtor no longer had the discretion to proceed or not proceed as a small business debtor.

35. Accordingly, under Fed. R. Bank. Pro. 1020(a) a Chapter 11 debtor “shall state in the petition whether the debtor is a small business debtor”. If the debtor satisfies this requirement then it will be treated as such pursuant to the BAPCPA as amended. See also, In Re Roots Rents Inc., *supra*.

36. Fed. R. Bank. Pro. 1020 (b) provides that, the United States Trustee or other party in interest may file an objection to the debtor’s statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under 11 U.S.C. §341. Fed. R. Bank. Pro 1020(d) states in part, that, “Any objection or request for a determination under this rule shall be governed by Rule 9014 and served on: the debtor; the debtor's attorney; the United States trustee; the trustee; any committee appointed under §1102 or its authorized agent, or, if no committee of unsecured creditors has been appointed under §1102, the creditors included on the list filed under Rule 1007(d); and any other entity as the court directs.” See, Fed. R. Bank. Pro 1020(d).

**The Debtor Requests a Determination
that it is Not a Small Business**

37. There are few cases on point that fit the Debtor's circumstances concerning the erroneous designation of a debtor as a small business in a voluntary Chapter 11 petition, as is the case in the instant proceeding.

38. In the reported cases which pertain to the small business designation, the issue of whether the debtor was a small business arose because the debtor in those cases, failed to meet the time constraints of a small business debtor under 11 U.S.C. §1121(e). If those cases were indeed small business cases, the petitions had to be dismissed or converted to a chapter 7 due to the debtor's noncompliance with 11 U.S.C §1121(e).

39. Prior to the passage of BAPCPA, a debtor could elect to proceed as a small business debtor. See, In re Roots Rents Inc., 420 B.R. 28, 34-35 (Bankr. D. Idaho 2009). Since that time, however, the small business debtor status is not voluntary, but mandatory if the debtor fits within the enumerated qualifications. Those qualifications include (1) not having more than \$2,566,050 in aggregate noncontingent liquidated secured and unsecured debt or (2) being engaged in commercial or business activities that are not primarily the owning or operating of real property. See, 11 U.S.C. §101(51D).

40. Either a debtor qualifies as a small business or it does not. It is not a status that can be chosen, but rather a status imposed upon the debtor based upon the requirements of 11 U.S.C. §101(51D). To indicate its qualification as a small business debtor, a debtor must state such "in the petition." See, In re Childs, Bank. No. 09-33970. (Bankr. D. Utah 12/9/2010).

41. A party in interest or the U.S. Trustee may object to the debtor's designation within 30 days of the later of the 341 meeting **or the latest amendment of the small business statement**. [emphasis added]. See, Fed. R. Bank. Pro. 1020 (b). The deadline for objection is,

however, subject to enlargement, even after the original time limit has passed, upon a finding by a court of excusable neglect. See, Fed. R. Bankr. Pro. 9006(b)(1).

42. An erroneous election to be a small business debtor is not binding upon the Court. If the Debtor does not qualify as a small business debtor, then “debtors” designation in their petitions and election [is] incorrect and should be extinguished. See, In re Childs, supra.

43. This is consistent with the rules governing the amendments of pleadings. See, Fed. R. Bankr. Pro. 7015. Courts are given guidance as to allowing amendments to pleadings ‘freely... when justice so requires’ and to ‘freely permit an amendment when doing so will aid in presenting the merits, and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits.’. See, In re Childs, supra; see also, F.R.C.P. 15(a).

44. Debtors may amend their petitions and other filings as a matter of course at any time prior to the closing of the case. This includes amending the designation as a small business debtor. Courts have unanimously agreed that the designation by the debtor is not the determining factor; either the debtor qualifies as a small business, or it does not.

45. The secondary issue in the reported cases was the retroactivity of the removal of the small business designation from the Debtor’s petition.

46. In the case In re Childs, the Debtor originally elected small business status, and proceeded with its case as such. Thereafter, the applicable small business case time limitations passed without proper action by the debtor. The debtor in Childs could not survive in Chapter 11, so it moved to have its status changed from small business, thereby eliminating the 1121(e) deadlines and allowing it to continue.

47. After determining that the Childs' debtor was not a small business, the Court allowed the change and determined the change was *retroactive*. In Childs, the Court concluded that the debtor's designation in their petition and election was incorrect and should be extinguished. The court held that its determination was consistent with the rules governing amendments to pleadings and that there was little or no prejudice to any creditors.

48. The Court also went on to say that "the Court does not find it prudent to require a debtor to be bound by rules that by definition are not applicable to that debtor." See, In re Childs, supra. Therefore, if by definition a debtor is not a small business, then the small business rules cannot apply, as is the case in the instant bankruptcy action.

49. Accordingly, pursuant to the holding in Childs, the Debtor in the instant action should not be bound by the rules of 11 U.S.C. §101(51D) pertaining to a "small business debtor" inasmuch as the Debtor properly amended its petition and corrected its erroneous designation as a small business and such amendment did not prejudice any creditor nor was done in bad faith. Consistent with the holding in Childs, the change to the petition should be deemed retroactive to the initial filing date of the petition, *to wit*, January 25, 2017.

50. Similarly, the debtor in the case In re Coleman Enterprises Inc., filed its petition as a small business debtor. It was subsequently determined that the election was incorrect as the debtor's liabilities exceeded the amount allowable. It was determined that the Coleman debtor could not file a confirmable plan because it missed the small business deadlines, therefore the debtor moved to change its status so it was no longer considered a small business debtor. See, In re Coleman Enterprises Inc., 275 B.R. 533 (B.A.P. 8th Cir. 2002).

51. The Court in Coleman, and confirmed by the Eight Circuit BAP, determined "Debtors, by definition, were not small business at the time they filed their Chapter 11 petitions.

They, therefore, did not satisfy the condition precedent to making a small business election, making the election void ab initio.” The Court “nullified” the small business election in that action and permitted the case to proceed as a standard Chapter 11. The Childs Court also cited the Coleman case for this proposition.

52. In another case, In re Barnes, the court determined that 11 U.S.C. § 105(a) permitted the Court, *sua sponte*, to grant a withdrawal of the small business debtor election as none of the creditors in that case would be prejudiced by a withdrawal, and the debtor did not appear to be abusing the system by requesting the withdrawal.” See, In re Barnes, 310 B.R. 209 (Bankr. D. Colo. 2004).

53. In Barnes, the debtor sought to change its status away from that of a small business debtor as it was facing a Chapter 7 conversion, due to its failure to meet the small business deadlines. The Court invoked its powers under 11 U.S.C. § 105(a) and changed the debtor’s status retroactively [removing the small business designation] and allowed the debtor to proceed as a regular Chapter 11 case.

54. The Barnes Court stated 11 USC § 105 is an omnibus statute which provided the basis for a broad exercise of power by the courts in the administration of a bankruptcy case. The provision provides the court with expansive equitable powers to ‘issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.’” See, In re Barnes, 310 B.R. 209 (Bankr. D. Colo. 2004). Since the debtor in the Barnes case did not wait nearly a year before filing a plan of reorganization and seeking an exit from the small business election, the court did not find any evidence that any prejudice to the creditors would occur if the debtor is allowed to continue and operate in Chapter 11. Id.

55. In Re Dal-Jones Investments, LLC, nine (9) months after the petition was filed, the debtor moved to rescind its small business designation, claiming it determined it did not qualify as such. The Court allowed the change retroactive to the petition date acknowledging that “it is evident that the debtor made the small business election in error and sought to correct it through ... amendment.” See, In Re Dal-Jones Investments, LLC, 11-05971-8 E.D. U.S.B.C., E.D. North Carolina, Wilmington Division 7/9/2012.

56. The Honorable Alan S. Trust also had occasion to rule on the issue of when the change in designation takes effect. In re Display Group, the debtor did not designate itself as a small business. The Trustee objected to debtor’s failure to designate itself as a small business. Judge Trust ruled that the change in designation was effective retroactively to the initial filing of debtor’s petition.

57. In that same case, Judge Trust compared Rule 1020(a) with 1020(c). Rule 1020(c) involves a small business that also has a committee of unsecured creditors appointed. Judge Trust pointed out that under 1020(c), the debtor proceeds as a small business “*from the time when*” the Court makes its determination. However, Rule 1020(a) does not contain the words “*from the time when*” and therefore the change in status proceeds from the initial filing of the petition. The Court concluded that the deadlines applicable in a small business case take effect as of the petition date, and therefore the changes in the debtor’s status are retroactive. See, In re Display Group, Inc., 10-75502-ast, U.S.B.C., EDNY, 11/16/2012.

58. Judge Trust goes on to say that Rule 1020(a) provides that the “status of the case as a small business case shall be in accordance with the debtor’s statement under this subdivision, unless and until the court enters an order finding that the debtor’s statement is incorrect.” Id. In the instant case, the Debtor’s statement was that it was not a small business.

59. In every reported case cited hereinabove, the debtor intended to file initially as a small business, which is the contrary here.

60. In the instant case, the Debtor never intended to file as a small business, as the Debtor's liabilities would not permit it to qualify as such. The petition was submitted with a clerical error [which designated the Debtor as a small business case] which is inconsistent with the Debtor's statement submitted in support thereof evidencing debts in excess of \$2,566,050.00.

61. The checking of the box on the second petition [designating it as a small business] was merely a clerical error and should not deprive the Debtor of the protections afforded to it under a regular Chapter 11 bankruptcy.

62. The Court should also take note that the Debtor's filing is in the early stages, and any amendment thereto was completed prior to any official action taking place or any court appearance.

63. In other cases, the small business deadlines set forth in 11 U.S.C. §1121(e) had passed and therefore those debtors could not survive in chapter 11 as a small debtor, thereby requiring a change in their status in order to continue. See for example, In re Castle Horizon Real Estate, LLC, 2010 Bankr. LEXIS 2900 (Bankr. E.D.N.C. 9/10/2010); In re WIN Trucking Inc., 236 B.R.774 (Bankr. D. Utah 1999); In re Western Steel Metals, Inc., 200 B.R. 873 (Bankr. S.D. 1996). These cases denied the change retroactively as the Court determined that the debtors in those cases had proceeded too far and enjoyed the benefits of being a small business for too long to allow the change at that stage of the case. However, even those courts recognize that a debtor can change its designation after the initial filings and that the proper designation can be retroactive to the initial filing.

64. As of this date, there is no reported case where the debtor removed its designation a small business at the initial stage of the case, as exists here.

65. Until a court determines otherwise, it is the Debtor's statement that governs the applicability of the small business proceedings. According, to Judge Trust in the In re Display Group case, a determination under Rule 1020(a) is retroactive to the filing of the petition.

66. Pursuant to Rule 1020(a), "In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor. ... the status of the case as a small business case shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect." See, Rule 1020(a).

67. Since amendments are freely granted by the court, the Debtor's amendment to the initial petition and/or statement is proper and should be freely granted. Upon the filing of the amendment, the status of the instant case shall be in accordance with [that] statement that the Debtor is NOT a small business and should proceed as a regular Chapter 11 case. Rule 1020 clearly allows an amendment to the small business statement.

68. Accordingly, based upon the foregoing, the Debtor requests that the Court make a determination that the Debtor is not a small business debtor and that same be retroactively applied to the initial filing on January 25, 2017.

Stabilis Master Fund III, LLC
Violated the Automatic Stay

69. Notwithstanding the Debtor's amended petition [removing the designation as a small business], Stabilis took steps to proceed with the foreclosure sale and permitted the Debtor's Property to be auctioned off on March 2, 2017.

70. By proceeding with the auction, Stabilis violated the automatic stay, despite having clear knowledge of the Debtor's pending petition, and over the Debtor's objections.

71. Even if it is determined that Stabilis did not violate the automatic stay because of the Debtor's initial filing designating it as a small business case, any current decision by this Court that the Debtor is not a small business would be retroactive to the initial request for relief, and as such, the automatic stay is and always was in effect since the filing of the initial petition on January 25, 2017.

72. Based upon the foregoing, the Debtor requests that the Court determine that Stabilis violated the automatic stay and award Debtor damages as a result of same. Debtor also seeks an order restraining Stabilis and its agents from conveying or otherwise encumbering the Property until further order of this Court.

**Debtor's Request For An Order Authorizing
The Debtor To Convey Its Right, Title, and
Interest in Real Property**

73. The Debtor also submits the within application for approval of the sale of the Debtor's right, title, and interest in the property located at 3073 Emmons Avenue, Brooklyn, New York to a bona fide purchaser for value.

74. Section 363 of the Bankruptcy Code governs the use, lease or sale of property of the estate. 11 U.S.C. §363. Under §363(b), a debtor in possession, such as the Debtor here, may sell property of the estate outside of the ordinary course of business. 11 U.S.C. §363 and §1107. In addition, §363(f) allows a debtor in possession to sell such property free and clear of any interest in such property of an entity other than the estate, only if—

1. applicable nonbankruptcy law permits sale of such property free and clear of such interest.
2. such entity consents
3. such interest is a lien and the price at which such property is to be sold is greater

- than the aggregate value of all liens on such property;
- 4. such interest is in bona fide dispute; or
- 5. such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. 11 U.S.C. §363(f).

75. The language of this section is disjunctive; thus only one of the conditions set forth in §363(f) need be satisfied in order to sell the property free and clear of claims and interests. Collier on Bankruptcy Par. 363.06 (16th ed.).

76. The standard for determining whether a sale outside the ordinary course of business should be approved is whether there is a good business reason to grant the application and that the sale is in the best interests of the estate. See, In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983); see also In re Ionosphere Clubs, 100 B.R. 670, 674-675 (Bankr. S.D.N.Y. 1989). In making its determination, the Court must "consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders." See Lionel, supra.

77. Under the Lionel standard, there must be some articulated business justification for the sale. Relevant factors in the context of a sale of substantially all of the Debtor's property pursuant to 11 U.S.C. 363(b) include: (i) the amount of time that has elapsed since the filing; (ii) the proceeds to be obtained in relationship to any valuations of the property to be sold; and (iii) whether the assets are decreasing in value. See, In re Betty Owens Schools, Inc., 1997 U.S. Dist. LEXIS 5877 (S.D.N.Y. 1997). See also, In re Medical Software Solutions, 286 B.R. 431 (Bankr. D. Utah 2002); In re Ionosphere Clubs, Inc., 100 B.R. 674, 677 (Bankr. S.D.N.Y. 1989).

78. If the Court finds business justification for the sale, it must then consider whether: (A) notice has been given to all creditors and interested parties; (B) the purchaser is proceeding

in good faith; and (C) the sale contemplates a fair and reasonable Price. See, Betty Owens Schools, Inc., supra at 4.

79. Notwithstanding the fact that the auction of the Debtor's Property took place on March 2, 2017, and the pending Referee's sale, the Debtor has located a purchaser and seeks approval of this Court to convey the Property to the Purchaser for the sum of \$1,300,000.

80. After several years of marketing the Property, the Debtor finally located a purchaser, named Ibrahim Barakat ("Purchaser") who submitted the highest offer during all the time that the property was being marketed.

81. There is no prior relationship between the Purchaser and the Debtor, and they did not know each other prior to this transaction. The agreement is a result of arm's length negotiations.

82. The terms of the offer and subsequent contract are as follows:

- a. Sale Price: \$1,300,000
- b. Down Payment: \$65,000
- c. Balance at Closing: \$1,235,000

83. The sale is not contingent upon the Purchaser receiving a mortgage, and the closing is scheduled for on or about May 29, 2017.

84. There is no broker involved in the sale, thereby reducing closing costs.

85. Moreover, the Sale Price should be acceptable to the secured creditor, Stabilis.

86. As discussed at length above, Stabilis violated the automatic stay on March 2, 2017 (by permitting the Property to be auctioned) causing the Debtor to incur damages, despite having received written and verbal notice of Debtor's amended petition and the protection of the automatic stay.

87. Incredulously, Stabilis never filed a motion to lift the stay and request permission to sell the Property, nor sought any intervention from this Court before it proceeded to auction the Property.

88. Stabilis had a court appointed referee conduct the auction at the Kings County Supreme Court, after transmittal of numerous letters to said Referee of the second filing and the application of the automatic stay.

89. The Debtor came to learn that the high bidder at the auction submitted a bid in the sum of \$1,367,000 which was accepted by Stabilis.

90. The Purchaser has agreed to pay \$1,300,000.

91. The Debtor believes that \$1,300,000 is the current fair market value of the property and a fair price sale price.

92. Jeffrey Brown, the Debtor's principal, has been trying to sell this property for over two years, both with and without brokers. The Purchaser's offer is the highest offer he has ever received.

93. While this price is \$67,000 less than the auction bidding, it is close enough to the auction price to be deemed a reasonable sale price by this Court.

94. The fact that the Debtor incurred damages as a result of Stabilis' violation of the automatic stay, justifies voiding that sale, and authorizing the Debtor to convey its interests in the Property to the Purchaser for the benefit of the bankruptcy estate. This would also be a reasonable sanction imposed upon Stabilis for violating the automatic stay.

95. The Property is currently encumbered by a first mortgage in favor of Stabilis in the approximate sum of \$2,200,000, including accrued interest, escrow, legal fees and late fees.

96. The terms as set forth hereinabove are the most significant terms and conditions of the sale agreement between the Debtor and Purchaser. A true copy of the sale agreement is annexed hereto as Exhibit "C".

97. Based upon the Debtor's presentation of an agreement of sale with a bona fide purchaser, for market value, the Debtor is hopeful that Stabilis will not object to these proposed terms and approve the sale to the Purchaser for \$1,300,000.

98. The proceeds of sale will be used, first to pay any closing costs, and second, to pay Stabilis the remaining proceeds in satisfaction of its claim.

99. Both Debtor and Purchaser have acted in good faith in accordance with 11 U.S.C. §363(m).

100. Accordingly, the Debtor requests that the Court make a factual determination that the Purchaser's acquisition of the Property under the sale agreement are in good faith as defined in 11 U.S.C §363(m) and are not subject to avoidance under 11 U.S.C. §363(n) and issue an order authorizing the Debtor to convey its right, title, and interest in 3073 Emmons Avenue, Brooklyn, New York.

CONCLUSION

For the foregoing reasons, the Debtor requests that the instant motion be granted in its entirety, together with such other, further, and different relief this Court deems just and proper.

Dated: New York, New York
March 16, 2017

GABOR & MAROTTA LLC

/S/
Richard M. Gabor, Esq. (RG8746)
Attorneys for Debtor
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Staten Island, NY 10314
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RESIDENTIAL CONTRACT OF SALE

Jointly Prepared by the Real Property Section of the New York State Bar Association, the New York State Land Title Association, the Committee on Real Property Law of the Association of the Bar of the City of New York and the Committee on Real Property Law of the New York County Lawyers' Association. (11/00)

CONSULT YOUR LAWYER BEFORE SIGNING THIS CONTRACT.

NOTE: FIRE AND CASUALTY LOSSES AND CONDEMNATION. This contract form does not provide for what happens in the event of fire, or other casualty loss or condemnation before the title closing. Unless different provision is made in this contract, Section 5-1311 of the General Obligations Law will apply. One part of that law makes a Purchaser responsible for fire and casualty loss upon taking possession of the Premises before the title closing.

WARNING: PLAIN LANGUAGE. No representation is made that this form of contract for the sale and purchase of real estate complies with Section 5-702 of the General Obligations Law ("Plain Language").

CONTRACT OF SALE made as of

Mosh, 2017
~~January~~ 2017

between

3073 Emmons Avenue Corp,
Address: 3073 Emmons Ave, Brooklyn, New York 11235

Social Security Number/Fed. I. D. No(s):

hereinafter called "Seller" and

Ebrahim
~~Ebrahim~~ Barakat *or on title to be furnished*
Address:

Social Security Number/Fed. I. D. No(s):

hereinafter called "Purchaser."

The parties hereby agree as follows:

1. Premises. Seller shall sell and convey and Purchaser shall purchase the property, together with all buildings and improvements thereon (collectively the "Premises"), more fully described on a separate page marked "Schedule A," annexed hereto and made a part hereof and also known as:

Street Address: 3073 Emmons Ave, Brooklyn, New York 11235

Tax Map Designation: Block 8800, Lot(s) 74, Kings County

Together with Seller's ownership and rights, if any, to land lying in the bed of any street or highway, opened or proposed, adjoining the Premises to the center line thereof, including any right of Seller to any unpaid award by reason of any taking by condemnation and/or for any damage to the Premises by reason of change of grade of any street or highway. Seller shall deliver at no additional cost to Purchaser, at Closing (as hereinafter defined), or thereafter, on demand, any documents that Purchaser may reasonably require for the conveyance of such title and the assignment and collection of such award or damages.

2. Personal Property. This sale also includes all fixtures and articles of personal property now attached or appurtenant to the Premises, unless specifically excluded below. Seller represents and warrants that at Closing they will be paid for and owned by Seller, free and clear of all liens and encumbrances, except any existing mortgage to which this sale may be subject. They include, but are not limited to, plumbing, heating, lighting and cooking fixtures, chandeliers, bathroom and kitchen cabinets and counters, mantels, door mirrors, switch plates and door hardware, venetian blinds, window treatments, shades, screens, awnings, storm windows, storm doors, window boxes, mail box, TV aerials, weather vane, flagpole, pumps, shrubbery, fencing, outdoor statuary, tool shed, dishwasher, washing machine, clothes dryer, garbage disposal unit, range, oven, built-in microwave oven, refrigerator, freezer, air conditioning equipment and installations, wall to wall carpeting and built-ins not excluded below. (*strike out inapplicable items*).

ALL IN AS IS AND WHERE IS CONDITION

Excluded from this sale are furniture and household furnishings and

3. **Purchase Price.** The purchase price is payable as follows:

\$ 1,300,000.00

(a) on the signing of this contract, by Purchaser's good check payable to the Escrowee (as hereinafter defined), subject to collection, the receipt of which is hereby acknowledged, to be held in escrow pursuant to paragraph 6 of this contract (the "Downpayment"):

\$ ~~120,000.00~~ \$65,000.-

(b) ~~by a promissory note and mortgage from Purchaser to Seller~~ amount unpaid on the existing mortgage on the date hereof, payment of which Purchaser shall assume by joinder in the deed:

\$

(c) ~~by a promissory note and mortgage from Purchaser to Seller:~~

\$

(d) balance at Closing in accordance with paragraph 7:

\$ ~~1,200,000.00~~ \$ 1,235,000

~~4. Existing Mortgage (Delete if inapplicable)~~ If this sale is subject to an existing mortgage as indicated in paragraph 3(b) above:

~~(a) The Premises shall be conveyed subject to the continuing lien of the existing mortgage, which is presently payable, with interest at the rate of _____ percent per annum, in monthly installments of \$ _____ which include principal, interest and escrow amounts if any, and with any balance of principal being due and payable on _____~~

~~(b) To the extent that any required payments are made on the existing mortgage between the date hereof and Closing which reduce the unpaid principal amount thereof below the amount shown in paragraph 3(b), then the balance of the price payable at Closing under paragraph 3(d) shall be increased by the amount of the payments of principal. Seller represents and warrants that the amount shown in paragraph 3(b) is substantially correct and agrees that only payments required by the existing mortgage will be made between the date hereof and Closing.~~

~~(c) If there is a mortgage escrow account, Seller shall assign it to Purchaser, if it can be assigned, and in that case Purchaser shall pay the amount in the escrow account to Seller at Closing.~~

~~(d) Seller shall deliver to Purchaser at Closing a certificate dated not more than 30 days before Closing signed by the holder of the existing mortgage in form for recording, certifying the amount of the unpaid principal, the date to which interest has been paid and the amounts if any claimed to be unpaid for principal and interest, itemizing the same. Seller shall pay the fees for recording such certificate. If the holder of the existing mortgage is a bank or other institution as defined in Section 274-a of the Real Property Law, it may, instead of the certificate, furnish a letter signed by a duly authorized officer, employee or agent, dated not more than 30 days before Closing, containing the same information.~~

~~(e) Seller represents and warrants that (i) Seller has delivered to Purchaser true and complete copies of the existing mortgage, the note secured thereby and any extensions and modifications thereof, (ii) the existing mortgage is not now, and at the time of Closing will not be, in default, and (iii) the existing mortgage does not contain any provision that permits the holder of the mortgage to require its immediate payment in full or to change any other term thereof by reason of the sale or conveyance of the Premises.~~

~~5. Purchase Money Mortgage (Delete if inapplicable)~~ If there is to be a purchase money mortgage as indicated in paragraph 3(c) above:

~~(a) The purchase money note and mortgage shall be drawn by the attorney for Seller in the form attached or, if not, in the standard form adopted by the New York State Land Title Association. Purchaser shall pay at Closing the mortgage recording tax, recording fees and the attorney's fees in the amount of \$ _____ for its preparation.~~

~~(b) The purchase money note and mortgage shall also provide that it is subject and subordinate to the lien of the existing mortgage and any extensions, modifications, replacements or consolidations of the existing mortgage, provided that (i) the interest rate thereof shall not be greater than _____ percent per annum and the total debt service thereunder shall not be greater than _____ percent per annum, and (ii) if the principal amount thereof shall exceed the amount of principal owing and unpaid on the existing mortgage at the time of placing such new mortgage or consolidated mortgage, the excess be paid to the holder of such purchase money mortgage in reduction of the principal thereof. The purchase money mortgage shall also provide that such payment to the holder thereof shall not affect the regular installments, if any, of principal payable thereunder and that the holder thereof will, on demand and without charge therefor, execute, acknowledge and deliver any agreement or agreements further to effectuate such subordination.~~

6. **Downpayment in Escrow.** (a) Seller's attorney ("Escrowee") shall hold the Downpayment in escrow in a segregated bank account at **TD Bank**

Address: **2700 Coney Island Avenue, Brooklyn, NY 11235**

until Closing or sooner termination of this contract and shall pay over or apply the Downpayment in accordance with the terms of this paragraph. Escrowee shall hold the Downpayment in a(n) _____ interest-bearing account for the benefit of the parties. If interest is held for the benefit of the parties, it shall be paid to the party entitled to the Downpayment and the party receiving the interest shall pay any income taxes thereon. If interest is not held for the benefit of the parties, the Downpayment shall be placed in an IOLA account or as otherwise permitted or required by law. The Social Security or Federal Identification numbers of the parties shall be furnished to Escrowee upon request. At Closing, the Downpayment shall be paid by Escrowee to Seller. If for any reason Closing does not occur and either party gives Notice (as defined in paragraph 25) to Escrowee demanding payment of the Downpayment, Escrowee shall give prompt Notice to the other party of such demand. If Escrowee does not receive Notice of

objection from such other party to the proposed payment within 10 business days after the giving of such Notice, Escrowee is hereby authorized and directed to make such payment. If Escrowee does receive such Notice of objection within such 10 day period or if for any other reason Escrowee in good faith shall elect not to make such payment, Escrowee shall continue to hold such amount until otherwise directed by Notice from the parties to this contract or a final, nonappealable judgment, order or decree of a court. However, Escrowee shall have the right at any time to deposit the Downpayment and the interest thereon with the clerk of a court in the county in which the Premises are located and shall give Notice of such deposit to Seller and Purchaser. Upon such deposit or other disbursement in accordance with the terms of this paragraph, Escrowee shall be relieved and discharged of all further obligations and responsibilities hereunder.

(b) The parties acknowledge that, Escrowee is acting solely as a stakeholder at their request and for their convenience and that Escrowee shall not be liable to either party for any act or omission on its part unless taken or suffered in bad faith or in willful disregard of this contract or involving gross negligence on the part of Escrowee. Seller and Purchaser jointly and severally (with right of contribution) agree to defend (by attorneys selected by Escrowee), indemnify and hold Escrowee harmless from and against all costs, claims and expenses (including reasonable attorneys' fees) incurred in connection with the performance of Escrowee's duties hereunder, except with respect to actions or omissions taken or suffered by Escrowee in bad faith or in willful disregard of this contract or involving gross negligence on the part of Escrowee.

(c) Escrowee may act or refrain from acting in respect of any matter referred to herein in full reliance upon and with the advice of counsel which may be selected by it (including any member of its firm) and shall be fully protected in so acting or refraining from acting upon the advice of such counsel.

(d) Escrowee acknowledges receipt of the Downpayment by check subject to collection and Escrowee's agreement to the provisions of this paragraph by signing in the place indicated on the signature page of this contract.

(e) Escrowee or any member of its firm shall be permitted to act as counsel for Seller in any dispute as to the disbursement of the Downpayment or any other dispute between the parties whether or not Escrowee is in possession of the Downpayment and continues to act as Escrowee.

(f) The party whose attorney is Escrowee shall be liable for loss of the Downpayment.

7. **Acceptable Funds.** All money payable under this contract, unless otherwise specified, shall be paid by:

(a) Cash, but not over \$1,000.00;

(b) Good certified check of Purchaser drawn on or official check issued by any bank, savings bank, trust company or savings and loan association having a banking office in the State of New York, unendorsed and payable to the order of Seller, or as Seller may otherwise direct upon reasonable prior notice (by telephone or otherwise) to Purchaser;

(c) As to money other than the purchase price payable to Seller at Closing, uncertified check of Purchaser up to the amount of \$ 500.00 ; and

(d) As otherwise agreed to in writing by Seller or Seller's attorney.

8. Mortgage Commitment Contingency. (Delete paragraph if inapplicable. For explanation, see Notes on Mortgage Commitment Contingency Clause.)

~~##### (a) The obligation of Purchaser to purchase under this contract is conditioned upon issuance, on or before _____ days after a fully executed copy of this contract is given to Purchaser or Purchaser's attorney in the manner set forth in paragraph 25 or subparagraph 8(i) (the "Commitment Date"), of a written commitment from an Institutional Lender pursuant to which such Institutional Lender agrees to make a first mortgage loan, other than a VA, FHA or other governmentally insured loan, to Purchaser, at Purchaser's sole cost and expense, of \$ _____ for a term of at least _____ years (or such lesser sum or shorter term as Purchaser shall be willing to accept) at the prevailing fixed or adjustable rate of interest and on other customary commitment terms (the "Commitment"). To the extent a Commitment is conditioned on the sale of Purchaser's current home, payment of any outstanding debt, no material adverse change in Purchaser's financial condition or any other customary conditions, Purchaser accepts the risk that such conditions may not be met; however, a commitment conditioned on the Institutional Lender's approval of an appraisal shall not be deemed a "Commitment" hereunder until an appraisal is approved (and if that does not occur before the Commitment Date, Purchaser may cancel under subparagraph 8(e) unless the Commitment Date is extended). Purchaser's obligations hereunder are conditioned only on issuance of a Commitment. Once a Commitment is issued, Purchaser is bound under this contract even if the lender fails or refuses to fund the loan for any reason.~~

~~##### (b) Purchaser shall: (i) make prompt application to one or, at Purchaser's election, more than one Institutional Lender for such mortgage loan; (ii) furnish accurate and complete information regarding Purchaser and members of Purchaser's family, as required; (iii) pay all fees, points and charges required in connection with such application and loan; (iv) pursue such application with diligence; and (v) cooperate in good faith with such Institutional Lender(s) to obtain a Commitment. Purchaser shall accept a Commitment meeting the terms set forth in subparagraph 8(a) and shall comply with all requirements of such Commitment (or any other commitment accepted by Purchaser). Purchaser shall furnish Seller with a copy of the Commitment promptly after receipt thereof.~~

~~##### (c) (Delete this subparagraph if inapplicable) Prompt submission by Purchaser of an application to a mortgage broker registered pursuant to Article 12-B of the New York Banking Law ("Mortgage Broker") shall constitute full compliance with the~~

terms and conditions set forth in subparagraph 8(b)(i), provided that such Mortgage Broker promptly submits such application to such Institutional Lender(s). Purchaser shall cooperate in good faith with such Mortgage Broker to obtain a Commitment from such Institutional Lender(s).

~~iiii(d) If all Institutional Lenders to whom applications were made deny such applications in writing prior to the Commitment Date, Purchaser may cancel this contract by giving Notice thereof to Seller, with a copy of such denials, provided that Purchaser has complied with all its obligations under this paragraph 8.~~

~~iiii(e) If a Commitment is issued by the Institutional Lender on or before the Commitment Date, then, unless Purchaser has accepted a written commitment from an Institutional Lender that does not conform to the terms set forth in subparagraph 8(a), Purchaser may cancel this contract by giving Notice to Seller within 5 business days after the Commitment Date, provided that such Notice includes the name and address of the Institutional Lender(s) to whom application was made and that Purchaser has complied with all its obligations under this paragraph 8.~~

~~iiii(f) If this contract is canceled by Purchaser pursuant to subparagraphs 8(d) or (e), neither party shall thereafter have any further rights against or obligations or liabilities to, the other by reason of this contract, except that the Downpayment shall be promptly refunded to Purchaser and except as set forth in paragraph 27.~~

~~iiii(g) If Purchaser fails to give timely Notice of cancellation or if Purchaser accepts a written commitment from an Institutional Lender that does not conform to the terms set forth in subparagraph 8(a), then Purchaser shall be deemed to have waived Purchaser's right to cancel this contract and to receive a refund of the Downpayment by reason of the contingency contained in this paragraph 8.~~

~~iiii(h) If Seller has not received a copy of a commitment from an Institutional Lender accepted by Purchaser by the Commitment Date, Seller may cancel this contract by giving Notice to Purchaser within 5 business days after the Commitment Date, which cancellation shall become effective unless Purchaser delivers a copy of such commitment to Seller within 10 business days after the Commitment Date. After such cancellation neither party shall have any further rights against, or obligations or liabilities to, the other by reason of this contract, except that the Downpayment shall be promptly refunded to Purchaser (provided Purchaser has complied with all its obligations under this paragraph 8) and except as set forth in paragraph 27.~~

~~iiii(i) For purposes of this contract, the term "Institutional Lender" shall mean any bank, savings bank, private banker, trust company, savings and loan association, credit union or similar banking institution whether organized under the laws of this state, the United States or any other state; foreign banking corporation licensed by the Superintendent of Banks of New York or regulated by the Comptroller of the Currency to transact business in New York State; insurance company duly organized or licensed to do business in New York State; mortgage banker licensed pursuant to Article 12-D of the Banking Law; and any instrumentality created by the United States or any state with the power to make mortgage loans.~~

~~iiii(j) For purposes of subparagraph 8(a), Purchaser shall be deemed to have been given a fully executed copy of this contract on the third business day following the date of ordinary or regular mailing, postage prepaid.~~

9. Permitted Exceptions. The Premises are sold and shall be conveyed subject to:

- (a) Zoning and subdivision laws and regulations, and landmark, historic or wetlands designation, provided that they are not violated by the existing buildings and improvements erected on the property or their use;
- (b) Consents for the erection of any structures on, under or above any streets on which the Premises abut;
- (c) Encroachments of stoops, areas, cellar steps, trim and cornices, if any, upon any street or highway;
- (d) Real estate taxes that are a lien, but are not yet due and payable; and
- (e) The other matters, if any, including a survey exception, set forth in a Rider attached.

10. Governmental Violations and Orders. (a) Seller shall comply with all notes or notices of violations of law or municipal ordinances, orders or requirements noted or issued as of the date ^{of closing} ~~hereof~~ by any governmental department having authority as to lands, housing, buildings, fire, health, environmental and labor conditions affecting the Premises. The Premises shall be conveyed free of them at Closing. Seller shall furnish Purchaser with any authorizations necessary to make the searches that could disclose these matters.

(b) *(Delete if inapplicable)* All obligations affecting the Premises pursuant to the Administrative Code of the City of New York incurred prior to Closing and payable in money shall be discharged by Seller at or prior to Closing.

11. Seller's Representations. (a) Seller represents and warrants to Purchaser that:

- (i) The Premises abut or have a right of access to a public road;
- (ii) Seller is the sole owner of the Premises and has the full right, power and authority to sell, convey and transfer the same in accordance with the terms of this contract;
- (iii) Seller is not a "foreign person," as that term is defined for purposes of the Foreign Investment in Real Property Tax Act, Internal Revenue Code ("IRC") Section 1445, as amended, and the regulations promulgated thereunder (collectively "FIRPTA");
- (iv) The Premises are not affected by any exemptions or abatements of taxes; and
- (v) Seller has been known by no other name for the past ten years, except

(b) Seller covenants and warrants that all of the representations and warranties set forth in this contract shall be true and correct at Closing.

(c) Except as otherwise expressly set forth in this contract, none of Seller's covenants, representations, warranties or other obligations contained in this contract shall survive Closing.

12. Condition of Property. Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the Premises and of all other property included in this sale, based on Purchaser's own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation and not upon any information, data, statements or representations, written or oral, as to the physical condition, state of repair, use, cost of operation or any other matter related to the Premises or the other property included in the sale, given or made by Seller or its representatives, and shall accept the same "as is" in their present condition and state of repair, subject to reasonable use, wear, tear and natural deterioration between the date hereof and the date of closing (except as otherwise set forth in paragraph 16(e)), without any reduction in the purchase price or claim of any kind for any change in such condition by reason thereof subsequent to the date of this contract. Purchaser and its authorized representatives shall have the right, at reasonable times and upon reasonable notice (by telephone or otherwise) to Seller, to inspect the Premises before Closing.

13. Insurable Title. Seller shall give and Purchaser shall accept such title as **any reputable title insurance or abstract company licensed to do business in the state of New York** shall be willing to approve and insure in accordance with its standard form of title policy approved by the New York State Insurance Department, subject only to the matters provided for in this contract.

14. Closing, Deed and Title. (a) "Closing" means the settlement of the obligations of Seller and Purchaser to each other under this contract, including the payment of the purchase price to Seller, and the delivery to Purchaser of a **bargain and sale with covenant against grantor's acts** deed in proper statutory short form for record, duly executed and acknowledged, so as to convey to Purchaser fee simple title to the Premises, free of all encumbrances, except as otherwise herein stated. The deed shall contain a covenant by Seller as required by subd. 5 of Section 13 of the Lien Law.

(b) If Seller is a corporation, it shall deliver to Purchaser at the time of Closing (i) a resolution of its Board of Directors authorizing the sale and delivery of the deed, and (ii) a certificate by the Secretary or Assistant Secretary of the corporation certifying such resolution and setting forth facts showing that the transfer is in conformity with the requirements of Section 909 of the Business Corporation Law. The deed in such case shall contain a recital sufficient to establish compliance with that Section.

15. Closing Date and Place. Closing shall take place at the office of **Seller's attorney**

at _____ o'clock on **or about May 29, 2017** or, upon reasonable notice (by telephone or otherwise) by Purchaser, at the office of _____

16. Conditions to Closing. This contract and Purchaser's obligation to purchase the Premises are also subject to and conditioned upon the fulfillment of the following conditions precedent:

(a) The accuracy, as of the date of Closing, of the representations and warranties of Seller made in this contract.

(b) The delivery by Seller to Purchaser of a valid and subsisting Certificate of Occupancy or other required certificate of compliance, or evidence that none was required, covering the building(s) and all of the other improvements located on the property authorizing their use as a **Two family & a Restaurant - copy of the Certificate of Occupancy is attached hereto** family dwelling at the date of Closing. **or made a part of this Agreement**

(c) The delivery by Seller to Purchaser of a certificate stating that Seller is not a foreign person, which certificate shall be in the form then required by FIRPTA, or a withholding certificate from the I.R.S. If Seller fails to deliver the aforesaid certificate or if Purchaser is not entitled under FIRPTA to rely on such certificate, Purchaser shall deduct and withhold from the purchase price a sum equal to 10% thereof (or any lesser amount permitted by law) and shall at Closing remit the withheld amount with the required forms to the Internal Revenue Service.

(d) The delivery of the Premises and all buildings(s) and improvements comprising a part thereof in broom clean condition, vacant and free of leases or tenancies, together with keys to the Premises.

(e) All plumbing (including water supply and septic systems, if any), heating and air conditioning, if any, electrical and mechanical systems, equipment and machinery in the buildings(s) located on the property and all appliances which are included in this sale being in working order as of the date of Closing.

(f) If the Premises are a one or two family house, delivery by the parties at Closing of affidavits in compliance with state and local law requirements to the effect that there is installed in the Premises a smoke detecting alarm device or devices.

(g) The delivery by the parties of any other affidavits required as a condition of recording the deed.

17. Deed Transfer and Recording Taxes. At Closing, certified or official bank checks payable to the order of the appropriate

State, City or County officer in the amount of any applicable transfer and/or recording tax payable by reason of the delivery or recording of the deed or mortgage, if any, shall be delivered by the party required by law or by this contract to pay such transfer and/or recording tax, together with any required tax returns duly executed and sworn to, and such party shall cause any such checks and returns to be delivered to the appropriate officer promptly after Closing. The obligation to pay any additional tax or deficiency and any interest or penalties thereon shall survive Closing.

18. Apportionments and Other Adjustments; Water Meter and Installment Assessments. (a) To the extent applicable, the following shall be apportioned as of midnight of the day before the day of Closing:

(i) taxes, water charges and sewer rents, on the basis of the fiscal period for which assessed; (ii) fuel; ~~(iii) interest on the existing mortgage; (iv) premiums on existing transferable insurance policies and renewals of those expiring prior to Closing;~~ (v) ~~vacant~~ charges; (vi) rents as and when collected.

(b) If Closing shall occur before a new tax rate is fixed, the apportionment of taxes shall be upon the basis of the tax rate for the immediately preceding fiscal period applied to the latest assessed valuation.

Seller Ref. 10346 (c) If there is a water meter on the Premises, Seller shall furnish a reading to a date not more than 30 days before Closing and the unfixed meter charge and sewer rent, if any, shall be apportioned on the basis of such last reading. *Actual / Final*

(d) If at the date of Closing the premises are affected by an assessment which is or may become payable in annual installments, and the first installment is then a lien, or has been paid, then for the purposes of this contract all the unpaid installments shall be considered due and shall be paid by Seller at or prior to Closing.

(e) Any errors or omissions in computing apportionments or other adjustments at Closing shall be corrected within a reasonable time following Closing. This subparagraph shall survive Closing.

19. Allowance for Unpaid Taxes, etc. Seller has the option to credit Purchaser as an adjustment to the purchase price with the amount of any unpaid taxes, assessments, water charges and sewer rents, together with any interest and penalties thereon to a date not less than five business days after Closing, provided that official bills therefor computed to said date are produced at Closing.

20. Use of Purchase Price to Remove Encumbrances. If at Closing there are other liens or encumbrances that Seller is obligated to pay or discharge, Seller may use any portion of the cash balance of the purchase price to pay or discharge them, provided Seller shall simultaneously deliver to Purchaser at Closing instruments in recordable form and sufficient to satisfy such liens or encumbrances of record, together with the cost of recording or filing said instruments. As an alternative Seller may deposit sufficient moneys with the title insurance company employed by Purchaser acceptable to and required by it to assure their discharge, but only if the title insurance company will insure Purchaser's title clear of the matters or insure against their enforcement out of the Premises and will insure Purchaser's Institutional Lender clear of such matters. Upon reasonable prior notice (by telephone or otherwise), Purchaser shall provide separate certified or official bank checks as requested to assist in clearing up these matters.

21. Title Examination; Seller's Inability to Convey; Limitations of Liability. (a) Purchaser shall order an examination of title in respect of the Premises from a title company licensed or authorized to issue title insurance by the New York State Insurance Department or any agent for such title company promptly after the execution of this contract or, if this contract is subject to the mortgage contingency set forth in paragraph 8, after a mortgage commitment has been accepted by Purchaser. Purchaser shall cause a copy of the title report and of any additions thereto to be delivered to the attorney(s) for Seller promptly after receipt thereof.

(b)(i) If at the date of Closing Seller is unable to transfer title to Purchaser in accordance with this contract, or Purchaser has other valid grounds for refusing to close, whether by reason of liens, encumbrances or other objections to title or otherwise (herein collectively called "Defects"), other than those subject to which Purchaser is obligated to accept title hereunder or which Purchaser may have waived and other than those which Seller has herein expressly agreed to remove, remedy or discharge and if Purchaser shall be unwilling to waive the same and to close title without abatement of the purchase price, then, except as hereinafter set forth, Seller shall have the right, at Seller's sole election, either to take such action as Seller may deem advisable to remove, remedy, discharge or comply with such Defects or to cancel this contract; (ii) if Seller elects to take action to remove, remedy or comply with such Defects, Seller shall be entitled from time to time, upon Notice to Purchaser, to adjourn the date for Closing hereunder for a period or periods not exceeding 60 days in the aggregate (but not extending beyond the date upon which Purchaser's mortgage commitment, if any, shall expire), and the date for Closing shall be adjourned to a date specified by Seller not beyond such period. If for any reason whatsoever, Seller shall not have succeeded in removing, remedying or complying with such Defects at the expiration of such adjournment(s), and if Purchaser shall still be unwilling to waive the same and to close title without abatement of the purchase price, then either party may cancel this contract by Notice to the other given within 10 days after such adjourned date; (iii) notwithstanding the foregoing, the existing mortgage (unless this sale is subject to the same) and any matter created by Seller after the date hereof shall be released, discharged or otherwise cured by Seller at or prior to Closing.

(c) If this contract is cancelled pursuant to its terms, other than as a result of Purchaser's default, this contract shall terminate and come to an end, and neither party shall have any further rights, obligations or liabilities against or to the other hereunder or otherwise, except that: (i) Seller shall promptly refund or cause the Escrowee to refund the Downpayment to Purchaser and, unless

cancelled as a result of Purchaser's default or pursuant to paragraph 8, to reimburse Purchaser for the net cost of examination of title, including any appropriate additional charges related thereto, and the net cost, if actually paid or incurred by Purchaser, for updating the existing survey of the Premises or of a new survey, and (ii) the obligations under paragraph 27 shall survive the termination of this contract.

22. Affidavit as to Judgments, Bankruptcies, etc. If a title examination discloses judgments, bankruptcies or other returns against persons having names the same as or similar to that of Seller, Seller shall deliver an affidavit at Closing showing that they are not against Seller.

23. Defaults and Remedies. (a) If Purchaser defaults hereunder, Seller's sole remedy shall be to receive and retain the Downpayment as liquidated damages, it being agreed that Seller's damages in case of Purchaser's default might be impossible to ascertain and that the Downpayment constitutes a fair and reasonable amount of damages under the circumstances and is not a penalty.

(b) If Seller defaults hereunder, Purchaser shall have such remedies as Purchaser shall be entitled to at law or in equity, including, but not limited to, specific performance.

24. Purchaser's Lien. All money paid on account of this contract, and the reasonable expenses of examination of title to the Premises and of any survey and survey inspection charges, are hereby made liens on the Premises, but such liens shall not continue after default by Purchaser under this contract.

25. Notices. Any notice or other communication ("Notice") shall be in writing and either (a) sent by either of the parties hereto or by their respective attorneys who are hereby authorized to do so on their behalf or by the Escrowee, by registered or certified mail, postage prepaid, or

(b) delivered in person or by overnight courier, with receipt acknowledged, to the respective addresses given in this contract for the party and the Escrowee, to whom the Notice is to be given, or to such other address as such party or Escrowee shall hereafter designate by Notice given to the other party or parties and the Escrowee pursuant to this paragraph. Each Notice mailed shall be deemed given on the third business day following the date of mailing the same, except that any notice to Escrowee shall be deemed given only upon receipt by Escrowee and each Notice delivered in person or by overnight courier shall be deemed given when delivered, or

(c) with respect to ¶7(b) or ¶20, sent by fax to the party's attorney. Each Notice by fax shall be deemed given when transmission is confirmed by the sender's fax machine. A copy of each Notice sent to a party shall also be sent to the party's attorney. The attorneys for the parties are hereby authorized to give and receive on behalf of their clients all Notices and deliveries. This contract may be delivered as provided above or by ordinary mail.

26. No Assignment. This contract may not be assigned by Purchaser without the prior written consent of Seller in each instance and any purported assignment(s) made without such consent shall be void, *unless to an entity owned by the Purchaser*

27. Broker. Seller and Purchaser each represents and warrants to the other that it has not dealt with any real estate broker in connection with this sale other than

("Broker") and Seller shall pay Broker any commission earned pursuant to a separate agreement between Seller and Broker. Seller and Purchaser shall indemnify and defend each other against any costs, claims and expenses, including reasonable attorneys' fees, arising out of the breach on their respective parts of any representation or agreement contained in this paragraph. The provisions of this paragraph shall survive Closing or, if Closing does not occur, the termination of this contract.

28. Miscellaneous. (a) All prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged in this contract; it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this contract.

(b) Neither this contract nor any provision thereof may be waived, changed or cancelled except in writing. This contract shall also apply to and bind the heirs, distributees, legal representatives, successors and permitted assigns of the respective parties. The parties hereby authorize their respective attorneys to agree in writing to any changes in dates and time periods provided for in this contract.

(c) Any singular word or term herein shall also be read as in the plural and the neuter shall include the masculine and feminine gender, whenever the sense of this contract may require it.

(d) The captions in this contract are for convenience of reference only and in no way define, limit or describe the scope of this contract and shall not be considered in the interpretation of this contract or any provision hereof.

(e) This contract shall not be binding or effective until duly executed and delivered by Seller and Purchaser.

- (f) Seller and Purchaser shall comply with IRC reporting requirements, if applicable. This subparagraph shall survive Closing.
- (g) Each party shall, at any time and from time to time, execute, acknowledge where appropriate and deliver such further instruments and documents and take such other action as may be reasonably requested by the other in order to carry out the intent and purpose of this contract. This subparagraph shall survive Closing.
- (h) This contract is intended for the exclusive benefit of the parties hereto and, except as otherwise expressly provided herein, shall not be for the benefit of, and shall not create any rights in, or be enforceable by, any other person or entity.
- (i) If applicable, the complete and fully executed disclosure of information on **lead-based paint** and/or lead-based paint hazards is attached hereto and made a part hereof.

Continued on addendum or rider attached hereto.

IN WITNESS WHEREOF, this contract has been duly executed by the parties hereto.

Jeffrey Brown, Seller

Abraham Barakat, Purchaser

Social Security No./Fed. I.D. No.

Social Security No./Fed. I.D. No.

Seller

Purchaser

Social Security No./Fed. I.D. No.

Social Security No./Fed. I.D. No.

Attorney for Seller: Mark Bratkovsky, Esq.
Law Offices of Mark Bratkovsky, PC.
Address: 2652 Coney Island Avenue
Brooklyn, New York 11223

Tel.: (718) 891-0564 Fax: (718) 232-4333

Attorney for Purchaser: Michael Herskowitz, Esq.

Address: 1999 Flatbush Ave
Brooklyn, New York 11234

Tel.: (718) 998-5088 Fax: (718) 362-8023

Receipt of the Downpayment is acknowledged and the undersigned agrees to act in accordance with the provisions of paragraph 6.

Law Offices of Mark Bratkovsky, PC.

NOTES ON MODEL MORTGAGE COMMITMENT CONTINGENCY CLAUSE for RESIDENTIAL CONTRACT OF SALE

1. WARNING: the mortgage commitment contingency clause for the Residential Contract of Sale is a bar association form that attempts to provide a mechanism that makes the rights and obligations of the parties clear in sales of residences in ordinary circumstances. It should be reviewed carefully by Seller and Purchaser and their attorneys in each and every transaction to make sure that all the provisions are appropriate for that transaction. Negotiated modifications should be made whenever necessary.
2. Under the clause, the obligation of Purchaser to purchase under the contract of sale is contingent on Purchaser's obtaining a mortgage commitment letter from an Institutional Lender within the number of days specified for the amount specified. This refers to calendar days. Seller's attorney should state his/her calculation of the Commitment Date in the letter delivering the executed contract to Purchaser's attorney, to prevent confusion later. Purchaser should promptly confirm or correct that date. In applying for a loan, Purchaser should inform its lender of the scheduled date of closing in the contract and request that the expiration date of the commitment occur after the scheduled date of closing. Purchaser must comply with deadlines and pursue the application in good faith. The commitment contingency is satisfied by issuance of a commitment in the amount specified on or before the Commitment Date, unless the commitment is conditioned on approval of an appraisal. If the commitment is conditioned on approval of an appraisal and such approval does not occur prior to the Commitment Date, Purchaser should either cancel the contract or obtain an extension of the Commitment Date. If the commitment is later withdrawn or not honored, Purchaser runs the risk of being in default under the contract of sale with Seller.
3. If there are loan terms and conditions that are required or would not be acceptable to Purchaser, such as the interest rate, term of the loan, points, fees or a condition requiring sale of the current home, those terms and conditions should be specified in a rider.
4. This clause assumes that initial review and approval of Purchaser's credit will occur before the commitment letter is issued. Purchaser should confirm with the lender that this is the case before applying for the commitment.
5. If, as has been common, the commitment letter itself is conditioned on sale of Purchaser's home or payment of any outstanding debt or no material adverse change in Purchaser's financial condition, such a commitment will satisfy the contract contingency nonetheless, and Purchaser will take the risk of fulfilling those commitment conditions, including forfeiture of the downpayment if Purchaser defaults on its obligation to close. Under New York case law, a defaulting purchaser may not recover any part of the downpayment, and Seller does not have to prove any damages. If Purchaser is not willing to take that risk, the clause must be modified accordingly.
6. Purchaser may submit an application to a registered mortgage broker instead of applying directly to an Institutional Lender.
7. This clause allows Seller to cancel if a commitment is not accepted by Purchaser by the Commitment Date, unless Purchaser timely supplies a copy of the commitment, to allow Seller the option to avoid having to wait until the scheduled date of closing to see if Purchaser will be able to close. Seller may prefer to cancel rather than to wait and settle for forfeiture of the downpayment if Purchaser defaults. Because of Seller's right to cancel, Purchaser may not waive this contingency clause. This clause means that Purchaser is subject to cancellation by Seller even if Purchaser is willing to risk that he/she will obtain the Commitment after the Commitment Date. Some Purchasers may not want to be subject to such cancellation by Seller.
8. Purchaser may want to add to paragraph 22 that Purchaser's reimbursement should include non-refundable financing and inspection expenses of Purchaser, which should be refunded by Seller if Seller willfully defaults under the contract of sale [alternative: if Seller is unable to transfer title under the contract of sale].

Joint Committee on the Mortgage Contingency Clause: Real Property Section of the New York State Bar Association; Real Property Law Committee of the Association of the Bar of the City of New York; Real Property Committee of the New York County Lawyers Association.

RIDER TO CONTRACT OF SALE DATED AS OF January , 2017 BETWEEN
3073 Emmons Avenue Corp , AS SELLER AND
Abraham Barakat, AS PURCHASER

Premises: 3073 Emmons Ave, Brooklyn, NY 11235

1. In the event of any inconsistency between the provisions of this Rider and the provisions contained in the pre-printed form contract to which this Rider is annexed, the provisions of this Rider shall control, govern and be binding. The pre-printed form contract and this rider shall hereafter collectively be referred to as "the Contract"
2. Purchaser may examine premises within forty-eight (48) hours before closing, *& at any time throughout the duration of this contract upon 24 hours notice.*
3. Wood Destroying Insect Inspection: The PURCHASER shall have the right to have the premises inspected for the purpose of determining the existence of termite infestation, of termite damage, or both. The cost of said inspection shall be borne by the PURCHASER. in the event termite infestation or damage is found, or both, a copy of the report issued by the termite company or other written notice shall be served upon the SELLER's attorney within 10 days from the date hereof. Upon receipt of such notice by the SELLER's attorney, SELLER may do on of the following:
 - (a) treat or repair the termite condition or damage at his own cost and expense, in which PURCHASER agree to consummate this transaction pursuant to the terms hereof; and get a year written guarantee from the termite company or
 - (b) *pay up to \$1,000- for treatment, otherwise, purchaser may* terminate this CONTRACT *only* by refunding the sums paid hereunder by the PURCHASER.

Notice of SELLER's intent to exercise either option shall be served upon the PURCHASER's attorney within 21 days after the receipt of the termite report.

In the event the PURCHASER shall fail to have the PREMISES inspected or fail to serve said written notice postmarked no later than 10 days from the date hereof, the PURCHASER shall be deemed to have waived the provisions of this paragraph and this CONTRACT shall remain in full force and effect. Anything to the contrary herein notwithstanding, it is agreed that in the event termite activity is present, PURCHASER may waive these rights under this clause and agrees to close title despite the termite condition in which case SELLER may not cancel this CONTRACT.

4. Seller represents that the premises are equipped with a smoke detecting device, and it shall be operational on the date of closing. Purchase shall inspect said device and by accepting the deed from the Seller at closing, Purchaser waives the rights under Executive Law, Article 18, Section 378-1(S).

5. It is agreed that Seller is not obligated to install or replace any equipment or appliances in the Premises or otherwise make any repairs improvements or decorations in the Premises or any equipment, appliances and fixtures located therein, except that the appliances will be in working order as of the date of the Closing and in an "AS IS" condition. *however, 12 plumbing, heating & electrical systems shall be in working order & Roof Free of Leaks.*
6. Notwithstanding anything to the contrary contained in this Contract, the parties agree that if, for any reason Seller is unable to deliver title to the Premises to Purchaser in accordance with any provisions of this Contract, or if Seller is unable to comply with any of the provisions of this Contract, or if any of Seller's representations are incorrect, Seller shall not be required to bring any action or proceeding or otherwise incur any expense to render title to the Premises marketable or to correct the misrepresentations, and if Purchaser shall refuse title, Seller may rescind this Contract whereupon all further liabilities on the part of the Seller shall cease and terminate, and this contract shall become null and void and be canceled and of no further force and effect, except for those provisions expressly stated to survive, and Seller shall not be liable for any costs.
7. AT OR PRIOR TO CLOSING OF TITLE, Seller shall deliver to the Purchaser, Certificate of Occupancy and Certificates of Completion for premises as they presently exist or a letter from the Building Department (if the municipality issues same) to the effect that the existing structure was erected prior to the effective date for zoning and building ordinances, and that no certificate is required. In no event, however, shall Seller be required to bring variance proceedings or change of zone proceedings, if same be necessary to secure any of said certificates or expend more than ~~\$1,000.00~~ *\$10,000*. In the event that same cannot be obtained by Seller without bringing said proceedings or spending more than ~~\$1,000.00~~ *\$10,000*, the Seller has the option to cancel this Contract and return the monies deposited upon the signing hereof to the Purchaser, and upon collection thereof, neither party shall have any further rights against the other. In any event, however, Purchaser may elect to proceed with the purchase regardless of the production of said certificates.
8. This Contract is subject to any state of facts an accurate survey may show provided said survey does not show facts that would render title unmarketable or provided affirmative insurance may be granted to cover any encroachment of premises on adjoining property, party walls and party wall agreements, if any, possible encroachments of retaining walls, coping, cellar doors, side walls elevators, fences and fire escapes. The violation of any covenant and restrictions by existing improvements shall not be deemed an objection to title provided that the title company insuring the title shall agree to insure, that such improvements may remain in their present location as long as the same shall stand.
9. The premises are to be delivered subject to the following tenancies:

1 st Floor	LEASE TO BE DETERMINED AT CLOSING
2 nd Floor Front	\$1,500 per month 1 year term No Sec
2 nd Floor Rear	\$1,150 per month No lease No Sec

10. The submission of this contract by the Seller, or Sellers attorney to the Purchaser, or the Purchaser's attorney or broker shall not be deemed an offer, and is submitted solely for the Purchaser's consideration, and not for acceptance and execution, and shall have no binding force or effect, shall confer no rights or impose any obligations, including brokerage obligations upon either party unless and until both Seller and Purchaser have executed this Contract and duplicate originals thereof have been delivered to the respective parties or their attorneys.
11. Deleted
12. Supplementing the printed Contract, the proceeds of the down payment check will be held by Seller's/Sellers' attorney in a non-interest bearing Escrow account at TD Bank, 2700 Coney Island Ave, Brooklyn, NY, until the closing or earlier termination of this Contract.
 - (a) Escrowee shall not be responsible or liable for any direct or consequential damage to either party resulting from the insolvency of any banking or similar institution (bank) into which the Contract Deposit is placed provided:
 1. Escrowee deposits the Contract Deposit into a bank that is FDIC insured;
 - or
 2. Escrowee invests the Contract Deposit as directed in writing by both Purchaser(s) and Seller(s).
 - (b) Both Purchaser(s) and Seller(s) acknowledges that any Contract Deposit in excess of Two Hundred Fifty Thousand and 00/100ths (\$250,000.00) Dollars will not be insured by the FDIC even though the bank is a member.
 - (c) If for any reason closing does not occur, and either party makes written demand for payment of the escrow, Escrowee shall give written notice to the other party of such demand. If Escrowee does not receive written objection from the other party to the proposed payment within ten (10) days after such notice, Escrowee is hereby authorized to make such payment.
 - (d) If Escrowee received timely written objection, to if Escrowee otherwise, in good faith, shall elect not to make such payment, Escrowee shall continue to hold such escrow funds until otherwise directed by written agreement of the parties or a court order or final judgment Purchaser, nevertheless must bring its action to recover the down payment within thirty (30) days after serving its written notice of Objection or Escrowee will be relieved of liability for paying over the down payment sums to Seller(s).

Additional Escrow Provisions: the following additional provisions shall apply to the Escrow for the Contract Deposit:

- (a) Notwithstanding any of the foregoing, in the event of any dispute between the parties, Escrowee shall have the right to deposit the escrow funds with the Clerk of the Supreme Court in the County in which the subject property is situated pursuant to applicable statute,

and Escrowee shall give written notice to the parties of such deposit. Upon such deposit, Escrowee shall be discharged from all obligations and responsibilities hereunder.

(b) The parties acknowledge that Escrowee is the attorney for the Seller(s) and All parties acknowledge and agree that Escrowee may continue to represent such party in connection with the present transaction and any subsequent transactions between the parties and in any arbitration or litigation which may arise between the parties, including without limitation, litigation arising out of this Agreement.

(c) The Escrowee shall not be bound by any modification, cancellation or rescission of this Agreement unless in writing and signed by Escrowee and all other parties hereto. In no event, shall any modification of this Agreement, which shall affect the rights or duties of the Escrowee, be binding on the Escrowee unless it shall have given prior written consent.

(d) Escrowee may at any time resign hereunder by giving written notice of its resignation to the other parties hereto at least ten (10) days prior to the date specified for such resignation to take effect, and upon the effective date of such resignation, all securities, cash, instruments, documents and all other property then held by cash, instruments, documents and all other property then held by Escrowee hereunder shall be delivered by it to such person as may be designated in writing by the parties hereto whereupon all obligations of the Escrowee hereunder shall cease and terminate. If no such person is designated, the Escrowee's obligations shall nevertheless, cease and terminate. Its sole responsibility thereafter shall be to keep safely all property then held by it and to deliver the same to a person designated by all other parties hereto or in accordance with the directions of a final order or judgment of a court of competent jurisdiction.

(e) The Escrowee shall have the right to act in reliance upon any document, instrument & signature believed by it to be genuine and to assume that any person purporting to give any notice or instructions in accordance with the provisions hereof has been duly authorized to do so.

(f) The Escrowee shall not be responsible in any manner for the validity or sufficiency or any securities, cash instruments, documents or any other property delivered hereunder, or for the value or collectability of any note, check or other instrument or security so delivered, or for any representations made or obligations assumed by any other party to this Agreement.

(g) Nothing herein contained shall be deemed to obligate the Escrowee to deliver any securities, cash instruments, documents or any other property referred to herein, unless the same shall have first been received by the Escrowee pursuant to this Agreement.

12A. Financial Representation: Purchaser(s) represents that he/she/they has no judgments and/or tax warrants against him, nor has he/she/they ever been adjudicated as bankrupt (including, but not limited to, a Chapter 13 filing and/or Chapter 7 filing). Purchaser(s)

represents that his annual income is sufficient to enter into this transaction and acknowledges that Seller(s) is relying on this representation and is entering into this Contract based upon the accuracy of this representation. In addition, Purchaser(s) represents that he/she/they has sufficient funds to pay the balance of the purchase price, plus any adjustments that are required hereunder.

13. For transactions not exempt under Article 14 of Real Property Law, the seller hereby declares its intention to **NOT** deliver a Property Condition Disclosure Statement. The purchaser shall receive a credit at closing of \$500.00. The purchaser shall not receive this credit however,, if no closing actually takes place or the transfer of title is not completed for any reason.

If a disclosure form has already been provided to the purchaser, the seller hereby serves notice that although the representations and statements contained therein are made to the best of Sellers knowledge, such representations and/or statements may not be accurate. The seller will not provide a revised disclosure form. By the acceptance of a \$500.00 credit at closing, the purchaser waives any failure or misrepresentation whether or not knowing or willful on the part of the Seller.

Purchaser is specifically advised not to rely on any statements contained in any disclosure form may have received. The purchaser acknowledges that it has either conducted a full home inspection by a professional of Purchasers choice or that purchaser waives the right to have a home inspection conducted after having been given full opportunity to do so prior to execution of this contract.

- 13A. **In the event the down payment on contract is less than ten (10%) percent of the purchase price, it is agreed that liquidated damages shall be ten (10%) percent of the purchase price.**

In the event the downpayment check is dishonored or stopped for any reason whatsoever, purchaser shall be required to replace the check by certified funds and to reimburse the sellers attorney the sum of \$150.00 as and for the expenses incurred and related services involved in re-depositing the down payment funds.

14. This contract is subject to covenants, agreements, reservations, restrictions and easements of record, if any, provided that same are not now violated by the structure or by the present use and occupancy.
15. Purchaser agrees to notify the Attorney for the Seller in writing not less that two (2) week before title closing date, of any objections there may then be to the title of said premises, and seller, shall have a reasonable time to remove such objections
16. The acceptance of the Deed by Purchaser shall be deemed to be the full performance and discharge of every representation, agreement and obligation on the part of the Seller to be

performed pursuant to the provisions of this Contract, except those expressly herein provided to survive the Closing.

17. If any term or provision of this Contract or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Contract, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this contract shall be valid and enforced to the fullest extent permitted by law.
18. Radio, television antenna and/or air conditioning unit violations shall be no objection to title and the purchaser shall take title subject thereto.
19. Contract adjustments shall be computed, as of date of title closing, or date of delivery of possession, whichever shall be later.
20. This contract shall be governed by, interpreted under, and construed and enforced in accordance with the laws of the State of New York, and the parties hereby consent to jurisdiction in the State of New York.
21. It is agreed that in the event the Closing of title takes place outside of Kings County, that the purchaser shall pay the seller's attorney the sum of \$250.00, the cost of traveling time to attend the closing.
22. Seller reserves the right to include this transaction as part of an IRC, Section 1031 tax deferred exchange for the benefit of the seller, at no cost, expense or liability to the buyer. Buyer further agrees to execute any and all documents (subject to the reasonable approval of Buyer's counsel) as are reasonably necessary in connection therewith, provided that the close of this transaction for the conveyance of seller's property shall not be contingent upon or subject to the completion of such exchange. Buyer understands and acknowledges that the seller is participating in a _____ tax deferred exchange program. Seller agrees to indemnify and hold buyer free and harmless from any cost, expense or liability, including attorney's fees resulting from buyer's participation in such exchange.
23. The seller shall be entitled to reasonable adjournments, if required, including but not limited to the time necessary to cure any objections to title. Any steps taken or money expended or incurred to cure any objections to title and/or to render title marketable, shall be at the seller's sole discretion, and shall not obligate the seller to take any further steps nor to expend any further sums regarding same.
24. **LEAD WARNING STATEMENT:** Every Purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduces

up to Thirty (30) day 5.

intelligence quotient, behavioral problems and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the Purchaser with any information on lead-based paint hazards from risk assessments or inspection in the Seller's possession and notify the Purchaser of any known lead-based paint hazard. A risk assessment or inspection for possible lead based paint hazards is recommended prior to closing.

25. The submission of this Contract in draft for examination, or for execution by Purchaser, does not constitute an offer, option or reservation. This Contract shall not be binding or have any force or effect until it has been fully executed by all parties and delivered by Seller or Seller's Attorney to Purchaser or Purchaser's Attorney, and the down payment has been delivered to Seller's attorney .
26. This contract may be executed by one or more of the parties in separate counterparts, which counterparts taken together shall be deemed to constitute on one and the same instrument.

This contract shall not be binding unless a fully executed counterpart thereof has been delivered to each of the parties.

27. ~~if this transaction involves a "seller's concession", seller is agreeing to said concession solely to assist buyer, and that if the premises appraises for less than the purchase price stated herein but at least equal to or greater than the purchase price less the seller's concession amount, then purchaser accepts and agrees to close title with a smaller concession or no concession.~~

IN WITNESS WHEREOF, Seller and Purchaser have executed this Contract on the day and year first above written.

Seller-



Buyer-

Seller-

Buyer -