
UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 10-Q

(Mark One)

- QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d)
OF THE SECURITIES EXCHANGE ACT OF 1934**
For the quarterly period ended January 26, 2007
or
 **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d)
OF THE SECURITIES EXCHANGE ACT OF 1934**
For the transition period from to

Commission file number 0-27130

Network Appliance, Inc.

(Exact name of registrant as specified in its charter)

Delaware
*(State or other jurisdiction of
incorporation or organization)*

77-0307520
*(IRS Employer
Identification No.)*

**495 East Java Drive,
Sunnyvale, California 94089**
(Address of principal executive offices, including zip code)

**Registrant's telephone number, including area code:
(408) 822-6000**

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes No

Indicate by check mark whether the Registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of "accelerated filer and large accelerated filer" in Rule 12b-2 of the Exchange Act.

Large accelerated filer Accelerated filer Non-accelerated filer

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes No

Number of shares outstanding of the registrant's common stock, \$0.001 par value, as of the latest practicable date.

<u>Class</u>	<u>Outstanding at February 23, 2007</u>
Common Stock	371,059,425

TABLE OF CONTENTS

	<u>Page No.</u>	
<u>PART I — FINANCIAL INFORMATION</u>		
Item 1.	Condensed Consolidated Financial Statements (Unaudited)	3
	Condensed Consolidated Balance Sheets as of January 26, 2007 and April 30, 2006 (Unaudited)	3
	Condensed Consolidated Statements of Income for the three and nine-month periods ended January 26, 2007 and January 27, 2007 (Unaudited)	4
	Condensed Consolidated Statements of Cash Flows for the nine-month period ended January 26, 2007 and January 27, 2007 (Unaudited)	5
	Notes to Condensed Consolidated Financial Statements (Unaudited)	6
Item 2.	Management's Discussion and Analysis of Financial Condition and Results of Operations	27
Item 3.	Quantitative and Qualitative Disclosures About Market Risk	48
Item 4.	Controls and Procedures	50
<u>PART II — OTHER INFORMATION</u>		
Item 1.	Legal Proceedings	51
Item 1A.	Risk Factors	51
Item 2.	Unregistered Sales of Equity Securities and Use of Proceeds	62
Item 3.	Defaults Upon Senior Securities	62
Item 4.	Submission of Matters to a Vote of Security holders	62
Item 5.	Other Information	62
Item 6.	Exhibits	63
SIGNATURE		66
EXHIBIT 10.46		
EXHIBIT 10.47		
EXHIBIT 10.48		
EXHIBIT 10.49		
EXHIBIT 10.50		
EXHIBIT 10.53		
EXHIBIT 31.1		
EXHIBIT 31.2		
EXHIBIT 32.1		
EXHIBIT 32.2		

TRADEMARKS

2007 Network Appliance, Inc. All rights reserved. Specifications subject to change without notice. NetApp, the Network Appliance logo, Data ONTAP, FlexVol, NearStore, NetCache, and Snap Manager are registered trademarks and Network Appliance, and FlexClone, is a trademark of Network Appliance, Inc. in the U.S. and other countries. Decru is a registered trademark of Decru, a NetApp company. Windows is a registered trademarks of Microsoft Corporation. Oracle is a registered trademark of Oracle Corporation. Symantec is a trademark of Symantec Corporation. UNIX is a registered trademark of The Open Group. All other brands or products are trademarks or registered trademarks of their respective holders and should be treated as such.

PART I. FINANCIAL INFORMATION

Item 1. Condensed Consolidated Financial Statements (Unaudited)

NETWORK APPLIANCE, INC.
CONDENSED CONSOLIDATED BALANCE SHEETS

	January 26, 2007	April 30, 2006
	(In thousands — unaudited)	
ASSETS		
Current Assets:		
Cash and cash equivalents	\$ 490,216	\$ 461,256
Short-term investments	805,094	861,636
Accounts receivable, net of allowances of \$2,775 at January 26, 2007 and \$2,380 at April 30, 2006	438,818	415,295
Inventories	61,474	64,452
Prepaid expenses and other assets	48,266	43,536
Short-term restricted cash and investments	126,014	138,539
Deferred income taxes	63,542	48,496
Total current assets	2,033,424	2,033,210
Property and Equipment, net	586,578	513,193
Goodwill	601,318	487,535
Intangible Assets, net	89,994	75,051
Long-Term Restricted Cash and Investments	59,702	108,371
Other Assets	122,273	43,605
	<u>\$ 3,493,289</u>	<u>\$3,260,965</u>
LIABILITIES AND STOCKHOLDERS' EQUITY		
Current Liabilities:		
Current portion of long-term debt	\$ 123,951	\$ 166,211
Accounts payable	124,262	101,278
Income taxes payable	39,305	51,577
Accrued compensation and related benefits	147,832	129,636
Other accrued liabilities	91,119	69,073
Deferred revenue	546,562	399,388
Total current liabilities	1,073,031	917,163
Long-Term Debt	27,180	133,789
Long-Term Deferred Revenue	398,326	282,149
Long-Term Obligations	19,883	4,411
Total liabilities	1,518,420	1,337,512
Stockholders' Equity:		
Common stock (419,094 shares at January 26, 2007 and 407,994 shares at April 30, 2006)	419	408
Additional paid-in capital	2,262,428	1,872,962
Deferred stock compensation	—	(49,266)
Treasury stock (48,980 shares at January 26, 2007 and 31,996 shares at April 30, 2006)	(1,423,690)	(817,983)
Retained earnings	1,136,544	928,430
Accumulated other comprehensive loss	(832)	(11,098)
Total stockholders' equity	1,974,869	1,923,453
	<u>\$ 3,493,289</u>	<u>\$3,260,965</u>

See accompanying notes to unaudited condensed consolidated financial statements.

NETWORK APPLIANCE, INC.
CONDENSED CONSOLIDATED STATEMENTS OF INCOME

	Three Months Ended		Nine Months Ended	
	January 26, 2007	January 27, 2006	January 26, 2007	January 27, 2006
(In thousands, except per share amounts — unaudited)				
Revenues:				
Product	\$ 550,882	\$ 413,489	\$1,497,777	\$1,122,135
Software subscriptions	84,969	60,747	242,052	171,507
Service	93,427	62,795	263,260	174,853
Total	<u>729,278</u>	<u>537,031</u>	<u>2,003,089</u>	<u>1,468,495</u>
Cost of Revenues:				
Cost of product	211,211	161,349	585,437	432,131
Cost of software subscriptions	2,710	2,156	7,458	6,232
Cost of service	71,248	46,502	191,708	130,530
Total cost of revenues	<u>285,169</u>	<u>210,007</u>	<u>784,603</u>	<u>568,893</u>
Gross margin	<u>444,109</u>	<u>327,024</u>	<u>1,218,486</u>	<u>899,602</u>
Operating Expenses:				
Sales and marketing	236,433	153,333	636,214	430,377
Research and development	97,516	65,087	276,555	175,391
General and administrative	37,724	25,022	105,337	68,011
In process research and development	—	—	—	5,000
Restructuring charges (recoveries)	—	117	(74)	(495)
Gain on sale of assets	—	—	(25,339)	—
Total operating expenses	<u>371,673</u>	<u>243,559</u>	<u>992,693</u>	<u>678,284</u>
Income from Operations	<u>72,436</u>	<u>83,465</u>	<u>225,793</u>	<u>221,318</u>
Other Income (Expense), net:				
Interest income	17,086	9,891	51,220	28,590
Interest expense	(2,335)	17	(11,377)	(34)
Other income	533	984	3,191	487
Net gain (loss) on investments	884	—	(1,116)	101
Total other income (expense), net	<u>16,168</u>	<u>10,892</u>	<u>41,918</u>	<u>29,144</u>
Income before Income Taxes	<u>88,604</u>	<u>94,357</u>	<u>267,711</u>	<u>250,462</u>
Provision for Income Taxes	<u>22,090</u>	<u>17,964</u>	<u>59,597</u>	<u>43,231</u>
Net Income	<u>\$ 66,514</u>	<u>\$ 76,393</u>	<u>\$ 208,114</u>	<u>\$ 207,231</u>
Net Income per Share:				
Basic	<u>\$ 0.18</u>	<u>\$ 0.21</u>	<u>\$ 0.56</u>	<u>\$ 0.56</u>
Diluted	<u>\$ 0.17</u>	<u>\$ 0.20</u>	<u>\$ 0.53</u>	<u>\$ 0.54</u>
Shares Used in per Share Calculations:				
Basic	<u>371,287</u>	<u>371,768</u>	<u>371,938</u>	<u>370,069</u>
Diluted	<u>389,120</u>	<u>389,149</u>	<u>389,555</u>	<u>386,991</u>

See accompanying notes to unaudited condensed consolidated financial statements.

NETWORK APPLIANCE, INC.
CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS

	Nine Months Ended	
	January 26, 2007	January 27, 2006
	(In thousands — unaudited)	
Cash Flows from Operating Activities:		
Net income	\$ 208,114	\$ 207,231
Adjustments to reconcile net income to net cash provided by operating activities:		
Depreciation	62,316	46,175
In process research and development	—	5,000
Amortization of intangible assets	14,970	11,329
Amortization of patents	1,486	1,487
Stock compensation	124,679	9,442
Net loss (gain) on investments	1,116	(101)
Gain on sale of assets	(25,339)	—
Net loss on disposal of equipment	686	1,318
Allowance for doubtful accounts	186	921
Deferred rent	979	301
Excess tax benefit from stock-based compensation	(43,463)	—
Changes in assets and liabilities:		
Accounts receivable	(22,996)	(70,153)
Inventories	3,495	(38,397)
Prepaid expenses and other assets	(981)	(6,590)
Accounts payable	4,446	16,072
Income taxes payable	31,569	39,620
Accrued compensation and related benefits	16,870	12,992
Other accrued liabilities	12,127	970
Deferred revenue	263,449	144,737
Net cash provided by operating activities	653,709	382,354
Cash Flows from Investing Activities:		
Purchases of investments	(1,938,191)	(450,555)
Redemptions of investments	2,007,726	471,755
Redemptions of restricted investments	63,236	—
Increase (decrease) in restricted cash	333	(1,997)
Proceeds from sale of assets	23,914	—
Purchases of property and equipment	(112,411)	(96,476)
Proceeds from sales of investments	1,774	130
Purchases of equity securities	(1,333)	(7,100)
Purchase of businesses, net of cash acquired	(131,241)	(53,747)
Net cash used in investing activities	(86,193)	(137,990)
Cash Flows from Financing Activities:		
Proceeds from sale of common stock related to employee stock transactions	177,425	141,725
Excess tax benefit from stock-based compensation	43,463	—
Repayment of debt	(148,869)	—
Tax withholding payments reimbursed by restricted stock	(4,692)	(794)
Repurchases of common stock	(605,708)	(390,147)
Net cash used in financing activities	(538,381)	(249,216)
Effect of Exchange Rate Changes on Cash and Cash Equivalents	(175)	(565)
Net Increase in Cash and Cash Equivalents	28,960	(5,417)
Cash and Cash Equivalents:		
Beginning of period	461,256	193,542
End of period	\$ 490,216	\$ 188,125
Noncash Investing and Financing Activities:		
Acquisition of property and equipment on account	\$ 17,157	\$ 11,158
Options assumed for acquired business	\$ 8,369	\$ 38,456
Common stocks received from sale of assets	\$ 9,069	\$ —
Supplemental cash flow information:		
Income taxes paid	\$ 30,260	\$ 5,625
Interest paid on debt	\$ 8,776	\$ —

See accompanying notes to unaudited condensed consolidated financial statements.

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS
(In thousands, except per-share data)
(Unaudited)

1. The Company

Based in Sunnyvale, California, Network Appliance was incorporated in California in April 1992 and reincorporated in Delaware in November 2001. Network Appliance, Inc. is a leading supplier of enterprise storage and data management software and hardware products and services. Our solutions help global enterprises meet major information technology challenges such as managing storage growth, assuring secure and timely information access, protecting data, and controlling costs by providing innovative solutions that simplify the complexity associated with managing corporate data. Network Appliance™ solutions are the data management and storage foundation for many of the world's leading corporations and government agencies. In the following notes to our interim condensed consolidated financial statements, Network Appliance is also referred to as "we," "our," and "us."

2. Condensed Consolidated Financial Statements

The accompanying interim unaudited condensed consolidated financial statements have been prepared by Network Appliance, Inc. without audit and reflect all adjustments, consisting only of normal recurring adjustments which are, in the opinion of management, necessary for a fair presentation of our financial position, results of operations, and cash flows for the interim periods presented. The statements have been prepared in accordance with accounting principles generally accepted in the United States of America ("generally accepted accounting principles") for interim financial information and in accordance with the instructions to Form 10-Q and Article 10-01 of Regulation S-X. Accordingly, they do not include all information and footnotes required by generally accepted accounting principles for annual consolidated financial statements. Certain prior period balances have been reclassified to conform with the current period presentation.

We operate on a 52-week or 53-week year ending on the last Friday in April. For presentation purposes we have indicated in the accompanying interim unaudited condensed consolidated financial statements that our fiscal year end is April 30. The third quarter of fiscal 2007 and 2006 were both 13-week fiscal periods. The first nine months of fiscal 2007 and 2006 were both 39-week fiscal periods.

These financial statements should be read in conjunction with the audited consolidated financial statements and accompanying notes included in our Annual Report on Form 10-K for the year ended April 30, 2006. The results of operations for the quarter ended January 26, 2007 are not necessarily indicative of the operating results to be expected for the full fiscal year or future operating periods.

In fiscal 2006, we began to separately disclose software subscriptions revenue and cost of software subscriptions revenue in our income statements. All prior periods have been revised to reflect this presentation. Such balances were previously included as a part of product revenue and cost of product revenue and disclosed separately in our footnotes.

3. Significant Accounting Policies and Use of Estimates

Revenue Recognition: We apply the provisions of Statement of Position ("SOP") No. 97-2, *Software Revenue Recognition* (SOP No. 97-2), and related interpretations to our product sales, both hardware and software, because our software is essential to the performance of our hardware. We recognize revenue when:

- *Persuasive evidence of an arrangement exists:* It is our customary practice to have a purchase order and/or contract prior to recognizing revenue on an arrangement from our end users, customers, value-added resellers, or distributors.
- *Delivery has occurred:* Our product is physically delivered to our customers, generally with standard transfer terms such as FOB origin. We typically do not allow for restocking rights with any of our value-

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

added resellers or distributors. Products shipped with acceptance criteria or return rights are not recognized as revenue until all criteria are achieved. If undelivered products or services exist that are essential to the functionality of the delivered product in an arrangement, delivery is not considered to have occurred.

- *The fee is fixed or determinable:* Arrangements with payment terms extending beyond our standard terms, conditions, and practices are not considered to be fixed or determinable. Revenue from such arrangements is recognized as the fees become due and payable. We typically do not allow for price-protection rights with any of our value-added resellers or distributors.
- *Collection is probable:* Probability of collection is assessed on a customer-by-customer basis. Customers are subjected to a credit review process that evaluates the customers' financial position and ultimately their ability to pay. If it is determined at the outset of an arrangement that collection is not probable based upon our review process, revenue is recognized upon cash receipt.

Our multiple element arrangements include our systems and generally may also include one or more of the following undelivered elements: software subscriptions, premium hardware maintenance, storage review services, and installation services. Our software subscriptions entitle our customers to receive unspecified product upgrades and enhancements on a when-and-if-available basis, bug fixes, and patch releases. Premium hardware maintenance services include contracts for technical support and minimum response times. Revenue from software subscriptions and premium hardware maintenance services is recognized ratably over the contractual term, generally from one to three years. We also offer extended service contracts (which extend our standard parts warranty and may include premium hardware maintenance) at the end of the warranty term; revenues from these contracts are recognized ratably over the contract term. When storage optimization reviews are sold as a bundled element with our software subscriptions and premium hardware maintenance services, the revenue is recognized ratably over the contract term. We typically sell technical consulting services separately from any of our other revenue elements, either on a time and materials basis or for fixed price standard projects; we recognize revenue for these services as they are performed. Revenue from hardware installation services is recognized at the time of delivery and any remaining costs are accrued, as the remaining undelivered services are considered to be inconsequential and perfunctory. For arrangements with multiple elements, we recognize as revenue the difference between the total arrangement price and the greater of fair value or stated price for any undelivered elements ("the residual method").

If the arrangement contains both software-related and non-software-related elements, we allocate revenue to the non-software elements based on objective and reliable evidence of fair value in accordance with Emerging Issues Task Force ("EITF") 00-21, *Revenue Arrangements with Multiple Deliverables*. Non-software elements are items for which the functionality of the software is not essential to its performance; the non-software-related elements in our arrangements may consist of storage optimization reviews (which are sold only within a bundled service offering that also contains software-related services), and/or technical consulting. For undelivered software-related elements, we apply the provisions of SOP No. 97-2 and determine fair value of these undelivered software-related elements based on vendor-specific objective evidence which for us consists of the prices charged when these services are sold separately. To determine the fair value of our undelivered elements, we analyze both the selling prices when the elements are sold separately as well as the concentrations of those prices. We believe these concentrations have been sufficient to enable us to establish VSOE or objective and reliable evidence of fair value for the undelivered elements. If VSOE or objective and reliable evidence cannot be obtained to establish fair value of the undelivered elements, revenue from the entire arrangement would be deferred and recognized once these elements are delivered or fair value is established.

We record reductions to revenue for estimated sales returns at the time of shipment. Sales returns are estimated based on historical sales returns, current trends, and our expectations regarding future experience. Reductions to revenue associated with sales returns include consideration of historical sales levels, the timing and magnitude of historical sales returns, and a projection of this experience into the future. We monitor and analyze the accuracy of sales returns estimates by reviewing actual returns and adjust them for future expectations to determine the

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

adequacy of our current and future reserve needs. If actual future returns and allowances differ from past experience, additional allowances may be required.

Stock-Based Compensation: Beginning in fiscal 2007, we estimate the fair value of stock options using the Black-Scholes valuation model, consistent with the provisions of the Financial Accounting Standards Board's (FASB) SFAS No. 123 (revised 2004), *Share-Based Payment* (SFAS No. 123R) as interpreted by Staff Accounting Bulletin (SAB) No. 107. Option-pricing models require the input of highly subjective assumptions, including the expected term of options, the determination of risk-free interest rates, and the expected price volatility of the stock underlying such options. In addition, we estimate the number of share-based awards that will be forfeited due to employee turnover based on historical trends. Finally, we capitalize into inventory a portion of the periodic stock-based compensation expense that relates to employees working in manufacturing activities.

In November 2005, FASB issued Financial Statement Position, or FSP, on SFAS No. 123R, *Transition Election Related to Accounting for Tax Effects of Share-Based Payment Awards* (FSP No. 123R-3). Effective upon issuance, FSP No. 123R-3 provides for an alternative transition method for calculating the tax effects of stock-based compensation expense pursuant to SFAS No. 123R. The alternative transition method provides simplified approaches to establish the beginning balance of a tax benefit pool comprised of the additional paid-in capital, or APIC, related to the tax effects of employee stock-based compensation expense, and to determine the subsequent impact on the APIC tax benefit pool and the statement of cash flows of stock-based awards that were outstanding upon the adoption of SFAS No. 123R. Because we have not made the election to use the simplified approach to establish the beginning balance of the tax benefit pool, the tax effects of stock-based compensation expense were calculated as if Statement of Financial Accounting Standards ("SFAS") No. 123, *Accounting for Stock-Based Compensation* had always been applied for recognition purposes. For awards that are both fully vested and partially vested as of the date of adoption, the financing cash inflow is the excess tax benefit computed as if SFAS No. 123 had always been applied for recognition purposes.

Use of Estimates: The preparation of the condensed consolidated financial statements is in conformity with generally accepted accounting principles and requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the condensed consolidated financial statements and the reported amounts of revenues and expenses during the reporting period. Such estimates include, but are not limited to, revenue recognition and allowances; valuation of goodwill and intangibles; accounting for income taxes; inventory reserves and write-down; restructuring accruals; impairment losses on investments; accounting for stock-based compensation; and loss contingencies. Actual results could differ from those estimates.

4. Stock-based Compensation

Effective May 1, 2006, we adopted SFAS No. 123R, *Share-Based Payments* (SFAS No. 123R), which provides guidance on accounting for stock-based awards for employee services. We elected to adopt the modified prospective method, and accordingly we were not required to restate our prior period financial statements.

Prior to the adoption of SFAS No. 123R

Prior to the adoption of SFAS No. 123R, stock-based compensation expense had not been recognized in our consolidated statement of operations, other than those related to acquisitions and restricted stock awards. As a result of adopting SFAS No. 123R, pre-tax stock-based compensation expense recorded for the three- and nine-month periods ended January 26, 2007 of \$39,234 and \$124,679, respectively, was related to employee stock options, restricted stock units (RSUs), restricted stock awards (RSAs), and employee stock purchases under our Employee Stock Purchase Plan. Pre-tax stock-based compensation expense of \$4,070 and \$9,442 for the three- and nine-month periods ended January 27, 2006, respectively, which we recorded under APB No. 25, was related to RSUs, RSAs, and options assumed from acquisitions.

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

As a result of adoption of SFAS No. 123R, our income from operations and net income for the three-month period ended January 26, 2007 were \$34,163 and \$32,444 lower, respectively, and \$109,431 and \$94,571 lower, respectively, for the nine-month period ended January 26, 2007, than they would have been if we had continued to account for share-based compensation under APB No. 25. Basic and diluted earnings per share for the three-month period ended January 26, 2007, were \$0.09 and \$0.08 lower, respectively, and basic and diluted earnings per share for the nine months ended January 26, 2007 were each \$0.25 lower than they would have been if we had continued to account for share-based compensation under APB No. 25. We currently estimate that the impact of adopting SFAS No. 123R on our fiscal year ending April 30, 2007 will be between \$0.33 and \$0.40 per share.

As required by SFAS No. 123R, we eliminated the unamortized deferred stock compensation of \$49,266 on May 1, 2006. Our common stock and additional paid-in capital were also reduced by the same amount and had been included in the Stockholders Equity of our Consolidated Balance Sheets as of April 30, 2006.

Had compensation expense been determined based on the fair value at the grant date for awards, consistent with the provisions of SFAS No. 123, our pro forma net income and pro forma net income per share for the three- and nine-month periods ended January 27, 2006, would be as follows:

	Three Months Ended January 27, 2006	Nine Months Ended January 27, 2006
Net income as reported	\$ 76,393	\$ 207,231
Add: stock-based employee compensation expense included in reported net income under APB No. 25, net of related tax effects	2,442	5,665
Deduct: total stock-based compensation determined under fair value based method for all awards, net of related tax effects	(24,860)	(74,224)
Pro forma net income	<u>\$ 53,975</u>	<u>\$ 138,672</u>
Basic net income per share, as reported	<u>\$ 0.21</u>	<u>\$ 0.56</u>
Diluted net income per share, as reported	<u>\$ 0.20</u>	<u>\$ 0.54</u>
Basic net income per share, pro forma	<u>\$ 0.15</u>	<u>\$ 0.37</u>
Diluted net income per share, pro forma	<u>\$ 0.14</u>	<u>\$ 0.36</u>

SFAS No. 123R requires forfeitures to be estimated at the time of grant and revised, if necessary, in subsequent periods if actual forfeitures differ from those estimates. In our pro forma information required under SFAS No. 123 for the periods prior to fiscal 2007, we reflect cancellations and forfeitures due to employee terminations as they occurred.

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

SFAS No. 123R stock-based compensation expense

The stock-based compensation expenses included in the Condensed Consolidated Statement of Income for the three- and nine-month periods ended January 26, 2007 are as follows:

	<u>Three Months Ended</u> <u>January 26,</u> <u>2007</u>	<u>Nine Months Ended</u> <u>January 26,</u> <u>2007</u>
Cost of product revenue	\$ 922	\$ 2,660
Cost of service revenue	2,533	7,657
Sales and marketing	17,315	54,747
Research and development	12,276	39,166
General and administrative	6,188	20,449
Total stock-based compensation expense before income taxes	39,234	124,679
Income taxes	(5,371)	(20,652)
Total stock-based compensation expense after income taxes	<u>33,863</u>	<u>104,027</u>

The following table summarizes stock-based compensation associated with each type of award:

	<u>Three Months Ended</u> <u>January 26,</u> <u>2007</u>	<u>Nine Months Ended</u> <u>January 26,</u> <u>2007</u>
Employee stock options and awards	\$ 36,276	\$ 115,574
Employee stock purchase plan ("ESPP")	2,954	9,609
Amounts (capitalized in) reduced from inventory	4	(504)
Total stock-based compensation expense before income taxes	39,234	124,679
Income taxes	(5,371)	(20,652)
Total stock-based compensation expense after income taxes	<u>33,863</u>	<u>104,027</u>

In conjunction with the adoption of SFAS No. 123R, we changed our accounting policy of attributing the fair value of stock-based compensation to expense from the accelerated multiple-option approach provided by APB No. 25, as allowed under SFAS No. 123, to the straight-line single-option approach. Compensation expense for all stock-based payment awards expected to vest that were granted on or prior to April 30, 2006 will continue to be recognized using the accelerated multiple-option method. Compensation expense for all stock-based payment awards expected to vest that were granted subsequent to April 30, 2006 is recognized on a straight-line basis under the single-option approach.

Income Tax Benefits Recorded in Stockholders Equity

For the three- and nine-month periods ended January 26, 2007, the total income tax benefit associated with employee stock transactions was \$13,555 and \$92,575, respectively. For the three- and nine-month periods ended January 27, 2006, the total income tax benefit associated with employee stock transactions was \$6,045 and \$22,334, respectively.

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

Income Tax Effects on Statements of Cash Flows

In accordance with SFAS No. 123R, we have presented tax benefits resulting from tax deductions in excess of the compensation cost recognized for those options as financing cash flows for the nine-month period ended January 26, 2007. Prior to the adoption of SFAS No. 123R, tax benefits of stock option exercises were presented as operating cash flows. Tax benefits, related to tax deductions in excess of the compensation cost recognized, of \$43,463 presented as financing cash flows for the nine-month period ended January 26, 2007, would have been classified as operating cash flows if we had not adopted SFAS No. 123R.

Valuation Assumptions

In compliance with SFAS No. 123R, we estimated the fair value of stock options using the Black-Scholes model on the date of the grant. Assumptions used in the Black-Scholes valuation model were as follows:

	Stock Options Three Months Ended January 26, 2007	ESPP Three Months Ended January 26, 2007	Stock Options Nine Months Ended January 26, 2007	ESPP Nine Months Ended January 26, 2007
Expected life in years(1)	4.0	0.5	4.0	0.5
Risk-free interest rate(2)	4.64%	5.06%	4.77%	5.06%
Volatility(3)	35%	35%	35%	35%
Expected dividend(4)	0%	0%	0%	0%

- (1) The expected life of 4.0 years represented the period that our stock-based award was expected to be outstanding and was determined based on historical experience on similar awards. The expected life of 0.5 years for the purchase was based on the term of the purchase period of the purchase plan.
- (2) The risk-free interest rate for the options was based upon U.S. Treasury bills with equivalent expected terms of our employee stock-based award. The risk-free interest rate for purchases was based upon U.S. Treasury bills (2) yield curve in effect at the time of grant for the expected term of the purchase period.
- (3) We used the implied volatility of traded options to estimate our stock price volatility. Prior to adoption of SFAS No. 123R, we estimated volatility based upon historical volatility rates as required by SFAS No. 123.
- (4) The expected dividend was determined based on our history and expected dividend payouts.

As required by SFAS No. 123R, we estimate our forfeiture rates based on historical voluntary termination behavior.

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

Stock Options

A summary of the combined activity under our stock option plans and agreements is as follows:

	Options Available for Grant	Outstanding Options Number of Shares	Weighted Average Exercise Price	Weighted Average Remaining Contractual Term	Aggregate Intrinsic Value
Outstanding at April 30, 2006	22,546	65,709	\$ 26.08		
Shares Reserved for Plan	10,900	—	—		
Options Granted	(11,640)	11,640	35.10		
Assumed Topio Options (See Note 16)	858	—	—		
RSUs Granted	(15)	15	—		
Options Exercised	—	(9,510)	14.74		
RSUs Exercised	—	(93)	—		
Options Forfeitures and Cancellations	2,206	(2,206)	39.38		
RSUs Forfeitures and Cancellations	20	(20)	—		
Options Expired	(39)	—	—		
Outstanding at January 26, 2007	<u>24,836</u>	<u>65,535</u>	<u>\$ 28.92</u>	5.90	\$758,531
Options vested and expected to vest at January 26, 2007		62,566	29.11	0.51	720,601
Exercisable at January 26, 2007		39,069	27.95	4.79	570,664
RSUs vested and expected to vest at January 26, 2007		678	—	1.48	\$ 24,920
Exercisable at January 26, 2007		—	—	—	—

The intrinsic value represents the difference between the exercise price of stock options and the market price of our stock on that day for all in-the-money options. The weighted-average fair value as of the grant date was \$14.10. The total intrinsic value of options exercised was \$96,699 and \$214,030 for the three- and nine-month periods ended January 26, 2007, respectively, and \$83,322 and \$176,681 for the three- and nine-month periods ended January 27, 2006, respectively. We received \$65,270 and \$140,217 from the exercise of stock options for the three- and nine-month periods ended January 26, 2007, respectively, and received \$54,764 and \$112,963 from the exercise of stock options for the three- and nine-month periods ended January 27, 2006, respectively.

The following table summarizes our non-vested shares (restricted stock awards) as of January 26, 2007:

	Number of Shares	Weighted-Average Grant-Date Fair Value
Non-vested at April 30, 2006	228	\$ 27.58
Awards granted	125	39.83
Awards vested	(67)	21.92
Awards canceled/expired/forfeited	—	—
Non-vested at January 26, 2007	<u>286</u>	<u>\$ 34.25</u>

Although non-vested shares are legally issued, they are considered contingently returnable shares subject to repurchase by the Company when employees terminate their employment. The total fair value of shares vested during the three- and nine-month periods ended January 26, 2007 was \$367 and \$2,449, respectively. There was

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

\$26,258 of total unrecognized compensation as of January 26, 2007 related to restricted stock awards. The unrecognized compensation will be amortized over a weighted-average period of 1.9 years.

The following table summarizes information about stock options outstanding under all option plans as of January 26, 2007:

Range of Exercise Prices	Options Outstanding			Options Exercisable	
	Number Outstanding at January 26, 2007	Weighted Average Remaining Contractual Life (In Years)	Weighted Average Exercise Price	Number Exercisable	Weighted Average Exercise Price
\$ —	749	1.93	—	—	—
0.02	2,604	2.69	3.09	2,121	3.69
5.11	3,592	5.07	9.18	3,514	9.23
10.24	3,778	3.23	11.80	3,757	11.80
15.21	8,522	5.42	17.18	7,355	16.95
20.16	12,360	6.27	22.05	8,873	21.74
25.64	5,959	8.31	28.53	1,826	28.67
30.88	12,236	7.28	32.37	3,572	31.94
36.71	8,539	7.25	39.34	856	41.08
46.56	4,282	3.31	53.53	4,281	53.53
56.94	2,914	3.39	88.93	2,914	88.93
\$ —	<u>65,535</u>	5.90	\$28.92	<u>39,069</u>	\$27.95

Employee Stock Purchase Plan

	Number of Shares	Weighted Average Exercise Price	Weighted Average Remaining Contractual Term	Aggregate Intrinsic Value
Outstanding at January 26, 2007	721	\$ 32.74	0.34	\$ 2,877
Vested and expected to vest at January 26, 2007	706	\$ 32.74	0.34	\$ 2,814

The total intrinsic value of employee stock purchases was \$9,520 and \$20,462 for the three- and nine-month periods ended January 26, 2007. The intrinsic value of employee stock purchases was \$7,882 and \$16,778 for the three- and nine-month periods ended January 27, 2006, respectively. The compensation cost for options purchased under the ESPP plan was \$2,954 and \$9,609 for the three- and nine-month periods ended January 26, 2007, respectively. This compensation cost will be amortized on a straight-line basis over a weighted-average period of approximately 0.34 years.

The following table shows the shares issued and their purchase price per share for the employee stock purchase plan for the six-month period ended November 30, 2006:

Purchase date	November 30, 2006
Shares issued	744
Average purchase price per share	\$ 26.48

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

5. Debt

On March 31, 2006, Network Appliance Global LTD. (“Global”), a subsidiary of the Company, entered into a loan agreement (the “Loan Agreement”), with the lenders and JPMorgan Chase Bank, National Association, as administrative agent. The Loan Agreement provides for a term loan available in two tranches, a tranche of \$220,000 (“Tranche A”) and a tranche of \$80,000 (“Tranche B”), for an aggregate borrowing of \$300,000. The proceeds of the term loan have been used to finance a dividend from Global to the Company under the American Jobs Creation Act. The Tranche A term loan together with accrued and unpaid interest, are due in full on the maturity date of March 31, 2008. The Tranche B term loan was fully repaid as of January 26, 2007. Loan repayments of \$63,864 and \$87,267 are due in the remainder of fiscal 2007 and in fiscal 2008, respectively.

Interest for both the Tranche A and Tranche B term loan accrues at a floating rate based on the base rate in effect from time to time, plus a margin, which totaled 5.48% at January 26, 2007.

During the three- and nine-month periods ended January 26, 2007, we made repayments of \$42,297 and \$148,869, respectively, on the term loan. The Tranche A term loan was secured by certain investments totaling \$180,155 as of January 26, 2007 held by Global and the Tranche B term loan was secured by a pledge of accounts receivable by Global’s subsidiary, Network Appliance B.V.

As of January 26, 2007, Global was in compliance with all debt covenants as required by the Loan Agreement.

6. Short-Term Investments

The following is a summary of investments at January 26, 2007:

	<u>Amortized</u>	<u>Gross Unrealized</u>		<u>Estimated</u>
	<u>Cost</u>	<u>Gains</u>	<u>Losses</u>	<u>Fair Value</u>
Auction rate securities	\$ 144,977	\$ —	\$ —	\$ 144,977
Municipal bonds	5,112	—	33	5,079
Corporate securities	128,869	14	123	128,760
Corporate bonds	492,702	79	2,248	490,533
U.S. government agencies	269,926	3	1,338	268,591
U.S. Treasuries	15,176	—	162	15,014
Marketable equity securities	4,637	4,432	—	9,069
Money market funds	134,432	—	—	134,432
Total debt and equity securities	1,195,831	4,528	3,904	1,196,455
Less cash equivalents	211,289	12	95	211,206
Less short-term restricted investments	124,662	—	711	123,951(1)
Less long-term restricted investments	56,933	—	729	56,204(1)
Short-term investments	<u>\$ 802,947</u>	<u>\$4,516</u>	<u>\$2,369</u>	<u>\$ 805,094</u>

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

The following is a summary of investments at April 30, 2006:

	Amortized	Gross Unrealized		Estimated
	Cost	Gains	Losses	Fair Value
Auction rate securities	\$ 325,608	\$ 1	\$ —	\$ 325,609
Municipal bonds	5,024	—	65	4,959
Corporate securities	4,945	—	3	4,942
Corporate bonds	469,135	9	5,339	463,805
U.S. government agencies	286,983	—	3,812	283,171
U.S. Treasuries	20,189	—	386	19,803
Money market funds	472,722	17	114	472,625
Total debt and equity securities	1,584,606	27	9,719	1,574,914
Less cash equivalents	472,224	17	114	472,127
Less short-term restricted investments	138,215	—	1,507	136,708(2)
Less long-term restricted investments	106,616	—	2,173	104,443(2)
Short-term investments	<u>\$ 867,551</u>	<u>\$ 10</u>	<u>\$5,925</u>	<u>\$ 861,636</u>

- (1) As of January 26, 2007, we have pledged \$123,951 and \$56,204 of short-term and long-term restricted investments, respectively, for the Tranche A term loan as defined in the Loan Agreement (see Note 5). In addition, we have short-term and long-term restricted cash of \$2,063 and \$3,498, respectively, relating to our foreign rent, custom, and service performance guarantees. These combined amounts are presented as short-term and long-term restricted cash and investments in the accompanying Consolidated Balance Sheets as of January 26, 2007.
- (2) As of April 30, 2006, we have pledged \$136,708 and \$104,443 of short-term and long-term restricted investments, respectively, for the Tranche A term loan as defined in Loan Agreement (see Note 5). In addition, we have short-term and long-term restricted cash of \$1,831 and \$3,928, respectively, relating to our foreign rent, custom, and service performance guarantees. These combined amounts are presented as short-term and long-term restricted cash and investments in the accompanying Consolidated Balance Sheets as of April 30, 2006.

We record net unrealized gains or losses on available-for-sale securities in stockholders' equity. Realized gains or losses are reflected in income which have not been material for all years presented. The following table shows the gross unrealized losses and fair values of our investments, aggregated by investment category and length of time that individual securities have been in a continuous unrealized loss position, at January 26, 2007:

	Less Than 12 Months		12 Months or Greater		Total	
	Fair Value	Unrealized Loss	Fair Value	Unrealized Loss	Fair Value	Unrealized Loss
Municipal bonds	\$ 3,519	\$ (24)	\$ 1,560	\$ (9)	\$ 5,079	\$ (33)
Corporate securities	73,049	(123)	—	—	73,049	(123)
Corporate bonds	134,618	(626)	288,974	(1,622)	423,592	(2,248)
U.S. Treasury	4,949	(79)	4,988	(83)	9,937	(162)
U.S. government agencies	101,061	(460)	156,385	(878)	257,446	(1,338)
Total	<u>\$317,196</u>	<u>\$(1,312)</u>	<u>\$451,907</u>	<u>\$(2,592)</u>	<u>\$769,103</u>	<u>\$(3,904)</u>

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

Management evaluates investments on a regular basis to determine if an other-than-temporary impairment has occurred, and there were no such impairment as of January 26, 2007. The unrealized losses on these investments at January 26, 2007 were primarily due to interest rate fluctuations. We have the ability and intent to hold these investments until recovery of their carrying values. We also believe that we will be able to collect all principal and interest amounts due to us at maturity given the high credit quality of these investments. Accordingly, we do not consider these investments to be other-than-temporarily impaired at January 26, 2007.

7. Inventories

Inventories are stated at the lower of cost (first-in, first-out basis) or market. Inventories consist of the following:

	January 26, 2007	April 30, 2006
Purchased components	\$ 22,812	\$17,231
Work in process	972	744
Finished goods	37,690	46,477
	<u>\$ 61,474</u>	<u>\$64,452</u>

8. Goodwill and Intangible Assets

Goodwill is reviewed annually for impairment (or more frequently if indicators of impairment arise). We completed our annual impairment assessment in fiscal 2006 and concluded that goodwill was not impaired. In the three- and nine-month periods ended January 26, 2007, there were no indicators that would suggest that goodwill and intangible assets should be assessed for impairment. During the second quarter of fiscal year 2007, we recorded a reduction of goodwill for \$1,180 in connection with the divestiture of certain NetCache assets.

During December 2006, we acquired Topio, Inc. ("Topio") and recorded goodwill of \$114,960 and intangible assets of \$31,400 resulting from the allocation of the purchase price. See Note 16, "Business Combinations."

Intangible assets are summarized as follows:

	Amortization Period (Years)	January 26, 2007			April 30, 2006		
		Gross Assets	Accumulated Amortization	Net Assets	Gross Assets	Accumulated Amortization	Net Assets
Intangible Assets:							
Patents	5	\$ 10,040	\$ (6,934)	\$ 3,106	\$ 10,040	\$ (5,448)	\$ 4,592
Existing technology	4 - 5	113,625	(44,600)	69,025	91,025	(32,297)	58,728
Trademarks/tradenames	3 - 6	5,280	(1,422)	3,858	5,080	(739)	4,341
Customer Contracts/relationships	1.5 - 5	17,220	(3,653)	13,567	8,620	(2,380)	6,240
Covenants Not to Compete	1.5 - 2	9,510	(9,072)	438	9,510	(8,360)	1,150
Total Intangible Assets, Net		<u>\$155,675</u>	<u>\$ (65,681)</u>	<u>\$89,994</u>	<u>\$124,275</u>	<u>\$ (49,224)</u>	<u>\$75,051</u>

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

Amortization expense for identified intangible assets is summarized below:

	Three Months Ended		Nine Months Ended	
	January 26, 2007	January 27, 2006	January 26, 2007	January 27, 2006
Patents	\$ 495	\$ 495	\$ 1,486	\$ 1,487
Existing technology	4,572	3,866	12,303	7,920
Other identified intangibles	1,026	940	2,668	3,409
	<u>\$ 6,093</u>	<u>\$ 5,301</u>	<u>\$ 16,457</u>	<u>\$ 12,816</u>

Based on the identified intangible assets recorded at January 26, 2007, the future amortization expense of identified intangibles for the remainder of fiscal 2007 and the next four fiscal years and thereafter is as follows:

Year Ending April,	<u>Amount</u>
Remainder of Fiscal 2007	\$ 6,985
2008	27,176
2009	24,664
2010	19,694
2011	8,987
Thereafter	2,488
Total	<u>\$89,994</u>

9. Derivative Instruments

As a result of our significant international operations, we are subject to risks associated with fluctuating exchange rates. We use derivative financial instruments, principally currency forward contracts and currency options, to attempt to minimize the impact of exchange rate movements on our balance sheet and operating results. Factors that could have an impact on the effectiveness of our hedging program include the accuracy of forecasts and the volatility of foreign currency markets. These programs reduce, but do not always entirely eliminate, the impact of currency exchange movements. The maturities of these instruments are generally less than one year.

Currently, we do not enter into any foreign exchange forward contracts to hedge exposures related to firm commitments or equity investments. Our major foreign currency exchange exposures and related hedging programs are described below:

Balance Sheet Exposures: We utilize foreign currency forward and options contracts to hedge exchange rate fluctuations related to certain foreign assets and liabilities. Gains and losses on these derivatives offset gains and losses on the assets and liabilities being hedged and the net amount is included in earnings. For the three-month period ended January 26, 2007, net losses generated by hedged assets and liabilities totaled \$22 and were offset by gains on the related derivative instruments of \$495. For the nine-month period ended January 26, 2007, net gains generated by hedged assets and liabilities and related derivative instruments totaled \$522 and \$770, respectively. For the three-month period ended January 27, 2006, net gains generated by hedged assets and liabilities totaled \$1,169 and were offset by losses on the related derivative instruments of \$113. For the nine-month period ended January 27, 2006, net losses generated by hedged assets and liabilities totaled \$2,407 and were offset by gains on the related derivative instruments of \$3,035.

The premiums paid on the foreign currency option contracts are recognized as a reduction to other income when the contract is entered into. Other than the risk associated with the financial condition of the counterparties, our maximum exposure related to foreign currency options is limited to the premiums paid.

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

Forecasted Transactions: We use currency forward contracts to hedge exposures related to forecasted sales and operating expenses denominated in certain foreign currencies. These contracts are designated as cash flow hedges and in general closely match the underlying forecasted transactions in duration. The contracts are carried on the balance sheet at fair value and the effective portion of the contracts' gains and losses is recorded as other comprehensive income until the forecasted transaction occurs.

If the underlying forecasted transactions do not occur, or if it becomes probable that they will not occur, the gain or loss on the related cash flow hedge is recognized immediately in earnings. For the three- and nine-month periods ended January 26, 2007 and January 27, 2006, we did not record any gains or losses related to forecasted transactions that did not occur or that became improbable.

We measure the effectiveness of hedges of forecasted transactions on at least a quarterly basis by comparing the fair values of the designated currency forward contracts with the fair values of the forecasted transactions.

As of January 26, 2007, the notional fair value of our foreign exchange forward and foreign currency option contracts totaled \$387,262.

10. Earnings Per Share

Basic net income per share is computed by dividing income available to common stockholders by the weighted average number of common shares outstanding excluding unvested restricted stock for that period. Diluted net income per share is computed giving effect to all dilutive potential shares that were outstanding during the period. Dilutive potential common shares consist of incremental common shares subject to repurchase, common shares issuable upon exercise of stock options, and restricted stock awards.

During all periods presented, we had certain options outstanding, which could potentially dilute basic earnings per share in the future, but were excluded in the computation of diluted earnings per share in such periods, as their effect would have been antidilutive. These certain options were antidilutive in the three- and nine-month periods ended January 26, 2007 and January 27, 2006 as these options' exercise prices were above the average market prices in such periods. For the three-month periods ended January 26, 2007 and January 27, 2006, 18,571 and 18,450 shares of common stock options with a weighted average exercise price of \$47.89 and \$47.83, respectively, were excluded from the diluted net income per share computation. For the nine-month periods ended January 26, 2007 and January 27, 2006, 22,271 and 18,881 shares of common stock options with a weighted average exercise price of \$44.75 and \$48.04, respectively, were excluded from the diluted net income per share computation.

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

The following is a reconciliation of the numerators and denominators of the basic and diluted net income per share computations for the periods presented:

	Three Months Ended		Nine Months Ended	
	January 26, 2007	January 27, 2006	January 26, 2007	January 27, 2006
Net Income (Numerator):				
Net income, basic and diluted	\$ 66,514	\$ 76,393	\$ 208,114	\$ 207,231
Shares (Denominator):				
Weighted average common shares outstanding	371,735	372,289	372,372	370,543
Weighted average common shares outstanding subject to repurchase	(448)	(521)	(434)	(474)
Shares used in basic computation	371,287	371,768	371,938	370,069
Weighted average common shares outstanding subject to repurchase	448	521	434	474
Common shares issuable upon exercise of stock options	17,385	16,860	17,183	16,448
Shares used in diluted computation	389,120	389,149	389,555	386,991
Net Income Per Share:				
Basic	\$ 0.18	\$ 0.21	\$ 0.56	\$ 0.56
Diluted	\$ 0.17	\$ 0.20	\$ 0.53	\$ 0.54

11. Stockholders' Equity

Stock Repurchase Program

On November 15, 2006, our Board approved a new stock repurchase program in which up to \$800,000 of additional shares may be purchased.

Share repurchase activities for the three- and nine-month periods ended January 26, 2007 and January 27, 2006, were as follows:

	Three Months Ended		Nine Months Ended	
	January 26, 2007	January 27, 2006	January 26, 2007	January 27, 2006
Shares repurchased	6,165	5,025	16,984	14,612
Cost of shares repurchased	\$ 241,800	\$ 145,583	\$ 605,708	\$ 390,147
Average price per share	\$ 39.22	\$ 28.97	\$ 35.66	\$ 26.70

Since the inception of the stock repurchase program through January 26, 2007, we have purchased a total of 48,980 shares of our common stock at an average price of \$29.07 per share for an aggregate purchase price of \$1,423,690. At January 26, 2007, \$599,948 remained available for repurchases under the plan. The stock repurchase program may be suspended or discontinued at any time.

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

Comprehensive Income

The components of comprehensive income were as follows:

	Three Months Ended		Nine Months Ended	
	January 26, 2007	January 27, 2006	January 26, 2007	January 27, 2006
Net income	\$ 66,514	\$ 76,393	\$ 208,114	\$ 207,231
Currency translation adjustment	437	(12)	1,323	(1,996)
Unrealized gain (loss) on investments	1,990	1,327	8,566	(4,492)
Unrealized gain (loss) on derivatives	(458)	352	377	559
Comprehensive income	<u>\$ 68,483</u>	<u>\$ 78,060</u>	<u>\$ 218,380</u>	<u>\$ 201,302</u>

The components of accumulated other comprehensive loss were as follows:

	January 26, 2007	April 30, 2006
Accumulated translation adjustments	\$ 1,690	\$ 367
Accumulated unrealized loss on investments	(1,148)	(9,714)
Accumulated unrealized loss on derivatives	(1,374)	(1,751)
Total accumulated other comprehensive loss	<u>\$ (832)</u>	<u>\$ (11,098)</u>

12. Divestiture

On September 11, 2006, we completed the sale of certain assets of our NetCache product line to Blue Coat Systems Inc. ("Blue Coat"), as previously discussed in our annual report on Form 10-K. We received \$23,914 in cash and 360 shares of Blue Coat's common stock with a fair value of \$9,069 as of January 26, 2007. In addition, we accrued \$2,032 for costs expected to be incurred to fulfill our engineering and service contractual obligations. Because of these continuing obligations, the NetCache sale does not qualify for presentation as a discontinued operation. As a result of this divestiture, we recorded a pre-tax gain of \$25,339 in our income from operations and a reduction of goodwill of \$1,180. We recorded revenues of \$13,160 and \$20,560 from NetCache products for three months ended January 26, 2007 and January 27, 2006, and \$51,012 and \$52,199 from NetCache products for the nine months ended January 26, 2007 and January 27, 2006, respectively. The contribution to operating income from these products was not significant.

13. Restructuring Charges

In fiscal 2002, as a result of continuing unfavorable economic conditions and a reduction in information technology (IT) spending rates, we implemented two restructuring plans, which included reductions in our workforce and consolidations of our facilities. As of January 26, 2007, we have no outstanding balance in our restructuring liability for the first restructuring. The second restructuring related to the closure of an engineering facility and consolidation of resources to the Sunnyvale headquarters. In fiscal 2006, we implemented a third restructuring plan related to the move of our global services center operations from Sunnyvale to our new flagship support center at our Research Triangle Park facility in North Carolina. Of the reserve balance at January 26, 2007, \$542 was included in other accrued liabilities and the remaining \$1,689 was classified as long-term obligations.

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

Our restructuring estimates are reviewed and revised periodically and may result in a substantial charge or reduction to restructuring expense should different conditions prevail than were anticipated in previous management estimates. Such estimates included various assumptions such as the time period over which the facilities will be vacant, expected sublease terms, and expected sublease rates. During the quarter ended January 26, 2007, we did not record any reduction or charges in the restructuring reserve.

	<u>Facility Accrual</u>	<u>Severance-Related</u>	<u>Total</u>
Reserve balance at April 30, 2005	\$ 4,503	\$ —	\$ 4,503
Restructuring charges	281	859	1,140
Adjustments	(1,256)	—	(1,256)
Cash payments	(862)	(521)	(1,383)
Reserve balance at April 30, 2006	\$ 2,666	\$ 338	\$ 3,004
Restructuring recoveries	—	(74)	(74)
Cash payments	(149)	(82)	(231)
Reserve balance at July 28, 2006	\$ 2,517	\$ 182	\$ 2,699
Cash payments	(143)	(182)	(325)
Reserve balance at October 27, 2006	\$ 2,374	\$ —	\$ 2,374
Cash payments	(143)	—	(143)
Reserve balance at January 26, 2007	<u>\$ 2,231</u>	<u>\$ —</u>	<u>\$ 2,231</u>

14. New Accounting Pronouncements

In February 2007, the Financial Accounting Standards Board (“FASB”) issued Statement of Financial Accounting Standards (“SFAS”) No. 159, *The Fair Value Option for Financial Assets and Financial Liabilities — Including an Amendment of FASB Statement No. 115*. SFAS No. 159 allows measurement at fair value of eligible financial assets and liabilities that are not otherwise measured at fair value. If the fair value option for an eligible item is elected, unrealized gains and losses for that item shall be reported in current earnings at each subsequent reporting date. SFAS No. 159 also establishes presentation and disclosure requirements designed to draw comparison between the different measurement attributes the company elects for similar types of assets and liabilities. This statement is effective for our fiscal year beginning May 1, 2008. We are currently evaluating the effect, if any, that the adoption of SFAS No. 159 will have on our consolidated financial statements.

In September, 2006, the Financial Accounting Standards Board (“FASB”) issued Statement of Financial Accounting Standards (“SFAS”) No. 157, *Fair Value Measurements*. SFAS No. 157 provides a framework for measuring fair value, clarifies the definition of fair value, and expands disclosures regarding fair value measurements. SFAS No. 157 does not require any new fair value measurements and eliminates inconsistencies in guidance found in various prior accounting pronouncements. We are required to adopt SFAS No. 157 for our fiscal year beginning May 1, 2008. We are currently evaluating the effect that the adoption of SFAS No. 157 will have on our consolidated results of operations and financial condition, but do not expect it to have a material impact.

In September 2006, the SEC issued Staff Accounting Bulletin (“SAB”) No. 108, *Considering the Effects of Prior Year Misstatements when Quantifying Misstatements in Current Year Financial Statements*. SAB No. 108 provides guidance on how prior year misstatements should be taken into consideration when quantifying misstatements in current year financial statements for purposes of determining whether the current year’s financial statements are materially misstated. SAB No. 108 is effective for fiscal years ending on or after November 15, 2006. We are required to adopt SAB No. 108 for our fiscal year beginning on May 1, 2007. We are currently evaluating the effect that the adoption of SAB No. 108 will have on our consolidated results of operations and financial condition.

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

In July 2006, the Financial Accounting Standards Board (“FASB”) issued FASB Interpretation No. 48, *Accounting for Uncertainty in Income Taxes — an Interpretation of FASB Statement No. 109* (FIN No. 48). FIN No. 48 prescribes a comprehensive model for how a company should recognize, measure, present, and disclose in its financial statements uncertain tax positions that the Company has taken or expects to take on a tax return (including a decision whether to file or not to file a return in a particular jurisdiction). FIN No. 48 is applicable to all uncertain tax positions for taxes accounted for under FASB Statement No. 109, *Accounting for Income Taxes* (SFAS No. 109), and substantially changes the applicable accounting model. FIN No. 48 is likely to cause greater volatility in income statements as more items are recognized discretely within income tax expense. We are required to adopt FIN No. 48 for our fiscal year beginning May 1, 2007. We are currently evaluating the effect that the adoption of FIN No. 48 will have on our consolidated results of operations and financial condition but do not expect it to have a material impact.

15. Commitments and Contingencies

The following summarizes our commitments and contingencies at January 26, 2007, and the effect such obligations may have on our future periods:

	Remainder of 2007	2008	2009	2010	2011	Thereafter	Total
Contractual Obligations:							
Office operating lease payments(1)	\$ 4,538	\$19,650	\$19,138	\$16,250	\$13,606	\$ 36,387	\$109,569
Real estate lease payments(2)	—	1,482	4,726	5,978	5,978	99,700	117,864
Equipment operating lease payments(3)	2,767	8,916	6,216	1,046	7	3	18,955
Venture capital funding commitments(4)	431	338	325	313	300	25	1,732
Capital expenditures(5)	3,990	256	—	—	—	—	4,246
Communications and maintenance(6)	6,012	15,635	10,697	4,128	223	3	36,698
Total Contractual Cash Obligations	<u>\$ 17,738</u>	<u>\$46,277</u>	<u>\$41,102</u>	<u>\$27,715</u>	<u>\$20,114</u>	<u>\$136,118</u>	<u>\$289,064</u>
Other Commercial Commitments:							
Lines of Credit(7)	<u>\$ 450</u>	<u>\$ 1,583</u>	<u>\$ —</u>	<u>\$ —</u>	<u>\$ —</u>	<u>\$ 362</u>	<u>\$ 2,395</u>

- (1) We lease sales offices and research and development facilities throughout the U.S. and internationally. These sales offices are leased under operating leases which expire through fiscal 2016. We are responsible for certain maintenance costs, taxes, and insurance under these leases. Substantially all lease agreements have fixed payment terms based on the passage of time. Some lease agreements provide us with the option to renew or terminate the lease. Our future operating lease obligations would change if we were to exercise these options and if we were to enter into additional operating lease agreements. Rent operating lease payments in the table exclude lease payments which are accrued as part of our fiscal 2002 restructurings and include only rent lease commitments that are over one year.
- (2) Included in the above contractual cash obligations pursuant to two financing arrangements with BNP Paribas LLC (“BNP”) are (a) lease commitments of \$1,482 in fiscal 2008; \$4,726 in fiscal 2009, \$5,978 in each of the fiscal years 2010, 2011, and 2012, \$4,495 in fiscal 2013; and \$1,252 in fiscal 2014, which are based on the LIBOR rate at January 26, 2007 for a term of five years, and (b) at the expiration or termination of the lease, a

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

supplemental payment obligation equal to our minimum guarantee of \$87,975 in the event that we elect not to purchase or arrange for sale of the buildings.

- (3) Equipment operating leases include servers and IT equipment used in our engineering labs and data centers.
- (4) Venture capital funding commitments include a quarterly committed management fee based on a percentage of our committed funding to be payable through June 2011.
- (5) Capital expenditures include worldwide contractual commitments to purchase equipment and to construct building and leasehold improvements, which will be recorded as Property and Equipment.
- (6) We are required to pay based on a minimum volume under certain communication contracts with major telecommunication companies as well as maintenance contracts with multiple vendors. Such obligations expire in April 2010.
- (7) The amounts outstanding under these letters of credit relate to workers' compensation, a customs guarantee, a corporate credit card program, and a foreign rent guarantee.

On December 16, 2005, we entered into financing, construction, and leasing arrangements with BNP for office space to be located on land currently owned by us in Sunnyvale, California. These arrangements require us to lease our land to BNP for a period of 50 years to construct approximately 190,000 square feet of office space costing up to \$38,500. After completion of construction, we will pay minimum lease payments, which vary based on London Interbank Offered Rate ("LIBOR") plus a spread (5.78% at January 26, 2007) on the cost of the facilities. We expect to begin making lease payments on the completed buildings in September 2007 for a term of five years. We have the option to renew the lease for two consecutive five-year periods upon approval by BNP. Upon expiration (or upon any earlier termination) of the lease term, we must elect one of the following options: We may (i) purchase the building from BNP for \$38,500, (ii) if certain conditions are met, arrange for the sale of the building by BNP to a third party for an amount equal to at least \$32,725, and be liable for any deficiency between the net proceeds received from the third party and \$32,725, or (iii) pay BNP a supplemental payment of \$32,725, in which event we may recoup some or all of such payment by arranging for a sale of the building by BNP during the ensuing two-year period.

On December 14, 2006, we entered into additional financing, construction, and leasing arrangements with BNP for office space to be located on land currently owned by us in Sunnyvale, California. These arrangements require us to lease our land to BNP for a period of 50 years to construct approximately 190,000 square feet of office space and parking structure costing up to \$65,000. After completion of construction, we will pay minimum lease payments, which vary based on LIBOR plus a spread (5.78% at January 26, 2007) on the cost of the facilities. We expect to begin making lease payments on the completed buildings in September 2008 for a term of five years. We have the option to renew the lease for two consecutive five-year periods upon approval by BNP. Upon expiration (or upon any earlier termination) of the lease term, we must elect one of the following options: We may (i) purchase the building from BNP for \$65,000, (ii) if certain conditions are met, arrange for the sale of the building by BNP to a third party for an amount equal to at least \$55,250, and be liable for any deficiency between the net proceeds received from the third party and \$55,250, or (iii) pay BNP a supplemental payment of \$55,250, in which event we may recoup some or all of such payment by arranging for a sale of the building by BNP during the ensuing two-year period.

Both leases also require us to maintain specified financial covenants with which we were in compliance as of January 26, 2007. Such specified financial covenants include a maximum ratio of Total Debt to Earnings Before Interest, Taxes, Depreciation and Amortization ("EBITDA") and a Minimum Unencumbered Cash and Short Term Investments.

As of January 26, 2007, the notional fair value of our foreign exchange forward and foreign currency option contracts totaled \$387,262. We do not believe that these derivatives present significant credit risks, because the counterparties to the derivatives consist of major financial institutions, and we manage the notional amount of

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

contracts entered into with any one counterparty. We do not enter into derivative financial instruments for speculative or trading purposes. Other than the risk associated with the financial condition of the counterparties, our maximum exposure related to foreign currency forward and option contracts is limited to the premiums paid on purchased options only.

We have both recourse and nonrecourse lease financing arrangements with third-party leasing companies through preexisting relationships with the customers. We sell our products directly to the leasing company, and the lease arrangement is made between our customer and the leasing company. Under the terms of recourse leases, which are generally three years or less, we remain liable for the aggregate unpaid remaining lease payments to the third-party leasing company in the event that any customers default. For these recourse arrangements, revenues on the sale of our product to the leasing company are deferred and recognized into income as payments to the leasing company come due. As of January 26, 2007 and April 30, 2006, the maximum recourse exposure under such leases totaled approximately \$9,215 and \$8,443, respectively. Under the terms of the nonrecourse leases, we do not have any continuing obligations or liabilities. To date, we have not experienced significant losses under this lease financing program.

From time to time, we have committed to purchase various key components used in the manufacture of our products. We establish accruals for estimated losses on purchased components for which we believe it is probable that they will not be utilized in future operations. To the extent that such forecasts are not achieved, our commitments and associated accruals may change.

During the quarter, two shareholder derivative lawsuits were filed against various of our officers and directors and naming us as a nominal defendant. The suits allege improper practices relating to the timing of stock option grants. Management believes that the claims are without merit and intends to defend the actions vigorously.

In addition, we are subject to various legal proceedings and claims which may arise in the normal course of business. While the outcome of these legal matters is currently not determinable, we do not believe that any current litigation or claims will have a material adverse effect on our business, cash flow, operating results, or financial condition.

We are currently undergoing federal income tax audits in the U.S. and several foreign tax jurisdictions. The rights to some of our intellectual property ("IP") are owned by certain of our foreign subsidiaries, and payments are made between foreign and U.S. tax jurisdictions relating to the use of this IP. Recently, some other companies have had their foreign IP arrangements challenged as part of an examination. Our management does not believe, based upon information currently known to us, that the final resolution of any of our audits will have a material adverse effect upon our consolidated financial position and the results of operations and cash flows. However, if upon the conclusion of these audits the ultimate determination of our taxes owed in any of these tax jurisdictions is for an amount in excess of the tax provision we have recorded or reserved for, our overall effective tax rate may be adversely impacted in the period of adjustment.

The General Services Administration (GSA) is currently auditing our records under the schedule contracts it had with us to verify our compliance with various contract provisions. If the audit determines that we did not comply with such provisions, we may be required to pay the GSA a potential settlement. The exact date for completion of the audit and the subsequent negotiation process is unknown and may not be concluded for some time. Our management does not believe, based upon information currently known to us, that the final resolution of our audit will have a material adverse effect upon our consolidated financial position and the results of operations and cash flows.

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

16. Business Combination

Acquisition of Topio

On December 7, 2006, we acquired Topio, Inc. ("Topio"), a privately held company based in Santa Clara, California, that develops and sells enterprise-class software for data replication and rapid recovery across the spectrum of locations, platforms and storage that support an enterprise. The acquisition will continue to expand our data protection portfolio and simplify the replication of data from other storage arrays to our storage systems. Under terms of the agreement, we paid Topio \$137,201 in cash, assumed approximately 853 stock options with a fair value of approximately \$8,369. We also incurred \$793 acquisition-related transaction costs and assumed certain operating assets and liabilities. The net deferred income tax liability of \$5,150 is comprised of deferred tax assets of \$7,644 primarily related to net operating losses incurred from inception through the acquisition date and a deferred tax liability of \$12,794 related to acquired intangible assets. The historical operations of Topio were not significant.

The acquisition was accounted for under the purchase method of accounting. The total purchase price for Topio is summarized below:

	<u>Topio</u>
Cash consideration	\$137,201
Stock options assumed	8,369
Acquisition-related transaction costs	793
	<u>\$146,363</u>

In accordance with SFAS 141, we have preliminarily allocated the purchase price to the estimated tangible and intangible assets acquired and liabilities assumed, based on their estimated fair values. Goodwill of \$114,960 was generated in connection with our acquisition of Topio. The current and future potential of the Topio technology will enable us to expand our data protection portfolio and simplify the replication of data from other storage arrays to our storage systems. In addition, Topio has an experienced and knowledgeable workforce and an existing infrastructure. These opportunities, along with the ability to leverage the Topio workforce, were significant contributing factors to the establishment of the purchase price, resulting in the recognition of a significant amount of goodwill. The fair values assigned to tangible and intangible assets acquired and liabilities assumed are based on management estimates and assumptions, and other information compiled by management, including third-party valuations that utilized established valuation techniques appropriate for the high-technology industry. Goodwill recorded as a result of this acquisition is not expected to be deductible for tax purposes. In accordance with SFAS 142, *Goodwill and Other Intangible Assets* ("SFAS 142"), goodwill is not amortized but will be reviewed at least annually for

NETWORK APPLIANCE, INC.
NOTES TO UNAUDITED CONDENSED CONSOLIDATED
FINANCIAL STATEMENTS — (Continued)

impairment. Purchased intangibles with finite lives will be amortized over their respective estimated useful lives on a straight line basis. The purchase price has been preliminarily allocated as follows:

Purchase Price Allocation:	Topio	Amortization Period (Years)
Fair value of tangible assets acquired	\$ 7,905	
Intangible assets:		
Existing Technology	18,800	4
Patents and Core Technology	3,800	4
Maintenance Agreements and Customer Relationships	100	4
BCP Contracts and Related Relationships	8,200	6
Non compete agreements	300	2
Trademarks and tradenames	200	2
Goodwill	114,960	
Fair value of liabilities assumed	(2,752)	
Net deferred income taxes	(5,150)	
	<u>\$146,363</u>	

Because Topio had recently introduced its products, no amount was allocated to in-process research and development.

Item 2. Management's Discussion and Analysis of Financial Condition and Results of Operations

This Quarterly Report on Form 10-Q contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and is subject to the safe harbor provisions set forth in the Exchange Act. Forward-looking statements usually contain the words "estimate," "intend," "plan," "predict," "seek," "may," "will," "should," "would," "anticipate," "expect," "believe," or similar expressions and variations or negatives of these words. In addition, any statements that refer to expectations, projections, or other characterizations of future events or circumstances, including any underlying assumptions, are forward-looking statements. All forward-looking statements, including, but not limited to, (1) our anticipation that the SAN competitiveness of our new products will continue to contribute to the block-based protocols component of our business; (2) our expectation that future gross margins may be negatively affected by various factors such as global service investment cost and competition; (3) our belief that our strategic investments are targeted at some of the strongest growth areas of the storage market; (4) our belief that our new emerging products will further expand our market opportunity; (5) our expectation that price per petabyte will continue to decline for our hardware products; (6) our plan to invest in the people, processes and systems necessary to best optimize our revenue growth; (7) our expectation that higher disk content associated with high-end and mid-range storage systems will negatively affect our gross margin in the future; (8) our expectation that our service margin may experience some variability; (9) our estimate of the impact that adopting SFAS No. 123R will have on our earnings per share; (10) our estimates of future amortization of patents, trademarks, tradenames, customer contracts, and relationships; (11) our expectation to continue to selectively add sales capacity in an effort to expand domestic and international markets; (12) our expectation that we will increase our sales and marketing expenses commensurate with future revenue growth; (13) our belief that our future performance will depend in large part on our ability to maintain and enhance our current product line, develop new products that achieve market acceptance, maintain technological competitiveness, and meet an expanding range of customer requirements; (14) our expectation that we will continuously support current and future product development and enhancement efforts and incur corresponding charges; (15) our intention to continuously broaden our existing product offerings and introduce new products; (16) our belief regarding our research and development and general and administrative expenses will increase in absolute dollars for the remainder of fiscal 2007; (17) our estimates regarding future amortization of covenants not to compete; (18) our expectation that interest income will increase year over year; (19) our belief that period-to-period changes in foreign exchange gains or losses will continue to be impacted by hedging costs associated with our forward and option activities and forecast variance; (20) our expectation that cash provided by operating activities may fluctuate in future periods; (21) our expectations regarding our contractual cash obligations and other commercial commitments at January 26, 2007, for future periods; (22) our expectation regarding the complete construction of our building under the BNP lease and the estimates regarding future minimum lease payments under the lease term; (23) our expectation that our existing facilities and those currently being developed will be sufficient for our needs for at least the next two years and that our contractual commitments, and any required capital expenditures over the next few years, will be funded through cash from operations and existing cash and investments; (24) our belief that claims on the derivative lawsuits are without merit; (25) our expectation that capital expenditures will increase consistent with our business growth; (26) our expectation that we will incur higher capital expenditures in the near future; (27) our belief that our cash and cash equivalents, short-term investments, and cash generated from operations will satisfy our working capital needs, capital expenditures, stock repurchases, contractual obligations, and other liquidity requirements associated with our operations through at least the next 12 months and (28) our belief that, based upon information available to us, that any current litigation and claims including our audits will not have a material adverse impact on our operating results, are inherently uncertain as they are based on management's current expectations and assumptions concerning future events, and they are subject to numerous known and unknown risks and uncertainties. Readers are cautioned not to place undue reliance on these forward-looking statements, which speak only as of the date hereof and are based upon information available to us at this time. These statements are not guarantees of future performance. We disclaim any obligation to update information in any forward-looking statement.

Third Quarter Fiscal 2007 Overview

During the third quarter and first nine months of fiscal 2007, our revenue grew year over year and the increase was across all major products categories and geographies. The net increase in revenues was attributable to increased

software licenses and software subscriptions, increased service revenue, an expanded portfolio with new products and solutions for the enterprise customers, and was partially offset by lower cost-per-megabyte disks, and a decline in shipments and lower average selling prices of our older generation products.

From a product perspective, we continued to enhance our data management and data protection portfolios with a key acquisition and several product introductions. We extended our data center portfolio with several additions including new midrange platforms, broader Fibre Channel (FC) storage area network (SAN) capabilities, significant enhancements in the NetApp® Manageability Software Family, and new professional services, all aimed at making enterprise data center management easier for customers who demand high-performance SAN solutions and increased application uptime to meet their business needs. We anticipate the SAN competitiveness of our new FAS3070, along with the strength of our high-end FAS6070 SAN-configured systems, to continue to contribute to an increase in the block-based protocols component of our business.

From a market perspective, we also continued to gain market acceptance in the storage area network (SAN) market while maintaining leadership in both the network-attached storage (NAS) and iSCSI markets. According to International Data Corporation's (IDC's) Worldwide Quarterly Disk Storage Systems Tracker Q3 2006, NetApp gained share in both capacity shipped and revenue for the FC SAN market. NetApp also continued to grow faster than the market in FC SAN in both revenue and capacity, year over year. For capacity shipped, NetApp grew at 210.2%, while the market grew at 46.3%. In terms of revenue, NetApp grew faster than the market for the 11th consecutive quarter at 62.1%, while the market grew at 14.1%. Sequentially, NetApp grew at 16.0%, while the market grew at 6.4%.

NetApp also demonstrated continued leadership in the NAS and iSCSI storage markets in the third quarter, according to IDC. NetApp maintained the number-one market share position in capacity shipped for NAS (42.0%) and in iSCSI for both capacity shipped (32.6%) and revenue (21.5%).

In IDC's calculations of the network storage market (which includes SAN, NAS, and iSCSI), NetApp grew faster than the market, year over year, in both capacity shipped and revenue. For capacity shipped, NetApp grew at 106.8%, while the market grew at 62.6%. In terms of revenue, NetApp grew 18.9%, while the market grew at 17.2%.

Despite continuous downward pricing pressures and competitive environments, our revenue continued to grow faster than our competitors. We expect to continue to experience price declines per petabyte for our hardware products, which may have an adverse impact on our future gross margins if not offset by a product mix with higher software content and higher average selling prices associated with new products. According to IDC's Worldwide Disk Storage Systems 2006-2010 Forecast and Analysis, November 2006, IDC predicts that the industry average dollar per petabyte (PB) will drop from \$8.61/PB in 2006 to \$1.88/PB in 2010. At the same time, we also expect our future gross margins may be negatively affected by factors such as global service investment cost, competition, indirect sales including OEM, and high disk content, partially offset by new product introductions and add-on software mix.

We believe that our strategic investments are targeted at some of the strongest growth areas of the storage market, such as modular storage, archive and compliance, data protection, data classification, data discovery, data migration, data permanence, data security and privacy, iSCSI, and grid computing. However, if any storage market trends and emerging standards on which we are basing our assumptions do not materialize as anticipated, our business could be materially adversely affected.

Continued revenue growth depends on the introduction and market acceptance of our new products and solutions. We believe that our new emerging products will further expand our market opportunity. Our acquisition of Topio in December 2006 will also help us expand our heterogeneous data protection portfolio as part of our plan to broaden our total addressable market. If we fail to introduce new products in a timely manner or to successfully integrate acquired technology into our existing architecture, or if there is no or reduced demand for these or our current products, we may experience adverse impact on our expected growth rates. We plan to invest in the people, processes, and systems necessary to best optimize our revenue growth and long-term profitability. However, we cannot assure you that such investments will achieve our financial objectives.

Third Quarter Fiscal 2007 Financial Performance

- Our revenues for the third quarter of fiscal 2007 were \$729.3 million, a 35.8% increase over the same period a year ago. Our revenues for the first nine months of fiscal 2007 were \$2,003.1 million, a 36.4% increase over the same period a year ago. Our revenue growth was driven by the adoption of our enterprise storage products, the FAS3000 and FAS6000 series, and emerging products such as VTL.
- Our overall gross margins for both the third quarter of fiscal 2007 and 2006 were 60.9%. The overall gross margin decreased to 60.8% in the first nine months of fiscal 2007, from 61.3% in the same period a year ago. The decline in our gross margin was primarily attributable to the impact of the adoption of Statement of Financial Accounting Standards (“SFAS”) No. 123 (revised 2004), *Share-Based Payment* (SFAS No. 123R) and the related stock-based compensation expense, partially offset by a higher add-on software mix and favorable production costs.
- Cash, cash equivalents, and short-term investments decreased to \$1,295.3 million as of January 26, 2007, compared to \$1,322.9 million as of April 30, 2006, due primarily to cash used to repurchase our common stock of \$605.7 million and net cash paid of \$131.2 million in connection with the Topio acquisition, partially offset by cash generated from operations and \$23.9 million received from the sale of certain NetCache® assets. Days sales outstanding decreased to 55 days as of January 26, 2007, compared to 63 days as of April 30, 2006, reflecting more linear shipments. Inventory turns were 18.2 times and 14.7 times as of January 26, 2007 and April 30, 2006, respectively, reflecting higher inventory at fiscal 2006 year end associated with the new FAS6000 launch and improved inventory management. Deferred revenue increased to \$944.9 million as of January 26, 2007, from \$681.5 million reported as of April 30, 2006, due to higher software subscription and service billings attributable to an increase in larger enterprise customers. Capital purchases of plant, property, and equipment for the first nine months of fiscal 2007 and 2006 were \$112.4 million and \$96.5 million, respectively, reflecting continued capital investment to meet our business growth.

Critical Accounting Estimates and Policies

Our discussion and analysis of financial condition and results of operations are based upon our Consolidated Financial Statements, which have been prepared in accordance with accounting principles generally accepted in the United States of America. The preparation of such statements requires us to make estimates and assumptions that affect the reported amounts of revenues and expenses during the reporting period and the reported amounts of assets and liabilities as of the date of the financial statements. Our estimates are based on historical experience and other assumptions that we consider to be appropriate in the circumstances. However, actual future results may vary from our estimates.

We believe that the following accounting policies are “critical” as defined by the Securities and Exchange Commission, in that they are both highly important to the portrayal of our financial condition and results, and require difficult management judgments and assumptions about matters that are inherently uncertain. We also have other important policies, including those related to derivative instruments and concentration of credit risk. However, these policies do not meet the definition of critical accounting policies because they do not generally require us to make estimates or judgments that are difficult or subjective. These policies are discussed in Note 3 to the Consolidated Financial Statements accompanying this Quarterly Report on Form 10-Q.

We believe the accounting policies described below are the ones that most frequently require us to make estimates and judgments, and therefore are critical to the understanding of our results of operations:

- Revenue recognition and allowances
- Valuation of goodwill and intangibles
- Accounting for income taxes
- Inventory write-downs
- Restructuring accruals

[Table of Contents](#)

- Impairment losses on investments
- Accounting for stock-based compensation
- Loss contingencies

Revenue Recognition and Allowances

We apply the provisions of Statement of Position (“SOP”) No. 97-2, *Software Revenue Recognition* (SOP No. 97-2), and related interpretations to our product sales, both hardware and software, because our software is essential to the performance of our hardware. We recognize revenue when:

- *Persuasive evidence of an arrangement exists:* It is our customary practice to have a purchase order and/or contract prior to recognizing revenue on an arrangement from our end users, customers, value-added resellers, or distributors.
- *Delivery has occurred:* Our product is physically delivered to our customers, generally with standard transfer terms such as FOB origin. We typically do not allow for restocking rights with any of our value-added resellers or distributors. Products shipped with acceptance criteria or return rights are not recognized as revenue until all criteria are achieved. If undelivered products or services exist that are essential to the functionality of the delivered product in an arrangement, delivery is not considered to have occurred.
- *The fee is fixed or determinable:* Arrangements with payment terms extending beyond our standard terms, conditions and practices are not considered to be fixed or determinable. Revenue from such arrangements is recognized as the fees become due and payable. We typically do not allow for price-protection rights with any of our value-added resellers or distributors.
- *Collection is probable:* Probability of collection is assessed on a customer-by-customer basis. Customers are subjected to a credit review process that evaluates the customers’ financial position and ultimately their ability to pay. If it is determined at the outset of an arrangement that collection is not probable based upon our review process, revenue is recognized upon cash receipt.

Our multiple element arrangements include our systems and generally may also include one or more of the following undelivered elements: software subscriptions, premium hardware maintenance, storage review services, and installation services. Our software subscriptions entitle our customers to receive unspecified product upgrades and enhancements on a when-and-if-available basis, bug fixes, and patch releases. Premium hardware maintenance services include contracts for technical support and minimum response times. Revenue from software subscriptions and premium hardware maintenance services is recognized ratably over the contractual term, generally from one to three years. We also offer extended service contracts (which extend our standard parts warranty and may include premium hardware maintenance) at the end of the warranty term; revenues from these contracts are recognized ratably over the contract term. When storage optimization reviews are sold as a bundled element with our software subscriptions and premium hardware maintenance services, the revenue is recognized ratably over the contract term. We typically sell technical consulting services separately from any of our other revenue elements, either on a time and materials basis or for fixed price standard projects; we recognize revenue for these services as they are performed. Revenue from hardware installation services is recognized at the time of delivery and any remaining costs are accrued, as the remaining undelivered services are considered to be inconsequential and perfunctory. For arrangements with multiple elements, we recognize as revenue the difference between the total arrangement price and the greater of fair value or stated price for any undelivered elements (“the residual method”).

If the arrangement contains both software-related and non-software-related elements, we allocate revenue to the non-software elements based on objective and reliable evidence of fair value in accordance with Emerging Issues Task Force (“EITF”) 00-21, *Revenue Arrangements with Multiple Deliverables*. Non-software elements are items for which the functionality of the software is not essential to its performance; the non-software-related elements in our arrangements may consist of storage optimization reviews (which are sold only within a bundled service offering that also contains software-related services), and/or technical consulting. For undelivered software-related elements, we apply the provisions of SOP No. 97-2 and determine fair value of these undelivered software-related elements based on vendor-specific objective evidence which for us consists of the prices charged when these

services are sold separately. To determine the fair value of our undelivered elements, we analyze both the selling prices when the elements are sold separately as well as the concentrations of those prices. We believe those concentrations have been sufficient to enable us to establish VSOE or objective and reliable evidence of fair value for the undelivered elements. If VSOE or objective and reliable evidence cannot be obtained to establish fair value of the undelivered elements, revenue from the entire arrangement would be deferred and recognized once these elements are delivered or fair value is established.

We record reductions to revenue for estimated sales returns at the time of shipment. Sales returns are estimated based on historical sales returns, current trends, and our expectations regarding future experience. Reductions to revenue associated with sales returns include consideration of historical sales levels, the timing and magnitude of historical sales returns, and a projection of this experience into the future. We monitor and analyze the accuracy of sales returns estimates by reviewing actual returns and adjust them for future expectations to determine the adequacy of our current and future reserve needs. Our reserve levels have been sufficient to cover actual returns and have not required material changes in subsequent periods. While we currently have no expectations for significant changes to these reserves, if actual future returns and allowances differ from past experience, additional allowances may be required.

We also maintain a separate allowance for doubtful accounts for estimated losses based on our assessment of the collectibility of specific customer accounts and the aging of the accounts receivable. We analyze accounts receivable and historical bad debts, customer concentrations, customer solvency, current economic and geographic trends, and changes in customer payment terms and practices when evaluating the adequacy of current and future allowance. In circumstances where we are aware of a specific customer's inability to meet its financial obligations to us, a specific allowance for bad debt is estimated and recorded, which reduces the recognized receivable to the estimated amount we believe will ultimately be collected. We monitor and analyze the accuracy of allowance for doubtful accounts estimate by reviewing past collectibility and adjust it for future expectations to determine the adequacy of our current and future allowance. Our reserve levels have generally been sufficient to cover credit losses. Our allowance for doubtful accounts as of January 26, 2007 was \$2.8 million, compared to \$2.4 million as of April 30, 2006. During the year ended April 30, 2006, we reduced our reserve by \$1.5 million due to overall improvement in our collections history. However, if the financial condition of our customers were to deteriorate, resulting in an impairment of their ability to make payments, additional allowances may be required.

Valuation of Goodwill and Intangibles

Identifiable intangible assets are amortized over time, while in-process research and development is recorded as a charge on the date of acquisition and goodwill is capitalized, subject to periodic review for impairment. Accordingly, the allocation of the acquisition cost to identifiable intangible assets has a significant impact on our future operating results. The allocation process requires extensive use of estimates and assumptions, including estimates of future cash flows expected to be generated by the acquired assets. Should conditions be different than management's current assessment, material write-downs of the fair value of intangible assets may be required. We periodically review the estimated remaining useful lives of our other intangible assets. In addition, a reduction in the estimate of remaining useful life could result in accelerated amortization expense or a write-down in future periods. As such, any future write-downs of these assets would adversely affect our gross and operating margins. We currently do not foresee changes to useful lives or write-downs to these assets.

Under our accounting policy we perform an annual review in the fourth quarter of each fiscal year, or more often if indicators of impairment exist. Triggering events for impairment reviews may be indicators such as adverse industry or economic trends, restructuring actions, lower projections of profitability, or a sustained decline in our market capitalization. Evaluations of possible impairment and, if applicable, adjustments to carrying values require us to estimate, among other factors, future cash flows, useful lives, and fair market values of our reporting units and assets. When we conduct our evaluation of goodwill, the fair value of goodwill is assessed using valuation techniques that require significant management judgment. Should conditions be different from management's last assessment, significant write-downs of goodwill may be required. In fiscal 2006, we performed such evaluation and found no impairment. However, any future write-downs of goodwill would adversely affect our operating margins. As of January 26, 2007, our assets included \$601.3 million in goodwill. See Note 8, "Goodwill and Purchased Intangible Assets," to our Condensed Consolidated Financial Statements.

During fiscal 2006, we adjusted goodwill by \$3.5 million and \$2.1 million relating to the tax benefits associated with the subsequent exercise of previously vested assumed Spinnaker and Decru options, respectively. Estimated future adjustments to goodwill related to the tax benefits associated with the subsequent exercise of previously vested assumed options by previous acquisitions are approximately \$8.4 million, subject to future cancellations relating to employee terminations. During the second quarter of fiscal year 2007, we recorded a reduction of goodwill for \$1.2 million in connection with the divestiture of certain NetCache assets. In the third quarter of fiscal 2007, we recorded goodwill of \$115.0 million in connection with our Topio acquisition.

Accounting for Income Taxes

The determination of our tax provision is subject to judgments and estimates due to the complexity of the tax law that we are subject to in several tax jurisdictions. Earnings derived from our international business are generally taxed at rates that are lower than U.S. rates, resulting in a reduction of our effective tax rate. The ability to maintain our current effective tax rate is contingent upon existing tax laws in both the U.S. and the respective countries in which our international subsidiaries are located. Future changes in domestic or international tax laws could affect the continued realization of the tax benefits we are currently receiving. In addition, a decrease in the percentage of our total earnings from our international business or a change in the mix of international business among particular tax jurisdictions could increase our overall effective tax rate.

We account for income taxes in accordance with SFAS No. 109, "Accounting for Income Taxes." SFAS No. 109 requires that deferred tax assets and liabilities be recognized for the effect of temporary differences between the carrying amounts of assets and liabilities for financial reporting purposes and the amounts used for income tax purposes. SFAS No. 109 also requires that deferred tax assets be reduced by a valuation allowance if it is more likely than not that some or all of the deferred tax asset will not be realized. We have provided a valuation allowance of \$400.6 million as of January 26, 2007, compared to \$431.2 million as of April 30, 2006 on certain of our deferred tax assets related to net operating loss carryforwards, conditional royalty carryforwards, and tax credit carryforwards attributable to the exercise of employee stock options. Under SFAS No. 123R, such amounts should not be realized until they result in a reduction of taxes payable.

We based our provision for income taxes on the expected tax treatment of transactions recorded in our financial statements. In determining our provision for income taxes, we interpret tax legislation in a number of jurisdictions. The provisions for income taxes have not changed significantly from our estimates. Further tax provision adjustments are not expected, but are possible in the event that our interpretation of tax legislation differs from that of the tax authorities.

We are currently undergoing federal income tax audits in the U.S. and several foreign tax jurisdictions. The rights to some of our intellectual property ("IP") are owned by certain of our foreign subsidiaries, and payments are made between foreign and U.S. tax jurisdictions relating to the use of this IP. Recently, some other companies have had their foreign IP arrangements challenged as part of an examination. Our management does not believe, based upon information currently known to us, that the final resolution of any of our audits will have a material adverse effect upon our consolidated financial position and the results of operations and cash flows. However, if upon the conclusion of these audits the ultimate determination of our taxes owed in any of these tax jurisdictions is for an amount in excess of the tax provision we have recorded or reserved for, our overall effective tax rate may be adversely impacted in the period of adjustment.

We are required to adopt FIN No. 48 beginning May 1, 2007. FIN No. 48 is likely to cause greater volatility in income statements as more items are recognized discretely within income tax expense. We are currently evaluating the effect that the adoption of FIN No. 48 will have on our consolidated results of operations and financial condition but do not expect it to have a material impact.

Inventory Write-Downs

Our net inventory balance was \$61.5 million as of January 26, 2007, compared to \$64.5 million as of April 30, 2006. Inventories are stated at the lower of cost (first-in, first-out basis) or market. We perform an in-depth excess and obsolete analysis of our inventory based upon assumptions about future demand and market conditions. We adjust the inventory value based on estimated excess and obsolete inventories determined primarily by future

demand forecasts. Although we strive for accuracy in our forecasts of future product demand, any significant unanticipated changes in demand or technological developments could have a significant impact on the value of our inventory and commitments, and on our reported results. If actual market conditions are less favorable than those projected, additional write-downs and other charges against earnings may be required. If actual market conditions are more favorable, we may realize higher gross margins in the period when the written-down inventory is sold. During the past few years, our inventory reserves have generally been sufficient to cover excess and obsolete exposure and have not required material changes in subsequent periods.

We record purchase commitment liabilities with our contract manufacturers and suppliers as a result of changes in demand forecasts or as we transition our products. As of January 26, 2007 and April 30, 2006, we did not have purchase commitment liabilities under such arrangements.

We engage in extensive, ongoing product quality programs and processes, including actively monitoring and evaluating the quality of our component suppliers. We also provide for the estimated cost of known product failures based on known quality issues when they arise. Should actual cost of product failure differ from our estimates, revisions to the estimated liability would be required.

We are subject to a variety of federal, state, local, and foreign environmental regulations relating to the use, storage, discharge, and disposal of hazardous chemicals used during our manufacturing process or requiring design changes or recycling of products we manufacture. We will continue to monitor our environmental compliance and could incur higher costs, including additional reserves for excess component inventory.

Restructuring Accruals

In fiscal 2002, as a result of continuing unfavorable economic conditions and a reduction in IT spending rates, we implemented two restructuring plans, which included reductions in our workforce and a consolidation of our facilities. In fiscal 2006, we implemented the third restructuring plan related to the move of our global service center operations. In determining restructuring charges, we analyze our future business requirements in order to properly align and manage our business commensurate with our future revenue levels.

Our restructuring costs, and any resulting accruals, involve significant estimates made by management using the best information available at the time the estimates are made, some of which may be provided by third parties. In recording severance reserves, we accrue a liability when the following conditions have been met: employees' rights to receive compensation are attributable to employees' services already rendered, the obligation relates to rights that vest or accumulate, payment of the compensation is probable, and the amount can be reasonably estimated. In recording the facilities lease restructuring reserve, we make various assumptions, including the time period over which the facilities are expected to be vacant, expected sublease terms, expected sublease rates, anticipated future operating expenses, and expected future use of the facilities.

Our estimates involve a number of risks and uncertainties, some of which are beyond our control, including future real estate market conditions and our ability to successfully enter into subleases or lease termination agreements with terms as favorable as those assumed when arriving at our estimates. We regularly evaluate a number of factors to determine the appropriateness and reasonableness of our restructuring and lease loss accruals, including the various assumptions noted above. If actual results differ significantly from our estimates, we may be required to adjust our restructuring and lease loss accruals in the future. We estimated our facility and severance restructuring reserve to be \$2.2 million as of January 26, 2007. Our fiscal 2006 facility restructuring reserve included a \$1.0 million reduction related to the execution of a new sublease agreement for our Tewksbury facility net of related cost.

Impairment Losses on Investments

As of January 26, 2007, our short-term investments have been classified as "available-for-sale" and are carried at fair value. There have been no significant declines in fair value of investments that are considered to be other-than-temporary for any of the three years in the period ended January 26, 2007. The fair value of our available-for-sale investments reflected in the Consolidated Balance Sheets were \$985.2 million and \$1,102.8 million as of January 26, 2007 and April 30, 2006, respectively. Included in these balances were

short-term and long-term restricted investments of \$124.0 million and \$56.2 million, respectively, as of January 26, 2007, and \$136.7 million and \$104.4 million, respectively, as of April 30, 2006. In addition, our available-for-sale investments also included an investment in a publicly held company of \$9.1 million which was based on quoted market prices on January 26, 2007. We had no investments in publicly held companies as of April 30, 2006. We have not identified any of these declines to be other than temporary, as market declines of our investments have been caused by interest rate changes and were not due to credit worthiness. Because we have the ability and intent to hold these investments until maturity, we would not expect any significant decline in value of our investments caused by market interest rate changes.

All of our available-for-sale investments and non-marketable equity securities are subject to a periodic impairment review. Investments are considered to be impaired when a decline in fair value is judged to be other-than-temporary. This determination requires significant judgment. For publicly traded investments, impairment is determined based upon the specific facts and circumstances present at the time, including factors such as current economic and market conditions, the credit rating of the security's issuer, the length of time an investment's fair value has been below our carrying value, and our ability and intent to hold investments to maturity. If an investment's decline in fair value, caused by factors other than changes in interest rates, is deemed to be other-than-temporary, we would reduce its carrying value to its estimated fair value, as determined based on quoted market prices or liquidation values. For investments in publicly held companies, we recognize an impairment charge when the declines in the fair values of our investments in these companies are below their cost basis are judged to be other-than-temporary. The ultimate value realized on these investments in publicly held companies is subject to market price volatility until they are sold. We have no impairment losses on our available-for-sale investments for the third quarter and first nine months of fiscal 2007 and 2006.

For non-marketable equity securities, the impairment analysis requires the identification of events or circumstances that would likely have a significant adverse effect on the fair value of the investment, including, revenue and earnings trends, overall business prospects, limited capital resources, limited prospects of receiving additional financing, limited prospects for liquidity of the related securities, and general market conditions in the investees' industry. Our investments in privately held companies were \$9.8 million and \$11.0 million as of January 26, 2007 and April 30, 2006, respectively. For the second quarter of fiscal 2007, we recorded an impairment of \$2.0 million for an investment in a privately held company, and subsequently recorded a gain of \$0.7 million in the third quarter of fiscal 2007. We have no impairment losses on our investments in privately held companies for the third quarter and first nine months of fiscal 2006.

Accounting for Stock-Based Compensation

We adopted SFAS No. 123R, *Share-Based Payment*, using the Black-Scholes option pricing model to value our employee stock options. The fair value of each option grant is estimated on the date of grant using the Black-Scholes option pricing model, and is not remeasured as a result of subsequent stock price fluctuations. Option pricing models require the input of highly subjective assumptions, including the expected stock price volatility, expected life, and forfeiture rate. We have chosen to base our estimate of future volatility using the implied volatility of traded options to purchase the Company's common stock as permitted by Staff Accounting Bulletin ("SAB") No. 107. As of May 1, 2006, the contractual life of our stock options has been shortened to seven years from ten years for options issued on or after this date, and to the extent that the shorter life changes employees' exercise behavior, it may change the expected term of an option going forward. SFAS No. 123R requires us to use estimated forfeitures, and therefore the adoption of SFAS No. 123R could have a material impact on the timing of and, based on the accuracy of estimates of future actual forfeitures, the amount of stock-based compensation expense. Any changes in these highly subjective assumptions may significantly impact the stock-based compensation expense for the future. Likewise, the shortening of the contractual life of our options could change the estimated exercise behavior in a manner other than currently expected.

We currently estimate that the impact of adopting SFAS No. 123R on our fiscal year ending April 30, 2007 will be between \$0.33 and \$0.40 per share.

Loss Contingencies

We are subject to the possibility of various loss contingencies arising in the course of business. We consider the likelihood of the loss or impairment of an asset or the incurrence of a liability as well as our ability to reasonably estimate the amount of loss in determining loss contingencies. An estimated loss contingency is accrued when it is probable that a liability has been incurred or an asset has been impaired and the amount of loss can be reasonably estimated. In the third quarter and first nine months of fiscal 2007 and 2006, we did not identify or accrue for any loss contingencies. We regularly evaluate current information available to us to determine whether such accruals should be adjusted.

New Accounting Standards

See Note 14 of the Condensed Consolidated Financial Statements for a full description of recent accounting pronouncements, including the respective expected dates of adoption and effects on results of operations and financial condition.

Results of Operations

The following table sets forth certain consolidated statements of income data as a percentage of total revenues for the periods indicated:

	Three Months Ended		Nine Months Ended	
	January 26, 2007	January 27, 2006	January 26, 2007	January 27, 2006
Revenues:	100.0%	100.0%	100.0%	100.0%
Product	75.5	77.0	74.8	76.4
Software subscriptions	11.7	11.3	12.1	11.7
Service	12.8	11.7	13.1	11.9
Cost of Revenues:				
Cost of product	28.9	30.0	29.2	29.4
Cost of software subscriptions	0.4	0.4	0.4	0.4
Cost of service	9.8	8.7	9.6	8.9
Gross margin	60.9	60.9	60.8	61.3
Operating Expenses:				
Sales and marketing	32.4	28.6	31.7	29.3
Research and development	13.4	12.1	13.8	11.9
General and administrative	5.2	4.7	5.3	4.7
In process research and development	—	—	—	0.3
Restructuring charges (recoveries)	—	—	—	—
Gain on sale of assets	—	—	(1.3)	—
Total operating expenses	51.0	45.4	49.5	46.2
Income from Operations	9.9	15.5	11.3	15.1
Other Income (Expense), net:				
Interest income	2.3	1.8	2.6	1.9
Interest expense	(0.3)	—	(0.6)	—
Other income	0.1	0.2	0.2	—
Net (loss) gain on investments	0.1	—	(0.1)	—
Total other income (expense), net	2.2	2.0	2.1	1.9
Income before Income Taxes	12.1	17.5	13.4	17.0
Provision for Income Taxes	3.0	3.3	3.0	2.9
Net Income	9.1%	14.2%	10.4%	14.1%

Discussion and Analysis of Results of Operations

Total Revenues — Total revenues increased by 35.8% to \$729.3 million for the third quarter of fiscal 2007, from \$537.0 million for the same period in the prior year. Total revenues increased by 36.4% to \$2,003.1 million for the first nine months of fiscal 2007, from \$1,468.5 million for the same period a year ago.

Product Revenues — Product revenues increased by 33.2% to \$550.9 million for the third quarter of fiscal 2007, from \$413.5 million for the same period in the prior year. Product revenues increased by 33.5% to \$1,497.8 million for the first nine months of fiscal 2007, from \$1,122.1 million for the same period a year ago.

Product revenues were impacted by the following factors:

- Increased revenues from our current product portfolio. Product revenue grew \$137.4 million for the third quarter of fiscal 2007 as compared to the same period in the prior year, with a \$147.2 million increase due to

unit volume and partially offset by a decrease of \$11.0 million due to price and configuration on existing products. Product revenue grew \$375.6 million for the first nine months of fiscal 2007 as compared to the same period in the prior year, with a \$394.5 million increase due to unit volume and partially offset by a decrease of \$21.0 million due to price and configuration of existing products. Price changes, volumes, and product model mix can have an effect on changes in product revenues; the impact on these forces is significantly affected by the configuration of systems shipped.

- New products generated \$114.3 million and \$208.1 million in the third quarter and first nine months of fiscal 2007, respectively, primarily driven by FAS6000 series, FAS3070, and the VTL products.
- Units shipped of the FAS3000 enterprise storage systems increased 39.6% and 104.2% for the third quarter and the first nine months of fiscal 2007, respectively, compared to the same periods in the prior fiscal year. The average capacity on revenue units of the FAS3000 series increased 196.7% and 130.4% for the third quarter and the first nine months of fiscal 2007, respectively, compared to the same periods in the prior fiscal year.
- Increased enterprise penetration in primary and secondary storage, i.e., enterprise data centers, data protection, disaster recovery, archival, and compliance requirements contributed to the increase in petabytes shipped. Systems shipped with ATA drives increased to 55.2% of total petabytes shipped in the third quarter of fiscal 2007, from 47.2% in the same quarter a year ago. For the first nine months of fiscal 2007 and 2006, systems shipped with ATA drives accounted for 54.0% and 46.8% of total petabytes shipped, respectively.
- Increase in software revenue from our application management suite, with products like Snap Manager® for Oracle®, Exchange, and SQL Server was also up 45.8% and 29.6% for the third quarter and first nine months of fiscal 2007, respectively, compared to the same period in the prior year, reflecting growth in our primary storage business.
- Increased sales through indirect channels, including sales through our resellers, distributors, and OEM partners, represented 59.6% and 58.2% of total revenues for the third quarter and first nine months of fiscal 2007, respectively, and 56.9% and 56.0% of total revenues for the third quarter and first nine months of fiscal 2006, respectively.
- Our petabytes shipped increased 116.3% year over year to a record 104 petabytes. This increase was driven by an increase in petabytes from 500 gigabyte Advanced Technology Attachment (ATA) drives. ATA drives accounted for 55.2% of our total petabytes shipped, and Fibre Channel petabytes were up 83.4% year over year, to 44.8% of our total shipped.
- Price declines per petabyte for our hardware products as disks are a significant component of our storage systems. As performance has improved on our devices, the related price we can charge per petabyte of storage has decreased as well.
- Revenues for our older products declined by \$90.3 million and \$278.8 million in the third quarter and first nine months of fiscal 2007, respectively, compared to the same periods in the prior year. This decrease in revenue was primarily due to a decline in revenue generated by FAS 900 series systems by 76.3% and 66.7%, respectively, in the third quarter and first nine months of fiscal 2007. NearStore R200 systems revenue decreased by 71.7% and 55.7%, respectively, in the third quarter and first nine months of fiscal 2007. In addition, revenue also declined by \$0.9 million and \$6.8 million, respectively, in the third quarter and first nine months of fiscal 2007 compared to the same periods in the prior year due to products that we no longer ship, including our NetCache products.

Our systems are highly configurable to respond to customer requirements in the open systems storage markets that we serve. As a result, the wide variation in customized configuration can significantly impact revenue, cost of revenues, and gross margin performance. Price changes, volumes, and product model mix can have an effect on changes in product revenues; the impact on these forces is significantly affected by the configuration of systems shipped.

While revenues generated from IBM and Decru® accounted for 5.9% and 1.3% of total revenue, respectively, for the third quarter of fiscal 2007, and 4.0% and 1.9% of total revenue, respectively, for the first nine months of fiscal 2007, we cannot assure you that IBM and Decru will continue to contribute meaningful revenue in future quarters. We also cannot assure you that we will be able to maintain or increase market demand for our products.

Software Subscriptions Revenues — Software subscriptions revenues increased by 39.9% to \$85.0 million for the third quarter of fiscal 2007, from \$60.7 million for the same period a year ago, due primarily to a larger installed base of customers who have purchased rights to renewals and upgrades, and an increased number of new enterprise customers. Software subscriptions revenues increased by 41.1% to \$242.1 million for the first nine months of fiscal 2007, from \$171.5 million for the same period a year ago, also due primarily to a larger installed base of customers who have purchased rights to renewals and upgrades, and an increased number of new enterprise customers. Software subscriptions revenues represented 11.7% and 12.1% of total revenues for the third quarter and first nine months of fiscal 2007, and 11.3% and 11.7% of total revenues for third quarter and first nine months of fiscal 2006.

Service Revenues — Service revenues, which include hardware support, professional services, and educational services, increased by 48.8% to \$93.4 million for the third quarter of fiscal 2007, from \$62.8 million in the same period a year ago. Service revenues increased by 50.6% to \$263.3 million for the first nine months of fiscal 2007, from \$174.9 million in the same period a year ago.

The increase in absolute dollars was due to the following factors:

- Professional service revenue increased by 51.6% and 52.3% in the third quarter and the first nine months of fiscal 2007 compared to the same period a year ago, due to an increasing number of enterprise customers, which typically purchase more complete and generally longer-term service packages than our non-enterprise customers.
- Service maintenance contracts increased by 47.7% and 50.1% in the third quarter and the first nine months of fiscal 2007, respectively, compared to the same periods a year ago due to a growing installed base resulted in new customer support contracts in addition to support contract renewals by existing customers.

While it is an element of our strategy to expand and offer more comprehensive global enterprise support and service solutions, we cannot assure you that service revenue will grow at the current rate in the remainder of fiscal 2007 or beyond.

A large portion of our service revenues is initially deferred and, in most cases, recognized ratably over the service obligation periods, which are typically one to three years. Service revenues represented 12.8% and 13.1% of total revenues for the third quarter and first nine months of fiscal 2007, respectively, and 11.7% and 11.9% of total revenues for the third quarter and first nine months of fiscal 2006, respectively.

International total revenues — International total revenues (including United States exports) increased by 42.2% and 41.8% for the third quarter and first nine months of fiscal 2007, respectively, as compared to the same periods in fiscal 2006. Total revenues from Europe were \$256.1 million and \$642.4 million, or 35.1% and 32.1% of total revenues, respectively, for the third quarter and first nine months of fiscal 2007, compared to \$177.3 million and \$444.6, or 33.0% and 30.3% of total revenues, for the third quarter and first nine months of fiscal 2006. Total revenues from Asia were \$83.9 million and \$230.0 million, or 11.5% and 11.5% of total revenues, respectively, for the third quarter and first nine months of fiscal 2007, compared to \$61.8 million and \$170.5 million, or 11.5% and 11.6% of total revenues, respectively, for the same periods a year ago. The increase in international sales was primarily driven by the same factors outlined under the Total Revenue discussion, as compared to the same periods in the prior fiscal year. We cannot assure you that we will be able to maintain or increase international revenues in the remainder of fiscal 2007 or beyond.

Product Gross Margin — Product gross margin increased to 61.7% for the third quarter of fiscal 2007, from 61.0% for the same period a year ago. Product gross margin decreased to 60.9% for the first nine months of fiscal 2007, from 61.5% for the same period a year ago.

Product gross margin was impacted by:

- SFAS 123R stock compensation expenses recorded in fiscal 2007

[Table of Contents](#)

- Sales price reductions due to competitive pricing pressure
- Increased sales through certain indirect channels, which generate lower gross margins than our direct sales in certain geographic regions
- Higher disk content with an expanded storage capacity for the higher-end storage systems, as resale of disk drives generates lower gross margin
- Favorable add-on software mix with software licenses increasing by 38.9% and 38.4% in the third quarter and first nine months of fiscal 2007 compared to the same periods a year ago
- Better disk utilization rates associated with sales of higher-margin management software products like FlexClone™ and FlexVol™ that run on the Data ONTAP® 7G operating system allowing customers to buy less disk storage

We expect that higher disk content associated with high-end and mid-range storage systems will negatively affect our gross margin in the future if not offset by increases in software revenue and new higher-margin products.

Stock-based compensation expense included in cost of product revenues was \$0.9 million and \$2.7 million for the third quarter and first nine months of fiscal 2007. Amortization of existing technology included in cost of product revenues was \$4.6 million and \$12.3 million for the third quarter and first nine months of fiscal 2007, respectively, and \$3.9 million and \$7.9 million for the third quarter and first nine months of fiscal 2006, respectively. Estimated future amortization of existing technology to cost of product revenues will be \$5.3 million for the remainder of fiscal 2007, \$21.1 million for fiscal year 2008, \$20.4 million for fiscal year 2009, \$15.9 million for fiscal year 2010, \$6.3 million for fiscal year 2011, and none thereafter.

Software Subscriptions Gross Margin — Software subscriptions gross margins increased slightly to 96.8% for the third quarter of fiscal 2007, from 96.5% for the same period a year ago. Software subscriptions gross margins increased slightly to 96.9% for the first nine months of fiscal 2007, from 96.4% for the same period a year ago.

Service Gross Margin — Service gross margin decreased to 23.7% for the third quarter of fiscal 2007 as compared to 25.9% for the same period in fiscal 2006. Service gross margin increased to 27.2% for the first nine months of fiscal 2007 as compared to 25.3% for the same period in fiscal 2006. Cost of service revenue increased by 53.2% to \$71.2 million for the third quarter of fiscal 2007 from \$46.5 million for the same period a year ago. Cost of service revenue increased by 46.9% to \$191.7 million for the first nine months of fiscal 2007 from \$130.5 million for the same period a year ago. Stock-based compensation expense of \$2.5 million and \$7.6 million was included in the cost of service revenue for the third quarter and first nine months of fiscal 2007, respectively.

The change in service gross margin year over year was primarily impacted by an increase in services revenue, improved headcount utilization, and continued spending in our service infrastructure to support our increasing enterprise customer base. This spending included additional professional support engineers, increased support center activities, and global service partnership programs. Service gross margin will typically be impacted by factors such as timing of technical support service initiations and renewals and additional investments in our customer support infrastructure. In fiscal 2007, we expect service margin to experience some variability over time as we continue to build out our service capability and capacity to support our growing enterprise customers and new products.

Sales and Marketing — Sales and marketing expenses consist primarily of salaries, commissions, advertising and promotional expenses, stock-based compensation expense, and certain customer service and support costs. Sales and marketing expenses increased 54.2% to \$236.4 million for the third quarter of fiscal 2007, from \$153.3 million for the same period a year ago. These expenses were 32.4% and 28.6% of total revenues for the third quarter of fiscal 2007 and fiscal 2006, respectively. Sales and marketing expenses increased 47.8% to \$636.2 million for the first nine months of fiscal 2007, from \$430.4 million for the same period a year ago. These expenses were 31.7% and 29.3% of total revenues for the first nine months of fiscal 2007 and 2006, respectively. The increase in absolute dollars was attributed to increased commission expenses resulting from increased revenues, higher performance-based payroll expenses due to higher profitability, higher partner program expenses, the continued worldwide investment in our sales and global service organizations associated with selling complete enterprise solutions, and stock-based compensation expense expenses recognized under adoption of SFAS No. 123R.

Stock-based compensation expense included in sales and marketing expenses for the third quarter and first nine months of fiscal 2007 was \$17.3 million and \$54.7 million. Compensation expenses related to stock options and restricted stock assumed in acquisitions was \$1.3 million and \$2.9 million for the third quarter and first nine months of fiscal 2006. Amortization of trademarks/tradenames and customer contracts/relationships included in sales and marketing expenses was \$0.8 million and \$0.7 million for the third quarter of fiscal 2007 and 2006, respectively, and was \$2.0 million and \$1.4 million for the first nine months of fiscal 2007 and 2006, respectively. Based on identified intangibles related to our acquisitions recorded at January 26, 2007, estimated future amortization such as trademarks, and customer relationships included in sales and marketing expenses will be \$1.0 million for the remainder of fiscal 2007, \$3.9 million for fiscal 2008, \$3.8 million for fiscal 2009, \$3.7 million for fiscal 2010, \$2.7 million for fiscal 2011, and \$2.5 million thereafter.

We expect to continue to selectively add sales capacity in an effort to expand domestic and international markets, introduce new products, establish and expand new distribution channels. We expect to increase our sales and marketing expenses commensurate with future revenue growth.

Research and Development — Research and development expenses consist primarily of salaries and benefits, stock-based compensation, prototype expenses, nonrecurring engineering charges, fees paid to outside consultants, and amortization of capitalized patents.

Research and development expenses increased 49.8% to \$97.5 million for the third quarter of fiscal 2007, from \$65.1 million for the same period in fiscal 2006. These expenses represented 13.4% and 12.1% of total revenues for the third quarters of fiscal 2007 and 2006, respectively. Research and development expenses increased 57.7% to \$276.6 million for the first nine months of fiscal 2007, from \$175.4 million for the same period in fiscal 2006. These expenses represented 13.8% and 11.9% of total revenues for the first nine months of fiscal 2007 and 2006, respectively. The increase in research and development expenses was primarily a result of increased headcount, ongoing operating impact of the acquisitions, ongoing support of current and future product development and enhancement efforts, higher performance-based payroll expenses due to higher profitability, and stock-based compensation expense recognized under adoption of SFAS No. 123R. For both the third quarter and first nine months of fiscal 2007 and 2006, no software development costs were capitalized.

Stock-based compensation expense included in research and development expenses for the third quarter and first nine months of fiscal 2007 was \$12.3 million and \$39.2 million. Compensation expenses related to stock option and restricted stock assumed in acquisitions was \$2.5 million and \$5.9 million for the third quarter and first nine months of fiscal 2006. Included in research and development expenses is capitalized patents amortization of \$0.5 million and \$1.5 million for the third quarter and first nine months of fiscal 2007, respectively, as compared to \$0.5 million and \$1.5 million for the third quarter and first nine months of fiscal 2006. Based on capitalized patents recorded at January 26, 2007, estimated future capitalized patents amortization expenses for the remainder of fiscal 2007 will be \$0.5 million, \$2.0 million for fiscal year 2008, \$0.5 million in fiscal 2009, \$0.2 million in fiscal 2010, and none thereafter.

We believe that our future performance will depend in large part on our ability to maintain and enhance our current product line, develop new products that achieve market acceptance, maintain technological competitiveness, and meet an expanding range of customer requirements. We expect to continuously support current and future product development and enhancement efforts, and to incur prototyping expenses and nonrecurring engineering charges associated with the development of new products and technologies. We intend to continuously broaden our existing product offerings and to introduce new products that expand our solutions portfolio.

We believe that our research and development expenses will increase in absolute dollars for the remainder of fiscal 2007, primarily due to ongoing costs associated with the development of new products and technologies, projected headcount growth, and the operating impact of potential future acquisitions.

General and Administrative — General and administrative expenses increased 50.8% to \$37.7 million for the third quarter of fiscal 2007, from \$25.0 million for the same period a year ago. These expenses represented 5.2% and 4.7% of total revenues for the third quarter of fiscal 2007 and 2006, respectively. General and administrative expenses increased 54.9% to \$105.3 million for the first nine months of fiscal 2007, from \$68.0 million for the same period a year ago. These expenses represented 5.3% and 4.7% of total revenues for the first nine months of fiscal

2007 and 2006, respectively. This increase in absolute dollars was primarily due to higher performance-based payroll expenses due to higher profitability and higher headcount growth, higher stock-based compensation expense recognized under SFAS No. 123R, and higher legal expenses and professional fees for general corporate matters.

We believe that our general and administrative expenses will increase in absolute dollars for the remainder of fiscal 2007 due to projected general and administrative headcount growth. Stock-based compensation expense included in general and administrative expenses for the third quarter and first nine months of fiscal 2007 was \$6.2 million and \$20.5 million, respectively. Compensation expenses related to stock options and restricted stock assumed in acquisitions were \$0.3 million and \$0.7 million, respectively, for the third quarter and first nine months of fiscal 2006. Amortization of covenants not to compete included in general and administrative expenses was \$0.2 million and \$0.7 million for the third quarter and first nine months of fiscal 2007, respectively, as compared to \$0.2 million and \$2.0 million for the same periods a year ago. Based on identified intangibles related to our acquisitions recorded at January 26, 2007, estimated future amortization of covenants not to compete relating to our acquisitions will be \$0.2 million in the remainder of fiscal 2007, \$0.2 million for fiscal year 2008, and none thereafter.

Restructuring Charges — In fiscal 2002, as a result of continuing unfavorable economic conditions and a reduction in information technology (IT) spending rates, we implemented two restructuring plans, which included reductions in our workforce and consolidations of our facilities. As of January 26, 2007, we have no outstanding balance in our restructuring liability for the first restructuring. The second restructuring related to the closure of an engineering facility and consolidation of resources to the Sunnyvale headquarters. In fiscal 2006, we implemented a third restructuring plan related to the move of our global services center operations from Sunnyvale to our new flagship support center at our Research Triangle Park facility in North Carolina.

Our restructuring estimates are reviewed and revised periodically and may result in a substantial charge or reduction to restructuring expense should different conditions prevail than were anticipated in previous management estimates. Such estimates included various assumptions such as the time period over which the facilities will be vacant, expected sublease terms, and expected sublease rates. During the third quarter of fiscal 2007, we did not record any reduction in restructuring reserve resulting from change in estimate of our third restructuring plan.

Of the reserve balance at January 26, 2007, \$0.5 million was included in other accrued liabilities and the remaining \$1.7 million was classified as long-term obligations. The balance of the reserve is expected to be paid by fiscal 2011.

The following analysis sets forth the changes in the restructuring reserve for each quarter of the three quarters in fiscal 2007 (in thousands):

	<u>Facility Accrual</u>	<u>Severance-Related</u>	<u>Total</u>
Reserve balance at April 30, 2005	\$ 4,503	\$ —	\$ 4,503
Restructuring charges	281	859	1,140
Adjustments	(1,256)	—	(1,256)
Cash payments	(862)	(521)	(1,383)
Reserve balance at April 30, 2006	\$ 2,666	\$ 338	\$ 3,004
Restructuring recoveries	—	(74)	(74)
Cash payments	(149)	(82)	(231)
Reserve balance at July 28, 2006	\$ 2,517	\$ 182	\$ 2,699
Cash payments	(143)	(182)	(325)
Reserve balance at October 27, 2006	\$ 2,374	\$ —	\$ 2,374
Cash payments	(143)	—	(143)
Reserve balance at January 26, 2007	<u>\$ 2,231</u>	<u>\$ —</u>	<u>\$ 2,231</u>

Gain on sale of assets — We recorded a gain of \$25.3 million for the first nine months in fiscal 2007 as a result of the sale of certain assets to Blue Coat (see Note 12 of the Condensed Consolidated Financial Statements).

Interest Income — Interest income was \$17.1 million and \$51.2 million for the third quarter and first nine months of fiscal 2007, respectively, as compared to \$9.9 million and \$28.6 million for the same periods a year ago. The increase in interest income was primarily driven by higher average interest rates on our investment portfolio. We expect interest income to increase compared to fiscal 2006 as a result of our cash and invested balances being reinvested in a higher interest-rate portfolio environment.

Interest Expense — Interest expense was \$2.3 million and \$11.4 million for the third quarter and first nine months of fiscal 2007, respectively, as compared to minimal interest expenses for the same periods a year ago. The increase in fiscal 2007 was primarily due to interest incurred in connection with our debt.

Other Income — Other income was \$0.5 million and \$3.2 million, respectively, for the third quarter and first nine months of fiscal 2007. Other income for the third quarter of fiscal 2007 included net exchange gains from foreign currency of \$0.5 million. Other income for the first nine months of fiscal 2007 included net exchange gains from foreign currency of \$1.3 million and other income of \$1.9 million. Other income included net exchange gains from foreign currency of \$1.0 million and \$0.4 million for the third quarter and first nine months of fiscal 2006. We believe that period-to-period changes in foreign exchange gains or losses will continue to be impacted by hedging costs associated with our forward and option activities and forecast variance.

Net Gain (Loss) on Investments — Net gain (loss) on investments included a write-down of \$1.1 million related to the impairment of our investment in a privately held company for the first nine months of fiscal 2007.

Provision for Income Taxes — For the third quarter and first nine months of fiscal 2007, we applied an annual effective tax rate of 24.9% and 22.3%, respectively, to pretax income versus 19.0% and 17.3%, respectively, for the comparable periods in the prior year. The increase to the effective tax rate for fiscal year 2007 is primarily attributable to the impact of SFAS No. 123R, which results in recording non-deductible compensation expense for certain of our stock option grants. Our estimate of the effective tax rate is based on the application of existing tax laws to current projections of our annual consolidated income, including projections of the mix of income (loss) earned among our entities and tax jurisdictions in which they operate.

The 2006 Tax Relief and Health Care Act was signed into law on December 20, 2006. One of the provisions of this law was the retroactive reinstatement of the research credit from January 1, 2006 and its extension through December 31, 2007. The effective tax rates for the third quarter and first nine months of fiscal 2007 reflected the benefits attributable to the extension of the research tax credit provisions.

Liquidity and Capital Resources

The following sections discuss the effects of changes in our balance sheet and cash flow, contractual obligations and other commercial commitments, stock repurchase program, capital commitments, and other sources and uses of cash flow on our liquidity and capital resources.

Balance Sheet and Operating Cash Flows

As of January 26, 2007, as compared to April 30, 2006, our cash, cash equivalents, and short-term investments decreased by \$27.6 million to \$1,295.3 million. We derive our liquidity and capital resources primarily from our cash flow from operations and from working capital. Working capital decreased by \$155.6 million to \$960.4 million as of January 26, 2007, compared to \$1,116.0 million as of April 30, 2006.

During the first nine months of fiscal 2007, we generated cash flows from operating activities of \$653.7 million, as compared with \$382.4 million in the same period in fiscal 2006. We recorded net income of \$208.1 million for the first nine months of fiscal 2007, as compared to \$207.2 million for the same period a year ago. A summary of the significant changes in noncash adjustments affecting net income is as follows:

- Stock-based compensation expense was \$124.7 million in the first nine months of fiscal 2007, compared to \$9.4 million in the same period a year ago. The increase was attributed to the adoption of SFAS No. 123R.

[Table of Contents](#)

- Depreciation expense was \$62.3 million and \$46.2 million in the first nine months of fiscal 2007 and 2006, respectively. The increase was due to continued capital expansion to meet our business growth.
- Amortization of intangibles was \$15.0 million and \$11.3 million in the first nine months of fiscal 2007 and 2006, respectively. The increase was attributed to the Decru and Topio acquisition.
- Gain on sale of certain assets to Blue Coat was \$25.3 million in the first nine months of fiscal 2007.
- Excess tax benefits of \$43.5 million relating to stock-based compensation upon the exercise of stock options.

In addition to net income and noncash adjustments for the first nine months of fiscal 2007, the primary factors that impacted the period-to-period change in cash flows relating to operating activities included the following:

- An increase in deferred revenues of \$263.4 million in the first nine months of fiscal 2007, due to higher software subscription and service billings attributable to the increase in larger enterprise customers, as well as renewals of existing maintenance agreements in the third quarter of fiscal 2007. The increase in deferred revenue of \$144.7 million in the first nine months of fiscal 2006 was due to higher software subscription and service billings resulting from increased enterprise penetration.
- Accrued compensation and related benefits increased by \$16.9 million in the first nine months of fiscal 2007 and increased by \$13.0 million in the same period in fiscal 2006, reflecting the timing of payroll accruals and payment.
- Increase in income taxes payable of \$31.5 million in the first nine months of fiscal 2007 was attributed to the tax provision of \$59.6 million, which was offset by a \$2.0 million tax refund and \$30.3 million of income tax payments made for fiscal year 2006, of which \$19.6 million was related to income tax on the foreign dividend repatriation. Income tax payable increased \$39.6 million in the first nine months of fiscal 2006, primarily due to tax provision of \$43.2 million, partially offset by tax payments of \$5.6 million.
- Net inventory decreased \$3.5 million for the first nine months of fiscal 2007, primarily due to higher inventory at fiscal 2006 year end associated with the new FAS 6000 launch. The increase of \$38.4 million in the first nine months of fiscal 2006 was due primarily to ramping up of purchased components in anticipation of revenue growth.

The above factors were partially offset by the effects of:

- Increase in accounts receivable of \$23.0 million in the first nine months of fiscal 2007 was due to higher revenue volume. Increase in accounts receivable of \$70.2 million in the first nine months of fiscal 2006 was due primarily to less linear shipments in the third quarter of fiscal 2006.

We expect that cash provided by operating activities may fluctuate in future periods as a result of a number of factors, including fluctuations in our operating results, shipment linearity, accounts receivable collections, inventory management, and the timing of tax and other payments.

Cash Flows from Investing Activities

Capital expenditures for the first nine months of fiscal 2007 were \$112.4 million as compared to \$96.5 million for the same period a year ago. We received net proceeds of \$69.5 million and \$21.2 million in the first nine months of fiscal 2007 and 2006, respectively, for net purchases/redemptions of short-term investments. We redeemed \$63.2 million of restricted investment and its interest income pledged with JP Morgan Chase to repay the Tranche A term loan with JP Morgan Chase. (See Note 5.) Investing activities in the first nine months of fiscal 2007 also included new investments in privately held companies of \$1.3 million. In the third quarter of fiscal 2007, we acquired Topio, Inc. for a purchase price of approximately \$146.4 million, which consisted the value of the assumed options, cash payments of \$131.2 million, and related transaction costs. In the first nine months of fiscal 2007, we received \$1.8 million from the sale of investments in privately held companies. In the second quarter of fiscal 2007, we received \$23.9 million in cash in connection with the sale of certain assets to Blue Coat. In the first quarter of fiscal 2006, we acquired Alacritus for a purchase price of approximately \$13.7 million, which consisted the value of the assumed options, cash payments of \$11.0 million, and related transaction costs. In the second quarter of fiscal

2006, we acquired Decru for a purchase price of approximately \$283.2 million, which consisted the value of the assumed options, net cash payments of \$41.2 million, and related transaction costs.

Cash Flows from Financing Activities

We used \$538.4 million and \$249.2 million in the first nine months of fiscal 2007 and 2006, respectively, from net financing activities, which included repayment of debt, sales of common stock related to employee stock transactions, and common stock repurchases. We made a repayment of \$148.9 million for our debt during the first nine months of fiscal 2007. We repurchased 17.0 million and 14.6 million shares of common stock at a total of \$605.7 million and \$390.1 million during the first nine months of fiscal 2007 and 2006, respectively. Other financing activities provided \$177.4 million and \$141.7 million in the first nine months of fiscal 2007 and 2006, respectively, from sales of common stock related to employee stock option exercises and employee stock purchases. Tax benefits, related to tax deductions in excess of the stock-based compensation expense recognized, of \$43.5 million were presented as financing cash flows for the first nine months of fiscal 2007 in accordance with SFAS No. 123R. During the first nine months of fiscal 2007 and 2006, we withheld \$4.7 million and \$0.8 million in shares, respectively, from certain employees' exercised shares of their restricted stock to reimburse for federal, state, and local withholding taxes obligations. The increase in the amounts withheld year over year was due to the release of Decru's assumed restricted stock units.

The change in cash flow from financing was primarily due to the effects of higher common stock repurchases partially offset by proceeds from the issuance of common stock under employee equity programs compared to the same period in the prior year. Net proceeds from the issuance of common stock related to employee participation in employee stock programs have historically been a significant component of our liquidity. The extent to which our employees participate in these programs generally increases or decreases based upon changes in the market price of our common stock. As a result, our cash flow resulting from the issuance of common stock related to employee participation in employee stock programs will vary.

Other Factors Affecting Liquidity and Capital Resources

The American Jobs Creation Act of 2004 ("the Jobs Act") created a one-time incentive for U.S. corporations to repatriate accumulated income earned abroad by providing an 85% dividend-received deduction for certain dividends from certain non-U.S. subsidiaries. Primarily as a result of this one time repatriation incentive, we remitted \$19.6 million of income taxes with the filing of our fiscal year 2006 federal income tax return, of which \$18.7 million was paid during the first quarter of fiscal year 2007 and the remaining \$0.9 million was paid in the third quarter of fiscal 2007.

For the first nine months of fiscal 2007 and 2006, the income tax benefit associated with dispositions of employee stock transactions was \$92.6 million and \$22.3 million, respectively. Of the \$92.6 million, \$65.8 million relates to tax benefits generated from stock option exercises during the first nine months of fiscal 2007 while the remaining \$26.8 million relates to a reduction of accrued income taxes payable due to the utilization of net operating loss carryovers generated from stock options in prior years. If stock option exercise patterns change, we may receive less cash from stock option exercises and may not receive the same level of tax benefits in the future, which could cause our cash payments for income taxes to increase.

Stock Repurchase Program

On November 15, 2006, our Board approved a new stock repurchase program in which up to \$800 million of additional shares may be purchased.

At January 26, 2007, \$599.9 million remained available for future repurchases. The stock repurchase program may be suspended or discontinued at any time.

Debt

In March 2006, we received proceeds from a term loan totaling \$300.0 million to finance a foreign dividend repatriation under the Jobs Act. (See Note 5 of the Condensed Consolidated Financial Statements.) The loan

[Table of Contents](#)

repayments of \$63.9 million and \$87.3 million are due in the remainder of fiscal 2007 and fiscal 2008. This debt was collateralized by restricted investments totaling \$180.2 million as of January 26, 2007. In accordance with the payment terms of the loan agreement, interest payments will be approximately \$1.6 million and \$2.8 million in the remainder of fiscal 2007 and fiscal 2008, respectively. As of January 26, 2007, we were in compliance with the liquidity and leverage ratio as required by the Loan Agreement with the lenders.

Contractual Cash Obligations and Other Commercial Commitments

The following summarizes our contractual cash obligations and commercial commitments at January 26, 2007, and the effect such obligations are expected to have on our liquidity and cash flow in future periods, (in thousands):

Contractual Obligations:	Remainder of						Total
	2007	2008	2009	2010	2011	Thereafter	
Office operating lease payments(1)	\$ 4,538	\$ 19,650	\$19,138	\$16,250	\$13,606	\$ 36,387	\$109,569
Real estate lease payments(2)	—	1,482	4,726	5,978	5,978	99,700	117,864
Equipment operating lease payments(3)	2,767	8,916	6,216	1,046	7	3	18,955
Venture capital funding commitments(4)	431	338	325	313	300	25	1,732
Capital expenditures(5)	3,990	256	—	—	—	—	4,246
Communications and maintenance(6)	6,012	15,635	10,697	4,128	223	3	36,698
Restructuring charges(7)	275	579	604	594	179	—	2,231
Debt(8)	65,496	90,110	—	—	—	—	155,606
Total Contractual Cash Obligations	\$ 83,509	\$136,966	\$41,706	\$28,309	\$20,293	\$136,118	\$446,901

For purposes of the above table, contractual obligations for the purchase of goods and services are defined as agreements that are enforceable, legally binding on us, and subject us to penalties if we cancel the agreement. Some of the figures we include in this table are based on management's estimates and assumptions about these obligations, including their duration, the possibility of renewal or termination, anticipated actions by management and third parties, and other factors. Because these estimates and assumptions are necessarily subjective, the enforceable and legally binding obligations we will actually pay in future periods may vary from those reflected in the table.

Other Commercial Commitments:	Remainder of						Total
	2007	2008	2009	2010	2011	Thereafter	
Lines of Credit(9)	\$ 450	\$1,583	\$—	\$—	\$—	\$ 362	\$2,395

- (1) We enter into operating leases in the normal course of business. We lease sales offices, research and development facilities, and other property and equipment under operating leases throughout the U.S. and internationally, which expire through fiscal year 2016. Substantially all lease agreements have fixed payment terms based on the passage of time and contain escalation clauses. Some lease agreements provide us with the option to renew the lease or to terminate the lease. Our future operating lease obligations would change if we were to exercise these options and if we were to enter into additional operating lease agreements. Facilities operating lease payments exclude the leases impacted by the restructurings. The amounts for the leases impacted by the restructurings are included in subparagraph (6) below. The net increase in the office operating lease payments was primarily due to a domestic lease extension and two new European leases during the third quarter of fiscal 2007.
- (2) Included in the above contractual cash obligations pursuant to two financing arrangements with BNP Paribas LLC ("BNP") are (a) lease commitments of \$1.5 million in fiscal 2008; \$4.7 million in fiscal 2009, \$6.0 million

in each of the fiscal years 2010, 2011, and 2012, \$4.5 million in fiscal 2013; and \$1.3 million in fiscal 2014, which are based on the LIBOR rate at January 26, 2007 for a term of five years, and (b) at the expiration or termination of the lease, a supplemental payment obligation equal to our minimum guarantee of \$88.0 million in the event that we elect not to purchase or arrange for sale of the buildings, see Note 15.

- (3) Equipment operating leases include servers and IT equipment used in our engineering labs and data centers.
- (4) Venture capital funding commitments include a quarterly committed management fee based on a percentage of our committed funding to be payable through June 2011.
- (5) Capital expenditures include worldwide contractual commitments to purchase equipment and to construct building and leasehold improvements, which will be recorded as Property and Equipment.
- (6) We are required to pay based on a minimum volume under certain communication contracts with major telecommunication companies as well as maintenance contracts with multiple vendors. Such obligations expire in April 2010.
- (7) These amounts are included on our Consolidated Balance Sheets under Long-term Obligations and Other Accrued Liabilities, which is comprised of committed lease payments and operating expenses net of committed and estimated sublease income.
- (8) Included in these amounts are the JP Morgan Chase loan (see Note 5) on our Consolidated Balance Sheets under Current Portion of Long-Term Debt and Long-Term Debt. This amount also includes estimated interest payments of \$1.6 million for the remainder of fiscal 2007 and \$2.8 million for fiscal 2008. The decrease from April 30, 2006 represented a loan repayment of \$148.9 million, plus interest of \$8.8 million for the first nine months of fiscal 2007.
- (9) The amounts outstanding under these letters of credit relate to workers' compensation, a customs guarantee, a corporate credit card program, and a foreign rent guarantee.

On December 16, 2005, we entered into financing, construction, and leasing arrangements with BNP for office space to be located on land currently owned by us in Sunnyvale, California. These arrangements require us to lease our land to BNP for a period of 50 years to construct approximately 190,000 square feet of office space costing up to \$38.5 million. After completion of construction, we will pay minimum lease payments, which vary based on London Interbank Offered Rate ("LIBOR") plus a spread (5.78% at January 26, 2007) on the cost of the facilities. We expect to begin making lease payments on the completed buildings in September 2007 for a term of five years. We have the option to renew the lease for two consecutive five-year periods upon approval by BNP. Upon expiration (or upon any earlier termination) of the lease term, we must elect one of the following options: We may (i) purchase the building from BNP for \$38.5 million, (ii) if certain conditions are met, arrange for the sale of the building by BNP to a third party for an amount equal to at least \$32.7 million, and be liable for any deficiency between the net proceeds received from the third party and \$32.7 million, or (iii) pay BNP a supplemental payment of \$32.7 million, in which event we may recoup some or all of such payment by arranging for a sale of the building by BNP during the ensuing two-year period.

On December 14, 2006, we entered into additional financing, construction, and leasing arrangements with BNP for office space to be located on land currently owned by us in Sunnyvale, California. These arrangements require us to lease our land to BNP for a period of 50 years to construct approximately 190,000 square feet of office space and parking structure costing up to \$65.0 million. After completion of construction, we will pay minimum lease payments, which vary based on LIBOR plus a spread (5.78% at January 26, 2007) on the cost of the facilities. We expect to begin making lease payments on the completed buildings in September 2008 for a term of five years. We have the option to renew the lease for two consecutive five-year periods upon approval by BNP. Upon expiration (or upon any earlier termination) of the lease term, we must elect one of the following options: We may (i) purchase the building from BNP for \$65.0 million, (ii) if certain conditions are met, arrange for the sale of the building by BNP to a third party for an amount equal to at least \$55.3 million, and be liable for any deficiency between the net proceeds received from the third party and \$55.3 million, or (iii) pay BNP a supplemental payment of \$55.3 million, in which event we may recoup some or all of such payment by arranging for a sale of the building by BNP during the ensuing two-year period.

Both leases also require us to maintain specified financial covenants with which we were in compliance as of January 26, 2007. Such specified financial covenants include a maximum ratio of Total Debt to Earnings Before

Interest, Taxes, Depreciation and Amortization ("EBITDA"), and a Minimum Unencumbered Cash and Short Term Investments.

As of January 26, 2007, the notional fair value of our foreign exchange forward and foreign currency option contracts totaled \$387.3 million. We do not believe that these derivatives present significant credit risks, because the counterparties to the derivatives consist of major financial institutions, and we manage the notional amount of contracts entered into with any one counterparty. We do not enter into derivative financial instruments for speculative or trading purposes. Other than the risk associated with the financial condition of the counterparties, our maximum exposure related to foreign currency forward and option contracts is limited to the premiums paid on purchased options only.

During the second quarter of fiscal 2007, two shareholder derivative lawsuits were filed against various of our officers and directors and naming us as a nominal defendant. The suits allege improper practices relating to the timing of stock option grants. Management believes that the claims are without merit and intends to defend the actions vigorously.

In addition, we are subject to various legal proceedings and claims which may arise in the normal course of business. While the outcome of these legal matters is currently not determinable, we do not believe that any current litigation or claims will have a material adverse effect on our business, cash flow, operating results, or financial condition.

Capital Expenditure Requirements

We expect capital expenditures to increase in the future consistent with the growth in our business, as we continue to invest in people, land, buildings, capital equipment, and enhancements to our worldwide infrastructure. We expect that our existing facilities and those being developed in Sunnyvale, California, Research Triangle Park ("RTP"), North Carolina, and worldwide are adequate for our requirements over at least the next two years and that additional space will be available as needed. We expect to finance all our construction projects, including our contractual commitments, operating leases, and any required capital expenditures over the next few years through cash from operations and existing cash and investments.

Off-Balance Sheet Arrangements

As of January 26, 2007, our financial guarantees of \$2.4 million that were not recorded on our balance sheet consisted of standby letters of credit related to workers' compensation, a customs guarantee, a corporate credit card program, and a foreign rent guarantee.

As of January 26, 2007, the notional fair value of our foreign exchange forward and foreign currency option contracts totaled \$387.3 million. We do not believe that these derivatives present significant credit risks, because the counterparties to the derivatives consist of major financial institutions, and we manage the notional amount of contracts entered into with any one counterparty. We do not enter into derivative financial instruments for speculative or trading purposes. Other than the risk associated with the financial condition of the counterparties, our maximum exposure related to foreign currency forward and option contracts is limited to the premiums paid.

We have entered into indemnification agreements with third parties in the ordinary course of business. Generally, these indemnification agreements require us to reimburse losses suffered by the third party due to various events, such as lawsuits arising from patent or copyright infringement. These indemnification obligations are considered off-balance sheet arrangements in accordance with FASB Interpretation 45, of FIN No. 45, "*Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others.*"

We have commitments related to two lease arrangements with BNP for approximately 380,000 square feet of office space to be located on land currently owned by us in Sunnyvale, California (as further described above under

“Contractual Cash Obligations and Other Commercial Commitments”). We have evaluated our accounting for these leases under the provisions of FIN No. 46R, and have determined the following:

- BNP is a leasing company for BNP Paribas in the U.S. BNP is not a “special purpose entity” organized for the sole purpose of facilitating the lease to us. The obligation to absorb expected losses and receive expected residual returns rests with the parent BNP Paribas. Therefore, we are not the primary beneficiary of BNP as we do not absorb the majority of BNP’s expected losses or expected residual returns; and
- BNP has represented in the Closing Agreement (filed as Exhibit 10.40) that the fair value of the property leased to us by BNP is less than half of the total of the fair values of all assets of BNP, excluding any assets of BNP held within a silo. Further, the property leased to Network Appliance is not held within a silo. The definition of “held within a silo” means that BNP has obtained funds equal to or in excess of 95% of the fair value of the leased asset to acquire or maintain its investment in such asset through non-recourse financing or other contractual arrangements, the effect of which is to leave such asset (or proceeds thereof) as the only significant asset of BNP at risk for the repayment of such funds.

Accordingly, under the current FIN No. 46R standard, we are not required to consolidate either the leasing entity or the specific assets that we lease under the BNP lease. Assuming that this transaction will continue to meet the provisions of FIN No. 46R as new standards evolve over time, our future minimum lease payments under this real estates lease will amount to a total of \$117.9 million reported under our Note 14 “Commitments and Contingencies.”

Liquidity and Capital Resource Requirements

Key factors affecting our cash flows include our ability to effectively manage our working capital, in particular, accounts receivable and inventories and future demand for our products and related pricing. We expect to incur higher capital expenditures in the near future to expand our operations. We will from time to time acquire products and businesses complementary to our business. In the future, we may continue to repurchase our common stock, which would reduce cash, cash equivalents, and/or short-term investments available to fund future operations and meet other liquidity requirements. Based on past performance and current expectations, we believe that our cash and cash equivalents, short-term investments, and cash generated from operations will satisfy our working capital needs, capital expenditures, stock repurchases, contractual obligations, and other liquidity requirements associated with our operations for at least the next twelve months.

Item 3. *Quantitative and Qualitative Disclosures about Market Risk*

We are exposed to market risk related to fluctuations in interest rates, market prices, and foreign currency exchange rates. We use certain derivative financial instruments to manage these risks. We do not use derivative financial instruments for speculative or trading purposes. All financial instruments are used in accordance with management-approved policies.

Market Interest and Interest Income Risk

Interest and Investment Income — As of January 26, 2007, we had available-for-sale investments of \$985.2 million. Our investment portfolio primarily consists of highly liquid investments with original maturities at the date of purchase of greater than three months, which are classified as available-for-sale. These highly liquid investments, consisting primarily of government, municipal, corporate debt securities, and auction-rate securities, are subject to interest rate and interest income risk and will decrease in value if market interest rates increase. A hypothetical 10 percent increase in market interest rates from levels at January 26, 2007 would cause the fair value of these available-for-sale investments to decline by approximately \$3.9 million. Because we have the ability to hold these investments until maturity, we would not expect any significant decline in value of our investments caused by market interest rate changes. Declines in interest rates over time will, however, reduce our interest income. We do not use derivative financial instruments in our investment portfolio.

Our investment portfolio also includes common stock holdings in Blue Coat (see Note 12 of the Condensed Consolidated Financial Statements). We are exposed to fluctuations in the market price of our investment in this

company. At the same time, we are precluded from selling these shares until September 2007. As a result of these factors, the amount of income and cash flow that we ultimately realize from this investment may vary materially from the current unrealized amount. A hypothetical 10 percent decrease in the fair market value from fair market value at January 26, 2007 would cause the fair value of this investment to decrease by approximately \$0.9 million.

Lease Commitments — As of January 26, 2007, we have two arrangements with BNP to lease our land for a period of 50 years to construct approximately 380,000 square feet of office space and a parking structure costing up to \$103.5 million. After completion of construction, we will pay minimum lease payments which vary based on London Interbank Offered Rate (“LIBOR”) plus a spread. We expect to pay lease payments on the first lease on September 2007 for a term of five years, and the second lease on September 2008 for a term of five years. We have the option to renew both leases for two consecutive five-year periods upon approval by BNP. A hypothetical 10 percent increase in market interest rates from levels at January 26, 2007 would increase our total lease payments under the initial five-year term by approximately \$2.8 million. We do not currently hedge against market interest rate increases. As cash from operating cash flows is invested in a higher interest rate environment, it will offer a natural hedge against interest rate risk from our lease commitments in the event of a significant increase in market interest rate.

Debt Obligation — We have an outstanding variable rate term loan totaling \$151.1 million as of January 26, 2007. Under terms of these arrangements, we expect to make interest payments at LIBOR plus a spread. A hypothetical 10 percent increase in market interest rates from levels at January 26, 2007 would increase our total interest payments by approximately \$0.8 million. We do not currently use derivatives to manage interest rate risk.

Equity Securities — We have from time to time made cash investments in companies with distinctive technologies that are potentially strategically important to us. Our investments in non-marketable equity securities would be negatively affected by an adverse change in equity market prices, although the impact cannot be directly quantified. Such a change, or any negative change in the financial performance or prospects of the companies whose non-marketable securities we own, would harm the ability of these companies to raise additional capital and the likelihood of our being able to realize any gains or return of our investments through liquidity events such as initial public offerings, acquisitions, and private sales. These types of investments involve a high degree of risk, and there can be no assurance that any company we invest in will grow or be successful. We do not currently engage in any hedging activities to reduce or eliminate equity price risk with respect to such equity investment. Accordingly, we could lose all or part of this investment if there is an adverse change in the market price of the company we invest in. Our investments in non-marketable equity securities had a carrying amount of \$9.8 million as of January 26, 2007 and \$11.0 million as of April 30, 2006. If we determine that an other-than-temporary decline in fair value exists for a non-marketable equity security, we write down the investment to its fair value and record the related write-down as an investment loss in our Consolidated Statements of Income. In the second quarter of fiscal 2007, we recorded a non-cash, other-than-temporary write-down of \$2.0 million related to an impairment of our investment in a privately held company and subsequently recorded a gain of \$0.7 million in the third quarter of fiscal 2007.

Foreign Currency Exchange Rate Risk

We hedge risks associated with foreign currency transactions to minimize the impact of changes in foreign currency exchange rates on earnings. We utilize forward and option contracts to hedge against the short-term impact of foreign currency fluctuations on certain assets and liabilities denominated in foreign currencies. All balance sheet hedges are marked to market through earnings every period. We also use foreign exchange forward contracts to hedge foreign currency forecasted transactions related to certain sales and operating expenses. These derivatives are designated as cash flow hedges under SFAS No. 133. For cash flow hedges outstanding at January 26, 2007, the gains or losses were included in other comprehensive income.

We do not enter into foreign exchange contracts for speculative or trading purposes. In entering into forward and option foreign exchange contracts, we have assumed the risk that might arise from the possible inability of counterparties to meet the terms of their contracts. We attempt to limit our exposure to credit risk by executing foreign exchange contracts with creditworthy multinational commercial banks. All contracts have a maturity of less than one year.

[Table of Contents](#)

The following table provides information about our foreign exchange forward and currency option contracts outstanding on January 26, 2007 (in thousands):

Currency	Buy/Sell	Foreign Currency Amount	Contract Value USD	Fair Value in USD
Forward contracts:				
CAD	Sell	9,580	\$ 8,126	\$ 8,126
ZAR	Sell	25,474	\$ 3,481	\$ 3,481
EUR	Sell	169,732	\$219,862	\$220,047
GBP	Sell	34,507	\$ 67,511	\$ 67,545
CHF	Sell	14,178	\$ 11,331	\$ 11,332
ILS	Sell	6,154	\$ 1,446	\$ 1,446
EUR	Buy	14,276	\$ 18,534	\$ 18,530
GBP	Buy	3,391	\$ 6,661	\$ 6,636
AUD	Buy	27,489	\$ 21,248	\$ 21,247
JPY	Buy	172,729	\$ 1,428	\$ 1,428
SEK	Buy	28,728	\$ 4,089	\$ 4,089
DKK	Buy	16,918	\$ 2,935	\$ 2,935
NOK	Buy	13,832	\$ 2,188	\$ 2,188
INR	Buy	112,495	\$ 2,539	\$ 2,539
Option contracts:				
EUR	Sell	9,000	\$ 11,655	\$ 11,745
GBP	Sell	2,000	\$ 3,912	\$ 3,948

Item 4. Controls and Procedures

Disclosure controls are controls and procedures designed to ensure that information required to be disclosed in our reports filed under the Exchange Act, such as this Quarterly Report, is recorded, processed, summarized, and reported within the time periods specified in the U.S. Securities and Exchange Commission's rules and forms. Disclosure controls and procedures are also designed to ensure that such information is accumulated and communicated to our management, including the CEO and CFO, as appropriate to allow timely decisions regarding required disclosure.

Under the supervision and with the participation of our management, including our principal executive officer and principal financial officer, we conducted an evaluation of the effectiveness of the design and operation of our disclosure controls and procedures, as defined in Rules 13a-15(e) and 15d-15(e) under the Securities Exchange Act of 1934, as amended, as of January 26, 2007, the end of the fiscal period covered by this quarterly report (the "Evaluation Date"). Based on this evaluation, our principal executive officer and principal financial officer concluded as of the Evaluation Date that our disclosure controls and procedures were effective such that the information relating to Network Appliance, including our consolidated subsidiaries, required to be disclosed in our Securities and Exchange Commission ("SEC") reports (i) is recorded, processed, summarized, and reported within the time periods specified in SEC rules and forms, and (ii) is accumulated and communicated to Network Appliance management, including our principal executive officer and principal financial officer, as appropriate to allow timely decisions regarding required disclosure.

There was no change in our internal control over financial reporting that occurred during the period covered by this Quarterly Report that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

PART II. OTHER INFORMATION

Item 1. *Legal Proceedings*

None

Item 1A. *Risk Factors*

The following risk factors and other information included in this Form 10-Q should be carefully considered. The risks and uncertainties described below are not the only ones we face. Additional risks and uncertainties not presently known to us or that we presently deem less significant may also impair our business operations. If any of the following risks actually occur, our business, operating results, and financial condition could be materially adversely affected.

Factors beyond our control could cause our quarterly results to fluctuate, which could adversely impact our common stock price.

We believe that period-to-period comparisons of our results of operations are not necessarily meaningful and should not be relied upon as indicators of future performance. Many of the factors that could cause our quarterly operating results to fluctuate significantly in the future are beyond our control and include, but are not limited to, the following:

- Changes in general economic conditions and specific economic conditions in the computer, storage, and networking industries
- General decrease in global corporate spending on information technology leading to a decline in demand for our products
- A shift in federal government spending patterns
- The possible effects of terrorist activity and international conflicts, which could lead to business interruptions and difficulty in forecasting
- The level of competition in our target product markets
- Our reliance on a limited number of suppliers due to industry consolidation, which could subject us to periodic supply-and-demand, price rigidity, and quality issues with our components
- The size, timing, and cancellation of significant orders
- Product configuration and mix
- The extent to which our customers renew their service and maintenance contracts with us
- Market acceptance of new products and product enhancements
- Announcements, introductions, and transitions of new products by us or our competitors
- Deferrals of customer orders in anticipation of new products or product enhancements introduced by us or our competitors
- Changes in pricing by us in response to competitive pricing actions
- Our ability to develop, introduce, and market new products and enhancements in a timely manner
- Supply constraints
- Technological changes in our target product markets
- The levels of expenditure on research and development and sales and marketing programs
- Our ability to achieve targeted cost reductions
- Excess or inadequate facilities

- Disruptions resulting from new systems and processes as we continue to enhance and adapt our system infrastructure to accommodate future growth
- Future accounting pronouncements and changes in accounting policies
- Seasonality

In addition, sales for any future quarter may vary and accordingly be different from what we forecast. We manufacture products based on a combination of specific order requirements and forecasts of our customer demands. Products are typically shipped within one to four weeks following receipt of an order. In certain circumstances, customers may cancel or reschedule orders without penalty. Product sales are also difficult to forecast because the storage and data management market is rapidly evolving and our sales cycle varies substantially from customer to customer.

We derive a majority of our revenue in any given quarter from orders booked in the same quarter. Bookings typically follow intra-quarter seasonality patterns weighted towards the back end of the quarter. If we do not achieve bookings in the latter part of a quarter consistent with our quarterly financial targets, our financial results will be adversely impacted.

Due to all of the foregoing factors, it is possible that in one or more future quarters our results may fall below our forecasts and the expectations of public market analysts and investors. In such event, the trading price of our common stock would likely decrease.

If we are unable to develop and introduce new products and respond to technological change, if our new products do not achieve market acceptance, or if we fail to manage the transition between our new and old products, or if we cannot provide the level of service and support for our new products, our operating results could be materially and adversely affected.

Our future growth depends upon the successful development and introduction of new hardware and software products. Due to the complexity of storage subsystems and storage security appliances, and the difficulty in gauging the engineering effort required to produce new products, such products are subject to significant technical risks. However, our new products may not achieve market acceptance. Additional product introductions in future periods may also impact our sales of existing products. In addition, our new products must respond to technological changes and evolving industry standards. If we are unable, for technological or other reasons, to develop and introduce new products in a timely manner in response to changing market conditions or customer requirements, or if such products do not achieve market acceptance, our operating results could be materially and adversely affected.

As new or enhanced products are introduced, we must successfully manage the transition from older products in order to minimize disruption in customers' ordering patterns, avoid excessive levels of older product inventories, and ensure that enough supplies of new products can be delivered to meet customers' demands.

As we enter into new or emerging markets, we will likely increase demands on our service and support operations and may be exposed to additional competition. There can be no assurance that we can provide products, service, and support to effectively compete for these market opportunities. Further, provision of greater levels of services from us may result in a delay in the timing of revenue recognition.

An increase in competition could materially and adversely affect our operating results.

The storage markets are intensely competitive and are characterized by rapidly changing technology. In the storage market, our primary and nearline storage system products, and our associated storage software portfolio compete primarily with storage system products and data management software from EMC, HDS, HP, IBM, and Sun/StorageTek. We also see Dell, Inc. as a competitor in the storage marketplace, primarily through their business partnership with EMC, allowing Dell to resell EMC storage hardware and software products. We have also historically encountered less-frequent competition from companies including Engenio Information Technologies, Inc. (formerly the Storage Systems Group of LSI Logic Corp.), Dot Hill Systems Corporation, and Xiotech Corporation. In the secondary storage market, which includes the disk-to-disk backup, compliance, and business continuity segments, our solutions compete primarily against products from EMC and Sun/StorageTek. Our

NearStore VTL appliances also compete with traditional tape backup solutions in the broader data backup/recovery space. Additionally, a number of new, privately held companies are currently attempting to enter the storage systems and data management software markets, the nearline and NearStore VTL storage markets, some of which may become significant competitors in the future.

We also develop and market network storage security products. With the acquisition of Decru, we have gained market share in the financial services, media, telecommunications, and pharmaceutical sectors as well several government agencies worldwide. Our future potential competitors could include developers of operating systems or hardware suppliers not currently offering competitive enterprise-wide security products. If any of those potential competitors begins to offer enterprise-wide security systems as a component of its product solution, demand for our storage security could decrease.

There has been a trend toward industry consolidation in our markets for several years. We expect this trend to continue as companies attempt to strengthen or hold their market positions in an evolving industry and as companies are acquired or are unable to continue operations. We believe that industry consolidation may result in stronger competitors that are better able to compete as sole-source vendors for customers. In addition, current and potential competitors have established or may establish cooperative relationships among themselves or with third parties. Accordingly, it is possible that new competitors or alliances among competitors may emerge and rapidly acquire significant market share. We cannot assure you that we will be able to compete successfully against current or future competitors. Competitive pressures we face could materially and adversely affect our operating results.

We rely on a limited number of suppliers, and any disruption or termination of these supply arrangements could delay shipment of our products and could materially and adversely affect our operating results.

We rely on a limited number of suppliers for components such as disk drives, computer boards and microprocessors utilized in the assembly of our products. In recent years, rapid industry consolidation has led to fewer component suppliers, which could subject us to periodic supply constraints and price rigidity.

Our reliance on a limited number of suppliers involves several risks, including:

- A potential inability to obtain an adequate supply of required components because we do not have long-term supply commitments
- Supplier capacity constraints
- Price increases
- Timely delivery
- Component quality

Component quality is particularly significant with respect to our suppliers of disk drives. In order to meet product performance requirements, we must obtain disk drives of extremely high quality and capacity. In addition, there are periodic supply-and-demand issues for disk drives, microprocessors, and semiconductor memory components, which could result in component shortages, selective supply allocations, and increased prices of such components. We cannot assure you that we will be able to obtain our full requirements of such components in the future or that prices of such components will not increase. In addition, problems with respect to yield and quality of such components and timeliness of deliveries could occur. Disruption or termination of the supply of these components could delay shipments of our products and could materially and adversely affect our operating results. Such delays could also damage relationships with current and prospective customers and suppliers.

In addition, we license certain technology and software from third parties that is incorporated into our products. If we are unable to obtain or license the technology and software on a timely basis, we will not be able to deliver products to our customers in a timely manner.

The loss of any contract manufacturers or the failure to accurately forecast demand for our products or successfully manage our relationships with our contract manufacturers could negatively impact our ability to manufacture and sell our products.

We currently rely on several contract manufacturers to manufacture most of our products. Our reliance on our third-party contract manufacturers reduces our control over the manufacturing process, exposing us to risks, including reduced control over quality assurance, production costs, and product supply. If we should fail to effectively manage our relationships with our contract manufacturers, or if our contract manufacturers experience delays, disruptions, capacity constraints, or quality control problems in their manufacturing operations, our ability to ship products to our customers could be impaired and our competitive position and reputation could be harmed. Qualifying a new contract manufacturer and commencing volume production are expensive and time-consuming. If we are required to change contract manufacturers or assume internal manufacturing operations, we may lose revenue and damage our customer relationships. If we inaccurately forecast demand for our products, we may have excess or inadequate inventory or incur cancellation charges or penalties, which could adversely impact our operating results. As of January 26, 2007, we have no purchase commitment under these agreements.

We intend to regularly introduce new products and product enhancements, which will require us to rapidly achieve volume production by coordinating with our contract manufacturers and suppliers. We may need to increase our material purchases, contract manufacturing capacity, and internal test and quality functions to meet anticipated demand. The inability of our contract manufacturers to provide us with adequate supplies of high-quality products, or the inability to obtain raw materials, could cause a delay in our ability to fulfill orders.

Our future financial performance depends on growth in the storage and data management markets. If these markets do not continue to grow at the rates at which we forecast growth, our operating results will be materially and adversely impacted.

All of our products address the storage and data management markets. Accordingly, our future financial performance will depend in large part on continued growth in the storage and data management markets and on our ability to adapt to emerging standards in these markets. We cannot assure you that the markets for storage and data management will continue to grow or that emerging standards in these markets will not adversely affect the growth of UNIX®, Windows®, and the World Wide Web server markets upon which we depend.

For example, we provide our open access data retention solutions to customers within the financial services, healthcare, pharmaceuticals, and government market segments, industries that are subject to various evolving governmental regulations with respect to data access, reliability, and permanence (such as Rule 17(a)(4) of the Securities Exchange Act of 1934, as amended) in the United States and in the other countries in which we operate. If our products do not meet, and continue to comply with, these evolving governmental regulations in this regard, customers in these market and geographical segments will not purchase our products, and therefore we will not be able to expand our product offerings in these market and geographical segments at the rates for which we have forecast.

We are also exposed to unfavorable economic and market conditions and the uncertain geopolitical environment.

Our operating results may be adversely affected by unfavorable economic and market conditions and the uncertain geopolitical environment. A reduction in demand for storage and data management caused by weakening economic conditions and decreases in corporate spending will result in decreased revenues and lower revenue growth rates. The network storage market growth declined significantly beginning in the third quarter of fiscal 2001 through fiscal 2003, causing both our revenues and operating results to decline. If the storage and data management markets grow more slowly than anticipated, or if emerging standards other than those adopted by us become increasingly accepted by these markets, our operating results could be materially and adversely affected.

Recent turmoil in the geopolitical environment in many parts of the world, including terrorist activities and military actions, particularly the continuing tension in and surrounding Iraq, and changes in energy costs may continue to put pressure on global economic conditions. If the economic and market conditions in the United States

and globally do not improve, or if they deteriorate, we may experience material impacts on our business, operating results, and financial condition.

Our gross margins may vary based on the configuration of our product and service solutions, and such variation may make it more difficult to forecast our earnings.

We derive a significant portion of our sales from the resale of disk drives as components of our storage systems, and the resale market for hard disk drives is highly competitive and subject to intense pricing pressures. Our sales of disk drives generate lower gross margin percentages than those of our storage systems. As a result, as we sell more highly configured systems with greater disk drive content, overall gross margin percentages may be negatively affected.

Our gross margins have been and may continue to be affected by a variety of other factors, including:

- Demand for storage and data management products
- Discount levels and price competition
- Direct versus indirect and OEM sales
- Product and add-on software mix
- The mix of services as a percentage of revenue
- The mix and average selling prices of products
- The mix of disk content
- New product introductions and enhancements
- Excess inventory purchase commitments as a result of changes in demand forecasts and possible product and software defects as we transition our products
- The cost of components, manufacturing labor, and quality

Changes in service gross margins may result from various factors such as continued investments in our customer support infrastructure and changes in the mix between technical support services and professional services, as well as the timing of technical support service contract initiations and renewals.

Our effective tax rate may increase or fluctuate, which could increase our income tax expense and reduce our net income.

Our effective tax rate could be adversely affected by several factors, many of which are outside of our control, including:

- Earnings being lower than anticipated in countries where we are taxed at lower rates as compared to the United States statutory tax rate
- Material differences between forecasted and actual tax rates as a result of a shift in the mix of pre-tax profits and losses by tax jurisdiction, our ability to use tax credits, or effective tax rates by tax jurisdiction different than our estimates
- Changing tax laws, accounting standards, including SFAS No. 123R, regulations, and interpretations in multiple tax jurisdictions in which we operate, as well as the requirements of certain tax rulings
- An increase in expenses not deductible for tax purposes, including certain stock-based compensation expense, write-offs of acquired in-process research and development, and impairment of goodwill
- The tax effects of purchase accounting for acquisitions and restructuring charges that may cause fluctuations between reporting periods
- Changes in the valuation of our deferred tax assets and liabilities

- Changes in tax laws or the interpretation of such tax laws
- Tax assessments, or any related tax interest or penalties, could significantly affect our income tax expense for the period in which the settlements take place
- A change in our decision to indefinitely reinvest foreign earnings

The price of our common stock could decline to the extent that our financial results are materially affected by an adverse change in our effective tax rate. We are currently undergoing federal income tax audits in the U.S. and several foreign tax jurisdictions. The rights to some of our intellectual property ("IP") are owned by certain of our foreign subsidiaries, and payments are made between U.S. and foreign tax jurisdictions relating to the use of this IP. Recently, some other companies have had their foreign IP arrangements challenged as part of an examination. Our management does not believe, based upon information currently known to us, that the final resolution of any of our audits will have a material adverse effect upon our consolidated financial position and the results of operations and cash flows. If the ultimate determination of our taxes owed in any of these tax jurisdictions is for an amount in excess of the tax provision we have recorded or reserved for, our operating results, cash flows, and financial condition could be adversely affected.

We may incur problems with current or future acquisitions and equity investments, and these investments may not achieve our objectives.

As part of our strategy, we are continuously evaluating opportunities to buy other businesses or technologies that would complement our current products, expand the breadth of our markets, or enhance our technical capabilities. We may engage in future acquisitions that dilute our stockholders' investments and cause us to use cash, to incur debt, or to assume contingent liabilities.

Acquisitions of companies entail numerous risks, and we may not be able to successfully integrate acquired operations and products or to realize anticipated synergies, economies of scale, or other value. Integration risks and issues may include, but are not limited to, key personnel retention and assimilation, management distraction, technical development, and unexpected costs and liabilities, including goodwill impairment charges. In addition, we may be unable to recover strategic investments in development stage entities. Any such problems could have a material adverse effect on our business, financial condition, and results of operation.

From time to time, we also make equity investments for the promotion of business and strategic objectives. We have already made strategic investments in a number of storage and data management-related technology companies. Equity investments may result in the loss of investment capital. The market price and valuation of our equity investments in these companies may fluctuate due to market conditions and other circumstances over which we have little or no control. To the extent that the fair value of these securities is less than our cost over an extended period of time, our results of operations and financial position could be negatively impacted. In the second quarter of fiscal 2007, we recorded a \$2.0 million write-down relating to our investment in a technology company.

We cannot assure you that our OEM relationship with IBM will generate significant revenue.

In April 2005, we announced a strategic partner relationship with IBM. As part of the relationship, we entered into an original equipment manufacturing (OEM) agreement that enables IBM to sell IBM branded solutions based on Network Appliance[™] unified and open network attached storage (NAS) and iSCSI/IP SAN solutions, including NearStore and the NetApp V-Series systems, as well as associated software offerings. While this agreement is an element of our strategy to expand our reach into more customers and countries, we do not have an exclusive relationship with IBM, and there is no minimum commitment for any given period of time; therefore we cannot assure you that this relationship will contribute any revenue in future years. In addition, we have no control over the products that IBM selects to sell, or their release schedule and timing of those products; nor do we control their pricing. Revenues from IBM accounted for 5.9% and 4.0% of our total consolidated revenue for the three- and nine-month periods ended January 26, 2007. Revenues from IBM accounted for 1.0% of our total consolidated revenue for the fiscal year 2006. In the event that sales through IBM will increase, we may experience distribution channel conflicts between our direct sales force and IBM, or among our channel partners. If we fail to minimize channel

conflicts, our operating results and financial condition could be harmed. In addition, since this agreement is relatively new, we do not have a history upon which to base our analysis of its future success.

Currently we do not and cannot assure you that this OEM relationship will generate significant revenue or that this strategic partnership will continue to be in effect for any specific period of time.

If we are unable to maintain our existing relationships and develop new relationships with major strategic partners, our revenue may be impacted negatively.

An element of our strategy to increase revenue is to strategically partner with major third-party software and hardware vendors that integrate our products into their products and also comarket our products with these vendors. We have significant partner relationships with database, business application, and backup management companies, including Microsoft, Oracle, SAP, and Symantec. A number of these strategic partners are industry leaders that offer us expanded access to segments of the storage market. There is intense competition for attractive strategic partners, and even if we can establish strategic relationships with these partners, we cannot assure you that these partnerships will generate significant revenue or that the partnerships will continue to be in effect for any specific period of time.

We intend to continue to establish and maintain business relationships with technology companies to accelerate the development and marketing of our storage solutions. To the extent that we are unsuccessful in developing new relationships and maintaining our existing relationships, our future revenue and operating results could be impacted negatively. In addition, the loss of a strategic partner could have a material adverse effect on the progress of our new products under development with that partner.

We cannot assure you that we are able to maintain existing resellers and attract new resellers, and that channel conflicts will not materially adversely affect our channel relationships. In addition, we do not have exclusive relationships with our resellers and accordingly there is a risk that those resellers may give higher priority to products of other suppliers, which could materially adversely affect our operating results.

We market and sell our storage solutions directly through our worldwide sales force and indirectly through channels such as value-added resellers, or VARs, systems integrators, distributors, OEMs, and strategic business partners, and we derive a significant portion of our revenue from these indirect channel partners. In the three-month period ended January 26, 2007, Fujitsu Siemens and our two-tier distribution partners, Arrow and Avnet, accounted for 3.8% and 10.5%, respectively, of our consolidated revenue. In the nine-month period ending January 27, 2006, Fujitsu Siemens and our two-tier distribution partners, Arrow and Avnet, accounted for 3.4% and 11.1%, respectively, of our consolidated revenue.

However, in order for us to maintain our current revenue sources and grow our revenue as we have forecasted, we must effectively manage our relationships with these indirect channel partners. To do so, we must attract and retain a sufficient number of qualified channel partners to successfully market our products. However, because we also sell our products directly to customers through our sales force, on occasion we compete with our indirect channels for sales of our products to our end customers, competition that could result in conflicts with these indirect channel partners and make it harder for us to attract and retain these indirect channel partners. At the same time, our indirect channel partners may offer products that are competitive to ours. In addition, because our reseller partners generally offer products from several different companies, including products of our competitors, these resellers may give higher priority to the marketing, sales, and support of our competitors' products than ours. If we fail to effectively manage our relationships with these indirect channel partners to minimize channel conflict and continue to evaluate and meet our indirect sales partners' needs with respect to our products, we will not be able to maintain or increase our revenue as we have forecasted, which would have a material adverse effect on our business, financial condition, and results of operations. Additionally, if we do not manage distribution of our products and services and support effectively, or if our resellers' financial conditions or operations weaken, our revenues and gross margins could be adversely affected.

Risks inherent in our international operations could have a material adverse effect on our operating results.

We conduct business internationally. For the third quarter and first nine months of fiscal 2007, 46.6% and 43.6%, respectively, of our total revenues were from international customers (including U.S. exports). Accordingly, our future operating results could be materially and adversely affected by a variety of factors, some of which are beyond our control, including regulatory, political, or economic conditions in a specific country or region, trade protection measures and other regulatory requirements, government spending patterns, and acts of terrorism and international conflicts.

Our international sales are denominated in U.S. dollars and in foreign currencies. An increase in the value of the U.S. dollar relative to foreign currencies could make our products more expensive and therefore potentially less competitive in foreign markets. Conversely, lowering our price in local currency may result in lower U.S.-based revenue. For international sales and expenditures denominated in foreign currencies, we are subject to risks associated with currency fluctuations. We utilize forward and option contracts to hedge our foreign currency exposure associated with certain assets and liabilities as well as anticipated foreign currency cash flows. All balance sheet hedges are marked to market through earnings every quarter, while gains and losses on cash flow hedges are recorded in other comprehensive income until forecasted transactions occur, at which time such realized gains and losses are recognized in earnings. These hedges attempt to reduce, but do not always entirely eliminate, the impact of currency exchange movements. Factors that could have an impact on the effectiveness of our hedging program include the accuracy of forecasts and the volatility of foreign currency markets. There can be no assurance that such hedging strategies will be successful and that currency exchange rate fluctuations will not have a material adverse effect on our operating results.

Additional risks inherent in our international business activities generally include, among others, longer accounts receivable payment cycles and difficulties in managing international operations. Such factors could materially and adversely affect our future international sales and consequently our operating results.

We receive significant tax benefits from sales to our non-U.S. customers. These benefits are contingent upon existing tax regulations in the U.S. and in the countries in which our international operations are located. Future changes in domestic or international tax regulations could adversely affect our ability to continue to realize these tax benefits. Our effective tax rate could also be adversely affected by different and evolving interpretations of existing law or regulations. Potentially adverse tax consequences could negatively impact the operating and financial results from international operations. International operations currently benefit from a tax ruling concluded in the Netherlands.

Although operating results have not been materially and adversely affected by seasonality in the past, because of the significant seasonal effects experienced within the industry, particularly in Europe, our future operating results could be materially and adversely affected by seasonality.

We cannot assure you that we will be able to maintain or increase international market demand for our products.

If we fail to manage our expanding business effectively, our operating results could be materially and adversely affected.

Our future operating results depend to a large extent on management's ability to successfully manage expansion and growth, including but not limited to expanding international operations, forecasting revenues, addressing new markets, controlling expenses, implementing and enhancing infrastructure, investing in people, facilities and capital equipment, and managing our assets. An unexpected decline in the growth rate of revenues without a corresponding and timely reduction in expense growth or a failure to manage other aspects of growth could materially and adversely affect our operating results.

In addition, continued expansion could strain our current management, financial, manufacturing, and other systems, and may require us to implement and improve those systems. If we experience any problems with any improvement or expansion of these systems, procedures, or controls, or if these systems, procedures or controls are not designed, implemented, or improved in a cost-effective and timely manner, our operations may be materially

and adversely affected. In addition, any failure to implement, improve, and expand such systems, procedures, and controls in a timely and efficient manner could harm our growth strategy and materially and adversely affect our financial condition and ability to achieve our business objectives.

As we continue to grow our business, we are likely to incur costs earlier than some of the anticipated benefits which could harm our operating results. A significant percentage of our expenses are fixed, which could materially and adversely affect our net income.

We are increasing our investment in engineering, sales, service support and other functions to grow our business. We are likely to recognize the costs associated with these increased investments earlier than some of the anticipated benefits and the return on these investments may be lower, or may develop more slowly, than we expect, which could harm our business.

Our expense levels are based in part on our expectations as to future sales, and a significant percentage of our expenses are fixed. As a result, if sales levels are below expectations or previously higher levels, net income will be disproportionately affected in a material and adverse manner.

The marketplace for our common stock has fluctuated significantly in the past and will likely continue to do so in the future.

The market price for our common stock has experienced substantial volatility in the past, and several factors could cause the price to fluctuate substantially in the future. These factors include but are not limited to:

- Fluctuations in our operating results
- Fluctuations in the valuation of companies perceived by investors to be comparable to us
- Economic developments in the storage and data management market as a whole
- International conflicts and acts of terrorism
- A shortfall in revenues or earnings compared to securities analysts' expectations
- Changes in analysts' recommendations or projections
- Announcements of new products, applications, or product enhancements by us or our competitors
- Changes in our relationships with our suppliers, customers, and channel and strategic partners
- General market conditions

In addition, the stock market has experienced volatility that has particularly affected the market prices of equity securities of many technology companies. Additionally, certain macroeconomic factors such as changes in interest rates, the market climate for the technology sector, and levels of corporate spending on information technology could also have an impact on the trading price of our stock. As a result, the market price of our common stock may fluctuate significantly in the future, and any broad market decline, as well as our own operating results, may materially and adversely affect the market price of our common stock.

We depend on the ability of our personnel, raw materials, equipment, and products to move reasonably unimpeded around the world. Our business could be materially and adversely affected as a result of a natural disaster, terrorist acts, or other catastrophic events.

Any political, military, world health (e.g., SARS, avian flu), or other issue which hinders this movement or restricts the import or export of materials could lead to significant business disruptions. Furthermore, any strike, economic failure, or other material disruption caused by fire, floods, hurricanes, power loss, power shortages, telecommunications failures, break-ins, and similar events could also adversely affect our ability to conduct business. If such disruptions result in cancellations of customer orders or contribute to a general decrease in economic activity or corporate spending on information technology, or directly impact our marketing, manufacturing, financial, and logistics functions, our results of operations and financial condition could be materially

adversely affected. In addition, our headquarters are located in Northern California, an area susceptible to earthquakes. If any significant disaster were to occur, our ability to operate our business could be impaired.

We depend on attracting and retaining qualified technical and sales personnel. If we are unable to attract and retain such personnel, our operating results could be materially and adversely impacted.

Our continued success depends, in part, on our ability to identify, attract, motivate, and retain qualified technical and sales personnel. Because our future success is dependent on our ability to continue to enhance and introduce new products, we are particularly dependent on our ability to identify, attract, motivate, and retain qualified engineers with the requisite education, background, and industry experience. Competition for qualified engineers, particularly in Silicon Valley, can be intense. The loss of the services of a significant number of our engineers or salespeople could be disruptive to our development efforts or business relationships and could materially and adversely affect our operating results.

Undetected software errors, hardware errors, or failures found in new products may result in loss of or delay in market acceptance of our products, which could increase our costs and reduce our revenues. Product quality problems could lead to reduced revenue, gross margins, and net income

Our products may contain undetected software errors, hardware errors, or failures when first introduced or as new versions are released. Despite testing by us and by current and potential customers, errors may not be found in new products until after commencement of commercial shipments, resulting in loss of or delay in market acceptance, which could materially and adversely affect our operating results.

If we fail to remedy a product defect, we may experience a failure of a product line, temporary or permanent withdrawal from a product or market, damage to our reputation, inventory costs, or product reengineering expenses, any of which could have a material impact on our revenue, margins, and net income.

In addition, we may be subject to losses that may result or are alleged to result from defects in our products, which could subject us to claims for damages, including consequential damages. Based on our historical experience, we believe that the risk of exposure to product liability claims is currently low. However, should we experience increased exposure to product liability claims, our business could be adversely impacted.

We are exposed to various risks related to legal proceedings or claims and protection of intellectual property rights, which could adversely affect our operating results.

We are a party to lawsuits in the normal course of our business. Litigation can be expensive, lengthy, and disruptive to normal business operations. Moreover, the results of complex legal proceedings are difficult to predict. An unfavorable resolution of a particular lawsuit could have a material adverse effect on our business, operating results, or financial condition.

If we are unable to protect our intellectual property, we may be subject to increased competition that could materially and adversely affect our operating results. Our success depends significantly upon our proprietary technology. We rely on a combination of copyright and trademark laws, trade secrets, confidentiality procedures, contractual provisions, and patents to protect our proprietary rights. We seek to protect our software, documentation, and other written materials under trade secret, copyright, and patent laws, which afford only limited protection. Some U.S. trademarks and some U.S.-registered trademarks are registered internationally as well. We will continue to evaluate the registration of additional trademarks as appropriate. We generally enter into confidentiality agreements with our employees and with our resellers, strategic partners, and customers. We currently have multiple U.S. and international patent applications pending and multiple U.S. patents issued. The pending applications may not be approved, and if patents are issued, such patents may be challenged. If such challenges are brought, the patents may be invalidated. We cannot assure you that we will develop proprietary products or technologies that are patentable, that any issued patent will provide us with any competitive advantages or will not be challenged by third parties, or that the patents of others will not materially and adversely affect our ability to do business.

Litigation may be necessary to protect our proprietary technology. Any such litigation may be time consuming and costly. Despite our efforts to protect our proprietary rights, unauthorized parties may attempt to copy aspects of

our products or to obtain and use information that we regard as proprietary. In addition, the laws of some foreign countries do not protect proprietary rights to as great an extent as do the laws of the United States. We cannot assure you that our means of protecting our proprietary rights will be adequate or that our competitors will not independently develop similar technology, duplicate our products, or design around patents issued to us or other intellectual property rights of ours.

We are subject to intellectual property infringement claims. We may, from time to time, receive claims that we are infringing third parties' intellectual property rights. Third parties may in the future claim infringement by us with respect to current or future products, patents, trademarks, or other proprietary rights. We expect that companies in the appliance market will increasingly be subject to infringement claims as the number of products and competitors in our industry segment grows and the functionality of products in different industry segments overlaps. Any such claims could be time consuming, result in costly litigation, cause product shipment delays, require us to redesign our products, or require us to enter into royalty or licensing agreements, any of which could materially and adversely affect our operating results. Such royalty or licensing agreements, if required, may not be available on terms acceptable to us or at all.

Our business is subject to increasingly complex corporate governance, public disclosure, accounting, and tax requirements that have increased both our costs and the risk of noncompliance.

Because our common stock is publicly traded, we are subject to certain rules and regulations of federal, state, and financial market exchange entities charged with the protection of investors and the oversight of companies whose securities are publicly traded. These entities, including the Public Company Accounting Oversight Board, the SEC, and NASDAQ, have implemented new requirements and regulations and continue developing additional regulations and requirements in response to recent corporate scandals and laws enacted by Congress, most notably the Sarbanes-Oxley Act of 2002. Our efforts to comply with these new regulations have resulted in, and are likely to continue resulting in, increased general and administrative expenses and diversion of management time and attention from revenue-generating activities to compliance activities.

We have recently completed our evaluation of our internal controls over financial reporting as required by Section 404 of the Sarbanes-Oxley Act of 2002. Although our assessment, testing, and evaluation resulted in our conclusion that as of April 30, 2006, our internal controls over financial reporting were effective, we cannot predict the outcome of our testing in future periods. If our internal controls are ineffective in future periods, our business and reputation could be harmed. We may incur additional expenses and commitment of management's time in connection with further evaluations, either of which could materially increase our operating expenses and accordingly reduce our net income.

Because new and modified laws, regulations, and standards are subject to varying interpretations in many cases due to their lack of specificity, their application in practice may evolve over time as new guidance is provided by regulatory and governing bodies. This evolution may result in continuing uncertainty regarding compliance matters and additional costs necessitated by ongoing revisions to our disclosure and governance practices.

Our ability to forecast earnings is limited by the impact of new accounting requirements such as SFAS No. 123R.

The Financial Accounting Standards Board requires companies to recognize the fair value of stock options and other share-based payment compensation to employees as compensation expense in the statement of income. Option pricing models require the input of highly subjective assumptions, including the expected stock price volatility, expected life, and forfeiture rate. We have chosen to base our estimate of future volatility using the implied volatility of traded options to purchase the Company's common stock as permitted by SAB No. 107. As of May 1, 2006, the contractual life of our stock options has been shortened to seven years from ten years for options issued on or after this date, and to the extent that the shorter life changes employees' exercise behavior, it may change the expected term of an option going forward. SFAS No. 123R requires us to use estimated forfeitures, and therefore the adoption of SFAS No. 123R could have a material impact on the timing of and, based on the accuracy of estimates of future actual forfeitures, the amount of stock-based compensation expense. Given the unpredictable nature of the "Black Scholes" variables and other management assumptions such as number of options to be granted, underlying strike price, and associated income tax impacts, it is very difficult to estimate stock-based compensation expense for any given quarter or year. Any changes in these highly subjective assumptions may

significantly impact our ability to make accurate forecasts of future earnings and volatility of our stock price. If another party asserts that the fair value of our employee stock options is misstated, securities class action litigation could be brought against us, or the market price of our common stock could decline, or both could occur. As a result, we could incur significant losses, and our operating results may be below our expectations and those of investors and stock market analysts.

The U.S. government has contributed to our revenue growth and become an important customer for us.

The U.S. government has become an important customer for the storage market and for us, however, government demand is unpredictable and there is no guarantee of future revenue growth from the U.S. government. Government agencies are subject to budgetary processes and expenditure constraints that could lead to delays or decreased capital expenditures in IT spending on infrastructures. If the government or individual agencies within the government reduce or shift their capital spending pattern, our financial results may be harmed. We cannot assure you that revenue from the U.S. government will continue to grow in the future.

The General Services Administration (GSA) is currently auditing our records under the schedule contracts it had with us to verify our compliance with various contract provisions. If the audit determines that we did not comply with such provisions, we may be required to pay the GSA a potential settlement. The exact date for completion of the audit and the subsequent negotiation process is unknown and may not be concluded for some time. Our management does not believe, based upon information currently known to us, that the final resolution of our audit will have a material adverse effect upon our consolidated financial position and the results of operations and cash flows.

Item 2. *Unregistered Sales of Equity Securities and Use of Proceeds*

The table below sets forth information with respect to common repurchases by Network Appliance, Inc. for the third quarter of fiscal 2007:

Period	Shares Purchased	Average Price Paid per Share	Total Number of Shares Purchased as Part of the Repurchase Program(1)	Value of Shares That may yet be Purchased Under the Repurchase Program(2)
October 28, 2006 — November 24, 2006	—	\$ —	42,815,630	\$ 41,748,253
November 25, 2006 — December 22, 2006	—	\$ —	42,815,630	\$ 41,748,253
December 23, 2006 — January 26, 2007	6,164,546	\$ 39.22	48,980,176	\$ 599,948,253
Total	<u>6,164,546</u>	\$ 39.22	48,980,176	\$ 599,948,253

- (1) This amount represented total number of shares purchased under our publicly announced repurchase programs since inception.
- (2) At January 26, 2007, \$599,948,253 remained available for future repurchases. The stock repurchase program may be suspended or discontinued at any time.

On November 15, 2006, our Board approved a new stock repurchase program in which up to \$800,000,000 of additional shares may be purchased.

Item 3. *Defaults Upon Senior Securities*

None

Item 4. *Submission of Matters to a Vote of Security Holders*

None

Item 5. *Other Information*

The information required by this item is incorporated by reference from our Proxy Statement for the 2006 Annual Meeting of Shareholders.

Item 6. Exhibits

- 2.1(6) Agreement and Plan of Merger of Network Appliance, Inc. (a Delaware corporation) and Network Appliance, Inc. (a California corporation) dated as of November 1, 2001.
- 2.2(9) Agreement and Plan of Merger dated as of November 3, 2003, by and among Network Appliance, Inc., Nagano Sub, Inc., and Spinnaker Networks, Inc.
- 2.3(9) Amendment to Merger Agreement, dated as of February 9, 2004, by and among Network Appliance, Inc., Nagano Sub, Inc., and Spinnaker Networks, Inc.
- 2.4(15) Agreement and Plan of Merger and Reorganization, dated as of June 15, 2005, by and among Network Appliance, Inc., Dolphin Acquisition Corp, and Decru, Inc.
- 3.1(6) Certificate of Incorporation of the Company dated as of November 1, 2001.
- 3.2(6) Bylaws of the Company dated as of November 1, 2001.
- 3.3(16) Certificate of Amendment to the Bylaws of the Company dated as of August 31, 2006.
- 4.1(6) Reference is made to Exhibits 3.1 and 3.2.
- 10.1(23)* The Company's Amended and Restated Employee Stock Purchase Plan.
- 10.2(14)* The Company's Amended and Restated 1995 Stock Incentive Plan.
- 10.3(2) The Company's Special Non-Officer Stock Option Plan.
- 10.4(7)* The Company's Amended and Restated 1999 Stock Incentive Plan.
- 10.5(3)† OEM Distribution and License Agreement, dated October 27, 1998, by and between Dell Products L.P. and the Company.
- 10.6(4) OEM Distribution and License Agreement, dated November 6, 1998, by and between Fujitsu Limited and the Company.
- 10.15(5)† Patent Cross License Agreement dated December 11, 2000, by and between Intel Corporation and the Company.
- 10.16(1)* Form of Indemnification Agreement entered into between the Company and its directors and officers.
- 10.17(8) Short Form Termination of Operative Documents, dated April 24, 2002, by and between BNP Leasing Corporation and the Company.
- 10.18(10)* Spinnaker Networks, Inc. 2000 Stock Plan.
- 10.19(12)* Alacritus, Inc. 2005 Stock Plan.
- 10.20(11)* The Company's Fiscal Year 2005 Incentive Compensation Plan.
- 10.21(13)* The Company's Deferred Compensation Plan.
- 10.22(21) Form of Stock Option Agreement approved for use under the Company's amended and restated 1995 Stock Option Plan.
- 10.23(21) Form of Stock Option Agreement approved for use under the Company's amended and restated 1995 Stock Option Plan (Chairman of the Board or any Board Committee Chairperson).
- 10.24(21) Form of Stock Option Agreement approved for use under the Company's amended and restated 1995 Stock Option Plan (Restricted Stock Agreement).
- 10.25(21) Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (Restricted Stock Unit Agreement).
- 10.26(21) Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan.
- 10.27(21) Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (Change of Control).
- 10.28(21) Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (China).
- 10.29(21) Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (Non-Employee Director Automatic Stock Option — Annual).
- 10.30(21) Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (Non-Employee Director Automatic Stock Option — Initial).

[Table of Contents](#)

10.31(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (France).
10.32(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (India).
10.33(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (United Kingdom).
10.34(17)	Form of Stock Option Grant Notice and Option Agreement under the Decru, Inc. Amended and Restated 2001 Equity Incentive Plan and the 2001 Equity Incentive Plan filed under Attachment II.
10.35(17)	Form of Stock Option Grant Notice and Option Agreement under the Decru, Inc. 2001 Equity Incentive Plan and the 2001 Equity Incentive Plan filed under Attachment II.
10.36(17)	Form of Early Exercise Stock Purchase Agreement under the Decru, Inc. 2001 Equity Incentive Plan.
10.37(17)	Form of Restricted Stock Bonus Grant Notice and Agreement under the Decru, Inc. 2001 Equity Incentive Plan.
10.38(18)	Asset Purchase Agreement dated June 20, 2003, by and between Auspex Systems, Inc. and the Company.
10.39(19)	Purchase and Sale Agreement dated July 27, 2004 by and between Cisco Systems, Inc. and the Company.
10.40(20)	Closing Certificate and Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.41(20)	Construction Management Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.42(20)	Lease Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.43(20)	Purchase Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.44(20)	Ground Lease, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.45(22)	Loan Agreement, dated March 31, 2006, by and between the Lenders party hereto and JP Morgan Chase Bank and Network Appliance Global Ltd.
10.46	Closing Certificate and Agreement, dated December 14, 2006, by and between BNP Leasing Corporation and the Company.
10.47	Construction Management Agreement, dated December 14, 2006, by and between BNP Leasing Corporation and the Company.
10.48	Lease Agreement, dated December 14, 2006, by and between BNP Leasing Corporation and the Company.
10.49	Purchase Agreement, dated December 14, 2006, by and between BNP Leasing Corporation and the Company.
10.50	Ground Lease, dated December 14, 2006, by and between BNP Leasing Corporation and the Company.
10.51(24)*	SANPro Systems, Inc. 2001 U.S. Stock Option Plan.
10.52(24)*	Topio, Inc. 2004 Israeli Share Option Plan.
10.53	Master Confirmation, dated December 6, 2006, by and between JP Morgan Securities Inc. and the Company.
31.1	Certification of the Chief Executive Officer pursuant to Section 302(a) of the Sarbanes-Oxley Act of 2002, dated March 6, 2007.
31.2	Certification of the Chief Financial Officer pursuant to Section 302(a) of the Sarbanes-Oxley Act of 2002, dated March 6, 2007.

[Table of Contents](#)

32.1	Certification of Chief Executive Officer pursuant to 18 U.S.C. section 1350, as adopted pursuant to section 906 of the Sarbanes-Oxley Act of 2002, dated March 6, 2007.
32.2	Certification of Chief Financial Officer pursuant to 18 U.S.C. section 1350, as adopted pursuant to section 906 of the Sarbanes-Oxley Act of 2002, dated March 6, 2007.

-
- (1) Previously filed as an exhibit to the Company's Registration Statement on Form S-1 (No. 33-97864).
 - (2) Previously filed as an exhibit with the Company's Annual Report on Form 10-K dated July 23, 1997.
 - (3) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated December 11, 1998.
 - (4) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated March 11, 1999.
 - (5) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated March 12, 2001.
 - (6) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated December 4, 2001.
 - (7) Previously filed as an exhibit with the Company's Proxy Statement dated July 15, 2004.
 - (8) Previously filed as an exhibit with the Company's Annual Report on Form 10-K dated June 28, 2002.
 - (9) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated February 27, 2004.
 - (10) Previously filed as an exhibit with the Company's Form S-8 registration statement dated March 1, 2004.
 - (11) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated May 18, 2005.
 - (12) Previously filed as an exhibit to the Company's Form S-8 registration statement dated June 2, 2005.
 - (13) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated July 7, 2005.
 - (14) Previously filed as an exhibit to the Company's Proxy Statement dated July 8, 2005.
 - (15) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated September 2, 2005.
 - (16) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated September 1, 2006.
 - (17) Previously filed as an exhibit to the Company's Form S-8 registration statement dated September 2, 2005.
 - (18) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated September 3, 2003.
 - (19) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated August 31, 2004.
 - (20) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated March 7, 2006.
 - (21) Previously filed as an exhibit to the Company's Annual Report on Form 10-K dated July 8, 2005.
 - (22) Previously filed as an exhibit to the Company's Annual Report on Form 10-K dated July 11, 2006.
 - (23) Previously filed as an exhibit to the Company's S-8 registration statement dated October 31, 2006.
 - (24) Previously filed as an exhibit to the Company's S-8 registration statement dated January 5, 2007.
- † Specified portions of this agreement have been omitted and have been filed separately with the Commission pursuant to a request for confidential treatment.
- * Identifies management plan or compensatory plan or arrangement.

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, as amended, the registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

NETWORK APPLIANCE, INC.
(Registrant)

/s/ STEVEN J. GOMO
Steven J. Gomo
*Executive Vice President of Finance and
Chief Financial Officer*

Date: March 6, 2007

EXHIBIT INDEX

2.1 (6)	Agreement and Plan of Merger of Network Appliance, Inc. (a Delaware corporation) and Network Appliance, Inc. (a California corporation) dated as of November 1, 2001
2.2 (9)	Agreement and Plan of Merger dated as of November 3, 2003, by and among Network Appliance, Inc., Nagano Sub, Inc., and Spinnaker Networks, Inc.
2.3 (9)	Amendment to Merger Agreement, dated as of February 9, 2004, by and among Network Appliance, Inc., Nagano Sub, Inc., and Spinnaker Networks, Inc.
2.4 (15)	Agreement and Plan of Merger and Reorganization, dated as of June 15, 2005, by and among Network Appliance, Inc., Dolphin Acquisition Corp, and Decru, Inc.
3.1 (6)	Certificate of Incorporation of the Company dated as of November 1, 2001
3.2 (6)	Bylaws of the Company dated as of November 1, 2001
3.3(16)	Certificate of Amendment to the Bylaws of the Company dated as of August 31, 2006
4.1 (6)	Reference is made to Exhibits 3.1 and 3.2
10.1(23)*	The Company's Amended and Restated Employee Stock Purchase Plan
10.2(14)*	The Company's Amended and Restated 1995 Stock Incentive Plan
10.3 (2)	The Company's Special Non-Officer Stock Option Plan
10.4(7)*	The Company's Amended and Restated 1999 Stock Incentive Plan
10.5(3)†	OEM Distribution and License Agreement, dated October 27, 1998, by and between Dell Products L.P. and the Company
10.6 (4)	OEM Distribution and License Agreement, dated November 6, 1998, by and between Fujitsu Limited and the Company
10.15(5)†	Patent Cross License Agreement dated December 11, 2000, by and between Intel Corporation and the Company
10.16(1)*	Form of Indemnification Agreement entered into between the Company and its directors and officers
10.17(8)	Short Form Termination of Operative Documents, dated April 24, 2002, by and between BNP Leasing Corporation and the Company
10.18(10)*	Spinnaker Networks, Inc. 2000 Stock Plan
10.19(12)*	Alacritus, Inc. 2005 Stock Plan
10.20(11)*	The Company's Fiscal Year 2005 Incentive Compensation Plan
10.21(13)*	The Company's Deferred Compensation Plan
10.22(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1995 Stock Option Plan
10.23(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1995 Stock Option Plan (Chairman of the Board or any Board Committee Chairperson)
10.24(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1995 Stock Option Plan (Restricted Stock Agreement)
10.25(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (Restricted Stock Unit Agreement)
10.26(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan
10.27(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (Change of Control)
10.28(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (China)
10.29(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (Non-Employee Director Automatic Stock Option — Annual)
10.30(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (Non-Employee Director Automatic Stock Option — Initial)
10.31(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (France)

[Table of Contents](#)

10.32(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (India)
10.33(21)	Form of Stock Option Agreement approved for use under the Company's amended and restated 1999 Stock Option Plan (United Kingdom)
10.34(17)	Form of Stock Option Grant Notice and Option Agreement under the Decru, Inc. Amended and Restated 2001 Equity Incentive Plan and the 2001 Equity Incentive Plan filed under Attachment II
10.35(17)	Form of Stock Option Grant Notice and Option Agreement under the Decru, Inc. 2001 Equity Incentive Plan and the 2001 Equity Incentive Plan filed under Attachment II
10.36(17)	Form of Early Exercise Stock Purchase Agreement under the Decru, Inc. 2001 Equity Incentive Plan
10.37(17)	Form of Restricted Stock Bonus Grant Notice and Agreement under the Decru, Inc. 2001 Equity Incentive Plan
10.38(18)	Asset Purchase Agreement dated June 20, 2003, by and between Auspex Systems, Inc. and the Company
10.39(19)	Purchase and Sale Agreement dated July 27, 2004 by and between Cisco Systems, Inc. and the Company
10.40(20)	Closing Certificate and Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company
10.41(20)	Construction Management Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company
10.42(20)	Lease Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company
10.43(20)	Purchase Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company
10.44(20)	Ground Lease, dated December 15, 2005, by and between BNP Leasing Corporation and the Company
10.45(22)	Loan Agreement, dated March 31, 2006, by and between the Lenders party hereto and JP Morgan Chase Bank and Network Appliance Global Ltd.
10.46	Closing Certificate and Agreement, dated December 14, 2006, by and between BNP Leasing Corporation and the Company
10.47	Construction Management Agreement, dated December 14, 2006, by and between BNP Leasing Corporation and the Company
10.48	Lease Agreement, dated December 14, 2006, by and between BNP Leasing Corporation and the Company
10.49	Purchase Agreement, dated December 14, 2006, by and between BNP Leasing Corporation and the Company
10.50	Ground Lease, dated December 14, 2006, by and between BNP Leasing Corporation and the Company
10.51(24)*	SANPro Systems, Inc. 2001 U.S. Stock Option Plan
10.52(24)*	Topio, Inc. 2004 Israeli Share Option Plan
10.53	Master Confirmation, dated December 6, 2006, by and between JP Morgan Securities Inc. and the Company
31.1	Certification of the Chief Executive Officer pursuant to Section 302(a) of the Sarbanes-Oxley Act of 2002, dated March 6, 2007
31.2	Certification of the Chief Financial Officer pursuant to Section 302(a) of the Sarbanes-Oxley Act of 2002, dated March 6, 2007
32.1	Certification of Chief Executive Officer pursuant to 18 U.S.C. section 1350, as adopted pursuant to section 906 of the Sarbanes-Oxley Act of 2002, dated March 6, 2007
32.2	Certification of Chief Financial Officer pursuant to 18 U.S.C. section 1350, as adopted pursuant to section 906 of the Sarbanes-Oxley Act of 2002, dated March 6, 2007

(1) Previously filed as an exhibit to the Company's Registration Statement on Form S-1 (No. 33-97864).

(2) Previously filed as an exhibit with the Company's Annual Report on Form 10-K dated July 23, 1997.

[Table of Contents](#)

- (3) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated December 11, 1998.
 - (4) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated March 11, 1999.
 - (5) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated March 12, 2001.
 - (6) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated December 4, 2001.
 - (7) Previously filed as an exhibit with the Company's Proxy Statement dated July 15, 2004.
 - (8) Previously filed as an exhibit with the Company's Annual Report on Form 10-K dated June 28, 2002.
 - (9) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated February 27, 2004.
 - (10) Previously filed as an exhibit with the Company's Form S-8 registration statement dated March 1, 2004.
 - (11) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated May 18, 2005.
 - (12) Previously filed as an exhibit to the Company's Form S-8 registration statement dated June 2, 2005.
 - (13) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated July 7, 2005.
 - (14) Previously filed as an exhibit to the Company's Proxy Statement dated July 8, 2005.
 - (15) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated September 2, 2005.
 - (16) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated September 1, 2006.
 - (17) Previously filed as an exhibit to the Company's Form S-8 registration statement dated September 2, 2005.
 - (18) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated September 3, 2003.
 - (19) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated August 31, 2004.
 - (20) Previously filed as an exhibit to the Company's Quarterly Report on Form 10-Q dated March 7, 2006.
 - (21) Previously filed as an exhibit to the Company's Annual Report on Form 10-K dated July 8, 2005.
 - (22) Previously filed as an exhibit to the Company's Annual Report on Form 10-K dated July 11, 2006.
 - (23) Previously filed as an exhibit to the Company's S-8 registration statement dated October 31, 2006.
 - (24) Previously filed as an exhibit to the Company's S-8 registration statement dated January 5, 2007.
- † Specified portions of this agreement have been omitted and have been filed separately with the Commission pursuant to a request for confidential treatment.
- * Identifies management plan or compensatory plan or arrangement.

**CLOSING CERTIFICATE
AND AGREEMENT**

BETWEEN

**NETWORK APPLIANCE, INC.
("NAI")**

AND

**BNP PARIBAS LEASING CORPORATION
("BNPPLC")**

December 14, 2006

TABLE OF CONTENTS

	<u>Page</u>
1 Representations, Covenants and Acknowledgments of NAI Concerning the Property	2
(A) Prior Inspections and Investigations Concerning the Property	2
(B) Title	2
(C) Compliance with Covenants and Laws	2
2 Representations and Covenants by NAI	2
(A) Concerning NAI and the Operative Documents	2
(1) <i>Entity Status</i>	2
(2) <i>Authority</i>	2
(3) <i>Solvency</i>	3
(4) <i>Financial Reports</i>	3
(5) <i>Pending Legal Proceedings</i>	3
(6) <i>No Default or Violation</i>	3
(7) <i>Use of Proceeds</i>	4
(8) <i>Enforceability</i>	4
(9) <i>Pari Passu</i>	4
(10) <i>Conduct of Business and Maintenance of Existence</i>	4
(11) <i>Investment Company Act, etc</i>	4
(12) <i>Not a Foreign Person</i>	4
(13) <i>ERISA</i>	5
(14) <i>Compliance With Laws</i>	5
(15) <i>Payment of Taxes Generally</i>	5
(16) <i>Maintenance of Insurance Generally</i>	5
(17) <i>Franchises, Licenses, etc</i>	6
(18) <i>Patents, Trademarks, etc</i>	6
(19) <i>Labor</i>	6
(20) <i>Title to Properties Generally</i>	6
(21) <i>Books and Records</i>	7
(B) Further Assurances	7
(C) Syndication	7
(D) Financial Statements; Required Notices; Certificates	7
3 Financial Covenants and Negative Covenants of NAI	10
(B) Financial Covenants	11
(1) <i>Minimum Unencumbered Cash and Short Term Investments</i>	11
(2) <i>Maximum Leverage Ratio</i>	12
(C) Negative Covenants	12
(1) <i>Negative Pledge</i>	12
(2) <i>Transactions with Affiliates</i>	14
(3) <i>Capital Expenditures</i>	14
(4) <i>Merger, Consolidation, Transfer of Assets</i>	14

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
(5) <i>Change in Nature of Business</i>	14
(6) <i>Multiemployer ERISA Plans</i>	14
(7) <i>Prohibited ERISA Transaction</i>	14
4 Limited Representations and Covenants of BNPPLC	15
(A) Concerning Accounting Matters	15
(B) Other Limited Representations	17
(1) <i>Entity Status</i>	17
(2) <i>Authority</i>	17
(3) <i>Solvency</i>	17
(4) <i>Pending Legal Proceedings</i>	18
(5) <i>No Default or Violation</i>	18
(6) <i>Enforceability</i>	18
(7) <i>Conduct of Business and Maintenance of Existence</i>	18
(8) <i>Not a Foreign Person</i>	18
(C) Further Assurances	19
(D) Actions Permitted by NAI Without BNPPLC's Consent	22
(E) Waiver of Landlord's Liens	23
(F) Estoppel Letters	23
(G) No Implied Representations or Promises by BNPPLC	24
5 Usury Savings Provision	24
6 Obligations of NAI Under Other Operative Documents Not Limited by this Certificate	25
7 Obligations of NAI Hereunder Not Limited by Other Operative Documents	25
8 Waiver of Jury Trial	25

TABLE OF CONTENTS
(Continued)

Exhibits and Schedules

Exhibit A	Legal Description
Exhibit B	Permitted Encumbrances
Exhibit C	Quarterly Certificate
Exhibit D	Certificate to be Provided by BNPPLC Re: Accounting

CLOSING CERTIFICATE AND AGREEMENT

This CLOSING CERTIFICATE AND AGREEMENT (this “**Certificate**”), dated as of December 14, 2006 (the “**Effective Date**”), is made by and between BNP PARIBAS LEASING CORPORATION (“**BNPPLC**”), a Delaware corporation, and NETWORK APPLIANCE, INC. (“**NAI**”), a Delaware corporation.

RECITALS

Contemporaneously with the execution of this Certificate, BNPPLC and NAI are executing a Common Definitions and Provisions Agreement dated as of the Effective Date (the “**Common Definitions and Provisions Agreement**”), which by this reference is incorporated into and made a part of this Certificate for all purposes. *As used in this Certificate, capitalized terms defined in the Common Definitions and Provisions Agreement and not otherwise defined in this Certificate are intended to have the respective meanings assigned to them in the Common Definitions and Provisions Agreement.*

Also contemporaneously with this Certificate, BNPPLC is executing and accepting a Ground Lease from NAI (the “**Ground Lease**”), pursuant to which BNPPLC is acquiring a leasehold estate in the Land described in Exhibit A and any existing Improvements on the Land.

Also contemporaneously with this Certificate, BNPPLC and NAI are executing a Construction Management Agreement (the “**Construction Management Agreement**”) and a Lease Agreement (the “**Lease**”). Pursuant to the Construction Management Agreement, BNPPLC is agreeing to provide funding for the construction of new Improvements. When the term of the Lease commences, the Lease will cover all Improvements on the Land described in Exhibit A.

Also contemporaneously with this Certificate, BNPPLC and NAI are executing a Purchase Agreement (the “**Purchase Agreement**”), pursuant to which NAI may purchase or arrange for the purchase of the Property and BNPPLC may collect a Supplemental Payment from NAI sufficient to cover all or a substantial portion of the Lease Balance not otherwise repaid to BNPPLC from the proceeds of any sale of the Property.

As a condition to BNPPLC’s execution of the other Operative Documents, BNPPLC requires the representations and covenants of NAI set out below.

AGREEMENTS

In consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1 Representations, Covenants and Acknowledgments of NAI Concerning the Property. To induce BNPPPLC to enter into the Ground Lease, and to enter into this Certificate and the other Operative Documents, NAI represents, covenants and acknowledges as follows:

(A) Prior Inspections and Investigations Concerning the Property. NAI has thoroughly inspected, investigated and evaluated the condition of and title to the Property and Applicable Laws which will govern the construction, use and operation of the Property required or permitted by the Operative Documents, as necessary to make the representations concerning the Property set forth in this Certificate and other Operative Documents.

(B) Title. Good and indefeasible title to the Land and any existing Improvements thereon is currently vested in NAI, subject only to the rights of BNPPPLC under the Ground Lease, the Permitted Encumbrances and any Liens Removable by BNPPPLC. So long as NAI has any rights under the Construction Management Agreement, the Lease or the Purchase Agreement, NAI will not permit any Person to acquire rights of the landlord under the Ground Lease other than NAI itself or a corporation that controls, is controlled by or under common control with NAI.

(C) Compliance with Covenants and Laws. The construction contemplated by the Construction Management Agreement and use of the Property permitted by the Lease complies, or will comply after NAI obtains readily available permits (either as the construction manager under the Construction Management Agreement or as the tenant under the Lease), in all material respects with all Applicable Laws. NAI has obtained or can and will promptly obtain all utility, building, health and operating permits required by any governmental authority or municipality having jurisdiction over the Property for the construction contemplated in the Construction Management Agreement and the use of the Property permitted by the Lease.

2 Representations and Covenants by NAI. NAI also represents and covenants to BNPPPLC as follows:

(A) Concerning NAI and the Operative Documents.

(1) *Entity Status.* NAI is a corporation duly incorporated and validly existing in the State of Delaware and is authorized to do business in and is in good standing under the laws of California.

(2) *Authority.* The Constituent Documents of NAI permit the execution, delivery and performance of the Operative Documents by NAI, and all actions and approvals necessary to bind NAI under the Operative Documents have been taken and

obtained. Without limiting the foregoing, the Operative Documents will be binding upon NAI when signed on behalf of NAI by Ingemar Lanevi, Vice President and Corporate Treasurer of NAI. NAI has all requisite power and all governmental certificates of authority, licenses, permits and qualifications to carry on its business as now conducted and contemplated to be conducted and to perform the Operative Documents.

(3) *Solvency.* NAI is not “insolvent” on the Effective Date (that is, the sum of NAI’s absolute and contingent liabilities — including the obligations of NAI under the Operative Documents — does not exceed the fair market value of NAI’s assets), and NAI has no outstanding liens, suits, garnishments or court actions which could render NAI insolvent or bankrupt. NAI’s capital is adequate for the businesses in which NAI is engaged and intends to be engaged. NAI has not incurred (whether by the Operative Documents or otherwise), nor does NAI intend to incur or believe that it will incur, debts which will be beyond its ability to pay as such debts mature. No petition or answer has been filed by or, to NAI’s knowledge, against NAI in bankruptcy or other legal proceedings that seeks an assignment for the benefit of creditors, the appointment of a receiver, trustee, custodian or liquidator with respect to NAI or any significant portion of NAI’s property, a reorganization, arrangement, rearrangement, composition, extension, liquidation or dissolution of NAI or similar relief under the federal Bankruptcy Code or any state law.

(4) *Financial Reports.* All reports, financial statements and other data furnished by NAI to BNPPLC in connection with the agreements set forth in the Operative Documents are true and correct in all material respects and do not omit to state any fact or circumstance necessary to make the statements contained therein not misleading. No material adverse change has occurred since the dates of such reports, statements and other data in the financial condition of NAI.

(5) *Pending Legal Proceedings.* No judicial or administrative investigations, actions, suits or proceedings are pending or, to the knowledge of NAI, threatened against or affecting NAI by or before any court or other Governmental Authority that have or could reasonably be expected to have a Material Adverse Effect. NAI is not in default with respect to any order, writ, injunction, decree or demand of any court or other Governmental Authority in a manner that has or could reasonably be expected to have a Material Adverse Effect.

(6) *No Default or Violation.* The execution and performance by NAI of the Operative Documents do not and will not contravene or result in a breach of or default under any other agreement to which NAI is a party or by which NAI is bound or which affects any assets of NAI. Such execution and performance by NAI do not contravene any law, order, decree, rule or regulation to which NAI is subject. Further, such

execution and performance by NAI will not result in the creation or imposition of (or the obligation to create or impose) any lien, charge or encumbrance on, or security interest in, any property of NAI pursuant to the provisions of any such other agreement.

(7) *Use of Proceeds*. In no event will the funds from any Funding Advance be used directly or indirectly for personal, family, household or agricultural purposes or for the purpose, whether immediate, incidental or ultimate, of purchasing, acquiring or carrying any “margin stock” or any “margin securities” (as such terms are defined in Regulation U promulgated by the Board of Governors of the Federal Reserve System) or to extend credit to others directly or indirectly for the purpose of purchasing or carrying any such margin stock or margin securities. NAI represents that NAI is not engaged principally, or as one of NAI’s important activities, in the business of extending credit to others for the purpose of purchasing or carrying such margin stock or margin securities.

(8) *Enforceability*. The Operative Documents constitute the legal, valid and binding obligations of NAI enforceable in accordance with their terms, subject to the effect of bankruptcy, insolvency, reorganization, receivership and other similar laws affecting the rights of creditors generally.

(9) *Pari Passu*. The claims of BNPPPLC against NAI under the Operative Documents rank at least *pari passu* with the claims of all its other unsecured creditors, except those whose claims are preferred solely by any laws of general application having effect in relation to bankruptcy, insolvency, liquidation or other similar events.

(10) *Conduct of Business and Maintenance of Existence*. So long as any obligations of NAI under the Operative Documents remain outstanding, NAI will continue to engage in business of the same general type as now conducted by it and will preserve, renew and keep in full force and effect its corporate existence and its rights, privileges and franchises necessary or desirable in the normal conduct of business.

(11) *Investment Company Act, etc.* NAI is not and will not become, by reason of the Operative Documents or any business or transactions in which it participates voluntarily, (a) an “investment company” or a company “controlled” by an “investment company” (as each of the quoted terms is defined or used in the Investment Company Act of 1940, as amended), or (b) subject to regulation under the Public Utility Holding Company Act of 1935, the Federal Power Act, or any foreign, federal or local statute or regulation limiting NAI’s ability to incur or guarantee indebtedness or obligations, or to pledge its assets to secure indebtedness or obligations, as contemplated by any of the Operative Documents.

(12) *Not a Foreign Person*. NAI is not a “foreign person” within the meaning

of Sections 1445 and 7701 of the Code (i.e. NAI is not a non-resident alien, foreign corporation, foreign partnership, foreign trust or foreign estate as those terms are defined in the Code and regulations promulgated thereunder).

(13) *ERISA*. NAI is not and will not become an “employee benefit plan” (as defined in Section 3(3) of ERISA) which is subject to Title I of ERISA. The assets of NAI do not and will not in the future constitute “plan assets” of one or more such plans within the meaning of 29 C.F.R. Section 2510.3-101. NAI is not and will not become a “governmental plan” within the meaning of Section 3(32) of ERISA. Transactions by or with NAI are not subject to state statutes regulating investments of and fiduciary obligations with respect to governmental plans. No ERISA Termination Event has occurred with respect to any Plan, and NAI and its Subsidiaries are in compliance with ERISA. Neither NAI nor any of its Subsidiaries is required to contribute to, or has any other absolute or contingent liability in respect of, any Multiemployer Plan. As of the Effective Date no “accumulated funding deficiency” (as defined in Section 412(a) of the Code) exists with respect to any Plan, whether or not waived by the Secretary of the Treasury or his delegate, and there are no Unfunded Benefit Liabilities with respect to any Plan.

(14) *Compliance With Laws*. NAI and its Subsidiaries comply and will comply with all Applicable Laws (including environmental laws and ERISA and the rules and regulations thereunder), except when the necessity of compliance is contested in good faith by appropriate proceedings which do not have and could not reasonably be expected to have a Material Adverse Effect. Neither NAI nor its Subsidiaries have received any notice asserting or describing a material failure on the part of NAI or any Subsidiary to comply with Applicable Laws, other than failures that have been fully rectified by NAI or the Subsidiary, as the case may be, in a manner approved or accepted by Governmental Authorities responsible for the enforcement of the Applicable Laws.

(15) *Payment of Taxes Generally*. Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect (taking into account any appropriate contest of taxes), NAI and its Subsidiaries have filed and will file all tax declarations, reports and returns which are required by (and in the form required by) Applicable Laws and have paid and will pay all taxes or other charges shown to be due and payable on such declarations, reports and returns and all assessments made against it or its assets by any Governmental Authority; and no liens have been filed or established by any Governmental Authority against NAI or its assets or against any Subsidiary or its assets to secure the payment of taxes or assessments that are past due or claimed to be past due.

(16) *Maintenance of Insurance Generally*. Except when the failure to do so

does not have and could not reasonably be expected to have a Material Adverse Effect, NAI and its Subsidiaries have maintained and will maintain insurance with respect to its properties and businesses, with financially sound and reputable insurers, having coverages against losses or damages of the kinds customarily insured against by reputable companies in the same or similar businesses, such insurance being the types, and in amounts no less than the amounts, which are customary for such companies under similar circumstances.

(17) *Franchises, Licenses, etc.* Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect, NAI and its Subsidiaries have and comply with, and will have and will comply with, all franchises, certificates, licenses, permits and other authorizations from Governmental Authorities that are necessary for the ownership, maintenance and operation of its properties and assets.

(18) *Patents, Trademarks, etc.* Except when the failure to do so does not have and could not reasonably be expected to have a Material Adverse Effect, NAI and its Subsidiaries have and will have and maintain in full force and effect all patents, trademarks, service marks, trade names, copyrights, licenses and other such rights, free from burdensome restrictions, which are necessary for the operation of its businesses. Without limiting the foregoing, to the knowledge of NAI, no product, process, method, service or other item presently sold by or employed by NAI or any Subsidiary in connection with its business as presently conducted infringes any patents, trademark, service mark, trade name, copyright, license or other right owned by any other Person. No claim or litigation is presently pending, or to the knowledge of NAI, threatened against or affecting NAI or any Subsidiary that contests its right to sell or use any such product, process, method, substance or other item and that has or could reasonably be expected to have a Material Adverse Effect.

(19) *Labor.* Neither NAI nor any of its Subsidiaries has experienced strikes, labor disputes, slow downs or work stoppages due to labor disagreements that currently have or could reasonably be expected to have a Material Adverse Effect, and to the knowledge of NAI there are no such strikes, disputes, slow downs or work stoppages threatened against it or against any Subsidiary. The hours worked and payment made to employees of NAI and its Subsidiaries have not been in violation in any material respect of the Fair Labor Standards Act or any other Applicable Laws dealing with such matters. All material payments due on account of wages or employee health and welfare insurance and other benefits from NAI or from any Subsidiary have been paid or accrued as liabilities on its books.

(20) *Title to Properties Generally.* Except when the failure to do so does not

have and could not reasonably be expected to have a Material Adverse Effect, NAI and its Subsidiaries have and will have and maintain good and indefeasible fee simple title to or valid leasehold interests in all of its real property and good title to or a valid leasehold interest in all of its other material assets, as such properties and assets are reflected in the most recent financial statements delivered to BNPPLC, other than properties or assets disposed of in the ordinary course of business since such date; *subject, however*, in the case of the Property to Permitted Encumbrances and Liens created by the Operative Documents. NAI enjoys peaceful and undisturbed possession under all of its leases.

(21) Books and Records. NAI will keep proper books of record and account, containing complete and accurate entries of all its financial and business transactions.

(B) Further Assurances. NAI will, upon the reasonable request of BNPPLC, (i) execute, acknowledge, deliver and record or file such further instruments and do such further acts as may be necessary, desirable or proper to carry out more effectively the purposes of the Operative Documents and to subject to any of the Operative Documents any property intended by the terms thereof to be covered thereby, including specifically, but without limitation, any renewals, additions, substitutions, replacements or appurtenances to the Property; (ii) execute, acknowledge, deliver, procure and record or file any document or instrument deemed advisable by BNPPLC to protect its rights in and to the Property against the rights or interests of third persons; and (iii) provide such certificates, documents, reports, information, affidavits and other instruments and do such further acts as may be necessary, desirable or proper in the reasonable determination of BNPPLC to enable BNPPLC to comply with the requirements or requests of any agency or authority having jurisdiction over it.

(C) Syndication. Without limiting the foregoing, NAI will cooperate with BNPPLC as reasonably required to allow BNPPLC to induce banks not affiliated with BNPPLC to become Participants. Such cooperation will include the execution of any modification proposed by BNPPLC to any of the Operative Documents at the request of a prospective Participant; *subject, however*, to the conditions that (i) in no event will NAI be required to approve or accept an increase in the Spread or other modifications that change the economics of the transactions contemplated by the Operative Documents to NAI, and (ii) in other respects the form and substance of any such modification agreement must not reasonably be objectionable to NAI.

(D) Financial Statements; Required Notices; Certificates. Prior to the Completion Date and throughout the Term of the Lease, NAI will deliver to BNPPLC and to each Participant of which NAI has been notified:

(1) as soon as available and in any event within 45 days after the end of each of the first three fiscal quarters of each fiscal year of NAI, the unaudited consolidated balance sheet of NAI and its Subsidiaries as of the end of such quarter and consolidated

unaudited statements of income, stockholders' equity and cash flow of NAI and its Subsidiaries for the period commencing at the end of the previous fiscal year and ending with the end of such quarter, setting forth in comparative form figures for the corresponding period in the preceding fiscal year, in the case of such statements of income, stockholders' equity and cash flow, and figures for the preceding fiscal year in the case of such balance sheet, all in reasonable detail, in accordance with GAAP, and certified in a manner acceptable to BNPPPLC by a Responsible Financial Officer of NAI (subject to normal year-end adjustments); *provided*, that so long as NAI is a company subject to the periodic reporting requirements of Section 12 of the Securities Exchange Act of 1934, as amended, NAI will be deemed to have satisfied its obligations under this clause (1) if NAI delivers to BNPPPLC the same quarterly reports, certified by a Responsible Financial Officer of NAI (subject to year-end adjustments), that NAI delivers to its shareholders;

(2) as soon as available and in any event within ninety days after the end of each fiscal year of NAI, the consolidated balance sheet of NAI and its Subsidiaries as of the end of such fiscal year and consolidated statements of income, stockholders' equity and cash flow of NAI and its Subsidiaries for the period commencing at the end of the previous fiscal year and ending with the end of such fiscal year, setting forth in comparative form figures for the preceding fiscal year, all in reasonable detail, in accordance with GAAP, and certified in a manner acceptable to BNPPPLC by independent public accountants of recognized national standing reasonably acceptable to BNPPPLC; *provided*, that so long as NAI is a company subject to the periodic reporting requirements of Section 12 of the Securities Exchange Act of 1934, as amended, NAI will be deemed to have satisfied its obligations under this clause (ii) if NAI delivers to BNPPPLC the same annual report and report and opinion of accountants that NAI delivers to its shareholders;

(3) in each case if requested in writing by BNPPPLC, together with the financial statements furnished in accordance with subparagraph 2(D)(1) and 2(D)(2), a certificate of a Responsible Financial Officer of NAI in the form of certificate attached hereto as Exhibit C (a) representing that no Event of Default or material Default by NAI has occurred (or, if an Event of Default or material Default by NAI has occurred, stating the nature thereof and the action which NAI has taken or proposes to take to rectify it), (b) stating that the representations and warranties by NAI contained herein are true and complete in all material respects on and as of the date of such certificate as though made on and as of such date, and (c) setting forth calculations which show whether NAI is complying with financial covenants set forth in subparagraph 3(B);

(4) as soon as possible and in any event within five days after the occurrence of each Event of Default or material Default known to a Responsible Financial Officer of NAI, a statement of NAI setting forth details of such Event of Default or material Default

and the action which NAI has taken and proposes to take with respect thereto;

(5) promptly after the sending or filing thereof, copies of all such financial statements, proxy statements, notices and reports which NAI or any Subsidiary sends to its public stockholders, and copies of all reports and registration statements (without exhibits) which NAI or any Subsidiary files with the Securities and Exchange Commission (or any governmental body or agency succeeding to the functions of the Securities and Exchange Commission) or any national securities exchange;

(6) as soon as practicable and in any event within thirty days after a Responsible Financial Officer of NAI knows or has reason to know that any ERISA Termination Event with respect to any Plan has occurred, a statement of a Responsible Financial Officer of NAI describing such ERISA Termination Event and the action, if any, which NAI proposes to take with respect thereto;

(7) upon request by BNPPLC, a statement in writing certifying that the Operative Documents are unmodified and in full effect (or, if there have been modifications, that the Operative Documents are in full effect as modified, and setting forth such modifications) and either stating that no default exists under the Operative Documents or specifying each such default; it being intended that any such statement by NAI may be relied upon by any prospective purchaser or mortgagee of the Property or any prospective Participant; and

(8) such other information respecting the condition or operations, financial or otherwise, of NAI, of its Subsidiaries or of the Property as BNPPLC or BNPPLC's Parent or any Participant through BNPPLC may from time to time reasonably request.

Reports and financial statements required to be delivered pursuant to paragraphs (1), (2) and (5) of this subparagraph 2(D) shall be deemed to have been delivered on the date on which such reports, or reports containing such financial statements, are posted for downloading (in a "PDF" or other readily available format) on one of NAI's internet websites at www.netapp.com or www.investors.netapp.com or on the SEC's internet website at www.sec.gov; provided, however, that after being posted they remain available for downloading at the applicable website for at least 90 days.

BNPPLC is hereby authorized to deliver a copy of any information or certificate delivered to it pursuant to this subparagraph 2(D) to any Participant and to any regulatory body having

jurisdiction over BNPPLC, BNPPLC's Parent or any Participant that requires or requests it.

(E) Omissions. None of NAI's representations in the Operative Documents or in any other document, certificate or written statement furnished to BNPPLC by or on behalf of NAI contains any untrue statement of a material fact or omits a material fact necessary in order to make the statements contained herein or therein (when taken in their entireties) not misleading.

3 Financial Covenants and Negative Covenants of NAI. NAI represents and covenants as follows:

(A) Definitions. As used in this Certificate:

“**Adjusted EBITDA**” means, for any accounting period, the net income (or net loss) of NAI and its Subsidiaries (determined on a consolidated basis), plus without duplication and to the extent reflected as a charge in the statement of such consolidated net income for such period, the sum of (a) income tax expense, (b) interest expense, (c) depreciation and amortization expense, (d) amortization of intangibles and organization costs, (e) non-cash amortization of deferred stock compensation, (f) non-cash expenses related to stock-based compensation, (g) non-cash in-process research and development expense and (h) any extraordinary or non-recurring non-cash expenses or losses (including, whether or not otherwise includable as a separate item in the statement of such consolidated net income for such period, non-cash losses on sales of assets outside the ordinary course of business), minus (x) to the extent included in the statement of such consolidated net income for such period, (i) interest income, (ii) any extraordinary or non-recurring non-cash income or gains (including, whether or not otherwise includable as a separate item in the statement of such consolidated net income for such period, gains on sales of assets outside the ordinary course of business), (iii) income tax credits (to the extent not netted from income tax expense) and (iv) any other non-cash income, and (y) any cash payments made during such period in respect of items described in clause (e) above subsequent to the fiscal quarter in which the relevant non-cash expenses or losses were reflected as a charge in the statement of consolidated net income, all as determined on a consolidated basis.

“**NAI/Company**” means NAI or any of its Subsidiaries.

“**Rolling Four Quarter Period**” means a period of four consecutive fiscal quarters of NAI.

“**Total Debt**” means, without duplication, the following (each, unless otherwise noted, determined in accordance with GAAP):

(a) all obligations of any NAI/Company evidenced by notes, bonds, debentures or other similar instruments and all other obligations of any NAI/Company for borrowed money (including obligations to repurchase receivables or other assets sold with recourse);

(b) all obligations of any NAI/Company for the deferred purchase price of property or services (including obligations under letters of credit or other credit facilities which secure or finance such purchase price, and the capitalized amount reported for income tax purposes with respect to obligations under “synthetic” leases, but excluding accounts payable for property or services or the deferred purchase price of property to the extent due within one year of the applicable determination of Total Debt);

(c) all obligations of any NAI/Company under conditional sale or other title retention agreements with respect to property (other than inventory) acquired by the NAI/Company (but limited in amount to the value of such property if the rights and remedies of the seller or lender under such agreement in the event of default are limited solely to the repossession or sale of such property);

(d) all obligations of any NAI/Company as lessee under or with respect to capital leases;

(e) all guaranty obligations of any NAI/Company with respect to the indebtedness of any other person, and all other contingent obligations of any NAI/Company; and

(f) all obligations of other persons of the types described in clauses (a) through (e) preceding to the extent secured by (or for which any holder of such obligations has an existing right, contingent or otherwise, to be secured by) any Lien on any property (including accounts and contract rights) of any NAI/Company, even though the NAI/Company has not assumed or become liable for the payment of such obligations.

(B) Financial Covenants. NAI covenants that it shall not, at any time prior to the Completion Date and so long thereafter as the Lease continues in effect, suffer or permit:

(1) *Minimum Unencumbered Cash and Short Term Investments*. The sum (without duplication of any item) of the unrestricted cash, unencumbered short term cash investments and unencumbered marketable securities classified as short term investments according to GAAP of NAI and its Subsidiaries (determined on a consolidated basis) to be less than \$300,000,000.

(2) *Maximum Leverage Ratio*. The ratio of (a) Total Debt as of the end of any Rolling Four Quarter Period, to (b) Adjusted EBITDA for such Rolling Four Quarter Period, to be more than 2.00 to 1.00.

(C) Negative Covenants. NAI will not, without the prior consent of BNPPLC in each case, do or permit any of its Subsidiaries to do any of the following: Without limiting NAI's obligations under the other provisions of the Operative Documents, during the Term, NAI shall not, without the prior written consent of BNPPLC in each case:

(1) *Negative Pledge*. Create, incur, assume or suffer to exist, or permit any of its Consolidated Subsidiaries to create, incur, assume or suffer to exist, any Lien, upon or with respect to any of its properties, now owned or hereafter acquired, provided that the following shall be permitted except to the extent that they would encumber any interest in the Property in violation of other provisions of the Operative Documents:

(a) Liens for taxes or assessments or other government charges or levies if not yet due and payable or if they are being contested in good faith by appropriate proceedings and for which appropriate reserves are maintained;

(b) Liens imposed by law, such as mechanic's, materialmen's, landlord's, warehousemen's and carrier's Liens, and other similar Liens, securing obligations incurred in the ordinary course of business which are not past due for more than thirty (30) days, or which are being contested in good faith by appropriate proceedings and for which appropriate reserves have been established;

(c) Liens under workmen's compensation, unemployment insurance, social security or similar laws (other than ERISA);

(d) Liens, deposits or pledges to secure the performance of bids, tenders, contracts (other than contracts for the payment of money), leases, public or statutory obligations, surety, stay, appeal, indemnity, performance or other similar bonds, or other similar obligations arising in the ordinary course of business;

(e) judgment and other similar Liens against assets other than the Property or any part thereof in an aggregate amount not in excess of \$25,000,000 arising in connection with court proceedings; provided that the execution or other enforcement of such Liens is effectively stayed and the claims secured thereby are being actively contested in good faith by appropriate proceedings;

(f) easements, rights-of-way, restrictions and other similar

encumbrances which, in the aggregate, do not materially interfere with the occupation, use and enjoyment by NAI or any such Consolidated Subsidiary of the property or assets encumbered thereby in the normal course of its business or materially impair the value of the property subject thereto;

(g) Liens securing obligations of such a Consolidated Subsidiary to NAI or to another such Consolidated Subsidiary;

(h) Liens not otherwise permitted by this subparagraph 3(C)(1) (and not encumbering the Property) incurred in connection with the incurrence of additional Indebtedness or asserted to secure Unfunded Benefit Liabilities, provided that (a) the sum of the aggregate principal amount of all outstanding obligations secured by Liens incurred pursuant to this clause shall not at any time exceed ten percent (10%) of NAI consolidated net worth (determined in accordance with GAAP); and (b) such Liens do not constitute Liens against NAI's interest in any material Subsidiary or blanket Liens against all or substantially all of the inventory, receivables, general intangibles or equipment of NAI or of any material Subsidiary of NAI (for purposes of this clause, a "material Subsidiary" means any subsidiary whose assets represent a substantial part of the total assets of NAI and its Subsidiaries, determined on a consolidated basis in accordance with GAAP); and

(i) Permitted Encumbrances;

(j) Liens created by the Operative Documents or other documents being executed or accepted by BNPPPLC in connection with the Operative Documents; and

(k) Liens on property existing at the time of acquisition of such property or to secure the payment of all or any part of the purchase price of such property or any addition thereto or to secure any indebtedness incurred at the time of, or within 120 days after the acquisition of such property or any addition thereto for the purpose of financing all or any part of the purchase price thereof (provided such liens are limited to such property or additions thereto)

(l) in the event a corporation is merged into NAI or a Subsidiary of NAI or becomes a Subsidiary of NAI after the Effective Date, Liens on the property or shares of capital stock of such corporation existing at the time of such merger or at the time the corporation became a Subsidiary of NAI as the case may be;

(m) Liens incurred in connection with any renewals, extensions or refundings of any Debt secured by Liens described in the preceding clauses of this subparagraph (1), provided that there is no increase in the aggregate principal amount of Debt secured thereby from that which was outstanding as of the date of such renewal, extension or refunding and no additional property is encumbered; and

(n) Liens incurred to secure Indebtedness incurred no later than June 30, 2006 to fund expenditures by NAI made to comply with or generate tax savings under the American Job Creations Act of 2004.

(2) *Transactions with Affiliates.* Enter into or permit any Subsidiary of NAI to enter into any material transactions (including, without limitation, the purchase, sale or exchange of property or the rendering of any service) with any Affiliates of NAI except on terms (1) that would not cause or result in a Default by NAI under the financial covenants set forth in Part II of this Schedule, and (2) that are no less favorable to NAI or the relevant Subsidiary than those that would have been obtained in a comparable transaction on an arm's length basis from an unrelated Person.

(3) *Capital Expenditures.* Make any additional investment in fixed assets in any fiscal year in excess of an aggregate of twenty percent (20%) of NAI's total assets as of the end of the prior fiscal year.

(4) *Merger, Consolidation, Transfer of Assets.* Merge into or consolidate with any other entity (unless NAI is the surviving entity and remains in compliance of all provisions of the Operative Documents); or make any substantial change in the nature of NAI's business as conducted as of the date hereof; or sell, lease, transfer or otherwise dispose of all or a substantial or material portion of NAI's assets except in the ordinary course of its business.

(5) *Change in Nature of Business.* Make or do anything that would result in a material change in the nature of the business NAI and its Subsidiaries, taken as whole, as carried on at the Effective Date.

(6) *Multiemployer ERISA Plans.* Incur any obligation to contribute to any "multiemployer plan" as defined in Section 4001 of ERISA.

(7) *Prohibited ERISA Transaction.* Enter into any transaction which would cause any of the Operative Documents or any related documents executed or accepted by BNPPCLC (or any exercise of BNPPCLC's rights hereunder or thereunder) to constitute a non-exempt prohibited transaction under ERISA.

4 Limited Representations and Covenants of BNPPLC

(A) Concerning Accounting Matters.

(1) To permit NAI to determine the appropriate accounting for NAI's relationship with BNPPLC under FASB Interpretation No. 46, *Consolidation of Variable Interest Entities* ("FIN 46"), BNPPLC represents that to the knowledge of BNPPLC the fair value of the Property and of other properties, if any, leased to NAI by BNPPLC (collectively, whether one or more, the "**Properties Leased to NAI**") are, as of the Effective Date, less than half of the total of the fair values of all assets of BNPPLC, excluding any assets of BNPPLC held within a silo. Further, none of the Properties Leased to NAI are, as of the Effective Date, held within a silo. Consistent with the directions of NAI (based upon the current interpretation of FIN 46 by NAI and its auditors), and for purposes of this representation only:

- "**held within a silo**" means, with respect to any asset or group of assets leased by BNPPLC to a single lessee or group of affiliated lessees, that BNPPLC has obtained funds equal to or in excess of 95% of the fair value of the leased asset or group of assets to acquire or maintain its investment in such asset or group of assets through non-recourse financing or other contractual arrangements (such as targeted equity or bank participations), the effect of which is to leave such asset or group of assets (or proceeds thereof) as the only significant asset or assets of BNPPLC at risk for the repayment of such funds;
- "**fair value**" means, with respect to any asset, the amount for which the asset could be bought or sold in a current transaction negotiated at arms length between willing parties (that is, other than in a forced or liquidation sale);
- with respect to the Properties Leased to NAI (regardless of how BNPPLC accounts for the leases of the Properties Leased to NAI), and with respect to other assets that are subject to leases accounted for by BNPPLC as operating leases pursuant to Financial Accounting Standards Board Statement 13 ("**FAS 13**"), fair value is determined without regard to residual value guarantees, remarketing agreements, non-recourse financings, purchase options or other contractual arrangements, whether made by BNPPLC with NAI or with other parties, that might otherwise impact the fair

value of such assets;

- with respect to assets, other than Properties Leased to NAI, that are subject to leases accounted for by BNPPLC as leveraged leases pursuant to FAS 13, fair value is determined on a gross basis prior to the application of leveraged lease accounting, recognizing that equity investments made by BNPPLC in its assets subject to leveraged lease accounting should be grossed up in applying this test (however, equity investments made by BNPPLC through another legal entity should not be so grossed up in applying this test);
- with respect to assets, other than Properties Leased to NAI, that are subject to leases accounted for by BNPPLC as direct financing leases pursuant to FAS 13, fair value is determined as the sum of the fair values (considering current interest rates at which similar loans would be made to borrowers with similar credit ratings and for the same remaining maturities) of the corresponding finance lease receivables and related unguaranteed residual values.

(2) BNPPLC also represents that BNPPLC's Parent is, as of the Effective Date, including BNPPLC as a consolidated subsidiary in the audited financial statements issued by BNPPLC's Parent.

(3) BNPPLC covenants that, as reasonably requested by NAI from time to time with respect to any accounting period during which the Lease is or was in effect, BNPPLC will provide to NAI confirmation of facts concerning BNPPLC and its assets as necessary to permit NAI to determine the proper accounting for the Lease (including updates of the facts set forth in clauses (1) and (2) above); except that BNPPLC will not be required by this provision to (w) provide any information that is not in the possession or control of BNPPLC or its Affiliates, (x) disclose the specific terms and conditions of its leases or other transactions with other parties or the names of such parties, (y) make disclosures prohibited by any law applicable to BNPPLC or BNPPLC's Parent, or (z) disclose any other information that is protected from disclosure by confidentiality provisions in favor of such other parties or would be protected if their agreements with BNPPLC contained confidentiality provisions similar in scope and substance to any confidentiality provisions set forth in the Operative Documents for the benefit of NAI or its Affiliates. BNPPLC will represent that information provided by it pursuant to this clause is true and complete in all material respects, but only to the knowledge of BNPPLC as of the date it is provided, utilizing the form of the certificate attached hereto as Exhibit D (signed by an officer of BNPPLC), which certificate will be provided

periodically by BNPPPLC within five business days of reasonable written request therefor by NAI as provided above, or such longer period of time as may be reasonably necessary under the circumstances in order for BNPPPLC to confirm such information.

(4) Although the representations required of BNPPPLC by this subparagraph are intended to cover *facts*, it is understood and agreed (consistent with subparagraph 4(C) of the Lease) that BNPPPLC has not made and will not make any representation or warranty as to the proper accounting by NAI or its Affiliates of the Lease or as to other accounting *conclusions*.

(B) Other Limited Representations. BNPPPLC represents that:

(1) *Entity Status*. BNPPPLC is a corporation duly incorporated, validly existing and in good standing under the laws of Delaware.

(2) *Authority*. The Constituent Documents of BNPPPLC permit the execution, delivery and performance of the Operative Documents by BNPPPLC, and all actions and approvals necessary to bind BNPPPLC under the Operative Documents have been taken and obtained. Without limiting the foregoing, the Operative Documents will be binding upon BNPPPLC when signed on behalf of BNPPPLC by Lloyd G. Cox, Managing Director of BNPPPLC. BNPPPLC has all requisite power and all governmental certificates of authority, licenses, permits and qualifications to carry on its business as now conducted and contemplated to be conducted and to perform the Operative Documents, except that BNPPPLC makes no representation as to whether it has obtained governmental certificates of authority, licenses, permits, qualifications or other documentation required by state or local Applicable Laws. With regard to any such state or local requirements, NAI may require that BNPPPLC obtain a specific governmental certificates of authority, licenses, permits, qualifications or other documentation pursuant to subparagraph 4(C), subject to the conditions set forth in that subparagraph.

(3) *Solvency*. BNPPPLC is not “insolvent” on the Effective Date (that is, the sum of BNPPPLC’s absolute and contingent liabilities — including the obligations of BNPPPLC under the Operative Documents — does not exceed the fair market value of BNPPPLC’s assets), and BNPPPLC has no outstanding liens, suits, garnishments or court actions which could render BNPPPLC insolvent or bankrupt. BNPPPLC’s capital is adequate for the businesses in which BNPPPLC is engaged and intends to be engaged. BNPPPLC has not incurred (whether by the Operative Documents or otherwise), nor does BNPPPLC intend to incur or believe that it will incur, debts which will be beyond its ability to pay as such debts mature. No petition or answer has been filed by or, to BNPPPLC’s knowledge, against BNPPPLC in bankruptcy or other legal proceedings that seeks an assignment for the benefit of creditors, the appointment of a receiver, trustee,

custodian or liquidator with respect to BNPPPLC or any significant portion of BNPPPLC's property, a reorganization, arrangement, rearrangement, composition, extension, liquidation or dissolution of BNPPPLC or similar relief under the federal Bankruptcy Code or any state law. (As used in the Operative Documents, "**BNPPPLC's knowledge**" and words of like effect mean the present actual knowledge of Lloyd G. Cox and Barry Mendelsohn, the current officers of BNPPPLC having primary responsibility for the negotiation of the Operative Documents.)

(4) *Pending Legal Proceedings.* No judicial or administrative investigations, actions, suits or proceedings are pending or, to the knowledge of BNPPPLC, threatened against or affecting BNPPPLC by or before any court or other Governmental Authority. BNPPPLC is not in default with respect to any order, writ, injunction, decree or demand of any court or other Governmental Authority in a manner that has or could reasonably be expected to have a material adverse effect on BNPPPLC or its ability to perform its obligations under the Operative Documents.

(5) *No Default or Violation.* The execution and performance by BNPPPLC of the Operative Documents do not and will not contravene or result in a breach of or default under any other agreement to which BNPPPLC is a party or by which BNPPPLC is bound or which affects any assets of BNPPPLC. Such execution and performance by BNPPPLC do not contravene any law, order, decree, rule or regulation to which BNPPPLC is subject. Further, such execution and performance by BNPPPLC will not result in the creation or imposition of (or the obligation to create or impose) any lien, charge or encumbrance on, or security interest in, any property of BNPPPLC pursuant to the provisions of any such other agreement.

(6) *Enforceability.* The Operative Documents constitute the legal, valid and binding obligations of BNPPPLC enforceable in accordance with their terms, subject to the effect of bankruptcy, insolvency, reorganization, receivership and other similar laws affecting the rights of creditors generally.

(7) *Conduct of Business and Maintenance of Existence.* So long as any of the Operative Documents remains in force, BNPPPLC will continue to engage in business of the same general type as now conducted by it and will preserve, renew and keep in full force and effect its corporate existence and its rights, privileges and franchises necessary or desirable in the normal conduct of business.

(8) *Not a Foreign Person.* BNPPPLC is not a "foreign person" within the meaning of Sections 1445 and 7701 of the Code (i.e. BNPPPLC is not a non-resident alien, foreign corporation, foreign partnership, foreign trust or foreign estate as those terms are defined in the Code and regulations promulgated thereunder).

Notwithstanding the foregoing, however or any other provision herein or in other Operative Documents to the contrary, it is understood that NAI is not relying upon BNPPPLC for any evaluation of California or local Applicable Laws upon the transactions contemplated in the Operative Documents, and BNPPPLC makes no representation and will not make any representation that conditions imposed by zoning ordinances or other state or local Applicable Laws to the purchase, ownership, lease or operation of the Property have been satisfied.

(C) Further Assurances. Prior to the Completion Date and during the Term of the Lease BNPPPLC will take any action reasonably requested by NAI to facilitate the construction contemplated by the Construction Management Agreement or the use of the Property permitted by the Lease or the establishment of a commercial condominium regime that includes the Property (a “**Condominium Regime**”) or replatting of the Land and other adjacent land owned by NAI (a “**Replatting**”); subject, however, to the following terms and conditions:

(1) This subparagraph 4(C) will not impose upon BNPPPLC the obligation to take any action that can be taken by NAI, NAI’s Affiliates or anyone else other than BNPPPLC as the lessee under the Ground Lease or the owner of the Property.

(2) BNPPPLC will not be required by this subparagraph 4(C) to incur any expense or make any payment to another Person unless (a) BNPPPLC has received funds from NAI, in excess of any other amounts due from NAI under any of the Operative Documents, sufficient to cover the expense or make the payment or (b) the request by NAI which will result in such expense or payment is made before the Completion Date and BNPPPLC can include such expense or payment in the Outstanding Construction Allowance for purposes of the Construction Management Agreement.

(3) BNPPPLC will have no obligations whatsoever under this subparagraph 4(C) at any time after a 97-10/Event or when a Default or an Event of Default has occurred and is continuing.

(4) NAI must request any action to be taken by BNPPPLC pursuant to this subparagraph 4(C), and such request must be specific and in writing, if required by BNPPPLC at the time the request is made.

(5) No action may be required of BNPPPLC pursuant to this subparagraph 4(C) that could constitute a violation of any Applicable Laws or compromise or constitute a waiver of BNPPPLC’s rights under other provisions of this Certificate or any of the other Operative Documents or that for any other reason is reasonably objectionable to BNPPPLC.

The actions BNPPPLC will take pursuant to this subparagraph 4(C) if reasonably requested

by NAI will include, subject to the conditions listed in the proviso above, executing or consenting to, or exercising or assisting NAI to exercise rights under any: (I) grant of easements, licenses, rights of way, and other rights in the nature of easements encumbering the Land or the Improvements, (II) release, relocation or termination of easements, licenses, rights of way or other rights in the nature of easements which are for the benefit of the Land or Improvements or any portion thereof, (III) dedication or transfer of portions of the Land not improved with a building, for road, highway or other public purposes, (IV) agreements (which will, in the case of agreements made with NAI or its Affiliates, remain subject to subparagraphs (J), (K) and (L) of the Ground Lease or comparable provisions included in amendments to the Operative Documents) for the use and maintenance of common areas, for reciprocal rights of parking, ingress and egress and amendments to any covenants and restrictions affecting the Land or any portion thereof, (V) documents required to create or administer a governmental special benefit district or assessment district for public improvements and collection of special assessments, (VI) instruments necessary or desirable for the exercise or enforcement of rights or performance of obligations under any Permitted Encumbrance or any contract, permit, license, franchise or other right included within the term "Property", (VII) modifications of Permitted Encumbrances, (VIII) permit applications or other documents required to accommodate the Construction Project or any Replatting, (IX) confirmations of NAI's rights under any particular provisions of the Operative Documents which NAI may wish to provide to a third party, (X) tract or parcel map subdividing the Land into lots or parcels as part of a Replatting, or (XI) condominium documents (e.g., a condominium declaration or map) meeting the requirements of Applicable Laws to establish a Condominium Regime. However, the determination of whether any such action is reasonably requested or reasonably objectionable to BNPPPLC may depend in whole or in part upon the extent to which the requested action may result in a lien to secure payment or performance obligations against BNPPPLC's interest in the Property, may cause the value of the Property to be less than the Lease Balance after any Qualified Prepayments that may result from such action are taken into account, or may impose upon BNPPPLC any present or future obligations greater than the obligations BNPPPLC is willing to accept, taking into consideration the indemnifications provided by NAI under the Construction Management Agreement or the Lease, as applicable.

In addition, with respect to any request made by NAI to facilitate a relocation of any easements or a substitution of new easements for those described in Exhibit A, the following will be relevant to the determination of whether the request is reasonable:

- (i) whether material encroachments will result from the relocation or replacement, and whether title to the land over or under which any such easement is to be relocated or replaced is encumbered by Liens other than those which are Fully Subordinated or Removable or which otherwise constitute Permitted Encumbrances;
- (ii) whether the relocation or replacement will result in any interruption of

access or services provided to the Property which is likely to extend beyond the Designated Sale Date (it being understood, however, that any such interruption which is not likely to extend beyond the Designated Sale Date will not be a reason for BNPPPLC to decline the request); and

(iii) whether the relocation or replacement is to be accomplished in a manner that will not, when the relocation or replacement is complete, result in a material adverse change in the access to or services provided to the Improvements or the Land.

With respect to any request made by NAI to facilitate the establishment of a Condominium Regime or Replatting, the following will be relevant to the determination of whether the request is reasonable:

(1) whether the Condominium Regime or Replatting will create one or more distinct condominium units or parcels of land that include all significant Improvements constructed or to be constructed by NAI for BNPPPLC pursuant to the Construction Management Agreement and only such Improvements (whether one or more, the “**Applicable Units**”);

(2) whether NAI is willing to amend the Operative Documents by amendments in form and substance acceptable to BNPPPLC (the “**Anticipated Amendments**”) as necessary to ensure that:

(A) the Property will include of the Applicable Units, together with all access, parking or other property rights (whether exclusive or nonexclusive) that will be created as appurtenances to the Applicable Units by the Condominium Regime (“**Appurtenant Condo Rights**”) or by a recorded declaration of covenants, conditions and rights executed in connection with a Replatting (“**CCRs**”);

(B) the land leased to BNPPPLC pursuant to the Ground Lease will include and be limited to the land (if any) over which exclusive possession and control must reasonably be vested in the owner of the Applicable Units to preserve the value and utility of the Applicable Units to such owner, taking into account Appurtenant Condo Rights or CCRs; and

(C) if the event discretionary approvals or consents are required from any “declarant” or “operator” by the Condominium Regime or CCRs over the design, construction or alteration of Improvements or over the sale, use, leasing or financing of the Property, then (i) the “declarant” or “operator” will be NAI or another party acceptable to BNPPPLC and will be bound by and remain bound by

subparagraphs (J), (K) and (L) of the Ground Lease or comparable provisions in the Anticipated Amendments with respect to such discretionary approvals or consents;

(3) whether the request itself (if granted) or the proposed Condominium Regime or Replatting is likely to have any material adverse impact on the value or utility of the Property, taken as a whole, after giving effect to the Anticipated Amendments and taking into account Appurtenant Condo Rights and CCRs; and

(4) whether the request itself (if granted) or the Condominium Regime or CCRs will materially limit, or give NAI or its Affiliates discretionary control over, the rights of BNPPPLC and its successors and assigns to use or lease, sell or otherwise transfer the Applicable Units in the event NAI declines for any reason to purchase the Property on the Designated Sale Date pursuant to the Purchase Agreement, but taking into account any superior rights BNPPPLC has or may reserve under or by reference to subparagraphs (J), (K) and (L) of the Ground Lease or comparable provisions in the Anticipated Amendments.

Any and all Losses incurred by BNPPPLC because of any action taken after the Completion Date pursuant to this subparagraph 4(C) will be covered by the indemnifications of BNPPPLC set forth in Construction Management Agreement or in the Lease. Further, for purposes of such indemnification, any such action taken by BNPPPLC will be deemed to have been made at the request of NAI if made pursuant to any request of counsel to or any officer of NAI (or with their knowledge, and without their objection) in connection with the execution or administration of the Lease or the other Operative Documents.

(D) Actions Permitted by NAI Without BNPPPLC's Consent. No refusal by BNPPPLC to execute or join in the execution of any agreement, application or other document requested by NAI pursuant to the preceding subparagraph 4(C) will prevent NAI from itself executing such agreement, application or other document, so long as NAI is not purporting to act for BNPPPLC and does not thereby create or expand any obligations or restrictions that encumber BNPPPLC's title to the Property. Further, subject to the other terms and conditions of the Lease and other Operative Documents, NAI may do any of the following in NAI's own name and to the exclusion of BNPPPLC before and during the Term of the Lease, so long as no 97-10/Event has occurred and no Default or Event of Default has occurred and is continuing, and provided NAI is not purporting to act for BNPPPLC and does not thereby create or expand any obligations or restrictions that encumber BNPPPLC's title to the Property:

(1) perform obligations arising under and exercise and enforce the rights of NAI or the owner of the Property under the Permitted Encumbrances;

(2) perform obligations arising under and exercise and enforce the rights of NAI or the owner of the Property with respect to any other contracts or documents (such as building permits) included within the Personal Property; and

(3) recover and retain any monetary damages or other benefit inuring to NAI or the owner of the Property through the enforcement of any rights, contracts or other documents included within the Personal Property (including the Permitted Encumbrances); provided, that to the extent any such monetary damages may become payable as compensation for an adverse impact on value of the Property, the rights of BNPPPLC and NAI under the other Operative Documents with respect to the collection and application of such monetary damages will be the same as for condemnation proceeds payable because of a taking of all or any part of the Property.

(E) Waiver of Landlord's Liens. BNPPPLC waives any security interest, statutory landlord's lien or other interest BNPPPLC may have in or against computer equipment and other tangible personal property placed on the Land from time to time that NAI or its Affiliates own or lease from other lessors; however, BNPPPLC does not waive its interest in or rights with respect to equipment or other property included within the "Property" as described in Paragraph 7 of the Lease. Although computer equipment or other tangible personal property may be "bolted down" or otherwise firmly affixed to Improvements, it will not by reason thereof become part of the Improvements if it can be removed without causing structural or other material damage to the Improvements and without rendering HVAC or other major building systems inoperative and if it does not otherwise constitute "Property" as provided in Paragraph 7 of the Lease.

Without limiting the foregoing, BNPPPLC acknowledges that NAI may obtain financing from other parties for inventory, furnishings, equipment, machinery and other personal property that is located in or about the Improvements, but that is not included in or integral to the Property, and to secure such financing NAI may grant a security interest under the California Uniform Commercial Code in such inventory, furnishings, equipment, machinery and other personal property. Further, BNPPPLC acknowledges that the lenders providing such financing may require confirmation from BNPPPLC of its agreements concerning landlord's liens and other matters set forth in this subparagraph 4(E), and NAI may obtain such confirmation in any statement required of BNPPPLC by the next subparagraph.

(F) Estoppel Letters. Upon thirty days written request by NAI at any time and from time to time prior to the Designated Sale Date, BNPPPLC must provide a statement in writing certifying that the Operative Documents are unmodified and in full effect (or, if there have been modifications, that the Operative Documents are in full effect as modified, and setting forth such modifications), certifying the dates to which the Base Rent payable by NAI under the Lease has been paid, stating whether BNPPPLC is aware of any default by NAI that may exist under the Operative Documents and confirming BNPPPLC's agreements concerning landlord's liens and

other matters set forth in subparagraph 4(E). Any such statement by BNPPLC may be relied upon by anyone with whom NAI may intend to enter into an agreement for construction of the Improvements or other significant agreements concerning the Property.

(G) No Implied Representations or Promises by BNPPLC. NAI acknowledges and agrees that neither BNPPLC nor its representatives or agents have made any representations or promises with respect to the Property or the transactions contemplated in the Operative Documents except as expressly set forth in the Operative Documents, and no rights, easements or licenses are being acquired by NAI from BNPPLC by implication or otherwise, except as expressly set forth in the other Operative Documents.

5 Usury Savings Provision. Notwithstanding anything to the contrary in any of the Operative Documents, BNPPLC does not intend to contract for, charge or collect any amount of money from NAI that constitutes interest in excess of the maximum nonusurious rate of interest, if any, allowed by applicable usury laws (the “**Maximum Rate**”). BNPPLC and NAI agree that it is their intent in the execution of the Lease, the Purchase Agreement and other Operative Documents to contract in strict compliance with applicable usury laws, if any. In furtherance thereof, BNPPLC and NAI stipulate and agree that none of the provisions of the Lease, the Purchase Agreement or the other Operative Documents shall ever be construed to create a contract requiring compensation for the use, forbearance or detention of money at a rate in excess of the Maximum Rate, and the provisions of this paragraph shall control over all other provisions of this Certificate or other Operative Documents which may be in apparent conflict herewith. All interest paid or agreed to be paid by NAI to BNPPLC shall, to the extent permitted by applicable usury laws, be amortized, prorated, allocated, and spread throughout the period that any principal upon which such interest accrues is expected to be outstanding (including without limitation any renewal or extension of the term of the Lease) so that the amount of interest included in such payments does not exceed the maximum nonusurious amount permitted by applicable usury laws. If the Designated Sale Date is accelerated and as a result thereof amounts paid by NAI to BNPPLC as interest are determined to exceed the interest that would have accrued at the Maximum Rate for the period prior to the Designated Sale Date, then BNPPLC shall, at its option, either refund to NAI the amount of such excess or credit such excess as a Qualified Prepayment (and thus reduce the Lease Balance and other amounts, the determination of which depend upon Qualified Prepayments credited to NAI) and thereby shall render inapplicable any and all penalties of any kind provided by applicable usury laws as a result of such excess interest. If BNPPLC receives money (or anything else) that is determined to constitute interest and that would, but for this provision, increase the effective interest rate received by BNPPLC under or in connection with the Operative Documents to a rate in excess of the Maximum Rate, then the amount determined to constitute interest in excess of the maximum nonusurious interest shall, immediately following such determination, be returned to NAI or be credited as a Qualified Prepayment, in which event any and all penalties of any kind under applicable usury law shall be

inapplicable. If BNPPLC does not actually receive, but shall contract for, request or demand, a payment of money (or anything else) which is determined to constitute interest and to increase the effective interest rate contracted for or charged to a rate in excess of the Maximum Rate, BNPPLC shall be entitled, following such determination, to waive or rescind the contractual claim, request or demand for the amount determined to exceed the Maximum Rate, in which event any and all penalties of any kind under applicable usury law shall be inapplicable. If at any time NAI should have reason to believe that the transactions evidenced by the Operative Documents are in fact usurious, NAI shall promptly give BNPPLC notice of such condition, after which BNPPLC shall have ninety days in which to make appropriate refund or other adjustment in order to correct such condition if it in fact exists.

6 Obligations of NAI Under Other Operative Documents Not Limited by this Certificate. Except as provided above in Paragraph 5, nothing contained in this Certificate will limit, modify or otherwise affect any of NAI's obligations under the other Operative Documents. Subject to Paragraph 5, those obligations are intended to be separate, independent and in addition to, and not in lieu of, those established by this Certificate.

7 Obligations of NAI Hereunder Not Limited by Other Operative Documents. Recognizing that but for this Certificate (including the representations of NAI set forth in Paragraph 1) BNPPLC would not acquire the Property or enter into the other Operative Documents, NAI agrees that BNPPLC's rights for any breach of this Certificate (including a breach of such representations) will not be limited by any provision of the other Operative Documents that would limit NAI's liability thereunder.

8 Waiver of Jury Trial. By its execution of this Certificate, each of NAI and BNPPLC hereby waives its respective rights to a jury trial of any claim or cause of action based upon or arising out of the Operative Documents or any of them or any other document or dealings between them relating to the Property. The scope of this waiver is intended to be all-encompassing of any and all disputes that may be filed in any court and that relate to the subject matter of this transaction, including contract claims, tort claims, breach of duty claims, and all other common law and statutory claims. This waiver is a material inducement to each of BNPPLC and NAI as they enter into a business relationship; each has already relied on the waiver in entering into the Operative Documents; and each will continue to rely on the waiver in their related future dealings. NAI and BNPPLC, each having reviewed this waiver with its legal counsel, knowingly and voluntarily waives its jury trial rights following consultation with legal counsel. **This waiver is irrevocable, meaning that it may not be modified either orally or in writing, and the waiver will apply to any subsequent amendments, renewals, supplements or modifications to each of the Operative Documents or to any other documents or agreements relating to the Property.** In the event of litigation, this Certificate may be filed as a written consent to a trial by the court.

[The signature pages Follow.]

Closing Certificate and Agreement — Page 26

IN WITNESS WHEREOF, this Closing Certificate and Agreement is executed to be effective as of December 14, 2006.

BNP PARIBAS LEASING CORPORATION, a
Delaware corporation

By: /s/ Lloyd G. Cox
Lloyd G. Cox, Managing Director

Closing Certificate and Agreement — Signature Page

[Continuation of signature pages for Closing Certificate and Agreement dated as of December 14, 2006]

NETWORK APPLIANCE, INC., a Delaware
corporation

By: /s/ Ingemar Lanevi
Ingemar Lanevi, Vice President and Corporate
Treasurer

Closing Certificate and Agreement — Signature Page

Exhibit A

Legal Description

Proposed Parcel 8, and (except to the extent within a different platted Parcel as currently shown in the Map Records of the County of Santa Clara, California) proposed Parcel 12, and the Additional Leased Premises as defined below, (collectively, the “**2006 Ground Lease Premises**”) as shown on that certain Vesting Tentative Parcel Map provided to BNP Paribas Leasing Corporation (“**BNPPLC**”) by Network Appliance, Inc. (“**NAI**”) attached hereto and made a part hereof (the “**Tentative Map**”), which has received preliminary approval from the City of Sunnyvale, California, but not yet been filed for record in the office of the recorder of the County of Santa Clara, State of California. As used herein, “**Additional Leased Premises**” means the parking lots, driveways and other areas shaded in gray on the Tentative Map attached hereto within the larger area designated as Common Lot A (consisting of 30.46 Acres, more or less) on the Tentative Map. The southern boundary of the Additional Leased Premises is a line that runs North 75 degrees, 07 minutes, 58 seconds equidistant from the southern boundary of Parcel 8 and the northern boundary of Parcel 7, both as shown on the Tentative Map. The eastern boundary of the Additional Leased Premises runs along the same line as the eastern boundary of Common Lot A, as shown on the Tentative Map. The western boundary of the Additional Leased Premises runs along the same line as the western boundary of Parcel 8 and Parcel 7, as shown on the Tentative Map. The northern boundary of the Additional Leased Premises runs along the center of an existing or proposed driveway which is situated between Parcel 8 and Parcel 9, as shown on the Tentative Map.

TOGETHER WITH, easements appurtenant to the 2006 Ground Lease Premises as described in Exhibit A attached to the Ground Lease.

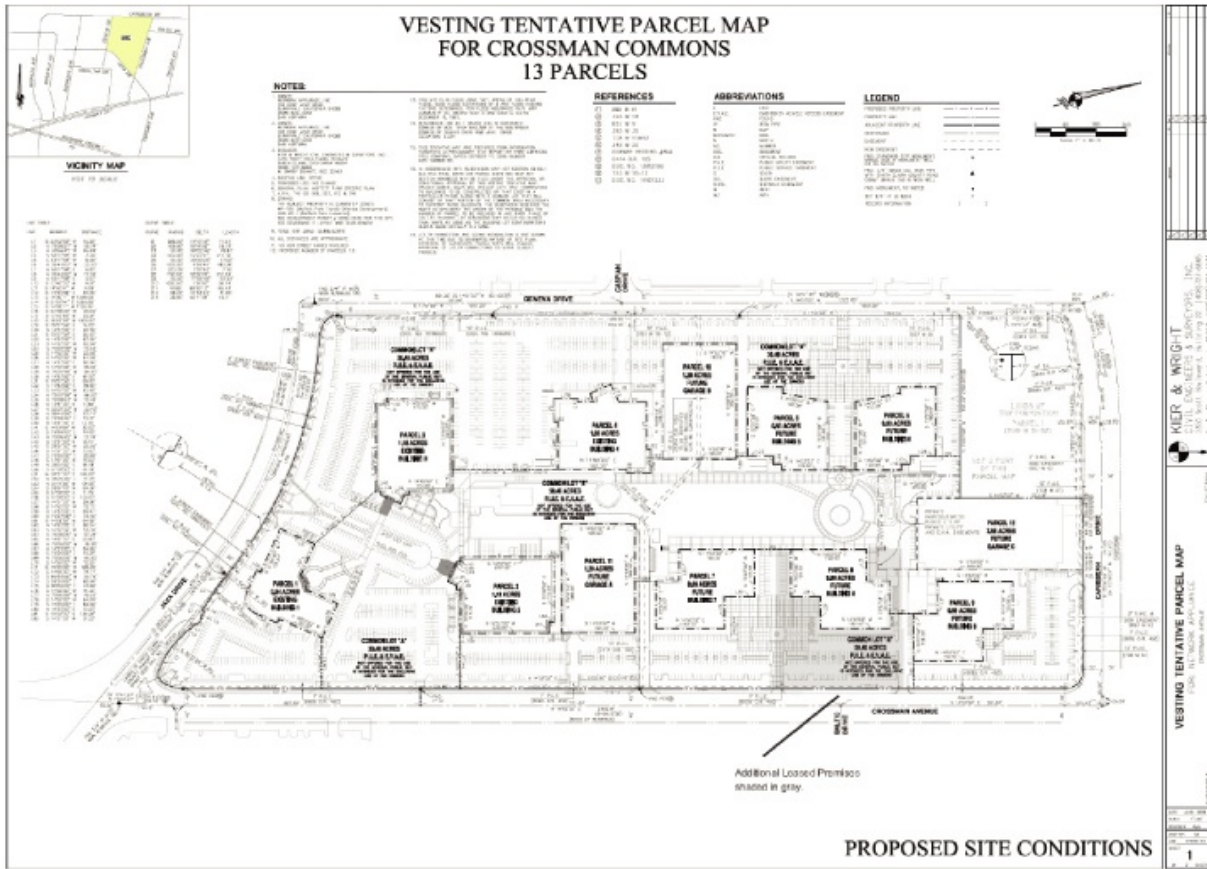


Exhibit B

Permitted Encumbrances

1. TAXES for the fiscal year 2006-2007, a lien not yet due or payable.
2. THE LIEN of supplemental taxes, if any, assessed pursuant to Chapter 3.5 commencing with Section 75 of the California Revenue and Taxation Code, resulting from changes of ownership or completion of construction on or after the date hereof.
3. EASEMENT for the purposes stated herein and incidents thereto

Purpose : Slope Easement
In favor of : City of Sunnyvale
Recorded : October 9, 1964 in Book 6695, page 430, Official Records
Affects : Easterly 18 feet, as shown on a survey plat entitled ALTA/ACSM
Land Title Survey for: Network Appliance, 1345 Crossman
Avenue, dated December 2, 1999, prepared by Kier & Wright, Job
No. 97208-16.

4. EASEMENT for the purposes stated herein and incidents thereto

Purpose : Public utilities easement
In favor of : City of Sunnyvale
Recorded : October 9, 1964 in Book 6695, page 450, Official Records
Affects : Easterly 7 feet, as shown on a survey plat entitled ALTA/ACSM
Land Title Survey for: Network Appliance, 1345 Crossman
Avenue, dated December 2, 1999, prepared by Kier & Wright, Job
No. 97208-16.

5. Covenants, Conditions and Restrictions in the Declaration of Protective Covenants — Moffett Industrial Park No. 2) recorded December 23, 1971 in Book 9640, page 443, Official Records; which provide that a violation thereof shall not defeat or render invalid the lien of any Mortgage or Deed of Trust made in good faith and for value. Said Covenants, Conditions and Restrictions do not provide for reversion of title in the event of a breach thereof. Restrictions, if any, based upon race, color, religion, sex, handicap, familial status, or national origin are deleted, unless and only to the extent that said covenant (a) is exempt under Chapter 42, Section 3607, of the United States Code, or (b) related to handicap but does not discriminate against handicapped persons.

ASSIGNMENT AND ASSUMPTION of the rights, powers, duties, obligations, and reservations of Moffett Park Associates, in favor of The Prudential Insurance Company of America, recorded February 8, 1977 in Book C583, page 685, Official Records.

6. EASEMENT for the purposes stated herein and incidents thereto

Purpose : Public utilities
Granted to : City of Sunnyvale
Recorded : November 16, 1976 in Book C414, page 105, Official Records
Affects : Southerly 10 feet, as shown on a survey plat entitled
ALTA/ACSM Land Title Survey for: Network Appliance, 1345
Crossman Avenue, dated December 2, 1999, prepared by Kier &
Wright, Job No. 97208-16.

7. LIMITATIONS, covenants, restrictions, reservations, exceptions or terms, but deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin to the extent such covenants, conditions or restrictions violate 42 USC 3604(c), contained in the document recorded February 5, 1980 in Book F122, page 460, Official Records.

Exhibit C

Quarterly Certificate

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director

Gentlemen:

This Certificate is furnished pursuant to subparagraph 2(D)(3) of the Closing Certificate and Agreement dated as of December 14, 2006 between Network Appliance, Inc. and BNP Paribas Leasing Corporation (as amended, the "**Closing Certificate**"). Terms defined in the Closing Certificate and used but not otherwise defined in this Certificate are intended to have the respective meanings ascribed to them in the Closing Certificate.

The undersigned, being a Responsible Financial Officer of Network Appliance, Inc., represents and certifies the following to BNP Paribas Leasing Corporation:

(a) No Event of Default or material Default by NAI has occurred except as follows:

[If an Event of Default or material Default by NAI has occurred, insert a description of the nature thereof and the action which NAI has taken or proposes to take to rectify it; otherwise, insert the word "none".]

(b) The representations and warranties by NAI in the Closing Certificate are true and complete in all material respects on and as of the date of this Certificate as though made on and as of such date.

(c) the calculations set forth in the attachment to this Certificate, which show whether NAI is complying with financial covenants set forth in subparagraph 3(B) of the Closing Certificate based upon the most recent information available, are true and complete.

Executed this _____ day of _____, 20_____.

**[INSERT SIGNATURE BLOCK FOR A
RESPONSIBLE FINANCIAL OFFICER]**

Exhibit D

Certificate of BNPPLC Re: Accounting

Network Appliance, Inc.
7301 Kit Creek Road
Research Triangle Park, NC 27709
Attention: Ingemar Lanevi

Gentlemen:

This certificate is furnished pursuant to subparagraph 4(A) of the Closing Certificate and Agreement dated as of December 14, 2006 between BNP Paribas Leasing Corporation and Network Appliances, Inc. (as amended, the "**Closing Certificate**"). Terms defined in the Closing Certificate and used but not otherwise defined in this certificate are intended to have the respective meanings ascribed to them in the Closing Certificate.

BNP Paribas Leasing Corporation ("**BNPPLC**") certifies that the following are true and complete in all material respects, but only to the knowledge of BNPPLC as of the date hereof:

(A) The facts disclosed in any financial statements or other documents listed in the Annex attached to this certificate were (as of their respective dates) true and complete in all material respects. Copies of such statements or other documents were provided by or behalf of BNPPLC to NAI prior to the date hereof to permit NAI to determine the appropriate accounting for NAI's relationship with BNPPLC under FASB Interpretation No. 46, *Consolidation of Variable Interest Entities* ("**FIN 46**").

(B) The fair value of the Property and of other properties, if any, leased to NAI by BNPPLC (collectively, whether one or more, the "**Properties Leased to NAI**") are, as of the date hereof, less than half of the total of the fair values of all assets of BNPPLC, excluding any assets of BNPPLC which are held within a silo. Further, none of the Properties Leased to NAI are, as of the date hereof, held within a silo.

Although the representations required of BNPPLC by this certificate are intended to cover *facts*, it is understood and agreed (consistent with subparagraph 4(C) of the Lease) that BNPPLC has not made and will not make any representation or warranty as to the proper accounting by NAI or its Affiliates of the Lease or other Operative Documents or as to other accounting *conclusions*.

Executed this _____ day of _____, 20_____.

BNP PARIBAS LEASING CORPORATION, a
Delaware corporation

By: _____
Lloyd G. Cox, Managing Director

CONSTRUCTION MANAGEMENT AGREEMENT

BETWEEN

**NETWORK APPLIANCE, INC.
("NAI")**

AND

**BNP PARIBAS LEASING CORPORATION
("BNPPLC")**

December 14, 2006

TABLE OF CONTENTS

	<u>Page</u>
<i>ENGAGEMENT AND AUTHORIZATION</i>	1
<i>GENERAL TERMS AND CONDITIONS</i>	2
1 Additional definitions	2
“97-10/Event”	2
“97-10/Maximum Permitted Prepayment”	2
“97-10/Prepayment”	3
“97-10/Project Costs”	3
“97-10/Pronouncement”	4
“NAI’s Estimate of Force Majeure Delays”	4
“NAI’s Estimate of Force Majeure Excess Costs”	4
“Accrued Construction Period Interest Expense”	4
“Affiliate’s Contract”	5
“Arrangement Fee”	5
“Administrative Fee”	5
“Capital Adequacy Charges”	5
“Carrying Costs”	5
“Commitment Fees”	5
“Complete Taking”	5
“Completion Date”	5
“Completion Notice”	5
“Construction Advances”	5
“Construction Advance Request”	6
“Construction Allowance”	6
“Construction Budget”	6
“Construction Project”	6
“Covered Construction Period Losses”	6
“Defective Work”	6
“FOCB Notice”	6
“Force Majeure Event”	7
“Funded Construction Allowance”	7
“Future Work”	7
“Ground Lease Rents”	7
“Increased Cost Charges”	7
“Increased Commitment”	7
“Increased Funding Commitment”	7
“Increased Time Commitment”	7
“Initial Advance”	7
“Maximum Construction Allowance”	7

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
“Notice of NAI’s Intent to Terminate”	7
“Notice of NAI’s Intent to Terminate Because of a Force Majeure Event”	8
“Notice of Termination By NAI”	8
“Outstanding Construction Allowance”	8
“Owner’s Election to Continue Construction”	8
“Pre-lease Casualty”	8
“Pre-lease Force Majeure Delays”	8
“Pre-lease Force Majeure Event”	8
“Pre-lease Force Majeure Event Notice”	8
“Pre-lease Force Majeure Excess Costs”	8
“Pre-lease Force Majeure Losses”	9
“Prior Work”	10
“Projected Cost Overruns”	10
“Reimbursable Construction Period Costs”	10
“Remaining Proceeds”	10
“Scope Change”	10
“Target Completion Date”	10
“Termination of NAI’s Work”	10
“Third Party Contract”	11
“Third Party Contract/Termination Fees”	11
“Timing or Budget Shortfall”	11
“Work”	11
“Work/Suspension Event”	11
“Work/Suspension Notice”	12
“Work/Suspension Period”	12
2 Construction and Management of the Property by NAI	12
(A) The Construction Project	12
(1) Construction Approvals by BNPPPLC	12
(a) Preconstruction Approvals by BNPPPLC	12
(b) Approval of Scope Changes	12
(2) NAI’s Right to Possession and to Control Construction	13
(c) Adequacy of Drawings, Specifications and Budgets	14
(d) Existing Condition of the Land and Improvements	14
(e) Correction of Defective Work	14
(f) Clean Up	15
(g) No Damage for Delays	15
(h) No Fee For Construction Management	15
(3) Quality of Work	15

TABLE OF CONTENTS
(Continued)

		<u>Page</u>
	(B) Completion Notice	15
	(C) Status of Property Acquired With BNPPPLC's Funds	16
	(D) Insurance	16
	(1) Liability Insurance	16
	(2) Property Insurance	17
	(3) Failure of NAI to Obtain Insurance	17
	(4) Waiver of Subrogation	17
	(E) Condemnation	18
	(F) Additional Representations, Warranties and Covenants of NAI Concerning the Property	18
	(1) Payment of Local Impositions	18
	(2) Operation and Maintenance	19
	(3) Debts for Construction, Maintenance, Operation or Development	20
	(4) Permitted Encumbrances and the Ground Lease	20
	(5) Books and Records Concerning the Property	20
	(G) BNPPPLC's Right of Access	21
	(1) Access Generally	21
	(2) Failure of NAI to Perform	21
3	Amounts to be Added to the Lease Balance (in Addition to Construction Advances)	22
	(A) Initial Advance	22
	(B) Carrying Costs	23
	(C) Commitment Fees	23
	(D) Future Administrative Fees and Out-of-Pocket Costs	24
	(E) Increased Cost Charges and Capital Adequacy Charges	24
	(F) Ground Lease Payments	25
4	Construction Advances	25
	(A) Costs Subject to Reimbursement Through Construction Advances	25
	(B) Exclusions From Reimbursable Construction Period Costs	27
	(C) Conditions to NAI's Right to Receive Construction Advances	27
	(1) Construction Advance Requests	27
	(2) Amount of the Advances	28
	(a) The Maximum Construction Allowance	28
	(b) Costs Previously Incurred by NAI	28
	(c) Limits During any Work/Suspension Period	29
	(d) Restrictions Imposed for Administrative Convenience	29
	(3) No Advances After Certain Dates	29
	(D) Breakage Costs for Construction Advances Requested But Not Taken	29

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
(E) No Third Party Beneficiaries	30
(F) No Waiver	30
5 Application of Insurance and Condemnation Proceeds	30
(A) Collection and Application Generally	30
(B) Advances of Escrowed Proceeds to NAI	31
(C) Status of Escrowed Proceeds After Commencement of the Term of the Lease	31
(D) Special Provisions Applicable After a 97-10/Event or Event of Default	31
(E) NAI's Obligation to Restore	31
(F) Special Provisions Concerning a Complete Taking	32
6 Notice of Cost Overruns and Pre-lease Force Majeure Events	32
(A) Notice of Projected Cost Overruns	32
(B) Pre-lease Force Majeure Event Events and Notices	32
7 Suspension and Termination of NAI's Work	32
(A) Rights and Obligations During a Work/Suspension Period	32
(B) NAI's Election to Terminate NAI's Work	32
(C) BNPPLC's Election to Terminate NAI's Work	36
(D) Surviving Rights and Obligations	36
(E) Cooperation After a Termination of NAI's Work	37
8 Continuation of Construction by BNPPLC	38
(A) Owner's Election to Continue Construction	38
(1) Take Control of the Property	39
(2) Continuation of Construction	39
(3) Arrange for Turnkey Construction	40
(4) Suspension or Termination of Construction by BNPPLC	40
(B) Powers Coupled With an Interest	40
9 NAI's Obligation for 97-10/Prepayments	40
10 Indemnity for Covered Construction Period Losses	41
(A) Covenant to Indemnify Against Covered Construction Period Losses	41
(B) Certain Losses Included or Excluded	42
(1) <i>Environmental</i>	42
(2) <i>Failure to Maintain a Safe Work Site</i>	43
(3) <i>Failure to Complete Construction</i>	43
(4) <i>Fraud</i>	43

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
(5) <i>Excluded Taxes and Established Misconduct</i>	43
(C) Express Negligence Protection	44
(D) Survival of Indemnity	44
(E) Due Date for Indemnity Payments	44
(F) Order of Application of Payments	44
(G) Defense of BNPPLC	44
(1) <i>Assumption of Defense</i>	44
(2) <i>Indemnity Not Contingent</i>	45
(H) When Payments Are Due	45
(I) Survival	45
(J) Notice of Claims	45
(K) Withholding of Consent to Settlements Proposed by NAI	46
(L) Settlements Without the Prior Consent of NAI	46
(1) <i>Election to Pay Reasonable Settlement Costs in Lieu of Actual</i>	46
(2) <i>Conditions to Election</i>	46
(3) <i>Indemnity Survives Settlement</i>	47
(M) No Authority to Admit Wrongdoing on the Part of NAI	47
(N) Refunds of Covered Construction Period Losses Paid by NAI	47
(2) <i>Meaning of Refund</i>	48
(3) <i>Conditions to Payment</i>	48

**TABLE OF CONTENTS
(Continued)**

Exhibits and Schedules

Exhibit A	Legal Description
Exhibit B	Description of the Construction Project and Budget
Exhibit C	Construction Advance Request Form
Exhibit D	Pre-lease Force Majeure Event Notice
Exhibit E	Notice of Termination by NAI's Work
Exhibit F	Notice of NAI's Intent to Terminate
Exhibit G	Notice of Increased Funding Commitment by BNPPLC
Exhibit H	Notice of Increased Time Commitment by BNPPLC
Exhibit I	Notice of Rescission of NAI's Intent to Terminate

CONSTRUCTION MANAGEMENT AGREEMENT

This CONSTRUCTION MANAGEMENT AGREEMENT (this “**Agreement**”), dated as of December 14, 2006 (the “**Effective Date**”), is made by and between BNP PARIBAS LEASING CORPORATION (“**BNPPLC**”), a Delaware corporation, and NETWORK APPLIANCE, INC. (“**NAI**”), a Delaware corporation.

RECITALS

Contemporaneously with the execution of this Agreement, BNPPLC and NAI are executing a Common Definitions and Provisions Agreement dated as of the Effective Date (the “**Common Definitions and Provisions Agreement**”), which by this reference is incorporated into and made a part of this Agreement for all purposes. *As used in this Agreement, capitalized terms defined in the Common Definitions and Provisions Agreement and not otherwise defined in this Agreement are intended to have the respective meanings assigned to them in the Common Definitions and Provisions Agreement.*

At the request of NAI and to facilitate the transaction contemplated in the other Operative Documents, contemporaneously with this Agreement BNPPLC is executing and accepting a Ground Lease from NAI (the “**Ground Lease**”), pursuant to which BNPPLC is acquiring a leasehold estate in the Land described in Exhibit A and any existing Improvements on such Land.

Also contemporaneously with this Agreement, BNPPLC and NAI are executing a Lease Agreement (the “**Lease**”), pursuant to which the parties expect that NAI will lease the Improvements on the Land described in Exhibit A from BNPPLC for a lease term that will commence on the Completion Date (as defined below).

In anticipation of the construction of new or additional Improvements for NAI’s use pursuant to the Lease, BNPPLC and NAI have agreed upon the terms and conditions upon which BNPPLC is willing to authorize NAI to arrange and manage such construction and upon which BNPPLC is willing to provide funds for such construction, and by this Agreement BNPPLC and NAI desire to evidence such agreement.

ENGAGEMENT AND AUTHORIZATION

Subject to the terms and conditions set forth in this Agreement, BNPPLC does hereby engage and authorize NAI — and NAI does hereby accept such engagement and authorization, as an independent contractor for BNPPLC — to construct the Construction Project on the Land and to manage such construction for BNPPLC. As more particularly provided in subparagraph 2(A)(2) below, NAI will take possession and control of the Land and all Improvements on the Land to accomplish such construction. However, the rights and authority granted to NAI by this Agreement are expressly made subject and subordinate to the terms and condition hereinafter set

forth and to the Ground Lease, to the Permitted Encumbrances and to any other claims or encumbrances affecting the Land or the Property that may be asserted by third parties other than Liens Removable by BNPPLC.

GENERAL TERMS AND CONDITIONS

1 **Additional definitions.** As used in this Agreement, capitalized terms defined above will have the respective meanings assigned to them above; as indicated above, capitalized terms that are defined in the Common Definitions and Provisions Agreement and that are used but not defined herein will have the respective meanings assigned to them in the Common Definitions and Provisions Agreement; and, the following terms will have the following respective meanings:

“**97-10/Event**” means any of the following:

- (a) NAI gives a Notice of NAI’s Intent to Terminate and thereafter (i) fails to rescind the same as described in subparagraph 7(B)(7) within ten days after BNPPLC responds with any Increased Commitment, or (ii) gives a Notice of Termination as provided in subparagraph 7(B)(1); or
- (b) NAI gives a notice to terminate the Supplemental Payment Obligation as described in subparagraph 6(B) of the Purchase Agreement; or
- (c) BNPPLC gives notice to NAI as described in subparagraph 7(C) to cause a Termination of NAI’s Work; or
- (d) NAI fails for any reason whatsoever to substantially complete the Construction Project and give a Completion Notice to BNPPLC prior to the Target Completion Date; or
- (e) for any reason whatsoever (including the accrual of Carrying Costs), the Funded Construction Allowance exceeds the Maximum Construction Allowance.

“**97-10/Maximum Permitted Prepayment**” as of any date means the amount equal to eighty-nine and nine-tenths of one percent (89.9%) of the aggregate of all 97-10/Project Costs paid or incurred on or prior to such date.

“97-10/Prepayment” means any payment to BNPPLC required by Paragraph 9, which in each case will equal (A) the 97-10/Maximum Permitted Prepayment, computed as of the date on which the payment becomes due, less (B) the sum of (1) the accreted value of any prior payments actually received by BNPPLC from NAI constituting 97-10/Prepayments, and (2) amounts (if any) then owed by BNPPLC to NAI pursuant to this Agreement as reimbursements for 97-10 Project Costs paid by NAI and not theretofore reimbursed. For purposes of the preceding sentence, “accreted value” of a payment means the amount of the payment plus an amount equal to the interest that would have accrued on the payment if it bore interest at the Effective Rate plus the Spread.

“97-10/Project Costs” means the following:

- (a) costs incurred for the Work, including not only hard costs incurred for the new Improvements described in Exhibit B, but also the following costs to the extent reasonably incurred in connection with the Construction Project:
 - soft costs, such as architectural fees, engineering fees and fees and costs paid in connection with obtaining project permits and approvals required by governmental authorities or any Permitted Encumbrance,
 - site preparation costs, and
 - costs of offsite and other public improvements required as conditions of governmental approvals for the Construction Project or required by any Permitted Encumbrances;
- (b) costs incurred to maintain insurance required by (and consistent with the requirements of) this Agreement prior to the Completion Date;
- (c) Local Impositions that have accrued or become due prior to the Completion Date;
- (d) Accrued Construction Period Interest Expense; and
- (e) any costs in addition to those described in clauses (a) through (d) preceding that GAAP (as it exists on the Effective Date) would allow BNPPLC to capitalize as part of the cost of the Property or that the 97-10/Pronouncement would allow BNPPLC to characterize as project costs, including:
 - (1) cancellation or termination fees or other compensation payable by NAI or BNPPLC pursuant to any contract concerning the Construction Project made by NAI or BNPPLC with any general contractor, architect, engineer or other third party because of any election by NAI or BNPPLC to cancel or

terminate such contract, and (2) any costs that BNPPLC incurs and is allowed to capitalize to continue or complete the Construction Project after any Owner's Election to Continue Construction as provided in subparagraph 8(A).

However, notwithstanding the foregoing, 97-10/Project Costs will not include Pre-lease Force Majeure Losses, Administrative Fees, the Arrangement Fee, or any legal fees which are included in Transaction Expenses.

"97-10/Pronouncement" means the pronouncement issued by the Emerging Issues Task Force of the Financial Accounting Standards Board in 1998 titled "EITF 97-10: The Effect of Lessee Involvement in Construction", which provides that certain kinds of involvement by a lessee in pre-lease commencement construction will cause the lessee to be considered as the owner of the leased property during the construction period and then will require application of the appropriate sale and leaseback accounting rules.

"NAI's Estimate of Force Majeure Delays" has the meaning indicated in subparagraph 7(B)(4).

"NAI's Estimate of Force Majeure Excess Costs" has the meaning indicated in subparagraph 7(B)(3).

"Accrued Construction Period Interest Expense" means interest that has accrued and that BNPPLC has paid or is obligated to pay on Funding Advances for any period prior to the Completion Date. Such interest will include a percentage, equal to the aggregate Percentages of all Participants (under and as defined in the Participation Agreement), of Carrying Costs and Commitment Fees that accrue after the execution of any Participation Agreement and that are added to the Outstanding Construction Allowance as provided in this Agreement, it being understood that the additional amounts BNPPLC must pay to the Participants under the Participation Agreement because of the accrual of Carrying Costs and Commitment Fees effectively constitute construction period interest on advances the Participants make to BNPPLC under the Participation Agreement. Accrued Construction Period Interest Expense will also include any interest and other finance charges that accrue prior to the Completion Date because of Funding Advances provided to BNPPLC by BNPPLC's Parent in the form of loans, regardless of whether BNPPLC's obligation in respect of such loans is limited to BNPPLC's interest in the Property. However, any such interest and other finance charges accruing on Funding Advances provided by BNPPLC's Parent and included in Accrued Construction Period Interest Expense will not exceed the Carrying Costs attributable to the portion of the Lease Balance funded or maintained by such Funding Advances. Further, Accrued Construction Period Interest will not include any portion of Carrying Costs included in Pre-lease Force Majeure Losses (as set forth in the definition thereof below) or interest or finance charges that BNPPLC must pay to the

Participants under the Participation Agreement because of the accrual of such portion of Carrying Costs.

“**Affiliate’s Contract**” has the meaning indicated in subparagraph 2(A)(2)(b).

“**Arrangement Fee**” has the meaning indicated in subparagraph 3(A).

“**Administrative Fee**” has the meanings indicated in subparagraph 3(A) and subparagraph 3(D).

“**Capital Adequacy Charges**” has the meaning indicated in subparagraph 3(E)(1).

“**Carrying Costs**” has the meaning indicated in subparagraph 3(B).

“**Commitment Fees**” has the meaning indicated in subparagraph 3(C).

“**Complete Taking**” means a taking by eminent domain prior to the Completion Date over NAI’s objection of all of the Land or the Property, or so much thereof as to make it impossible to complete the Construction Project for its intended uses on the Land regardless of any Scope Changes BNPPLC may be willing to approve or any Increased Commitment that BNPPLC may be willing to provide.

“**Completion Date**” means the the date upon which NAI gives the notice to BNPPLC which is required by subparagraph 2(B), after having substantially completed the Construction Project and having obtained any certificate of substantial completion or other permit (temporary or permanent) required for the commencement of NAI’s use of the Improvements.

“**Completion Notice**” means the notice required by subparagraph 2(B) from NAI to BNPPLC, advising BNPPLC that NAI has substantially completed construction of the Construction Project and has obtained any certificate of substantial completion or other permit (temporary or permanent) required for the commencement of NAI’s use of the Improvements. (Any such Completion Notice will also confirm the amounts required to compute the Projected Economic Depreciation of Equipment, consistent with BNPPLC’s determination of the projected future value as provided in subparagraph ?, for use in calculating Amortizing Rent as provided in the Lease.)

“**Construction Advances**” means (1) actual advances of funds made by or on behalf of BNPPLC to or on behalf of NAI as provided in Paragraph 4, which sets forth NAI’s rights to receive advances for Reimbursable Construction Period Costs, and (2) other amounts paid or incurred by BNPPLC that subparagraph 8(A) or other provisions of this

Agreement allow BNPPPLC to characterize as Construction Advances. The term “Construction Advances” will not, however, include advances of insurance proceeds, condemnation proceeds or other Escrowed Proceeds to pay or reimburse costs of repairs or restoration.

“**Construction Advance Request**” has the meaning indicated in subparagraph 4(C)(1).

“**Construction Allowance**” means the allowance to be provided by BNPPPLC for the design and construction of the Construction Project, against which and from which Carrying Cost, Construction Advances and other amounts will be or may be charged and paid as provided in various provisions of this Agreement (including Paragraphs 3, 4 and 8).

“**Construction Budget**” means the budget for the Construction Project set forth in Exhibit B.

“**Construction Project**” means the new buildings or other substantial Improvements to be constructed, or the alteration of existing Improvements, as described generally in Exhibit B.

“**Covered Construction Period Losses**” has the meaning indicated in subparagraph 10(A).

“**Defective Work**” has the meaning indicated in subparagraph 2(A)(2)(e).

“**FOCB Notice**” means a notice from BNPPPLC to NAI advising NAI of any of the following events or circumstances, and also advising NAI that because of any of the following events or circumstances BNPPPLC will be entitled to make the election described in subparagraph 7(C), which will constitute a Termination of NAI’s Work and a 97-10/Event:

(1) NAI has taken action to cancel or terminate or reduce the coverage available to BNPPPLC under the builder’s risk insurance obtained for the Construction Project as required by this Agreement, or NAI has otherwise failed to maintain any insurance or to provide insurance certificates to BNPPPLC as required by this Agreement and not cured such failure within ten days after receiving notice thereof, or

(2) NAI has given any Pre-lease Force Majeure Event Notice to BNPPPLC, or

(3) an Event of Default has occurred and is continuing; or

(4) a Work/Suspension Event has occurred and continued for more than thirty consecutive days after NAI's receipt of a Work/Suspension Notice advising NAI of such Work/Suspension Event, and subsequent to such thirty day period the Work/Suspension Event has not been rectified by NAI.

"Force Majeure Event" means (A) any taking of any part of the Property by eminent domain prior to the Completion Date, and (B) any damage to the Improvements or disruption of the Work that occurs prior to the Completion Date and that is caused by fire or acts of God (such as flood, lightning, earthquake or hurricane), war, strikes and other labor disputes, or riot or similar civil disturbance, but only to the extent such damage or disruption (i) is beyond the control of and not caused in whole or in part by negligence, illegal acts or willful misconduct on the part of NAI or of its employees or of any other party acting under NAI's control or with the approval or authorization of NAI, and (ii) could not have been avoided or overcome by the exercise of due diligence or reasonable foresight on the part of NAI or of any other such party.

"Funded Construction Allowance" means on any day the Outstanding Construction Allowance on that day, including all Construction Advances and Carrying Costs added to the Outstanding Construction Allowance on or prior to that day, plus the amount of any Qualified Prepayments deducted on or prior to that day in the calculation of such Outstanding Construction Allowance.

"Future Work" has the meaning indicated in subparagraph 4(C)(2)(b).

"Ground Lease Rents" has the meaning indicated in subparagraph 3(F).

"Increased Cost Charges" has the meaning indicated in subparagraph 3(E)(1).

"Increased Commitment" has the meaning indicated in subparagraph 7(B)(6).

"Increased Funding Commitment" has the meaning indicated in subparagraph 7(B)(6)(a).

"Increased Time Commitment" has the meaning indicated in subparagraph 7(B)(6)(b).

"Initial Advance" has the meaning indicated in subparagraph 3(A).

"Maximum Construction Allowance" means an amount equal to \$65,000,000, less the Initial Advance.

"Notice of NAI's Intent to Terminate" has the meaning indicated in

subparagraph 7(B)(2).

“**Notice of NAI’s Intent to Terminate Because of a Force Majeure Event**” has the meaning indicated in subparagraph 7(B)(5).

“**Notice of Termination By NAI**” has the meaning indicated in subparagraph 7(B)(1).

“**Outstanding Construction Allowance**” means, as of any date, the difference (but not less than zero) of (A) the total Construction Advances made by or on behalf of BNPPLC on or prior to such date in question, plus (B) all Carrying Costs, Commitment Fees, Administrative Fees, Increased Cost Charges and Capital Adequacy Charges added on or prior to the date as provided in Paragraph 3, less (C) any funds received and applied as Qualified Prepayments on or prior to such date.

“**Owner’s Election to Continue Construction**” has the meaning indicated in subparagraph 8(A).

“**Pre-lease Casualty**” has the meaning indicated in subparagraph 2(A)(2)(a).

“**Pre-lease Force Majeure Delays**” means delays in the completion of the Work to the extent (but only to the extent) caused solely by a Pre-lease Force Majeure Event.

“**Pre-lease Force Majeure Event**” means a Force Majeure Event that occurs prior to the Completion Date; *provided, however, that if NAI does not notify BNPPLC of any such Force Majeure Event by the delivery of a Pre-lease Force Majeure Event Notice within thirty days after the Force Majeure Event first occurs or commences, then such Force Majeure Event will not qualify as a “Pre-lease Force Majeure Event” for purposes of this Agreement or the other Operative Documents.*

“**Pre-lease Force Majeure Event Notice**” has the meaning indicated in subparagraph 6(B).

“**Pre-lease Force Majeure Excess Costs**” means the amount (if any) by which the increase in the costs of the Work resulting directly and solely from a Pre-lease Force Majeure Event (such as, for example, the costs of repairing damage to the Improvements caused by a Pre-lease Force Majeure Event) exceed the amounts available to pay or reimburse NAI for such increased costs. Amounts available to pay or reimburse such increased costs will include (a) insurance proceeds or any recovery from a third party (including any Escrowed Proceeds held by BNPPLC), and (b) any part of the Construction Allowance (including any unused contingency amount in the Construction Budget) not used or needed to cover other Reimbursable Construction Period Costs.

“Pre-lease Force Majeure Losses” means any of the following Losses that BNPPLC suffers by reason of damage to the Improvements caused by a Pre-lease Force Majeure Event:

(a) the costs of repairing such damage to the extent that such costs have, as of the date of any required determination of Pre-lease Force Majeure Losses, (i) been paid or reimbursed from a Construction Advance (and thus are included in the Lease Balance as of that date), to be distinguished from costs of repairs paid or reimbursed from insurance proceeds or from any recovery from a third party, and (ii) exceeded amounts (if any) available in the NAI’s original Construction Budget for contingencies and thus would not have been covered by the Construction Allowance but for an Increased Funding Commitment;

(b) any diminution in the value of the Improvements resulting from any such damage that has not, as of the date of the required determination of Pre-lease Force Majeure Losses, been repaired;

(c) any increase in the total amount of Carrying Costs, Commitment Fees, Administrative Fees, Increased Cost Charges, Capital Adequacy Charges and Ground Lease Rents (and any other amounts) added to the Lease Balance as provided in Paragraph 3 solely by reason of Pre-lease Force Majeure Delays; and

(d) to the extent not already included in the increase described in the preceding clause, all increases in Carrying Costs that are attributable to the amounts included in Pre-lease Force Majeure Losses pursuant to the preceding clause (a);

but in each case such amounts will constitute Pre-lease Force Majeure Losses only to the extent, if any, that they are not offset by insurance proceeds which are (1) paid by reason of such Pre-lease Force Majeure Event (including insurance proceeds paid to compensate BNPPLC or NAI for increased financing costs, the lost time value of BNPPLC’s investment in the Project or business interruption) and (2) applied as a Qualified Prepayment to reduce the Lease Balance.

Also, for purposes of this definition, the diminution in the value of the Improvements, as described in the preceding clause (b), will not exceed the amount thereof estimated in good faith by any independent appraiser or insurance adjuster engaged by BNPPLC to determine such amount after BNPPLC has received a Notice of Pre-lease Force Majeure Event as provided in subparagraph 6(B), nor will it exceed the cost of repairing the damage described in the preceding clause (b) as estimated in good faith by any such independent insurance adjuster or as indicated by any bona fide written bid to make the repairs that BNPPLC obtains from a reputable contractor capable of making the repairs.

“**Prior Work**” has the meaning indicated in subparagraph 4(C)(2)(b).

“**Projected Cost Overruns**” means the excess (if any), calculated as of the date of each Construction Advance Request, of (1) the total of projected Reimbursable Construction Period Costs yet to be incurred or for which NAI has yet to be reimbursed hereunder (including projected Reimbursable Construction Period Costs for Future Work), over (2) the balance of the remaining Construction Allowance then projected to be available to cover such costs. The balance of the remaining Construction Allowance then projected to be available will equal: (i) the amount (if any) by which the Maximum Construction Allowance exceeds the Funded Construction Allowance, *plus* (ii) any Escrowed Proceeds then available or expected to be available to cover costs of repairs and restoration that NAI will perform as part of the Work after a casualty or condemnation, *less* (iii) all projected future Carrying Costs, Commitment Fees, Administrative Fees and other amounts to be added to the Outstanding Construction Allowance as provided in Paragraph 3.

“**Reimbursable Construction Period Costs**” has the meaning indicated in subparagraph 4(A).

“**Remaining Proceeds**” has the meaning indicated in subparagraph 5(A).

“**Scope Change**” means a change to the Construction Project that, if implemented, will make the quality, function or capacity of the Improvements “materially different” (as defined below in this subparagraph) than as described or inferred by the site plan or plans and renderings referenced in Exhibit B. The term “**Scope Change**” is not intended to include the mere refinement, correction or detailing of the site plan, plans or renderings submitted to BNPLC by NAI. As used in this definition, a “material difference” means a difference that could reasonably be expected to (a) cause the Lease Balance to exceed the fair market value of the Property when the Construction Project is completed and all Construction Advances required in connection therewith have been funded, or significantly increase any such excess, (b) change the general character of the Improvements from that needed to accommodate the uses to be permitted by subparagraph 2(A) of the Lease, or (c) cause or exacerbate Projected Cost Overruns.

“**Target Completion Date**” means the last day of the 24th calendar month following the Effective Date.

“**Termination of NAI’s Work**” means a termination of NAI’s rights and obligations to continue the Work because of an election to terminate made by NAI pursuant to subparagraph 7(B) or because of an election by BNPLC made pursuant to subparagraph 7(C).

“**Third Party Contract**” has the meaning indicated in subparagraph 2(A)(2)(b).

“**Third Party Contract/Termination Fees**” means any amounts, however denominated, for which NAI will be obligated under a Third Party Contract as a result of any election or decision by NAI to terminate such Third Party Contract, including demobilization costs; provided, however, amounts payable only by reason of Prior Work as of the date any such termination will not be characterized as Third Party Contract/Termination Fees. If NAI reserves an absolute express right in a Third Party Contract to terminate such contract at any time, without cause, for a specified U.S. dollar amount, such amount will constitute a Third Party Contract/Termination Fee. If no such right is reserved in a Third Party Contract, the amount of damages that NAI is required to pay (in addition to payments required for Prior Work) upon a repudiation of the Third Party Contract by NAI will qualify as a “Third Party Contract/Termination Fee” applicable to such contract for purposes of this Agreement.

“**Timing or Budget Shortfall**” has the meaning indicated in subparagraph 7(B).

“**Work**” has the meaning indicated in subparagraph 2(A)(2)(a).

“**Work/Suspension Event**” means any of the following:

(1) Projected Cost Overruns have become more likely than not, in BNPPPLC’s good faith judgment (taking into account any notices or Construction Draw Requests from NAI indicating that a Pre-lease Force Majeure Event may result in Projected Cost Overruns), and BNPPPLC has notified NAI of such judgement and the reasons therefor.

(2) Delays in the Work (including any delays resulting from damage to the Property by fire or other casualty or from any taking of any part of the Property by condemnation) have made it substantially unlikely, in BNPPPLC’s good faith judgment, that NAI will be able to complete the Construction Project in accordance with the requirements of this Agreement prior to the Target Completion Date using only the funds available to NAI under this Agreement, and BNPPPLC has notified NAI of such judgement and the reasons therefor.

(3) BNPPPLC has requested with respect to any Construction Advance, but NAI has failed to provide within thirty days after receipt of the request: (1) invoices, requests for payment from contractors and other evidence reasonably establishing that the costs and expenses for which NAI has requested or is requesting reimbursement constitute actual Reimbursable Construction Period Costs, and (2) canceled checks, lien waivers or other evidence reasonably establishing that all prior Construction Advances paid to NAI have been used by NAI to pay the Reimbursable Construction Period Costs

for which the prior advances were requested and made.

“**Work/Suspension Notice**” means a notice from BNPPLC to NAI advising NAI of any event or circumstances that constitute a Work/Suspension Event and advising NAI that (1) before the Work/Suspension Event is rectified BNPPLC may limit Construction Advances to NAI as permitted by this Agreement, and (2) unless NAI does rectify the Work/Suspension Event within thirty days after NAI’s receipt of such notice, BNPPLC may elect to send an FOCB Notice in anticipation of a Termination of NAI’s Work.

“**Work/Suspension Period**” means any period (1) beginning with the date of any Work/Suspension Notice, FOCB Notice or Notice of NAI’s Intent to Terminate, and (2) ending on the earlier of (a) the first date upon which (i) no Work/Suspension Events are continuing, (ii) all previous FOCB Notices and Notices of NAI’s Intent to Terminate (if any) have been rescinded, and (iii) no 97-10/Events have occurred, or (b) the effective date of any Termination of NAI’s Work as described in subparagraph 7(B) or subparagraph 7(C).

2 Construction and Management of the Property by NAI.

(A) The Construction Project.

(1) Construction Approvals by BNPPLC.

(a) Preconstruction Approvals by BNPPLC. NAI submitted and obtained BNPPLC’s approval of the site plan and descriptions of the Construction Project referenced in Exhibit B. Also set forth in Exhibit B is a general description of the Construction Project. The Construction Project, as constructed by NAI pursuant to this Agreement, and all construction contracts and other agreements executed or adopted by NAI in connection therewith, must not be inconsistent in any material respect with the plans or other items referenced in Exhibit B, except to the extent otherwise provided by any Scope Change approved by BNPPLC and except as otherwise provided in subparagraph 8(A) if BNPPLC should make an Owner’s Election to Continue Construction after any Termination of NAI’s Work.

(b) Approval of Scope Changes. Before making a Scope Change, NAI must provide to BNPPLC a reasonably detailed written description of the Scope Change, a revised Construction Budget and a copy of any changes to the drawings, plans and specifications for the Improvements required in connection therewith, all of which must be approved in writing by BNPPLC before the Scope Change is implemented. After receiving such items, BNPPLC will endeavor in good faith to respond promptly (and in any event no later than thirty days after

such receipt) to any request by NAI for approval of the Scope Change. BNPPLC will not, however, be liable for any failure to provide a prompt response. Further, BNPPLC's approval will not in any event constitute a waiver of subparagraph 2(A)(3) or of any other provision of this Agreement or other Operative Documents.

(2) NAI's Right to Possession and to Control Construction. Subject to the terms and conditions set forth in this Agreement, and prior to any Termination of NAI's Work as provided in subparagraphs 7(B) and 7(C), NAI will have possession of the Land and all Improvements on the Land to the exclusion of BNPPLC and will have the sole right to control and the sole responsibility for the design and construction of the Construction Project, including the means, methods, sequences and procedures implemented to accomplish such design and construction. Although title to all Improvements will vest in BNPPLC (as more particularly provided in subparagraph 2(C)), BNPPLC's obligation with respect to the Construction Project will be limited to the making of advances under and subject to the conditions set forth in this Agreement. Without limiting the foregoing, NAI acknowledges and agrees that:

(a) Performance of the Work. Except as provided in subparagraphs 7(A) and 7(D), NAI must, using its best skill and judgment and in an expeditious and economical manner not inconsistent with the interests of BNPPLC, perform or cause to be performed all work required, and must provide or cause to be provided all supplies and materials required, to design and complete construction of the Construction Project (collectively "**Work**") no later than the Target Completion Date. The Work will include obtaining all necessary building permits and other governmental approvals required in connection with the design and construction of the Construction Project, or required in connection with the use and occupancy thereof (*e.g.*, final certificates of occupancy). The Work will also include any repairs or restoration required because of damage to Improvements by fire or other casualty prior to the Completion Date (a "**Pre-lease Casualty**"); *provided, however*, the cost of any such repairs or restoration will be subject to reimbursement not only through Construction Advances made to NAI on and subject to the terms and conditions of this Agreement, but also through the application of Escrowed Proceeds as provided in Paragraph 5; and, *provided further*, like other Work, any such repairs and restoration to be provided by NAI will be subject to subparagraphs 7(A) and 7(D), which establish certain rights of NAI to suspend or discontinue any Work. NAI will carefully schedule and supervise all Work, will check all materials and services used in connection with all Work and will keep full and detailed accounts as may be necessary to document expenditures made or expenses incurred for the Work.

(b) Third Party Contracts.

1) NAI will not enter into any construction contract or other agreement with a third party concerning the Work or the Construction Project (a “**Third Party Contract**”) in the name of BNPPPLC or otherwise purport to bind BNPPPLC to any obligation to any third party.

2) In any Third Party Contract between NAI and any of its Affiliates (an “**Affiliate’s Contract**”) NAI must reserve the right to terminate such contract at any time, without cause, and without subjecting NAI to liability for any Third Party Contract/Termination Fee. Further, NAI must not enter into any Affiliate’s Contract that obligates NAI to pay more than would be required under an arms-length contract or that would require NAI to pay its Affiliate any amount in excess of the sum of actual, out-of-pocket direct costs and internal labor costs incurred by the Affiliate to perform such contract.

(c) Adequacy of Drawings, Specifications and Budgets. BNPPPLC has not made and will not make any representations as to the adequacy of the Construction Budget or any other budget or any site plans, renderings, plans, drawings or specifications for the Construction Project, and no modification of any such budgets, site plans, renderings, plans, drawings or specifications that may be required from time to time will entitle NAI to any adjustment in the Construction Allowance.

(d) Existing Condition of the Land and Improvements. NAI is familiar with the conditions of the Land and any existing Improvements on the Land. NAI will have no claim for damages against BNPPPLC or for an increase in the Construction Allowance or for an extension of the deadline specified in subparagraph 2(A)(2)(a) for completing the Work by reason of any condition (concealed or otherwise) of or affecting the Land or Improvements.

(e) Correction of Defective Work. NAI will promptly correct all Work performed prior to any Termination of NAI’s Work that does not comply with the requirements of this Agreement for any reason other than a Pre-lease Casualty (“**Defective Work**”). If NAI fails to correct any Defective Work or fails to carry out Work in accordance with this Agreement, BNPPPLC may (but will not be required to) order NAI to stop all Work until the cause for such failure has been eliminated.

(f) Clean Up. Upon the completion of all Work, NAI will remove all waste material and rubbish from and about the Land, as well as all tools, construction equipment, machinery and surplus materials. NAI will keep the Land and the Improvements thereon in a reasonably safe and slightly condition as Work progresses.

(g) No Damage for Delays. NAI will have no claim for damages against BNPPLC or for an increase in the Construction Allowance by reason of any delay in the performance of any Work. Nor will NAI have any claim for an extension of the deadline specified in subparagraph 2(A)(2)(a) for completing the Work because of any such period of delay, except that (i) in the case of any Pre-lease Force Majeure Delays, NAI will have certain rights as set forth in subparagraph 7(B) and other provisions of this Agreement, and (ii) in the event of intentional interference with the Work by BNPPLC itself for which NAI provides written notice to cease, NAI will be entitled to an extension of the deadline specified in subparagraph 2(A)(2)(a) as needed because of any delays resulting from such intentional interference. It is also understood that any such intentional interference by BNPPLC will constitute a Force Majeure Event. In no event, however, will BNPPLC's exercise of its rights and remedies permitted under this Agreement or the other Operative Documents be construed as intentional interference with NAI's performance of any Work; and thus neither BNPPLC's exercise of its right to withhold Construction Advances at any time when NAI has failed to satisfy all conditions herein to such advances, nor BNPPLC's exercise of its right to terminate Work by NAI as provided in subparagraph 7(C), be considered as intentional interference with the Work or a Pre-lease Force Majeure Event.

(h) No Fee For Construction Management. NAI will have no claim under this Agreement for any fee or other compensation or for any reimbursement of internal administrative or overhead expenses (other than the out-of-pocket overhead expenses properly included in the Construction Budget, if any), it being understood that NAI is executing this Agreement in consideration of the rights expressly granted to it herein and in the other Operative Documents.

(3) Quality of Work. NAI will cause the Work undertaken and administered by it pursuant to this Agreement to be performed (a) in a safe and good and workmanlike manner, (b) in accordance with Applicable Laws, and (c) in compliance with the provisions of this Agreement and the material provisions of the Permitted Encumbrances.

(B) Completion Notice. Within ten Business Days after NAI substantially completes construction of the Construction Project and obtains any certificate of occupancy or other permit

(temporary or permanent) required by Applicable Laws for the commencement of NAI's use and occupancy of the Improvements, NAI must provide a notice (a "**Completion Notice**") to BNPPLC, advising BNPPLC thereof, and thereby establish the Completion Date. For purposes of this Agreement and the other Operative Documents, BNPPLC will be entitled to rely without investigation upon any such notice given by NAI as evidence that NAI has, in fact, substantially completed the Construction Project and has obtained any certificate of occupancy or other permit (temporary or permanent) required for the commencement of NAI's use of the Improvements, and after giving any such notice NAI will be estopped from later claiming that the Completion Date has not occurred.

(C) Status of Property Acquired With BNPPLC's Funds. All Improvements constructed on the Land as provided in this Agreement will constitute "Property" for purposes of the Lease and other Operative Documents. Further, to the extent heretofore or hereafter acquired (in whole or in part) with any portion of the Initial Advance or with any Construction Advances or with other funds for which NAI receives reimbursement from the Initial Advance or Construction Advances, all furnishings, furniture, chattels, permits, licenses, franchises, certificates and other personal property of whatever nature will be considered as having been acquired on behalf of BNPPLC by NAI and will constitute "Property" for purposes of the Lease and other Operative Documents, as will all renewals or replacements of or substitutions for any such Property. The parties intend that title to the Improvements and to any other such Property will vest in BNPPLC without passing through NAI or NAI's Affiliates before it is transferred to BNPPLC from contractors, suppliers, vendors or other third Persons, but with the understanding that all such Property will be accepted by BNPPLC subject to the terms and conditions of the other Operative Documents, including subparagraph 4(C)(1) of the Lease (concerning the characterization of the Lease and other Operative Documents for tax and certain other purposes). Although nothing herein constitutes authorization of NAI by BNPPLC to bind BNPPLC to any construction contract or other agreement with a third Person, any construction contract or other agreement executed by NAI for the acquisition or construction of Improvements or other components of the Property may, as NAI deems appropriate, provide for the direct transfer of title to BNPPLC as described in the preceding sentence.

(D) Insurance.

(1) Liability Insurance. Throughout the period prior to any Termination of NAI's Work, NAI must maintain commercial general liability insurance against claims for bodily and personal injury, death and property damage occurring in or upon or resulting from any occurrence in or upon the Property under one or more insurance policies that satisfy the Minimum Insurance Requirements, which are set forth in an exhibit to the Common Definitions and Provisions Agreement. NAI must deliver and maintain with BNPPLC for each liability insurance policy required by this Agreement written confirmation of the policy and the scope of the coverage provided thereby issued by the

applicable insurer or its authorized agent, which confirmation must also satisfy the Minimum Insurance Requirements.

(2) Property Insurance. Throughout the period prior to any Termination of NAI's Work, NAI must also keep all Improvements (including all alterations, additions and changes made to the Improvements) insured against fire and other casualty under one or more property insurance policies that satisfy the Minimum Insurance Requirements. NAI must deliver and maintain with BNPPPLC for each property insurance policy required by this Agreement written confirmation of the policy and the scope of the coverage provided thereby issued by the applicable insurer or its authorized agent, which confirmation must also satisfy the Minimum Insurance Requirements. If any of the Property is destroyed or damaged by fire, explosion, windstorm, hail or by any other casualty against which insurance has been required hereunder, (i) BNPPPLC may, but will not be obligated to, make proof of loss if not made promptly by NAI after notice from BNPPPLC, (ii) each insurance company concerned is hereby authorized and directed to make payment for such loss directly to BNPPPLC for application as required by Paragraph 5, and (iii) BNPPPLC may settle, adjust or compromise any and all claims for loss, damage or destruction under any policy or policies of insurance (provided, that so long as no 97-10/Event has occurred and no Event of Default has occurred and is continuing, BNPPPLC must provide NAI with at least forty-five days notice of BNPPPLC's intention to settle any such claim before settling it unless NAI has already approved of the settlement by BNPPPLC). BNPPPLC will not in any event or circumstances be liable or responsible for failure to collect, or to exercise diligence in the collection of, any insurance proceeds. If any casualty results in damage to or loss or destruction of the Property, NAI must give prompt notice thereof to BNPPPLC and Paragraph 5 will apply.

(3) Failure of NAI to Obtain Insurance. If NAI fails to obtain any insurance or to provide confirmation of any insurance as required by this Agreement, BNPPPLC will be entitled (but not required) to obtain the insurance that NAI has failed to obtain or for which NAI has not provided the required confirmation and, without limiting BNPPPLC's other remedies under the circumstances, BNPPPLC may charge the cost of such insurance against the Construction Allowance as if it were a Construction Advance paid to NAI as hereinafter provided.

(4) Waiver of Subrogation. NAI, for itself and for any Person claiming through it (including any insurance company claiming by way of subrogation), waives any and every claim which arises or may arise in its favor against BNPPPLC or any other Interested Party for any and all Losses, to the extent that NAI is compensated by insurance or would be compensated by the insurance policies contemplated in this Agreement, but for any deductible or self-insured retention maintained under such insurance or but for a failure of NAI to maintain the insurance as required by this

Agreement. NAI agrees to have such insurance policies properly endorsed so as to make them valid notwithstanding this waiver, if such endorsement is required to prevent a loss of insurance.

(E) Condemnation. Immediately upon obtaining knowledge of the institution of any proceedings for the condemnation of the Property or any portion thereof, or any other similar governmental or quasi-governmental proceedings arising out of injury or damage to the Property or any portion thereof, each party must promptly notify the other (provided, however, BNPPLC will have no liability for its failure to provide such notice) of the pendency of such proceedings. Prior to any Termination of NAI's Work, NAI must, if requested by BNPPLC, diligently prosecute any such proceedings and consult with BNPPLC, its attorneys and experts and cooperate with them as reasonably requested in the carrying on or defense of any such proceedings. All proceeds of condemnation awards or proceeds of sale in lieu of condemnation with respect to the Property and all judgments, decrees and awards for injury or damage to the Property will be paid to BNPPLC as Escrowed Proceeds, and all such proceeds will be applied as provided in Paragraph 5. BNPPLC is hereby authorized, in its own name or in the name of NAI or in the name of both, to settle and deliver valid acquittances for, or to challenge and to appeal from, any such judgment, decree or award concerning condemnation of any of the Property (provided, that so long as no 97-10/Event has occurred and no Event of Default has occurred and is continuing, BNPPLC must provide NAI with at least forty-five days notice of BNPPLC's intention to settle any such claim before settling it unless NAI has already approved of the settlement by BNPPLC). BNPPLC will not in any event or circumstances be liable or responsible for failure to collect, or to exercise diligence in the collection of, any such proceeds, judgments, decrees or awards.

(F) Additional Representations, Warranties and Covenants of NAI Concerning the Property. Without limiting the rights granted to NAI by other provisions of this Agreement to be reimbursed from Construction Advances for the cost of complying with the following, NAI represents, warrants and covenants as follows:

(1) Payment of Local Impositions. Throughout the period prior to any Termination of NAI's Work, NAI must pay or cause to be paid prior to delinquency all ad valorem taxes assessed against the Property and other Local Impositions. If requested by BNPPLC from time to time, NAI will furnish BNPPLC with receipts or other appropriate evidence showing payment of all Local Impositions prior to the applicable delinquency date therefor.

Notwithstanding the foregoing, NAI may in good faith, by appropriate proceedings, contest the validity, applicability or amount of any asserted Local Imposition, and pending such contest NAI will not be deemed in default under any of the provisions of this Agreement because of the Local Imposition if (1) NAI diligently prosecutes such

contest to completion in a manner reasonably satisfactory to BNPPLC, and (2) NAI promptly causes to be paid any amount adjudged by a court of competent jurisdiction to be due, with all costs, penalties and interest thereon, promptly after such judgment becomes final; provided, however, in any event each such contest must be concluded and the contested Local Impositions must be paid by NAI prior to the earlier of (i) the date that any criminal prosecution is instituted or overtly threatened against BNPPLC or its directors, officers or employees because of the nonpayment thereof, or (ii) the date any writ or order is issued under which any property owned or leased by BNPPLC (including the Property) may be seized or sold or any other action is taken or overtly threatened against BNPPLC or against any property owned or leased by BNPPLC because of the nonpayment thereof, or (iii) any Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPLC's interest in the Property pursuant to the Purchase Agreement for a price to BNPPLC (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

(2) Operation and Maintenance. Throughout the period prior to any Termination of NAI's Work, NAI must operate and maintain the Property in a good and workmanlike manner and in compliance with Applicable Laws in all material respects and pay or cause to be paid all fees or charges of any kind in connection therewith. (If NAI does not promptly correct any failure of the Property to comply with Applicable Laws that is the subject of a written complaint or demand for corrective action given by any Governmental Authority to NAI, or to BNPPLC and forwarded by it to NAI, then for purposes of the preceding sentence, NAI will be considered not to have maintained the Property "in compliance with all Applicable Laws in all material respects" whether or not the noncompliance would be material in the absence of the complaint or demand.) NAI must not use or occupy, or allow the use or occupancy of, the Property in any manner which violates any Applicable Law or which constitutes a public or private nuisance or which makes void, voidable or cancelable any insurance then in force with respect thereto. Without limiting the generality of the foregoing, NAI must not conduct or permit others to conduct Hazardous Substance Activities on the Property, except Permitted Hazardous Substance Use and Remedial Work; and NAI must not discharge or permit the discharge of anything (including Permitted Hazardous Substances) on or from the Property that would require any permit under applicable Environmental Laws, other than (1) storm water runoff, (2) fume hood emissions, (3) waste water discharges through a publicly owned treatment works, (4) discharges that are a necessary part of any Remedial Work, and (5) other similar discharges consistent with the definition herein of Permitted Hazardous Substance Use which do not significantly increase the risk of Environmental Losses to BNPPLC, in each case in strict compliance with Environmental Laws. To the extent that any of the following would, individually or in the aggregate, increase the

likelihood of a 97-10/Event or materially and adversely affect the value of the Property or the use of the Property for purposes permitted by this Agreement, NAI must not, without BNPPPLC's prior consent: (i) initiate or permit any zoning reclassification of the Property; (ii) seek any variance under existing zoning ordinances applicable to the Property; (iii) use or permit the use of the Property in a manner that would result in such use becoming a nonconforming use under applicable zoning ordinances or similar laws, rules or regulations; (iv) execute or file any subdivision plat affecting the Property; or (v) consent to the annexation of the Property to any municipality. NAI will not cause or permit any drilling or exploration for, or extraction, removal or production of, minerals from the surface or subsurface of the Property, and NAI must not do anything that could reasonably be expected to significantly reduce the market value of the Property. If NAI receives a notice or claim from any federal, state or other governmental authority that the Property is not in compliance with any Applicable Law, or that any action may be taken against BNPPPLC because the Property does not comply with any Applicable Law, NAI must promptly furnish a copy of such notice or claim to BNPPPLC.

(3) Debts for Construction, Maintenance, Operation or Development. NAI must promptly pay or cause to be paid all debts and liabilities incurred it or its contractors or subcontractors in the construction, maintenance, operation or development of the Property. Such debts and liabilities will include those incurred for labor, material and equipment and all debts and charges for utilities servicing the Property.

(4) Permitted Encumbrances and the Ground Lease. NAI must comply with and will cause to be performed all of the covenants, agreements and obligations imposed upon the owner of any interest in the Property by the Permitted Encumbrances or the Ground Lease throughout the period prior to any Termination of NAI's Work. NAI must not, without the prior consent of BNPPPLC, create any new Permitted Encumbrance or enter into, initiate, approve or consent to any modification of any Permitted Encumbrance that would create or expand or purport to create or expand obligations or restrictions encumbering BNPPPLC's interest in the Property. (Whether BNPPPLC must give any such consent requested by NAI prior to the Completion Date will be governed by subparagraph 4(C) of the Closing Certificate.)

(5) Books and Records Concerning the Property. NAI must keep books and records that are accurate and complete in all material respects for NAI's construction and management of the Property as contemplated in this Agreement and must permit all such books and records (including all contracts, statements, invoices, bills and claims for labor, materials and services supplied for the construction and operation of any Improvements) to be inspected and copied by BNPPPLC.

(G) BNPPLC's Right of Access.

(1) Access Generally. BNPPLC and BNPPLC's representatives may enter the Property at any time for the purpose of making inspections or performing any work BNPPLC is authorized to undertake by the next subparagraph or for the purpose confirming whether NAI has complied with the requirements of this Agreement or the other Operative Documents. However, prior to any Termination of NAI's Work, BNPPLC or BNPPLC's representative will, before making any entry upon the Property or performing any work on the Property authorized by this Agreement, do the following

(a) BNPPLC will give NAI at least 24 hours notice, unless BNPPLC believes in good faith that an emergency may exist or a Default has occurred and is continuing, because of which significant damage to the Property or other significant Losses may be sustained if BNPPLC delays entry to the Property; and

(b) if then requested to do so by NAI in order to maintain NAI's security, BNPPLC or its representative will: (i) sign in at NAI's security or information desk if NAI has such a desk on the premises, (ii) wear a visitor's badge or other reasonable identification, (iii) permit an employee of NAI to observe such inspection or work, and (iv) comply with other similar reasonable nondiscriminatory security requirements of NAI that do not, individually or in the aggregate, significantly interfere with inspections or work of BNPPLC authorized by this Agreement.

(2) Failure of NAI to Perform. If NAI fails to perform any act or to take any action required of it by this Agreement or other Operative Documents, or to pay any money which NAI is required by this Agreement or other Operative Documents to pay, and if such failure or action constitutes an Event of Default or renders BNPPLC or any director, officer, employee or Affiliate of BNPPLC at risk of criminal prosecution or renders BNPPLC's interest in the Property or any part thereof at risk of forfeiture by forced sale or otherwise, then in addition to any other remedies specified herein or otherwise available, BNPPLC may, perform or cause to be performed such act or take such action or pay such money. (To the extent that expenses so incurred by BNPPLC, and money so paid by BNPPLC, qualify as a Covered Construction Period Losses, NAI must pay the same to BNPPLC upon demand. If any such expenses incurred or money paid do not qualify as Covered Construction Period Losses, but do constitute 97-10/Project Costs, BNPPLC may treat them as Construction Advances hereunder. To the extent that any such expenses incurred or money paid do not qualify as Covered Construction Period Losses and do constitute 97-10/Project Costs, they will be included — with interest — in the Balance of Unpaid Covered Construction Period Losses under and as defined in the Purchase Agreement.) Further, BNPPLC, upon making such payment, will be subrogated

to all of the rights of the person, corporation or body politic receiving such payment. But nothing herein will imply any duty upon the part of BNPPLC to do any work which, under any provision of this Agreement or otherwise, NAI may be required to perform, and the performance thereof by BNPPLC will not constitute a waiver of NAI's default. BNPPLC may during the progress of any such work permitted by BNPPLC hereunder on or in the Property keep and store upon the Property all necessary materials, tools, and equipment. BNPPLC will not in any event be liable for inconvenience, annoyance, disturbance, loss of business, or other damage to NAI or the subtenants or invitees of NAI by reason of BNPPLC's performance of any such work, or on account of bringing materials, supplies and equipment into or through the Property during the course of such work, and the obligations of NAI under this Agreement and the other Operative Documents will not thereby be excused in any manner.

3 Amounts to be Added to the Lease Balance (in Addition to Construction Advances) .

(A) **Initial Advance.** Upon execution and delivery of this Agreement by BNPPLC, an advance (the "**Initial Advance**") will be made by BNPPLC to cover the cost of certain Transaction Expenses and other amounts described in this subparagraph. The amount of the Initial Advance, which will be included in the Lease Balance, may be confirmed by a separate closing certificate executed by NAI as of the Effective Date. An arrangement fee (the "**Arrangement Fee**") and an initial administrative agency fee (an "**Administrative Fee**") will be paid from the Initial Advance (and thus be included in the Lease Balance) in the amounts provided in the Term Sheet. To the extent that BNPPLC does not itself use the entire the Initial Advance to pay such fees and Transaction Expenses incurred by BNPPLC, the remainder thereof will be advanced to NAI, with the understanding that NAI will use any such amount advanced for one or more of the following purposes: (1) the payment or reimbursement of Transaction Expenses incurred by NAI and all "soft costs" incurred by NAI in connection with the planning, design, engineering, construction and permitting of the Construction Project; (2) the maintenance of the Property; or (3) the payment of other amounts due pursuant to the Operative Documents. (Before executing the separate closing certificate to confirm the Initial Advance, NAI will make a reasonable effort to determine all prior expenses incurred by it as described in clause (1) of the preceding sentence and to request an Initial Advance sufficient in amount to cover all such expenses in addition to the Arrangement Fee, the Administrative Fee and all Transaction Expenses incurred by BNPPLC. However, no failure by NAI to identify and include all such expenses in the amount of the requested Initial Advance will preclude NAI from requesting reimbursement for the same through a subsequent Construction Advance as provided in Paragraph 4. Reimbursable Construction Period Costs to be paid or reimbursed pursuant to Paragraph 4 will not be limited to those incurred after the Effective Date.)

(B) Carrying Costs. For each Construction Period certain charges (“**Carrying Costs**”) will accrue and be added to the Outstanding Construction Allowance on the last day of such Construction Period (*i.e.*, generally on the Advance Date upon which such Construction Period ends). If, however, for any reason the Lease Balance (and thus the Outstanding Construction Allowance included as a component thereof) must be determined as of any date between Advance Dates, the Outstanding Construction Allowance determined on such date will include not only Carrying Costs added on or before the immediately preceding Advance Date computed as described below, but also Carrying Costs accruing on and after such preceding Advance Date to but not including the date in question. Carrying Costs accruing for any Construction Period will be equal to:

- the amount equal on the first day of such Construction Period to the Lease Balance, *times*
- the sum of the Effective Rate and the Spread for such Construction Period, *times*
- a fraction, the numerator of which is the number of days in such Construction Period and the denominator of which is three hundred sixty.

(C) Commitment Fees. For each Construction Period additional charges (“**Commitment Fees**”) will accrue and be added to the Outstanding Construction Allowance on the last day of such Construction Period (*i.e.*, generally on the Advance Date upon which such Construction Period ends). If, however, for any reason the Lease Balance (and thus the Outstanding Construction Allowance included as a component thereof) must be determined as of any date between Advance Dates, the Outstanding Construction Allowance determined on such date will include not only Commitment Fees added on or before the immediately preceding Advance Date computed as described below, but also Commitment Fees accruing on and after such preceding Advance Date to but not including the date in question. Commitment Fees for each Construction Period will be computed as follows:

- 15.0 basis points (15/100 of 1%), times an amount equal to:
 - (1) the Maximum Construction Allowance, less
 - (2) the Funded Construction Allowance on the first day of such Construction Period; times
- the number of days in such Construction Period; divided by
- three hundred sixty.

(D) Future Administrative Fees and Out-of-Pocket Costs. If the Completion Date does not occur prior to the first anniversary of the Effective Date, then on each anniversary of the Effective Date prior to the Completion Date, an administrative agency fee (also, an “**Administrative Fee**”) will be added to the Outstanding Construction Allowance by BNPPPLC in the amount provided in the Term Sheet. Also, to the extent that BNPPPLC incurs any out-of-pocket costs prior to the Completion Date with respect to the administration of or performance of its obligations under this Agreement or other Operative Documents (*e.g.*, any rents required by the Ground Lease and any Attorneys’ Fees or other costs incurred to evaluate lien releases and other information submitted by NAI with requests for Construction Advances), BNPPPLC may add such costs to the Outstanding Construction Allowance from time to time.

(E) Increased Cost Charges and Capital Adequacy Charges.

(1) If after the Effective Date there is any increase in the cost to BNPPPLC’s Parent or any other Participant agreeing to make or making, funding or maintaining advances to BNPPPLC in connection with the Property because of any Banking Rules Change, then BNPPPLC may agree or become obligated to pay to BNPPPLC’s Parent or such other Participant, as the case may be, additional amounts (“**Increased Cost Charges**”) sufficient to compensate BNPPPLC’s Parent or the Participant for such increased costs. Any Increased Cost Charges paid by BNPPPLC or for which BNPPPLC becomes obligated to pay, prior to the Completion Date, will be added to the Outstanding Construction Allowance by BNPPPLC.

(2) BNPPPLC’s Parent or any other Participant may demand additional payments (“**Capital Adequacy Charges**”) if BNPPPLC’s Parent or the other Participant determines that any Banking Rules Change affects the amount of capital to be maintained by it and that the amount of such capital is increased by or based upon the existence of advances made or to be made to BNPPPLC to permit BNPPPLC to maintain BNPPPLC’s investment in the Property or to make Construction Advances. To the extent that BNPPPLC’s Parent or a Participant demands Capital Adequacy Charges as compensation for the additional capital requirements reasonably allocable to such investment or advances, and BNPPPLC pays or becomes obligated to pay to BNPPPLC’s Parent or the other Participant the amount so demanded prior to the Completion Date, such amount will also be added to the Outstanding Construction Allowance by BNPPPLC.

(3) Notwithstanding the foregoing provisions of this subparagraph 3(E), the Outstanding Construction Allowance will not be increased by Increased Cost Charges or Capital Adequacy Charges that arise or accrue (a) as a result of any change in the rating assigned to BNPPPLC by rating agencies or bank regulators in regard to BNPPPLC’s creditworthiness, record keeping or failure to comply with Applicable Laws (including U.S. banking regulations applicable to subsidiaries of a bank holding company), or (b)

more than nine months prior to the date NAI is notified of the intent of BNPPLC's Parent or a Participant to make a claim for such charges; provided, that if the Banking Rules Change which results in a claim for compensation is retroactive, then the nine month period will be extended to include the period of the retroactive effect of such Banking Rules Change. Further, BNPPLC will cause BNPPLC's Parent and any Participant that is an Affiliate of BNPPLC to use commercially reasonable efforts to reduce or eliminate any claim for compensation pursuant to this subparagraph 3(E), including a change in the office of BNPPLC's Parent or such Participant through which it provides and maintains Funding Advances if such change will avoid the need for, or reduce the amount of, such compensation and will not, in the reasonable judgment of BNPPLC's Parent or such Participant, be otherwise disadvantageous to it. It is understood that NAI may also request similar commercial reasonable efforts on the part of any Participant that is not an Affiliate of BNPPLC, but if a claim for additional compensation by any such Participant is not eliminated or waived, then NAI may request that BNPPLC replace such Participant under the Participation Agreement.

(F) Ground Lease Payments. All rentals payable by BNPPLC under the Ground Lease prior to the Completion Date ("**Ground Lease Rents**") will be added to the Outstanding Construction Allowance by BNPPLC on the date paid.

4 **Construction Advances.**

(A) Costs Subject to Reimbursement Through Construction Advances. Subject to the terms and conditions set forth herein, NAI will be entitled to a Construction Allowance, from which BNPPLC will make Construction Advances on Advance Dates from time to time to pay or reimburse NAI for the following costs ("**Reimbursable Construction Period Costs**") to the extent the following costs are not already included in Transaction Expenses paid by BNPPLC from the Initial Advance:

(1) the actual costs and expenses incurred or paid by NAI for the preparation, negotiation and execution of this Agreement and the other Operative Documents;

(2) costs of the Work, including not only hard costs incurred for the new Improvements described in Exhibit B, but also other the following costs to the extent reasonably incurred in connection with the Construction Project:

- soft costs payable to third parties (whether or not incurred prior to the Effective Date), such as legal fees, architectural fees, engineering fees, construction management fees, transaction management fees and fees and costs paid in connection with obtaining project permits and approvals required by

governmental authorities or any of the Permitted Encumbrances,

- site preparation costs,
- costs of offsite and other public improvements required as conditions of governmental approvals for the Construction Project, and
- to the extent that funds from the Construction Allowance can be used for such costs without causing Projected Cost Overruns, the costs of constructing parking lots, driveways and other improvements on the land subject to the Appurtenant Easements;

(3) the cost of title insurance in favor of BNPPPLC and of maintaining other insurance required by (and consistent with the requirements of) this Agreement prior to the Completion Date, and costs of repairing any damage to the Improvements caused by a Pre-lease Casualty to the extent such costs are not covered by Escrowed Proceeds made available to NAI as provided herein prior to the Completion Date;

(4) Local Impositions that accrue or become due prior to the Completion Date;

(5) reasonable and ordinary out-of-pocket costs of operating and maintaining the Property prior to the Completion Date in accordance with the requirements of this Agreement;

(6) Third Party Contract/Termination Fees, not to exceed in the aggregate ten percent (10%) of the Maximum Construction Allowance, payable by NAI in connection with any Third Party Contract between NAI and a Person not an Affiliate of NAI because of any election by NAI to cancel or terminate such contract during a Work/Suspension Period; and

(7) furniture, trade fixtures and equipment and other tenant improvements to support NAI's use and occupancy of the Property for the permitted uses described in subparagraph 2(A) of the Lease, but that are not integral to or affixed in such a manner as to become part of the Improvements, the aggregate cost of which does not exceed ten percent (10%) of the Maximum Construction Allowance; provided, that no Construction Advance for furniture and other items described in this clause will be required of BNPPPLC or requested by NAI before the Construction Project is substantially complete and substantially all other Reimbursable Construction Period Costs have been paid or reimbursed from Construction Advances.

(B) Exclusions From Reimbursable Construction Period Costs. Notwithstanding anything herein to the contrary, BNPPLC will not be required to make any Construction Advance to pay or to reimburse or compensate NAI for Covered Construction Period Losses paid by NAI as provided in subparagraph 10(A) or for any of the following Losses which may be incurred by NAI or any other party:

(1) Environmental Losses;

(2) Losses that would not have been incurred but for any affirmative act taken by NAI or of any NAI's contractors or subcontractors, which act is contrary to the other terms and conditions of this Agreement or to the terms and conditions of the other Operative Documents (*e.g.*, undertaking a Scope Change without prior authorization of BNPPLC);

(3) Losses that would not have been incurred but for any fraud, misapplication of Construction Advances or other funds, illegal acts or willful misconduct on the part of the NAI or its employees or of any other party acting under NAI's control or with the approval or authorization of NAI; and

(4) Losses that would not have been incurred but for any bankruptcy proceeding involving NAI.

(C) Conditions to NAI's Right to Receive Construction Advances. BNPPLC's obligation to provide Construction Advances to NAI from time to time under this Agreement will be subject to the following terms and conditions, all of which terms and conditions are intended for the sole benefit of BNPPLC, and none of which will limit in any way the right of BNPPLC to treat costs or expenditures incurred or paid by or on behalf of BNPPLC as Construction Advances pursuant to subparagraph 8(A):

(1) Construction Advance Requests. NAI must make a written request (a "**Construction Advance Request**") for any Construction Advance, specifying the amount of such advance, at least five Business Days prior to the Advance Date upon which the advance is to be paid. To be effective for purposes of this Agreement, a Construction Advance Request must be in substantially the form attached as Exhibit C. NAI will not submit more than one Construction Advance Request in any calendar month.

(2) Amount of the Advances.

(a) The Maximum Construction Allowance. NAI will not be entitled to require any Construction Advance that would cause the Funded Construction Allowance to exceed the Maximum Construction Allowance or that would increase the amount of such excess.

(b) Costs Previously Incurred by NAI. NAI will not be entitled to require any Construction Advance that would cause the aggregate of all Construction Advances to exceed the sum of:

(i) Reimbursable Construction Period Costs that NAI has, to the reasonable satisfaction of BNPPLC, substantiated as having been paid or incurred by NAI other than for Work (*e.g.*, Local Impositions), plus

(ii) the Reimbursable Construction Period Costs that NAI has, to the reasonable satisfaction of BNPPLC, substantiated as having been paid or incurred for Prior Work as of the date of the Construction Advance Request in which NAI requests the advance.

As used in this Agreement, “**Prior Work**” means all labor and services actually performed, and all materials actually delivered to the construction site, in accordance with this Agreement prior to the date in question as part of the Work, and “**Future Work**” means labor and services performed or to be performed, and materials delivered or to be delivered, on or after the date in question as part of the Work. For purposes of this Agreement, NAI and BNPPLC intend to allocate Reimbursable Construction Period Costs between Prior Work and Future Work in a manner that is generally consistent with the allocations expressed or implied in construction-related contracts negotiated in good faith between NAI and third parties not affiliated with NAI (*e.g.*, a general contractor); however, in order to verify the amount of Reimbursable Construction Period Costs actually paid or incurred by NAI and the proper allocation thereof between Prior Work and Future Work, BNPPLC will be entitled (but not required) to: (x) request, receive and review copies of such agreements between NAI and third parties and of draw requests, budgets or other supporting documents provided to NAI in connection with or pursuant to such agreements as evidence of the allocations expressed or implied therein, (y) from time to time engage one or more independent inspecting architects, certified public accountants or other appropriate professional consultants and, absent manifest error, rely without further investigation upon their reports and recommendations, and (z) without waiving BNPPLC’s right to challenge or verify allocations required with respect to future Construction

Advances, rely without investigation upon the accuracy of NAI's own Construction Advance Requests.

(c) Limits During any Work/Suspension Period. Without limiting the other terms and conditions imposed by this Agreement for the benefit of BNPPLC with respect all Construction Advances, BNPPLC will have no obligation to make any Construction Advance during any Work/Suspension Period that would cause the aggregate of all Construction Advances to exceed the sum of:

(i) Reimbursable Construction Period Costs that NAI has, to the reasonable satisfaction of BNPPLC, substantiated as having been paid or incurred by NAI other than for Work (e.g., Local Impositions), plus

(ii) the Reimbursable Construction Period Costs that NAI has, to the reasonable satisfaction of BNPPLC, substantiated as having been paid or incurred for Prior Work as of the date the Work/Suspension Period commenced.

For purposes of computing the limits described in this subparagraph 4(C)(2)(c), Reimbursable Construction Period Costs "other than for Work" will include Third Party Contract/Termination Fees that qualify as Reimbursable Construction Period Costs pursuant to subparagraph 4(A)(6). However, as provided in subparagraph 4(A)(6), the amount of such Third Party Contract/Termination Fees subject to reimbursement will not in any event exceed ten percent (10%) of the Maximum Construction Allowance. If NAI fails to manage and administer Third Party Contracts as necessary to ensure that NAI can (at any point in time) terminate all such contracts without becoming liable for Third Party Contract/Termination Fees in excess of ten percent (10%) of the Maximum Construction Allowance, then the excess will be the responsibility of NAI.

(d) Restrictions Imposed for Administrative Convenience. NAI will not request any Construction Advance (other than the final Construction Advance NAI intends to request) for an amount less than \$1,000,000.

(3) No Advances After Certain Dates. BNPPLC will have no obligation to make any Construction Advance (x) after the last Advance Date, (y) on or after the Designated Sale Date, or (z) on or after the effective date of any Termination of NAI's Work pursuant to subparagraph 7(B) or subparagraph 7(C).

(D) Breakage Costs for Construction Advances Requested But Not Taken. If NAI requests but thereafter declines to accept any Construction Advance, or if NAI requests a

Construction Advance that it is not permitted to take because of its failure to satisfy any of the conditions specified in subparagraph 4(C), BNPPPLC will be entitled to add any resulting Breakage Costs to the Outstanding Construction Allowance and the Lease Balance.

(E) No Third Party Beneficiaries. No contractor or other third party will be entitled to require BNPPPLC to make advances as a third party beneficiary of this Agreement, and nothing contained herein or in any of the other Operative Documents will be construed as an agreement obligating BNPPPLC to make advances to anyone other than NAI itself.

(F) No Waiver. No funding of Construction Advances and no failure of BNPPPLC to object to any Work proposed or performed by or for NAI will constitute a waiver by BNPPPLC of the requirements contained in this Agreement.

5 Application of Insurance and Condemnation Proceeds.

(A) Collection and Application Generally. This Paragraph 5 will govern the application of proceeds received by BNPPPLC or NAI from any third party prior to the commencement of the Term of the Lease (1) under any property insurance policy as a result of damage to the Property (including proceeds payable under any insurance policy covering the Property which is maintained by NAI), (2) as compensation for any restriction placed upon the use or development of the Property or for the condemnation of the Property or any portion thereof, or (3) because of any judgment, decree or award for injury or damage to the Property (e.g., damage resulting from a third party's release of Hazardous Materials onto the Property); excluding, however, any funds paid to BNPPPLC by BNPPPLC's Parent, by an Affiliate of BNPPPLC or by any Participant that is made to compensate BNPPPLC for any Losses BNPPPLC may suffer or incur in connection with this Agreement or the Property. NAI will promptly pay over to BNPPPLC any insurance, condemnation or other proceeds covered by this Paragraph 5 which NAI may receive from any insurer, condemning authority or other third party. All proceeds covered by this Paragraph 5, including those received by BNPPPLC from NAI or third parties, will be applied as follows:

(1) First, proceeds covered by this Paragraph 5 will be used to reimburse BNPPPLC for any reasonable costs and expenses, including Attorneys' Fees, that BNPPPLC incurred to collect the proceeds.

(2) Second, the proceeds remaining after such reimbursement to BNPPPLC (the "**Remaining Proceeds**") will be applied, as hereinafter more particularly provided, either as a Qualified Prepayment or to pay or reimburse NAI or BNPPPLC for the actual out-of-pocket costs of repairing or restoring the Property. Until any Remaining Proceeds received by BNPPPLC are applied by BNPPPLC as a Qualified Prepayment or applied by

BNPPLC to reimburse costs of repairs to or restoration of the Property pursuant to this Paragraph 5, BNPPLC will hold and maintain such Remaining Proceeds as Escrowed Proceeds in an interest bearing account, and all interest earned on such account will be added to and made a part of such Escrowed Proceeds.

(B) Advances of Escrowed Proceeds to NAI. Except as otherwise provided below in this Paragraph 5, BNPPLC will hold all such Escrowed Proceeds until they are advanced to reimburse NAI for the actual out-of-pocket cost to NAI of repairing or restoring the Property in accordance with the requirements of this Agreement. BNPPLC will so advance the Escrowed Proceeds as the applicable repair or restoration, progresses and upon compliance by NAI with such conditions and requirements as may be reasonably imposed by BNPPLC, including conditions and requirements similar to those that set forth herein for the payment of Construction Advances. In no event, however, will BNPPLC be required to pay Escrowed Proceeds to NAI in excess of the actual out-of-pocket cost to NAI of the applicable repair, restoration or replacement, as evidenced by invoices or other documentation reasonably satisfactory to BNPPLC.

(C) Status of Escrowed Proceeds After Commencement of the Term of the Lease. Any Remaining Proceeds governed by this Paragraph 5 which BNPPLC is continuing to hold as Escrowed Proceeds when the Term of the Lease commences will be applied in accordance with the terms and conditions of the Lease as if received by BNPPLC immediately after the Term commenced.

(D) Special Provisions Applicable After a 97-10/Event or Event of Default. Notwithstanding the foregoing, after any 97-10/Event and when any Event of Default has occurred and is continuing, BNPPLC will be entitled to receive and collect all insurance, condemnation or other proceeds governed by this Paragraph 5 and to apply all Remaining Proceeds, when and in such order and to such extent deemed appropriate by BNPPLC in its sole discretion, either (A) to the reimbursement of NAI or BNPPLC for the out-of-pocket cost of repairing or restoring the Property, or (B) as Qualified Prepayments.

(E) NAI's Obligation to Restore. Regardless of the adequacy of any Remaining Proceeds available to NAI hereunder, if the Property is damaged by fire or other casualty or any part of the Property is taken by condemnation, NAI must to the maximum extent possible, as part of the Work, restore the Property or the remainder thereof and continue construction of the Construction Project on and subject to the terms and conditions set forth in this Agreement; *provided, however*, like other Work, any such restoration and continuation of construction by NAI will be subject to subparagraphs 7(A) and 7(D), which establish certain rights of NAI to suspend or discontinue any Work; and, *provided further*, any additional costs required to complete the Construction Project resulting from such a casualty or taking prior to the Completion Date will, to the extent not covered by Remaining Proceeds paid to NAI as provided

herein, be subject to reimbursement by BNPPLC as Reimbursable Construction Period Costs on the same terms and conditions that apply to reimbursements of other costs of the Work hereunder.

(F) Special Provisions Concerning a Complete Taking. NAI may react to any threat of a Complete Taking from a governmental authority by exercising NAI's right to accelerate the Designated Sale Date (as provided in the definition thereof) and by exercising the Purchase Option under the Purchase Agreement. By so doing, NAI will put itself in a position to control condemnation proceedings and to receive all proceeds of the Complete Taking. If, however, NAI does not buy the Property pursuant to the Purchase Agreement prior to any Complete Taking, then BNPPLC will be entitled to receive and retain all amounts paid for the Property in connection with the Complete Taking, notwithstanding any contrary provision herein or in the other Operative Documents and notwithstanding that such proceeds may exceed the Lease Balance.

6 Notice of Cost Overruns and Pre-lease Force Majeure Events.

(A) Notice of Projected Cost Overruns. If, at the time NAI submits any Construction Advance Request, NAI believes for any reason (including any damage to the Property by fire or other casualty or any taking of any part of the Property by condemnation) that Projected Cost Overruns are more likely than not, NAI must state such belief in the Construction Advance Request and, if NAI can reasonably do so, NAI will estimate the approximate amount of such Projected Cost Overruns.

(B) Pre-lease Force Majeure Event Events and Notices. NAI may from time to time provide a notice to BNPPLC in the form attached as Exhibit D (a "**Pre-lease Force Majeure Event Notice**"), describing any Pre-lease Force Majeure Event that has occurred or commenced within the 30 days prior to such notice and setting forth NAI's preliminary good faith estimate of any Pre-lease Force Majeure Delays, Pre-lease Force Majeure Losses and Pre-lease Force Majeure Excess Costs that are likely to result from such event. BNPPLC will have the option to respond to any Pre-lease Force Majeure Event Notice with an FOCB Notice or, alternatively and if applicable, with an Increased Commitment as provided in subparagraph 7(B)(6).

7 Suspension and Termination of NAI's Work.

(A) Rights and Obligations During a Work/Suspension Period. During any Work/Suspension Period, NAI will have the right to suspend the Work; however, the obligations of NAI which are to survive any Termination of NAI's Work as provided in subparagraph 7(D) will continue and survive during any Work/Suspension Period.

(B) NAI's Election to Terminate NAI's Work. NAI may elect to terminate its rights

and obligations to continue Work at any time prior to the Completion Date if at such time NAI believes in good faith that a Timing or Budget Shortfall exists. As used herein, “**Timing or Budget Shortfall**” means that (i) the remaining available Construction Allowance will not be sufficient to cover Reimbursable Construction Period Costs yet to be paid or reimbursed from Construction Advances (x) because the cost of the Work exceeds budgeted expectations (resulting in Projected Cost Overruns) through no fault of NAI or its employees or any other party acting under NAI’s control or with the approval or authorization of NAI, (y) because of any Pre-lease Force Majeure Event or (z) because NAI can no longer satisfy conditions to BNPPPLC’s obligation to provide further Construction Advances, or (ii) the Work will not be substantially completed prior to the Target Completion Date through no fault of NAI or its employees or any other party acting under NAI’s control or with the approval or authorization of NAI. (For the avoidance of doubt, as used in this subparagraph 7(B) with respect to any party, the term “fault” will not include insufficient estimation of time or dollars unless shown to be caused by the negligence or wilful misconduct of such party.) To be effective, however, any such election by NAI must be made in accordance with the following:

(1) Any such election by NAI to terminate its rights and obligations to continue the Work must be made by notice to BNPPPLC and the Participants in the form of Exhibit E (a “**Notice of Termination by NAI**”).

(2) At least forty-five days before giving any such Notice of Termination by NAI, NAI must give a notice of NAI’s intent to terminate to BNPPPLC and the Participants in the form of Exhibit E (a “**Notice of NAI’s Intent to Terminate**”), and the Notice of NAI’s Intent to Terminate must state the reasons why, in NAI’s good faith determination, the remaining available Construction Allowance will not be sufficient to cover Reimbursable Construction Period Costs yet to be paid or reimbursed from Construction Advances or the Work will not be substantially complete prior to the Target Completion Date, as applicable.

(3) Without limiting the forgoing, prior to giving any Notice of Termination by NAI predicated upon NAI’s belief that the remaining available Construction Allowance will not be sufficient only because of Pre-lease Force Majeure Excess Costs incurred or anticipated as a result of a Pre-lease Force Majeure Event, NAI must — after having notified BNPPPLC of the such event by the delivery of a Notice of Pre-lease Force Majeure Event in accordance with subparagraph 6(B) — expressly set forth such belief in the Notice of NAI’s Intent to Terminate as indicated in Exhibit E. In any such Notice of NAI’s Intent to Terminate, NAI must also specify its good faith estimate of the Pre-lease Force Majeure Excess Costs likely to be incurred (“**NAI’s Estimate of Force Majeure Excess Costs**”).

(4) Similarly, prior to giving any Notice of Termination by NAI predicated

upon NAI's belief that the Work will not be substantially complete before the Target Completion Date only because of Pre-lease Force Majeure Delays resulting from a Pre-lease Force Majeure Event, NAI must — after having notified BNPPLC of such event by the delivery of a Notice of Pre-lease Force Majeure Event in accordance with subparagraph 6(B) — expressly set forth such belief in the Notice of NAI's Intent to Terminate as indicated in Exhibit F. In any such Notice of NAI's Intent to Terminate, NAI must also specify its good faith estimate of the Pre-lease Force Majeure Delays likely to occur (“**NAI's Estimate of Force Majeure Delays**”).

(5) As used herein, a “**Notice of NAI's Intent to Terminate Because of a Force Majeure Event**” means any Notice of NAI's Intent to Terminate that sets forth NAI's belief, by the optional provisions contemplated in Exhibit F, that either or both: (a) the remaining available Construction Allowance will not be sufficient only because of Pre-lease Force Majeure Excess Costs incurred or anticipated as a result of a Pre-lease Force Majeure Event, or (b) the Work will not be substantially complete before the Target Completion Date only because of Pre-lease Force Majeure Delays resulting from a Pre-lease Force Majeure Event. Should any Termination of NAI's Work occur before NAI sends a Notice of NAI's Intent to Terminate Because of a Force Majeure Event in accordance with this subparagraph (and in the form attached as Exhibit F), such Termination of NAI's Work will, for purposes of determining whether any 97-10/Prepayment may be required pursuant to Paragraph 9, be conclusively presumed to have occurred for reasons other than a Pre-lease Force Majeure Event.

(6) After receipt of any Notice of NAI's Intent to Terminate and before receipt of a Notice of Termination by NAI, BNPPLC may, but will not be obligated to, respond to NAI with certain commitments as follows (such a response being hereinafter called an “**Increased Commitment**”):

(a) In the case of a Notice of Intent to Terminate Because of a Force Majeure Event which expresses NAI's belief that the remaining available Construction Allowance will not be sufficient only because of Pre-lease Force Majeure Excess Costs, BNPPLC may respond with a written commitment to increase the Construction Allowance (an “**Increased Funding Commitment**”) by an amount equal to NAI's Estimate of Force Majeure Excess Costs as set forth in such Notice of NAI's Intent to Terminate. Any such Increased Funding Commitment may be in the form of Exhibit G.

(b) In the case of a Notice of Intent to Terminate Because of a Force Majeure Event which expresses NAI's belief that the Work will not be substantially complete before the Target Completion Date only because of Pre-lease Force Majeure Delays, BNPPLC may respond with a written commitment to

extend the Target Completion Date (an “**Increased Time Commitment**”) by the number of days included in NAI’s Estimate of Force Majeure Delays as set forth in such Notice of NAI’s Intent to Terminate. Any such Increased Time Commitment may be in the form of Exhibit H.

(c) In the case of a Notice of Intent to Terminate Because of a Force Majeure Event which expresses NAI’s belief that both (i) the remaining available Construction Allowance will not be sufficient only because of Pre-lease Force Majeure Excess Costs and (ii) the Work will not be substantially complete before the Target Completion Date only because of Pre-lease Force Majeure Delays, BNPPPLC may respond with both an Increased Funding Commitment and an Increased Time Commitment as provided in the preceding subparagraphs (a) and (b).

(d) In the case of a Notice of Intent to Terminate which is not a Notice of Intent to Terminate Because of a Force Majeure Event (and thus not covered by any of the preceding subparagraphs (a) through (c)), BNPPPLC may require NAI to promptly provide a good faith estimate of the minimum Increased Funding Commitment or Increased Time Commitment (or both) reasonably required to eliminate the reasons for NAI’s delivery of the Notice of Intent to Terminate. After receipt of NAI’s good faith estimate, BNPPPLC may respond with an Increased Funding Commitment or Increased Time Commitment (or both) consistent with such estimate.

(7) If BNPPPLC does respond to a Notice of NAI’s Intent to Terminate with an Increased Commitment, NAI will be entitled to, and will not unreasonably refuse to, rescind such Notice of NAI’s Intent to Terminate within ten days after receipt of such Increased Commitment. To be effective, any such rescission must be by notice to BNPPPLC in the form of Exhibit I. In any event, except as provided in the next subparagraph, the failure of NAI to so rescind any Notice of NAI’s Intent to Terminate within ten days after receipt of the Increased Commitment will, for purposes of determining whether any 97-10/Prepayment may be required pursuant to Paragraph 9, create a conclusive presumption that any Termination of NAI’s Work after the date of such response was made for reasons other than a Pre-lease Force Majeure Event.

(8) For the avoidance of doubt, BNPPPLC acknowledges that NAI’s rescission of any Notice of NAI’s Intent to Terminate (including any Notice of NAI’s Intent to Terminate Because of a Force Majeure Event) after receipt of an Increased Commitment as described in the preceding subsection will not preclude NAI from subsequently exercising its rights under this subparagraph 7(B) in the event NAI subsequently believes in good faith that a Timing or Budget Shortfall exists.

Thus, for example, if NAI rescinds a Notice of NAI's Intent to Terminate Because of a Force Majeure Event after receiving an Increased Commitment from BNPPPLC, but subsequently determines that such Increased Commitment is insufficient (through no fault of NAI or its employees or any other party acting under NAI's control or with the approval or authorization of NAI) to rectify the Timing or Budget Shortfall which caused NAI to send such notice, then NAI may deliver a second Notice of NAI's Intent to Terminate Because of a Force Majeure Event, and in response thereto BNPPPLC may elect to provide yet another Increased Commitment. Moreover, such process may be repeated any number of times, in each case without causing NAI to lose its right to subsequently invoke this subparagraph 7(B) and send yet another Notice of NAI's Intent to Terminate (including another Notice of NAI's Intent to Terminate Because of a Force Majeure Event).

(9) Notwithstanding the foregoing, in the event of a Complete Taking, NAI may deliver a Notice of NAI's Intent to Terminate Because of a Force Majeure Event that explains the futility of continuing with the Construction Project on the Land regardless of any willingness of BNPPPLC to approve or consider Scope Changes or an Increased Commitment, and no offer by BNPPPLC of an Increased Commitment after a Complete Taking will preclude a "Termination of NAI's Work because of a Pre-lease Force Majeure Event" for the purposes of determining whether NAI must pay a 97-10/Prepayment pursuant to Paragraph 9.

(C) BNPPPLC's Election to Terminate NAI's Work. By notice to NAI BNPPPLC may elect to terminate NAI's rights and obligations to continue the Work at any time (i) more than thirty days after BNPPPLC has given an FOEB Notice to NAI, or (ii) after BNPPPLC's receipt of a Notice of NAI's Intent to Terminate and before an election by NAI to rescind the same as described in subparagraph 7(B)(7).

(D) Surviving Rights and Obligations. Following any Termination of NAI's Work as provided in subparagraph 7(B) or in 7(C), NAI will have no obligation to continue or complete any Work; however, no such Termination of NAI's Work will reduce or excuse the following rights and obligations of the parties, it being intended that all such rights and obligations will survive and continue after any Termination of NAI's Work:

(1) NAI's obligations described in the next subparagraph 7(E);

(2) the rights and obligations of NAI and BNPPPLC under the Ground Lease;

(3) the rights and obligations of NAI and BNPPPLC under the Purchase Agreement, other than NAI's Supplemental Payment Obligation if it has been terminated as provided in subparagraph 6(B) of the Purchase Agreement;

(4) any obligations of NAI under the other Operative Documents by reason of any misrepresentation or other act or omission of NAI that occurred prior to the Termination of NAI's Work or during any other period that NAI remains in possession or control of the Construction Project; and

(5) NAI's obligations to indemnify BNPPPLC as set forth in subparagraph 10(A).

(E) Cooperation After a Termination of NAI's Work. After any Termination of NAI's Work as provided in subparagraph 7(B) or subparagraph 7(C), NAI must comply with the following terms and conditions, all of which will survive notwithstanding any such termination:

(1) NAI must promptly deliver copies to BNPPPLC of all Third Party Contracts and purchase orders made by NAI in the performance of or in connection with the Work, together with all plans, drawings, specifications, bonds and other materials relating to the Work in NAI's possession, including all papers and documents relating to governmental permits, orders placed, bills and invoices, lien releases and financial management under this Agreement. All such deliveries must be made free and clear of any liens, security interests, or encumbrances, except such as may be created by the Operative Documents.

(2) Promptly after any request from BNPPPLC made with respect to any Third Party Contract, NAI must deliver a letter confirming: (i) whether NAI has performed any act or executed any other instrument which invalidates or modifies such contract in whole or in part (and, if so, the nature thereof); (ii) the extent to which such contract is valid and subsisting and in full force and effect; (iii) that, to NAI's knowledge, there are no defaults or events of default then existing under such contract and, to NAI's knowledge, no event has occurred which with the passage of time or the giving of notice, or both, would constitute such a default or event of default (or, if there is a default or potential default, the nature of such default in detail); (iv) whether the services and construction contemplated by such contract is proceeding in a satisfactory manner in all material respects (and if not, a detailed description of all significant problems with the progress of the services or construction); (v) in reasonable detail the then critical dates projected by NAI for work and deliveries required by such contract; (vi) the total amount received by the other party to such contract for work or services provided by the other party through the date of the letter; (vii) NAI's good faith estimate of the total cost of completing the services and work contemplated under such contract as of the date of the letter, together with any current draw or payment schedule for the contract; and (viii) any other information BNPPPLC may reasonably request to allow it to decide what steps it should take concerning the contract within BNPPPLC's rights under this Agreement and the other Operative Documents.

(3) As and to the extent requested by BNPPLC, NAI will make every reasonable effort (but without any obligation to incur any expense or liability to do so, unless BNPPLC agrees to reimburse the same with reasonable promptness) to secure any required consents or approvals for an assignment of any then existing Third Party Contract to BNPPLC or its designee, upon terms satisfactory to BNPPLC. To the extent assignable, any then existing Third Party Contract will be assigned by NAI to BNPPLC upon request, without charge by NAI.

(4) If NAI has canceled any Third Party Contract before and in anticipation of a Termination of NAI's Work, then as and to the extent requested by BNPPLC, NAI must make every reasonable effort (but without any obligation to incur any expense or liability to do so, unless BNPPLC agrees to reimburse the same with reasonable promptness) to secure a reinstatement of such Third Party Contract in favor of BNPPLC and upon terms satisfactory to BNPPLC.

(5) For a period not to exceed thirty days after the Termination of NAI's Work, NAI must take such steps as are reasonably necessary to preserve and protect Work completed and in progress and to protect materials, equipment, and supplies at the Property or in transit. Without regard to the conditions applicable to other payments required of BNPPLC by this Agreement, BNPPLC must with reasonable promptness reimburse any reasonable out-of-pocket expenses incurred by NAI to comply with this subparagraph (5); however, BNPPLC may at any time or from time to time by notice to NAI limit or terminate such reimbursements as to expenses incurred after NAI's receipt of such notice, and thereafter NAI will be excused from any obligation to incur expenses that BNPPLC may decline to reimburse.

8 Continuation of Construction by BNPPLC.

(A) **Owner's Election to Continue Construction.** Without limiting BNPPLC's other rights and remedies under this Agreement or the other Operative Documents, and without terminating NAI's surviving obligations under this Agreement or NAI's obligations under the other Operative Documents, after any Termination of NAI's Work as provided in subparagraph 7(B) or subparagraph 7(C), BNPPLC will be entitled (but not obligated) to take whatever action it deems necessary or appropriate by the use of legal proceedings or otherwise to continue or complete the Construction Project in a manner not substantially inconsistent (to the extent practicable under Applicable Laws) with the general description of the Construction Project set forth in Exhibit B. (As used herein, "**Owner's Election to Continue Construction**" means any election by BNPPLC to continue or complete the Construction Project pursuant to the preceding sentence.) After any Owner's Election to Continue Construction, BNPPLC may do any one or more of the following pursuant to this subparagraph without further notice and regardless of whether any breach of this Agreement by NAI is then continuing:

(1) Take Control of the Property. BNPPLC may cause NAI and any contractors or other parties on the Property to vacate the Property until the Construction Project is complete or BNPPLC elects not to continue work on the Construction Project.

(2) Continuation of Construction. BNPPLC may perform or cause to be performed any work to complete or continue the construction of the Construction Project. In this regard, so long as work ordered or undertaken by BNPPLC is not substantially inconsistent (to the extent practicable under Applicable Laws) with the general description of the Construction Project set forth in Exhibit B and the permitted use of the Property set forth in the Lease, BNPPLC will have complete discretion to:

- (a) proceed with construction according to such plans and specifications as BNPPLC may from time to time approve;
- (b) establish and extend construction deadlines as BNPPLC from time to time deems appropriate, without obligation to adhere to any deadlines for construction by NAI set forth in this Agreement;
- (c) hire, fire and replace architects, engineers, contractors, construction managers and other consultants as BNPPLC from time to time deems appropriate, without obligation to use, consider or compensate architects, engineers, contractors, construction managers or other consultants previously selected or engaged by NAI;
- (d) determine the compensation that any architect, engineer, contractor, construction manager or other consultant engaged by BNPPLC will be paid, and the terms and conditions that will govern the payment of such compensation (including whether payment will be due in advance, over the course of construction or on some other basis and including whether contracts will be let on a fixed price basis, a cost plus a fee basis or some other basis), as BNPPLC from time to time reasonably deems appropriate;
- (e) pay, settle or compromise existing or future bills and claims which are or may be liens against the Property or as BNPPLC reasonably considers necessary or desirable for the completion of the Construction Project or the removal of any clouds on title to the Property;
- (f) prosecute and defend all actions or proceedings in connection with the construction of the Construction Project;
- (g) select and change interior and exterior finishes for the

Improvements and landscaping as BNPPPLC from time to time deems appropriate; and

(h) generally do anything that NAI itself might have done if NAI had satisfied or obtained BNPPPLC's waiver of the conditions specified therein.

(3) Arrange for Turnkey Construction. Without limiting the generality of the foregoing, BNPPPLC may engage any contractor or real estate developer BNPPPLC believes to be reputable to take over and complete construction of the Construction Project on a "turnkey" basis.

(4) Suspension or Termination of Construction by BNPPPLC. Notwithstanding any Owner's Election to Continue Construction, BNPPPLC may subsequently elect at any time to suspend or terminate further construction without obligation to NAI.

For purposes of the Operative Documents (including the determination of the Outstanding Construction Allowance, the Lease Balance and the Break Even Price), after any Owner's Election to Continue Construction, all costs and expenditures incurred or paid by or on behalf of BNPPPLC to complete or continue construction as provided in this subparagraph 8(A) will be considered Construction Advances, regardless of whether they cause the Funded Construction Allowance to exceed the Maximum Construction Allowance. Further, as used in the preceding sentence, "costs incurred" by BNPPPLC will include costs that BNPPPLC has become obligated to pay to any third party that is not an Affiliate of BNPPPLC (including any construction contractor), even if the payments for which BNPPPLC has become so obligated constitute prepayments for work or services to be rendered after payment and notwithstanding that BNPPPLC's obligations for the payments may be conditioned upon matters beyond BNPPPLC's control. For example, even if a construction contract between BNPPPLC and a contractor excuses BNPPPLC from making further progress payments to the contractor upon NAI's failure to make any required 97-10/Prepayment under the Purchase Agreement, the obligation to make a progress payment would nonetheless be "incurred" by BNPPPLC, for purposes of determining whether BNPPPLC has incurred costs considered to be 97-10/Project Costs and Construction Advances, when BNPPPLC's obligation to pay it became subject only to NAI's payment of a 97-10/Prepayment or other conditions beyond BNPPPLC's control.

(B) Powers Coupled With an Interest. BNPPPLC's rights under subparagraph 8(A) are intended to constitute powers coupled with an interest which cannot be revoked.

9 NAI's Obligation for 97-10/Prepayments. After any 97-10/Event NAI must make a 97-10/Prepayment to BNPPPLC within three Business Days after receipt from BNPPPLC of any demand for such a payment. BNPPPLC may demand 97-10/Prepayments pursuant to this Paragraph at any time and from time to time (as 97-10/Project Costs increase) after a

97-10/Event. NAI acknowledges that it is undertaking the obligation to make 97-10/Prepayments as provided in this Paragraph in consideration of the rights afforded to it by this Agreement, but that such obligation is not contingent upon any exercise by NAI of such rights or upon its rights under any other Operative Documents. If a 97-10/Event does occur, NAI's obligation to make 97-10/Prepayments as provided in this Paragraph will survive any Termination of NAI's Work.

Notwithstanding the foregoing provisions of this Paragraph 9, if (as provided in subparagraph 7(B)) NAI effectively makes the election for a Termination of NAI's Work because of a Pre-lease Force Majeure Event that resulted in Pre-lease Force Majeure Excess Repair Costs or Pre-lease Force Majeure Delays, then NAI will be excused from the obligation to make 97-10/Prepayments until such time (if ever) that BNPPPLC itself completes the Construction Project or causes it to be completed as BNPPPLC is authorized to do by subparagraph 8(A).

10 Indemnity for Covered Construction Period Losses.

(A) Covenant to Indemnify Against Covered Construction Period Losses. Subject to the qualifications in subparagraph 10(B), as directed by BNPPPLC, NAI must indemnify and defend BNPPPLC from and against all of the following Losses ("**Covered Construction Period Losses**"):

(1) Losses suffered or incurred by BNPPPLC, directly or indirectly, relating to or arising out of, based on or as a result of any of the following which occurs or is alleged to have occurred prior to any Termination of NAI's Work: (i) any Hazardous Substance Activity; (ii) any violation of any applicable Environmental Laws relating to the Land or the Property or to the ownership, use, occupancy or operation thereof; (iii) any investigation, inquiry, order, hearing, action, or other proceeding by or before any governmental or quasi-governmental agency or authority in connection with any Hazardous Substance Activity; or (iv) any claim, demand, cause of action or investigation, or any action or other proceeding, whether meritorious or not, brought or asserted against BNPPPLC which directly or indirectly relates to, arises from, is based on, or results from any of the matters described in clauses (i), (ii), or (iii) of this provision or any allegation of any such matters;

(2) Losses incurred or suffered by BNPPPLC that BNPPPLC would not have incurred or suffered but for any act or any omission of NAI or of any NAI's contractors or subcontractors during the period prior to any Termination of NAI's Work as provided in subparagraphs 7(B) and 7(C) or during any other period that NAI remains in possession or control of the Construction Project (including any failure by NAI to obtain or maintain insurance as required by this Agreement during such periods; but excluding, however, as described below, certain Losses consisting of claims related to any failure of NAI to

complete the Construction Project);

(3) Losses incurred or suffered by BNPPPLC that would not have been incurred but for any fraud, misapplication of funds (including Construction Advances), illegal acts, or willful misconduct on the part of the NAI or its employees or of any other party acting under NAI's control or with the approval or authorization of NAI; and

(4) Losses incurred or suffered by BNPPPLC that would not have been incurred but for any bankruptcy proceeding involving NAI.

NAI's obligations under this indemnity will apply whether or not BNPPPLC is also indemnified as to the applicable Covered Construction Period Loss by any third party (including another Interested Party) and whether or not the Covered Construction Period Loss arises or accrues prior to the Effective Date. Further, in the event, for income tax purposes, BNPPPLC must include in its taxable income any payment or reimbursement from NAI which is required by this indemnity (in this provision, the "**Original Indemnity Payment**"), and yet BNPPPLC is not entitled during the same taxable year to a corresponding and equal deduction from its taxable income for the Covered Construction Period Loss paid or reimbursed by such Original Indemnity Payment (in this provision, the "**Corresponding Loss**"), then NAI must also pay to BNPPPLC on demand the additional amount (in this provision, the "**Additional Indemnity Payment**") needed to gross up the Original Indemnity Payment for any and all resulting additional income taxes. That is, NAI must pay an Additional Indemnity Payment as is needed so that the Corresponding Loss (computed net of the reduction, if any, of BNPPPLC's income taxes because of credits or deductions that are attributable to the BNPPPLC's payment or deemed payment of the Corresponding Loss and that are recognized for tax purposes in the same taxable year during which BNPPPLC must recognize the Original Indemnity Payment as income) will not exceed the difference computed by subtracting (i) all income taxes (determined for this purpose based on the highest marginal income tax rates applicable to corporations for the relevant period or periods and the highest applicable state or local marginal rates of such taxing authority applicable to corporations for the relevant period or periods) imposed upon BNPPPLC with respect to the Original Indemnity Payment and the Additional Indemnity Payment, from (ii) the sum of the Original Indemnity Payment and the Additional Indemnity Payment. (With regard to any payment or reimbursement of an Original Indemnity Payment, "**After Tax Basis**" means that such payment or reimbursement is or will be made together with the additional amount needed to gross up such Original Indemnity Payment as described in this provision.)

(B) Certain Losses Included or Excluded.

(1) *Environmental.* As used in clause (1) of the preceding subparagraph 10(A), "Losses" will not include costs properly incurred in connection with the Work to prevent the occurrence of a violation of Environmental Laws that did not

previously exist. (For example, Environmental Losses will not include the increase in costs resulting from NAI's installation of fire proofing materials other than asbestos because of Environmental Laws that prohibit the use of asbestos.) However, any costs to correct or answer for any violation of Environmental Laws that occurred on or prior to the Effective Date or that NAI causes or permits to occur after the Effective Date in connection with the Work or the Property will constitute Environmental Losses. (Thus, for instance, if NAI releases Hazardous Materials from the Property in a manner that contaminates ground water in violation of Environmental Laws, the costs of correcting the contamination and any applicable fines or penalties will constitute Environmental Losses for which NAI must indemnify and defend BNPPPLC pursuant to subparagraph 10(A).)

(2) *Failure to Maintain a Safe Work Site.* If a third party asserts a claim for damages against BNPPPLC because of injuries the third party sustained while on the Land as a result of NAI's breach of its obligations under this Agreement to keep the Land and the Improvements thereon in a reasonably safe condition as Work progresses under NAI's direction and control, then any such claim and other Losses resulting from such claim will constitute Covered Construction Period Losses under clause (b) of the definition of Covered Construction Period Losses in subparagraph 10(A).

(3) *Failure to Complete Construction.* Additional costs of construction may result from NAI's failure to complete the Construction Project if a Termination of NAI's Work occurs pursuant to subparagraphs 7(B) and 7(C). Nevertheless, it is understood that a failure of NAI to complete the Construction Project following any such Termination of NAI's Work will not necessarily constitute a breach of this Agreement, and clause (b) of subparagraph 10(A) will not include any such additional costs of performing the Work or the cost to BNPPPLC of completing the Construction Project after the Termination of NAI's Work. (Such costs may, however, qualify as 97-10/Project Costs and thus increase the 97-10/Maximum Permitted Prepayment.)

(4) *Fraud.* As used in clause (3) of subparagraph 10(A), "fraud" or "willful misconduct" will include (i) any deliberate decision by NAI to make a Scope Change without BNPPPLC's prior written approval, (ii) any fraud or intentional misrepresentation by NAI, or its vendors, contractors or subcontractors regarding NAI's ongoing compliance with the requirements of this Agreement, and (iii) the performance by NAI or its vendors, contractors or subcontractors of Defective Work, with NAI's knowledge that it constitutes Defective Work, prior to any Termination of NAI's Work as provided in subparagraphs 7(B) and 7(C).

(5) *Excluded Taxes and Established Misconduct.* Nothing in this subparagraph 10 or other provisions of this Agreement will be construed to require NAI

to reimburse or pay Excluded Taxes or Losses incurred or suffered by BNPPLC that are proximately caused by (and attributed by any applicable principles of comparative fault to) the Established Misconduct of BNPPLC.

(C) Express Negligence Protection. Every release provided in this Agreement for BNPPLC or any other Interested Party, and the indemnity provided for the benefit of BNPPLC in the preceding subparagraph 10(A), will apply even if and when the subject matters thereof are alleged to be caused by or to arise out of the negligence or strict liability of BNPPLC or another Interested Party. Further, all such releases and the indemnity will apply even if insurance obtained by NAI or required of NAI by this Agreement is not adequate to cover Losses against or for which the releases and the indemnity are provided (although NAI's liability for any failure to obtain insurance required by this Agreement will not be limited to Losses against which indemnity is provided, it being understood that the parties have agreed upon insurance requirements for reasons that extend beyond providing a source of payment for Losses against which BNPPLC may be indemnified by NAI).

(D) Survival of Indemnity. NAI's obligations under this subparagraph 10 will survive the termination or expiration of this Agreement and any Termination of NAI's Work with respect to Losses suffered by BNPPLC resulting or arising from events or circumstances which existed or occurred or are alleged to have existed or occurred prior to the Termination of NAI's Work or during any other period that NAI remains in possession or control of the Construction Project, whether such Losses are asserted, suffered or paid before or after the Termination of NAI's Work.

(E) Due Date for Indemnity Payments. Any amount to be paid by NAI under this subparagraph 10 will be due fifteen days after a notice requesting such payment is received by NAI. Any such amount not paid by NAI when first due will bear interest at the Default Rate in effect from time to time from the date it first became due until paid; provided, that nothing herein contained will be construed as permitting the charging or collection of interest at a rate exceeding the maximum rate permitted under Applicable Laws.

(F) Order of Application of Payments. BNPPLC will be entitled to apply any payments by or on behalf of NAI against NAI's obligations under this subparagraph or against other amounts owing by NAI and then past due under any of the other Operative Documents in the order the same became due or in such other order as BNPPLC may elect.

(G) Defense of BNPPLC.

(1) *Assumption of Defense*. By notice to NAI BNPPLC may direct NAI to assume on behalf of BNPPLC and to conduct with due diligence and in good faith the defense of and the response to any claim, proceeding or investigation included in or

concerning any Covered Construction Period Loss. NAI must promptly comply with any such direction using counsel selected by NAI and reasonably satisfactory to BNPPPLC to represent BNPPPLC. In the event NAI fails to promptly comply with any such direction from BNPPPLC, BNPPPLC may contest or settle the claim, proceeding or investigation using counsel of its own selection at NAI's expense, subject only to subparagraph 10(K) if that subparagraph is applicable.

(2) *Indemnity Not Contingent.* Also, although subparagraphs 10(K) and 10(L) will apply to tort claims asserted against BNPPPLC related to the Property, the right of BNPPPLC to be indemnified pursuant to subparagraph 10(A) for payments made to satisfy governmental requirements ("**Government Mandated Payments**") (e.g., fines payable because of any release of Hazardous Materials from the Property) will not be conditioned in any way upon NAI having consented to or approved of, or having been provided with an opportunity to defend against or contest, such Government Mandated Payments. In all cases, however, including those which may involve Government Mandated Payments, the rights of BNPPPLC to be indemnified will be subject to subparagraph 10(M).

(H) When Payments Are Due. Any amount to be paid by NAI under subparagraph 10(A) will be due ten days after a notice requesting such payment is given to NAI, subject to any applicable contest rights expressly granted to NAI by other provisions of this Agreement.

(I) Survival. NAI's obligations under subparagraph 10(A) will survive the termination or expiration of this Agreement and any Termination of NAI's Work Lease.

(J) Notice of Claims. If BNPPPLC receives a written notice of a claim for taxes or a claim alleging a tort or other unlawful conduct that BNPPPLC believes is covered by the indemnity in subparagraph 10(A), then BNPPPLC will be expected to promptly furnish a copy of such notice to NAI. The failure to so provide a copy of the notice will not excuse NAI from its obligations under subparagraph 10(A); except that if such failure continues for more than fifteen days after the notice is received by BNPPPLC and NAI is unaware of the matters described in the notice, with the result that NAI is unable to assert defenses or to take other actions which could minimize its obligations, then NAI will be excused from its obligation to indemnify BNPPPLC against the Covered Construction Period Losses, if any, which would not have been incurred or suffered but for such failure. For example, if BNPPPLC fails to provide NAI with a copy of a notice of an overdue tax obligation covered by the indemnity set out in subparagraph 10(A) and NAI is not otherwise already aware of such obligation, and if as a result of such failure BNPPPLC becomes liable for penalties and interest covered by the indemnity in excess of the penalties and interest that would have accrued if NAI had been promptly provided with a copy of the notice, then NAI will be excused from any obligation to BNPPPLC (or any Affiliate of BNPPPLC) to pay the excess.

(K) Withholding of Consent to Settlements Proposed by NAI. With regard to any tort claim against BNPPLC for which NAI undertakes to defend BNPPLC as provided in subparagraph 10(G)(1), if BNPPLC unreasonably refuses to consent to a settlement of the claim which is proposed by NAI and which will meet the conditions listed in the next sentence, NAI's liability for the cost of continuing the defense and for any other amounts payable in respect of the claim will be limited to the total cost for which the settlement proposed by NAI would have been accomplished but for the unreasonable refusal to consent. Any such settlement proposed by NAI must meet the following conditions: (A) at the time of the settlement by NAI, NAI must pay all amounts required to release BNPPLC and other affected Interested Parties (if any) and their property interests from any further obligation for or liens securing the applicable claim and from any interest, penalties and other related liabilities, and (B) the settlement or compromise must not involve an admission of fraud or criminal wrongdoing or result in some other material adverse consequence to BNPPLC or any other Interested Party.

(L) Settlements Without the Prior Consent of NAI.

(1) *Election to Pay Reasonable Settlement Costs in Lieu of Actual*. Except as otherwise provided in subparagraph 10(L)(2), if BNPPLC settles any tort claim for which it is entitled to be indemnified by NAI without NAI's consent, then NAI may, by notice given to BNPPLC no later than ten days after NAI is notified of the settlement, elect to pay Reasonable Settlement Costs to BNPPLC in lieu of a payment or reimbursement of actual settlement costs. (With respect to any tort claim asserted against BNPPLC, "**Reasonable Settlement Costs**" means the maximum amount that a prudent Person in the position of BNPPLC, but able to pay any amount, might reasonably agree to pay to settle the tort claim, taking into account the nature and amount of the claim, the relevant facts and circumstances known to BNPPLC at the time of settlement and the additional Attorneys Fees' and other costs of defending the claim which could be anticipated but for the settlement.) After making an election to pay Reasonable Settlement Costs with regard to a particular tort claim, NAI will have no right to rescind or revoke the election, despite any subsequent determination that Reasonable Settlement Costs exceed actual settlement costs. It is understood that Reasonable Settlement Costs may be more or less than actual settlement costs and that a final determination of Reasonable Settlement Costs may not be possible until after NAI must decide between paying Reasonable Settlement Costs or paying actual settlement costs.

(2) *Conditions to Election*. Notwithstanding the foregoing, NAI will have no right to elect to pay Reasonable Settlement Costs in lieu of actual settlement costs if BNPPLC settles claims without NAI's consent at any time when an Event of Default has occurred and is continuing or after a failure by NAI to conduct with due diligence and in good faith the defense of and the response to any claim, proceeding or investigation as provided in subparagraph 10(G)(1).

(3) *Indemnity Survives Settlement.* Except as provided in this subparagraph 10(L), no settlement by BNPPLC of any claim made against it will excuse NAI from any obligation to indemnify BNPPLC against the settlement costs or other Covered Construction Period Losses suffered by reason of, in connection with, arising out of, or in any way related to such claim.

(M) No Authority to Admit Wrongdoing on the Part of NAI. BNPPLC will not under any circumstances have any authority to bind NAI to an admission of wrongdoing or responsibility to any third party claimant with regard to matters for which BNPPLC claims a right to indemnification from NAI under this Agreement.

Further, nothing herein contained, including the foregoing provisions concerning settlements by BNPPLC of indemnified Losses, will be construed as authorizing BNPPLC to bind NAI to do or refrain from doing anything to satisfy a third party claimant. If, for example, a claim is made by a Governmental Authority that NAI must refrain from some particular conduct on or about the Land in order to comply with Applicable Laws, BNPPLC cannot bind NAI (and will not purport to bind NAI) to any agreement to refrain from such conduct or otherwise prevent NAI from continuing to contest the claim by reason of any provision set forth herein.

Moreover, so long as this Agreement or the Lease continues, BNPPLC's right to settle any claim involving the Property will not include the right to bind NAI to any agreement (including any consent decree proposed by any Governmental Authority) which purports to prohibit, limit or impose conditions upon any use of the Property by NAI without the prior written consent of NAI. In the case of any proposed settlement of a claim asserted by a Governmental Authority against BNPPLC, NAI will not unreasonably withhold such consent. However, for purposes of determining whether it is reasonable for NAI to withhold such consent, any diligent ongoing undertaking by NAI to contest such the claim on behalf of BNPPLC will be relevant.

Subject to the foregoing provisions in this subparagraph 10(M), BNPPLC may agree for itself (and only for itself) to act or refrain from doing anything as demanded or requested by a third party claimant; provided, however, in no event will such an agreement impede NAI from continuing to exercise its rights to operate its business on the Property or elsewhere in any lawful manner deemed appropriate by NAI, nor will any such agreement limit or impede NAI's right to contest claims raised by any third party claimants (including Governmental Authorities) that NAI is not complying or has not complied with Applicable Laws.

(N) Refunds of Covered Construction Period Losses Paid by NAI.

(1) *Payment by BNPPLC After Refund.* If BNPPLC receives a refund of any Covered Construction Period Losses paid, reimbursed or advanced by NAI pursuant to subparagraph 10(A), BNPPLC will promptly pay to NAI the amount of such refund, plus

or minus any net tax benefits or detriments realized by BNPPPLC as a result of such refund and such payment to NAI; provided, that the amount payable to NAI will not exceed the amount of the indemnity payment in respect of such refunded Covered Construction Period Losses that was made by NAI. If it is subsequently determined that BNPPPLC was not entitled to such refund, the portion of such refund that is repaid or recaptured will be treated as a Covered Construction Period Loss for which NAI must indemnify BNPPPLC pursuant to subparagraph 10(A) without regard to subparagraph 10(B)(5). If, in connection any such refund, BNPPPLC also receives an amount representing interest on such refund, BNPPPLC will promptly pay to NAI the amount of such interest, plus or minus any net tax benefits or detriments realized by BNPPPLC as a result of the receipt or accrual of such interest and as a result of the such payment to NAI; provided, that BNPPPLC will not be required to make any such payment in respect of the interest (if any) that is fairly attributable to a period before NAI paid, reimbursed or advanced the Covered Construction Period Losses refunded to BNPPPLC.

(2) *Meaning of Refund.* With respect to Covered Construction Period Losses incurred or suffered by BNPPPLC and paid or reimbursed by NAI on an After Tax Basis, if taxes of BNPPPLC which are not subject to indemnification by NAI are reduced because of such Losses (whether by reason of a deduction, credit or otherwise) and such reduction was not taken into account in the calculation of the required reimbursement or payment by NAI, then for purposes of this subparagraph 10(N) such reduction will be considered a “refund”.

(3) *Conditions to Payment.* Notwithstanding the foregoing, in no event will BNPPPLC be required to make any payment to NAI pursuant to this subparagraph 10(N) after any 97-10/Event or when any Event of Default has occurred and is continuing.

[The signature pages follow.]

IN WITNESS WHEREOF, this Construction Management Agreement is executed to be effective as of December 14, 2006.

BNP PARIBAS LEASING CORPORATION,
a Delaware corporation

By: /s/ Lloyd G. Cox
Lloyd G. Cox, Managing Director

[Continuation of signature pages for Construction Management Agreement dated as of December 14, 2006]

NETWORK APPLIANCE, INC., a Delaware corporation

By: /s/ Ingemar Lanevi
Ingemar Lanevi, Vice President and Corporate
Treasurer

Construction Management Agreement — Signature Page

Exhibit A

Legal Description

Proposed Parcel 8, and (except to the extent within a different platted Parcel as currently shown in the Map Records of the County of Santa Clara, California) proposed Parcel 12, and the Additional Leased Premises as defined below, (collectively, the “**2006 Ground Lease Premises**”) as shown on that certain Vesting Tentative Parcel Map provided to BNP Paribas Leasing Corporation (“**BNPPLC**”) by Network Appliance, Inc. (“**NAI**”) attached hereto and made a part hereof (the “**Tentative Map**”), which has received preliminary approval from the City of Sunnyvale, California, but not yet been filed for record in the office of the recorder of the County of Santa Clara, State of California. As used herein, “**Additional Leased Premises**” means the parking lots, driveways and other areas shaded in gray on the Tentative Map attached hereto within the larger area designated as Common Lot A (consisting of 30.46 Acres, more or less) on the Tentative Map. The southern boundary of the Additional Leased Premises is a line that runs North 75 degrees, 07 minutes, 58 seconds equidistant from the southern boundary of Parcel 8 and the northern boundary of Parcel 7, both as shown on the Tentative Map. The eastern boundary of the Additional Leased Premises runs along the same line as the eastern boundary of Common Lot A, as shown on the Tentative Map. The western boundary of the Additional Leased Premises runs along the same line as the western boundary of Parcel 8 and Parcel 7, as shown on the Tentative Map. The northern boundary of the Additional Leased Premises runs along the center of an existing or proposed driveway which is situated between Parcel 8 and Parcel 9, as shown on the Tentative Map.

TOGETHER WITH, easements appurtenant to the 2006 Ground Lease Premises as described in Exhibit A attached to the Ground Lease.

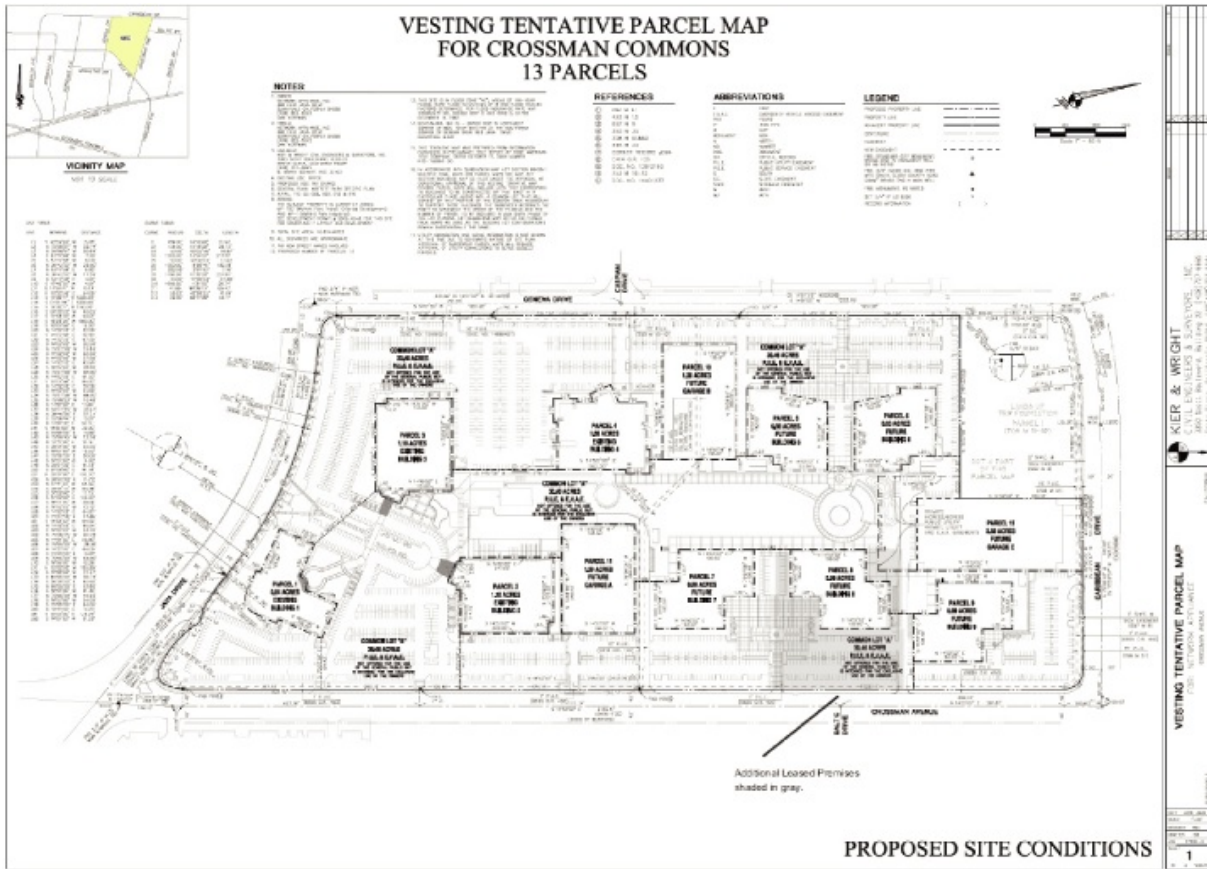


Exhibit A to Construction Management Agreement — Page 2

Exhibit B

Description of the Construction Project and Construction Budget

Subject to future Scope Changes, the Construction Project will be substantially consistent with the following general description and with the site plan attached as part of Exhibit A and the elevations attached to this Exhibit:

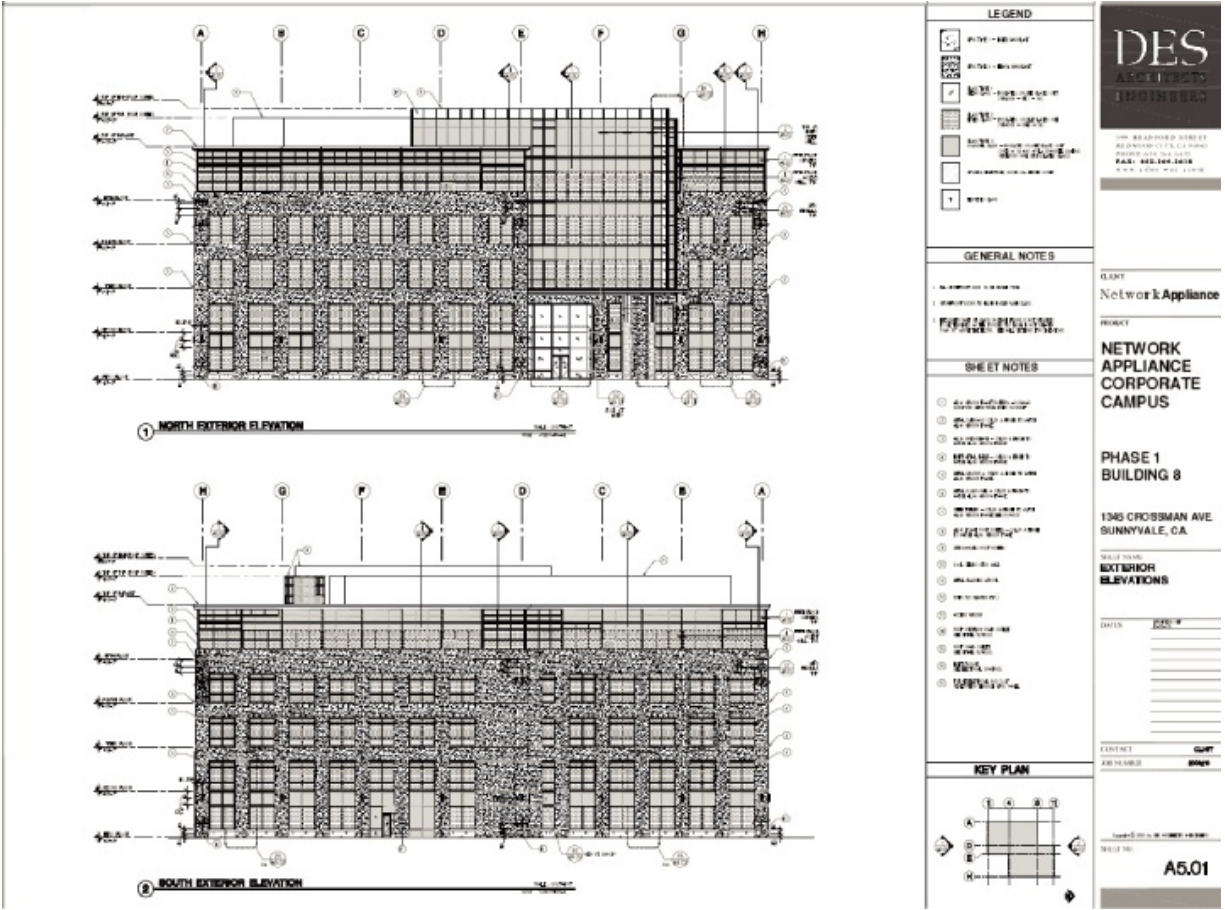
A new 5-story class A office building containing a total of approximately 189,500 square feet of gross building area and approximately 177,500 square feet of net rentable area, including fixed building services and necessary land improvements. The subject building once completed will be constructed with a steel frame covered by GFRC (Glass Fiber Reinforced Concrete) walls, insulated windows, and built-up asphalt roofs. The structure will be built on reinforced concrete slab foundation with column footings and girders. Additionally the subject will have a four-story parking garage containing approximately 660 parking spaces. Land improvements consisting mainly of paved parking area (206 parking spaces), parking lot lighting, and landscaping.

All of the improvements will be suitable for uses contemplated in the Lease and of a quality, when complete to be considered first class facilities for such uses. The location of improvements, including appurtenant parking areas, driveways and other facilities on the Land (or pursuant to appurtenant easements described in Exhibit A to the Ground Lease) will be as shown in the Tentative Parcel Map attached to and made a part of Exhibit A.

The budget for the Construction Project is as shown on the attached pages.

Construction Budget

	<i>Cost</i>
Unallocated Costs	
Carrying Costs	\$ 6,448,496
Insurance	237,120
Building 8 Costs	
Design & Engineering	1,240,816
Permits	5,055,240
Site & Shell Construction	20,361,240
Interior Construction	21,818,719
Subtotal	48,476,016
Garage C Costs	
Design & Engineering	739,900
Permits	195,771
Site & Shell Construction	8,799,378
Subtotal	9,735,049
Total Project Cost	<u>\$64,896,681</u>



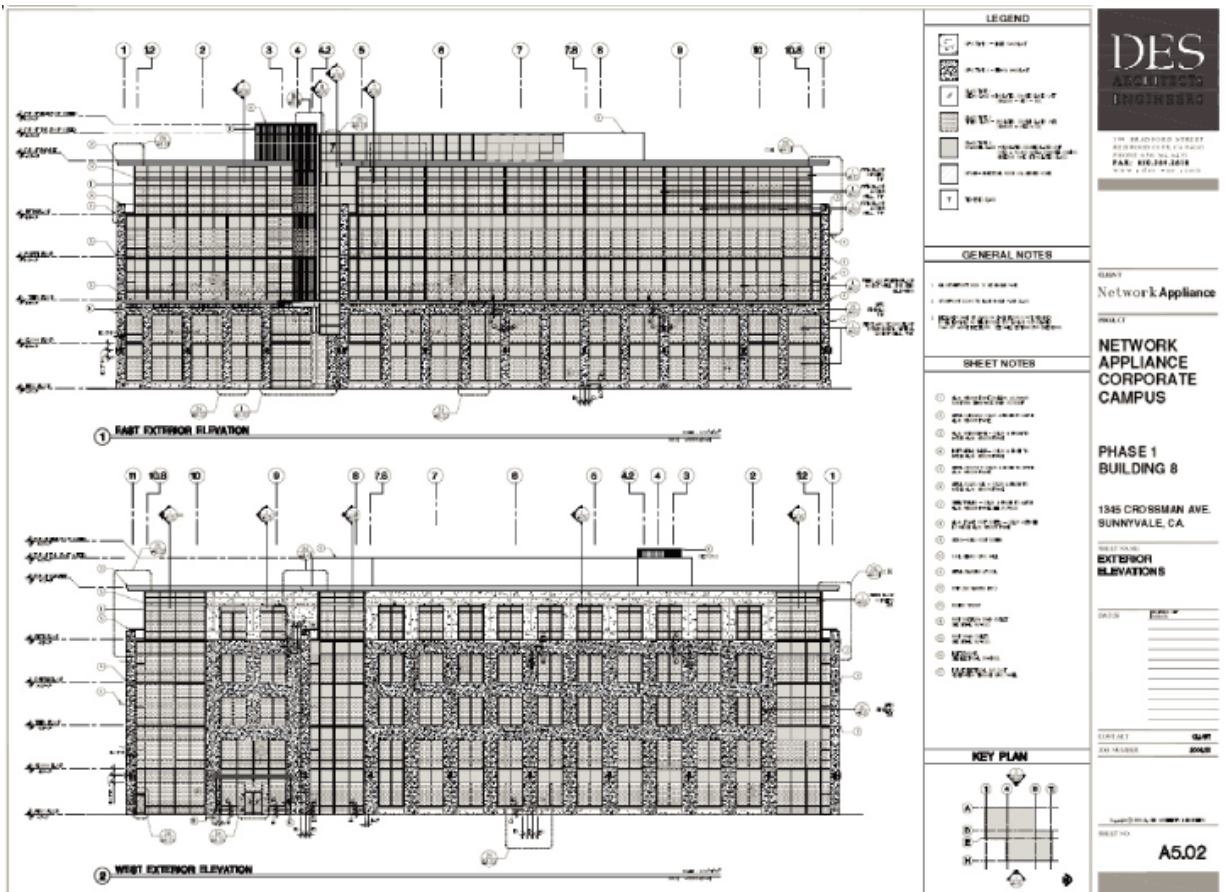


Exhibit C

Construction Advance Request Form

[Date]

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director

Re: Construction Management Agreement dated as of December 14, 2006 (the "**Construction Management Agreement**"), between Network Appliance, Inc. ("**NAI**"), a Delaware corporation, and BNP Paribas Leasing Corporation ("**BNPPLC**")

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Construction Management Agreement or in the Common Definitions and Provisions Agreement referenced in the Construction Management Agreement. This letter constitutes a Construction Advance Request, requesting a Construction Advance of:

\$ _____,

on the Advance Date that will occur on:

_____, 20 _____.

To induce BNPPLC to make such Construction Advance, NAI represents and warrants as follows:

I. Calculation of limit imposed by Subparagraph 4(C)(2)(b) of the Construction Management Agreement:

- | | |
|---|----------|
| (1) NAI has paid or incurred bona fide Reimbursable Construction Period Costs other than for Work (<i>e.g.</i> , property taxes) of no less than | \$ _____ |
| (2) NAI has paid or incurred bona fide Reimbursable Construction Period Costs for Prior Work of no less than | \$ _____ |
| (3) NAI has received prior Construction Advances of no more than | \$ _____ |
| LIMIT (1 + 2 - 3) | \$ _____ |
-

II. Projected Cost Overruns:

NAI [check one:*not*] believe that Projected Construction Overruns are more likely than not. [If NAI does believe that Projected Cost Overruns are more likely than not, and if NAI believes that the amount of such Projected Construction Overruns can be reasonably estimated, NAI estimates the same at \$ ____.]

III. Construction Advances Covering Pre-lease Force Majeure Losses:

Neither the Construction Advance requested this letter nor prior Construction Advances (if any) have been used or will be used to cover any costs of repairs that constitute Pre-lease Force Majeure Losses, except as follows: (*if there are no exceptions, insert "No Exceptions"*)

IV. Absence of Certain Work/Suspension Events:

A. The Construction Project is progressing without significant interruption in a good and workmanlike manner and substantially in accordance with Applicable Laws, with Permitted Encumbrances and with the requirements of the Construction Management Agreement, except as follows: (*if there are no exceptions, insert "No Exceptions"*)

B. If NAI has received notice of any Defective Work, NAI has promptly corrected or is diligently pursuing the correction of such Defective Work, except as follows: (*if there are no exceptions, insert "No Exceptions"*)

NETWORK APPLIANCE, INC., a Delaware corporation

By: _____
Name: _____
Title: _____

[cc all Participants]

Exhibit D

Pre-lease Force Majeure Event Notice

[Date]

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director

Re: Construction Management Agreement dated as of December 14, 2006 (the "**Construction Management Agreement**"), between Network Appliance, Inc. ("**NAI**"), a Delaware corporation, and BNP Paribas Leasing Corporation ("**BNPPLC**"), a Delaware corporation

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Construction Management Agreement referenced above or in the Common Definitions and Provisions Agreement referenced in the Construction Management Agreement.

IMPORTANT: It is imperative that BNPPLC promptly review with legal counsel the ramifications of this notice under the Construction Management Agreement and other Operative Documents.

This letter constitutes a Pre-lease Force Majeure Event Notice, given as provided in subparagraph 6(B) of the Construction Management Agreement to preserve the right of NAI to assert the occurrence of a Pre-lease Force Majeure Event.

NAI certifies to BNPPLC that the following Pre-lease Force Majeure Event occurred on _____, 20__:

[INSERT DESCRIPTION OF EVENT HERE]

NAI's preliminary good faith estimate of the Pre-lease Force Majeure Delays, of the Pre-lease Force Majeure Losses and of the Pre-lease Force Majeure Excess Costs likely to result from such event are ___ days, \$___ and \$___, respectively. Such amounts, however, are only estimates.

NAI acknowledges that after NAI gives this notice, BNPPLC may at any time deliver an FOCB Notice to NAI as described in the Construction Management Agreement.

NETWORK APPLIANCE, INC., a Delaware corporation

By: _____

Name: _____

Title: _____

[cc all Participants]

Exhibit E

Notice of Termination of NAI's Work

[Date]

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director

Re: Construction Management Agreement dated as of December 14, 2006 (the "**Construction Management Agreement**"), between Network Appliance, Inc. ("**NAI**"), a Delaware corporation, and BNP Paribas Leasing Corporation ("**BNPPLC**"), a Delaware corporation

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Construction Management Agreement referenced above or in the Common Definitions and Provisions Agreement referenced in the Construction Management Agreement.

IMPORTANT: It is imperative that BNPPLC promptly review with legal counsel the ramifications of this notice under the Construction Management Agreement and other Operative Documents.

NAI has determined that the Construction Allowance to be provided to it under the Construction Management Agreement will not be sufficient to cover all Reimbursable Construction Period Costs yet to be paid or reimbursed from Construction Advances for the reason or reasons set forth in the Notice of NAI's Intent to Terminate dated ___, 200 ___, previously delivered to you as provided in subparagraph 7(B) of the Construction Management Agreement. That Notice of NAI's Intent to Terminate has not been rescinded by NAI.

NAI hereby irrevocably and unconditionally elects to terminate its rights and obligations to continue the Work under Construction Management Agreement effective as of the date of this letter (which, as required by subparagraph 7(B) of the Construction Management Agreement, is a date not less than forty-five days after the date the aforementioned Notice of NAI's Intent to Terminate). This notice constitutes a "Notice of Termination by NAI" as described in subparagraph 7(B) of the Construction Management Agreement.

NAI also acknowledges that a 97-10/Event has occurred under and as defined in the Construction Management Agreement, and that BNPPLC is thus entitled to demand and receive 97-10/Prepayments under and as provided in Paragraph 9 of that agreement.

NETWORK APPLIANCE, INC., a Delaware corporation

By: _____
Name: _____
Title: _____

[cc all Participants]

Exhibit F

Notice of NAI's Intent to Terminate

[Date]

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director

Re: Construction Management Agreement dated as of December 14, 2006 (the "**Construction Management Agreement**") between Network Appliance, Inc. ("**NAI**"), a Delaware corporation, and BNP Paribas Leasing Corporation ("**BNPPLC**"), a Delaware corporation

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Construction Management Agreement referenced above or in the Common Definitions and Provisions Agreement referenced in the Construction Management Agreement.

IMPORTANT: It is imperative that BNPPLC promptly review with legal counsel the ramifications of this notice under the Construction Management Agreement and other Operative Documents.

[DRAFTING NOTE: Unless this letter contains the alternative provisions set forth below as being required after a Complete Taking in any "Notice of NAI's Intent to Terminate Because of a Force Majeure Event," this letter must contain the following paragraph and inserts following such paragraph as indicated:

NAI has determined that the Construction Allowance to be provided to it under the Construction Management Agreement will not be sufficient to cover all Reimbursable Construction Period Costs yet to be paid or reimbursed from Construction Advances, because:

[INSERT ANY ONE OR MORE OF THE FOLLOWING REASONS THAT APPLY: (1) THE COST OF THE WORK EXCEEDS BUDGETED EXPECTATIONS (RESULTING IN PROJECTED COST OVERRUNS), (2) A PRE-LEASE FORCE MAJEURE EVENT, OR (3) NAI CAN NO LONGER SATISFY CONDITIONS TO BNPPLC'S OBLIGATION TO PROVIDE CONSTRUCTION ADVANCES IN THE CONSTRUCTION MANAGEMENT AGREEMENT.]

The purpose of this letter is to give notice to BNPPPLC and Participants of NAI's intent to terminate NAI's rights and obligations to perform Work under the Construction Management Agreement. This letter constitutes a "Notice of NAI's Intent to Terminate" given pursuant to subparagraph 7(B) of the Construction Management Agreement. As provided in that subparagraph, as a condition to any effective Termination of NAI's Work, NAI must deliver a subsequent notice of termination to BNPPPLC and Participants, no less than forty-five days after the date BNPPPLC receives this letter.

[DRAFTING NOTE: Unless this letter contains the alternative provisions set forth below as being required for any "Notice of NAI's Intent to Terminate Because of a Force Majeure Event," this letter must contain the following paragraph:

The period running from the date of BNPPPLC's receipt of this letter to the effective date of any actual Termination of NAI's Work by NAI or BNPPPLC will constitute a Work/Suspension Period under the Construction Management Agreement. During such period BNPPPLC's funding obligations will be limited and NAI may suspend the Work to the extent so provided in the Construction Management Agreement. Moreover, NAI acknowledges that the delivery of this Notice of Intent to Terminate is a 97-10/Event. *Therefore, after receipt of this notice BNPPPLC will have the rights to demand and receive 97-10/Prepayments from NAI as provided in Paragraph 9 of the Construction Management Agreement.*

[DRAFTING NOTE: This letter will qualify as a "Notice of NAI's Intent to Terminate Because of a Force Majeure Event" only if NAI includes one of the following alternative sets of provisions, as applicable.]

[ALTERNATIVE #1 (Applies only if there has been a Complete Taking):

This letter constitutes a "Notice of NAI's Intent to Terminate Because of a Force Majeure Event" as defined in the Construction Management Agreement. *A Complete Taking has occurred.* Thus, regardless of any Scope Changes BNPPPLC may be willing to approve or consider, and regardless of any Increased Commitment BNPPPLC may be willing to provide, it would be futile to continue the Construction Project on the Land.

NAI acknowledges and agrees that BNPPPLC is entitled to all proceeds of the taking of the Property and all such proceeds must be paid to BNPPPLC. NAI has no right and will not assert any right to share in such proceeds. NAI agrees to cooperate with BNPPPLC as BNPPPLC may

from time to time request in order to maximize BNPPLC's recovery of such proceeds.]

[ALTERNATIVE #2 (applies in the event of a Pre-lease Force Majeure Event other than a Complete Taking): Include the next (single sentence) paragraph, together with one or both (as applicable) of the two paragraphs following the next (single sentence) paragraph, and together with the remaining paragraphs after those two paragraphs, all with blanks filled in appropriately:

This letter constitutes a "Notice of NAI's Intent to Terminate Because of a Force Majeure Event" as defined in the Construction Management Agreement.

NAI now believes that the remaining available Construction Allowance will not be sufficient to cover all Reimbursable Construction Period Costs yet to be paid or reimbursed from Construction Advances only because of Pre-lease Force Majeure Excess Costs incurred or anticipated as a result of one or more Pre-lease Force Majeure Events. BNPPLC has previously been notified of such Pre-lease Force Majeure Event(s) by notice(s) dated ____, which NAI delivered to BNPPLC in accordance with subparagraph 6(B) of the Construction Management Agreement. NAI's current good faith estimate of the Pre-lease Force Majeure Excess Costs that are most likely to be incurred because of such Pre-lease Force Majeure Event(s) is \$____.

NAI now believes that the Work will not be substantially complete before the Target Completion Date only because of Pre-lease Force Majeure Delays resulting from one or more Pre-lease Force Majeure Events. BNPPLC has previously been notified of such Pre-lease Force Majeure Event(s) by notice(s) dated ____, which NAI delivered to BNPPLC in accordance with subparagraph 6(B) of the Construction Management Agreement. NAI's current good faith estimate of the Pre-lease Force Majeure Delays that are most likely to occur because of such Pre-lease Force Majeure Event(s) is ____ days.

Also be advised that, as provided in subparagraph 7(B) of the Construction Management Agreement, BNPPLC is entitled to (but not obligated to) respond to this notice with an Increased Commitment. Responding with an Increased Commitment will result in a conclusive presumption (for purposes of calculating any 97-10/Prepayment required of NAI under the Purchase Agreement) that any Termination of NAI's Work is for reasons other than the Pre-lease Force Majeure Events of which BNPPLC has previously been notified.

In the event BNPPLC fails to respond with an Increased Commitment, the failure may excuse NAI from the obligation to make a 97-10/Prepayment under Paragraph 5 of the Construction Management Agreement notwithstanding any Termination of NAI's Work, which would constitute a very material adverse consequence to BNPPLC. Moreover, the Construction Management Agreement grants to NAI a right to cause a Termination of NAI's

Work at any time more than forty-five days after giving this notice, provided that NAI continues to believe that the Construction Allowance is insufficient at that time. Thus, if BNPPPLC intends to respond with an Increased Commitment, BNPPPLC would be well advised to do so *before* the expiration of such forty-five day period.]

NETWORK APPLIANCE, INC., a Delaware corporation

By: _____
Name: _____
Title: _____

[cc all Participants]

Exhibit G

Notice of Increased Funding Commitment by BNPPLC

[Date]

Network Appliance, Inc.
7301 Kit Creek Road
Research Triangle Park, NC 27709
Attention: Ingemar Lanevi

Re: Construction Management Agreement dated as of December 14, 2006 (the "**Construction Management Agreement**") between Network Appliance, Inc. ("**NAI**"), a Delaware corporation, and BNP Paribas Leasing Corporation ("**BNPPLC**"), a Delaware corporation

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Construction Management Agreement or in the Common Definitions and Provisions Agreement referenced in the Construction Management Agreement.

NAI has delivered a notice to BNPPLC dated ___, 20___, which by its terms expressed NAI's intent that it constitute a "Notice of NAI's Intent to Terminate Because of a Force Majeure Event" as defined in the Construction Management Agreement. In such notice, NAI advised BNPPLC of NAI's intent to terminate the Construction Management Agreement because of NAI's belief that the Construction Allowance to be provided to it under the Construction Management Agreement will not be sufficient to cover all Reimbursable Construction Period Costs yet to be paid or reimbursed from Construction Advances. Such notice also expressed NAI's belief that, but for the cost of repairing damage to the Improvements caused by a Pre-lease Force Majeure Event, the remaining available Construction Allowance would be sufficient. In addition, such notice set forth the amount of \$ ___ as NAI's estimate of the Pre-lease Force Majeure Excess Costs most likely to be incurred because of such Pre-lease Force Majeure Event.

This response to such notice constitutes an Increased Funding Commitment. ***BNPPLC hereby commits to increase the amount of the Construction Allowance by \$___ (the estimate given by NAI as described above).*** Such commitment is made on and subject to all of the same terms and conditions set forth in the Construction Management Agreement and other Operative Documents as being applicable to the original Construction Allowance and to Construction Advances required thereunder.

Please note that, according to the Construction Management Agreement, NAI will have ten days after the date of any Increased Commitment (which may be comprised of this Increased Funding Commitment and any separate Increased Time Commitment given contemporaneously

herewith) within which NAI may rescind the aforementioned Notice of NAI's Intent to Terminate Because of a Force Majeure Event by a notice given in the form prescribed by the Construction Management Agreement. Any failure of NAI to so rescind the notice will constitute a 97-10/Event under and as defined in the Construction Management Agreement and will result in a conclusive presumption (for purposes of calculating any 97-10/Prepayment required of NAI) that any Termination of NAI's Work occurred for reasons other than the Pre-lease Force Majeure Events of which BNPPPLC has previously been notified.

BNP PARIBAS LEASING CORPORATION, a
Delaware corporation

By: _____
Lloyd G. Cox, Managing Director

[cc all Participants]

Exhibit H

Notice of Increased Time Commitment by BNPPLC

[Date]

Network Appliance, Inc.
7301 Kit Creek Road
Research Triangle Park, NC 27709
Attention: Ingemar Lanevi

Re: Construction Management Agreement dated as of December 14, 2006 (the "**Construction Management Agreement**") between Network Appliance, Inc. ("**NAI**"), a Delaware corporation, and BNP Paribas Leasing Corporation ("**BNPPLC**"), a Delaware corporation

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Construction Management Agreement or in the Common Definitions and Provisions Agreement referenced in the Construction Management Agreement.

NAI has delivered a notice to BNPPLC dated ___, 20___, which by its terms expressed NAI's intent that it constitute a "Notice of NAI's Intent to Terminate Because of a Force Majeure Event" as defined in the Construction Management Agreement. In such notice, NAI advised BNPPLC of NAI's intent to elect a Termination of NAI's Work because of NAI's belief that the Work will not be substantially complete prior to the Target Completion Date only because of Pre-lease Force Majeure Delays. Such notice also expressed NAI's belief that Pre-lease Force Majeure Delays are likely to be ___ days in the aggregate.

This response to such notice constitutes an Increased Time Commitment. ***BNPPLC hereby commits to extend the Target Completion Date by ___ days (the estimate given by NAI as described above).***

Please note that, according to the Construction Management Agreement, NAI will have ten days after the date of any Increased Commitment (which may be comprised of this Increased Time Commitment and any separate Increased Funding Commitment given contemporaneously herewith) within which NAI may rescind the aforementioned Notice of NAI's Intent to Terminate Because of a Force Majeure Event by a notice given in the form prescribed by the Construction Management Agreement. Any failure of NAI to so rescind the notice will constitute a 97-10/Event under and as defined in the Construction Management Agreement and will result in a conclusive presumption (for purposes of calculating any 97-10/Prepayment required of NAI) that any Termination of NAI's Work occurred for reasons other than the Pre-lease Force Majeure Events of which BNPPLC has previously been notified.

BNP PARIBAS LEASING CORPORATION, a Delaware corporation

By: _____
Lloyd G. Cox, Managing Director

[cc all Participants]

Exhibit I

Rescission of Notice of NAI's Intent to Terminate

[Date]

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director

Re: Construction Management Agreement dated as of December 14, 2006 (the "**Construction Management Agreement**") between Network Appliance, Inc. ("**NAI**"), a Delaware corporation, and BNP Paribas Leasing Corporation ("**BNPPLC**"), a Delaware corporation

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Construction Management Agreement referenced above or in the Common Definitions and Provisions Agreement referenced in the Construction Management Agreement.

NAI has delivered to BNPPLC a Notice of NAI's Intent to Terminate dated ___, 200 ___, and BNPPLC has responded with an Increased Commitment as of ___, 200 ___. NAI hereby accepts the Increased Commitment and, as provided in subparagraph 7(B) of the Construction Management Agreement, rescinds such Notice of NAI's Intent to Terminate.

NAI acknowledges that, because of such rescission, NAI must, as a condition precedent to any exercise of its remaining rights to terminate the Construction Management Agreement pursuant to subparagraph 7(B) thereof, deliver another Notice of NAI's Intent to Terminate at least forty five days prior to the effective date of the Termination of NAI's Work.

NETWORK APPLIANCE, INC., a Delaware corporation

By: _____
Name: _____
Title: _____

[cc all Participants]

LEASE AGREEMENT

BETWEEN

**NETWORK APPLIANCE, INC.
("NAI")**

AND

**BNP PARIBAS LEASING CORPORATION
("BNPPLC")**

December 14, 2006

TABLE OF CONTENTS

	<u>Page</u>
1 Term; Lease Obligations Deferred Until Completion of Initial Improvements; Termination Prior to Lease Commencement	2
(A) Scheduled Term; Deferral of Obligations	3
(B) Option of BNPPLC to Terminate	3
(C) Automatic Termination	3
(D) Extension of the Term	3
2 Use and Condition of the Property	4
(A) Use	4
(B) Condition of the Property	5
(C) Consideration for and Scope of Waiver	5
3 Rent	6
(A) Base Rent Generally	6
(B) Calculation of and Due Dates for Base Rent	6
(1) Determination of Payment Due Dates Generally	6
(2) Special Adjustments to Base Rent Payment Dates and Periods	6
(3) Base Rent Formula	7
(4) Fixed Rate Lock	7
(C) Early Termination of Fixed Rate Lock	8
(D) Additional Rent	9
(E) Administrative Fees	9
(F) No Demand or Setoff	9
(G) Default Interest and Order of Application	9
(H) Calculations by BNPPLC Are Conclusive	9
4 Nature of this Agreement	9
(A) "Net" Lease Generally	9
(B) No Termination	10
(C) Characterization of this Lease	11
5 Payment of Executory Costs and Losses Related to the Property	13
(A) Local Impositions	13
(B) Increased Costs; Capital Adequacy Charges	13
(C) NAI's Payment of Other Losses; General Indemnification	15
(D) Exceptions and Qualifications to Indemnities	19
(E) Refunds and Credits Related to Losses Paid by NAI	23
(F) Reimbursement of Excluded Taxes Paid by NAI	25
6 Replacement of Participants	25
(A) NAI's Right to Substitute Participants	25

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
(B) Conditions to Replacement of Participants	25
7 Items Included in the Property	26
(A) Status of Property	26
(B) Changes in the Land Covered by the Ground Lease	27
8 Environmental	27
(A) Environmental Covenants by NAI	27
(B) Right of BNPPLC to do Remedial Work Not Performed by NAI	27
(C) Environmental Inspections and Reviews	28
(D) Communications Regarding Environmental Matters	29
9 Insurance Required and Condemnation	30
(A) Liability Insurance	30
(B) Property Insurance	30
(C) Failure to Obtain Insurance	31
(D) Condemnation	31
(E) Waiver of Subrogation	31
10 Application of Insurance and Condemnation Proceeds	32
(A) Collection and Application of Insurance and Condemnation Proceeds Generally	32
(B) Advances of Escrowed Proceeds to NAI	32
(C) Application of Escrowed Proceeds as a Qualified Prepayment	33
(D) Right of NAI to Receive and Apply Remaining Proceeds Below a Certain Level	33
(E) Special Provisions Applicable After a 97-10/Event or Event of Default	33
(F) NAI's Obligation to Restore	34
(G) Takings of All or Substantially All of the Property on or after the Completion Date	34
(H) If Remaining Proceeds Exceed the Lease Balance	34
11 Additional Representations, Warranties and Covenants of NAI Concerning the Property	34
(A) Operation and Maintenance	34
(B) Debts for Construction, Maintenance, Operation or Development	35
(C) Repair, Maintenance, Alterations and Additions	36

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
(D) Permitted Encumbrances	37
(E) Books and Records Concerning the Property	37
12 Assignment and Subletting by NAI	37
(A) BNPPPLC's Consent Required	37
(B) Standard for BNPPPLC's Consent to Assignments and Certain Other Matters	38
(C) Consent Not a Waiver	39
13 Assignment by BNPPPLC	39
(A) Restrictions on Transfers	39
(B) Effect of Permitted Transfer or other Assignment by BNPPPLC	39
14 BNPPPLC's Right to Enter and to Perform for NAI	39
(A) Right to Enter	39
(B) Performance for NAI	40
(C) Building Security	40
15 Remedies	40
(A) Traditional Lease Remedies	40
(B) Foreclosure Remedies	43
(C) Notice Required So Long As the Purchase Option Continues Under the Purchase Agreement	43
(D) Enforceability	43
(E) Remedies Cumulative	44
16 Default by BNPPPLC	44
17 Quiet Enjoyment	44
18 Surrender Upon Termination	45
19 Holding Over by NAI	45
20 Recording Memorandum	45
21 Independent Obligations Evidenced by Other Operative Documents	45
22 Proprietary Information and Confidentiality	45

TABLE OF CONTENTS
(Continued)

(A)	Proprietary Information	<u>Page</u>
(B)	Confidentiality	46
		46

Exhibits and Schedules

Exhibit A	Legal Description
Exhibit B	California Lien and Foreclosure Provisions

LEASE AGREEMENT

This LEASE AGREEMENT (this "**Lease**"), dated as of December 14, 2006 (the "**Effective Date**"), is made by and between BNP PARIBAS LEASING CORPORATION ("**BNPPLC**"), a Delaware corporation, and NETWORK APPLIANCE, INC. ("**NAI**"), a Delaware corporation.

RECITALS

Contemporaneously with the execution of this Lease, BNPPLC and NAI are executing a Common Definitions and Provisions Agreement dated as of the Effective Date (the "**Common Definitions and Provisions Agreement**"), which by this reference is incorporated into and made a part of this Lease for all purposes. *As used in this Lease, capitalized terms defined in the Common Definitions and Provisions Agreement and not otherwise defined in this Lease are intended to have the respective meanings assigned to them in the Common Definitions and Provisions Agreement.*

At the request of NAI and to facilitate the transactions contemplated in the other Operative Documents, pursuant to the Ground Lease, BNPPLC is acquiring a leasehold estate in the Land described in Exhibit A and any existing improvements on the Land from NAI contemporaneously with the execution of this Lease.

In anticipation of BNPPLC's acquisition of the leasehold estate under the Ground Lease and other property described below, BNPPLC and NAI have reached agreement as to the terms and conditions upon which BNPPLC is willing to sublease the Land to NAI and to lease to NAI any existing Improvements and the Improvements to be constructed on the Land as hereinafter provided, and by this Lease BNPPLC and NAI desire to evidence such agreement.

GRANTING CLAUSES

BNPPLC does hereby LEASE, DEMISE and LET unto NAI for the Term (as hereinafter defined) all right, title and interest of BNPPLC, now owned or hereafter acquired, in and to:

- (1) the Land, including the leasehold estate in the Land acquired by BNPPLC under the Ground Lease;
 - (2) any and all Improvements;
 - (3) all easements and other rights appurtenant to the leasehold estate created by the Ground Lease or to the Improvements; and
 - (4) (A) any land lying within the right-of-way of any street, open or proposed, adjoining the Land, (B) any sidewalks and alleys adjacent to the Land, and (C) any strips
-

and gores between the Land and abutting land.

BNPPLC's interest in all property described in clauses (1) through (4) above is hereinafter referred to collectively as the "**Real Property**".

To the extent, but only to the extent, that assignable rights or interests in, to or under the following have been or will be acquired by BNPPLC under the Ground Lease or as described in subparagraph 7(A) below, BNPPLC also hereby grants and assigns to NAI for the term of this Lease the right to use and enjoy (and, in the case of contract rights, to enforce) such rights or interests of BNPPLC:

(a) any goods, equipment, furnishings, furniture and other tangible personal property of whatever nature that are located on the Real Property and all renewals or replacements of or substitutions for any of the foregoing (collectively, the "**Tangible Personal Property**");

(b) the benefits, if any, conferred upon the owner of the Real Property by the Permitted Encumbrances; and

(c) any permits, licenses, franchises, certificates, and other rights and privileges against third parties related to the Real Property, including warranties, if any, given by vendors from whom any Tangible Personal Property was or may be acquired.

Such rights and interests of BNPPLC, whether now existing or hereafter arising, are hereinafter collectively called the "**Personal Property**". The Real Property and the Personal Property are hereinafter sometimes collectively called the "**Property**."

However, the leasehold estate conveyed by this Lease and NAI's rights hereunder are expressly made subject and subordinate to the terms and conditions of this Lease and the Ground Lease, to the matters listed in Exhibit B to the Closing Certificate and all other Permitted Encumbrances, and to any other claims or encumbrances not constituting Liens Removable by BNPPLC.

GENERAL TERMS AND CONDITIONS

The Property is leased by BNPPLC to NAI and is accepted and is to be used and possessed by NAI upon and subject to the following terms and conditions:

1 Term; Lease Obligations Deferred Until Completion of Initial Improvements; Termination Prior to Lease Commencement.

(A) Scheduled Term: Deferral of Obligations. The term of this Lease (the "**Term**") will not commence until a Completion Date occurs either (1) because of a Completion Notice given by NAI to BNPPPLC, as required by subparagraph 2(B) of the Construction Management Agreement after NAI substantially completes the Construction Project, or (2) because of a Completion Notice given by BNPPPLC to NAI as described in subparagraph 8(C) of the Construction Management Agreement, advising NAI (after an Owner's Election to Complete Construction) that construction of the Construction Project is substantially complete.

The Term will begin on and include any such Completion Date (herein sometimes called the "**Lease Commencement Date**") and will end on the first Business Day of December, 2013, unless the Term is extended as provided in subparagraph 1(D) or sooner terminated as expressly provided in other provisions of this Lease.

BNPPPLC and NAI intend to be legally bound by this Lease when it is executed by them. They also intend, however, that this Lease will not impose any payment obligations upon either of them prior to the Lease Commencement Date. Accordingly, neither NAI nor BNPPPLC will have any obligation to make any payments under this Lease until the Lease Commencement Date, and if this Lease terminates before the Lease Commencement Date pursuant to subparagraph 1(B) or subparagraph 1(C), the Term will never commence and neither party will have any obligation for payments by reason of this Lease following the termination.

Nothing in this subparagraph 1(A) nor any other provision of this Lease will defer or terminate the rights and obligations of the parties under the *other* Operative Documents. Unlike this Lease, the other Operative Documents will, when executed, immediately impose payment obligations upon BNPPPLC and NAI.

(B) Option of BNPPPLC to Terminate. BNPPPLC will have the option to terminate this Lease, which BNPPPLC may exercise by notice to NAI, at any time after any 97-10/Event or after BNPPPLC's receipt of a Pre-lease Force Majeure Notice. Such option may be exercised by BNPPPLC as it deems appropriate in its sole and absolute discretion.

(C) Automatic Termination. If NAI elects to accelerate the Designated Sale Date (as provided in the definition thereof in the Common Definitions and Provisions Agreement) prior to the Lease Commencement Date, or if a Termination of NAI's Work occurs under and as provided in the Construction Management Agreement before the Lease Commencement Date, then this Lease will terminate automatically before the Term begins.

(D) Extension of the Term. The Term may be extended at the option of NAI for up to two successive periods of five years each; provided, however, that prior to each such extension the following conditions must have been satisfied: (A) NAI must have delivered a notice of its election to exercise the option at least one hundred eighty days prior to the end of the Term, and

prior to the commencement of any such extension BNPPLC and NAI must have agreed in writing upon, and received the written consent and approval of BNPPLC's Parent and all Participants (other than Participants being replaced at the request of NAI as provided in Paragraph 6) to, (1) a corresponding extension of the date specified in clause (1) of the definition of Designated Sale Date in the Common Definitions and Provisions Agreement and of the term of the Ground Lease, and (2) an adjustment to the Rent that NAI will be required to pay during the extension, it being expected that the Rent for the extension may be different than the Rent required for the original Term or any prior extension, and it being understood that the Rent for any extension must in all events be satisfactory to both BNPPLC and NAI, each in its sole and absolute discretion; (B) at the time of NAI's exercise of its option to extend, no Event of Default has occurred and is continuing, and no Event of Default will result from the extension; (C) immediately prior to any such extension, this Lease must then remain in effect; and (D) if this Lease has been assigned by NAI, then NAI must have executed a guaranty (or confirmed an existing guaranty, if applicable), guaranteeing NAI's assignee's obligations under the Operative Documents throughout such extended Term. With respect to the condition that BNPPLC and NAI must have agreed upon the Rent required for any extension of the Term, neither NAI nor BNPPLC is willing to submit itself to a risk of liability or loss of rights hereunder for being judged unreasonable. Accordingly, NAI and BNPPLC will each have sole and absolute discretion in making its determination, and both NAI and BNPPLC hereby disclaim any obligation express or implied to be reasonable in negotiating the Rent for any such extension. Subject to the changes to the Rent and satisfaction of the other conditions listed in this subparagraph, if NAI exercises its option to extend the Term as provided in this subparagraph, this Lease will continue in full force and effect, and the leasehold estate hereby granted to NAI will continue without interruption and without any loss of priority over other interests in or claims against the Property that may be created or arise after the Effective Date and before the extension.

2 Use and Condition of the Property.

(A) Use. Subject to the Permitted Encumbrances, NAI may use and occupy the Property during the Term, but only for the following purposes and other lawful purposes incidental thereto:

- (1) construction and development of the Construction Project;
- (2) administrative and office space;
- (3) activities related to NAI's research and development or production of products that are of substantially the same type and character as those regularly sold by NAI in the ordinary course of its business as of the Effective Date;
- (4) cafeteria and other support facilities that NAI may provide to its employees;

and

(5) other lawful purposes (including NAI's research and development or production of products that are not of substantially the same type and character as those regularly sold by NAI in the ordinary course of its business as of the Effective Date) approved in advance and in writing by BNPPLC, which approval will not be unreasonably withheld after completion of the Construction Project (but NAI acknowledges that BNPPLC's withholding of such approval shall be reasonable if BNPPLC determines in good faith that (1) giving the approval may materially increase BNPPLC's risk of liability for any existing or future environmental problem, or (2) giving the approval is likely to substantially increase BNPPLC's administrative burden of complying with or monitoring NAI's compliance with the requirements of this Improvements Lease or other Operative Documents).

(B) Condition of the Property. NAI acknowledges that it has carefully and fully inspected the Property and accepts the Property in its present state, AS IS, and without any representation or warranty, express or implied, as to the condition of such property or as to the use which may be made thereof. NAI also accepts the Property without any covenant, representation or warranty, express or implied, by BNPPLC or its Affiliates regarding the title thereto or the rights of any parties in possession of any part thereof, except as expressly set forth in Paragraph 17. BNPPLC will not be responsible for any latent or other defect or change of condition in the Land, Improvements or other Property or for any violations with respect thereto of Applicable Laws. Further, BNPPLC will not be required to furnish to NAI any facilities or services of any kind, including water, phone, sewer, steam, heat, gas, air conditioning, electricity, light or power.

(C) Consideration for and Scope of Waiver. The provisions of subparagraph 2(B) have been negotiated by BNPPLC and NAI as being consistent with the Rent payable under this Lease, and such provisions are intended to be a complete exclusion and negation of any representations or warranties of BNPPLC or its Affiliates, express or implied, with respect to the Property that may arise pursuant to any law now or hereafter in effect or otherwise, except as expressly set forth herein.

However, such exclusion of representations and warranties by BNPPLC is not intended to impair any representations or warranties made by other parties, including any architects, engineers or contractors engaged to work on the Construction Project, the benefit of which may pass to NAI during the Term because of the definition of Personal Property and Property above.

3 Rent.

(A) Base Rent Generally. On each Base Rent Date through the end of the Term, NAI must pay BNPPLC rent (“**Base Rent**”), calculated as provided below. Each payment of Base Rent must be received by BNPPLC no later than 2:00 p.m. (Eastern time) on the date it becomes due; if received after 2:00 p.m. (Eastern time) it will be considered for purposes of this Lease as received on the next following Business Day. At least five days prior to any Base Rent Date upon which an installment of Base Rent becomes due, BNPPLC will notify NAI in writing of the amount of each installment, calculated as provided below. Any failure by BNPPLC to so notify NAI, however, will not constitute a waiver of BNPPLC’s right to payment, but absent such notice NAI will not be in default hereunder for any underpayment resulting therefrom if NAI, in good faith, reasonably estimates the payment required, makes a timely payment of the amount so estimated and corrects any underpayment within three Business Days after being notified by BNPPLC of the underpayment.

(B) Calculation of and Due Dates for Base Rent. Payments of Base Rent will be calculated and become due as follows:

(1) Determination of Payment Due Dates Generally. For Base Rent Periods subject to a LIBOR Period Election of six months, Base Rent will be payable in two installments, with the first installment becoming due on the Base Rent Date that occurs on the first Business Day of the third calendar month following the commencement of such Base Rent Period, and with the second installment becoming due on the Base Rent Date upon which the Base Rent Period ends. For all other Base Rent Periods, Base Rent will be due in one installment on the Base Rent Date upon which the Base Rent Period ends.

(2) Special Adjustments to Base Rent Payment Dates and Periods. Notwithstanding the foregoing, if NAI or any Applicable Purchaser purchases BNPPLC’s interest in the Property pursuant to the Purchase Agreement, any accrued unpaid Base Rent and all outstanding Additional Rent will be due on the date of purchase in addition to the purchase price and other sums due to BNPPLC under the Purchase Agreement.

(3) **Base Rent Formula.** Each installment of Base Rent payable for any Base Rent Period will equal:

- the Lease Balance on the first day of such Base Rent Period, less Losses (if any) that BNPPPLC suffered or incurred prior to the Term and that qualify as Pre-lease Force Majeure Losses (as defined in the Construction Management Agreement), *times*
- the sum of the Effective Rate and the Spread, *times*
- the number of days in the period from and including the preceding Base Rent Date to but not including the Base Rent Date upon which the installment is due, *divided by*
- three hundred sixty.

Only for the purpose of illustration, assume the following for a hypothetical Base Rent Period: that prior to the first day of such Base Rent Period the Construction Allowance has been fully funded, and no Pre-lease Force Majeure Losses have occurred, but Qualified Prepayments have been received by BNPPPLC, leaving a Lease Balance of \$50,000,000; that the Effective Rate for the Base Rent Period is 6%; that the Spread is one hundred fifty basis points (150/100 of 1%); and that such Base Rent Period contains exactly thirty days. Under such assumptions, the Base Rent for the hypothetical Base Rent Period will equal:

$$\$50,000,000 \times [6\% + 1.50\%] \times 30/360 = \$312,500.$$

(4) **Fixed Rate Lock.** At any time during the Term, NAI may deliver a notice in the form attached to the Common Definitions and Provisions Agreement as **Annex 2** (a “**Fixed Rate Lock Notice**”), requesting that BNPPPLC establish a fixed rate for use in the calculation of the Effective Rate hereunder (a “**Fixed Rate Lock**”) for all Base Rent Periods commencing on or after a date specified in such notice, which date must be the first Business Day of a calendar month (the “**Fixed Rate Lock Date**”). Promptly after receiving a Fixed Rate Lock Notice, BNPPPLC will enter into an Interest Rate Swap with BNP Paribas (the “**Fixed Rate Swap**”); except that BNPPPLC may decline to enter into the Fixed Rate Swap and to establish a Fixed Rate Lock, if:

- (a) NAI does not deliver the Fixed Rate Lock Notice to BNPPPLC at least ten Business days prior to the Fixed Rate Lock Date specified therein;
- (b) NAI specifies a Fixed Rate Lock Date in the Fixed Rate Lock

Notice that is prior to the end of any Base Rent Period which commenced before BNPPPLC receives the Fixed Rate Lock Notice;

(c) any notice has been given to accelerate the Designated Sale Date as provided in the definition thereof in the Common Definitions and Provisions Agreement;

(d) the estimate of the Fixed Rate (hereinafter defined) specified by NAI in the Fixed Rate Lock Notice is for any reason less than the fixed rate available to BNPPPLC under any Interest Rate Swap proposed by BNP Paribas;

(e) at the time the Fixed Rate Lock Notice is given, the Interest Rate Swap requested thereby is contrary to any Applicable Laws or any interpretation thereof by any governmental authority, central bank or comparable agency charged with the interpretation or administration thereof, or any request or directive (whether or not having the force of law) of any such authority, central bank or comparable agency (including, without limitation, any such requirement imposed by the Board of Governors of the United States Federal Reserve System); or

(f) any event has occurred or circumstance exists that constitutes a Default, an Event of Default or a 97-10/Event.

The notional principal amount of the Fixed Rate Swap will equal the Lease Balance on the date such notice is given. The fixed rate used to calculate payments required of BNPPPLC under the Fixed Rate Swap, as the counterparty designated the fixed rate payor, will constitute the "**Fixed Rate**" for purposes of this Lease.

(C) Early Termination of Fixed Rate Lock. After a Fixed Rate Lock is established, BNPPPLC may cause or suffer a termination in whole or in part of the Fixed Rate Swap in the event that (i) NAI fails to make any payment of Base Rent required hereunder on the Base Rent Date when it first becomes due, (ii) the Designated Sale Date occurs before the date specified in clause (1) of the definition thereof in the Common Definitions and Provisions Agreement, (iii) for any reason a Qualified Prepayment is applied to reduce the Lease Balance, (iv) the Lease Balance on the Fixed Rate Lock Date is less than the notional amount of the Fixed Rate Swap for any reason. NAI must reimburse to BNPPPLC any Fixed Rate Settlement Amount charged to BNPPPLC in connection with such a termination, and if the termination is a complete, rather than a partial, termination of the Fixed Rate Swap then in effect, it will for purposes of this Lease constitute a termination of the Fixed Rate Lock itself. Further, if BNPPPLC is charged penalties or interest because of its failure to make a timely payment required under the Fixed Rate Swap, and if BNPPPLC's failure to make the timely payment was caused by NAI's failure to make a

timely payment of Base Rent or other amounts due hereunder or under other Operative Documents, then such penalties or interest will constitute Losses against which BNPPPLC is entitled to be indemnified pursuant to subparagraph 5(C). If a Fixed Rate Lock is terminated as provided in this subparagraph, NAI shall have no right to require BNPPPLC to enter into another Interest Rate Swap in order to establish a new fixed rate.

(D) Additional Rent. All amounts which NAI is required to pay to or on behalf of BNPPPLC pursuant to this Lease, together with every charge, premium, interest and cost set forth herein which may be added for nonpayment or late payment thereof, will constitute rent (all such amounts, other than Base Rent, are herein called "**Additional Rent**"; and, collectively, Base Rent and Additional Rent are herein sometimes called "**Rent**").

(E) Administrative Fees. On each anniversary of the Effective Date after the Completion Date and prior to the Designated Sale Date, NAI must pay BNPPPLC an administrative agency fee (an "**Administrative Fee**") as provided in the Term Sheet. Each payment of an Administrative Fee will represent Additional Rent for the first Base Rent Period during which it first becomes due.

(F) No Demand or Setoff. Except as expressly provided herein, NAI must pay all Rent without notice or demand and without counterclaim, deduction, setoff or defense.

(G) Default Interest and Order of Application. All Rent will bear interest, if not paid when first due, at the Default Rate in effect from time to time from the date due until paid; provided, that nothing herein contained will be construed as permitting the charging or collection of interest at a rate exceeding the maximum rate permitted under Applicable Laws. BNPPPLC may apply any amounts paid by or on behalf of NAI against any Rent then past due in the order the same became due or in such other order as BNPPPLC elects.

(H) Calculations by BNPPPLC Are Conclusive. All calculations by BNPPPLC of Base Rent, Additional Rent or any amount needed to calculate Base Rent (including the Effective Rate for any Base Rent Period and the Lease Balance) or Additional Rent will, in the absence of clear and demonstrable error, be conclusive and binding upon NAI.

4 Nature of this Agreement.

(A) "Net" Lease Generally. Subject only to the exceptions listed in subparagraph 5(D) below, it is the intention of BNPPPLC and NAI that Base Rent and other payments herein specified will be absolutely net to BNPPPLC and that NAI must pay all costs, expenses and obligations of every kind relating to the Property or this Lease which may arise or become due. Further, it is understood that all amounts payable by NAI to BNPPPLC under this Lease and the other Operative Documents are expressed as minimum payments to be made net of any deduction

or withholding required under any Applicable Laws.

(B) No Termination. Except as expressly provided in this Lease itself, this Lease will not terminate, nor will NAI have any right to terminate this Lease, nor will NAI be entitled to any abatement of or setoff against the Rent, nor will the obligations of NAI under this Lease be excused, for any reason whatsoever, including any of the following: (i) any damage to or the destruction of all or any part of the Property from whatever cause, (ii) the taking of the Property or any portion thereof by eminent domain or otherwise for any reason, (iii) the prohibition, limitation or restriction of NAI's use or development of all or any portion of the Property or any interference with such use by governmental action or otherwise, (iv) any eviction of NAI or of anyone claiming through or under NAI, (v) any default on the part of BNPPPLC under this Lease or any of the other Operative Documents or any other agreement to which BNPPPLC and NAI are parties, (vi) the inadequacy in any way whatsoever of the design, construction, assembly or installation of any improvements, fixtures or tangible personal property included in the Property (it being understood that BNPPPLC has not made, does not make and will not make any representation express or implied as to the adequacy thereof), (vii) any latent or other defect in the Property or any change in the condition thereof or the existence with respect to the Property of any violations of Applicable Laws, (viii) NAI's ownership of any interest in the Property, or (ix) any other cause, whether similar or dissimilar to the foregoing, any existing or future law to the contrary notwithstanding. It is the intention of the parties hereto that the obligations of NAI hereunder be separate and independent of the covenants and agreements of BNPPPLC, that Base Rent and all other sums payable by NAI hereunder continue to be payable in all events and that the obligations of NAI hereunder continue unaffected, unless the requirement to pay or perform the same have been terminated or limited pursuant to an express provision of this Lease. Without limiting the foregoing, NAI waives to the extent permitted by Applicable Laws, except as otherwise expressly provided herein, all rights to which NAI may now or hereafter be entitled by law (including any such rights arising because of any "warranty of suitability" or other warranties implied as a matter of law) (i) to quit, terminate or surrender this Lease or the Property or any part thereof or (ii) to any abatement, suspension, deferment or reduction of the Rent.

However, nothing in this subparagraph 4(B) will be construed as a waiver by NAI of any right NAI may have at law or in equity to the following remedies, whether because of BNPPPLC's failure to remove a Lien Removable by BNPPPLC or because of any other default by BNPPPLC under this Lease: (i) the recovery of monetary damages in the case of any default that continues beyond the period for cure provided in Paragraph 16, (ii) injunctive relief in case of the violation, or attempted or threatened violation, by BNPPPLC of any of the express covenants, agreements, conditions or provisions of this Lease which are binding upon BNPPPLC (including the confidentiality provisions set forth in subparagraph 22(B), 32, 32 below), or (iii) a decree compelling performance by BNPPPLC of any of the express covenants, agreements, conditions or provisions of this Lease which are binding upon BNPPPLC.

(C) Characterization of this Lease.

(1) Both NAI and BNPPLC intend that (A) for the purposes of determining the proper accounting for this Lease by NAI, BNPPLC will be treated as the owner and landlord of the Property and NAI will be treated as the tenant of the Property, and (B) for income tax purposes and real estate, commercial law (including bankruptcy) and regulatory purposes, (1) this Lease and the other Operative Documents will be treated as a financing arrangement, (2) BNPPLC will be deemed a lender making loans to NAI in the principal amount equal to the Lease Balance, which loans are secured by the Property, and (3) NAI will be treated as the owner of the Property and will be entitled to all tax benefits available to the owner of the Property. ***Consistent with such intent, by the provisions set forth in Exhibit B, NAI is granting to BNPPLC a lien upon and mortgaging and warranting title to the leasehold estate in the Land created by the Ground Lease and the Improvements and all rights, titles and interests of NAI in and to other Property, WITH POWER OF SALE, to secure all obligations (monetary or otherwise) of NAI arising under or in connection with any of the Operative Documents.*** Without limiting the generality of the foregoing, NAI and BNPPLC desire that their intent as set forth in this subparagraph be given effect both in the context of any bankruptcy, insolvency or receivership proceedings concerning NAI or BNPPLC and in other contexts. Accordingly, NAI and BNPPLC expect that in the event of any bankruptcy, insolvency or receivership proceedings affecting NAI or BNPPLC or any enforcement or collection actions arising out of such proceedings, the transactions evidenced by this Lease and the other Operative Documents will be characterized and treated as loans made to NAI by BNPPLC, as an unrelated third party lender to NAI, secured by the Property.

(2) Notwithstanding the foregoing, NAI acknowledges and agrees that none of BNPPLC or the other Interested Parties has made, or will be deemed to have made, in the Operative Documents or otherwise, any representations or warranties concerning how this Lease and the other Operative Documents will be characterized or treated under applicable accounting rules, income tax, regulatory, commercial or real estate law, bankruptcy, insolvency or receivership law or any other rules or requirements concerning the tax, accounting or legal characteristics of the Operative Documents. NAI further acknowledges and agrees that it is sophisticated and knowledgeable regarding all such matters and that it has, as it deemed appropriate, obtained from and relied upon its own professional accountants, counsel and other advisors for such tax, accounting and legal advice concerning the Operative Documents.

(3) In any event, NAI will be required by subparagraph 5(C) below to indemnify and hold harmless BNPPLC from and against all actual additional taxes that may arise or become due because of any refusal of taxing authorities to recognize and

give effect to the intention of the parties as set forth in subparagraph 4(C)(1) (“**Unexpected Recharacterization Taxes**”), including any actual, additional income or capital gain tax that may become due because of payments to BNPPPLC of the purchase price upon any sale under the Purchase Agreement resulting from any insistence of such taxing authorities that BNPPPLC be treated as the “true owner” of the Property for tax purposes (a “**Forced Recharacterization**”); provided, however, NAI will not be required to pay or reimburse Unexpected Recharacterization Taxes to the extent that they are, in any given tax year, eliminated or offset by actual savings to BNPPPLC because of additional depreciation deductions or other tax benefits available to BNPPPLC in the same year only by reason of the Forced Recharacterization (“**Unexpected Tax Savings**”). To the extent Unexpected Recharacterization Taxes are eliminated or offset by Unexpected Tax Savings in a given tax year, including the tax year in which any sale under the Purchase Agreement occurs (the “**Year of Sale**”), such Unexpected Recharacterization Taxes will constitute Excluded Taxes as provided in clause (D) of the definition thereof in the Common Definitions and Provisions Agreement. Also, for purposes of this provision, it is understood that any depreciation deductions first available to BNPPPLC in tax years prior to the Year of Sale and resulting from a Forced Recharacterization (“**Prior Year Depreciation Deductions**”) will be considered “available to BNPPPLC” in the Year of Sale (and thus will eliminate or offset any Unexpected Recharacterization Taxes resulting from the recapture of such Prior Year Depreciation Deductions upon a sale under the Purchase Agreement) to the extent that (A) such Prior Year Depreciation Deductions are not otherwise used to generate Unexpected Tax Savings or Unexpected Net Tax Benefits (as defined below), and (B) the tax laws and regulations applicable in the Year of Sale effectively permit BNPPPLC to carry over the Prior Year Depreciation Deductions to the Year of Sale by allowing BNPPPLC to carry over net operating losses from the years in which the Prior Year Depreciation Deductions were first available to BNPPPLC to the Year of Sale.

(4) After any Forced Recharacterization, BNPPPLC will make a reasonable effort to determine whether Unexpected Tax Savings *exceed* Unexpected Recharacterization Taxes in any given tax year (any such excess being hereinafter called an “**Unexpected Net Tax Benefit**”); and if BNPPPLC does determine that an Unexpected Net Tax Benefit has been realized and the amount thereof, BNPPPLC will notify NAI of the same and either credit the amount thereof against payments otherwise then due or to become due from NAI under this Lease or the other Operative Documents or pay the amount of such Unexpected Net Tax Benefit to NAI. It is understood, however, that the tax position of BNPPPLC (and the consolidated tax group of which it is a part) may, in any given tax year, be such that no Unexpected Net Tax Benefit exists or can be determined with a reasonable effort on the part of BNPPPLC. Therefore, BNPPPLC makes no representation that NAI will receive any credits or payments pursuant to this provision after any Forced Recharacterization. Also, the determination by BNPPPLC of the amount

of any Unexpected Net Tax Benefit will be conclusive absent clear and manifest error, as will any determination by BNPPPLC that the amount of any Unexpected Net Tax Benefit in a given tax year cannot be calculated with a reasonable effort. If NAI is dissatisfied with any such determination by BNPPPLC prior to the Designated Sale Date, NAI will be entitled to accelerate the Designated Sale Date (as provided in clause (2) of the definition thereof), after which NAI may purchase or cause an Applicable Purchaser to purchase the Property on the accelerated Designated Sale Date pursuant to the Purchase Agreement.

5 Payment of Executory Costs and Losses Related to the Property.

(A) Local Impositions. Subject only to the exceptions listed in subparagraph 5(D) below, NAI must pay or cause to be paid prior to delinquency all Local Impositions. If requested by BNPPPLC from time to time, NAI must furnish BNPPPLC with receipts or other appropriate evidence showing payment of all Local Impositions at least ten days prior to the applicable delinquency date therefor.

Notwithstanding the foregoing, NAI may in good faith, by appropriate proceedings, contest the validity, applicability or amount of any asserted Local Imposition, and pending such contest NAI will not be deemed in default under any of the provisions of this Lease because of the Local Imposition if (1) NAI diligently prosecutes such contest to completion in a manner reasonably satisfactory to BNPPPLC, and (2) NAI promptly causes to be paid any amount adjudged by a court of competent jurisdiction to be due, with all costs, penalties and interest thereon, promptly after such judgment becomes final; provided, however, in any event each such contest must be concluded and the contested Local Impositions must be paid by NAI prior to the earliest of (i) the date that any criminal prosecution is instituted or overtly threatened against BNPPPLC or its directors, officers or employees because of the nonpayment thereof or (ii) the date any writ or order is issued under which any property owned or leased by BNPPPLC (including the Property) may be seized or sold or any other action is taken or overtly threatened against BNPPPLC or against any property owned or leased by BNPPPLC because of the nonpayment thereof, or (iii) any Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPPLC's interest in the Property pursuant to the Purchase Agreement for a price (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

(B) Increased Costs; Capital Adequacy Charges. Subject only to the exceptions listed in subparagraph 5(D) below:

(1) If there is any increase in the cost to BNPPPLC's Parent or any Participant of agreeing to make or making, funding or maintaining advances to BNPPPLC in connection with the Property because of any Banking Rules Change, then NAI must from

time to time (after receipt of a request from BNPPLC's Parent or such Participant as provided below) pay to BNPPLC for the account of BNPPLC's Parent or such Participant, as the case may be, additional amounts sufficient to compensate BNPPLC's Parent or the Participant for such increased cost. A certificate as to the amount of such increased cost, submitted to BNPPLC and NAI by BNPPLC's Parent or the Participant, will be conclusive and binding upon NAI, absent clear and demonstrable error.

(2) BNPPLC's Parent or any Participant may demand additional payments ("**Capital Adequacy Charges**") if BNPPLC's Parent or the Participant determines that any Banking Rules Change affects the amount of capital to be maintained by it and that the amount of such capital is increased by or based upon the existence of advances made or to be made to or for BNPPLC to permit BNPPLC to maintain BNPPLC's investment in the Property. To the extent that BNPPLC's Parent or any Participant demands Capital Adequacy Charges as compensation for the additional capital requirements reasonably allocable to such investment or advances, NAI must pay to BNPPLC for the account of BNPPLC's Parent or the Participant, as the case may be, the amount so demanded.

(3) Notwithstanding the foregoing provisions of this subparagraph 5(B), NAI will not be obligated to pay any claim for compensation pursuant to this subparagraph 5(B) that arises or accrues (a) as a result of any change in the rating assigned to BNPPLC by rating agencies or bank regulators in regard to BNPPLC's creditworthiness, record keeping or failure to comply with Applicable Laws (including U.S. banking regulations applicable to subsidiaries of a bank holding company), or (b) more than nine months prior to the date NAI is notified of the intent of BNPPLC's Parent or a Participant to make a claim for such charges; provided, that if the Banking Rules Change which results in a claim for compensation is retroactive, then the nine month period will be extended to include the period of the retroactive effect of such Banking Rules Change. Further, BNPPLC will cause BNPPLC's Parent and any Participant that is an Affiliate of BNPPLC to use commercially reasonable efforts to reduce or eliminate any claim for compensation pursuant to this subparagraph 5(B), including a change in the office of BNPPLC's Parent or such Participant through which it provides and maintains Funding Advances if such change will avoid the need for, or reduce the amount of, such compensation and will not, in the reasonable judgment of BNPPLC's Parent or such Participant, be otherwise disadvantageous to it. It is understood that NAI may also request similar commercial reasonable efforts on the part of any Participant that is not an Affiliate of BNPPLC, but if a claim for additional compensation by any such Participant is not eliminated or waived, then NAI may request that BNPPLC replace such Participant as provided in Paragraph 6. Nothing in this subparagraph will be construed to require BNPPLC's Parent or any Participant to create any new office through which to make or maintain Funding Advances.

(4) Any amount required to be paid by NAI under this subparagraph 5(B) will be due ten days after a notice requesting such payment is received by NAI from BNPPPLC's Parent or the applicable Participant.

(C) NAI's Payment of Other Losses: General Indemnification. Subject only to the exceptions listed in subparagraph 5(D) below:

(1) *Agreement to Indemnify.* As directed by BNPPPLC, NAI must pay, reimburse, indemnify, defend, protect and hold harmless BNPPPLC and all other Interested Parties from and against all Losses (including Environmental Losses) asserted against or incurred or suffered by any of them at any time and from time to time by reason of, in connection with, arising out of, or in any way related to the following:

- the ownership or alleged ownership of any interest in the Property or the Rents;
- the purchase, design, construction, preparation, installation, inspection, delivery, non-delivery, acceptance, rejection, possession, use, operation, maintenance, management, rental, lease, sublease, repossession, condition (including defects, whether or not discoverable), destruction, repair, alteration, modification, restoration, addition or substitution, storage, transfer of title, redelivery, return, sale or other disposition of all or any part of or interest in the Property;
- the imposition of any Lien (or incurring of any liability to refund or pay over any amount as a result of any Lien) against all or any part of or interest in the Property;
- any failure of the Property or NAI itself to comply with Applicable Laws;
- Permitted Encumbrances or any violation thereof;
- Hazardous Substance Activities, including those occurring prior to the Term;
- the negotiation, administration or enforcement of the Operative Documents or the Participation Agreement;
- the making or maintenance of Funding Advances;

- any Interest Rate Swap that BNPPLC enters into as described in subparagraph 3(B)(4) of this Lease;
- the breach by NAI of this Lease, any other Operative Document or any other document executed by NAI pursuant to or in connection with any Operative Document;
- any obligations of BNPPLC under the Closing Certificate or the Ground Lease; or
- any bodily or personal injury or death or property damage occurring in or upon or in the vicinity of the Property through any cause whatsoever.

NAI's obligations under this indemnity will apply whether or not any Interested Party is also indemnified as to the applicable Loss by another Interested Party and whether or not the Loss arises or accrues because of any condition of the Property or other circumstance concerning the Property prior to the Effective Date.

Further, in the event, for income tax purposes, an Interested Party must include in its taxable income any payment or reimbursement from NAI which is required by this indemnity (in this provision, the "**Original Indemnity Payment**"), and yet the Interested Party is not entitled during the same taxable year to a corresponding and equal deduction from its taxable income for the Loss paid or reimbursed by such Original Indemnity Payment (in this provision, the "**Corresponding Loss**"), then NAI must also pay to such Interested Party on demand the additional amount (in this provision, the "**Additional Indemnity Payment**") needed to gross up the Original Indemnity Payment for any and all resulting additional income taxes. That is, NAI must pay an Additional Indemnity Payment as is needed so that the Corresponding Loss (computed net of the reduction, if any, of the Interested Party's income taxes because of credits or deductions that are attributable to the Interested Party's payment or deemed payment of the Corresponding Loss and that are recognized for tax purposes in the same taxable year during which the Interested Party must recognize the Original Indemnity Payment as income) will not exceed the difference computed by subtracting (i) all income taxes (determined for this purpose based on the highest marginal income tax rate applicable to corporations for the relevant period or periods and the highest applicable state or local marginal rates of such taxing authority applicable to corporations for the relevant period or periods) imposed upon the Interested Party with respect to the Original Indemnity Payment and the Additional Indemnity Payment, from (ii) the sum of the Original Indemnity Payment and the Additional Indemnity Payment. (With regard to any payment or reimbursement of an Original Indemnity Payment, "**After Tax Basis**" means that such payment or

reimbursement is or will be made together with the additional amount needed to gross up such Original Indemnity Payment as described in this provision.)

(2) *Scope of Indemnities and Releases.* **Every indemnity and release provided in this Lease and the other Operative Documents for the benefit of BNPPPLC or other Interested Parties, including the indemnity set forth in subparagraph 5(C)(1), will apply even if and when the subject matter of the indemnity or release arises out of or results from the negligence or strict liability of BNPPPLC or any other Interested Party.** Further, all such indemnities and releases will apply even if insurance obtained by NAI or required of NAI by this Lease or the other Operative Documents is not adequate to cover Losses against or for which the indemnities and releases are provided. (However, NAI's liability for any failure to obtain insurance required by this Lease or the other Operative Documents will not be limited to Losses against which indemnities are provided, it being understood that the parties have agreed upon insurance requirements for reasons that extend beyond providing a source of payment for Losses against which BNPPPLC and other Interested Parties may be indemnified by NAI.)

(3) *Nonexclusive List of Costs Covered by Indemnity.* Costs and expenses for which NAI is responsible on an After Tax Basis pursuant to this subparagraph 5(C) will include all of the following, except to the extent that the following are included in the Initial Advance or in the calculation of any Break Even Price or Make Whole Amount paid to BNPPPLC pursuant to the Purchase Agreement:

- appraisal fees;
- Uniform Commercial Code search fees;
- filing and recording fees;
- inspection fees and expenses;
- brokerage fees and commissions;
- survey fees;
- title policy premiums and escrow fees;

- any Breakage Costs or Fixed Rate Settlement Amount;
- Attorneys' Fees incurred by BNPPPLC with respect to the drafting, negotiation, administration or enforcement of this Lease or the other Operative Documents; and
- all taxes (except Excluded Taxes) related to the Property or to the transactions contemplated in the Operative Documents.

Such costs and expenses will also include all rent or other payments required of BNPPPLC under the Ground Lease, so long as this Lease remains in force or NAI remains in possession of the Property or is entitled to possession by this Lease. (It is understood, however, that with respect to payments which are required by the Ground Lease from BNPPPLC to NAI and for which NAI is required to reimburse BNPPPLC, such payments and the corresponding reimbursements will be offset and deemed paid by offsetting book entries rather than by an actual transfer of funds back and forth between the parties.)

(4) *Defense and Settlement of Indemnified Claims.*

(a) By notice to NAI BNPPPLC may direct NAI to assume on behalf of BNPPPLC or any other Interested Party and to conduct with due diligence and in good faith the defense of and the response to any claim, proceeding or investigation included in or concerning any Loss for which NAI is responsible pursuant to subparagraph 5(C)(1). NAI must promptly comply with any such direction using counsel selected by NAI and reasonably satisfactory to BNPPPLC to represent BNPPPLC or the applicable Interested Party. In the event NAI fails to promptly comply with any such direction from BNPPPLC, BNPPPLC or any other affected Interested Party may contest or settle the claim, proceeding or investigation using counsel of its own selection at NAI's expense, subject to subparagraph 5(D)(3) if that subparagraph is applicable.

(b) Also, although subparagraphs 5(D)(3) and 5(D)(4) will apply to tort claims asserted against any Interested Party related to the Property, the right of an Interested Party to be indemnified pursuant to this subparagraph 5(C) for taxes or other payments made to satisfy governmental requirements ("**Government Mandated Payments**") will not be conditioned in any way upon NAI having consented to or approved of, or having been provided with an opportunity to defend against or contest, such Government Mandated Payments. In all cases, however, including those which may involve Government Mandated Payments, the rights of each Interested Party to be indemnified will be subject to subparagraph 5(D)(5).

(5) *Payments Due.* Any amount to be paid by NAI under this subparagraph 5(C) will be due ten days after a notice requesting such payment is given to NAI, subject to any applicable contest rights expressly granted to NAI by other provisions of this Lease.

(6) *Survival.* NAI's obligations under this subparagraph 5(C) will survive the termination or expiration of this Lease with respect to Losses suffered by any Interested Party on or prior to, or by reason of any actual or alleged occurrence or circumstances on or prior to, the later of the dates upon which (a) this Lease terminates or expires, or (b) NAI surrenders possession and control of the Property.

(D) Exceptions and Qualifications to Indemnities.

(1) *Exceptions.* BNPPPLC acknowledges and agrees that nothing in Paragraph 4 or the preceding subparagraphs of this Paragraph 5 will be construed to require NAI to pay or reimburse:

- Excluded Taxes; or
- Losses incurred or suffered by any Interested Party that are proximately caused by (and attributed by any applicable principles of comparative fault to) the Established Misconduct of that Interested Party; or
- Losses that result from any Liens Removable by BNPPPLC; or
- Losses incurred or suffered by any of the Participants in connection with the negotiation or execution of the Participation Agreement (or supplements making them parties thereto) or in connection with any due diligence Participants may undertake before entering into the Participation Agreement; or
- Local Impositions or other Losses contested, if and so long as they are contested, by NAI in accordance with any of the provisions of this Lease or other Operative Documents which expressly authorize such contests; or
- transaction expenses or other Losses caused by or necessary to accomplish any conveyance by BNPPPLC to BNPPPLC's Parent or a Qualified Affiliate which constitutes a Permitted Transfer only by reason of clause (3) of the definition of Permitted Transfer in the Common Definitions and Provisions Agreement ; or

- any amount which may from time to time be payable by BNPPLC to any Participant representing the excess of “Base Rent” as defined in the Participation Agreement over Base Rent as defined in and calculated pursuant to this Lease and the Common Definitions and Provisions Agreement; or

- any decline in the value of the Property solely by reason of decline in general market conditions and not because of any breach of this Lease or other Operative Documents by NAI.

Further, without limiting BNPPLC’s rights (as provided in other provisions of this Lease and other Operative Documents) to include the following in the calculation of the Lease Balance, the Break Even Price and the Make Whole Amount (as applicable) or to collect Base Rent, a Supplemental Payment and other amounts, the calculation of which depends upon the Lease Balance, BNPPLC acknowledges and agrees that nothing in Paragraph 4 or the preceding subparagraphs of this Paragraph 5 will be construed to require NAI to pay or reimburse an Interested Party for costs paid by BNPPLC with the proceeds of the Initial Advance as part of the Transaction Expenses or with Construction Advances.

(2) *Notice of Claims.* If an Interested Party receives a written notice of a claim for taxes or a claim alleging a tort or other unlawful conduct that the Interested Party believes is covered by the indemnity in subparagraph 5(C)(1), then such Interested Party will be expected to promptly furnish a copy of such notice to NAI. The failure to so provide a copy of the notice will not excuse NAI from its obligations under subparagraph 5(C)(1); except that if such failure continues for more than fifteen days after the notice is received by such Interested Party and NAI is unaware of the matters described in the notice, with the result that NAI is unable to assert defenses or to take other actions which could minimize its obligations, then NAI will be excused from its obligation to indemnify such Interested Party (and any Affiliate of such Interested Party) against Losses, if any, which would not have been incurred or suffered but for such failure. For example, if BNPPLC fails to provide NAI with a copy of a notice of an overdue tax obligation covered by the indemnity set out in subparagraph 5(C)(1) and NAI is not otherwise already aware of such obligation, and if as a result of such failure BNPPLC becomes liable for penalties and interest covered by the indemnity in excess of the penalties and interest that would have accrued if NAI had been promptly provided with a copy of the notice, then NAI will be excused from any obligation to BNPPLC (or any Affiliate of BNPPLC) to pay the excess.

(3) *Withholding of Consent to Settlements Proposed by NAI.* With regard to any tort claim against an Interested Party for which NAI undertakes to defend the Interested Party as provided in subparagraph 5(C)(4)(a), if the Interested Party unreasonably refuses to consent to a settlement of the claim which is proposed by NAI

and which will meet the conditions listed in the next sentence, NAI's liability for the cost of continuing the defense and for any other amounts payable in respect of the claim will be limited to the total cost for which the settlement proposed by NAI would have been accomplished but for the unreasonable refusal to consent. Any such settlement proposed by NAI must meet the following conditions: (A) at the time of the settlement by NAI, NAI must pay all amounts required to release the Interested Party and its property interests from any further obligation for or liens securing the applicable claim and from any interest, penalties and other related liabilities, and (B) the settlement or compromise must not involve an admission of fraud or criminal wrongdoing or result in some other material adverse consequence to the Interested Party.

(4) *Settlements Without the Prior Consent of NAI.*

(a) Except as otherwise provided in subparagraph 5(D)(4)(b), if any Interested Party settles any tort claim for which it is entitled to be indemnified by NAI without NAI's consent, then NAI may, by notice given to the Interested Party no later than ten days after NAI is notified of the settlement, elect to pay Reasonable Settlement Costs to the Interested Party in lieu of a payment or reimbursement of actual settlement costs. (With respect to any tort claim asserted against an Interested Party, "**Reasonable Settlement Costs**" means the maximum amount that a prudent Person in the position of the Interested Party, but able to pay any amount, might reasonably agree to pay to settle the tort claim, taking into account the nature and amount of the claim, the relevant facts and circumstances known to such Interested Party at the time of settlement and the additional Attorneys Fees' and other costs of defending the claim which could be anticipated but for the settlement.) After making an election to pay Reasonable Settlement Costs with regard to a particular tort claim and a particular Interested Party, NAI will have no right to rescind or revoke the election, despite any subsequent determination that Reasonable Settlement Costs exceed actual settlement costs. It is understood that Reasonable Settlement Costs may be more or less than actual settlement costs and that a final determination of Reasonable Settlement Costs may not be possible until after NAI must decide between paying Reasonable Settlement Costs or paying actual settlement costs.

(b) Notwithstanding the foregoing, NAI will have no right to elect to pay Reasonable Settlement Costs in lieu of actual settlement costs if an Interested Party settles claims without NAI's consent at any time when an Event of Default has occurred and is continuing or after a failure by NAI to conduct with due diligence and in good faith the defense of and the response to any claim, proceeding or investigation as provided in subparagraph 5(C)(4)(a).

(c) Except as provided in this subparagraph 5(D)(4), no settlement by any Interested Party of any claim made against it will excuse NAI from any obligation to indemnify the Interested Party against the settlement costs or other Losses suffered by reason of, in connection with, arising out of, or in any way related to such claim.

(5) *No Authority to Admit Wrongdoing by NAI or to Bind NAI to any Settlement.* No Interested Party will under any circumstances have any authority to bind NAI to an admission of wrongdoing or responsibility to any third party claimant with regard to matters for which such Interested Party claims a right to indemnification from NAI under this Lease.

Further, nothing herein contained, including the foregoing provisions concerning settlements by Interested Parties of indemnified Losses, will be construed as authorizing any Interested Party to bind NAI to do or refrain from doing anything to satisfy a third party claimant. If, for example, a claim is made by a Governmental Authority that NAI must refrain from some particular conduct on or about the Land in order to comply with Applicable Laws, BNPPLC cannot bind NAI (and will not purport to bind NAI) to any agreement to refrain from such conduct or otherwise prevent NAI from continuing to contest the claim by reason of any provision set forth herein.

Moreover, so long as this Lease continues, no Interested Party may settle any claim involving the Property by executing any agreement (including any consent decree proposed by any Governmental Authority) which purports to prohibit, limit or impose conditions upon any use of the Property by NAI without the prior written consent of NAI. In the case of any proposed settlement of a claim asserted by a Governmental Authority against BNPPLC, NAI will not unreasonably withhold such consent. However, for purposes of determining whether it is reasonable for NAI to withhold such consent, any diligent ongoing undertaking by NAI to contest such the claim on behalf of BNPPLC will be relevant.

Subject to the foregoing provisions in this subparagraph 5(D)(5), any Interested Party may agree for itself (and only for itself) to act or refrain from doing anything as demanded or requested by a third party claimant; provided, however, in no event will such an agreement impede NAI from continuing to exercise its rights to operate its business on the Property or elsewhere in any lawful manner deemed appropriate by NAI, nor will any such agreement limit or impede NAI's right to contest claims raised by any third party claimants (including Governmental Authorities) that NAI is not complying or has not complied with Applicable Laws.

(6) *Defense of Tax Claims.* This Lease does not grant to NAI any right to

control the defense of or contest any tax claim for which an Interested Party may have a right to indemnity under subparagraph 5(C), other than the right to contest Local Impositions as provided in subparagraph 5(A), nor does this Lease grant to NAI the right to inspect the income tax returns, books or records of any Interested Party. Nevertheless, if a tax claim is asserted against BNPPPLC for which it is entitled to be indemnified pursuant to subparagraph 5(C), BNPPPLC will consider in good faith any defenses and strategies proposed by NAI with regard to such claim, provided that NAI has delivered to BNPPPLC at NAI's expense an opinion of reputable tax counsel to the effect that there is a reasonable basis (as defined in ABA Formal Opinion 85-532) for contesting such claim. Further, if any such tax claim is asserted against BNPPPLC which involves assertions that apply not only to the transactions contemplated by this Lease, but also to other similar transactions in which BNPPPLC has participated, then BNPPPLC will not settle the claim on a basis that results in a disproportionately greater tax burden with respect to the transactions contemplated herein than with respect to such other similar transactions. For example, if taxing authorities assert that both this Lease and other comparable lease agreements made by BNPPPLC are not financing arrangements as intended by the parties thereto, and on the basis of such assertions the taxing authorities claim that BNPPPLC owes income taxes which are not Excluded Taxes, then BNPPPLC will not settle the claim in a manner that would cause NAI's liability under subparagraph 5(C) to be disproportionately greater than the indemnity obligation of another similarly situated tenant of BNPPPLC under another lease agreement with an indemnity provision comparable to subparagraph 5(C). Also, BNPPPLC will not grant to another tenant the right to dictate to BNPPPLC the tax position BNPPPLC must take in regard to the Property or the Operative Documents, except that BNPPPLC may include provisions comparable to the foregoing in other leases to assure other tenants against a disproportionately greater burden than NAI will bear in regard to any settlement of a tax claim by BNPPPLC.

(7) *Indemnified Parties Other than Landlord.* As a condition to making any indemnity payment for Losses directly to any Interested Party other than BNPPPLC itself, NAI may require the Interested Party to confirm and agree in writing that it will be obligated to make the payments to NAI as provided in subparagraph 5(E) in the event the Interested Party subsequently receives a refund of the Losses covered by such indemnity payment.

(E) Refunds and Credits Related to Losses Paid by NAI.

(1) If BNPPPLC receives a refund of any Losses paid, reimbursed or advanced by NAI pursuant to this Paragraph 5 that has not already been accounted for in the After Tax Basis calculation described in subparagraph 5(C)(1), BNPPPLC will promptly pay to NAI the amount of such refund, plus or minus any net tax benefits or detriments realized by BNPPPLC as a result of the refund and such payment to NAI; provided, that the amount

payable to NAI will not exceed the amount of the indemnity payment in respect of such refunded Losses that was made by NAI. If it is subsequently determined that BNPPLC was not entitled to the refund, the portion of the refund that is repaid or recaptured will be treated as a Loss for which NAI must indemnify BNPPLC pursuant to this Paragraph 5 without regard to subparagraph 5(D). If, in connection with any such refund, BNPPLC also receives an amount representing interest on such refund, BNPPLC will promptly pay to NAI the amount of such interest, plus or minus any net tax benefits or detriments realized by BNPPLC as a result of the receipt or accrual of the interest and as a result of such payment to NAI; provided, that BNPPLC will not be required to make any such payment in respect of the interest (if any) that is fairly attributable to a period for which NAI had not yet paid, reimbursed or advanced the Losses refunded to BNPPLC.

(2) If any Interested Party (other than BNPPLC itself) receives a refund of any Loss paid, reimbursed or advanced by NAI pursuant to this Paragraph 5 that has not already been accounted for in the After Tax Basis calculation described in subparagraph 5(C)(1), NAI may demand (and enforce the demand pursuant to any agreement previously delivered by the Interested Party as provided in subparagraph 5(D)(7)) that such Interested Party promptly pay to NAI the amount of such refund, plus or minus any net tax benefits or detriments realized by such Interested Party as a result of the refund and such payment to NAI; provided, that the amount payable to NAI will not exceed the amount of the indemnity payment in respect of such refunded Losses that was made by NAI. If it is subsequently determined that such Interested Party was not entitled to the refund, the portion of the refund that is repaid or recaptured will be treated as a Loss for which NAI must indemnify such Interested Party pursuant to this Paragraph 5 without regard to subparagraph 5(D). If, in connection with any such refund, such Interested Party also receives an amount representing interest on such refund, NAI may demand that such Interested Party promptly pay to NAI the amount of such interest, plus or minus any net tax benefits or detriments realized by such Interested Party as a result of the receipt or accrual of the interest and as a result of such payment to NAI; provided, that such Interested Party will not be required to make any such payment in respect of the interest (if any) which is fairly attributable to a period before NAI paid, reimbursed or advanced the Losses refunded to such Interested Party.

(3) With respect to Losses incurred or suffered by an Interested Party and paid or reimbursed by NAI on an After Tax Basis, if taxes of such Interested Party which are not subject to indemnification by NAI are reduced because of such Losses (whether by reason of a deduction, credit or otherwise) and such reduction was not taken into account in the calculation of the required reimbursement or payment by NAI, then for purposes of this subparagraph 5(E) such reduction will be considered a "refund".

(4) Notwithstanding the foregoing, in no event will BNPPLC or any other

Interested Party be required to make any payment to NAI pursuant to this subparagraph 5(E) when an Event of Default has occurred and is continuing.

(F) Reimbursement of Excluded Taxes Paid by NAI. If NAI is ever required (by laws imposing withholding tax obligations or otherwise) to pay Excluded Taxes that any Interested Party should have paid, but failed to pay when due, in connection with this Lease, such Interested Party must reimburse NAI for such Excluded Taxes (together with any additional amount required to preserve for NAI the full amount of such reimbursement after related taxes are considered, calculated in the same manner that an Additional Indemnity Payment would be calculated under subparagraph ? in the case of a reimbursement owed by NAI to an Interested Party) within 30 days after such Interested Party's receipt of a written demand for such reimbursement by NAI.

6 Replacement of Participants.

(A) NAI's Right to Substitute Participants. So long as no Event of Default exists, and subject to the terms and conditions set forth in subparagraph 6(B), if any Participant which is not an Affiliate of BNPPPLC (in this Paragraph, the "**Unrelated Participant**") (1) declines to approve the Rent for an extension of this Lease under subparagraph 1(D), or (2) makes a demand for compensation under subparagraph 5(B), NAI may request that BNPPPLC execute Participation Agreement Supplements (as defined in the Participation Agreement) as needed to transfer the rights of the Unrelated Participant thereunder to one or more new Participants (in this subparagraph, whether one or more, the "**New Participants**") designated by NAI who are willing and able to accept such interests and to make Funding Advances as necessary to terminate the Unrelated Participant's right to payments in respect of Base Rent and the Lease Balance under the Operative Documents. BNPPPLC will execute such Participation Agreement Supplements within ten Business Days of the later to occur of such request by NAI and satisfaction of all conditions set forth in subparagraph 6(B).

(B) Conditions to Replacement of Participants. NAI and BNPPPLC, working together, will endeavor in good faith to identify New Participants that are willing to replace any Unrelated Participant described in the preceding subparagraph and that are acceptable to both NAI and BNPPPLC. (The term New Participants may include new parties to the Participation Agreement and it may include existing Participants that increase their Funding Advances as needed to replace the Unrelated Participant.) However, nothing contained herein will be construed to require BNPPPLC itself to increase its Percentage (as defined in the Participation Agreement) to replace an Unrelated Participant, and nothing herein contained will be construed to require BNPPPLC itself to provide or to obtain from its Affiliates Funding Advances to replace the Funding Advances that an Unrelated Participant has provided or agreed to provide. Also, New Participants will be subject to the approval of BNPPPLC; provided, that BNPPPLC must not unreasonably withhold its approval for the substitution of any New Participant proposed by NAI

for any Unrelated Participant so long as (i) no Event of Default has occurred and is continuing, (ii) BNPPLC determines it can give such approval without violating Applicable Laws, without breaching its obligations under the Participation Agreement, and without waiving rights or remedies it has under this Lease or the other Operative Documents, (iii) BNPPLC or BNPPLC's Parent is not involved in any material litigation adverse to the New Participant in any pending lawsuit or other legal proceeding, and (iv) all of the conditions listed in the next sentence are satisfied. Any substitution of New Participants for an Unrelated Participant as provided in this Paragraph will be subject to the following conditions:

(1) the proposed substitution does not include a waiver of rights by BNPPLC against any Unrelated Participant or require BNPPLC to pay any amounts out-of-pocket that is not reimbursed concurrently by NAI or the New Participants;

(2) the New Participants must become parties to the Participation Agreement (by executing supplements to that agreement as provided therein) and must provide all funds due to the Unrelated Participant being replaced because of the termination of the Unrelated Participant's rights to receive payments in respect of Net Cash Flow and Net Sales Proceeds (both as defined in the Participation Agreement); and

(3) the obligations of BNPPLC to the New Participants must not exceed the obligations that BNPPLC would have had to the Unrelated Participant if there had been no substitution, other than those for which NAI is liable.

Upon consummation of any such substitution NAI must pay to the replaced Participant Breakage Costs, if any, incurred by the replaced Participant because of the substitution.

7 Items Included in the Property

(A) Status of Property. All Improvements on the Land from time to time will constitute "Property" covered by this Lease. Further, as provided in the Construction Management Agreement, to the extent heretofore or hereafter acquired by NAI (in whole or in part) with any portion of the Initial Advance or with any Construction Advances or with other funds for which NAI receives reimbursement from the Initial Advance or Construction Advances, all furnishings, furniture, chattels, permits, licenses, franchises, certificates and other personal property of whatever nature will be deemed to have been acquired on behalf of BNPPLC by NAI and will constitute "Property" covered by this Lease, as will all renewals or replacements of or substitutions for any such Property. Upon request of BNPPLC, but not more often than once in any period of twelve consecutive months, NAI will deliver to BNPPLC an inventory describing all significant items of Personal Property (and, in the case of tangible personal property, showing the make, model, serial number and location thereof) other than Improvements, with a certification by NAI that such inventory is true and complete and that all

items specified in the inventory are covered by this Lease free and clear of any Lien other than the Permitted Encumbrances or Liens Removable by BNPPLC.

(B) Changes in the Land Covered by the Ground Lease. Upon any amendment of the definition of the “Land” covered by the Ground Lease, the “Land” as defined in and covered by this Lease and the other Operative Documents will also be so amended.

8 Environmental.

(A) Environmental Covenants by NAI.

(1) NAI will not conduct or permit others to conduct Hazardous Substance Activities on the Property, except Permitted Hazardous Substance Use and Remedial Work.

(2) NAI will not discharge or permit the discharge of anything (including Permitted Hazardous Substances) on or from the Property that would require any permit under applicable Environmental Laws, other than (i) storm water runoff, (ii) waste water discharges through a publicly owned treatment works, (iii) discharges that are a necessary part of any Remedial Work, and (iv) other similar discharges consistent with the definition herein of Permitted Hazardous Substance Use which do not significantly increase the risk of Environmental Losses to BNPPLC, in each case in strict compliance with Environmental Laws.

(3) Following any discovery that Remedial Work is required by Environmental Laws or is otherwise reasonably believed by BNPPLC to be required, and to the extent not inconsistent with the other provisions of this Lease, NAI must promptly perform and diligently and continuously pursue such Remedial Work.

(4) If requested by BNPPLC in connection with any Remedial Work required by this subparagraph, NAI must retain environmental consultants reasonably acceptable to BNPPLC to evaluate any significant new information generated during NAI’s implementation of the Remedial Work and to discuss with NAI whether such new information indicates the need for any additional measures that NAI should take to protect the health and safety of persons (including employees, contractors and subcontractors and their employees) or to protect the environment. NAI must implement any such additional measures to the extent required with respect to the Property by Environmental Laws or otherwise reasonably believed by BNPPLC to be required.

(B) Right of BNPPLC to do Remedial Work Not Performed by NAI. If NAI’s failure to perform any Remedial Work required as provided in subparagraph 8(A) continues beyond the

Environmental Cure Period (as defined below), BNPPPLC may, in addition to any other remedies available to it, conduct all or any part of the Remedial Work. To the extent that Remedial Work is done by BNPPPLC pursuant to the preceding sentence (including any removal of Hazardous Substances), the cost thereof will be a demand obligation owing by NAI to BNPPPLC. As used in this subparagraph, “**Environmental Cure Period**” means the period ending on the earliest of: (1) ninety days after NAI is notified of the breach which must be cured within such period or, if during such ninety days NAI initiates the Remedial Work and diligently and continuously pursues it in accordance with a timetable accepted and approved by applicable Governmental Authorities (which may include delays waiting for permits or other authorizations), the date by which such Remedial Work is to be completed according to such timetable, (2) the date that any writ or order is issued for the levy or sale of any property owned by BNPPPLC (including the Property) because of such breach, (3) the date that any criminal action is instituted or overtly threatened against BNPPPLC or any of its directors, officers or employees because of such breach, or (4) any Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPPLC’s interest in the Property pursuant to the Purchase Agreement for a net price to BNPPPLC (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

(C) Environmental Inspections and Reviews. BNPPPLC reserves the right to retain environmental consultants to review any report prepared by NAI or to conduct BNPPPLC’s own investigation to confirm whether NAI is complying with the requirements of this Paragraph 8. NAI grants to BNPPPLC and to BNPPPLC’s agents, employees, consultants and contractors the right to enter upon the Property during reasonable hours and after reasonable notice to inspect the Property and to perform such tests as BNPPPLC deems reasonably necessary or appropriate to review or investigate Hazardous Substances in, on, under or about the Property or any discharge or reasonably suspected discharge of Hazardous Substances into groundwater or surface water from the Property. NAI must promptly reimburse BNPPPLC for the fees of its environmental consultants and the costs of any such inspections and tests; provided, however, BNPPPLC’s right to reimbursement for the fees of any consultant engaged as provided in this subparagraph or for the costs of any inspections or test undertaken as provided in this subparagraph will be limited to the following circumstances: (1) an Event of Default has occurred and is continuing at the time of such engagement, tests or inspections; (2) NAI has not exercised the Purchase Option and BNPPPLC has retained the consultant to establish the condition of the Property prior to any conveyance thereof pursuant to the Purchase Agreement or to the expiration of this Lease; (3) BNPPPLC has retained the consultant to satisfy any regulatory requirements applicable to BNPPPLC or its Affiliates; (4) BNPPPLC has retained the consultant because it has reason to believe, and does in good faith believe, that a significant violation of Environmental Laws concerning the Property has occurred; or (5) BNPPPLC has retained the consultant because BNPPPLC has been notified of a possible violation of Environmental Laws concerning the Property by any Governmental Authority having jurisdiction.

(D) Communications Regarding Environmental Matters.

(1) NAI must promptly advise BNPPLC and Participants of (i) any discovery known to NAI of any event or circumstance which would render any of the representations of NAI herein or in any of the other Operative Documents concerning environmental matters materially inaccurate or misleading if made at the time of such discovery and assuming that NAI was aware of all relevant facts, (ii) any Remedial Work (or change in Remedial Work) required or undertaken by NAI or its Affiliates in response to any (A) discovery of any Hazardous Substances on, under or about the Property other than Permitted Hazardous Substances or (B) any claim for damages resulting from Hazardous Substance Activities, (iii) any discovery known to NAI of any occurrence or condition on any real property adjoining or in the vicinity of the Property which would or could reasonably be expected to cause the Property or any part thereof to be subject to any ownership, occupancy, transferability or use restrictions under Environmental Laws, or (iv) any investigation or inquiry known to NAI of any failure or alleged failure by NAI to comply with Environmental Laws affecting the Property by any Governmental Authority responsible for enforcing Environmental Laws. In such event, NAI will deliver to BNPPLC within thirty days after BNPPLC's request, a preliminary written environmental plan setting forth a general description of the action that NAI proposes to take with respect thereto, if any, to bring the Property into compliance with Environmental Laws or to correct any breach by NAI of this Paragraph 8, including any proposed Remedial Work, the estimated cost and time of completion, the name of the contractor and a copy of the construction contract, if any, and such additional data, instruments, documents, agreements or other materials or information as BNPPLC may reasonably request.

(2) NAI will provide BNPPLC and Participants with copies of all material written communications with Governmental Authorities relating to the matters listed in the preceding clause (1). NAI will also provide BNPPLC and Participants with copies of any correspondence from third Persons which threaten litigation over any significant failure or alleged significant failure of NAI to maintain or operate the Property in accordance with Environmental Laws.

(3) Prior to NAI's submission of a communication to any regulatory agency or third party which causes, or potentially could cause (whether by implementation of or response to said communication), a material change in the scope, duration, or nature of any Remedial Work, NAI must, to the extent practicable, deliver to BNPPLC and Participants a draft of the proposed submission (together with the proposed date of submission), and in good faith assess and consider any comments of BNPPLC regarding the same. Promptly after BNPPLC's request, NAI will meet with BNPPLC to discuss the submission, will provide any additional information reasonably requested by BNPPLC

and will provide a written explanation to BNPPPLC addressing the issues raised by comments (if any) of BNPPPLC regarding the submission.

9 Insurance Required and Condemnation.

(A) Liability Insurance. Throughout the Term NAI must maintain commercial general liability insurance against claims for bodily and personal injury, death and property damage occurring in or upon or resulting from any occurrence in or upon the Property under one or more insurance policies that satisfy the Minimum Insurance Requirements. NAI must deliver and maintain with BNPPPLC for each liability insurance policy required by this Lease written confirmation of the policy and the scope of the coverage provided thereby issued by the applicable insurer or its authorized agent, which confirmation must also satisfy the Minimum Insurance Requirements.

(B) Property Insurance.

(1) Throughout the Term NAI must keep all Improvements (including all alterations, additions and changes made to the Improvements) insured against fire and other casualty under one or more property insurance policies that satisfy the Minimum Insurance Requirements. NAI must deliver and maintain with BNPPPLC for each property insurance policy required by this Lease written confirmation of the policy and the scope of the coverage provided thereby issued by the applicable insurer or its authorized agent, which confirmation must also satisfy the Minimum Insurance Requirements.

(2) If any of the Property is destroyed or damaged by fire, explosion, windstorm, hail or by any other casualty against which insurance is required hereunder, (a) BNPPPLC may, but will not be obligated to, make proof of loss if not made promptly by NAI after notice from BNPPPLC, (b) each insurance company concerned is hereby authorized and directed to make payment for such loss directly to BNPPPLC (or, if so instructed by BNPPPLC, to NAI) for application as required by Paragraph 10, and (c) BNPPPLC will be entitled, in its own name or in the name of NAI or in the name of both, to settle, adjust or compromise any and all claims for loss, damage or destruction under any policy or policies of insurance; except that, if any such claim is for less than \$1,000,000, if no 97-10/Event has occurred and if no Event of Default has occurred and is continuing, NAI alone will have the right to settle, adjust or compromise the claim as NAI deems appropriate; and, except that, so long as no 97-10/Event has occurred and no Event of Default has occurred and is continuing, BNPPPLC must provide NAI with at least forty-five days notice of BNPPPLC's intention to settle any such claim before settling it unless NAI has already approved of the settlement by BNPPPLC.

(3) BNPPPLC will not in any event or circumstances be liable or responsible

for failure to collect, or to exercise diligence in the collection of, any insurance proceeds.

(4) If any casualty results in damage to or loss or destruction of the Property, NAI must give prompt notice thereof to BNPPLC and Paragraph 10 will apply.

(C) Failure to Obtain Insurance. If NAI fails to obtain any insurance or to provide confirmation of any such insurance as required by this Lease, BNPPLC will be entitled (but not required) to obtain the insurance that NAI has failed to obtain or for which NAI has not provided the required confirmation and, without limiting BNPPLC's other remedies under the circumstances, BNPPLC may require NAI to reimburse BNPPLC for the cost of such insurance and to pay interest thereon computed at the Default Rate from the date such cost was paid by BNPPLC until the date of reimbursement by NAI.

(D) Condemnation. Immediately upon obtaining knowledge of the institution of any proceedings for the condemnation of the Property or any portion thereof, or any other similar governmental or quasi-governmental proceedings arising out of injury or damage to the Property or any portion thereof, each party will promptly notify the other (provided, however, BNPPLC will have no liability for its failure to provide such notice) of the pendency of such proceedings. (As used herein, "condemnation of the Property" or words of like effect will include any indirect condemnation by means of a taking of the Land or the Existing Appurtenant Easements or any part thereof.) NAI must, at its expense, diligently prosecute any such proceedings and must consult with BNPPLC, its attorneys and experts and cooperate with them as reasonably requested in the carrying on or defense of any such proceedings. BNPPLC is hereby authorized, in its own name or in the name of NAI or in the name of both, at any time after a 97-10/Event or when an Event of Default has occurred and is continuing, but not otherwise without NAI's prior consent, to execute and deliver valid acquittances for, and to appeal from, any such judgment, decree or award concerning condemnation of any of the Property. BNPPLC will not in any event or circumstances be liable or responsible for failure to collect, or to exercise diligence in the collection of, any such proceeds, judgments, decrees or awards.

Notwithstanding the foregoing provisions of this subparagraph, if condemnation proceeds totaling not more than \$1,000,000 are to be recovered as a result of a taking of less than all or substantially all of the Property, NAI may directly receive and hold such proceeds so long as no Event of Default has occurred and is continuing and so long as NAI applies such proceeds as required herein.

(E) Waiver of Subrogation. NAI, for itself and for any Person claiming through it (including any insurance company claiming by way of subrogation), waives any and every claim which arises or may arise in its favor against BNPPLC or any other Interested Party to recover Losses for which NAI is compensated by insurance or would be compensated by the insurance contemplated in this Lease, but for any deductible or self-insured retention maintained under

such insurance or but for a failure of NAI to maintain the insurance as required by this Lease. NAI agrees to have such insurance policies properly endorsed so as to make them valid notwithstanding this waiver, if such endorsement is required to prevent a loss of insurance.

10 Application of Insurance and Condemnation Proceeds.

(A) Collection and Application of Insurance and Condemnation Proceeds Generally. This Paragraph 10 will govern the application of proceeds received by BNPPPLC or NAI during the Term from any third party (1) under any property insurance policy as a result of damage to the Property (including proceeds payable under any insurance policy covering the Property which is maintained by NAI), (2) as compensation for any restriction placed upon the use or development of the Property or for the condemnation of the Property or any portion thereof, or (3) because of any judgment, decree or award for injury or damage to the Property (e.g., damage resulting from a third party's release of Hazardous Materials onto the Property); excluding, however, any funds paid to BNPPPLC by BNPPPLC's Parent, by an Affiliate of BNPPPLC or by any Participant that is made to compensate BNPPPLC for any Losses BNPPPLC may suffer or incur in connection with this Lease or the Property. Except as provided in subparagraph 10(D), NAI must promptly pay over to BNPPPLC any insurance, condemnation or other proceeds covered by this Paragraph 10 which NAI may receive from any insurer, condemning authority or other third party. All proceeds covered by this Paragraph 10, including those received by BNPPPLC from NAI or third parties, will be applied as follows:

(1) First, proceeds covered by this Paragraph 10 will be used to reimburse BNPPPLC for any reasonable costs and expenses, including Attorneys' Fees, that BNPPPLC incurred to collect the proceeds.

(2) Second, the proceeds remaining after such reimbursement to BNPPPLC (hereinafter, the "**Remaining Proceeds**") will be applied, as hereinafter more particularly provided, either as a Qualified Prepayment or to reimburse NAI or BNPPPLC for the actual out-of-pocket costs of repairing or restoring the Property. Until, however, any Remaining Proceeds received by BNPPPLC are applied by BNPPPLC as a Qualified Prepayment or applied by BNPPPLC to reimburse costs of repairs to or restoration of the Property pursuant to this Paragraph 10, BNPPPLC will hold and maintain such Remaining Proceeds as Escrowed Proceeds in an interest bearing account, and all interest earned on such account will be added to and made a part of such Escrowed Proceeds.

(B) Advances of Escrowed Proceeds to NAI. Except as otherwise provided below in this Paragraph 10, BNPPPLC will advance all Remaining Proceeds held by it as Escrowed Proceeds to reimburse NAI for the actual out-of-pocket cost to NAI of repairing or restoring the Property in accordance with the requirements of this Lease and the other Operative Documents as the applicable repair or restoration, progresses and upon compliance by NAI with such terms,

conditions and requirements as may be reasonably imposed by BNPPPLC to assure the completion of such repair or restoration with available funds. So long as any Lease Balance remains outstanding, however, BNPPPLC will not be required to pay Escrowed Proceeds to NAI in excess of the actual out-of-pocket cost to NAI of the applicable repair or restoration, as evidenced by invoices or other documentation reasonably satisfactory to BNPPPLC, it being understood that BNPPPLC may retain and, after NAI has completed the applicable repair or restoration and been reimbursed for the out-of-pocket cost thereof, apply any such excess (or so much thereof as is needed to reduce the Lease Balance to zero) as a Qualified Prepayment.

(C) Application of Escrowed Proceeds as a Qualified Prepayment. Provided no 97-10/Event has occurred and no Event of Default has occurred and is continuing, BNPPPLC will apply any Remaining Proceeds paid to it (or other amounts available for application as a Qualified Prepayment) as a Qualified Prepayment on any date that BNPPPLC is directed to do so by a notice from NAI; however, if such a notice from NAI specifies an effective date for a Qualified Prepayment that is less than five Business Days after BNPPPLC's actual receipt of the notice, BNPPPLC may postpone the date of the Qualified Prepayment to any date not later than five Business Days after BNPPPLC's receipt of the notice. In any event, BNPPPLC may deduct Breakage Costs or any Fixed Rate Settlement Amount incurred in connection with any Qualified Prepayment from the Remaining Proceeds or other amounts available for application as the Qualified Prepayment, and NAI must reimburse BNPPPLC upon request for any such Breakage Costs or Fixed Rate Settlement Amount that BNPPPLC incurs but does not deduct.

(D) Right of NAI to Receive and Apply Remaining Proceeds Below a Certain Level. If, after the Completion Date, any condemnation of any portion of the Property or any casualty resulting in the diminution, destruction, demolition or damage to any portion of the Property will (in the good faith judgment of BNPPPLC) reduce the then current "AS IS" market value by less than \$1,000,000 and (in the good faith estimation of BNPPPLC) be unlikely to result in Remaining Proceeds of more than \$1,000,000, and if no 97-10/Event has occurred and no Event of Default has occurred and is continuing, then BNPPPLC will, upon NAI's request, instruct the condemning authority or insurer, as applicable, to pay the Remaining Proceeds resulting therefrom directly to NAI. NAI must apply any such Remaining Proceeds to the repair or restoration of the Property to a safe and secure condition and to a value of no less than the value before taking or casualty.

(E) Special Provisions Applicable After a 97-10/Event or Event of Default. Notwithstanding the foregoing, after any 97-10/Event, and when any Event of Default has occurred and is continuing, BNPPPLC will be entitled to receive and collect all insurance, condemnation or other proceeds governed by this Paragraph 10 and to apply all Remaining Proceeds, when and to the extent deemed appropriate by BNPPPLC in its sole discretion, either (A) to the reimbursement of NAI or BNPPPLC for the out-of-pocket cost of repairing or restoring the Property, or (B) as Qualified Prepayments.

(F) NAI's Obligation to Restore. Regardless of the adequacy of any Remaining Proceeds available to NAI hereunder, if *on or after* the Completion Date, the Property is damaged by fire or other casualty or less than all or substantially all of the Property is taken by condemnation, NAI must promptly restore or improve the Property or the remainder thereof to a value no less than the Lease Balance and to a reasonably safe and slightly condition. If for some reason NAI is unable to restore the Property or remainder thereof to a value of no less than the Lease Balance, then NAI must nevertheless promptly restore the Property or remainder thereof to a reasonably safe and slightly condition and pay to BNPPPLC for application as a Qualified Prepayment the amount (if any), as determined by BNPPPLC, needed to reduce the Lease Balance to no more than the then current "AS IS" market value of the Property or remainder thereof.

(G) Takings of All or Substantially All of the Property on or after the Completion Date. In the event of any taking of all or substantially all of the Property on or after the Completion Date, BNPPPLC will be entitled to apply all Remaining Proceeds (or so much thereof as is required to reduce the Lease Balance to zero) as a Qualified Prepayment. Any taking of so much of the Property as, in BNPPPLC's good faith judgment, makes it impracticable to restore or improve the remainder thereof as required by part (1) of the preceding subparagraph will be considered a taking of substantially all the Property for purposes of this Paragraph 10.

(H) If Remaining Proceeds Exceed the Lease Balance. Notwithstanding the various provisions of this Lease authorizing BNPPPLC to apply Remaining Proceeds received by it during the Term as a Qualified Prepayment, in the event any such Remaining Proceeds exceed the sum of (i) all payments thereof to NAI, (ii) any application thereof to cover the costs of repairing or restoring the Property and (iii) the Lease Balance, then the excess will not be applied as a Qualified Prepayment, but rather will constitute Escrowed Proceeds which must, if NAI exercises the Purchase Option pursuant to the Purchase Agreement, be delivered to NAI as provided therein.

11 **Additional Representations, Warranties and Covenants of NAI Concerning the Property**. NAI represents, warrants and covenants as follows:

(A) Operation and Maintenance. NAI must operate and maintain the Property in a good and workmanlike manner and in compliance with Applicable Laws in all material respects and pay or cause to be paid all fees or charges of any kind due in connection therewith. (If NAI does not promptly correct any failure of the Property to comply with Applicable Laws that is the subject of a written complaint or demand for corrective action given by any Governmental Authority to NAI, or to BNPPPLC and forwarded by it to NAI, then for purposes of the preceding sentence, NAI will be considered not to have maintained the Property "in compliance with all Applicable Laws in all material respects" whether or not the noncompliance would be material in the absence of the complaint or demand.) NAI will not use or occupy, or allow the use or occupancy of, the Property in any manner which violates any Applicable Laws or which

constitutes a public or private nuisance or which makes void, voidable or cancelable any insurance then in force with respect to the Property. To the extent that any of the following would, individually or in the aggregate, increase the likelihood of a 97-10/Event or materially and adversely affect the value of the Property or the use of the Property for purposes permitted by this Lease, NAI will not, without BNPPLC's prior consent: (i) initiate or permit any zoning reclassification of the Property; (ii) seek any variance under existing zoning ordinances applicable to the Property; (iii) use or permit the use of the Property in a manner that would result in such use becoming a nonconforming use under applicable zoning ordinances or similar laws, rules or regulations; (iv) execute or file any subdivision plat affecting the Property; or (v) consent to the annexation of the Property to any municipality. NAI will not cause or permit any drilling or exploration for, or extraction, removal or production of, minerals from the surface or subsurface of the Property, and NAI will not do anything that could reasonably be expected to significantly reduce the market value of the Property. If NAI receives a notice or claim from any Governmental Authority that the Property is not in compliance with any Applicable Law, or that any action may be taken against BNPPLC because the Property does not comply with any Applicable Law, NAI must promptly furnish a copy of such notice or claim to BNPPLC.

Notwithstanding the foregoing, NAI may in good faith, by appropriate proceedings, contest the validity and applicability of any Applicable Law with respect to the Property, and pending such contest NAI will not be deemed in default hereunder because of the violation of such Applicable Law, if NAI diligently prosecutes such contest to completion in a manner reasonably satisfactory to BNPPLC, and if NAI promptly causes the Property to comply with any such Applicable Law upon a final determination by a court of competent jurisdiction that the same is valid and applicable to the Property; provided, however, in any event such contest must be concluded and the violation of such Applicable Law must be corrected by NAI and any claims asserted against BNPPLC or the Property because of such violation must be paid by NAI, all prior to the earliest of (i) the date that any criminal prosecution is instituted or overtly threatened against BNPPLC or any of its directors, officers or employees because of such violation, (ii) the date that any action is taken or overtly threatened by any Governmental Authority against BNPPLC or any property owned by BNPPLC (including the Property) because of such violation, or (iii) a Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPLC's interest in the Property pursuant to the Purchase Agreement for a price to BNPPLC (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

(B) Debts for Construction, Maintenance, Operation or Development. NAI must cause all debts and liabilities incurred in the construction, maintenance, operation or development of the Property, including invoices for labor, material and equipment and all debts and charges for utilities servicing the Property, to be promptly paid.

Notwithstanding the foregoing, NAI may in good faith, by appropriate proceedings, contest the validity, applicability or amount of any asserted statutory liens in the nature of contractors', mechanics' or materialmens' liens, and pending such contest NAI will not be deemed in default under this subparagraph because of the contested lien if (1) within thirty days after being asked to do so by BNPPLC, NAI bonds over to BNPPLC's reasonable satisfaction all such contested liens against the Property alleged to secure an amount in excess of \$1,000,000 (individually or in the aggregate), (2) NAI diligently prosecutes such contest to completion in a manner reasonably satisfactory to BNPPLC, and (3) NAI promptly causes to be paid any amount adjudged by a court of competent jurisdiction to be due, with all costs and interest thereon, promptly after such judgment becomes final; provided, however, that in any event each such contest must be concluded and the lien, interest and costs must be paid by NAI prior to the earliest of (i) the date that any criminal prosecution is instituted or overtly threatened against BNPPLC or its directors, officers or employees because of the nonpayment thereof, (ii) the date that any writ or order is issued under which the Property or any other property in which BNPPLC has an interest may be seized or sold or any other action is taken or overtly threatened against BNPPLC or any property in which BNPPLC has an interest because of the nonpayment thereof, or (iii) a Designated Sale Date upon which, for any reason, NAI or an Affiliate of NAI or any Applicable Purchaser does not purchase BNPPLC's interest in the Property pursuant to the Purchase Agreement for a price to BNPPLC (when taken together with any Supplemental Payment paid by NAI pursuant to the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Break Even Price.

(C) Repair, Maintenance, Alterations and Additions. NAI must keep the Property in good order, operating condition and appearance and must cause all necessary repairs, renewals and replacements to be promptly made. NAI will not allow any of the Property to be materially misused, abused or wasted, and NAI will promptly replace any worn-out fixtures and tangible Personal Property with fixtures and personal property comparable to the replaced items when new. NAI will not, without the prior consent of BNPPLC, (i) remove from the Property any fixture or Personal Property having significant value except such as are replaced by NAI by fixtures or Personal Property of equal suitability and value, free and clear of any lien or security interest (and for purposes of this clause "significant value" will mean any fixture or Personal Property that has a value of more than \$100,000 or that, when considered together with all other fixtures and Personal Property removed and not replaced by NAI by items of equal suitability and value, has an aggregate value of \$500,000 or more) or (ii) make material new Improvements or alter Improvements in any material respect following completion of the Work contemplated in the Construction Management Agreement.

However, provided that no 97-10/Event has occurred, and so long as no Event of Default has occurred and is continuing, BNPPLC will not unreasonably withhold a consent requested by NAI pursuant to the preceding sentence for the construction or alteration of Improvements. NAI acknowledges, however, that BNPPLC's refusal or failure to give such consent will be deemed

reasonable if BNPPLC believes in good faith that the construction or alteration for which NAI is requesting consent could have a material adverse impact upon the value of the Property (taken as whole), or if NAI has not provided BNPPLC with adequate information to allow BNPPLC to properly evaluate such impact on value.

Without limiting the foregoing, NAI must notify BNPPLC before making any significant alterations to the Improvements after the completion of the Construction Project, regardless of the impact on the value of the Property expected to result from such alterations.

(D) Permitted Encumbrances. NAI must comply with and will cause to be performed all of the covenants, agreements and obligations imposed upon the owner of any interest in the Property by the Permitted Encumbrances. Without limiting the foregoing, NAI must cause all amounts to be paid when due, the payment of which is secured by any Lien against the Property created by the Permitted Encumbrances. Without the prior consent of BNPPLC, NAI will not create any new Permitted Encumbrance or enter into, initiate, approve or consent to any modification of any Permitted Encumbrance that would create or expand or purport to create or expand obligations or restrictions which would encumber BNPPLC's interest in the Property or be binding upon BNPPLC itself. (Whether BNPPLC must give any such consent requested by NAI during the Term of this Lease will be governed by subparagraph 4(C) of the Closing Certificate.)

(E) Books and Records Concerning the Property. NAI must keep books and records that are accurate and complete in all material respects for the Property and, subject to Paragraph 22, must permit all such books and records (including all contracts, statements, invoices, bills and claims for labor, materials and services supplied for the construction and operation of any Improvements) to be inspected and copied by BNPPLC during normal business hours. (BNPPLC will not over the objection of NAI inspect or copy such materials more than once in any twelve month period unless BNPPLC believes in good faith that more frequent inspection and copying is required to determine whether a Default or an Event of Default has occurred and is continuing or to assess the effect thereof or to properly exercise remedies with respect thereto.) This subparagraph will not be construed as requiring NAI to regularly maintain separate books and records relating exclusively to the Property, but NAI will as reasonably requested from time to time by BNPPLC construct or abstract from its regularly maintained books and records information required by this subparagraph relating to the Property.

12 Assignment and Subletting by NAI.

(A) BNPPLC's Consent Required. Without the prior consent of BNPPLC, NAI will not assign, transfer, mortgage, pledge or hypothecate this Lease or any interest of NAI hereunder and will not sublet all or any part of the Property, by operation of law or otherwise, except as follows:

(1) So long as no 97-10/Event has occurred and no Event of Default has occurred and is continuing, NAI may sublet (a) to Affiliates of NAI, or (b) no more than thirty-three percent (33%) (computed on the basis of square footage) of the useable space in then existing and completed building Improvements to Persons who are not NAI's Affiliates, subject to the conditions that (i) any such sublease by NAI must be made expressly subject and subordinate to the terms hereof, (ii) the sublease must have a term equal to or less than the remainder of the then effective Term of this Lease, and (iii) the use permitted by the sublease must be expressly limited to uses consistent with subparagraph 2(A) or other uses approved in advance by BNPPLC as uses that will not present any extraordinary risk of uninsured environmental or other liability.

(2) So long as no 97-10/Event has occurred and no Event of Default has occurred and is continuing, NAI may assign all of its rights under this Lease and the other Operative Documents to an Affiliate of NAI, subject to the conditions that (a) the assignment must be in writing and must unconditionally provide that the Affiliate assumes all of NAI's obligations hereunder and thereunder, and (b) NAI must execute an unconditional guaranty of the obligations assumed by the Affiliate in form satisfactory to BNPPLC, confirming (x) that notwithstanding the assignment NAI will remain primarily liable for all of the obligations undertaken by NAI under the Operative Documents, (y) that such guaranty is a guaranty of payment and not merely of collection, and (z) that NAI waives to the extent permitted by Applicable Law all defenses otherwise available to guarantors or sureties.

(B) Standard for BNPPLC's Consent to Assignments and Certain Other Matters. Consents and approvals of BNPPLC which are required by this Paragraph 12 will not be unreasonably withheld, but NAI acknowledges that BNPPLC's withholding of such consent or approval will be reasonable if BNPPLC determines in good faith that (1) giving the approval may increase BNPPLC's risk of liability for any existing or future environmental problem, (2) giving the approval is likely to substantially increase BNPPLC's administrative burden of complying with or monitoring NAI's compliance with the requirements of this Lease, or (3) any transaction for which NAI has requested the consent or approval would negate NAI's representations in the Operative Documents regarding ERISA or cause any of the Operative Documents (or any exercise of BNPPLC's rights thereunder) to constitute a violation of any provision of ERISA. Further, NAI acknowledges that BNPPLC may reasonably require, as a condition to giving its consent to any assignment by NAI, that NAI execute an unconditional guaranty providing that NAI will remain primarily liable for all of the tenant's obligations hereunder and under other Operative Documents. Any such guaranty must be a guaranty of payment and not merely of collection, must provide that NAI waives to the extent permitted by Applicable Law all defenses otherwise available to guarantors or sureties, and must otherwise be in a form satisfactory to BNPPLC.

(C) Consent Not a Waiver. No consent by BNPPPLC to a sale, assignment, transfer, mortgage, pledge or hypothecation of this Lease or NAI's interest hereunder, and no assignment or subletting of the Property or any part thereof in accordance with this Lease or otherwise with BNPPPLC's consent, will release NAI from liability hereunder; and any such consent will apply only to the specific transaction thereby authorized and will not relieve NAI from any requirement of obtaining the prior consent of BNPPPLC to any further sale, assignment, transfer, mortgage, pledge or hypothecation of this Lease or any interest of NAI hereunder.

13 Assignment by BNPPPLC.

(A) Restrictions on Transfers. Except by a Permitted Transfer, BNPPPLC will not assign, transfer, mortgage, pledge, encumber or hypothecate this Lease or the other Operative Documents or any interest of BNPPPLC in and to the Property during the Term without the prior consent of NAI, which consent NAI may withhold in its sole discretion. Further, notwithstanding anything to the contrary herein contained, if withholding taxes are imposed on the Rents payable to BNPPPLC hereunder because of BNPPPLC's assignment of this Lease to any citizen of, or any corporation or other entity formed under the laws of, a country other than the United States, NAI will not be required to compensate BNPPPLC or any such assignee for the withholding tax.

(B) Effect of Permitted Transfer or other Assignment by BNPPPLC. If by a Permitted Transfer BNPPPLC sells or otherwise transfers the Property and assigns to the transferee all of BNPPPLC's rights under this Lease and under the other Operative Documents, and if the transferee expressly assumes all of BNPPPLC's obligations under this Lease and under the other Operative Documents, then BNPPPLC will thereby be released from any obligations arising after such assumption under this Lease or under the other Operative Documents (other than any liability for a breach of any continuing obligation to provide Construction Advances under the Construction Management Agreement), and NAI must look solely to each successor in interest of BNPPPLC for performance of such obligations.

14 BNPPPLC's Right to Enter and to Perform for NAI.

(A) Right to Enter. BNPPPLC and BNPPPLC's representatives may, subject to subparagraph 14(C), enter the Property for the purpose of making inspections or performing any work BNPPPLC is authorized to undertake by the next subparagraph or for the purpose of confirming whether NAI has complied with the requirements of this Lease or the other Operative Documents. So long as no Event of Default has occurred and is continuing and no apparent emergency exists which would justify immediate entry, BNPPPLC will give NAI at least two Business Days notice before making any such entry over the objection of NAI and will limit any such entry to normal business hours.

(B) Performance for NAI. If NAI fails to perform any act or to take any action required of it by this Lease or the Closing Certificate, or to pay any money which NAI is required by this Lease or the Closing Certificate to pay, and if such failure or action constitutes an Event of Default or renders BNPPLC or any director, officer, employee or Affiliate of BNPPLC at risk of criminal prosecution or renders BNPPLC's interest in the Property or any part thereof at risk of forfeiture by forced sale or otherwise, then in addition to any other remedies specified herein or otherwise available, BNPPLC may, perform or cause to be performed such act or take such action or pay such money. Any expenses so incurred by BNPPLC, and any money so paid by BNPPLC, will be a demand obligation owing by NAI to BNPPLC. Further, upon making such payment, BNPPLC will be subrogated to all of the rights of the person, corporation or body politic receiving such payment. But nothing herein will imply any duty upon the part of BNPPLC to do any work which under any provision of this Lease NAI may be required to perform, and the performance thereof by BNPPLC will not constitute a waiver of NAI's default. BNPPLC may during the progress of any such work by BNPPLC keep and store upon the Property all necessary materials, tools, and equipment. BNPPLC will not in any event be liable for inconvenience, annoyance, disturbance, loss of business, or other damage to NAI or the subtenants or invitees of NAI by reason of the performance of any such work, or on account of bringing materials, supplies and equipment into or through the Property during the course of such work, and the obligations of NAI under this Lease will not thereby be excused in any manner.

(C) Building Security. So long as NAI remains in possession of the Property, BNPPLC or BNPPLC's representative will, before making any inspection or performing any work on the Property authorized by this Lease, do the following

(1) BNPPLC will give NAI at least 24 hours notice, unless BNPPLC believes in good faith that an emergency may exist or a Default has occurred and is continuing, because of which significant damage to the Property or other significant Losses may be sustained if BNPPLC delays entry to the Property; and

(2) if then requested to do so by NAI in order to maintain NAI's security, BNPPLC or its representative will: (i) sign in at NAI's security or information desk if NAI has such a desk on the premises, (ii) wear a visitor's badge or other reasonable identification, (iii) permit an employee of NAI to observe such inspection or work, and (iv) comply with other similar reasonable nondiscriminatory security requirements of NAI that do not, individually or in the aggregate, significantly interfere with inspections or work of BNPPLC authorized by this Lease.

15 Remedies.

(A) Traditional Lease Remedies. At any time after an Event of Default and after BNPPLC has given any notice required by subparagraph 15(C), BNPPLC will be entitled at

BNPPLC's option (and without limiting BNPPLC in the exercise of any other right or remedy BNPPLC may have, and without any further demand or notice except as expressly described in this subparagraph 15(A)), to exercise any one or more of the following remedies:

- (1) By notice to NAI, BNPPLC may terminate NAI's right to possession of the Property. However, only a notice clearly and unequivocally confirming that BNPPLC has elected to terminate NAI's right of possession will be effective for purposes of this provision.
- (2) Upon termination of NAI's right to possession as provided in the immediately preceding subsection (1) and without further demand or notice, BNPPLC may re-enter the Property in any manner not prohibited by Applicable Laws and take possession of all improvements, additions, alterations, equipment and fixtures thereon and remove any persons in possession thereof. Any personal property on the Land may be removed and stored in a warehouse or elsewhere, and in such event the cost of any such removal and storage will be at the expense and risk of and for the account of NAI.
- (3) Upon termination of NAI's right to possession as provided in the immediately preceding subsection (1), this Lease will terminate and BNPPLC may recover from NAI damages which include the following:
 - (a) the worth at the time of award of the unpaid Rent which had been earned at the time of termination;
 - (b) costs and expenses actually incurred by BNPPLC to repair damage to the Property that NAI was obligated to (but failed to) repair prior to the termination;
 - (c) the sum of the following ("**Lease Termination Damages**"):
 - 1) the worth at the time of award of the amount by which the unpaid Rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that NAI proves could have been reasonably avoided;
 - 2) the worth at the time of award of the amount by which the unpaid Rent for the balance of the scheduled Term after the time of award exceeds the amount of such rental loss that NAI proves could be reasonably avoided;
 - 3) any other amount necessary to compensate BNPPLC for all

the detriment proximately caused by NAI's failure to perform NAI's obligations under this Lease or which in the ordinary course of things would be likely to result therefrom, including the costs and expenses of preparing and altering the Property for reletting and all other costs and expenses of reletting (including Attorneys' Fees, advertising costs and brokers' commissions), and

(d) such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by applicable California law.

The "**worth at the time of award**" of the amounts referred to in subparagraph 15(A)(3)(a) and subparagraph 15(A)(3)(c)1) will be computed by allowing interest at the Default Rate. The "**worth at the time of award**" of the amount referred to in subparagraph 15(A)(3)(c)2) will be computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent (1%).

Notwithstanding the foregoing, the total Lease Termination Damages which BNPPLC may recover from NAI will be limited in amount to the extent required, if any, to prevent the sum of recoverable Lease Termination Damages, plus any Supplemental Payment that BNPPLC has received or remains entitled to recover pursuant to the Purchase Agreement, from being more than the Maximum Remarketing Obligation; *provided, however*, if a Supplemental Payment is owed to BNPPLC according to the Purchase Agreement, but NAI fails to pay it, this limitation upon BNPPLC's right to recover Lease Termination Damages will be of no effect. For purposes of this provision, "Maximum Remarketing Obligation" is intended to have the meaning assigned to it in the Purchase Agreement and is intended to be computed as of the date any award of Lease Termination Damages to BNPPLC as if such date was the Designated Sale Date.

(4) Even after a breach of this Lease or abandonment of the Property by NAI, BNPPLC may continue this Lease in force and recover Rent as it becomes due. Accordingly, despite any breach or abandonment by NAI, this Lease will continue in effect for so long as BNPPLC does not terminate NAI's right to possession, and BNPPLC may enforce all of BNPPLC's rights and remedies under this Lease, including the right to recover the Rent as it becomes due under this Lease. NAI's right to possession will not be deemed to have been terminated by BNPPLC except pursuant to subparagraph 15(A)(1) hereof. The following will not constitute a termination of NAI's right to possession:

- (a) Acts of maintenance or preservation or efforts to relet the Property;
- (b) The appointment of a receiver upon the initiative of BNPPLC to

protect BNPPPLC's interest under this Lease; or

(c) Reasonable withholding of consent to an assignment or subletting, or terminating a subletting or assignment by NAI.

(B) Foreclosure Remedies. At any time when an Event of Default has occurred and is continuing, BNPPPLC may notify NAI of BNPPPLC's intent to pursue remedies described in Exhibit B, and at any time thereafter, regardless of whether the Event of Default is continuing, if NAI has not already purchased the Property or caused an Applicable Purchaser to purchase the Property pursuant to the Purchase Agreement, (i) BNPPPLC will have the power and authority, to the extent provided by law, after proper notice and lapse of such time as may be required by law, to sell or arrange for a sale to foreclose its lien and security interest granted in Exhibit B, and (ii) BNPPPLC, in lieu of or in addition to exercising any power of sale granted in Exhibit B, may proceed by a suit or suits in equity or at law, whether for a foreclosure or sale of the Property, or against NAI for the Lease Balance, or for the specific performance of any covenant or agreement herein contained or in aid of the execution of any power herein granted, or for the appointment of a receiver pending any foreclosure or sale of the Property, or for the enforcement of any other appropriate legal or equitable remedy.

(C) Notice Required So Long As the Purchase Option Continues Under the Purchase Agreement. After the Term actually commences and so long as NAI remains in possession of the Property and there has been no termination of the Purchase Option as provided in Paragraph 6(B) of the Purchase Agreement, BNPPPLC's right to exercise remedies provided in subparagraph 15(A) or to complete any foreclosure sale as provided in subparagraph 15(B) will be subject to the condition precedent that BNPPPLC has notified NAI, at a time when an Event of Default has occurred and is continuing and no less than thirty days prior to exercising such remedies or completing such a sale, of BNPPPLC's intent to do so. The condition precedent is intended to provide NAI with an opportunity to exercise the Purchase Option before losing possession of the Property because of the remedies enumerated in subparagraph 15(A) or because of a sale authorized by subparagraph 15(B). The condition precedent is not, however, intended to extend any period for curing an Event of Default. Accordingly, if an Event of Default has occurred, and regardless of whether any Event of Default is then continuing, BNPPPLC may proceed immediately to exercise remedies provided in subparagraph 15(A) or complete a sale authorized by subparagraph 15(B) at any time after the earliest of (i) thirty days after BNPPPLC has given such a notice to NAI, (ii) any date upon which NAI relinquishes possession of the Property, or (iii) any termination of the Purchase Option.

(D) Enforceability. This Paragraph 15 will be enforceable to the maximum extent not prohibited by Applicable Laws, and the unenforceability of any provision in this Paragraph will not render any other provision unenforceable.

(E) **Remedies Cumulative.** No right or remedy herein conferred upon or reserved to BNPPLC is intended to be exclusive of any other right or remedy, and each and every such right and remedy will be cumulative and in addition to any other right or remedy given to BNPPLC hereunder or now or hereafter existing in favor of BNPPLC under Applicable Laws, except as otherwise expressly provided in this subparagraph ?. In addition to other remedies provided in this Lease, BNPPLC will be entitled, to the extent permitted by Applicable Law or in equity, to injunctive relief in case of the violation, or attempted or threatened violation, of any of the covenants, agreements, conditions or provisions of this Lease, or to a decree compelling performance of any of the other covenants, agreements, conditions or provisions of this Lease to be performed by NAI, or to any other remedy allowed to BNPPLC at law or in equity. Nothing contained in this Lease will limit or prejudice the right of BNPPLC to prove for and obtain in proceedings for bankruptcy or insolvency of NAI by reason of the termination of this Lease, an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which, the damages are to be proved, whether or not the amount be greater, equal to, or less than the amount of the loss or damages referred to above. Without limiting the generality of the foregoing, nothing contained herein will modify, limit or impair any of the rights and remedies of BNPPLC under the Purchase Agreement, and BNPPLC will not be required to give the thirty day notice described in subparagraph 15(C) as a condition precedent to any acceleration of the Designated Sale Date or to taking any action to enforce the Purchase Agreement. However, to prevent a double recovery, BNPPLC acknowledges that BNPPLC's right to recover Lease Termination Damages may be limited by the last provision of subparagraph 15(A)(3) above in the event BNPPLC collects or remains entitled to collect a Supplemental Payment as provided in the Purchase Agreement.

16 **Default by BNPPLC.** If BNPPLC should default in the performance of any of its obligations under this Lease, BNPPLC will have the time reasonably required, but in no event less than thirty days, to cure such default after receipt of notice from NAI specifying such default and specifying what action NAI believes is necessary to cure the default.

17 **Quiet Enjoyment.** Provided NAI pays the Base Rent and all Additional Rent payable hereunder as and when due and payable and keeps and fulfills all of the terms, covenants, agreements and conditions to be performed by NAI hereunder, BNPPLC will not during the Term disturb NAI's peaceable and quiet enjoyment of the Property; however, such enjoyment will be subject to the terms and conditions of this Lease, to the Ground Lease, to Permitted Encumbrances and to any other claims not constituting Liens Removable by BNPPLC. If any Lien Removable by BNPPLC is established against the Property, BNPPLC will remove the Lien Removable by BNPPLC promptly. Any breach by BNPPLC of this Paragraph will render BNPPLC liable to NAI for any monetary damages proximately caused thereby, but as more specifically provided in subparagraph 4(B) above, no such breach will entitle NAI to terminate this Lease or excuse NAI from its obligation to pay Rent.

18 **Surrender Upon Termination.** Unless NAI or an Applicable Purchaser is purchasing or has purchased BNPPLC's entire interest in the Property pursuant to the terms of the Purchase Agreement, NAI must, upon the termination of NAI's right to occupancy, surrender to BNPPLC the Property, including Improvements constructed by NAI and fixtures and furnishings included in the Property, free of all Hazardous Substances (including Permitted Hazardous Substances) and tenancies and with all Improvements in substantially the same condition as of the date the same were initially completed, excepting only (i) ordinary wear and tear that occurs between the maintenance, repairs and replacements required by other provisions of this Lease, and (ii) demolition, alterations and additions which are expressly permitted by the terms of this Lease and which have been completed by NAI in a good and workmanlike manner in accordance with all Applicable Laws. Any movable furniture or movable personal property belonging to NAI or any party claiming under NAI, if not removed at the time of such termination and if BNPPLC so elects, will be deemed abandoned and become the property of BNPPLC without any payment or offset therefor. If BNPPLC does not so elect, BNPPLC may remove such property from the Property and store it at NAI's risk and expense. NAI must bear the expense of repairing any damage to the Property caused by such removal by BNPPLC or NAI.

19 **Holding Over by NAI.** Should NAI not purchase BNPPLC's right, title and interest in the Property as provided in the Purchase Agreement, but nonetheless continue to hold the Property after the termination of this Lease without objection by BNPPLC, whether such termination occurs by lapse of time or otherwise, such holding over will constitute and be construed as a tenancy from day to day only on and subject to all of the terms, provisions, covenants and agreements on the part of NAI hereunder. No payments of money by NAI to BNPPLC after the termination of this Lease will reinstate, continue or extend the Term of this Lease and no extension of this Lease after the termination thereof will be valid unless and until the same is reduced to writing and signed by both BNPPLC and NAI.

20 **Recording Memorandum.** Contemporaneously with the execution of this Lease, the parties will execute and record a memorandum of this Lease for purposes of effecting constructive notice to all Persons of NAI's rights hereunder.

21 **Independent Obligations Evidenced by Other Operative Documents.** NAI acknowledges and agrees that nothing contained in this Lease will limit, modify or otherwise affect any of NAI's obligations under the other Operative Documents, which obligations are intended to be separate, independent and in addition to, and not in lieu of, the obligations set forth herein. Further, in the event of any inconsistency between the express terms and provisions of the Purchase Agreement and the express terms and provisions of this Lease, the express terms and provisions of the Purchase Agreement will control.

22 **Proprietary Information and Confidentiality.**

(A) Proprietary Information. NAI will have no obligation to provide proprietary information (as defined in the next sentence) to BNPPPLC, except and to the extent (1) expressly required by other terms and conditions of the Operative Documents, or (2) requested by BNPPPLC in connection with any inspection of the Property pursuant to the various provisions hereof and, in BNPPPLC's reasonable determination, required to allow BNPPPLC to accomplish the purposes of such inspection. (Before NAI delivers any such proprietary information in connection with any inspection of the Property, NAI may require that BNPPPLC confirm and ratify the confidentiality agreements covering such proprietary information set forth herein.) For purposes of this Lease and the other Operative Documents, "**proprietary information**" means NAI's intellectual property, trade secrets and other confidential information of value to NAI (including, among other things, information about NAI's manufacturing processes, products, marketing and corporate strategies) that (1) is received by any representative of BNPPPLC at the time of any on-site visit to the Property or (2) otherwise delivered to BNPPPLC by or on behalf of NAI and labeled "proprietary" or "confidential" or by some other similar designation to identify it as information which NAI considers to be proprietary or confidential.

(B) Confidentiality. BNPPPLC will endeavor in good faith to use reasonable precautions to keep confidential any proprietary information that BNPPPLC may receive from NAI or otherwise discover with respect to NAI or NAI's business in connection with the administration of this Lease or any investigation by BNPPPLC hereunder. This provision will not, however, render BNPPPLC liable for any disclosures of proprietary information made by it or its employees or representatives, unless the disclosure is intentional and made for no reason other than to damage NAI's business. Also, this provision will not apply to disclosures: (i) specifically and previously authorized in writing by NAI; (ii) to any assignee of BNPPPLC as to any interest in the Property so long as such assignee has agreed in writing to use its reasonable efforts to keep such information confidential in accordance with the terms of this paragraph; (iii) to legal counsel, accountants, auditors, environmental consultants and other professional advisors to BNPPPLC so long as BNPPPLC informs such persons in writing (if practicable) of the confidential nature of such information and directs them to treat such information confidentially; (iv) to regulatory officials having jurisdiction over BNPPPLC or BNPPPLC's Parent (although the disclosing party will request confidential treatment of the disclosed information, if practicable); (v) as required by legal process (although the disclosing party will request confidential treatment of the disclosed information, if practicable); (vi) of information which has previously become publicly available through the actions or inactions of a person other than BNPPPLC not, to BNPPPLC's knowledge, in breach of an obligation of confidentiality to NAI; (vii) to any Participant so long as the Participant is bound by and has not repudiated a confidentiality provision concerning NAI's proprietary information set forth in the Participation Agreement; or (viii) that are reasonably believed by BNPPPLC to be necessary or helpful to the determination or enforcement of any contractual or other rights which BNPPPLC has or may have against NAI or its Affiliates or which BNPPPLC has or may have concerning the Property (provided, that BNPPPLC must cooperate with NAI as NAI may reasonably request to mitigate any risk that such

disclosures will result in subsequent disclosures of proprietary information which are not necessary or helpful to any such determination or enforcement; such cooperation to include, for example, BNPPLC's agreement not to oppose a motion by NAI to seal records containing proprietary information in any court proceeding initiated because of a dispute between the parties over the Property or the Operative Documents).

Further, notwithstanding any other contrary provision contained in this Lease or the other Operative Documents, BNPPLC and NAI (and each of their respective employees, representatives or other agents) may disclose, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Lease and all materials of any kind (including opinions or other tax analyses) that are provided to such party relating to such tax treatment and tax structure, other than any information for which non-disclosure is reasonably necessary in order to comply with applicable securities laws and other than any information the disclosure of which would waive the attorney-client privilege, the tax advisor privilege under Section 7525 of the Internal Revenue Code, or similar privileges.

[The signature pages follow.]

IN WITNESS WHEREOF, this Lease is executed to be effective as of December 14, 2006.

BNP PARIBAS LEASING CORPORATION, a
Delaware corporation

By: /s/ Lloyd G. Cox
Lloyd G. Cox, Managing Director

Lease Agreement — Signature Page

[Continuation of signature pages for Lease dated as of December 14, 2006]

NETWORK APPLIANCE, INC., a Delaware
corporation

By: /s/ Ingemar Lanevi
Ingemar Lanevi, Vice President and Corporate
Treasurer

Lease Agreement — Signature Page

Exhibit A

Legal Description

Proposed Parcel 8, and (except to the extent within a different platted Parcel as currently shown in the Map Records of the County of Santa Clara, California) proposed Parcel 12, and the Additional Leased Premises as defined below, (collectively, the “**2006 Ground Lease Premises**”) as shown on that certain Vesting Tentative Parcel Map provided to BNP Paribas Leasing Corporation (“**BNPPLC**”) by Network Appliance, Inc. (“**NAI**”) attached hereto and made a part hereof (the “**Tentative Map**”), which has received preliminary approval from the City of Sunnyvale, California, but not yet been filed for record in the office of the recorder of the County of Santa Clara, State of California. As used herein, “**Additional Leased Premises**” means the parking lots, driveways and other areas shaded in gray on the Tentative Map attached hereto within the larger area designated as Common Lot A (consisting of 30.46 Acres, more or less) on the Tentative Map. The southern boundary of the Additional Leased Premises is a line that runs North 75 degrees, 07 minutes, 58 seconds equidistant from the southern boundary of Parcel 8 and the northern boundary of Parcel 7, both as shown on the Tentative Map. The eastern boundary of the Additional Leased Premises runs along the same line as the eastern boundary of Common Lot A, as shown on the Tentative Map. The western boundary of the Additional Leased Premises runs along the same line as the western boundary of Parcel 8 and Parcel 7, as shown on the Tentative Map. The northern boundary of the Additional Leased Premises runs along the center of an existing or proposed driveway which is situated between Parcel 8 and Parcel 9, as shown on the Tentative Map.

TOGETHER WITH, easements appurtenant to the 2006 Ground Lease Premises as described in Exhibit A attached to the Ground Lease.

Exhibit B

California Foreclosure Provisions

Without limiting any of the provisions set forth in the body of this Lease or other attachments to this Lease, the following provisions are included in and made a part of this Lease for all purposes:

GRANT OF LIEN AND SECURITY INTEREST.

NAI, for and in consideration of the sum of Ten Dollars (\$10.00) to NAI in hand paid by Lloyd G. Cox, Trustee, of Dallas County, Texas (in this Exhibit called the "**Trustee**"), in order to secure the recovery of the Lease Balance by BNPPPLC and the payment of all of the other obligations, covenants, agreements and undertakings of NAI under this Lease or other Operative Documents (in this Exhibit called the "**Secured Obligations**"), does hereby irrevocably GRANT, BARGAIN, SELL, CONVEY, TRANSFER, ASSIGN and SET OVER to the Trustee, IN TRUST WITH POWER OF SALE, for the benefit of BNPPPLC, the leasehold interest in the Land created by the Ground Lease, together with (i) all the buildings and other improvements now on or hereafter located thereon; (ii) all materials, equipment, fixtures or other property whatsoever now or hereafter attached or affixed to or installed in said buildings and other improvements, including, but not limited to, all heating, plumbing, lighting, water heating, refrigerating, incinerating, ventilating and air conditioning equipment, utility lines and equipment (whether owned individually or jointly with others), sprinkler systems, fire extinguishing apparatus and equipment, water tanks, engines, machines, elevators, motors, cabinets, shades, blinds, partitions, window screens, screen doors, storm windows, awnings, drapes, and floor coverings, and all fixtures, accessions and appurtenances thereto, and all renewals or replacements of or substitutions for any of the foregoing, all of which are hereby declared to be permanent fixtures and accessions to the freehold and part of the realty conveyed herein as security for the obligations mentioned hereinabove; (iii) all easements and rights of way now and at any time hereafter used in connection with any of the foregoing property or as a means of ingress to or egress from the Land or for utilities to said property; (iv) all interests of NAI in and to any streets, ways, alleys and/or strips of land adjoining said land or any part thereof; (v) all rents, issues, profits, royalties, bonuses, income and other benefits derived from or produced by the Land or Improvements; (vi) all leases or subleases of the Land or Improvements or any part thereof now or hereafter in effect, including all security or other deposits, advance or prepaid rents, and deposits or payments of similar nature; (vii) all options to purchase or lease the Land or Improvements or any part thereof or interest therein, and any greater estate in the Land or Improvements now owned or hereafter acquired by NAI; (viii) all right, title, estate and interest of every kind and nature, at law or in equity, which NAI now has or may hereafter acquire in the Land or Improvements; and (ix) all other claims and demands with respect to the Land or Improvements or the Collateral (as hereinafter defined), including all claims or demands to all proceeds of all insurance now or hereafter in effect with respect to the Land, Improvements or Collateral, all awards made for the taking by condemnation or the power of eminent domain, or by any proceeding or purchase in lieu thereof, of the Land, Improvements or Collateral, or any part thereof, or any damage or injury thereto, all awards resulting from a change of grade of

streets, and all awards for severance damages; and (vi) all rights, estates, powers and privileges appurtenant or incident to the foregoing.

TO HAVE AND TO HOLD the foregoing property (in this Exhibit called the "Mortgaged Property") unto the Trustee, IN TRUST, and his successors or substitutes in this trust and to his or their successors and assigns upon the terms, provisions and conditions herein set forth for the benefit of BNPPLC.

In order to secure the Secured Obligations, NAI also hereby grants to BNPPLC a security interest in: all components of the Property which constitute personalty, whether owned by NAI now or hereafter, and all fixtures, accessions and appurtenances thereto, and all renewals or replacements of or substitutions for any of the foregoing (including all building materials and equipment now or hereafter delivered to said premises and intended to be installed or in or incorporated as part of the Improvements); all rents and other amounts from and under leases of all or any part of the Property; all issues, profits and proceeds from all or any part of the Property; all proceeds (including premium refunds) of each policy of insurance relating to the Property; all proceeds from the taking of the Property or any part thereof or any interest therein or right or estate appurtenant thereto by eminent domain or by purchase in lieu thereof; all permits, licenses, franchises, certificates, and other rights and privileges obtained in connection with the Property; all plans, specifications, maps, surveys, reports, architectural, engineering and construction contracts, books of account, insurance policies and other documents, of whatever kind or character, relating to the use, construction upon, occupancy, leasing, sale or operation of the Property; all proceeds and other amounts paid or owing to NAI under or pursuant to any and all contracts and bonds relating to the construction, erection or renovation of the Property; and all oil, gas and other hydrocarbons and other minerals produced from or allocated to the Property and all products processed or obtained therefrom, the proceeds thereof, and all accounts and general intangibles under which such proceeds may arise, together with any sums of money that may now or at any time hereafter become due and payable to NAI by virtue of any and all royalties, overriding royalties, bonuses, delay rentals and any other amount of any kind or character arising under any and all present and future oil, gas and mining leases covering the Property or any part thereof (all of the property described in this section are collectively called the "**Collateral**" in this Exhibit) and all proceeds of the Collateral. (The Mortgaged Property and the Collateral are in this Exhibit sometimes collectively called the "**Security**".)

FORECLOSURE BY POWER OF SALE

Upon the occurrence of any Event of Default, the Trustee, its successor or substitute, and/or BNPPLC is authorized and empowered to execute all written notices then required by law to cause the Security to be sold under power of sale to satisfy the Secured Obligations. Trustee shall give and record such notices as the law then requires as a condition precedent to a trustee's sale. When the minimum period of time required by law after giving all required notices has elapsed, Trustee, without notice to or demand upon NAI except as otherwise required by law,

shall sell the Security at the time and place of sale fixed by it in the notice of sale, at one or several sales, either as a whole or in separate parcels and in such manner and order, all as BNPPPLC or Trustee in its sole discretion may determine, at public auction to the highest bidder for cash, in lawful money of the United States, payable at the time of sale (the obligations hereby secured being the equivalent of cash for purposes of said sale). NAI shall have no right to direct the order in which the Security is sold or to require that the Security be sold in separate lots or parcels or items. The sale by the Trustee of less than the whole of the Mortgaged Property shall not exhaust the power of sale herein granted, and the Trustee is specifically empowered to make successive sale or sales under such power until the whole of the Mortgaged Property shall be sold; and, if the proceeds of such sale of less than the whole of the Mortgaged Property shall be less than the aggregate of the indebtedness secured hereby and the expense of executing this trust as provided herein, the rights and remedies of BNPPPLC hereunder and the lien hereof shall remain in full force and effect as to the unsold portion of the Mortgaged Property just as though no sale or sales had been made; provided, however, that NAI shall never have any right to require the sale of less than the whole of the Mortgaged Property but BNPPPLC shall have the right, at its sole election, to request the Trustee to sell less than the whole of the Mortgaged Property. Subject to requirements and limits imposed by law, including California Civil Code § 2924g, Trustee may postpone sale of all or any portion of the Security by public announcement at such time and place of sale and from time to time may postpone the sale by public announcement at the time and place fixed by the preceding postponement. Any person or entity, including Trustee, NAI or BNPPPLC, may purchase at the sale, and NAI hereby covenants to warrant and defend the title of such purchaser or purchasers. Trustee shall deliver to the purchaser at such sale a deed conveying the Security or portion thereof so sold, but without any covenant or warranty, express or implied. At any such sale (i) NAI hereby agrees, in its behalf and in behalf of its heirs, executors, administrators, successors, personal representatives and assigns, that any and all recitals made in any deed of conveyance given by Trustee of any matters or facts stated therein, including without limitation, the identity of BNPPPLC, the occurrence or existence of any default, the acceleration of the maturity of any of the Secured Obligations, the request to sell, the notice of sale, the giving of notice to all debtors legally entitled thereto, the time, place, terms, and manner of sale, and receipt, distribution and application of the money realized therefrom, and the due and proper appointment of a substitute Trustee and any other act or thing duly done by BNPPPLC or by Trustee hereunder, shall be taken by all courts of law and equity as prima facie evidence that the statement or recitals state facts and are without further question to be so accepted as conclusive proof of the truthfulness thereof, and NAI hereby ratifies and confirms every act that Trustee or any substitute Trustee hereunder may lawfully do in the premises by virtue hereof; and (ii) the purchaser may disaffirm any easement granted, or rental, lease or other contract made, in violation of any provision of any of the Operative Documents, and may take immediate possession of the Security free from, and despite the terms, of, such grant of easement and rental or lease contract.

BNPPPLC may elect to cause the Security or any part thereof to be sold under the power of sale herein granted in any manner permitted by applicable law. In connection with any sale or sales

hereunder, BNPPLC may elect to treat any portion of the Security which consists of a right in action or which is property that can be severed from the Security without causing structural damage thereto as if the same were personal property, and dispose of the same in accordance with applicable law, separate and apart from the sale of the real property. Any sale of any personal property hereunder shall be conducted in any manner permitted by the California Uniform Commercial Code (in this Exhibit called the “Code”). Where any portion of the Security consists of real property and personal property or fixtures, whether or not such personal property is located on or within the real property, BNPPLC may elect in its discretion to exercise its rights and remedies against any or all of the real property, personal property and fixtures, in such order and manner as is now or hereafter permitted by applicable law. Without limiting the generality of the foregoing, BNPPLC may, in its sole and absolute discretion and without regard to the adequacy of its security, elect to proceed against any or all of the real property, personal property and fixtures in any manner permitted by the Code; and if BNPPLC elects to sell both personal property and real property together as permitted by the Code, the power of sale herein granted shall be exercisable with respect to all or any of the real property, personal property and fixtures covered hereby, as designated by BNPPLC, and Trustee is hereby authorized and empowered to conduct any such sale of any real property, personal property and fixtures in accordance with the procedures applicable to real property. Where any portion of the Security consists of real property and personal property, any reinstatement of the Secured Obligations, following default and an election by BNPPLC to accelerate the maturity of said obligations, which is made by NAI or any other person or entity permitted to exercise the right of reinstatement under § 2924c of the California Civil Code or any successor statute, shall, in accordance with the terms of Code, not prohibit BNPPLC or Trustee from conducting a sale or other disposition of any personal property or fixtures or from otherwise proceeding against or continuing to proceed against any personal property or fixtures in any manner permitted by the Code, nor shall any such reinstatement invalidate, rescind or otherwise affect any sale, disposition or other proceeding held, conducted or instituted with respect to any personal property or fixtures prior to such reinstatement or pending at the time of such reinstatement. Any sums paid to BNPPLC in effecting any reinstatement pursuant to § 2924c of the California Civil Code shall be applied to the indebtedness secured hereby, and to BNPPLC’s reasonable costs and expenses in the manner required by § 2924c. Should BNPPLC elect to sell any portion of the Security which is real property, or which is personal property or fixtures that BNPPLC has elected to sell together with the real property in accordance with the laws governing a sale of real property, BNPPLC or Trustee shall give such notice of default and election to sell as may then be required by law, and without the necessity of any demand on NAI, Trustee, at the time(s) and place(s) specified in the notice of sale, shall sell said real property, and all estate, right, title, interest, claim and demand therein, and equity and right of redemption thereof, at such times and places as required or permitted by law, upon such terms as BNPPLC or Trustee may fix and specify in the notice of sale or as may be required by law. If the Security consists of several lots, parcels or items of property, BNPPLC may: (i) designate the order in which such lots, parcels or items shall be offered for sale or sold, or (ii) elect to sell such lots, parcels or items through a single sale, or through two or more successive sales, or in any other manner BNPPLC deems in

its best interest. Should BNPPPLC desire that more than one sale or other disposition of the Mortgaged Property be conducted, BNPPPLC may, at its option, cause the same to be conducted simultaneously, or successively, on the same day, or on such different days or times and in such order as BNPPPLC may deem to be in its best interests, and no such sale shall exhaust the power of sale herein granted or terminate or otherwise affect the lien granted by NAI herein on, or the security interests of BNPPPLC in, any part of the Security not sold, until all of the indebtedness secured hereby has been fully paid and satisfied. In the event BNPPPLC elects to dispose of the Security through more than one sale, NAI agrees to pay the costs and expenses of each such sale and of any judicial proceedings wherein the same may be made, including reasonable compensation to BNPPPLC and Trustee, their agents and counsel, and to pay all expenses, liabilities and advances made or incurred by BNPPPLC and Trustee (or either of them) in connection with such sale or sale, together with interest on all such advances made by BNPPPLC and Trustee (or either of them) at the Default Rate.

JUDICIAL FORECLOSURE

This instrument shall be effective as a mortgage as well as a deed of trust and upon the occurrence of an Event of Default may be foreclosed as to any of the Security in any manner permitted by the laws of the State of California or of any other state in which any part of the Security is situated, and any foreclosure suit may be brought by the Trustee or by BNPPPLC. In the event a foreclosure hereunder shall be commenced by the Trustee, or his substitute or successor, BNPPPLC may at any time before the sale of the Security direct the said Trustee to abandon the sale, and may then institute suit for the collection of the Secured Obligations and for the judicial foreclosure of this instrument. It is agreed that if BNPPPLC should institute a suit for the collection of the Secured Obligations and for the foreclosure of this instrument, BNPPPLC may at any time before the entry of a final judgment in said suit dismiss the same, and require the Trustee, his substitute or successor to exercise the power of sale granted herein to sell the Security in accordance with the provisions of this instrument.

BNPPPLC AS PURCHASER

BNPPPLC shall have the right to become the purchaser at any sale held by any Trustee or substitute or successor or by any receiver or public officer, and any BNPPPLC purchasing at any such sale shall have the right to credit upon the amount of the bid made therefor, to the extent necessary to satisfy such bid, the outstanding Lease Balance and other Secured Obligations owing to such BNPPPLC.

UNIFORM COMMERCIAL CODE REMEDIES

Upon the occurrence of an Event of Default, BNPPPLC may exercise its rights of enforcement with respect to the Collateral under the California Uniform Commercial Code, as

amended, and in conjunction with, in addition to or in substitution for those rights and remedies:

- (a) BNPPLC may enter upon the Land to take possession of, assemble and collect the Collateral or to render it unusable; and
- (b) BNPPLC may require NAI to assemble the Collateral and make it available at a place BNPPLC designates which is mutually convenient to allow BNPPLC to take possession or dispose of the Collateral; and
- (c) written notice mailed to NAI as provided herein ten (10) days prior to the date of public sale of the Collateral or prior to the date after which private sale of the Collateral will be made shall constitute reasonable notice; and
- (d) any sale made pursuant to the provisions of this section shall be deemed to have been a public sale conducted in a commercially reasonable manner if held contemporaneously with the sale of the Mortgaged Property under power of sale as provided herein upon giving the same notice with respect to the sale of the Collateral hereunder as is required for such sale of the Mortgaged Property under power of sale; and
- (e) in the event of a foreclosure sale, whether made by the Trustee exercising the power of sale granted herein, or under judgment of a court, the Collateral and the Mortgaged Property may, at the option of BNPPLC, be sold as a whole; and
- (f) it shall not be necessary that BNPPLC take possession of the Collateral or any part thereof prior to the time that any sale pursuant to the provisions of this section is conducted and it shall not be necessary that the Collateral or any part thereof be present at the location of such sale; and
- (g) prior to application of proceeds of disposition of the Collateral to the Secured Obligations, such proceeds shall be applied to the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and the reasonable attorney's fees and legal expenses incurred by BNPPLC; and
- (h) any and all statements of fact or other recitals made in any bill of sale or assignment or other instrument evidencing any foreclosure sale hereunder as to nonpayment of the Secured Obligations or as to the occurrence of any Event of Default, or as to BNPPLC having declared any of the Secured Obligations to be due and payable, or as to notice of time, place and terms of sale and of the properties to be sold having been duly given, or as to any other act or thing having been duly done by BNPPLC, shall be taken as prima facie evidence of the truth of the facts so stated and recited; and
- (i) BNPPLC may appoint or delegate any one or more persons as agent to

perform any act or acts necessary or incident to any sale held by BNPPPLC, including the sending of notices and the conduct of the sale, but in the name and on behalf of BNPPPLC.

APPOINTMENT OF A RECEIVER

In addition to all other remedies herein provided for, if any Event of Default occurs or continues after the Designated Sale Date, BNPPPLC shall as a matter of right be entitled to the appointment of a receiver or receivers for all or any part of the Security, whether such receivership be incident to a proposed sale of such property or otherwise, and without regard to the adequacy of the security or the value of the Security or the solvency of any person or persons liable for the payment of the Secured Obligations, and NAI does hereby irrevocably consent to the appointment of such receiver or receivers, waives any and all defenses to such appointment and agrees not to oppose any application therefor by BNPPPLC, but nothing herein is to be construed to deprive BNPPPLC of any other right, remedy or privilege it may now have under the law to have a receiver appointed. Any such receiver or receivers shall have all of the usual powers and duties of receivers in like or similar cases and shall continue as such and exercise all such powers until the date of confirmation of sale of the Security unless such receivership is sooner terminated. Any money advanced by BNPPPLC in connection with any such receivership shall be a demand obligation owing by NAI to BNPPPLC and shall bear interest from the date of making such advancement by BNPPPLC until paid at the Default Rate and shall be a part of the Secured Obligations and shall be secured by this lien and by any other instrument securing the Secured Obligations.

PROVISIONS CONCERNING THE TRUSTEE

Trustee accepts this trust when a Short Form Lease or memorandum referencing the provisions of this Exhibit, duly executed and acknowledged, is made a public record as provided by law. The trust hereby created shall be irrevocable by NAI.

In the event the Trustee takes any action pursuant to the provisions of this Exhibit, NAI shall pay to Trustee reasonable compensation for services rendered in the administration of this trust, which shall be in addition to any required reimbursement for Attorney's Fees or other expenses.

BNPPPLC may appoint a substitute to replace and act as the Trustee hereunder in any manner now or hereafter provided by law, or in lieu thereof, BNPPPLC may from time to time, by an instrument in writing, appoint substitutes as successor or successors to any Trustee named herein or acting hereunder, which instrument, executed and acknowledged by BNPPPLC and recorded in the Office of the Recorder of the county in which the Property is located, shall be conclusive proof of proper substitution of such successor Trustee or Trustees, who shall thereupon and without conveyance from the predecessor Trustee, succeed to all its title, estate,

rights, powers and duties. Such instrument must contain the name of the original NAI, Trustee and BNPPLC hereunder, the instrument number of this Deed of Trust, and the name and address of the successor Trustee. In the event the Secured Obligations are at any time owned by more than one person or entity, the holder or holders of not less than a majority in the amount of such Secured Obligations shall have the right and authority to make the appointment of a successor or substitute trustee provided for in the preceding sentences. Such appointment and designation by BNPPLC or by the holder or holders of not less than a majority of the Secured Obligations shall be full evidence of the right and authority to make the same and of all facts therein recited. If BNPPLC is a corporation and such appointment is executed in its behalf by an officer of such corporation, such appointment shall be conclusively presumed to be executed with authority and shall be valid and sufficient without proof of any action by the board of directors or any superior officer of the corporation. Upon the making of any such appointment and designation, all of the estate and title of the Trustee in the Security shall vest in the named successor or substitute trustee and he shall thereupon succeed to and shall hold, possess and execute all the rights, powers, privileges, immunities and duties herein conferred upon the Trustee; but nevertheless, upon the written request of BNPPLC or of the successor or substitute Trustee, the Trustee ceasing to act shall execute and deliver an instrument transferring to such successor or substitute Trustee all of the estate and title in the Security of the Trustee so ceasing to act, together with all the rights, powers, privileges, immunities and duties herein conferred upon the Trustee, and shall duly assign, transfer and deliver any of the properties and moneys held by said Trustee hereunder to said successor or substitute Trustee. All references herein to the Trustee shall be deemed to refer to the Trustee (including any successor or substitute appointed and designated as herein provided) from time to time acting hereunder. NAI hereby ratifies and confirms any and all acts which the herein named Trustee or his successor or successors, substitute or substitutes, in this trust, shall do lawfully by virtue hereof.

THE TRUSTEE SHALL NOT BE LIABLE FOR ANY ERROR OF JUDGMENT OR ACT DONE BY THE TRUSTEE IN GOOD FAITH, OR BE OTHERWISE RESPONSIBLE OR ACCOUNTABLE UNDER ANY CIRCUMSTANCES WHATSOEVER (INCLUDING THE TRUSTEE'S NEGLIGENCE), EXCEPT FOR THE TRUSTEE'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT. The Trustee shall have the right to rely on any instrument, document or signature authorizing or supporting any action taken or proposed to be taken by him hereunder, believed by him in good faith to be genuine. All moneys received by the Trustee shall, until used or applied as herein provided, be held in trust for the purposes for which they were received, but need not be segregated in any manner from any other moneys (except to the extent required by law), and the Trustee shall be under no liability for interest on any moneys received by him hereunder. NAI WILL REIMBURSE THE TRUSTEE FOR, AND INDEMNIFY AND SAVE HIM HARMLESS AGAINST, ANY AND ALL LIABILITY AND EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES) WHICH MAY BE INCURRED BY HIM IN THE PERFORMANCE OF HER DUTIES HEREUNDER (INCLUDING ANY LIABILITY AND EXPENSES RESULTING FROM THE TRUSTEE'S OWN NEGLIGENCE). The foregoing indemnity shall not terminate upon release, foreclosure or

other termination of this instrument.

MISCELLANEOUS

BNPPLC may resort to any security given by this instrument or to any other security now existing or hereafter given to secure the payment of the Secured Obligations, in whole or in part, and in such portions and in such order as may seem best to BNPPLC in its sole and uncontrolled discretion, and any such action shall not in anywise be considered as a waiver of any of the rights, benefits, liens or security interests evidenced by this instrument.

To the full extent NAI may do so, NAI agrees that NAI will not at any time insist upon, plead, claim or take the benefit or advantage of any law now or hereafter in force pertaining to the rights and remedies of sureties or redemption, and NAI, for NAI and NAI's successors and assigns, and for any and all persons ever claiming any interest in the Security, to the extent permitted by law, hereby waives and releases all rights of redemption, valuation, appraisal, stay of execution, notice of intention to mature or declare due the whole of the Secured Obligations, notice of election to mature or declare due the whole of the Secured Obligations and all rights to a marshaling of the assets of NAI, including the Security, or to a sale in inverse order of alienation in the event of foreclosure of the liens and security interests hereby created. NAI shall not have or assert any right under any statute or rule of law pertaining to the marshaling of assets, sale in inverse order of alienation, the exemption of homestead, the administration of estates of decedents or other matters whatever to defeat, reduce or affect the right of BNPPLC under the terms of this instrument to a sale of the Security for the collection of the Secured Obligations without any prior or different resort for collection, or the right of BNPPLC under the terms of this instrument to the payment of the Secured Obligations out of the proceeds of sale of the Security in preference to every other claimant whatever. If any law referred to in this section and now in force, of which NAI or NAI's successors and assigns and such other persons claiming any interest in the Security might take advantage despite this provision, shall hereafter be repealed or cease to be in force, such law shall not thereafter be deemed to preclude the application of this provision.

In the event there is a foreclosure sale hereunder and at the time of such sale NAI or NAI's successors or assigns or any other persons claiming any interest in the Security by, through or under NAI are occupying or using the Security, or any part thereof, each and all shall immediately become the tenant of the purchaser at such sale. Such tenancy shall be a tenancy from day-to-day, terminable at the will of either landlord or tenant, at a reasonable rental per day based upon the value of the property occupied, such rental to be due daily to the purchaser. In the event the tenant fails to surrender possession of said property upon demand, the purchaser shall be entitled to institute and maintain an action to obtain possession in any court of competent jurisdiction in California.

NAI agrees to pay BNPPLC for each statement of BNPPLC (as beneficiary) regarding the

obligations secured hereby the maximum fee allowed by law or, if there is no maximum fee, such reasonable fee as is then charged by BNPPPLC for rendering such statement.

Notwithstanding any contrary provisions regarding the giving of notices in the Common Definitions or Provisions Agreement or other Operative Documents, any service of a notice required by California Civil Code §2924 shall be considered complete when the requirements of that statute are met.

All rights of action under this Exhibit be enforced by BNPPPLC or Trustee without the possession of any instruments secured hereby and without the production thereof or of this Lease or other Operative Documents at any trial or other proceeding relative thereto.

PURCHASE AGREEMENT

BETWEEN

**NETWORK APPLIANCE, INC.
("NAI")**

AND

**BNP PARIBAS LEASING CORPORATION
("BNPPLC")**

December 14, 2006

TABLE OF CONTENTS

		<u>Page</u>
1	Additional Definitions	2
	“97-1/Default (100%)”	2
	“Applicable Purchaser”	2
	“Adjusted Break Even Price”	2
	“Adjusted Lease Balance”	2
	“Balance of Unpaid Construction Period Losses”	3
	“BNPPLC’s Actual Out of Pocket Costs”	4
	“Break Even Price”	4
	“Committed Price”	4
	“Conditions to NAI’s Initial Remarketing Rights”	4
	“Contingent Losses”	5
	“Decision Not to Sell at a Loss”	5
	“Deemed Sale”	5
	“Extended Remarketing Period”	5
	“Fair Market Value”	5
	“Final Sale Date”	5
	“Initial Remarketing Notice”	6
	“Initial Remarketing Price”	6
	“Lease Balance”	6
	“Make Whole Amount”	6
	“Maximum Remarketing Obligation”	7
	“Must Sell Price”	7
	“NAI’s Extended Remarketing Right”	7
	“NAI’s Initial Remarketing Rights”	7
	“NAI’s Target Price”	7
	“Notice of Sale”	7
	“Proposed Sale”	7
	“Proposed Sale Date”	7
	“Purchase Option”	7
	“Put Option”	7
	“Qualified Sale”	8
	“Sale Closing Documents”	8
	“Supplemental Payment”	9
	“Supplemental Payment Obligation”	9
	“Valuation Procedures”	9
2	NAI’s Options and Obligations <i>ON</i> the Designated Sale Date	9
	(A) <u>Purchase Option; Initial Remarketing Rights; Supplemental Payment Obligation</u>	9
	(B) <u>Designation of the Purchaser</u>	11
	(C) <u>Delivery of Property Related Documents If BNPPLC Retains the Property</u>	11

TABLE OF CONTENTS
(Continued)

	(D) <u>Effect of the Purchase Option and NAI's Initial Remarketing Rights on Subsequent Title Encumbrances</u>	11
	(E) <u>Security for NAI's Purchase Option</u>	12
3	NAI's Rights, Options and Obligations <i>AFTER</i> the Designated Sale Date	12
	(A) <u>NAI's Right to Buy During the Thirty Days After the Designated Sale Date</u>	12
	(B) <u>NAI's Obligation to Buy if Certain Conditions Are Satisfied</u>	12
	(C) <u>NAI's Extended Right to Remarket</u>	13
	(D) <u>Deemed Sale On the Second Anniversary of the Designated Sale Date</u>	14
	(E) <u>NAI's Right to Share in Sales Proceeds Received By BNPPLC From any Qualified Sale</u>	14
4	Transfers By BNPPLC After the Designated Sale Date	15
	(A) <u>BNPPLC's Right to Sell</u>	15
	(B) <u>Survival of NAI's Rights and the Supplemental Payment Obligation</u>	15
	(C) <u>Easements and Other Transfers in the Ordinary Course of Business</u>	15
5	Terms of Conveyance Upon Purchase	16
	(A) <u>Tender of Sale Closing Documents</u>	16
	(B) <u>Delivery of Escrowed Proceeds</u>	16
6	Survival and Termination of the Rights and Obligations of NAI and BNPPLC	17
	(A) <u>Status of this Agreement Generally</u>	17
	(B) <u>Election by NAI to Terminate the Supplemental Payment Obligation Prior to the Completion Date</u>	17
	(C) <u>Automatic Termination of NAI's Rights</u>	18
	(D) <u>Payment Only to BNPPLC</u>	18
	(E) <u>Preferences and Voidable Transfers</u>	18
	(F) <u>Remedies Under the Other Operative Documents</u>	18
7	Certain Remedies Cumulative	19
8	Attorneys' Fees and Legal Expenses	19
9	Successors and Assigns	19

TABLE OF CONTENTS
(Continued)

Exhibits and Schedules

Exhibit A	Legal Description
Exhibit B	Valuation Procedures
Exhibit C	Requirements Re: Forms to Accomplish Assignment and Conveyance
Exhibit C-1	Agreement Concerning Ground Lease
Exhibit C-2	Form of Assignment of Ground Lease and Improvements
Exhibit C-3	Form of Bill of Sale and Assignment
Exhibit C-4	Form of Acknowledgment of Disclaimer of Representations and Warranties
Exhibit D	Secretary's Certificate
Exhibit E	FIRPTA Statement
Exhibit F	Grant of Repurchase Option and Restrictive Covenants Agreement
Exhibit G	Notice of Election to Terminate the Supplemental Payment Obligation

PURCHASE AGREEMENT

This PURCHASE AGREEMENT (this “**Agreement**”), dated as of December 14, 2006 (the “**Effective Date**”), is made by and between BNP PARIBAS LEASING CORPORATION (“**BNPPLC**”), a Delaware corporation, and NETWORK APPLIANCE, INC. (“**NAI**”), a Delaware corporation.

RECITALS

Contemporaneously with the execution of this Agreement, BNPPLC and NAI are executing a Common Definitions and Provisions Agreement dated as of the Effective Date (the “**Common Definitions and Provisions Agreement**”), which by this reference is incorporated into and made a part of this Agreement for all purposes. *As used in this Agreement, capitalized terms defined in the Common Definitions and Provisions Agreement and not otherwise defined in this Agreement are intended to have the respective meanings assigned to them in the Common Definitions and Provisions Agreement.*

Contemporaneously with this Agreement, BNPPLC is executing and accepting a Ground Lease from NAI (the “**Ground Lease**”), pursuant to which BNPPLC is acquiring a leasehold estate in the Land described in Exhibit A and any existing Improvements on the Land.

Also contemporaneously with this Agreement, BNPPLC and NAI are executing a Construction Management Agreement dated as of the Effective Date (the “**Construction Management Agreement**”) and a Lease Agreement dated as of the Effective Date (the “**Lease**”). Pursuant to the Construction Management Agreement, BNPPLC is agreeing to provide funding for the construction of new Improvements. When the term of the Lease commences, the Lease will cover all Improvements on the Land described in Exhibit A. (As used herein, “**Property**” means (i) all of BNPPLC’s interests, including those created by the Ground Lease, in the Land and in the Improvements and in all other real and personal property from time to time covered or to be covered by the Lease and included within the “Property” as defined therein, and (ii) BNPPLC’s interest in any Escrowed Proceeds yet to be applied as a Qualified Prepayment or to the cost of repairs to the Improvements or other property covered by the Lease; except that, for purposes of this Agreement, Property will not include any condemnation or insurance proceeds included in Escrowed Proceeds as a result of any Pre-lease Force Majeure Event, nor will it include any right to receive any such condemnation or insurance proceeds in the future.)

NAI and BNPPLC have agreed on the terms and conditions upon which NAI may purchase or arrange for the purchase of the Property, and by this Agreement they desire to confirm all such terms and conditions.

AGREEMENTS

1 **Additional Definitions.** As used in this Agreement, capitalized terms defined above have the respective meanings assigned to them above; as indicated above, capitalized terms that are defined in the Common Definitions and Provisions Agreement and that are used but not otherwise defined have the respective meanings assigned to them in the Common Definitions and Provisions Agreement; and, the following terms have the following respective meanings:

“**97-1/Default (100%)**” means a Default or an Event of Default that results from (A) a failure of NAI to make any payment required by any Operative Document, including (i) any 97-10 Permitted Prepayment payable as provided in Paragraph 9 of the Construction Management Agreement, (ii) any other amounts payable under the Construction Management Agreement because of Covered Construction Period Losses, (iii) any payment of Rent required by the Lease or (iv) any Supplemental Payment required by this Agreement, or (B) any Hazardous Substance Activities occurring after the Completion Date on or about the Land, or (C) any failure of NAI after the Completion Date to insure, maintain, operate or repair the Property in accordance with all terms and conditions of the Lease, or (D) any failure of NAI after the Completion Date to apply insurance or condemnation proceeds as required by the Lease, or (E) any breach by NAI of the Ground Lease, or (F) subject to the proviso at the end of Exhibit B, any breach by NAI of the provisions set forth in Exhibit B. Except as provided in subparagraph 3(B), the characterization of any Event of Default as a 97-1/Default (100%) will not affect the rights or remedies available to BNPPPLC because of the Event of Default.

“**Applicable Purchaser**” means (1) the third party designated by NAI to purchase the Property at any sale arranged by NAI as provided in this Agreement, or (2) the third party designated by BNPPPLC as the purchaser at any Qualified Sale not arranged by NAI.

“**Adjusted Break Even Price**” means an amount equal to:

- the Adjusted Lease Balance, *plus*
- all of BNPPPLC’s Actual Out of Pocket Costs.

“**Adjusted Lease Balance**” means a dollar amount equal to the following (but not less than zero):

- the Lease Balance, *less*
- Pre-lease Force Majeure Losses (if any).

“**Balance of Unpaid Construction Period Losses**” means, subject to the qualifications set forth below in this definition, an amount equal to the sum of:

- (1) the total Losses (if any), including Contingent Losses, that have been incurred or suffered by BNPPPLC or other Interested Parties at any time and from time to time prior to the Completion Date by reason of, in connection with or arising out of (A) their ownership or alleged ownership of any interest in the Property or the payments required by the Operative Documents, (B) the use or operation of the Property, (C) the negotiation, administration or enforcement of the Operative Documents, (D) the making of Funding Advances, (E) the Construction Project, (F) the breach by NAI of this Agreement or any other Operative Document or any other document executed by NAI in connection herewith, (G) any failure of the Property or NAI itself to comply with Applicable Laws, (H) Permitted Encumbrances, (I) Hazardous Substance Activities, including those occurring prior to Effective Date, (J) any obligations of BNPPPLC under the Ground Lease or the Closing Certificate, or (K) any bodily or personal injury or death or property damage occurring in or upon or in the vicinity of the Property through any cause whatsoever; *plus*
- (2) interest accruing at the Default Rate, compounded annually, on each payment of any such Losses by BNPPPLC or any other Interested Party from the date such payment was made to the Designated Sale Date.

For purposes of computing the Balance of Unpaid Construction Period Losses, Losses as described in clause (1) of this definition will include each reduction (if any) (i) in the Carrying Costs added to the Outstanding Construction Allowance as provided in the Construction Management Agreement, or (ii) in the Base Rent payable to BNPPPLC as provided in the Lease, that results from Pre-lease Force Majeure Losses. In other words, the Losses described in clause (1) will include the amounts (if any) by which additional Carrying Costs and Base Rent would have accrued if Pre-lease Force Majeure Losses were not a factor in the formulas which are set forth in the Construction Management Agreement and in the Lease for calculating Carrying Costs and Base Rent, respectively.

Notwithstanding the foregoing, however, none of the following will be included in the Balance of Unpaid Construction Period Losses: (i) costs paid by BNPPPLC with the proceeds of the Initial Advance as part of the Transaction Expenses; (ii) Losses paid or reimbursed from Construction Advances (including Local Impositions, insurance premiums and amounts paid by NAI prior to the Completion Date and reimbursed to it through Construction Advances made pursuant to the Construction Management Agreement, and also including costs and expenditures incurred or paid by or on behalf of BNPPPLC after any Owner’s Election to Continue Construction, to the extent that such

costs and expenditures are considered to be Construction Advances as provided in the Construction Management Agreement); (iii) any other Losses which NAI has paid prior to the Designated Sale Date or for which NAI remains fully obligated to pay pursuant to the other Operative Documents (including Covered Construction Period Losses paid or payable by NAI pursuant to the Construction Management Agreement); and (iv) any decline in the value of the Property, including any such decline that is attributable solely to a Pre-lease Force Majeure Event and thus constitutes a Pre-lease Force Majeure Loss.

“**BNPPLC’s Actual Out of Pocket Costs**” means the out-of-pocket costs and expenses, if any, incurred by BNPPLC in connection with a sale of the Property under this Agreement or in connection with the collection of payments due to it under this Agreement (including any Breakage Costs; Attorneys’ Fees; appraisal costs; income, transfer, withholding or other taxes which do not constitute Excluded Taxes; but not including Excluded Taxes or costs of removing any Lien Removable by BNPPLC).

“**Break Even Price**” means an amount equal to:

- the Lease Balance, *plus*
- all costs and expenses (including any Breakage Costs, Attorneys’ Fees, appraisal costs and income or other taxes except Excluded Taxes) incurred by BNPPLC in connection with any sale of BNPPLC’s interests in the Property under this Agreement or in connection with collecting payments due to it under this Agreement, *and plus*
- an amount equal to the Balance of Unpaid Construction Period Losses (if any).

If, however, the Balance of Unpaid Construction Period Losses includes Contingent Losses, then for purposes of computing the Break Even Price applicable to any proposed sale on the Designated Sale Date, NAI may elect to exclude such Contingent Losses from the Break Even Price by providing to BNPPLC, for the benefit of BNPPLC and other Interested Parties, a written agreement to indemnify and defend BNPPLC and other Interested Parties against the excluded Losses. However, to be effective for purposes of reducing the Break Even Price, any such written indemnity must be fully executed and delivered by NAI on or prior to the Designated Sale Date, must include provisions comparable to subparagraphs 5(C)(1), (2), (3), (4) and (5) of the Lease and otherwise must be in form and substance reasonably satisfactory to BNPPLC.

“**Committed Price**” has the meaning indicated in subparagraph 3(C)(4).

“**Conditions to NAI’s Initial Remarketing Rights**” has the meaning indicated in

subparagraph 2(A)(2)(a).

“**Contingent Losses**” means any Losses that consist of claims asserted against BNPPPLC or another Interested Party prior to the Designated Sale Date, but that are not liquidated or paid on or prior to the Designated Sale Date. Any Contingent Losses included in the Unpaid Balance of Construction Period Losses, and thus which are relevant to the computation of the Break Even Price, will equal the sum as reasonably estimated by BNPPPLC of (i) all Attorneys’ Fees and other costs that will be incurred to defend against such claims, and (ii) the amount for which BNPPPLC or the other Interested Party can settle or satisfy such claims.

“**Decision Not to Sell at a Loss**” means a decision by BNPPPLC not to sell the Property on the Designated Sale Date to an Applicable Purchaser pursuant to subparagraph 2(A)(2), despite NAI’s satisfaction of the Conditions to NAI’s Initial Remarketing Rights.

“**Deemed Sale**” has the meaning indicated in subparagraph 3(D).

“**Extended Remarketing Period**” means a period beginning on the Designated Sale Date and ending on the Final Sale Date.

“**Fair Market Value**” has the meaning indicated in Exhibit B.

“**Final Sale Date**” means the earlier of:

- any date after the Designated Sale Date upon which BNPPPLC conveys the Property to consummate a sale of the Property to NAI because of BNPPPLC’s exercise of the Put Option as provided in subparagraph 3(B); or
- any date after the Designated Sale Date upon which BNPPPLC conveys the Property to consummate a sale of the Property to NAI or to any Affiliate of NAI, including any such sale resulting from NAI’s exercise of its rights under subparagraph 3(A); or
- any date after the Designated Sale Date upon which BNPPPLC conveys the Property to consummate a Qualified Sale, or would have done so but for a material breach of this Agreement by NAI (including any breach of its obligation to make any Supplemental Payment required in connection with such Qualified Sale); or
- the second anniversary of the Designated Sale Date, which will be the date of a

Deemed Sale as provided in subparagraph 3(0) if no earlier date qualifies as the Final Sale Date and the entire Property is not sold by BNPPPLC to NAI or an Applicable Purchaser prior to the second anniversary of the Designated Sale Date.

“**Initial Remarketing Notice**” means a notice delivered to BNPPPLC by NAI prior to the Designated Sale Date in which NAI confirms NAI’s decision to exercise NAI’s Initial Remarketing Rights and the amount of the Initial Remarketing Price. (Once given, any such notice may not be rescinded or modified without BNPPPLC’s consent.)

“**Initial Remarketing Price**” means the cash price set forth in an Initial Remarketing Notice delivered by NAI to BNPPPLC as the price for which NAI has arranged a sale of the Property to an Applicable Purchaser on the Designated Sale Date. Such price may be any price negotiated by the Applicable Purchaser in good faith and on an arms length basis with NAI.

“**Lease Balance**” means the Lease Balance (as defined in the Common Definitions and Provisions Agreement) on the Designated Sale Date, but computed without deduction for any Supplemental Payment or other amount paid to BNPPPLC pursuant to this Agreement on the Designated Sale Date.

“**Make Whole Amount**” means the sum of the following:

(1) the amount (if any) by which the Lease Balance plus any Base Rent or other amounts due to BNPPPLC pursuant to the other Operative Documents but unpaid on the Designated Sale Date, exceeds any Supplemental Payment which was actually paid to BNPPPLC on the Designated Sale Date, together with interest on such excess computed at the Default Rate for the period commencing on the Designated Sale Date and ending on the Final Sale Date, plus

(2) BNPPPLC’s Actual Out of Pocket Costs, plus

(3) the amount, but not less than zero, by which (i) all Local Impositions, insurance premiums and other Losses of every kind suffered or incurred by BNPPPLC (whether or not reimbursed in whole or in part by another Interested Party) with respect to the ownership, operation or maintenance of the Property during the Extended Remarketing Period, exceeds (ii) any rents or other sums collected by BNPPPLC during such period from third parties as consideration for any lease or other contracts made by BNPPPLC that authorize the use and enjoyment of the Property or any part thereof by such parties; together with interest on such excess computed at the Default Rate for each day prior to the Final Sale Date.

“**Maximum Remarketing Obligation**” means a dollar amount equal to the following (but not less than zero):

- 85% of the Adjusted Lease Balance; *less*
- any Fixed Rate Settlement Amount that NAI is required to pay pursuant to the Lease because of any acceleration of the Designated Sale Date which causes it to occur prior to the Scheduled Lease Expiration Date.

“**Must Sell Price**” means, with respect to any Proposed Sale arranged by NAI pursuant to subparagraph 3(C), a cash price to BNPPLC equal to the Make Whole Amount, computed as of the Proposed Sale Date applicable to such Proposed Sale, *plus* all reimbursements or payments by BNPPLC to NAI that will be required by clause (4) of subparagraph 3(E) in connection with the Proposed Sale.

“**NAI’s Extended Remarketing Right**” has the meaning indicated in subparagraph 3(C).

“**NAI’s Initial Remarketing Rights**” has the meaning indicated in subparagraph 2(A)(2).

“**NAI’s Target Price**” means the cash purchase price that, according to NAI, should reasonably be expected for the Property during the Extended Remarketing Period if NAI makes a reasonable marketing effort to sell the Property, as such price is set forth in a notice given by NAI to BNPPLC after the Designated Sale Date. Once established by any such notice, the amount of NAI’s Target Price will not be increased, although nothing in this definition will be construed to prevent NAI from arranging a sale of the Property pursuant to this Agreement at a price higher than NAI’s Target Price. After providing a notice of NAI’s Target Price to BNPPLC, NAI may later decrease NAI’s Target Price by another notice to BNPPLC, but only if the decrease is justified by a material adverse change in the physical condition of the Property (*e.g.*, significant damage to the Property by fire or other casualty).

“**Notice of Sale**” has the meaning indicated in subparagraph 3(C)(4).

“**Proposed Sale**” has the meaning indicated in subparagraph 3(C).

“**Proposed Sale Date**” has the meaning indicated in subparagraph 3(C).

“**Purchase Option**” has the meaning indicated in subparagraph 2(A)(1).

“**Put Option**” has the meaning indicated in subparagraph 3(B).

“**Qualified Sale**” means (1) a Deemed Sale as described in subparagraph 3(D), or (2) an actual sale (prior to any such Deemed Sale) of all or substantially all of the Property that occurs after the thirty day period specified in subparagraph 3(A) and that:

- results from NAI’s exercise of NAI’s Extended Remarketing Right as described in subparagraph 3(c); or
- is approved in advance as a Qualified Sale by NAI; or
- is to a third party, which is not an Affiliate of BNPPLC, for a price not less than the least of the following amounts:
 - (a) the lowest price at which BNPPLC will be obligated, pursuant to clause (4) of subparagraph 3(E), to reimburse to NAI (i) the entire amount of any Supplemental Payment theretofore made by NAI to BNPPLC, or (ii) if no such Supplemental Payment has been made, but NAI has theretofore made one or more 97-1/Prepayments to BNPPLC, all such 97-10/Prepayments; or
 - (b) (i) if NAI notified BNPPLC of NAI’s Target Price prior to the date BNPPLC and the third party agreed to a price for the sale, NAI’s Target Price, or (ii) if NAI did not notify BNPPLC of NAI’s Target Price prior to the date BNPPLC and the third party agreed to a price for the sale, any price satisfactory to BNPPLC in its sole good faith business judgment; or
 - (c) 90% of the Fair Market Value of the Property.

NAI acknowledges that BNPPLC’s own marketing efforts after the Designated Sale Date will depend upon the minimum price required for a Qualified Sale, and such efforts could be hampered if NAI’s Target Price is too high. Thus, after receipt of any notice of NAI’s Target Price from NAI, BNPPLC may (but will not be obligated to) invoke the Valuation Procedures in order to determine the minimum price permitted under clause (c) preceding.

“**Sale Closing Documents**” means the following documents, which BNPPLC must tender pursuant to Paragraph 5(A) to consummate any sale of the Property pursuant to this Agreement: (1) documents in the forms required by Exhibit C, including either a termination or an assignment of the Ground Lease and other rights and interests of BNPPLC in the Property, (2) a Secretary’s Certificate in the form attached as Exhibit D (3) a certificate concerning tax withholding in the form attached as Exhibit E, and (4) if the condition specified in subparagraph 3(C)(6) is applicable, a Grant of Repurchase

Option and Restrictive Covenants Agreement executed by both NAI and the Applicable Purchaser in the form attached as Exhibit E.

“**Supplemental Payment**” has the meaning indicated in subparagraph 2(A)(3).

“**Supplemental Payment Obligation**” has the meaning indicated in subparagraph 2(A)(3).

“**Valuation Procedures**” means procedures set forth in Exhibit B, which are to be followed in the event a determination of the Fair Market Value of the Property or any portion thereof is required by this Agreement.

2 NAI’s Options and Obligations ON the Designated Sale Date.

(A) Purchase Option; Initial Remarketing Rights; Supplemental Payment Obligation. Whether or not an Event of Default has occurred and is continuing, but subject to Paragraph 6 below:

(1) NAI will have the right (the “**Purchase Option**”) to purchase or cause an Affiliate of NAI, as the Applicable Purchaser, to purchase the Property on the Designated Sale Date for a cash price equal to the Break Even Price.

(2) If NAI does not exercise the Purchase Option, NAI will have the following rights (collectively, “**NAI’s Initial Remarketing Rights**”):

(a) First, NAI will have the right to designate a third party, other than an Affiliate of NAI, as the Applicable Purchaser and to cause such Applicable Purchaser to purchase the Property on the Designated Sale Date for a cash price equal to the Initial Remarketing Price. Such right, however, will be subject to the conditions (the “**Conditions to NAI’s Initial Remarketing Rights**”) that (i) NAI deliver an Initial Remarketing Notice to BNPPLC on or within the thirty days prior to the Designated Sale Date, (ii) on the Designated Sale Date the Applicable Purchaser tenders to BNPPLC a payment equal to the Initial Remarketing Price, and (iii) NAI itself tenders to BNPPLC the Supplemental Payment, if any, which will be required by subparagraph 2(A)(3) in the event BNPPLC completes the sale to the Applicable Purchaser. Further, notwithstanding the satisfaction of the Conditions to NAI’s Initial Remarketing Rights on the Designated Sale Date, if the sum of the price to be paid by the Applicable Purchaser for the Property (*i.e.*, the Initial Remarketing Price) and any Supplemental Payment required by subparagraph 2(A)(3) is less than the Break Even Price, then BNPPLC may affirmatively elect not to complete the sale of the Property to the Applicable

Purchaser on the Designated Sale Date (and thereby defer the sale of the Property pursuant to this Agreement) by making a Decision Not to Sell at a Loss.

(b) Second, if BNPPLC completes a sale of the Property to an Applicable Purchaser on the Designated Sale Date pursuant to subparagraph 2(A)(2)(a) and the price paid by the Applicable Purchaser for the Property (*i.e.*, the Initial Remarketing Price) is greater than the Break Even Price, then BNPPLC will pay the excess to NAI or as otherwise required by Applicable Law.

(3) If for any reason whatsoever BNPPLC does not receive a cash price for the Property on the Designated Sale Date equal to or in excess of the Break Even Price in connection with a sale made pursuant to subparagraph 2(A)(1) or subparagraph 2(A)(2)(a), then NAI will have the obligation (the “**Supplemental Payment Obligation**”) to pay to BNPPLC on the Designated Sale Date a supplemental payment (the “**Supplemental Payment**”) equal to the lesser of:

- (a) the amount by which the Break Even Price exceeds any such cash price actually received by BNPPLC on the Designated Sale Date; or
- (b) the Maximum Remarketing Obligation.

Without limiting the generality of the foregoing, NAI must make the Supplemental Payment even if BNPPLC does not sell the Property to NAI or an Applicable Purchaser on the Designated Sale Date because of (A) a Decision Not to Sell at a Loss, or (B) a failure of NAI to exercise, or a decision by NAI not to exercise, the Purchase Option or NAI’s Initial Remarketing Rights, or (C) a failure of NAI or any Applicable Purchaser to tender the price required by the forgoing provisions on the Designated Sale Date following any exercise of or attempt by NAI to exercise the Purchase Option or NAI’s Initial Remarketing Rights.

NAI acknowledges that it is undertaking the Supplemental Payment Obligation in consideration of the rights afforded to it by this Agreement, but that such obligation is not contingent upon any exercise by NAI of such rights or upon any purchase of the Property by NAI or an Applicable Purchaser. If any Supplemental Payment due according to this subparagraph 2(A)(3) is not actually paid to BNPPLC on the Designated Sale Date, then NAI must pay interest on the past due amount computed at the Default Rate. However, NAI will be entitled to a credit against the interest required by the preceding sentence equal to the Base Rent, if any, actually paid by NAI pursuant to the Lease for any period after the Designated Sale Date.

(B) Designation of the Purchaser. To give BNPPLC the opportunity before the Designated Sale Date to prepare the Sale Closing Documents, NAI must, by a notice to BNPPLC given at least ten days prior to the Designated Sale Date, specify irrevocably, unequivocally and with particularity any party who will purchase the Property because of NAI's exercise of its Purchase Option or of NAI's Initial Remarketing Rights. If NAI fails to do so, BNPPLC may postpone the delivery of the Sale Closing Documents until a date after the Designated Sale Date and not more than ten days after NAI finally does so specify a party, but such postponement will not relieve or postpone the obligation of NAI to make a Supplemental Payment on the Designated Sale Date as provided in subparagraph 2(A)(3).

(C) Delivery of Property Related Documents If BNPPLC Retains the Property. Unless NAI or its Affiliate or another Applicable Purchaser purchases the Property pursuant to subparagraph 2(A), promptly after the Designated Sale Date NAI must deliver and assign to BNPPLC all plans and specifications for the Property previously prepared for NAI or otherwise available to NAI (including those prepared in connection with the construction contemplated by the Construction Management Agreement), together with all other files, documents and permits of NAI (including any subleases then in force) which may be necessary or useful to any future owner's or occupant's use of the Property. Without limiting the foregoing, NAI will transfer or arrange the transfer to BNPPLC of all utility, building, health and other operating permits required by any municipality or other governmental authority having jurisdiction over the Property for uses of the Property permitted by the Lease or for any remaining construction required to complete the Improvements contemplated by the Construction Management Agreement if neither NAI nor any Affiliate or other Applicable Purchaser purchases the Property pursuant to subparagraph 2(A).

(D) Effect of the Purchase Option and NAI's Initial Remarketing Rights on Subsequent Title Encumbrances. Any conveyance made to consummate a sale of the Property to NAI or any Applicable Purchaser pursuant to subparagraph 2(A) will cut off and terminate all interests in the Property claimed by, through or under BNPPLC, including Liens Removable by BNPPLC (including any leasehold estate or other interests conveyed by BNPPLC to third parties, even if conveyed in the ordinary course of BNPPLC's business, and including any judgment liens established against the Property because of a judgment rendered against BNPPLC), but not personal obligations of NAI to BNPPLC under the Lease or other Operative Documents (including obligations of NAI arising under the indemnities in the Lease, which indemnities will survive any such sale). Anyone accepting or taking any interest in the Property through or under BNPPLC on or after the Effective Date will acquire such interest subject to the Purchase Option.

(E) Security for NAI's Purchase Option. If (contrary to the intent of the parties as expressed in subparagraph 4(C) of the Lease) it is determined that NAI is not, under applicable state law as applied to the Operative Documents, the equitable owner of the Property and the borrower from BNPPLC in a financing arrangement, but rather is a tenant under the Lease with an option to purchase from BNPPLC as provided in subparagraph 2(A)(1), then the parties intend that the Purchase Option be secured by a lien and security interest against the Property. **Accordingly, BNPPLC does hereby grant to NAI a lien and security interest against the Property, including all rights, title and interests of BNPPLC from time to time in and to the Land and Improvements, in order to secure (1) BNPPLC's obligation to convey the Property to NAI or an Affiliate designated by it if NAI exercises the Purchase Option and tenders payment of the Break Even Price to BNPPLC on the Designated Sale Date as provided herein, and (2) NAI's right to recover any damages from BNPPLC caused by a breach of such obligation, including any such breach caused by a rejection or termination of this Agreement in any bankruptcy or insolvency proceeding instituted by or against BNPPLC, as debtor.** NAI may enforce such lien and security interest judicially after any such breach by BNPPLC, but not otherwise.

3 NAI's Rights, Options and Obligations *AFTER* the Designated Sale Date.

(A) NAI's Right to Buy During the Thirty Days After the Designated Sale Date. Even after a failure to pay any required Supplemental Payment on the Designated Sale Date, NAI may tender (or cause an Applicable Purchaser to tender) to BNPPLC the full Make Whole Amount and all amounts then due under the Operative Documents on any Business Day within thirty days after the Designated Sale Date. If presented with such a tender within thirty days after the Designated Sale Date, BNPPLC must accept it and promptly thereafter deliver to NAI (or the Applicable Purchaser) the Sale Closing Documents and any Escrowed Proceeds then constituting Property held by BNPPLC. Otherwise, BNPPLC will have no further obligation to sell the Property to NAI or to any Affiliate of NAI pursuant to this Agreement, although BNPPLC will continue to have the option to require NAI to buy the Property after the Completion Date if the conditions listed in the next subparagraph are satisfied.

(B) NAI's Obligation to Buy if Certain Conditions Are Satisfied. Regardless of any prior Decision Not to Sell at a Loss, BNPPLC will have the option (the "**Put Option**") to require NAI to purchase the Property upon demand at any time after both the Completion Date and the Designated Sale Date for a cash price equal to the Make Whole Amount if:

- (1) BNPPLC has not already conveyed the Property to consummate a sale of the Property to NAI or an Applicable Purchaser pursuant to other provisions of this Agreement; and
- (2) either (i) NAI has elected to accelerate the Designated Sale Date as

provided in clause (2) of the definition of Designated Sale Date in the Common Definitions and Provisions Agreement, or (ii) a 97-1/Default (100%) occurs or is continuing on or after the Designated Sale Date; and

(3) BNPPLC notifies NAI of BNPPLC's exercise of the Put Option within two years following the Designated Sale Date.

(C) **NAI's Extended Right to Remarket.** If the Property is not sold to NAI or an Applicable Purchaser on the Designated Sale Date pursuant to this Agreement, NAI will have the right ("**NAI's Extended Remarketing Right**") during the Extended Remarketing Period to arrange a sale of the Property to an Applicable Purchaser, other than an Affiliate of NAI, for a price equal to or in excess of the Must Sell Price (a "**Proposed Sale**"). NAI's Extended Remarketing Right will, however, be subject to all of the following conditions:

(1) BNPPLC has not exercised the Put Option as provided in subparagraph 3(B) or already contracted with another Applicable Purchaser to convey the Property in connection with a Qualified Sale.

(2) NAI's Extended Remarketing Right is not terminated pursuant to subparagraph 6(C) because of NAI's failure to pay a Supplemental Payment.

(3) NAI's Extended Remarketing Right is not terminated pursuant to subparagraph 6(C) because of NAI's failure to pay a 97-10 Prepayment.

(4) NAI must have provided a notice to BNPPLC (a "**Notice of Sale**") setting forth (i) the date proposed by NAI as the Final Sale Date (the "**Proposed Sale Date**"), which must be no sooner than thirty days after BNPPLC's receipt of the Notice of Sale and no later than the last Business Day of the Extended Remarketing Period, (ii) the full legal name of the purchaser (be it NAI or an Applicable Purchaser) and such other information as is needed to prepare the Sale Closing Documents, and (iii) the cash price that will be tendered to BNPPLC for the Property (the "**Committed Price**").

(5) The Committed Price must be no less than the Must Sell Price, computed as of the Proposed Sale Date. Also, if NAI has notified BNPPLC of NAI's Target Price, the Committed Price must be no less than NAI's Target Price.

(6) If requested by BNPPLC, both NAI and the Applicable Purchaser must execute and acknowledge a Grant of Repurchase Option and Restrictive Covenants Agreement in the form attached as Exhibit F for delivery with the other Sale Closing Documents upon the consummation of the sale.

(D) Deemed Sale On the Second Anniversary of the Designated Sale Date. If no date prior to the second anniversary of the Designated Sale Date qualifies as the Final Sale Date, then on second anniversary of the Designated Sale Date BNPPLC will, for purposes of calculating NAI's Supplemental Payment Obligation, be *deemed* to have sold the Property (a "**Deemed Sale**") to an Applicable Purchaser at a Qualified Sale for a net cash price equal to its Fair Market Value.

(E) NAI's Right to Share in Sales Proceeds Received By BNPPLC From any Qualified Sale. BNPPLC must apply the cash proceeds received by BNPPLC from any Qualified Sale (regardless of whether the sale is arranged by NAI as provided in subparagraph 3(C) or by BNPPLC itself), or deemed to be received in connection with any Deemed Sale, in the following order of priority:

- (1) first, to pay or reimburse to BNPPLC BNPPLC's Actual Out of Pocket Costs incurred in connection with the Qualified Sale;
- (2) second, to pay or reimburse to BNPPLC the Local Impositions, insurance premiums and other Losses suffered or incurred by BNPPLC with respect to the ownership, operation or maintenance of the Property after the Designated Sale Date, together with interest on such Local Impositions, insurance premiums and other Losses computed at the Default Rate from the date paid or incurred to the date reimbursed from sales proceeds;
- (3) third, to pay to BNPPLC an amount equal to the difference, if any, computed by subtracting (i) the aggregate payments, if any, previously paid by NAI to BNPPLC as a Supplemental Payment or as a 97-10/Prepayment, from (ii) the Adjusted Lease Balance;
- (4) fourth, to reimburse NAI for the aggregate payments, if any, previously made by NAI to BNPPLC as a Supplemental Payment or as 97-10/Prepayments;
- (5) fifth, to pay to BNPPLC an amount that, when added to all payments or reimbursements to BNPPLC described in the preceding clauses (1), (2) and (3), will equal the Make Whole Amount;
- (6) sixth, to pay to BNPPLC any other amounts then due from NAI to BNPPLC under any of the Operative Documents; and
- (7) last, if any such cash proceeds exceed all the payments and reimbursements that are required or may be required as described in the preceding

clauses of this subparagraph, BNPPPLC may retain the excess.

If, however, BNPPPLC completes any sale and conveyance of the Property *after* the Extended Remarketing Period expires or is terminated, BNPPPLC will not be required by this subparagraph to share any proceeds of the sale or conveyance with NAI or any other party claiming through or under NAI.

4 Transfers By BNPPPLC After the Designated Sale Date.

(A) BNPPPLC's Right to Sell. At any time more than thirty days after the Designated Sale Date, if the Property has not already been sold and conveyed by BNPPPLC pursuant to Paragraph 2 or Paragraph 3, BNPPPLC will have the right to sell the Property or offer the Property for sale to any third party on any terms believed to be appropriate by BNPPPLC in its sole good faith business judgment.

(B) Survival of NAI's Rights and the Supplemental Payment Obligation. If the Property is not sold on the Designated Sale Date, and if BNPPPLC completes a sale or other transfer of the Property after the Designated Sale Date, other than a Qualified Sale, the Supplemental Payment Obligation will survive in favor of BNPPPLC's successors and assigns with respect to the Property, and BNPPPLC's successors and assigns will take the Property subject to NAI's rights under Paragraph 3, all on the same terms and conditions as would have applied to BNPPPLC itself if BNPPPLC had not transferred or sold the Property. Without limiting the foregoing, any purchaser that acquires the Property from BNPPPLC during the Extended Remarketing Period, other than at a Qualified Sale, will be obligated to distribute proceeds of a subsequent Qualified Sale of the Property as described in the subparagraph 3(E) in the same manner and to the same extent that BNPPPLC itself would have been obligated if not for the sale by BNPPPLC to the purchaser.

(C) Easements and Other Transfers in the Ordinary Course of Business. No "Permitted Transfer" described in clause (5) (the last clause) of the definition thereof in the Common Definitions and Provisions Agreement will constitute a Qualified Sale if it covers less than all or substantially all of BNPPPLC's then existing interests in the Property. Any such Permitted Transfer of less than all or substantially all of BNPPPLC's then existing interests in the Property will not be prohibited by this Agreement during the Extended Remarketing Period or otherwise; *provided, however*, any such Permitted Transfer made before the end of one hundred eighty days after the Designated Sale Date, or made to an Affiliate of BNPPPLC before the end of the Extended Remarketing Period, or otherwise not in the ordinary course of business, will be made subject to NAI's rights under Paragraph 3. Thus, for example, if the Property is not sold by BNPPPLC to an Applicable Purchaser on the Designated Sale Date, then at any time more than thirty days after the Designated Sale Date BNPPPLC may in the ordinary course of business convey a utility easement or a lease of space in the Improvements to a Person not an Affiliate of

BNPPLC free from NAI's rights under Paragraph 3, although following the conveyance of the lesser estate, NAI's rights under Paragraph 3 will continue during the Extended Remarketing Period as to BNPPLC's remaining interest in the Land and the Improvements.

5 Terms of Conveyance Upon Purchase.

(A) Tender of Sale Closing Documents. As necessary to consummate any sale of the Property to NAI or an Applicable Purchaser pursuant to this Agreement, BNPPLC must, subject to any postponement permitted by subparagraph 2(B), promptly after the tender of the purchase price and any other payments to BNPPLC required pursuant to Paragraph 2 or Paragraph 3, as applicable, convey the Property to NAI or the Applicable Purchaser, as the case may be, by BNPPLC's execution, acknowledgment (where appropriate) and delivery of the Sale Closing Documents. Such conveyance by BNPPLC will be subject to the Permitted Encumbrances and any other encumbrances that do not constitute Liens Removable by BNPPLC, and such conveyance will not include the rights of BNPPLC or other Interested Parties under the indemnities provided in the Operative Documents, including rights to any payments then due from NAI under the indemnities or that may become due thereafter because of any expense or liability incurred by BNPPLC or another Interested Party resulting in whole or in part from events or circumstances occurring or alleged to have occurred before such conveyance. The costs, both foreseen and unforeseen, of any purchase by NAI or an Applicable Purchaser will be the responsibility of the purchaser to the extent (if any) not included in any Break Even Price or Make Whole Amount actually paid to BNPPLC. If for any reason BNPPLC fails to tender the Sale Closing Documents as required by this Paragraph 5(A), BNPPLC will have the right and obligation to cure such failure at any time before thirty days after receipt of a demand for such cure from NAI. Prior to the end of such cure period, NAI may initiate appropriate legal action to specifically enforce BNPPLC's obligation to deliver the Sale Closing Documents or to foreclose NAI's liens or security interests against the Property which secure such obligation, but if BNPPLC does cure within such thirty day period, BNPPLC will not be liable for monetary damages because of its prior failure to deliver the Sale Closing Documents.

(B) Delivery of Escrowed Proceeds. BNPPLC may deliver any Escrowed Proceeds constituting Property directly to NAI or to any Applicable Purchaser purchasing the Property pursuant to this Agreement notwithstanding any prior actual or attempted conveyance or assignment by NAI, voluntary or otherwise, of any right to receive the same; BNPPLC will not be responsible for the proper distribution or application by NAI or any Applicable Purchaser of any such Escrowed Proceeds; and any such payment of Escrowed Proceeds to NAI or an Applicable Purchaser will discharge any obligation of BNPPLC to deliver the same to all Persons claiming an interest therein.

6 Survival and Termination of the Rights and Obligations of NAI and BNPPLC.

(A) Status of this Agreement Generally. Except as expressly provided in this Agreement, this Agreement will not terminate; nor will NAI have any right to terminate this Agreement; nor will NAI be entitled to any reduction (by setoff or otherwise) of the Break Even Price, the Make Whole Amount or any payment required under this Agreement; nor will any of the obligations of NAI to BNPPLC under Paragraph 2 or Paragraph 3 be excused by reason of (i) any damage to or the destruction of all or any part of the Property from whatever cause, (ii) the taking of the Property or any portion thereof by eminent domain or otherwise for any reason, (iii) the prohibition, limitation or restriction of NAI's use or development of all or any portion of the Property or any interference with such use by governmental action or otherwise, (iv) any eviction of NAI or of anyone claiming through or under NAI, (v) any default on the part of BNPPLC under this Agreement or any other Operative Document or any other agreement to which BNPPLC and NAI are parties, (vi) the inadequacy in any way whatsoever of the design, construction, assembly or installation of any improvements, fixtures or tangible personal property included in the Property (it being understood that BNPPLC has not made, does not make and will not make any representation express or implied as to the adequacy thereof), (vii) any latent or other defect in the Property or any change in the condition thereof or the existence with respect to the Property of any violations of Applicable Laws, or (viii) NAI's prior acquisition or ownership of any interest in the Property, or (ix) any other cause, whether similar or dissimilar to the foregoing, any existing or future law to the contrary notwithstanding. It is the intention of the parties hereto that the obligations of NAI under this Agreement (including the obligation to make any Supplemental Payment as provided in Paragraph 2) be separate from and independent of BNPPLC's obligations under this Agreement or any other agreement between BNPPLC and NAI; however, that nothing in this subparagraph will be construed as a waiver by NAI of any right NAI may have at law or in equity to the following remedies, whether because of BNPPLC's failure to remove a Lien Removable by BNPPLC or because of any other default by BNPPLC under this Agreement: (A) the recovery of monetary damages, (B) injunctive relief in case of the violation, or attempted or threatened violation, by BNPPLC of any of the express covenants, agreements, conditions or provisions of this Agreement which are binding upon BNPPLC, or (C) a decree compelling performance by BNPPLC of any of the express covenants, agreements, conditions or provisions of this Agreement which are binding upon BNPPLC.

(B) Election by NAI to Terminate the Supplemental Payment Obligation Prior to the Completion Date. By delivery of a notice to BNPPLC in the form attached as Exhibit G, NAI may terminate its Supplemental Payment Obligation, but only prior to the Completion Date and only if at the time of such exercise (1) NAI has given (and not rescinded) a Notice of NAI's Intent to Terminate as provided in the Construction Management Agreement, or (2) BNPPLC has given any FOCB Notice as provided in the Construction Management Agreement. (If for any reason

BNPPLC does not receive a notice terminating the Supplemental Payment Obligation as described in the preceding sentence prior to the Completion Date, then without any notice or other action by the parties to this Agreement, NAI will cease to have any right to terminate the Supplemental Payment Obligation.) If NAI does send a notice to BNPPLC in the form attached as Exhibit G, such notice will (as provided therein) constitute an irrevocable and absolute waiver by NAI of NAI's rights to purchase the Property or to cause any of its Affiliates to purchase the Property pursuant to this Agreement. No such termination of NAI's Supplemental Payment Obligation will terminate BNPPLC's right to exercise the Put Option, which BNPPLC may exercise if NAI fails to make a 97-10/Permitted Prepayment required by the Construction Management Agreement.

(C) Automatic Termination of NAI's Rights. If NAI fails to pay the full amount of any Supplemental Payment required by subparagraph 2(A)(3) on the Designated Sale Date, then the Purchase Option, NAI's Initial Remarketing Rights, NAI's Extended Remarketing Right and all other rights of NAI under this Agreement, other than its rights under subparagraph 3(A), will terminate automatically. If, however, prior to the Designated Sale Date NAI effectively terminates the Supplemental Payment Obligation pursuant to subparagraph 6(B) by the delivery of a notice to BNPPLC in the form attached as Exhibit G, so that NAI is excused from the obligation to make any Supplemental Payment pursuant to subparagraph 2(A)(3), then NAI's Extended Remarketing Right will not terminate automatically pursuant to this subparagraph 6(C), but rather will survive except to the extent waived by such notice. No termination of NAI's rights as described in this subparagraph will limit BNPPLC's other remedies, including its right to sue NAI for any amount due from NAI pursuant to any of the Operative Documents and its right to exercise the Put Option.

(D) Payment Only to BNPPLC. All amounts payable under this Agreement by NAI and, if applicable, by an Applicable Purchaser must be paid directly to BNPPLC. If paid to other parties, such payments will not be effective for purposes of this Agreement.

(E) Preferences and Voidable Transfers. If any payment to BNPPLC by an Applicable Purchaser is held to constitute a preference or a voidable transfer under Applicable Laws, or must for any other reason be refunded by BNPPLC to the Applicable Purchaser or to another Person, and if such payment to BNPPLC reduced or had the effect of reducing a payment required of NAI by this Agreement (e.g., the Supplemental Payment) or increased or had the effect of increasing any sale proceeds paid over to NAI pursuant to subparagraph 2(A)(2)(B) or pursuant to subparagraph 3(E), then NAI must pay to BNPPLC upon demand an amount equal to the reduction of the payment required of NAI or to the increase of the excess sale proceeds paid to NAI, as applicable, and this Agreement will continue to be effective or will be reinstated as necessary to permit BNPPLC to enforce its right to collect such amount from NAI.

(F) Remedies Under the Other Operative Documents. No repossession of or re-

entering upon the Property or exercise of any other remedies available to BNPPLC under the other Operative Documents will terminate NAI's rights or obligations under this Agreement, all of which will survive BNPPLC's exercise of remedies under the other Operative Documents. NAI acknowledges that the consideration for this Agreement is separate from and independent of the consideration for the Construction Management Agreement, the Lease, the Closing Certificate and other agreements executed by the parties, and NAI's obligations under this Agreement will not be affected or impaired by any event or circumstance that would excuse NAI from performance of its obligations under such other Operative Documents.

7 **Certain Remedies Cumulative.** No right or remedy herein conferred upon or reserved to BNPPLC is intended to be exclusive of any other right or remedy BNPPLC has with respect to the Property, and each and every right and remedy of BNPPLC will be cumulative and in addition to any other right or remedy given to it under this Agreement or now or hereafter existing in its favor at law or in equity. In addition to other remedies available under this Agreement, either party may obtain a decree compelling specific performance of any of the other party's agreements hereunder.

8 **Attorneys' Fees and Legal Expenses.** If BNPPLC commences any legal action or other proceeding because of any breach of this Agreement by NAI, BNPPLC may recover all Attorneys' Fees incurred by it in connection therewith from NAI, whether or not such controversy, claim or dispute is prosecuted to a final judgment. Any Attorneys' Fees incurred by BNPPLC in enforcing a judgment in its favor under this Agreement will be recoverable separately from such judgment, and the obligation for such Attorneys' Fees is intended to be severable from other provisions of this Agreement and not to be merged into any such judgment.

9 **Successors and Assigns.** The terms, provisions, covenants and conditions hereof will be binding upon NAI and BNPPLC and their respective permitted successors and assigns and will inure to the benefit of NAI and BNPPLC and all permitted transferees, mortgagees, successors and assignees of NAI and BNPPLC with respect to the Property; except that (A) the rights of BNPPLC hereunder will not pass to NAI or any Applicable Purchaser or any subsequent owner claiming through NAI or an Applicable Purchaser, (B) BNPPLC will not assign this Agreement or any rights hereunder except pursuant to a Permitted Transfer, and (C) NAI will not assign this Agreement or any rights hereunder without the prior written consent of BNPPLC.

[The signature pages follow.]

IN WITNESS WHEREOF, this Purchase Agreement is executed to be effective as of December 14, 2006.

BNP PARIBAS LEASING CORPORATION, a
Delaware corporation

By: /s/ Lloyd G. Cox
Lloyd G. Cox, Managing Director

Purchase Agreement — Signature Page

[Continuation of signature pages for Purchase Agreement dated as of December 14, 2006]

NETWORK APPLIANCE, INC., a Delaware
corporation

By: /s/ Ingemar Lanevi
Ingemar Lanevi, Vice President and Corporate
Treasurer

Purchase Agreement — Signature Page

Exhibit A

Legal Description

Proposed Parcel 8, and (except to the extent within a different platted Parcel as currently shown in the Map Records of the County of Santa Clara, California) proposed Parcel 12, and the Additional Leased Premises as defined below, (collectively, the “**2006 Ground Lease Premises**”) as shown on that certain Vesting Tentative Parcel Map provided to BNP Paribas Leasing Corporation (“**BNPPLC**”) by Network Appliance, Inc. (“**NAI**”) attached hereto and made a part hereof (the “**Tentative Map**”), which has received preliminary approval from the City of Sunnyvale, California, but not yet been filed for record in the office of the recorder of the County of Santa Clara, State of California. As used herein, “**Additional Leased Premises**” means the parking lots, driveways and other areas shaded in gray on the Tentative Map attached hereto within the larger area designated as Common Lot A (consisting of 30.46 Acres, more or less) on the Tentative Map. The southern boundary of the Additional Leased Premises is a line that runs North 75 degrees, 07 minutes, 58 seconds equidistant from the southern boundary of Parcel 8 and the northern boundary of Parcel 7, both as shown on the Tentative Map. The eastern boundary of the Additional Leased Premises runs along the same line as the eastern boundary of Common Lot A, as shown on the Tentative Map. The western boundary of the Additional Leased Premises runs along the same line as the western boundary of Parcel 8 and Parcel 7, as shown on the Tentative Map. The northern boundary of the Additional Leased Premises runs along the center of an existing or proposed driveway which is situated between Parcel 8 and Parcel 9, as shown on the Tentative Map.

TOGETHER WITH, easements appurtenant to the 2006 Ground Lease Premises as described in Exhibit A attached to the Ground Lease.

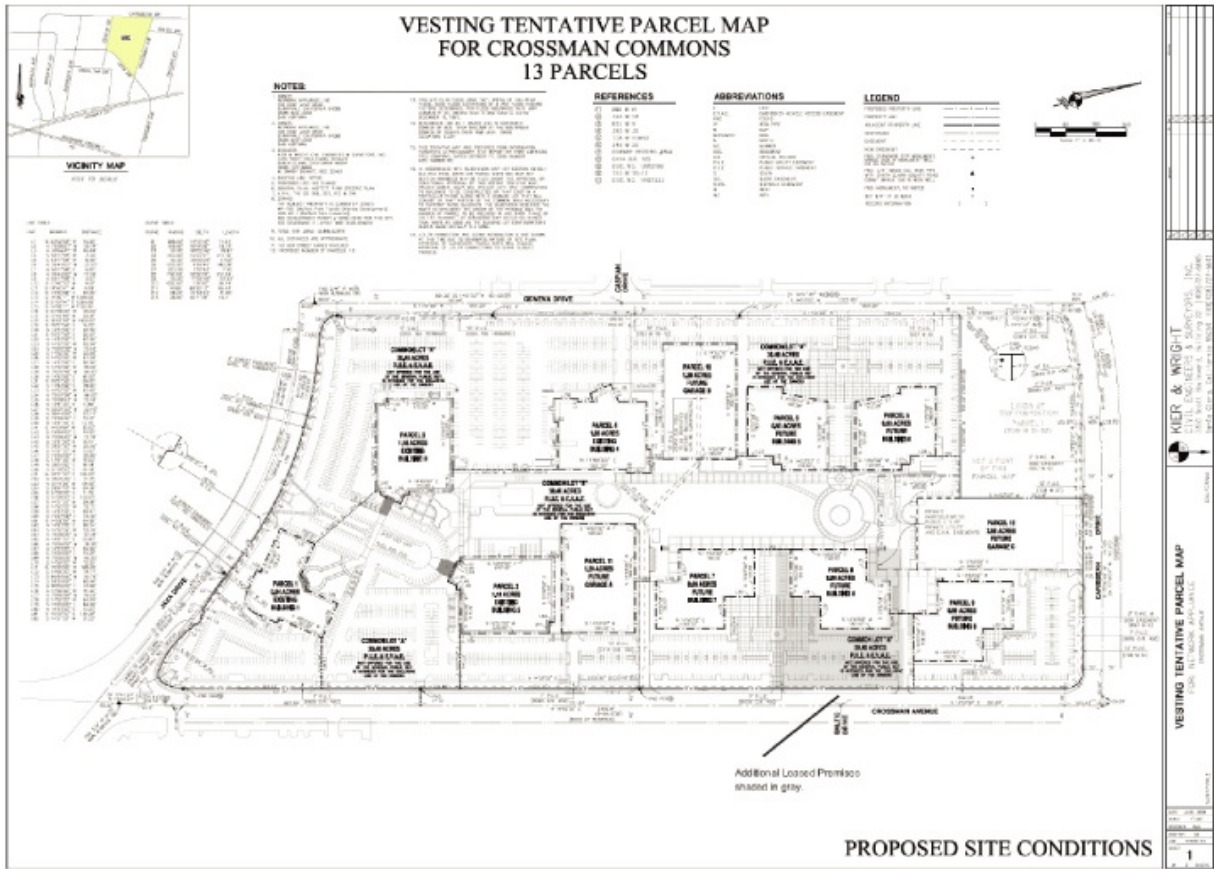


Exhibit B

Valuation Procedures

This Exhibit explains the procedures to be used to determine Fair Market Value of the Property if such a determination is required by this Agreement. In such event, either party may invoke the procedures set out herein prior to the date the determination will be needed so as to minimize any postponement of any payment, the amount of which depends upon Fair Market Value. In the event such a payment becomes due before the required determination of Fair Market Value is complete, such payment will be postponed until the determination is complete. But in that event, when the required determination is complete, the payment will be made together with interest thereon, computed at a rate equal to ABR, accruing over the period the payment was postponed.

If any determination of Fair Market Value is required, NAI and BNPPPLC will attempt in good faith to reach a written agreement upon the Fair Market Value without unnecessary delay, and either party may propose such an agreement to the other. If, however, for any reason whatsoever, they do not execute such an agreement within seven days after the first such proposed agreement is offered by one party to the other, then the determination will be made by independent appraisers in accordance with the following procedures:

1. Definitions and Assumptions. For purposes of the determination, Fair Market Value will be defined as follows, and all appraisers or others involved in the determination will be instructed to use the following definition:

“Fair Market Value” means the most probable net cash price, as of a specified date, for which the Property should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

In addition, the appraisers or others making the determination will be instructed to assume that ordinary and customary brokerage fees, title insurance costs and other sales expenses will be incurred and deducted in the calculation of such net cash price. Such appraisers or others making the determination will also be instructed to assume that the value of the Property (or applicable portion thereof) is neither enhanced nor reduced by any lease to another tenant that BNPPPLC may have executed subsequent to the termination or expiration of the Lease (a **“Replacement Lease”**). In other words, rather than determine value in light of actual rents generated or to be generated by any such Replacement Lease, the Property (or applicable portion thereof) will be valued in light of the most probable rent that it should bring in a competitive and open market (in this section, a **“Fair Market Rental”**), taking into account:

(x) the fact that the Ground Lease exists to permit the continued use and enjoyment of the Property during the term of the

Ground Lease¹ ; and

(y) the actual physical condition of the Property ² ; and

(z) that a reasonable period of time may be required to market the Property (or applicable portion thereof) for lease and make it ready for use or occupancy before it is leased at a Fair Market Rental.

2. Initial Selection of Appraisers; Appraiser's Agreement as to Value. After having failed to reach a written agreement upon Fair Market Value as described in the second paragraph of this Exhibit, either party may deliver a notice to the other demanding the appointment of appraisers (the "**First Appraisal Notice**") pursuant to this Exhibit. In such event:

(a) Within fifteen days after the First Appraisal Notice is delivered, NAI and BNPPPLC must each appoint an independent property appraiser who has experience appraising commercial properties in California and notify the other party of such appointment, including the name of the appointed appraiser (a "**Notice of Appointment**").

(b) If the appraiser appointed by NAI and the appraiser appointed by BNPPPLC agree in writing upon the Fair Market Value (an "**Appraiser's Agreement As To Value**"), such agreement will be binding upon NAI and BNPPPLC. Both NAI and BNPPPLC will instruct their respective appraisers to attempt in good faith to quickly reach an Appraiser's Agreement As To Value. Neither appraiser will be required to produce a formal appraisal prior to reaching an Appraiser's Agreement As To Value.

3. Selection of a Third Appraiser. If the two appraisers fail to deliver an Appraiser's Agreement As to Value within thirty days following the later of the dates upon which NAI or BNPPPLC delivers its Notice of Appointment, then either party (NAI or BNPPPLC) may deliver another notice to the other (a "**Third Appraisal Notice**"), demanding that the two appraisers appoint a third independent property appraiser to help determine Fair Market Value. Immediately after the Third Appraisal Notice is delivered, each of the first two appraisers must

¹ But for the Ground Lease, the Improvements could not be used and maintained in place. Thus, the parties believe that, but for the Ground Lease, the Improvements would be worth much less. However, it is understood that Property does not include the fee estate in the Land, and the continued use of the Improvements will necessitate the payment of rents as required by the Ground Lease and compliance with the other terms and conditions thereof. Accordingly, the value of the Land itself will not be included in the Fair Market Value of the Property.

² If, however, the use of the Property by BNPPPLC or any tenant under any Replacement Lease after NAI vacated the Property has resulted in excess wear and tear, such excess wear and tear will be assumed not to have occurred for purposes of determining Fair Market Value.

act promptly, reasonably and in good faith to try to reach agreement upon the third appraiser. If, however, the two appraisers fail to reach agreement upon a third appraiser within ten days after the Third Appraisal Notice is delivered:

(a) NAI and BNPPLC will each cause its respective appraiser to deliver, no later than fifteen days after the delivery of the Third Appraisal Notice, an unqualified written promise addressed to **both** of NAI and BNPPLC: (i) to act promptly, reasonably and in good faith in trying to reach agree upon the third appraiser, and (ii) to propose and consider proposals of persons as the third appraiser on the basis of objectivity and competence, not on the basis of such persons' relationships with the other appraisers or with NAI or BNPPLC, and not on the basis of preferences expressed by NAI or BNPPLC.

(b) If, despite the delivery of the promises described in the preceding subsection, the two appraisers fail to reach agreement upon a third appraiser within thirty days after the Third Appraisal Notice is delivered, then each of the first two appraisers must immediately submit its top choice for the third appraiser to the then highest ranking officer of the California Bar Association who will agree to help and who has no attorney/client or other significant relationship to either NAI or BNPPLC. Such officer will have complete discretion to select the most objective and competent third appraiser from between the choice of each of the first two appraisers, and will do so within ten days after such choices are submitted to him.

4. Resolution of Issues by the Third Appraiser. If a third appraiser is selected under the procedure set out above:

(a) No later than twenty days after a third appraiser is selected, each of the first two appraisers must submit (and NAI and BNPPLC will each cause its appointed appraiser to submit) his best estimate of Fair Market Value, together with a written report supporting such estimate. (Such report need not be in the form of a formal appraisal, and may contain any qualifications the submitting appraiser deems necessary under the circumstances. Any such qualifications, however, may be considered by the third appraiser for purposes of the selection required by the next subsection.)

(b) After receipt of the two estimates required by the preceding subsection, and no later than thirty days after the third appraiser is selected, he must (i) choose one or the other of the two estimates of Fair Market Value submitted by the first two appraisers as being the more accurate in his opinion, and (ii) notify NAI and BNPPLC of which estimate he chose. The third appraiser will *not* be asked or allowed to specify an amount as Fair Market Value that is different than an estimate provided by one of the other two appraisers (either by averaging the two estimates or otherwise). The estimate of Fair Market Value thus chosen by the third appraiser as being the more accurate will be binding upon NAI and BNPPLC.

5. Criteria For Selecting Appraisers: Cost of Appraisals. All appraisers selected for the

appraisal process set out in this Exhibit will be disinterested, reputable, qualified appraisers with the designation of MAI or equivalent and with at least five years experience in appraising commercial properties comparable to the Property. NAI and BNPPLC shall each bear the expense of the appraiser appointed by it, and the expense of the third appraiser and of any officer of the California Bar Association who participates in the appraisal process described above will be shared equally by NAI and BNPPLC.

6. Time is of the Essence: Defaults.

(a) All time periods and deadlines specified in this Exhibit are of the essence.

(b) Each party must cause the appraiser appointed by it (as set forth in Section 2(a)) to comply in a timely manner with the requirements of this Exhibit applicable to such appraiser. Accordingly, if an appraiser appointed by one of the parties as provided in Section 2(a) fails to comply in a timely manner with any provision of this Exhibit, such failure will be considered a default by the party who appointed such appraiser.

(c) Any breach of or default under this Exhibit by either party will be construed as a breach of the Purchase Agreement to which this Exhibit is attached.

(d) Any such breach or default by NAI will constitute a 97-1/Default (100%); *provided, however:*

(1) Before characterizing any such breach or default as a 97-1/Default (100%), BNPPLC must first notify NAI of the breach or default and give NAI the opportunity, during the five days after delivery of such notice, to fully rectify the breach or default.

(2) Any breach or default by NAI under this Exhibit will be deemed rectified if, within such five day period, NAI offers BNPPLC an unqualified written agreement that all determinations of Fair Market Value required by this Agreement will, if made by the appraiser appointed by BNPPLC as hereinabove provided, be binding upon BNPPLC and NAI. (It is understood that following the delivery of any such agreement by NAI, no further input from NAI's appraiser or from any official of the California bar association or from a third appraiser will be required for any required determination of Fair Market Value.)

Exhibit C

Requirements Re: Forms to Accomplish Assignment and Conveyance

The form of the documents to be used to accomplish any conveyance of BNPPPLC's interest in the Improvements and other Property pursuant to this Agreement will depend upon whether the conveyance is to NAI or an Applicable Purchaser and, in the case of an conveyance by NAI itself, upon whether NAI elects to take an assignment of the Ground Lease or to terminate the Ground Lease.

If NAI is itself acquiring BNPPPLC's interest in the Property, the conveyance of such interest will be accomplished either by (A) the execution of an Agreement Concerning Ground Lease in the form attached as Exhibit C-1, which (among other things) will effectively terminate the Ground Lease with the result that BNPPPLC's interest in all Improvements will revert to NAI by operation of law, or (B) BNPPPLC's execution of assignments in the forms attached as Exhibit C-2 and Exhibit C-3 and NAI's execution of an Acknowledgment of Disclaimer of Representations and Warranties in the form attached as Exhibit C-4. NAI may choose between the Agreement Concerning Ground Lease or the alternative forms attached as Exhibits C-2, C-3 and C-4; however, if NAI fails to notify BNPPPLC at least fifteen days prior to the Designated Sale Date that NAI chooses to receive the assignments in the forms attached as Exhibit C-2 and Exhibit C-3, BNPPPLC may assume that NAI has elected instead to have BNPPPLC execute the Agreement Concerning Ground Lease in the form attached as Exhibit C-1. If NAI does choose to receive the assignments in the forms attached as Exhibit C-2 and Exhibit C-3, NAI must execute and deliver to BNPPPLC the Acknowledgment of Disclaimer of Representations and Warranties in the form attached as Exhibit C-4.

If an Applicable Purchaser is acquiring BNPPPLC's interest in the Improvements and other Property, such interest will be conveyed by BNPPPLC's execution and delivery of assignments in the forms attached as Exhibit C-2 and Exhibit C-3, and the Applicable Purchaser must execute and deliver to BNPPPLC an Acknowledgment of Disclaimer of Representations and Warranties in the form attached as Exhibit C-4.

Exhibit C-1

RECORDING REQUESTED BY AND,
WHEN RECORDED, RETURN TO:

Network Appliance, Inc.
7301 Kit Creek Road
Research Triangle Park, NC 27709
Attention: Ingemar Lanevi

AGREEMENT CONCERNING GROUND LEASE

THIS AGREEMENT CONCERNING GROUND LEASE (this "Agreement") dated as of _____, 200__ (the "Effective Date"), is made by and between BNP PARIBAS LEASING CORPORATION ("**BNPPLC**"), a Delaware corporation, and NETWORK APPLIANCE, INC. ("**NAI**"), a Delaware corporation.

RECITALS

This Agreement is entered into upon, and with respect to, the following facts and intentions:

A. BNPPLC and NAI have heretofore entered into the following agreements:

(1) Ground Lease dated as of December 14, 2006 and recorded in the official records of Santa Clara County, California (the "Official Records") on or about December 14, 2006 as Instrument Number ___ (as the same may have been modified, the "Ground Lease"), whereby NAI, as ground lessor, ground leased to BNPPLC, as ground lessee, that certain land more particularly described in Annex A, attached hereto and incorporated herein by this reference (herein the "Land"); and

(2) Lease Agreement dated as of December 14, 2006 (as the same may have been modified, the "Sublease"), which was the subject of that certain Short Form of Sublease, dated as of December 14, 2006 and recorded in the Official Records on or about December 14, 2006 as Instrument Number ___ (the "Short Form of Sublease"), whereby BNPPLC, as sublessor, leased to NAI, as sublessee, its ground leasehold interest in the Land and all of the improvements located thereon (collectively the "Subleased Premises"); and

(3) Purchase Agreement dated as of December 14, 2006 (has the same may have been modified, the "Purchase Agreement"), which was the subject of that certain Memorandum of Purchase Agreement, dated as of December 14, 2006 and recorded in the Official Records on or about December 14, 2006 as Instrument Number ___.

(4) Common Definitions and Provisions Agreement dated as of December 14, 2006 Date (as the same may have been modified, the "Common Definitions and

Provisions Agreement”). As used in this Agreement, capitalized terms defined in the Common Definitions and Provisions Agreement and not otherwise defined in this Agreement are intended to have the respective meanings assigned to them in the Common Definitions and Provisions Agreement.

B. BNPPPLC and NAI now mutually wish to terminate the Ground Lease on the terms and conditions more particularly herein set forth.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration the adequacy of which is hereby acknowledges, the parties hereto agree as follows:

1. Termination of Ground Lease. As of the Effective Date, BNPPPLC hereby surrenders all of its right title and interest in the Ground Lease unto NAI, subject only to the “Permitted Encumbrances” described in Annex B attached hereto and incorporated herein by this reference, and the Ground Lease is hereby terminated. Notwithstanding anything to the contrary in this Agreement, BNPPPLC does, for itself and its successors, covenant, warrant and agree to defend the title to the Land against claims and demands of any person claiming under or through a Lien Removable by BNPPPLC. Except as expressly set forth in the preceding sentence, BNPPPLC makes no warranty of title, express or implied.

2. Acknowledgment of Reversion. BNPPPLC also acknowledges and agrees that because of the termination of the Ground Lease, all of BNPPPLC’s right, title and interest in and to the following property will revert to NAI and BNPPPLC does hereby forever relinquish, waive, and quitclaim unto NAI (subject to such Permitted Encumbrances):

- A. the Sublease;
- B. the Purchase Agreement;
- C. any pending or future award made because of our condemnation affecting the Property or because of any conveyance to be made in lieu thereof, and any unpaid proceeds of insurance or claim or cause of action for damages, loss or injury to the Subleased Premises; and
- D. all other property included within the definition of “Property” as set forth in the Purchase Agreement;

provided, however, that excluded from this conveyance and reserved to BNPPPLC are any rights or privileges of BNPPPLC under the following are expressly reserved and retained by BNPPPLC: (i) the indemnities set forth in the Sublease and the Ground Lease, whether such rights are presently known or unknown, including rights of BNPPPLC to be indemnified against environmental claims of third parties, as provided in the Ground Lease which may not presently

be known; and (ii) provision in the Sublease that establish the right of BNPPLC to recover any accrued unpaid rent under the Sublease which may be outstanding as of the date hereof; and (iii) agreements between BNPPLC and BNPPLC's Parent or any Participant, or any modification or extension thereof.

BNPPLC agrees to warrant and defend the title to the Subleased Premises as herein assigned, against claims and demands of any person claiming under or through a Lien Removable by BNPPLC relating to the Subleased Premises.

3. "As Is" Reversion. Notwithstanding any contrary provisions contained herein, NAI acknowledges that BNPPLC makes no representations or warranties of any nature or kind, whether statutory, express or implied, with respect to environmental matters or the physical condition of the Subleased Premises, and NAI, by acceptance of this agreement, accepts the Subleased Premises "As Is," "Where Is," and "With All Faults," and without any such representation or warranty by BNPPLC as to environmental matters, the physical condition of the Subleased Premises, compliance with subdivision or platting requirements or construction of any improvements. Without limiting the generality of the foregoing, NAI hereby further acknowledges and agrees that warranties of merchantability and fitness for a particular purpose are excluded from the transactions contemplated by this Agreement, as are any warranties arising from a course of dealing or usage of trade. NAI hereby assumes all risk and liability (and agrees that BNPPLC will not be liability for any special, direct, indirect, consequential, or other damages) resulting or arising from or relating to the ownership, use, condition, location, maintenance, repair, or operation of the Subleased Premises, except for damages proximately caused by (and attributed by any applicable principles of comparative fault to) the "Established Misconduct" of BNPPLC.

4. Binding Effect. The terms, provisions, covenants, and conditions hereof will be binding upon NAI and BNPPLC and their respective successors and assigns, and any other party claiming through either of them, and will inure to the benefit of NAI and BNPPLC and all transferees, mortgages, successors and assigns.

5. Miscellaneous. This Agreement and any other agreement relating hereto and executed concurrently herewith represent the entire agreement of the parties hereto with respect to the subject matter hereof and supersede any prior negotiations and agreement between BNPPLC and NAI concerning the subject matter hereof. No amendment or modification of this Agreement will be binding or valid unless express in a writing executed by both parties hereto. This Agreement will be governed by and construed in accordance with the laws of the State of California without regard to conflict or choice of laws. Words in the singular number will be held to include the plural and vice versa, unless the context otherwise requires. This Agreement may be executed in counterparts, each of which will be an original and all of which together will be a single

instrument.

[Signature pages follow.]

Exhibit C-1 to Purchase Agreement — Page 4

Annex A

Legal Description

[DRAFTING NOTE: TO THE EXTENT THAT THE “LAND” COVERED BY THE GROUND LEASE CHANGES FROM TIME TO TIME AS PROVIDED THEREIN OR BECAUSE OF ADJUSTMENTS FOR WHICH NAI REQUESTS BNPPLC’S CONSENT OR APPROVAL AS PROVIDED IN THE CLOSING CERTIFICATE, SO TOO WILL THE DESCRIPTION OF THE LAND BELOW CHANGE. ANY SUCH CHANGES WILL BE INCORPORATED INTO THE DESCRIPTION BELOW AND THIS “DRAFTING NOTE” WILL BE DELETED BEFORE THE ASSIGNMENT TO WHICH THIS DESCRIPTION IS ATTACHED IS ACTUALLY EXECUTED AND DELIVERED.]

Proposed Parcel 8, and (except to the extent within a different platted Parcel as currently shown in the Map Records of the County of Santa Clara, California) proposed Parcel 12, and the Additional Leased Premises as defined below, (collectively, the “**2006 Ground Lease Premises**”) as shown on that certain Vesting Tentative Parcel Map provided to BNP Paribas Leasing Corporation (“**BNPPLC**”) by Network Appliance, Inc. (“**NAI**”) attached hereto and made a part hereof (the “**Tentative Map**”), which has received preliminary approval from the City of Sunnyvale, California, but not yet been filed for record in the office of the recorder of the County of Santa Clara, State of California. As used herein, “**Additional Leased Premises**” means the parking lots, driveways and other areas shaded in gray on the Tentative Map attached hereto within the larger area designated as Common Lot A (consisting of 30.46 Acres, more or less) on the Tentative Map. The southern boundary of the Additional Leased Premises is a line that runs North 75 degrees, 07 minutes, 58 seconds equidistant from the southern boundary of Parcel 8 and the northern boundary of Parcel 7, both as shown on the Tentative Map. The eastern boundary of the Additional Leased Premises runs along the same line as the eastern boundary of Common Lot A, as shown on the Tentative Map. The western boundary of the Additional Leased Premises runs along the same line as the western boundary of Parcel 8 and Parcel 7, as shown on the Tentative Map. The northern boundary of the Additional Leased Premises runs along the center of an existing or proposed driveway which is situated between Parcel 8 and Parcel 9, as shown on the Tentative Map.

TOGETHER WITH, easements appurtenant to the 2006 Ground Lease Premises as described in Exhibit A attached to the Ground Lease.

Annex B

Permitted Encumbrances

[DRAFTING NOTE: BEFORE THIS AGREEMENT IS ACTUALLY EXECUTED AND DELIVERED BY BNPPLC: ALL PERMITTED ENCUMBRANCES LISTED IN EXHIBIT B TO THE CLOSING CERTIFICATE WILL BE SET OUT BELOW, IN ADDITION TO THE ITEMS ALREADY LISTED. ALSO, IF ANY ENCUMBRANCES (OTHER THAN "LIENS REMOVABLE BY BNPPLC") ARE IDENTIFIED IN ADDITION TO THOSE DESCRIBED BELOW OR IN EXHIBIT B TO THE CLOSING CERTIFICATE, SUCH ADDITIONAL ENCUMBRANCES WILL BE ADDED TO THE LIST BELOW. AFTER SUCH ADJUSTMENTS ARE MADE, THIS "DRAFTING NOTE" WILL BE DELETED. THE ADDITIONAL ENCUMBRANCES TO BE LISTED BELOW WOULD INCLUDE ANY NEW ENCUMBRANCES APPROVED BY BNPPLC AS "PERMITTED ENCUMBRANCES" FROM TIME TO TIME OR BECAUSE OF NAI'S REQUEST FOR BNPPLC'S CONSENT OR APPROVAL TO AN ADJUSTMENT.]

This conveyance is subject to all encumbrances not constituting a "Lien Removable by BNPPLC" (as defined in the Common Definitions and Provisions Agreement), including the following matters to the extent the same are still valid and in force:

1. Taxes and assessments for the year 200 ____ and subsequent years, which are not yet due and payable.
2. THE LIEN of supplemental taxes, if any, assessed pursuant to Chapter 3.5 commencing with Section 75 of the California Revenue and Taxation Code, resulting from changes of ownership or completion of construction on or after the date hereof.
3. EASEMENT for the purposes stated herein and incidents thereto

Purpose : Slope Easement
In favor of : City of Sunnyvale
Recorded : October 9, 1964 in Book 6695, page 430, Official Records
Affects : Easterly 18 feet, as shown on a survey plat entitled ALTA/ACSM Land Title Survey for: Network Appliance, 1345 Crossman Avenue, dated December 2, 1999, prepared by Kier & Wright, Job No. 97208-16.

4. EASEMENT for the purposes stated herein and incidents thereto

Purpose : Public utilities easement
In favor of : City of Sunnyvale

Recorded : October 9, 1964 in Book 6695, page 450, Official Records
Affects : Easterly 7 feet, as shown on a survey plat entitled ALTA/ACSM Land Title Survey
for: Network Appliance, 1345 Crossman Avenue, dated December 2, 1999, prepared by Kier
& Wright, Job No. 97208-16.

5. Covenants, Conditions and Restrictions in the Declaration of Protective Covenants — Moffett Industrial Park No. 2) recorded December 23, 1971 in Book 9640, page 443, Official Records; which provide that a violation thereof shall not defeat or render invalid the lien of any Mortgage or Deed of Trust made in good faith and for value. Said Covenants, Conditions and Restrictions do not provide for reversion of title in the event of a breach thereof. Restrictions, if any, based upon race, color, religion, sex, handicap, familial status, or national origin are deleted, unless and only to the extent that said covenant (a) is exempt under Chapter 42, Section 3607, of the United States Code, or (b) related to handicap but does not discriminate against handicapped persons.

ASSIGNMENT AND ASSUMPTION of the rights, powers, duties, obligations, and reservations of Moffett Park Associates, in favor of The Prudential Insurance Company of America, recorded February 8, 1977 in Book C583, page 685, Official Records.

6. EASEMENT for the purposes stated herein and incidents thereto

Purpose : Public utilities
Granted to : City of Sunnyvale
Recorded : November 16, 1976 in Book C414, page 105, Official Records
Affects : Southerly 10 feet, as shown on a survey plat entitled ALTA/ACSM Land Title Survey
for: Network Appliance, 1345 Crossman Avenue, dated December 2, 1999, prepared by Kier
& Wright, Job No. 97208-16.

7. LIMITATIONS, covenants, restrictions, reservations, exceptions or terms, but deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin to the extent such covenants, conditions or restrictions violate 42 USC 3604(c), contained in the document recorded February 5, 1980 in Book F122, page 460, Official Records.

Exhibit C-2

Form of Assignment of Ground Lease and Improvements

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

NAME: **[NAI or the Applicable Purchaser]**
ADDRESS: _____
ATTN: _____
CITY: _____
STATE: _____
Zip: _____

**ASSIGNMENT OF GROUND LEASE AND IMPROVEMENTS
(Covering Improvements and Leasehold Estate in Land)**

BNP Paribas Leasing Corporation (“**Assignor**”), a Delaware corporation, for and in consideration of the sum of Ten Dollars (\$10.00) and other valuable consideration paid to Assignor by **[NAI or the Applicable Purchaser]** (hereinafter called “Assignee”), the receipt and sufficiency of which are hereby acknowledged, does hereby GRANT, SELL, CONVEY, ASSIGN and DELIVER to Assignee (1) the leasehold estate created by a Ground Lease from NAI to Assignor dated as of December 14, 2006, which covers the land described in Annex A attached hereto and hereby made a part hereof, and (2) all other rights, titles and interests of Assignor in and to (a) such land, (b) the buildings and other improvements situated on such land, (c) any fixtures and other property affixed thereto and (d) the adjacent streets, alleys and rights-of-way (all of the property interests conveyed hereby being hereinafter collectively referred to as the “Property”); however, this conveyance is made by Assignor and accepted by Assignee subject to the terms and conditions of the aforementioned Ground Lease and to all zoning and other ordinances affecting the Property, all general or special assessments due and payable after the date hereof, all encroachments, variations in area or in measurements, boundary line disputes, roadways and other matters not of record which would be disclosed by a current survey and inspection of the Property, and the encumbrances listed in Annex B attached hereto and made a part hereof (collectively, the “Permitted Encumbrances”).

TO HAVE AND TO HOLD the Property, together with all and singular the rights and appurtenances thereto belonging unto Assignee, its successors and assigns, forever, and Assignor does hereby bind Assignor and Assignor’s successors and assigns to warrant and forever defend all and singular the said premises unto Assignee, its successors and assigns against every person whomsoever lawfully claiming, or to claim the same, or any part thereof by, through or under Assignor, but not otherwise; subject, however, to the Permitted Encumbrances. Except as expressly set forth in the preceding sentence, Assignor makes no warranty of title, express or implied.

Assignor makes no representations or warranties of any nature or kind, whether statutory, express or implied, with respect to environmental matters or the physical condition of the Property, and Assignee, by acceptance of this Assignment, accepts the Property “AS IS,” “WHERE IS,” “WITH ALL FAULTS” and without any such representation or warranty by Assignor as to environmental matters, the physical condition of the Property, compliance with subdivision or platting requirements or construction of any improvements. Without limiting the generality of the foregoing, by acceptance of this Assignment, Assignee hereby further acknowledges and agrees that warranties of merchantability and fitness for a particular purpose are excluded from the transaction contemplated by this Assignment, as are any warranties arising from a course of dealing or usage of trade.

Assignee hereby assumes the obligations (including any personal obligations) of Assignor, if any, created by or under, and agrees to be bound by the terms and conditions of, the Permitted Encumbrances to the extent that the same concern or apply to the land or improvements conveyed by this Assignment.

[Signature pages follow.]

IN WITNESS WHEREOF, Assignor and Assignee have signed this Assignment to be effective as of ____, 200__.

BNP PARIBAS LEASING CORPORATION, a Delaware corporation

By: _____
Lloyd G. Cox, Managing Director

STATE OF _____)
) SS
COUNTY OF _____)

On _____, 200__, before me _____, a Notary Public in and for the County and State aforesaid, personally appeared _____, who is personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity and that by his/her signature on such instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS, my hand and official seal.

Annex A

LEGAL DESCRIPTION

[DRAFTING NOTE: TO THE EXTENT THAT THE “LAND” COVERED BY THE GROUND LEASE CHANGES FROM TIME TO TIME AS PROVIDED THEREIN OR BECAUSE OF ADJUSTMENTS FOR WHICH NAI REQUESTS BNPLC’S CONSENT OR APPROVAL AS PROVIDED IN THE CLOSING CERTIFICATE, SO TOO WILL THE DESCRIPTION OF THE LAND BELOW CHANGE. ANY SUCH CHANGES WILL BE INCORPORATED INTO THE DESCRIPTION BELOW AND THIS “DRAFTING NOTE” WILL BE DELETED BEFORE THE ASSIGNMENT TO WHICH THIS DESCRIPTION IS ATTACHED IS ACTUALLY EXECUTED AND DELIVERED.]

Proposed Parcel 8, and (except to the extent within a different platted Parcel as currently shown in the Map Records of the County of Santa Clara, California) proposed Parcel 12, and the Additional Leased Premises as defined below, (collectively, the “**2006 Ground Lease Premises**”) as shown on that certain Vesting Tentative Parcel Map provided to BNP Paribas Leasing Corporation (“**BNPLC**”) by Network Appliance, Inc. (“**NAI**”) attached hereto and made a part hereof (the “**Tentative Map**”), which has received preliminary approval from the City of Sunnyvale, California, but not yet been filed for record in the office of the recorder of the County of Santa Clara, State of California. As used herein, “**Additional Leased Premises**” means the parking lots, driveways and other areas shaded in gray on the Tentative Map attached hereto within the larger area designated as Common Lot A (consisting of 30.46 Acres, more or less) on the Tentative Map. The southern boundary of the Additional Leased Premises is a line that runs North 75 degrees, 07 minutes, 58 seconds equidistant from the southern boundary of Parcel 8 and the northern boundary of Parcel 7, both as shown on the Tentative Map. The eastern boundary of the Additional Leased Premises runs along the same line as the eastern boundary of Common Lot A, as shown on the Tentative Map. The western boundary of the Additional Leased Premises runs along the same line as the western boundary of Parcel 8 and Parcel 7, as shown on the Tentative Map. The northern boundary of the Additional Leased Premises runs along the center of an existing or proposed driveway which is situated between Parcel 8 and Parcel 9, as shown on the Tentative Map.

TOGETHER WITH, easements appurtenant to the 2006 Ground Lease Premises as described in Exhibit A attached to the Ground Lease.

Annex B

Permitted Encumbrances

[DRAFTING NOTE: BEFORE THIS ASSIGNMENT IS ACTUALLY EXECUTED AND DELIVERED BY BNPPLC: ALL PERMITTED ENCUMBRANCES LISTED IN EXHIBIT B TO THE CLOSING CERTIFICATE WILL BE SET OUT BELOW, IN ADDITION TO THE ITEMS ALREADY LISTED. ALSO, IF ANY ENCUMBRANCES (OTHER THAN "LIENS REMOVABLE BY BNPPLC") ARE IDENTIFIED IN ADDITION TO THOSE DESCRIBED BELOW OR IN EXHIBIT B TO THE CLOSING CERTIFICATE, SUCH ADDITIONAL ENCUMBRANCES WILL BE ADDED TO THE LIST BELOW. AFTER SUCH ADJUSTMENTS ARE MADE, THIS "DRAFTING NOTE" WILL BE DELETED. THE ADDITIONAL ENCUMBRANCES TO BE LISTED BELOW WOULD INCLUDE ANY NEW ENCUMBRANCES APPROVED BY BNPPLC AS "PERMITTED ENCUMBRANCES" FROM TIME TO TIME OR BECAUSE OF NAI'S REQUEST FOR BNPPLC'S CONSENT OR APPROVAL TO AN ADJUSTMENT.]

This conveyance is subject to all encumbrances not constituting a "Lien Removable by BNPPLC" (as defined in the Common Definitions and Provisions Agreement incorporated by reference into the Lease Agreement referenced in the last item of the list below), including the following matters to the extent the same are still valid and in force:

1. Taxes and assessments for the year 200___ and subsequent years, which are not yet due and payable.
2. THE LIEN of supplemental taxes, if any, assessed pursuant to Chapter 3.5 commencing with Section 75 of the California Revenue and Taxation Code, resulting from changes of ownership or completion of construction on or after the date hereof.
3. EASEMENT for the purposes stated herein and incidents thereto

Purpose	: Slope Easement
In favor of	: City of Sunnyvale
Recorded	: October 9, 1964 in Book 6695, page 430, Official Records
Affects	: Easterly 18 feet, as shown on a survey plat entitled ALTA/ACSM Land Title Survey for: Network Appliance, 1345 Crossman Avenue, dated December 2, 1999, prepared by Kier & Wright, Job No. 97208-16.

4. EASEMENT for the purposes stated herein and incidents thereto

Purpose	: Public utilities easement
In favor of	: City of Sunnyvale

Recorded : October 9, 1964 in Book 6695, page 450, Official Records
Affects : Easterly 7 feet, as shown on a survey plat entitled ALTA/ACSM Land Title Survey for: Network Appliance, 1345 Crossman Avenue, dated December 2, 1999, prepared by Kier & Wright, Job No. 97208-16.

5. Covenants, Conditions and Restrictions in the Declaration of Protective Covenants — Moffett Industrial Park No. 2) recorded December 23, 1971 in Book 9640, page 443, Official Records; which provide that a violation thereof shall not defeat or render invalid the lien of any Mortgage or Deed of Trust made in good faith and for value. Said Covenants, Conditions and Restrictions do not provide for reversion of title in the event of a breach thereof. Restrictions, if any, based upon race, color, religion, sex, handicap, familial status, or national origin are deleted, unless and only to the extent that said covenant (a) is exempt under Chapter 42, Section 3607, of the United States Code, or (b) related to handicap but does not discriminate against handicapped persons.

ASSIGNMENT AND ASSUMPTION of the rights, powers, duties, obligations, and reservations of Moffett Park Associates, in favor of The Prudential Insurance Company of America, recorded February 8, 1977 in Book C583, page 685, Official Records.

6. EASEMENT for the purposes stated herein and incidents thereto

Purpose : Public utilities
Granted to : City of Sunnyvale
Recorded : November 16, 1976 in Book C414, page 105, Official Records
Affects : Southerly 10 feet, as shown on a survey plat entitled ALTA/ACSM Land Title Survey for: Network Appliance, 1345 Crossman Avenue, dated December 2, 1999, prepared by Kier & Wright, Job No. 97208-16.

7. LIMITATIONS, covenants, restrictions, reservations, exceptions or terms, but deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin to the extent such covenants, conditions or restrictions violate 42 USC 3604(c), contained in the document recorded February 5, 1980 in Book F122, page 460, Official Records.

Exhibit C-3

BILL OF SALE AND ASSIGNMENT

Reference is made to: (1) that certain Purchase Agreement dated as of December 14, 2006, (the "**Purchase Agreement**") between BNP Paribas Leasing Corporation ("**Assignor**"), a Delaware corporation, and Network Appliance, Inc. , a Delaware corporation, and (2) that certain Lease Agreement dated as of December 14, 2006 (the "**Lease**") between Assignor, as landlord, and Network Appliance, Inc. , a Delaware corporation, as tenant. *(Capitalized terms used and not otherwise defined in this document are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement incorporated by reference into both the Purchase Agreement and Lease.)*

As contemplated by the Purchase Agreement, Assignor hereby sells, transfers and assigns unto [**NAI or the Applicable Purchaser**], a _____ ("**Assignee**"), all of Assignor's right, title and interest in and to the following property, if any, to the extent such property is assignable:

- (a) the Lease;
- (b) any pending or future award made because of any condemnation affecting the Property or because of any conveyance to be made in lieu thereof, and any unpaid award for damage to the Property and any unpaid proceeds of insurance or claim or cause of action for damage, loss or injury to the Property; and
- (c) all other personal or intangible property included within the definition of "Property" as set forth in the Purchase Agreement, including but not limited to any of the following transferred to Assignor by the tenant pursuant to Paragraph 6 of the Lease or otherwise acquired by Assignor, at the time of the execution and delivery of the Lease and Purchase Agreement or thereafter, by reason of Assignor's status as the owner of any interest in the Property: (1) any goods, equipment, furnishings, furniture, chattels and tangible personal property of whatever nature that are located on the Property and all renewals or replacements of or substitutions for any of the foregoing; (ii) the rights of Assignor, existing at the time of the execution of the Lease and Purchase Agreement or thereafter arising, under Permitted Encumbrances; and (iii) any general intangibles, other permits, licenses, franchises, certificates, and other rights and privileges related to the Property that Assignee would have acquired if Assignee had itself acquired the interest of Assignor in and to the Property instead of Assignor.

Provided, however, excluded from this conveyance and reserved to Assignor are any rights or privileges of Assignor under the following: (1) the indemnities set forth in the Lease and the Ground Lease, whether such rights are presently known or unknown, including rights of the Assignor to be indemnified against environmental claims of third parties as provided in the Lease which may not presently be known, all of which indemnities will survive the deliver of this Bill

of Sale and Assignment and other documents required by the Purchase Agreement, (2) provisions in the Lease that establish the right of Assignor to recover any accrued unpaid rent under the Lease which may be outstanding as of the date hereof, (3) agreements between Assignor and Assignor's Parent or any Participant, (4) the right to retain Escrowed Proceeds, if any, that consist of condemnation or insurance proceeds resulting from a Pre-lease Force Majeure Event, (5) any right to receive future payments of any such condemnation or insurance proceeds, or (6) any other instrument being delivered to Assignor contemporaneously herewith pursuant to the Purchase Agreement.

Assignor does for itself and its successors covenant and agree to warrant and defend the title to the property assigned herein against the just and lawful claims and demands of any person claiming under or through a Lien Removable by Assignor, but not otherwise.

Assignee hereby assumes and agrees to keep, perform and fulfill Assignor's obligations, if any, relating to any permits or contracts (including the Lease), under which Assignor has rights being assigned herein.

[Signature pages follow.]

IN WITNESS WHEREOF, Assignor and Assignee have signed this Bill of Sale and Assignment to be effective as of _____, 200__.

BNP PARIBAS LEASING CORPORATION, a
Delaware corporation

By: _____
Lloyd G. Cox, Managing Director

STATE OF _____)
) SS
COUNTY OF _____)

On _____, 200__, before me _____, a Notary Public in and for the County and State aforesaid, personally appeared _____, who is personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity and that by his/her signature on such instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS, my hand and official seal.

Exhibit C-4

**ACKNOWLEDGMENT OF DISCLAIMER
OF REPRESENTATIONS AND WARRANTIES**

THIS ACKNOWLEDGMENT OF DISCLAIMER OF REPRESENTATIONS AND WARRANTIES (this “Certificate”) is made as of _____, ____, by [NAI or the Applicable Purchaser], a _____ (“Assignee”).

Contemporaneously with the execution of this Certificate, BNP Paribas Leasing Corporation (“Assignor”), a Delaware corporation, is executing and delivering to Assignee (1) an Assignment of Ground Lease and Improvements, and (2) a Bill of Sale and Assignment (the foregoing documents and any other documents to be executed in connection therewith are herein called the “Conveyancing Documents” and any of the properties, rights or other matters assigned, transferred or conveyed pursuant thereto are herein collectively called the “Subject Property”).

Notwithstanding any provision contained in the Conveyancing Documents to the contrary, Assignee acknowledges that Assignor makes no representations or warranties of any nature or kind, whether statutory, express or implied, with respect to environmental matters or the physical condition of the Subject Property, and Assignee, by acceptance of the Conveyancing Documents, accepts the Subject Property “AS IS,” “WHERE IS,” “WITH ALL FAULTS” and without any such representation or warranty by Grantor as to environmental matters, the physical condition of the Subject Property, compliance with subdivision or platting requirements or construction of any improvements. Without limiting the generality of the foregoing, Assignee hereby further acknowledges and agrees that warranties of merchantability and fitness for a particular purpose are excluded from the transaction contemplated by the Conveyancing Documents, as are any warranties arising from a course of dealing or usage of trade. Assignee hereby assumes all risk and liability (and agrees that Assignor will not be liable for any special, direct, indirect, consequential, or other damages) resulting or arising from or relating to the ownership, use, condition, location, maintenance, repair, or operation of the Subject Property, except for damages proximately caused by (and attributed by any applicable principles of comparative fault to) the Established Misconduct of Assignor. As used in the preceding sentence, “Established Misconduct” is intended to have, and be limited to, the meaning given to it in the Common Definitions and Provisions Agreement incorporated by reference into the Purchase Agreement dated as of December 14, 2006 between Assignor and Network Appliance, Inc. , pursuant to which Purchase Agreement Assignor is delivering the Conveyancing Documents.

The provisions of this Certificate will be binding on Assignee, its successors and assigns and any other party claiming through Assignee. Assignee hereby acknowledges that Assignor is entitled to rely and is relying on this Certificate.

[Signature page follows.]

Exhibit D

SECRETARY'S CERTIFICATE

The undersigned, [Secretary or Assistant Secretary] of BNP Paribas Leasing Corporation ("BNPPLC"), a Delaware corporation, hereby certifies as follows:

1. That he is the duly, elected, qualified and acting Secretary [or Assistant Secretary] of the Corporation and has custody of the corporate records, minutes and corporate seal.
2. That the following named persons have been properly designated, elected and assigned to the office in BNPPLC as indicated below; that such persons hold such office at this time and that the specimen signature appearing beside the name of such officer is his or her true and correct signature.

[The following blanks must be completed with the names and signatures of the officers who will be signing the Sale Closing Documents on behalf of BNPPLC.]

<u>Name</u> _____	<u>Title</u> _____	<u>Signature</u> _____
_____	_____	_____
_____	_____	_____

3. That the resolutions attached hereto and made a part hereof were duly adopted by the Board of Directors of BNPPLC in accordance with BNPPLC's Articles of Incorporation and Bylaws. Such resolutions have not been amended, modified or rescinded and remain in full force and effect.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the seal of the Corporation on this _____, day of _____, _____.

[signature and title]

**CORPORATE RESOLUTIONS OF
BNP PARIBAS LEASING CORPORATION**

[DRAFTING NOTE: INSERT HERE COPIES OF RESOLUTIONS ADOPTED BY THE BOARD OF DIRECTORS OF BNPPPLC SUFFICIENT TO AUTHORIZE THE DELIVERY OF SALE CLOSING DOCUMENTS. SUCH RESOLUTIONS MAY BE AS FOLLOWS:

WHEREAS, pursuant to that certain Purchase Agreement (herein called the "Purchase Agreement") dated as of December 14, 2006, by and between BNP Paribas Leasing Corporation ("BNPPPLC") and [NAI or the **Applicable Purchaser**] ("Purchaser"), BNPPPLC agreed to sell and Purchaser agreed to purchase or cause the Applicable Purchaser (as defined in the Purchase Agreement) to purchase the Corporation's interest in the property (the "Property") located in _____, California, more particularly described therein.

NOW THEREFORE, BE IT RESOLVED, that the Board of Directors of BNPPPLC, in its best business judgment, deems it in the best interest of BNPPPLC and its shareholders that BNPPPLC convey the Property to Purchaser or the Applicable Purchaser pursuant to and in accordance with the terms of the Purchase Agreement.

RESOLVED FURTHER, that the proper officers of BNPPPLC, and each of them, are hereby authorized and directed in the name and on behalf of BNPPPLC to cause BNPPPLC to fulfill its obligations under the Purchase Agreement.

RESOLVED FURTHER, that the proper officers of BNPPPLC, and each of them, are hereby authorized and directed to take or cause to be taken any and all actions and to prepare or cause to be prepared and to execute and deliver any and all deeds, assignments and other documents, instruments and agreements that are necessary, advisable or appropriate, in such officer's sole and absolute discretion, to carry out the intent and to accomplish the purposes of the foregoing resolutions.]

Exhibit E

CERTIFICATION OF NON-FOREIGN STATUS

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. Sections 18805, 18815 and 26131 of the California Revenue and Taxation Code, as amended, provide that a transferee of a California real property interest must withhold income tax if the transferor is a nonresident seller.

To inform NETWORK APPLIANCE, INC. ("**Transferee**"), a Delaware corporation, that withholding of tax is not required upon the disposition of a California real property interest by BNP PARIBAS LEASING CORPORATION ("**Transferor**"), a Delaware corporation, the undersigned hereby certifies the following on behalf of Transferor:

1. Transferor is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
2. Transferor is not a disregarded entity (as defined in Section 1.1445-2(b)(2)(iii) of the Income Tax Regulations);
3. Transferor's U.S. employer identification number is 75-2252918; and
4. Transferor's office address is:

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director

Transferor understands that this Certification of Non-Foreign Status may be disclosed to the Internal Revenue Service by Transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this Certification of Non-Foreign Status and to the best of my knowledge and belief it is true, correct and complete, and I further declare that I have authority to sign this document on behalf of the Transferor.

Dated: _____, 20____.

Lloyd G. Cox, Managing Director of Transferor

Exhibit F

**Grant of Repurchase Option
And Restrictive Covenants**

THIS GRANT OF REPURCHASE OPTION AND RESTRICTIVE COVENANTS AGREEMENT (this “**Agreement**”) is made as of _____, _____, by NETWORK APPLIANCE, INC. (“**NAI**”), a Delaware corporation, whose address is _____, and [THE APPLICABLE PURCHASER] (the “**Applicable Purchaser**”), whose address is _____, in favor of BNP PARIBAS LEASING CORPORATION (“**BNPPLC**”), a Delaware corporation.

RECITALS

BNPPLC and NAI entered into a Purchase Agreement dated as of December 14, 2006, (the “**Purchase Agreement**”) concerning the leasehold estate under a ground lease covering the land described in Annex 1 attached hereto and made a part hereof and other property described therein. (*Capitalized terms used and not otherwise defined in this document are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement incorporated by reference into the Purchase Agreement.*)

Pursuant to the Purchase Agreement, BNPPLC is, contemporaneously with the execution of this Agreement, executing and delivering to the Applicable Purchaser (1) an Assignment of Ground Lease and Improvements and (2) a Bill of Sale and Assignment (the foregoing documents and any other documents to be executed in connection therewith are herein called the “**Conveyancing Documents**” and any of the properties, rights or other matters assigned, transferred or conveyed pursuant thereto are herein collectively called the “**Subject Property**”).

As provided in the Purchase Agreement, BNPPLC is entitled to require this Agreement from NAI and the Applicable Purchaser to induce BNPPLC to execute the Conveyancing Documents and in consideration thereof.

COVENANTS AND GRANTS

NOW, THEREFORE, the Applicable Purchaser does hereby grant to BNPPLC an option to repurchase the Subject Property (the “**Repurchase Option**”) for a price and on the terms and conditions hereinafter set forth, and on the condition that NAI or the Applicable Purchaser breaches either of the following covenants (a “**Breach**”), both of which covenants are made jointly and severally by NAI and the Applicable Purchaser as covenants intended to run with the land described in Annex 1 for the benefit of BNPPLC and its successors and assigns:

1. No Other Payments to NAI. Except for the payments (if any) that BNPPLC must pay to NAI as provided in the Purchase Agreement, neither NAI nor any Affiliate of NAI will receive or accept any payment or other thing of value, directly or indirectly, from the Applicable Purchaser or any Affiliate of the Applicable Purchaser or any successor or assign of the

Applicable Purchaser because of or in connection with the sale of the Subject Property from BNPPPLC to the Applicable Purchaser pursuant to the Purchase Agreement.

2. 10 Year Restriction Against NAI's Involvement With the Property. Neither NAI nor any Affiliate of NAI may acquire, occupy or use, directly or indirectly, the Subject Property for a period of ten years after the date hereof.

To exercise the Repurchase Option, BNPPPLC must deliver notice thereof to NAI and the Applicable Purchaser at the addresses indicated above no later than the earlier of (1) one year after BNPPPLC is itself notified of a Breach, or (2) the tenth anniversary of the date of this Agreement. Within thirty days after receipt of any such notice, NAI and the Applicable Purchaser must deliver to BNPPPLC an assignment of ground lease and bill of sale that is sufficient to reconvey the Subject Property back to BNPPPLC, with warranties of title by NAI and the Applicable Purchaser against any and all claims other than the Permitted Encumbrances. Further, if the Ground Lease is no longer then in effect, NAI must reinstate the Ground Lease in favor of BNPPPLC. (But in no event will BNPPPLC be responsible for any breach of, or required to cure any default by the lessee under, the Ground Lease that first occurred after the date hereof and prior to any such conveyance back to BNPPPLC.) Contemporaneously with the reconveyance back to BNPPPLC, NAI and the Applicable Purchaser must cause possession of the Subject Property to be delivered to BNPPPLC, with the Subject Property in good condition and in compliance with Applicable Laws, unoccupied and free from any encumbrances other than Permitted Encumbrances.

The price required for the Subject Property if BNPPPLC exercises the Repurchase Option will be the lesser of (1) the net cash sales proceeds remaining after the payment of all sales costs that BNPPPLC is receiving and entitled to retain under the Purchase Agreement because of its sale of the Subject Property to the Applicable Purchaser, or (2) the then fair market value of the Subject Property, as determined in accordance with the appraisal procedures set forth in Annex 2 attached hereto. If for any reason the price has not been determined as of the date upon which a reconveyance to BNPPPLC is required by this Agreement, such date will be deferred until the price is determined.

Any reconveyance of the Subject Property back to BNPPPLC pursuant to this Agreement will cut off and terminate any interest in the Subject Property claimed by, through or under the Applicable Purchaser (such as, but not limited to, any judgment liens established against the Subject Property because of a judgment rendered against the Applicable Purchaser and any leasehold or other interests conveyed by the Applicable Purchaser in the ordinary course of its business). Anyone accepting or taking any interest in the Property through or under the Applicable Purchaser after the date of this Agreement will acquire such interest subject to the Repurchase Option. Further, BNPPPLC may make any payment of the purchase price required by this Agreement for the purchase of the Subject Property directly to the Applicable Purchaser notwithstanding any prior conveyance or assignment by the Applicable Purchaser, voluntary or

otherwise, of any right or interest in the Subject Property, and BNPPLC will not be responsible for the proper distribution or application of any such payments by the Applicable Purchaser; and any such payment to the Applicable Purchaser will discharge the obligation of BNPPLC to cause such payment to all Persons claiming an interest in such payment.

Notwithstanding any exercise by BNPPLC of the Repurchase Option, BNPPLC's obligation to close the repurchase of the Subject Property will be subject to the following terms and conditions, all of which are for the benefit of BNPPLC: (1) BNPPLC must have been furnished with evidence satisfactory to BNPPLC that title will be conveyed to it as required by the preceding subparagraph; (2) nothing has occurred or been discovered after BNPPLC exercised the Repurchase Option that could significantly and adversely affect title to the Subject Property or BNPPLC's use thereof, (3) all of the representations of NAI in the Ground Lease must continue to be true as if made effective on the date of the closing and, with respect to any such representations which may be limited to the knowledge of NAI or any of NAI's representatives, would continue to be true on the date of the closing if all relevant facts and circumstances were known to NAI and such representatives, (4) BNPPLC must find the price for the Subject Property to be acceptable after it is determined as provided in this Agreement, (5) the deed and other documents which are described in this Agreement as documents to be delivered to BNPPLC at the closing of BNPPLC's repurchase must have been tendered to BNPPLC; and (6) NAI and the Applicable Purchaser must have complied with the all the terms and condition of this Agreement.

BNPPLC may deduct from the purchase price required of it by this Agreement the full amount of any transfer taxes required because of the reconveyance of the Subject Property back to BNPPLC. Further, BNPPLC may deduct any withholding tax from the price required by this Agreement if BNPPLC is not excused from such withholding because of the delivery to it of an appropriate certificate of nonforeign status as needed to comply with the provisions of the U.S. Foreign Investors Real Property Tax Act (FIRPTA) or any comparable federal, state or local law in effect at the time.

At the closing or any repurchase of the Subject Property by BNPPLC hereunder, NAI and the Applicable Purchaser will pay for and deliver to BNPPLC an owner's title insurance policy in the full amount of the purchase price payable by BNPPLC, issued by a title insurance company designated by BNPPLC (or written confirmation from the title company that it is then prepared to issue such a policy), and subject only to standard printed exceptions which the title insurance company refuses to delete or modify in a manner acceptable to BNPPLC and to Permitted Encumbrances.

To secure the obligations of the Applicable Purchaser to reconvey the Subject Property if BNPPLC exercises the Repurchase Option and to pay any damages to BNPPLC caused by a breach of NAI's or the Applicable Purchaser's obligations hereunder, including any such breach caused by a rejection or termination of this Agreement in any bankruptcy or insolvency

proceeding instituted by or against NAI or the Applicable Purchaser, as debtor, the Applicable Purchaser does hereby grant to BNPPLC (and BNPPLC does hereby reserve from the conveyances provided in the Conveyancing Documents) a lien and security interest against all rights, title and interests conveyed by BNPPLC under the Conveyancing Documents.

The terms, provisions, covenants and conditions hereof will be binding upon NAI and the Applicable Purchaser and their respective successors and assigns with respect to the Subject Property and will inure to the benefit of BNPPLC and all transferees, mortgagees, successors and assignees of BNPPLC with respect to the Subject Property. It is understood that BNPPLC may transfer the Repurchase Option and other rights and interests granted to it or reserved by it herein, in whole or in part, by any instrument recorded in the real property records of the county in which the Subject Property is located.

[Signature pages follow.]

Exhibit F to Purchase Agreement — Page 4

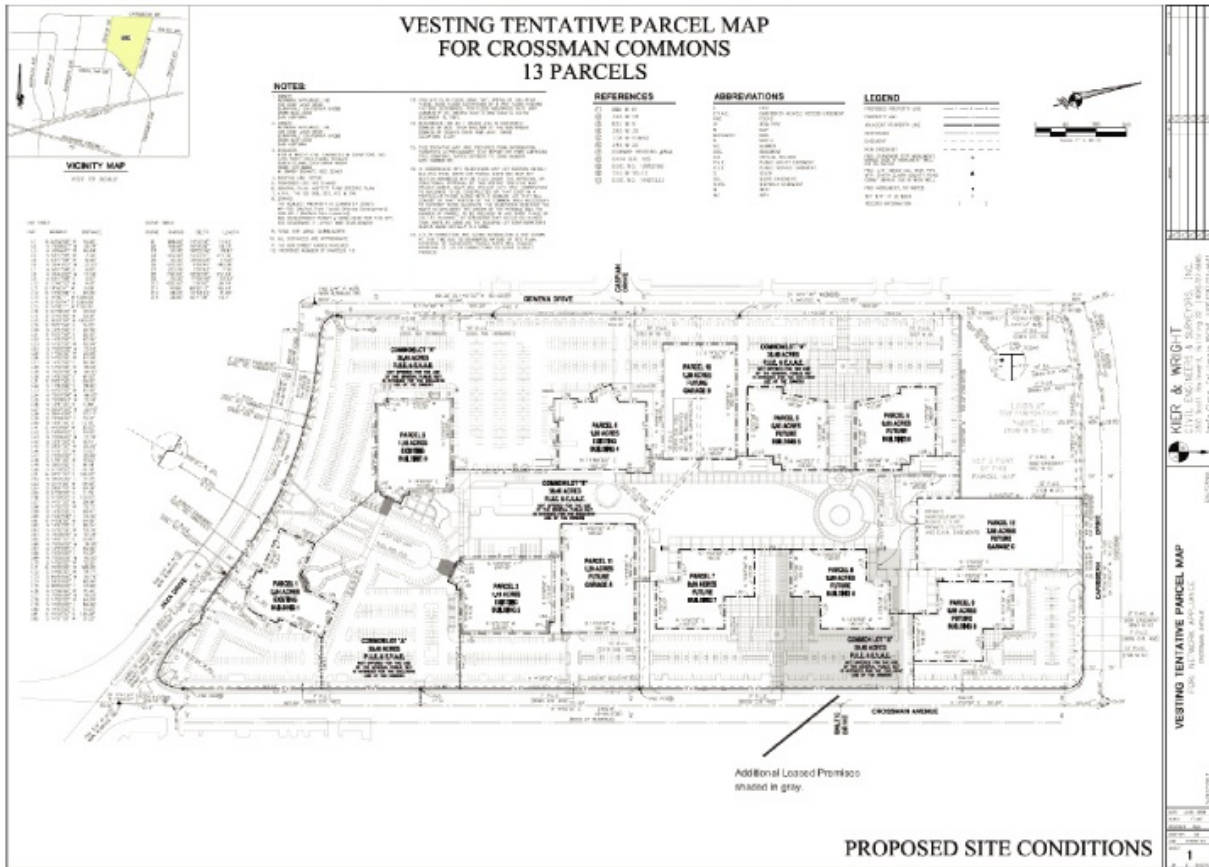
Annex A

LEGAL DESCRIPTION

[DRAFTING NOTE: TO THE EXTENT THAT THE “LAND” COVERED BY THE GROUND LEASE CHANGES FROM TIME TO TIME AS PROVIDED THEREIN OR BECAUSE OF ADJUSTMENTS FOR WHICH NAI REQUESTS BNPPLC’S CONSENT OR APPROVAL AS PROVIDED IN THE CLOSING CERTIFICATE, SO TOO WILL THE DESCRIPTION OF THE LAND BELOW CHANGE. ANY SUCH CHANGES WILL BE INCORPORATED INTO THE DESCRIPTION BELOW AND THIS “DRAFTING NOTE” WILL BE DELETED BEFORE THE ASSIGNMENT TO WHICH THIS DESCRIPTION IS ATTACHED IS ACTUALLY EXECUTED AND DELIVERED.]

Proposed Parcel 8, and (except to the extent within a different platted Parcel as currently shown in the Map Records of the County of Santa Clara, California) proposed Parcel 12, and the Additional Leased Premises as defined below, (collectively, the “**2006 Ground Lease Premises**”) as shown on that certain Vesting Tentative Parcel Map provided to BNP Paribas Leasing Corporation (“**BNPPLC**”) by Network Appliance, Inc. (“**NAI**”) attached hereto and made a part hereof (the “**Tentative Map**”), which has received preliminary approval from the City of Sunnyvale, California, but not yet been filed for record in the office of the recorder of the County of Santa Clara, State of California. As used herein, “**Additional Leased Premises**” means the parking lots, driveways and other areas shaded in gray on the Tentative Map attached hereto within the larger area designated as Common Lot A (consisting of 30.46 Acres, more or less) on the Tentative Map. The southern boundary of the Additional Leased Premises is a line that runs North 75 degrees, 07 minutes, 58 seconds equidistant from the southern boundary of Parcel 8 and the northern boundary of Parcel 7, both as shown on the Tentative Map. The eastern boundary of the Additional Leased Premises runs along the same line as the eastern boundary of Common Lot A, as shown on the Tentative Map. The western boundary of the Additional Leased Premises runs along the same line as the western boundary of Parcel 8 and Parcel 7, as shown on the Tentative Map. The northern boundary of the Additional Leased Premises runs along the center of an existing or proposed driveway which is situated between Parcel 8 and Parcel 9, as shown on the Tentative Map.

TOGETHER WITH, easements appurtenant to the 2006 Ground Lease Premises as described in Exhibit A attached to the Ground Lease.



Annex B

Appraisal Procedures

If the Applicable Purchaser and BNPPLC do not otherwise agree upon the amount of the fair market value of the Subject Property as required to establish the price to be paid by BNPPLC for the Subject Property following BNPPLC's exercise of the Repurchase Option, the fair market value will be determined in accordance with the following procedure:

1. The Applicable Purchaser and BNPPLC must each appoint a real estate appraiser who is familiar with properties in the vicinity of the Subject Property and who has not previously acted for either party. Each party will make the appointment no later than ten days after receipt of notice from the other party that the appraisal process described in this Annex has been invoked. The agreement of the two appraisers as to the Option Price will be binding upon the Applicable Purchaser and BNPPLC. If the two appraisers cannot agree upon fair market value within ten days following their appointment, they must within another ten days agree upon a third real estate appraiser. Immediately thereafter, each of the first two appraisers will submit his best estimate of the fair market value of the Subject Property (together with a written report supporting such estimate) to the third appraiser and the third appraiser will choose between the two estimates. The estimate of fair market value chosen by the third appraiser as the closest to the actual fair market value will be binding upon the Applicable Purchaser and BNPPLC. Notification in writing of fair market value must be made to the Applicable Purchaser and BNPPLC within fifteen days following the selection of the third appraiser.
2. If appraisers must be selected under the procedure set out above and either BNPPLC or the Applicable Purchaser fails to appoint an appraiser or fails to notify the other party of such appointment within fifteen days after receipt of notice that the prescribed time for appointing the appraisers has passed, then the other party's appraiser will determine fair market value. All appraisers selected for the appraisal process set out in this Annex will be disinterested, reputable, qualified real estate appraisers with the designation of MAI or equivalent and with at least 5 years experience in appraising properties comparable to the Subject Property.
3. If a third appraiser must be chosen under the procedure set out above, he will be chosen on the basis of objectivity and competence, not on the basis of his relationship with the other appraisers or the parties to this Agreement, and the first two appraisers will be so advised. Although the first two appraisers will be instructed to attempt in good faith to agree upon the third appraiser, if for any reason they cannot agree within the prescribed time, either the Applicable Purchaser and BNPPLC may require the first two appraisers to immediately submit its top choice for the third appraiser to JAMS/ENDISPUTE in Dallas, Texas, who will have complete discretion to select the most objective and competent third appraiser from between the choices of each of the first two appraisers, and will do so within ten Business Days after such choices are submitted for decision.

4. Either the Applicable Purchaser or BNPPLC may notify the appraiser selected by the other party to demand the submission of an estimate of Option Price or a choice of a third appraiser as required under the procedure described above; and if the submission of such an estimate or choice is required but the other party's appraiser fails to comply with the demand within fifteen days after receipt of such notice, then fair market value or choice of the third appraiser, as the case may be, selected by the other appraiser (i.e., the notifying party's appraiser) will be binding upon the Applicable Purchaser and BNPPLC.
5. The Applicable Purchaser bear the expenses of all appraisers involved in the determination of fair market value as provided in this Annex.

Exhibit G

**Notice of Election to Terminate the Supplemental Payment Obligation
and Irrevocable Release and Waiver of the Right to Purchase**

[Date]

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director

Re: Purchase Agreement dated as of December 14, 2006 (the "**Purchase Agreement**"), between Network Appliance, Inc. ("**NAI**"), a Delaware corporation, and BNP Paribas Leasing Corporation ("**BNPPLC**"), a Delaware corporation

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Purchase Agreement referenced above. This letter will constitute a notice given pursuant to subparagraph 6(B) of the Purchase Agreement. As provided in that subparagraph, NAI irrevocably elects to terminate the Supplemental Payment Obligation effective immediately, subject only to the conditions described below. In addition, NAI irrevocably waives and releases its rights to purchase or cause an Affiliate of NAI to purchase the Property granted to it by the Purchase Agreement. Because of (but without limiting) such waiver and release, the Purchase Option is terminated and so are all rights of NAI under subparagraph 2(A) of the Purchase Agreement.

NAI acknowledges that this notice will not be effective to terminate the Supplemental Payment Obligation if it is not received by BNPPLC prior to the Completion Date.

NAI also acknowledges that even if no prior 97-10/Event has occurred, the delivery of this notice is in and of itself a 97-10/Event under and as defined in the Construction Management Agreement. ***Therefore, after receipt of this notice BNPPLC will be entitled to demand and receive a 97-10/Prepayment on and subject to the terms and conditions of Paragraph 9 of the Construction Management Agreement.***

NAI also acknowledges that its right to terminate the Supplemental Payment Obligation is subject to the condition precedent that (1) NAI must have given (and not rescinded) a Notice of NAI's Intent to Terminate as provided in the Construction Management Agreement, or (2) BNPPLC must have given any FOCB Notice as provided in the Construction Management Agreement. Accordingly, if neither of the notices described in the preceding sentence have been given, the Supplemental Payment Obligation will not terminate by reason of this notice.

Finally, NAI acknowledges that because the delivery of this notice constitutes a 97-10/Event, BNPPLC will have the right at any time for any reason or no reason to terminate the Lease by notice to NAI.

NETWORK APPLIANCE, INC., a Delaware
corporation

By: _____
Name: _____
Title: _____

[cc all Participants]

GROUND LEASE

BETWEEN

**NETWORK APPLIANCE, INC.
("NAI")**

AND

**BNP PARIBAS LEASING CORPORATION
("BNPPLC")**

December 14, 2006

TABLE OF CONTENTS

	<u>Page</u>
<i>RECITALS</i>	1
<i>GRANTING CLAUSES</i>	1
<i>GENERAL TERMS AND CONDITIONS</i>	3
1 Additional Definitions	3
“Contingent Purchase Option”	3
“Fair Rental Value”	3
“Ground Lease Default”	3
“Ground Lease Rent”	3
“Ground Lease Term”	3
“Leasehold Mortgage”	3
“Leasehold Mortgagee”	4
“Turnover Date”	4
2 Ground Lease Term and Early Termination	4
3 Ground Lease Rent	4
4 Receipt and Application of Insurance and Condemnation Proceeds	4
5 No Lease Termination	5
6 The Lease and Other Operative Documents	5
7 Use of Leased Property	5
8 Assignment and Subletting; Pass Through of BNPPLC’s Liability Insurance and Indemnity Rights	6
9 Estoppel Certificate	6
10 Leasehold Mortgages	7
11 Other Representations, Warranties and Covenants of NAI	9
(A) Condition of the Property	9
(B) Environmental Representations	10
(C) Current Status of Title to the Land	10
(D) Intentionally Deleted	10
(E) Title to Improvements	10
(F) Defense of Adverse Title Claims	11
(G) Prohibition Against Consensual Liens on the Leased Property	12
(H) Compliance With Permitted Encumbrances	12

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
(I) Compliance With Laws	12
(J) Modification of Permitted Encumbrances	12
(K) Performance and Preservation of the Permitted Encumbrances for the Benefit of BNPPLC	13
(L) Cooperation by NAI and its Affiliates	13
(M) Omissions	14
(N) Insurance and Casualty	14
(O) Condemnation	14
(P) Further Assurances	15
12 Ground Lease Defaults	15
(A) Definition of Ground Lease Default	15
(B) Remedy	15
13 Quiet Enjoyment	16
14 Option to Purchase	16
15 Miscellaneous	16
(A) No Merger	16
(B) Recording; Memorandum of Lease	16

Exhibits and Schedules

Exhibit A	Legal Description
Exhibit B	Permitted Encumbrances List
Exhibit C	Contingent Purchase Option
Exhibit D	Determination of Fair Value

GROUND LEASE

This GROUND LEASE (this “**Ground Lease**”), dated as of December 14, 2006 (the “**Effective Date**”), is made by and between BNP PARIBAS LEASING CORPORATION (“**BNPPLC**”), a Delaware corporation, and NETWORK APPLIANCE, INC. (“**NAI**”), a Delaware corporation.

RECITALS

Contemporaneously with the execution of this Ground Lease, BNPPLC and NAI are executing a Common Definitions and Provisions Agreement dated as of the Effective Date (the “**Common Definitions and Provisions Agreement**”), which by this reference is incorporated into and made a part of this Ground Lease for all purposes. *As used in this Ground Lease, capitalized terms defined in the Common Definitions and Provisions Agreement and not otherwise defined in this Ground Lease are intended to have the respective meanings assigned to them in the Common Definitions and Provisions Agreement.*

At the request of NAI, and to facilitate the transactions contemplated in the other Operative Documents, BNPPLC is executing this Ground Lease to acquire from NAI a leasehold estate of 50 years in the Land described in Exhibit A attached hereto (the “**Land**”) and any existing Improvements on the Land.

Also contemporaneously with this Ground Lease, BNPPLC and NAI are executing a Construction Management Agreement (the “**Construction Management Agreement**”) and a Lease Agreement (the “**Lease**”). Pursuant to the Construction Management Agreement, BNPPLC is agreeing to provide funding for the construction of new Improvements. When the term of the Lease commences, the Lease will cover all Improvements on the Land.

Pursuant to a Purchase Agreement dated as of the Effective Date (the “**Purchase Agreement**”) between BNPPLC and NAI, NAI will have the right to purchase, among other things, BNPPLC’s leasehold estate under this Ground Lease on and subject to the terms and conditions set forth therein.

GRANTING CLAUSES

In consideration of the rent to be paid and the covenants and agreements to be performed by BNPPLC, as hereinafter set forth, NAI does hereby LEASE, DEMISE and LET unto BNPPLC for the term hereinafter set forth the Land, together with:

- (A) all easements and rights-of-way now owned or hereafter acquired by NAI for use in connection with the Land or any Improvements constructed thereon or as a means of access thereto and any and all easements and rights appurtenant to the Land; and
-

(B) all right, title and interest of NAI, now owned or hereafter acquired, in and to (A) any land lying within the right-of-way of any street, open or proposed, adjoining the Land, (B) any and all sidewalks and alleys adjacent to the Land and (C) any strips and gores between the Land and abutting land not owned by NAI.

The Land and all of the property described in items (1) and (2) above are hereinafter referred to collectively as the “**Real Property**”.

To the extent, but only to the extent, that assignable rights or interests in, to or under the following have been or will be acquired by NAI as the owner of any interest in the Real Property, NAI also hereby grants and assigns to BNPPPLC for the term of this Ground Lease the right to use and enjoy (and, in the case of contract rights, to enforce) such rights or interests of NAI:

(A) the Permitted Encumbrances; and

(B) any general intangibles, permits, licenses, franchises, certificates, and other rights and privileges related to the Real Property that BNPPPLC (rather than NAI) would have acquired if BNPPPLC had itself acquired the fee estate in the Real Property (excluding, however, the rights and privileges of NAI under this Ground Lease, the Construction Management Agreement, the Lease, the Purchase Agreement and any other Operative Documents).

Such rights and interests of NAI, whether now existing or hereafter arising, are hereinafter collectively called the “**Personal Property**”. The Real Property and the Personal Property are hereinafter sometimes collectively called the “**Leased Property**.” The Leased Property and all Improvements on the Land now or in the future (whether such Improvements are owned by BNPPPLC or NAI) are hereinafter sometimes called the “**Improved Property**”.

However, the leasehold estate conveyed hereby and BNPPPLC’s rights hereunder are expressly made subject and subordinate to the Permitted Encumbrances listed on Exhibit B.

Further, so long as any of the *other* Operative Documents remain in force, the rights and obligations of NAI and BNPPPLC hereunder will be subject to any contrary provisions therein, including provisions in the Construction Management Agreement and the Lease that govern the collection and application of condemnation and insurance proceeds in the event of any taking of or damage to the Improved Property.

GENERAL TERMS AND CONDITIONS

The Leased Property is leased by NAI to BNPPPLC and is accepted and is to be used and possessed by BNPPPLC upon and subject to the following terms, provisions, covenants, agreements and conditions:

1 **Additional Definitions.** As used in this Ground Lease, capitalized terms defined above have the respective meanings assigned to them above; as indicated above, capitalized terms that are defined in the Common Definitions and Provisions Agreement and that are used but not otherwise defined have the respective meanings assigned to them in the Common Definitions and Provisions Agreement; and, the following terms have the following respective meanings:

“**Contingent Purchase Option**” means the option granted BNPPPLC by NAI as provided in Exhibit C attached to this Ground Lease.

“**Fair Rental Value**” means (and all appraisers and other persons involved in the determination of the Fair Rental Value will be so advised) the annual rent, as determined in accordance with Exhibit D, that would be agreed upon between a willing tenant, under no compulsion to lease, and a willing landlord, under no compulsion to lease, for unimproved land (including appurtenances) comparable in size and location to the Land, exclusive of any Improvements but assuming that there is no higher and better use for such land than as a site for improvements of comparable size and utility to the Improvements, at the time a determination is required under this Ground Lease and taking into consideration the condition of the Land, the encumbrances affecting the title to the Land and all applicable zoning, land use approvals and other governmental permits relating to the Land at the time of such determination.

“**Ground Lease Default**” has the meaning assigned to it in subparagraph 13(A) below.

“**Ground Lease Rent**” means the rent payable by BNPPPLC pursuant to Paragraph 3 below.

“**Ground Lease Term**” has the meaning assigned to it in Paragraph 2 below.

“**Leasehold Mortgage**” means any mortgage, deed of trust (with or without a private power of sale), security agreement or assignment executed by BNPPPLC to secure an obligation to repay borrowed money or other voluntary obligations, which covers BNPPPLC’s leasehold estate hereunder or any part thereof or any rents or other charges to be paid to BNPPPLC pursuant to any sublease.

“**Leasehold Mortgagee**” means any lender or other beneficiary of a Leasehold Mortgage that has notified NAI of the existence such Leasehold Mortgage and of its address to which notices should be delivered.

“**Turnover Date**” means the day which is thirty days after any Designated Sale Date upon which, for any reason whatsoever, NAI does not purchase the Improved Property from BNPPLC pursuant to the Purchase Agreement.

2 **Ground Lease Term and Early Termination.** The term of this Ground Lease (herein called the “**Ground Lease Term**”) will commence on and include the Effective Date and end on the last Business Day which falls on or prior to the fiftieth (50th) anniversary of the Effective Date. However, subject to the prior approval of any Leasehold Mortgagee, BNPPLC will have the right to terminate this Ground Lease by giving a notice to NAI stating that BNPPLC unequivocally elects to terminate effective as of a date specified in such notice, which may be any date more than thirty days after the notice and after the expiration or termination of the Lease pursuant to its terms.

3 **Ground Lease Rent.** The rent required by this Ground Lease (herein called “**Ground Lease Rent**”) will equal the Fair Rental Value, determined as provided in Exhibit D, and be paid as follows:

Prior to the Completion Date, BNPPLC must pay Ground Lease Rent to NAI on the first Business Day of every calendar month for the preceding month. Consistent with the agreement of the parties in Exhibit D that the initial Fair Rental Value is \$600,000 per annum, each such monthly payment will be in the amount of \$50,000 prior to the Completion Date. (Notwithstanding the forgoing, if agreed by the parties for administrative convenience, BNPPLC will prepay all or a portion of the Ground Lease Rent expected to accrue prior to the Completion Date, rather than pay it monthly on the first Business Day of each month.)

After the Completion Date, Ground Lease Rent will be paid annually in arrears on each anniversary of the Effective Date. So long as the Lease continues, each such payment by BNPPLC may be offset against the reimbursement for such payment required of NAI by the Lease. After the Lease expires or terminates, however, BNPPLC’s obligation for the payment of Ground Lease will continue so long as this Ground Lease continues, on and subject to the terms and conditions set forth herein.

4 **Receipt and Application of Insurance and Condemnation Proceeds.** All insurance and condemnation proceeds payable with respect to any damage to or taking of the Leased Property will be payable to and become the property of BNPPLC; provided, however, NAI will be entitled to receive condemnation proceeds awarded for the value of NAI’s remainder interest in the Land exclusive of the Improvements. BNPPLC is authorized to take all action

necessary on behalf of both BNPPLC and NAI (as lessor under this Ground Lease) to collect insurance and condemnation proceeds.

5 **No Lease Termination.** Except as expressly provided herein, this Ground Lease will not terminate, nor will NAI have any right to terminate this Ground Lease nor will the obligations of NAI under this Ground Lease be excused, for any reason whatsoever, including without limitation any of the following: (i) any damage to or the destruction of all or any part of the Leased Property from whatever cause, (ii) the taking of the Leased Property or any portion thereof by eminent domain or otherwise for any reason, (iii) any default on the part of BNPPLC under this Ground Lease or under any other agreement to which NAI and BNPPLC are parties, or (iv) any other cause whether similar or dissimilar to the foregoing, any existing or future law to the contrary notwithstanding. Notwithstanding the foregoing, after any purchase by NAI of BNPPLC's interest in the Improved Property pursuant to the Purchase Agreement and payment to BNPPLC of the purchase price required by the Purchase Agreement and all other sums dues under any of the other Operative Documents, NAI (as the holder of both the lessor's and lessee's interests hereunder) may elect to terminate this Ground Lease; and after a purchase by BNPPLC of the Land because of BNPPLC exercise of the Contingent Purchase Option, BNPPLC (as the holder of both the lessor's and lessee's interests hereunder) may elect to terminate this Ground Lease. It is the intention of the parties hereto that the obligations of NAI hereunder will be separate and independent of the covenants and agreements of BNPPLC. However, nothing in this Paragraph will be construed as a waiver by NAI of any right NAI may have at law or in equity to recover monetary damages for any default under this Ground Lease by BNPPLC.

6 **The Lease and Other Operative Documents.** Nothing contained in this Ground Lease will limit, modify or otherwise affect any of NAI's or BNPPLC's respective rights and obligations under the other Operative Documents, which rights and obligations are intended to be separate, independent and in addition to, and not in lieu of, the obligations established by this Ground Lease. In the event of any inconsistency between the terms and provisions of the other Operative Documents and the terms and provisions of this Ground Lease, the terms and provisions of the other Operative Documents will control.

7 **Use of Leased Property.** Subject to the Permitted Encumbrances and the terms hereof, BNPPLC may use and occupy the Leased Property for any purpose permitted by Applicable Laws and may construct, modify, renovate, replace and remove any Improvements on the Land from time to time, subject only to the constraints that Applicable Laws would impose upon the owner of the Land if the owner were constructing, modifying, renovating, replacing or removing Improvements. To afford NAI an opportunity to file a notice of nonresponsibility pursuant to California Civil Code § 3094, BNPPLC will, before commencing the construction any major Improvements upon the Land after the Turnover Date, endeavor to notify NAI that BNPPLC intends to commence such construction; provided, however, BNPPLC will have no liability for its failure to provide such a notice.

8 **Assignment and Subletting; Pass Through of BNPPLC's Liability Insurance and Indemnity Rights.** BNPPLC may sublet or assign this Ground Lease without the consent of NAI or any of its Affiliates, subject only to limitations set forth in the Lease for the benefit of NAI so long as those limitations remain in force.

To the extent that BNPPLC may from time to time after the Turnover Date require any subtenant to agree to maintain liability insurance against claims of third parties and agree to make BNPPLC an additional or named insured under such insurance, BNPPLC will also require the subtenant to agree to make NAI an additional or named insured. However, BNPPLC will have no liability to NAI for a breach by the subtenant of any such agreements, and to the extent that BNPPLC's rights as an additional or named insured are subject to exceptions or limitations concerning BNPPLC's own acts or omissions or the acts or omissions of anyone other than the subtenant, so too may NAI's rights as an additional or named insured be subject to exceptions or limitations concerning NAI's own acts or omissions or the acts or omissions of anyone other than the subtenant.

To the extent that BNPPLC may itself from time to time after the Turnover Date maintain liability insurance against claims of third parties which may arise because of any occurrence on or alleged to have occurred on or about the Leased Property, BNPPLC will cause NAI to be an additional or named insured under such insurance, provided NAI pays or reimburses BNPPLC for any additional insurance premium required to have NAI made an insured.

To the extent that BNPPLC may from time to time after the Turnover Date require any subtenant to agree to indemnify BNPPLC against Environmental Losses or other Losses concerning the Leased Property, BNPPLC will also require the subtenant to agree to indemnify NAI. However, BNPPLC will have no liability to NAI for a breach by the subtenant of any such agreement, and to the extent that BNPPLC's rights as an indemnitee of the subtenant are subject to exceptions or limitations concerning BNPPLC's own acts or omissions or the acts or omissions of anyone other than the subtenant, so too may NAI's rights as an indemnitee be subject to exceptions or limitations concerning NAI's own acts or omissions or the acts or omissions of anyone other than the subtenant.

9 **Estoppel Certificate.** NAI and BNPPLC will from time to time, within ten days after receipt of request by the other party hereto, deliver a statement in writing to such other party or other Person(s) designated by such party certifying:

- (A) that this Ground Lease is unmodified and in full force and effect (or if modified that this Ground Lease as so modified is in full force and effect);
- (B) that to the knowledge of the party providing such certificate, the other party has

not previously assigned or hypothecated its rights or interests under this Ground Lease, except as is described in such statement with as much specificity as the party so certifying is able to provide;

(C) the term of this Ground Lease and the Ground Lease Rent then in effect and any additional charges;

(D) that to the knowledge of the party providing such certificate, the other party is not in default under any provision of this Ground Lease (or if in default, the nature thereof in detail) and, in any certificate provided by NAI, a statement as to any outstanding obligations on the part of NAI or BNPPPLC; and

(E) in any certificate provided by NAI, such other factual matters concerning the Leased Property or BNPPPLC's rights and obligations under this Ground Lease as are requested by BNPPPLC.

NAI's failure to deliver such statement within such time will constitute an admission by NAI (i) that this Ground Lease is in full force and effect, without modification except as may be represented by BNPPPLC, and (ii) that there are no uncured defaults in BNPPPLC's performance hereunder.

10 Leasehold Mortgages.

(A) By Leasehold Mortgage BNPPPLC may encumber BNPPPLC's leasehold estate in the Leased Property created by this Ground Lease and BNPPPLC's rights and interests in buildings, fixtures, equipment and improvements situated on the Land and rents, issues, profits, revenues and other income to be derived by BNPPPLC from the Leased Property. However, prior to the Turnover Date, a Leasehold Mortgage will be permitted hereunder only if it constitutes a Permitted Transfer and only if it is made expressly subject to the rights of NAI under the other Operative Documents.

(B) Any Leasehold Mortgagee or other party, including any corporation formed by a Leasehold Mortgagee, may become the legal owner of the leasehold estate created by this Ground Lease and of BNPPPLC's rights and interests in the improvements, equipment, fixtures and other property assigned as additional security pursuant to a Leasehold Mortgage, by foreclosure of a Leasehold Mortgage or as a result of the assignment or conveyance in lieu of foreclosure. Further, any such Leasehold Mortgagee or other party may itself, after becoming the legal owner and holder of the leasehold estate created by this Ground Lease, or of any improvements, equipment, fixtures and other property assigned as additional security pursuant to a Leasehold Mortgage, convey or pledge the same without the consent of NAI.

(C) NAI must serve notice of any default by BNPPLC hereunder upon any Leasehold Mortgagee for which NAI has received written notification from BNPPLC of the Leasehold Mortgagee's address for such notice. No notice of a default by BNPPLC will be deemed effective until it is so served. Any Leasehold Mortgagee will have the right to correct or cure any such default within the same period of time after receipt of such notice as is given to BNPPLC under this Ground Lease to correct or cure defaults, plus an additional period of thirty days thereafter. NAI will accept performance by any Leasehold Mortgagee of any covenant, condition or agreement on BNPPLC's part to be performed hereunder with the same force and effect as though performed by BNPPLC.

(D) If this Ground Lease should terminate by reason of a disaffirmance or rejection of this Ground Lease by BNPPLC or any receiver, liquidator or trustee for the property of BNPPLC, or by any governmental authority which had taken possession of the business or property of BNPPLC by reason of the insolvency or alleged insolvency of BNPPLC, then:

(1) NAI must give notice thereof to each Leasehold Mortgagee for which NAI has received written notification from BNPPLC of the Leasehold Mortgagee's address for such notice; and upon request of any Leasehold Mortgagee made within sixty days after NAI has given such notice, NAI must enter into a new ground lease of the Leased Property with such Leasehold Mortgagee for the remainder of the Ground Lease Term, at the same Ground Lease Rent and on the same terms and conditions (including subparagraph 11(E)) as are contained in this Ground Lease (a "**New Ground Lease**").

(2) The estate of the Leasehold Mortgagee, as lessee under the New Ground Lease, will have priority equal to the estate of BNPPLC hereunder. That is, there will be no charge, lien or burden upon the Leased Property prior to or superior to the estate granted by such New Ground Lease which was not prior to or superior to the estate of BNPPLC under this Ground Lease as of the date immediately preceding the termination of this Ground Lease. To the extent, however, that the other Operative Documents are in effect at the time of execution of such New Ground Lease, the New Ground Lease will be made expressly subject to the other Operative Documents.

(3) Notwithstanding the foregoing, if NAI receives requests to enter into a New Ground Lease from more than one Leasehold Mortgagee because of the expiration or termination of this Ground Lease, NAI will be required to enter into only one New Ground Lease, and the New Ground Lease will be to the requesting Leasehold Mortgagee who holds the highest priority lien or interest in BNPPLC's leasehold estate in the Land. If the liens or security interests of two or more such requesting Leasehold Mortgagees which shared the highest priority just prior to the termination of this Ground Lease, the New Ground Lease will name all such Leasehold Mortgagees as co-tenants thereunder.

(E) If BNPPLC has agreed with any Leasehold Mortgagee that such Leasehold Mortgagee's consent will be required to any modification or early termination of this Ground Lease by BNPPLC, and if NAI has been notified in writing of such agreement, such consent will be required for such Leasehold Mortgagee to be bound by any such modification or early termination of this Ground Lease.

(F) No Leasehold Mortgagee will assume any liability under this Ground Lease either by virtue of its Leasehold Mortgage or by any subsequent receipt or collection of rents or profits generated from the Leased Property, unless and until the Leasehold Mortgagee acquires BNPPLC's leasehold estate in the Leased Property at foreclosure or by deed in lieu of foreclosure.

(G) Although the foregoing provisions concerning Leasehold Mortgages and Leasehold Mortgagees will be self operative, NAI agrees to include, in addition to the items specified in Paragraph 9, confirmation of the foregoing with respect to any Leasehold Mortgagee or prospective Leasehold Mortgagee in any statement delivered to such Leasehold Mortgagee which is provided to a pursuant to Paragraph 9.

11 **Other Representations, Warranties and Covenants of NAI.** NAI represents, warrants and covenants as follows:

(A) **Condition of the Property.** The Land described in Exhibit A is the same as the land described in the Title Policy and as shown on the plat included as part of the survey prepared by December 2, 1999, prepared by Kier & Wright, Job No. 97208-16 (the "**Survey**"), which survey was delivered to BNPPLC at the request of NAI. All material improvements on the Land as of the Effective Date are as shown on the Survey, and except as shown on the Survey there are no easements or encroachments encumbering or affecting the Improved Property. No part of the Land is within a flood plain as designated by any governmental authority. Existing Improvements, if any, are free from latent or patent defects or deficiencies that, either individually or in the aggregate, could materially and adversely affect the use or occupancy of the Improved Property as permitted by the Lease or could reasonably be anticipated to cause injury or death to any person. When the construction contemplated by the Construction Management Agreement is complete in accordance with plans approved as described therein, the Improved Property and use thereof permitted by the Lease will comply in all material respects with all Applicable Laws, including laws regarding access and use by disabled persons and local zoning ordinances. Adequate provision has been made (or can be made at a cost that is reasonable in connection with future development of the Land) for the Land to be served by electric, gas, storm and sanitary sewers, sanitary water supply, telephone and other utilities required for the use thereof. All streets, alleys and easements necessary to serve the Improved Property for the construction contemplated by the Construction Management Agreement or uses permitted by the

Lease have been completed and are serviceable or will be completed and made serviceable as part of the construction contemplated by the Construction Management Agreement. No extraordinary circumstances (including any use of the Land as a habitat for endangered species) exist that would materially and adversely affect such construction or uses of the Improved Property. The Improvements, when constructed as contemplated in the Construction Management Agreement, will be useable for their intended purpose without the need to obtain any additional easements, rights-of-way or concessions from any third party or parties.

(B) Environmental Representations. Except as otherwise disclosed in the Environmental Report, to the knowledge of NAI: (i) no Hazardous Substances Activity has occurred prior to the Effective Date; (ii) no owner or operator of the Improved Property has reported or been required to report any release of any Hazardous Substances on or from the Leased Property pursuant to any Environmental Law; and (iii) no owner or operator of the Leased Property has received from any federal, state or local governmental authority any warning, citation, notice of violation or other communication regarding a suspected or known release or discharge of Hazardous Substances on or from the Leased Property or regarding a suspected or known violation of Environmental Laws concerning the Leased Property. Further, NAI represents, to its knowledge, that the Environmental Report taken as a whole is not misleading or inaccurate in any material respect.

(C) Current Status of Title to the Land. NAI holds good and indefeasible title to the Land, free and clear of all liens and encumbrances, other than the Permitted Encumbrances and any Liens Removable by BNPPPLC.

(D) Intentionally Deleted.

(E) Title to Improvements. The leasehold estate created in favor of BNPPPLC by this Ground Lease will extend to and include the rights to use and enjoy any and all Improvements of whatever nature at any time and from time to time located on the Land. Thus, throughout the term of this Ground Lease, BNPPPLC and its sublessees, assignees, licensees and concessionaires will be entitled to use and enjoy such Improvements — to the exclusion of NAI as the lessor hereunder, but subject to NAI's rights under the Operative Documents (including the Lease) so long as they remain in effect — as if the lessee hereunder was the owner of the Improvements. Further, although any Improvements which remain on the Land when this Ground Lease expires or is terminated will revert to NAI, it is also understood and agreed that the lessee hereunder may at any time and from time to time — after NAI ceases to have possession of the Leased Property pursuant to the Construction Management Agreement or as tenant under the Lease and prior to the expiration or termination of this Ground Lease — remove all or any Improvements from the Land without the consent of NAI and without any obligation to NAI or its Affiliates to provide compensation or to construct other Improvements on or about the Land. Any Improvements removed as provided in the preceding sentence will be considered severed from the Land and

thereupon become personal property of the lessee hereunder.

(F) Defense of Adverse Title Claims. If any encumbrance or title defect whatsoever affecting the Improved Property, other than Permitted Encumbrances or Liens Removable by BNPPLC, is claimed or discovered (including Liens against any part of or interest in the Improved Property which are not Fully Subordinated or Removable) or if any legal proceedings are instituted with respect to any such claimed or discovered encumbrance or title defect, NAI must give prompt notice thereof to BNPPLC and at NAI's own cost and expense will promptly remove any such encumbrance and cure any such defect and will take all necessary and proper steps for the defense of any such legal proceedings, including the employment of counsel, the prosecution or defense of litigation and the release or discharge of all adverse claims. If NAI fails to promptly remove any encumbrance or cure any title defect as required by the preceding sentence, BNPPLC (whether or not named as a party to legal proceedings with respect thereto) may take such additional steps as in its judgment may be necessary or proper to remove such encumbrance or cure such defect or for the defense of any such attack or legal proceedings or the protection of BNPPLC's leasehold or other interest in the Improved Property, including the employment of counsel, the prosecution or defense of litigation, the compromise or discharge of any adverse claims made with respect to the Improved Property, the removal of prior liens or security interests, and all expenses (including Attorneys' Fees) so incurred of every kind and character will be a demand obligation owing by NAI.

For purposes of this subparagraph 11(B), NAI will be deemed to be acting promptly to remove any encumbrance or to cure any title defect, other than a Lien which NAI or any of its Affiliates has granted or authorized, so long as NAI is in good faith by appropriate proceedings contesting the validity and applicability of the encumbrance or defect, and pending such contest NAI will not be deemed in default under this subparagraph because of the encumbrance or defect, provided that NAI must satisfy the following conditions and requirements:

- (1) NAI must diligently prosecute the contest to completion in a manner reasonably satisfactory to BNPPLC.
- (2) NAI must immediately remove the encumbrance or cure the defect upon a final determination by a court of competent jurisdiction that it is valid and applicable to the Improved Property.
- (3) NAI must in any event conclude the contest and remove the encumbrance or cure the defect and pay any claims asserted against BNPPLC or the Improved Property because of such encumbrance or defect, all prior to (i) the date any criminal charges may be brought against BNPPLC or any of its directors, officers or employees because of such encumbrance or defect or (ii) the date any action is taken or threatened against BNPPLC or any property owned by BNPPLC (including BNPPLC's leasehold estate under this

Ground Lease) by any governmental authority or any other Person who has or claims rights superior to BNPPPLC because of the encumbrance or defect. Also, with respect to a contest of any encumbrance or defect discovered or claimed before the Designated Sale Date, NAI must conclude the contest and remove the encumbrance or cure the defect and pay any claims asserted against BNPPPLC or the Improved Property because of such encumbrance or defect, all prior to the Designated Sale Date, unless on the Designated Sale Date NAI or an Affiliate of NAI or any Applicable Purchaser purchases the Improved Property pursuant to the Purchase Agreement for a net price to BNPPPLC (when taken together with any additional payments made by NAI pursuant to Paragraph 1(a)(ii) of the Purchase Agreement, in the case of a purchase by an Applicable Purchaser) equal to the Lease Balance.

(G) Prohibition Against Consensual Liens on the Leased Property. NAI will not, without the prior consent of BNPPPLC, create, place or authorize, or through any act or failure to act, acquiesce in the placing of, any deed of trust, mortgage or other Lien, whether statutory, constitutional or contractual against or covering the Land or Improvements or any part thereof (other than Permitted Encumbrances and Liens Removable by BNPPPLC). It is understood and agreed, however, that any Liens which are Fully Subordinated or Removable will constitute Permitted Encumbrances and thus will not be prohibited by this provision.

(H) Compliance With Permitted Encumbrances. NAI must comply with and cause to be performed all of the covenants, agreements and obligations imposed upon NAI or the owner of the Leased Property by the Permitted Encumbrances.

(I) Compliance With Laws. Without limiting the foregoing, the use of the Improved Property permitted by the Lease complies, or will comply after readily available permits are obtained, in all material respects with all Applicable Laws.

(J) Modification of Permitted Encumbrances. NAI will not create any new Permitted Encumbrance or enter into, initiate, approve or consent to any modification of any Permitted Encumbrance that would create or expand or purport to create or expand obligations or restrictions which would encumber the Leased Property or any Improvements constructed thereon without the prior consent of BNPPPLC; provided, this provision will not limit any right of the NAI Parties to modify any Lien that is Fully Subordinated or Removable and will remain Fully Subordinated or Removable after the modification. Whether BNPPPLC must give any such consent requested by NAI prior to the Designated Sale Date will be governed by subparagraph 4(C) of the Closing Certificate.

(K) Performance and Preservation of the Permitted Encumbrances for the Benefit of BNPPPLC. Not only prior to the expiration or termination of other Operative Documents, but thereafter throughout the term of this Ground Lease, NAI must comply with and perform the obligations imposed by the Permitted Encumbrances upon NAI or upon any owner of the Land and do whatever is required to preserve the rights and benefits conferred or intended to be conferred by the Permitted Encumbrances, as necessary to prevent any claim against or forfeiture of any of the Improved Property and to facilitate the construction and use of any Improvements on the Land after the Turnover Date by BNPPPLC and its successors, assigns and subtenants under this Ground Lease. Further, NAI hereby agrees for itself and its Affiliates, as the owner of the Land and any other land now owned or hereafter acquired by NAI or its Affiliates, which is encumbered or benefitted by the Permitted Encumbrances, to assume liability for and to indemnify BNPPPLC and other Interested Parties and to defend and hold them harmless from and against all Losses (including Losses caused by any decline in the value of the Leased Property or of the Improvements) that they would not have incurred or suffered but for:

- (1) any breach by NAI of its obligations under the preceding sentence,
- (2) any termination of any benefit to the owner, users or occupants of the Land or Improvements conferred by the Permitted Encumbrances if NAI agreed to the termination or the termination resulted from a breach of any Permitted Encumbrance by NAI or its Affiliates, or
- (3) any restrictions imposed by or asserted under any Permitted Encumbrance upon any transfer after (but only after) the Turnover Date by BNPPPLC of any interests it may then have in the Leased Property or in any Improvements.

NAI's obligations under this subparagraph 11(K) will be binding upon any successor or assign of NAI or its Affiliates with respect to the Land and other properties encumbered or benefitted by the Permitted Encumbrances, and such obligations will survive any sale of NAI's interest in the Leased Property to BNPPPLC because of BNPPPLC's exercise of the Contingent Purchase Option.

(L) Cooperation by NAI and its Affiliates.

- (1) After the Turnover Date, if neither NAI nor an Applicable Purchaser has purchased BNPPPLC's interest in the Improved Property pursuant to the Purchase Agreement, and if a use of the Improved Property by BNPPPLC or any new Improvements or any removal or modification of Improvements proposed by BNPPPLC would violate any Permitted Encumbrance or Applicable Law unless NAI or any of its Affiliates, as an owner of adjacent land or otherwise, gave its consent or approval thereto or agreed to join in a modification of a Permitted Encumbrance, then NAI must give and cause its Affiliates to give such consent or approval or join in such modification.

(2) After the Turnover Date, if neither NAI nor an Applicable Purchaser has purchased BNPPLC's interest in the Improved Property pursuant to the Purchase Agreement, and if any Permitted Encumbrance or Applicable Law requires the consent or approval of NAI or any of its Affiliates or of the city or county in which the Improved Property is located or of any other Person to an assignment of any interest in the Improved Property by BNPPLC or by any of its successors or assigns, NAI will without charge give and cause its Affiliates to give such consent or approval and will cooperate in any way reasonably requested by BNPPLC to assist BNPPLC to obtain such consent or approval from the city, county or other Person.

(3) NAI's obligations under this subparagraph 11(L) will be binding upon any successor or assign of NAI or its Affiliates with respect to the Land and other properties encumbered or benefitted by the Permitted Encumbrances, and such obligations will survive (a) any sale of the Improved Property by BNPPLC, other than to NAI or an Applicable Purchaser under the Purchase Agreement, for the benefit of BNPPLC's assignees, and (b) any sale of NAI's interest in the Leased Property to BNPPLC because of BNPPLC's exercise of the Contingent Purchase Option.

(M) Omissions. None of NAI's representations or warranties contained in this Ground Lease or in any other document, certificate or written statement furnished to BNPPLC by or on behalf of NAI contains any untrue statement of a material fact or omits a material fact necessary in order to make the statements contained herein or therein (when taken in their entireties) not misleading.

(N) Insurance and Casualty. In the event any of the Leased Property is destroyed or damaged by fire, explosion, windstorm, hail or by any other casualty against which insurance is maintained or required hereunder, (i) BNPPLC may make proof of loss, (ii) each insurance company concerned is hereby authorized and directed to make payment for such loss directly to BNPPLC for application as required by Paragraph 4, and (iii) BNPPLC's consent must be obtained for any settlement, adjustment or compromise of any claims for loss, damage or destruction under any policy or policies of insurance.

(O) Condemnation. All proceeds of condemnation awards or proceeds of sale in lieu of condemnation with respect to the Leased Property and all judgments, decrees and awards for injury or damage to the Leased Property will be paid to BNPPLC and applied as provided in Paragraph 4 above. BNPPLC is hereby authorized, in the name of NAI, to execute and deliver valid acquittances for, and to appeal from, any such judgment, decree or award concerning condemnation of any of the Leased Property. BNPPLC will not be, in any event or circumstances, liable or responsible for failure to collect, or to exercise diligence in the collection of, any such proceeds, judgments, decrees or awards.

(P) Further Assurances. NAI must, on request of BNPPLC, (i) promptly correct any defect, error or omission which may be discovered in the contents of this Ground Lease or in any other instrument executed in connection herewith or in the execution or acknowledgment thereof; (ii) execute, acknowledge, deliver and record or file such further instruments and do such further acts as may be necessary, desirable or proper to carry out more effectively the purposes of this Ground Lease and to subject to this Ground Lease any property intended by the terms hereof to be covered hereby including specifically, but without limitation, any renewals, additions, substitutions, replacements or appurtenances to the Leased Property; (iii) execute, acknowledge, deliver, procure and record or file any document or instrument deemed advisable by BNPPLC to protect BNPPLC's rights in and to the Leased Property against the rights or interests of third persons; and (iv) provide such certificates, documents, reports, information, affidavits and other instruments and do such further acts as may be necessary, desirable or proper in the reasonable determination of BNPPLC to enable BNPPLC or any Leasehold Mortgagee to comply with the requirements or requests of any agency or authority having jurisdiction over them.

12 **Ground Lease Defaults.**

(A) Definition of Ground Lease Default. Each of the following events will be deemed to be a "**Ground Lease Default**" by BNPPLC under this Ground Lease:

(1) A failure by BNPPLC to pay when due any installment of Ground Lease Rent due hereunder if such failure continues for sixty days after BNPPLC receives notice thereof.

(2) A failure by BNPPLC to comply with any term, provision or covenant of this Ground Lease (other than as described in the other clauses of this subparagraph 13(A)) if such failure is not cured prior to the earlier of (A) ninety days after notice thereof is sent to BNPPLC, or (B) the date any writ or order is issued for the levy or sale of any property owned by NAI or its Affiliates (including the leasehold created by this Ground Lease) because of such failure or any criminal action is instituted against BNPPLC or any of its directors, officers or employees because of such failure; provided, however, that so long as no such writ or order is issued and no such criminal actions is instituted, if such failure is susceptible of cure but cannot with reasonable diligence be cured within such ninety day period, and if BNPPLC has promptly commenced to cure the same and thereafter prosecutes the curing thereof with reasonable diligence, the period within which such failure may be cured will be extended for such further period as is necessary to complete the cure.

(B) Remedy. Upon the occurrence of a Ground Lease Default which is not cured within any applicable period expressly permitted by subparagraph 13(A), NAI's sole and exclusive remedies will be to sue BNPPLC for the collection of any amount due under this

Ground Lease, to sue for the specific enforcement of BNPPLC's obligations hereunder, or to enjoin the continuation of the Ground Lease Default, provided, however, no limitation of NAI's remedies contained herein will prevent NAI from exercising rights expressly provided in other Operative Documents or from recovering any reasonable costs NAI may incur to mitigate its damages by curing a Ground Lease Default that BNPPLC has failed to cure itself (so long as the cure by NAI is pursued in a lawful manner and the costs NAI seeks to recover do not exceed the actual damages to be mitigated). NAI may not terminate this Ground Lease or BNPPLC's right to possession under this Ground Lease, except as expressly provided in the Operative Documents. Any judgment which NAI may obtain against BNPPLC for amounts due under this Ground Lease may be collected only through resort of a judgement lien against BNPPLC's interest in the Leased Property and any Improvements. BNPPLC will have no personal liability for the payment amounts due under this or for the performance of any obligations of BNPPLC under this Ground Lease.

13 **Quiet Enjoyment.** NAI warrants that neither it nor any third party lawfully claiming any right or interest in the Leased Property will, during the Ground Lease Term, disturb BNPPLC's peaceable and quiet enjoyment of the Leased Property; however, such enjoyment will be subject to the terms, provisions, covenants, agreements and conditions of this Ground Lease and those Permitted Encumbrances which are listed on Exhibit B.

14 **Option to Purchase.** Subject to the terms and conditions set forth in Exhibit C, BNPPLC (and any assignee of BNPPLC's entire interest in the Leased Property, but not any subtenant or assignee of a lesser interest) will have the option, and NAI hereby grants to BNPPLC such option, to purchase NAI's interest in the Leased Property.

15 **Miscellaneous.**

(A) No Merger. There will be no merger of this Ground Lease or of the leasehold estate hereby created with the fee or any other estate in the Leased Property or any part thereof by reason of the fact that the same person may acquire or hold, directly or indirectly, this Ground Lease or the leasehold estate hereby created or any interest in this Ground Lease or in such leasehold estate as well as the fee or any other estate in the Leased Property or any interest in such fee or other estate, unless all parties with an interest in the Leased Property that would be adversely affected by any such merger specifically agree in writing that such a merger has occurred.

(B) Recording; Memorandum of Lease. Either party may record this Ground Lease in the real property records of Santa Clara County, California. If NAI and BNPPLC decide not to record this Ground Lease, they will execute a memorandum of this Ground Lease in recordable form which will be filed in the real property records of Santa Clara County, California.

16 **Certain Remedies Cumulative.** No right or remedy herein conferred upon or reserved to BNPPLC is intended to be exclusive of any other right or remedy BNPPLC has with respect to the Improved Property, and each and every right and remedy of BNPPLC will be cumulative and in addition to any other right or remedy given to it under this Ground Lease or now or hereafter existing in its favor at law or in equity. In addition to other remedies available under this Ground Lease, either party will be entitled, to the extent permitted by applicable law, to a decree compelling performance of any of the other party's agreements hereunder.

17 **Attorneys' Fees and Legal Expenses.** If BNPPLC commences any legal action or other proceeding because of any breach of this Ground Lease by NAI, BNPPLC may recover all Attorneys' Fees incurred by it in connection therewith from NAI, whether or not such controversy, claim or dispute is prosecuted to a final judgment. Any Attorneys' Fees incurred by BNPPLC in enforcing a judgment in its favor under this Ground Lease will be recoverable separately from such judgment, and the obligation for such Attorneys' Fees is intended to be severable from other provisions of this Ground Lease and not to be merged into any such judgment.

18 **Successors and Assigns.** The terms, provisions, covenants and conditions of this Ground Lease will be binding upon NAI and BNPPLC and their respective permitted successors and assigns and will inure to the benefit of NAI and BNPPLC and all permitted transferees, mortgagees, successors and assignees of NAI and BNPPLC with respect to the Leased Property; except that (A) BNPPLC will not assign this Ground Lease or any rights hereunder except pursuant to a Permitted Transfer, and (C) NAI will not assign this Ground Lease or any rights hereunder prior to the Turnover Date without the prior written consent of BNPPLC.

[The signature pages follow.]

[Continuation of signature pages for Ground Lease, executed on the date of acknowledgment before a notary indicated below to be effective as of December 14, 2006]

NETWORK APPLIANCE, INC., a Delaware corporation

By: /s/ Ingemar Lanevi
Ingemar Lanevi, Vice President and Corporate Treasurer

STATE OF NORTH CAROLINA)
) SS
COUNTY OF WAKE)

On December 14th, 2006, before me Edward E. Benton Jr., a Notary Public in and for the County and State aforesaid, personally appeared Ingemar Lanevi, Vice President and Corporate Treasurer of Network Appliance, Inc., who is personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity and that by his/her signature on such instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS, my hand and official seal.

/s/ Edward E. Benton Jr.

Ground Lease — Signature Page

Exhibit A

Legal Description

Proposed Parcel 8, and (except to the extent within a different platted Parcel as currently shown in the Map Records of the County of Santa Clara, California) proposed Parcel 12, and the Additional Leased Premises as defined below, (collectively, the “**2006 Ground Lease Premises**”) as shown on that certain Vesting Tentative Parcel Map provided to BNP Paribas Leasing Corporation (“**BNPPLC**”) by Network Appliance, Inc. (“**NAI**”) attached hereto and made a part hereof (the “**Tentative Map**”), which has received preliminary approval from the City of Sunnyvale, California, but not yet been filed for record in the office of the recorder of the County of Santa Clara, State of California. As used herein, “**Additional Leased Premises**” means the parking lots, driveways and other areas shaded in gray on the Tentative Map attached hereto within the larger area designated as Common Lot A (consisting of 30.46 Acres, more or less) on the Tentative Map. The southern boundary of the Additional Leased Premises is a line that runs North 75 degrees, 07 minutes, 58 seconds equidistant from the southern boundary of Parcel 8 and the northern boundary of Parcel 7, both as shown on the Tentative Map. The eastern boundary of the Additional Leased Premises runs along the same line as the eastern boundary of Common Lot A, as shown on the Tentative Map. The western boundary of the Additional Leased Premises runs along the same line as the western boundary of Parcel 8 and Parcel 7, as shown on the Tentative Map. The northern boundary of the Additional Leased Premises runs along the center of an existing or proposed driveway which is situated between Parcel 8 and Parcel 9, as shown on the Tentative Map.

TOGETHER WITH, easements appurtenant to the 2006 Ground Lease Premises (the “**Appurtenant Easements**”) under, over and across adjacent parcels (“**Adjacent Parcels**”) which are owned by NAI for the purposes described below and on and subject to the express terms and conditions set forth below:

The Appurtenant Easements will be for the following purposes:

1. The use, maintenance, repair, replacement expansion of utility lines under, over and across the Adjacent Parcels and related equipment (including lines or equipment for water, sanitary sewer, electricity, phone and gas) (collectively, the “**Utility Lines**”) to serve improvements constructed from time to time on the 2006 Ground Lease Premises.
2. Access and parking over and in paved driveways and parking lots or garages now or hereafter located on the Adjacent Parcels (“**Driveways and Parking Areas**”).
3. The encroachment, support, maintenance, repair and replacement of any buildings constructed on Parcel 8 as shown on the Tentative Map during the period that BNPPLC owns or leases Parcel 8.

The Appurtenant Easements will be subject to the following terms and conditions:

A. The Appurtenant Easements for Utility Lines will be limited to:

(1) those Utility Lines, if any, existing on the first date upon which any instrument is recorded which gives notice of the Appurtenant Easements;

(2) those Utility Lines, if any, constructed by or at the request of NAI itself;

(3) any other Utility Lines reasonably necessary for the use of improvements constructed by NAI (whether constructed for BNPPLC or otherwise) on the 2006 Ground Lease Premises (and in the case of Utility Lines permitted only because of this clause (3), such Utility Lines must be installed in a location that does not run through or under any then existing building or structured garage on the Adjacent Parcels); and

(4) replacements (including replacements that may increase utility capacity) for any Utility Lines permitted under the preceding clauses (1) through (3).

B. Any Utility Line on any Adjacent Parcel may be relocated to another location on the same Adjacent Parcel by the owner of such parcel and at its sole cost and expense, so long as the relocation is done in a good and workmanlike manner that does not and will not impose any significant or unexpected interruption of utility services or additional costs upon the owner or occupants of the 2006 Ground Lease Premises.

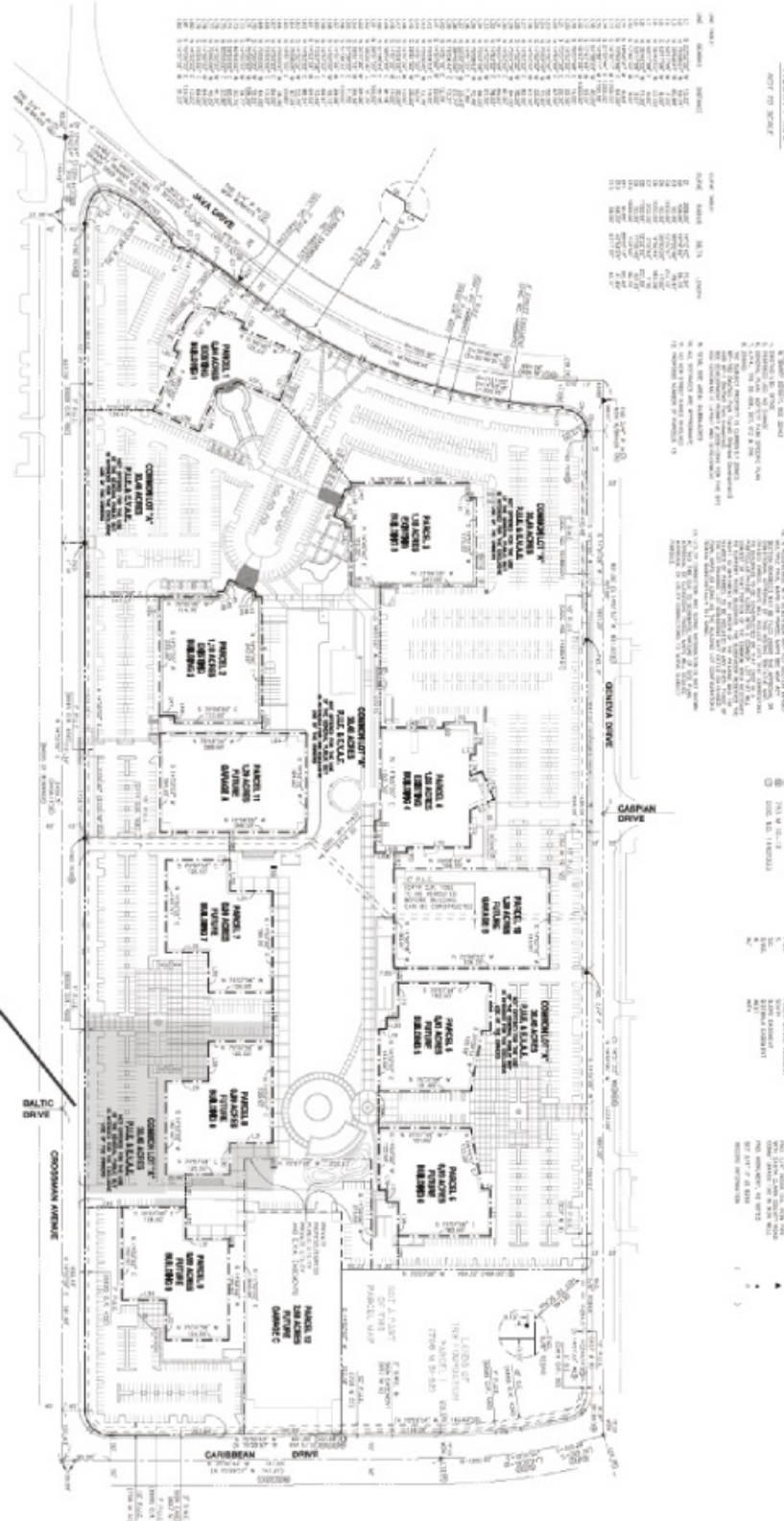
C. The use of Driveways and Parking Areas by the owner of the 2006 Ground Lease Premises and its tenants and other invitees will not exceed that reasonably required to provide buildings constructed on the 2006 Ground Lease Premises with parking that both (i) meets local zoning and other legal requirements, and (ii) when taken together with any permanent, concrete parking spaces from time to time constructed on the 2006 Ground Lease Premises, provides at least 632 parking spaces for buildings on the 2006 Ground Lease Premises and also causes the parking ratio for buildings on the 2006 Ground Lease Premises to be not less than 1 parking space per 333 square feet of interior building floor area (collectively, the “**Minimum Parking Requirements**”). However, for purposes of computing the Minimum Parking Requirements, parking spaces from time to time constructed on the 2006 Ground Lease Premises which are made available for parking by owners or occupants of any Adjacent Parcel pursuant to any easement which encumbers the 2006 Ground Lease Premises (or any leasehold estate therein) will be treated as if they did not exist. In other words, any such parking spaces available to owners or occupants of Adjacent Parcels will not be included in the numbers of parking spaces considered as available to owners or occupants of the 2006 Ground Lease Premises to satisfy the Minimum Parking Requirements.

D. NAI and its successors and assigns as the owners of Adjacent Parcels will always maintain a number of parking spaces on the Adjacent Parcels which is no less than the sum of (1) the spaces required to meet Minimum Parking Requirements for buildings on the 2006 Ground Lease Premises, and (2) the spaces required to satisfy zoning or other parking requirements for other buildings on or served by parking on the Adjacent Parcels.

E. The Appurtenant Easement for parking on Adjacent Parcels will be subject to the following condition subsequent: If a sufficient number of permanent, concrete parking spaces in parking lots or structured garages are constructed on the 2006 Ground Lease Premises to satisfy Minimum Parking Requirements (computed as described above) without the need for additional parking spaces on Adjacent Parcels, then the owners of Adjacent Parcels may terminate such parking easement by notice to the owner of the 2006 Ground Lease Premises and by recording a copy of such notice in the real property deed records. (This provision will not, however, be construed to require the construction of such lots or garages on the 2006 Ground Lease Premises.)

F. Notwithstanding the foregoing, at any time when BNPPLC or any successor of BNPPLC owns or leases all or any part of the land shown on the Tentative Map as Parcel 7 and adjacent parking lots, driveways and other areas within Common Lot A (collectively, the “**2005 Ground Lease Premises**”), BNPPLC may, at its sole option, cause the 2005 Ground Lease Premises to be released from all or any of the Appurtenant Easements. Notwithstanding any such release, the Appurtenant Easements will continue as to Adjacent Parcels other than the 2005 Ground Lease Premises. BNPPLC may exercise such option by written notice recorded in the real property records of Santa Clara County, California.

VESTING TENTATIVE PARCEL MAP FOR CROSSMAN COMMONS 13 PARCELS



- NOTES**
1. THIS MAP IS A TENTATIVE PARCEL MAP FOR THE PURPOSES OF NETWORK APPLIANCE ONLY. IT IS NOT A FINAL PARCEL MAP AND DOES NOT CONSTITUTE A GUARANTEE OF THE ACCURACY OF THE INFORMATION HEREON.
 2. THE INFORMATION ON THIS MAP IS BASED ON THE RECORDS OF THE COUNTY OF SAN DIEGO AND THE RECORDS OF THE CIVIL ENGINEERS & SURVEYORS, INC.
 3. THE BOUNDARIES OF THE PARCELS SHOWN ON THIS MAP ARE BASED ON THE RECORDS OF THE COUNTY OF SAN DIEGO AND THE RECORDS OF THE CIVIL ENGINEERS & SURVEYORS, INC.
 4. THE DIMENSIONS OF THE PARCELS SHOWN ON THIS MAP ARE BASED ON THE RECORDS OF THE COUNTY OF SAN DIEGO AND THE RECORDS OF THE CIVIL ENGINEERS & SURVEYORS, INC.
 5. THE AREA OF THE PARCELS SHOWN ON THIS MAP IS BASED ON THE RECORDS OF THE COUNTY OF SAN DIEGO AND THE RECORDS OF THE CIVIL ENGINEERS & SURVEYORS, INC.
 6. THE LOCATION OF THE PARCELS SHOWN ON THIS MAP IS BASED ON THE RECORDS OF THE COUNTY OF SAN DIEGO AND THE RECORDS OF THE CIVIL ENGINEERS & SURVEYORS, INC.
 7. THE SHADING OF THE PARCELS SHOWN ON THIS MAP IS BASED ON THE RECORDS OF THE COUNTY OF SAN DIEGO AND THE RECORDS OF THE CIVIL ENGINEERS & SURVEYORS, INC.
 8. THE INFORMATION ON THIS MAP IS BASED ON THE RECORDS OF THE COUNTY OF SAN DIEGO AND THE RECORDS OF THE CIVIL ENGINEERS & SURVEYORS, INC.
 9. THE BOUNDARIES OF THE PARCELS SHOWN ON THIS MAP ARE BASED ON THE RECORDS OF THE COUNTY OF SAN DIEGO AND THE RECORDS OF THE CIVIL ENGINEERS & SURVEYORS, INC.
 10. THE DIMENSIONS OF THE PARCELS SHOWN ON THIS MAP ARE BASED ON THE RECORDS OF THE COUNTY OF SAN DIEGO AND THE RECORDS OF THE CIVIL ENGINEERS & SURVEYORS, INC.
 11. THE AREA OF THE PARCELS SHOWN ON THIS MAP IS BASED ON THE RECORDS OF THE COUNTY OF SAN DIEGO AND THE RECORDS OF THE CIVIL ENGINEERS & SURVEYORS, INC.
 12. THE LOCATION OF THE PARCELS SHOWN ON THIS MAP IS BASED ON THE RECORDS OF THE COUNTY OF SAN DIEGO AND THE RECORDS OF THE CIVIL ENGINEERS & SURVEYORS, INC.
 13. THE SHADING OF THE PARCELS SHOWN ON THIS MAP IS BASED ON THE RECORDS OF THE COUNTY OF SAN DIEGO AND THE RECORDS OF THE CIVIL ENGINEERS & SURVEYORS, INC.

- REFERENCES**
- 1. RECORD MAP NO. 123456
 - 2. RECORD MAP NO. 123457
 - 3. RECORD MAP NO. 123458
 - 4. RECORD MAP NO. 123459
 - 5. RECORD MAP NO. 123460
 - 6. RECORD MAP NO. 123461
 - 7. RECORD MAP NO. 123462
 - 8. RECORD MAP NO. 123463
 - 9. RECORD MAP NO. 123464
 - 10. RECORD MAP NO. 123465
 - 11. RECORD MAP NO. 123466
 - 12. RECORD MAP NO. 123467
 - 13. RECORD MAP NO. 123468
 - 14. RECORD MAP NO. 123469
 - 15. RECORD MAP NO. 123470

- ABBREVIATIONS**
- 1. LOT
 - 2. BLOCK
 - 3. TRACT
 - 4. PARCEL
 - 5. LOT AREA
 - 6. BLOCK AREA
 - 7. TRACT AREA
 - 8. PARCEL AREA
 - 9. LOT PERCENTAGE
 - 10. BLOCK PERCENTAGE
 - 11. TRACT PERCENTAGE
 - 12. PARCEL PERCENTAGE
 - 13. LOT PERCENTAGE
 - 14. BLOCK PERCENTAGE
 - 15. TRACT PERCENTAGE
 - 16. PARCEL PERCENTAGE

- LEGEND**
- 1. PROPOSED IMPROVEMENTS
 - 2. EXISTING IMPROVEMENTS
 - 3. EXISTING LOT LINES
 - 4. EXISTING BLOCK LINES
 - 5. EXISTING TRACT LINES
 - 6. EXISTING PARCEL LINES
 - 7. EXISTING LOT AREAS
 - 8. EXISTING BLOCK AREAS
 - 9. EXISTING TRACT AREAS
 - 10. EXISTING PARCEL AREAS
 - 11. EXISTING LOT PERCENTAGES
 - 12. EXISTING BLOCK PERCENTAGES
 - 13. EXISTING TRACT PERCENTAGES
 - 14. EXISTING PARCEL PERCENTAGES
 - 15. EXISTING LOT PERCENTAGES
 - 16. EXISTING BLOCK PERCENTAGES
 - 17. EXISTING TRACT PERCENTAGES
 - 18. EXISTING PARCEL PERCENTAGES

Additional Leased Premises shaded in gray.

PROPOSED SITE CONDITIONS

<p>VESTING TENTATIVE PARCEL MAP FOR NETWORK APPLIANCE</p>	<p>KIER & WRIGHT CIVIL ENGINEERS & SURVEYORS, INC. 3300 Scott Boulevard, Building 22 609-277-6885 San Diego, California 92121 FAX 609-277-3641</p>	<p>DATE: 10/15/2014 TIME: 10:00 AM SCALE: AS SHOWN SHEET NO. 1 OF 1</p>	
--	---	---	--

Exhibit B

Permitted Encumbrances

The leasehold and other interests in the Land hereby conveyed by NAI are conveyed subject to the following matters to the extent the same are still valid and in force:

1. TAXES for the fiscal year 2006-2007, a lien not yet due or payable.
2. THE LIEN of supplemental taxes, if any, assessed pursuant to Chapter 3.5 commencing with Section 75 of the California Revenue and Taxation Code, resulting from changes of ownership or completion of construction on or after the date hereof.
3. EASEMENT for the purposes stated herein and incidents thereto

Purpose	: Slope Easement
In favor of	: City of Sunnyvale
Recorded	: October 9, 1964 in Book 6695, page 430, Official Records
Affects	: Easterly 18 feet, as shown on a survey plat entitled ALTA/ACSM Land Title Survey for: Network Appliance, 1345 Crossman Avenue, dated December 2, 1999, prepared by Kier & Wright, Job No. 97208-16.

4. EASEMENT for the purposes stated herein and incidents thereto

Purpose	: Public utilities easement
In favor of	: City of Sunnyvale
Recorded	: October 9, 1964 in Book 6695, page 450, Official Records
Affects	: Easterly 7 feet, as shown on a survey plat entitled ALTA/ACSM Land Title Survey for: Network Appliance, 1345 Crossman Avenue, dated December 2, 1999, prepared by Kier & Wright, Job No. 97208-16.

5. Covenants, Conditions and Restrictions in the Declaration of Protective Covenants — Moffett Industrial Park No. 2) recorded December 23, 1971 in Book 9640, page 443, Official Records; which provide that a violation thereof shall not defeat or render invalid the lien of any Mortgage or Deed of Trust made in good faith and for value. Said Covenants, Conditions and Restrictions do not provide for reversion of title in the event of a breach thereof. Restrictions, if any, based upon race, color, religion, sex, handicap, familial status, or national origin are deleted, unless and only to the extent that said covenant (a) is exempt under Chapter 42, Section 3607, of the United States Code, or (b) related to handicap but does not discriminate against handicapped persons.

ASSIGNMENT AND ASSUMPTION of the rights, powers, duties, obligations, and reservations of Moffett Park Associates, in favor of The Prudential Insurance Company of

America, recorded February 8, 1977 in Book C583, page 685, Official Records.

6. EASEMENT for the purposes stated herein and incidents thereto

Purpose	: Public utilities
Granted to	: City of Sunnyvale
Recorded	: November 16, 1976 in Book C414, page 105, Official Records
Affects	: Southerly 10 feet, as shown on a survey plat entitled ALTA/ACSM Land Title Survey for: Network Appliance, 1345 Crossman Avenue, dated December 2, 1999, prepared by Kier & Wright, Job No. 97208-16.

7. LIMITATIONS, covenants, restrictions, reservations, exceptions or terms, but deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin to the extent such covenants, conditions or restrictions violate 42 USC 3604(c), contained in the document recorded February 5, 1980 in Book F122, page 460, Official Records.

Exhibit C

CONTINGENT PURCHASE OPTION

Subject to the terms of this Exhibit, BNPPLC shall have an option (the “**Option**”) to buy NAI’ fee interest in the Leased Property at any time during the term of this Ground Lease after (but only after) any breach by NAI under the Purchase Agreement, provided NAI does not cure the breach within any time permitted for cure by the express provisions of the Purchase Agreement, for a purchase price (the “**Option Price**”) to NAI equal to fair market value.

For the purposes of this Exhibit, “fair market value” means (and all appraisers and other persons involved in the determination of the Option Price will be so advised) the price that would be agreed upon between a willing buyer, under no compulsion to buy, and a willing seller, under no compulsion to sell, for unimproved land comparable in size and location to the Land, exclusive of any Improvements but assuming that there is no higher and better use for such land than as a site for improvements of comparable size and utility to the Improvements, at the time of BNPPLC’s exercise of the Option and taking into consideration the condition of the Land, the encumbrances affecting the title to the Land and all applicable zoning, land use approvals and other governmental permits relating to the Land at the time of the exercise of the Option.

If BNPPLC exercises the Option, which BNPPLC may do by notifying NAI that BNPPLC has elected to buy NAI’ interest in the Leased Property as provided herein, then:

(1) To the extent, if any, required as a condition imposed by law to the conveyance of the fee interest in the Leased Property to BNPPLC, NAI shall promptly at its expense do whatever is necessary and possible (including, without limitation, cooperating with BNPPLC in seeking any zoning variances requested by BNPPLC) to obtain approvals of a new Parcel Map or lot line adjustments. Should it be determined that it is not possible to satisfy any such condition imposed by law, neither NAI nor BNPPLC shall be required to consummate any purchase pursuant to this Exhibit, and this Ground Lease will continue as if BNPPLC had not exercised the Option.

(2) Upon BNPPLC’s tender of the Option Price to NAI, NAI will convey good and indefeasible title to the fee estate in the Land and its interest in all other Leased Property to BNPPLC by general warranty deed and assignment subject only to the Permitted Encumbrances, to any claims of BNPPLC or Liens Removable by BNPPLC, and (to the extent still in force) to the Lease and the Purchase Agreement.

(3) BNPPLC’s obligation to close the purchase shall be subject to the following terms and conditions, all of which are for the benefit of BNPPLC:

- (1) BNPPLC shall have been furnished with evidence satisfactory to BNPPLC that NAI can convey title as required by the preceding subparagraph;
 - (2) nothing shall have occurred or been discovered after BNPPLC exercised the Option that could significantly and adversely affect title to the Leased Property or BNPPLC’s use thereof,
 - (3) all of the representations of NAI in this Ground Lease shall continue to be true as if made effective
-

on the date of the closing and, with respect to any such representations which may be limited to the knowledge of NAI or any of NAI' representatives, would continue to be true on the date of the closing if all relevant facts and circumstances were known to NAI and such representatives, and (4) BNPPLC shall have been tendered the deed and other documents which are described in this Exhibit as documents to be delivered to BNPPLC at the closing of BNPPLC's purchase.

(4) Closing of the purchase will be scheduled on the first Business Day following thirty days after the Option Price is established in accordance with the terms and conditions of this Exhibit and after any approvals described in subparagraph (a) above are obtained, and prior to closing BNPPLC's occupancy of the Leased Property shall continue to be subject to the terms and conditions of this Ground Lease, including the terms setting forth BNPPLC's obligation to pay rent. Closing shall take place at the offices of any title insurance company reasonably selected by BNPPLC to insure title under the title insurance policy described below.

(5) Any transfer taxes or notices or registrations required by law in connection with the sale contemplated by this Exhibit will be the responsibility of NAI.

(6) NAI will deliver a certificate of nonforeign status to BNPPLC at closing as needed to comply with the provisions of the U.S. Foreign Investors Real Property Tax Act (FIRPTA) or any comparable federal, state or local law in effect at the time.

(7) NAI will also pay for and deliver to BNPPLC at the closing an owner's title insurance policy in the full amount of the Option Price, issued by a title insurance company designated by BNPPLC (or written confirmation from the title company that it is then prepared to issue such a policy), and subject only to standard printed exceptions which the title insurance company refuses to delete or modify in a manner acceptable to BNPPLC and to Permitted Encumbrances.

(8) NAI shall also deliver at the closing all other documents or things reasonably required to be delivered to BNPPLC or by the title insurance company to evidence NAI' ability to transfer the Leased Property to BNPPLC.

If NAI and BNPPLC do not otherwise agree upon the amount of the Option Price within twenty days after BNPPLC exercises the Option, the Option Price shall be determined in accordance with the following procedure:

(a) NAI and BNPPLC shall each appoint a real estate appraiser who is familiar with properties in the vicinity of the Land and who has not previously acted for either party. Each party will make the appointment no later than ten days after receipt of notice from the other party that the appraisal process

described in this Exhibit has been invoked. The agreement of the two appraisers as to the Option Price will be binding upon NAI and BNPPPLC. If the two appraisers cannot agree upon the Option Price within ten days following their appointment, they shall within another ten days agree upon a third real estate appraiser. Immediately thereafter, each of the first two appraisers will submit his best estimate of the appropriate Option Price (together with a written report supporting such estimate) to the third appraiser and the third appraiser will choose between the two estimates. The estimate of Option Price chosen by the third appraiser as the closest to the prevailing monthly fair market value will be binding upon NAI and BNPPPLC. Notification in writing of the Option Price shall be made to NAI and BNPPPLC within fifteen days following the selection of the third appraiser.

(b) If appraisers must be selected under the procedure set out above and either BNPPPLC or NAI fails to appoint an appraiser or fails to notify the other party of such appointment within fifteen days after receipt of notice that the prescribed time for appointing the appraisers has passed, then the other party's appraiser will determine the Option Price. All appraisers selected for the appraisal process set out in this Exhibit will be disinterested, reputable, qualified real estate appraisers with the designation of MAI or equivalent and with at least 5 years experience in appraising properties comparable in Santa Clara County, California to the Land.

(c) If a third appraiser must be chosen under the procedure set out above, he will be chosen on the basis of objectivity and competence, not on the basis of his relationship with the other appraisers or the parties to this Ground Lease, and the first two appraisers will be so advised. Although the first two appraisers will be instructed to attempt in good faith to agree upon the third appraiser, if for any reason they cannot agree within the prescribed time, either NAI and BNPPPLC may require the first two appraisers to immediately submit its top choice for the third appraiser to the then highest ranking officer of the Dallas, Texas Bar Association who will agree to help and who has no attorney/client or other significant relationship to either NAI or BNPPPLC. Such officer will have complete discretion to select the most objective and competent third appraiser from between the choice of each of the first two appraisers, and will do so within ten days after such choices are submitted to him.

(d) Either NAI or BNPPPLC may notify the appraiser selected by the other party to demand the submission of an estimate of Option Price or a choice of a third appraiser as required under the procedure described above; and if the submission of such an estimate or choice is required but the other party's appraiser fails to comply with the demand within fifteen days after receipt of such notice,

then the Option Price or choice of the third appraiser, as the case may be, selected by the other appraiser (i.e., the notifying party's appraiser) will be binding upon NAI and BNPPPLC.

(e) NAI and BNPPPLC shall each bear the expense of the appraiser appointed by it, and the expense of the third appraiser and of any officer of the Dallas, Texas Bar Association who participates in the appraisal process described above will be shared equally by NAI and BNPPPLC.

Exhibit D

DETERMINATION OF FAIR RENTAL VALUE

Each annual payment of Ground Lease Rent will equal the Fair Rental Value, computed as of the most recent Rental Determination Date when such payment becomes due. As used in this Exhibit, "**Rental Determination Date**" means the (1) the Effective Date, (2) the earliest anniversary of the Effective Date to follow the Turnover Date by more than thirty days, and (3) after the second Rental Determination Date described in clause (2), each fifth anniversary of the preceding Rental Determination Date.

As of the Effective Date (*i.e.*, the first Rental Determination Date), the parties have agreed that Fair Rental Value is the dollar amount set forth in Paragraph 3 of this Ground Lease.

If NAI and BNPPPLC have not agreed upon Fair Rental Value as of any subsequent Rental Determination Date within one hundred eighty days after the such date, then Fair Rental Value will be determined as follows:

(a) NAI and BNPPPLC shall each appoint a real estate appraiser who is familiar with rental values for properties in the vicinity of the Land and who has not previously acted for either party. Each party will make the appointment no later than ten days after receipt of notice from the other party that the appraisal process described in this Exhibit has been invoked. The agreement of the two appraisers as to Fair Rental Value will be binding upon NAI and BNPPPLC. If the two appraisers cannot agree upon the Fair Rental Value within ten days following their appointment, they shall within another ten days agree upon a third real estate appraiser. Immediately thereafter, each of the first two appraisers will submit his best estimate of the appropriate Fair Rental Value (together with a written report supporting such estimate) to the third appraiser and the third appraiser will choose between the two estimates. The estimate of Fair Rental Value chosen by the third appraiser as the closest to the prevailing annual fair rental value will be binding upon NAI and BNPPPLC. Notification in writing of this estimate shall be made to NAI and BNPPPLC within fifteen days following the selection of the third appraiser.

(b) If appraisers must be selected under the procedure set out above and either BNPPPLC or NAI fails to appoint an appraiser or fails to notify the other party of such appointment within fifteen days after receipt of notice that the prescribed time for appointing the appraisers has passed, then the other party's appraiser will determine the Fair Rental Value. All appraisers selected for the appraisal process set out in this Exhibit will be disinterested, reputable, qualified real estate appraisers with the designation of MAI or equivalent and with at least 5 years experience in appraising properties in Santa Clara County, California comparable to the Land.

(c) If a third appraiser must be chosen under the procedure set out above, he or she will be chosen on the basis of objectivity and competence, not on the basis of his

relationship with the other appraisers or the parties to this Ground Lease, and the first two appraisers will be so advised. Although the first two appraisers will be instructed to attempt in good faith to agree upon the third appraiser, if for any reason they cannot agree within the prescribed time, either NAI and BNPPPLC may require the first two appraisers to immediately submit its top choice for the third appraiser to the then highest ranking officer of the Dallas, Texas Bar Association who will agree to help and who has no attorney/client or other significant relationship to either NAI or BNPPPLC. Such officer will have complete discretion to select the most objective and competent third appraiser from between the choice of each of the first two appraisers, and will do so within twenty days after such choices are submitted to him.

(d) Either NAI or BNPPPLC may notify the appraiser selected by the other party to demand the submission of an estimate of Fair Rental Value or a choice of a third appraiser as required under the procedure described above; and if the submission of such an estimate or choice is required but the other party's appraiser fails to comply with the demand within fifteen days after receipt of such notice, then the Fair Rental Value or choice of the third appraiser, as the case may be, selected by the other appraiser (i.e., the notifying party's appraiser) will be binding upon NAI and BNPPPLC.

(e) NAI and BNPPPLC shall each bear the expense of the appraiser appointed by it, and the expense of the third appraiser and of any officer of the Dallas, Texas Bar Association who participates in the appraisal process described above will be shared equally by NAI and BNPPPLC.



December 6, 2006

Network Appliance, Inc.
495 East Java Drive
Sunnyvale, California 94089
Telephone (408) 822-6000

Ladies and Gentlemen:

This master confirmation ("**Master Confirmation**") dated as of December 6, 2006, is intended to supplement the terms and provisions of certain transactions (each, a "**Transaction**") entered into from time to time between J.P. Morgan Securities Inc., as agent for JPMorgan Chase Bank, National Association, London Branch ("**Seller**") and Network Appliance, Inc., a Delaware corporation ("**Purchaser**"). This Master Confirmation, taken alone, is neither a commitment by either party to enter into any Transaction nor evidence of a Transaction. The terms of any particular Transaction shall be set forth in a Supplemental Confirmation in the form of **Exhibit A** hereto, which references this Master Confirmation (the "**Supplemental Confirmation**"). This Master Confirmation and each Supplemental Confirmation together shall constitute a "Master Confirmation" as referred to in the Agreement specified below.

This Master Confirmation and each Supplemental Confirmation evidence a complete binding agreement between the Purchaser and Seller as to the subject matter and terms of each Transaction to which this Master Confirmation and the related Supplemental Confirmation relate and shall supersede all prior or contemporaneous written or oral communications with respect thereto.

This Master Confirmation shall supplement, form a part of, and be subject to an agreement in the form of the 2002 ISDA Master Agreement (the "**Agreement**") as if the Seller and the Purchaser had executed an agreement in such form (but without any Schedule except for the election of the laws of the State of New York as the governing law) on the Execution Date set forth on any Supplemental Confirmation. The parties hereby agree that no Transaction other than the Transaction to which this Master Confirmation relates shall be governed by the Agreement.

All provisions contained or incorporated by reference in the Agreement shall govern this Master Confirmation and each Supplemental Confirmation relating to a Transaction except as expressly modified herein or in the related Supplemental Confirmation. If, in relation to any Transaction to which this Master Confirmation and related Supplemental Confirmation relate, there is any inconsistency between the Agreement, this Master Confirmation and any Supplemental Confirmation, the following will prevail for purposes of such Transaction in the order of precedence indicated: (i) such Supplemental Confirmation; (ii) this Master Confirmation; and (iii) the Agreement.

JPMorgan Chase Bank, National Association
Organised under the laws of the United States as a National Banking Association.
Main Office 1111 Polaris Parkway, Columbus, Ohio 43271
Registered as a branch in England & Wales branch No. BR000746. Registered
Branch Office 125 London Wall, London EC2Y 5AJ
Authorised and regulated by the Financial Services Authority

ARTICLE 1
Definitions

Section 1.01 *Definitions*. As used in this Master Confirmation, the following terms shall have the following meanings:

“**10b-18 VWAP**” means, (A) for any Trading Day described in clause (x) of the definition of Trading Day hereunder, the volume-weighted average price at which the Common Stock trades as reported in the composite transactions for the principal United States securities exchange on which such Common Stock is then listed (or, if applicable, the Successor Exchange on which the Common Stock has been listed in accordance with Section 7.01(c)), on such Trading Day, excluding (i) trades that do not settle regular way, (ii) opening (regular way) reported trades in the consolidated system on such Trading Day, (iii) trades that occur in the last ten minutes before the scheduled close of trading on the Exchange on such Trading Day and ten minutes before the scheduled close of the primary trading in the market where the trade is effected, and (iv) trades on such Trading Day that do not satisfy the requirements of Rule 10b-18(b)(3), as determined in good faith by the Calculation Agent, or (B) for any Trading Day that is described in clause (y) of the definition of Trading Day hereunder, an amount determined in good faith by the Calculation Agent as 10b-18 VWAP. The Purchaser acknowledges that the Seller may refer to the Bloomberg Page “NTAP UQ <Equity> AQR SEC” (or any successor thereto), in its reasonable judgment, for such Trading Day to determine the 10b-18 VWAP.

“**Additional Termination Event**” has the meaning set forth in Section 7.01(a).

“**Agreement**” has the meaning set forth in the third paragraph of this Master Confirmation.

“**Affected Party**” has the meaning set forth in Section 14 of the Agreement.

“**Affected Transaction**” has the meaning set forth in Section 14 of the Agreement.

“**Affiliated Purchaser**” means any “affiliated purchaser” (as such term is defined in Rule 10b-18) of the Purchaser.

“**Alternative Termination Delivery Unit**” means (i) in the case of a Termination Event (other than a Merger Event or Nationalization) or Event of Default (as defined in the Agreement), one share of Common Stock and (ii) in the case of a Merger Event or Nationalization, a unit consisting of the number or amount of each type of property received by a holder of one share of Common Stock in such Merger Event or Nationalization; provided that if such Merger Event involves a choice of consideration to be received by holders of the Common Stock, an Alternative Termination Delivery Unit shall be deemed to include the amount of cash received by a holder who had elected to receive the maximum possible amount of cash as consideration for his shares.

“**Averaging Period**” means the period of consecutive Trading Days from and including the first Trading Day following the Hedging Completion Date to and including the Valuation Completion Date.

“**Bankruptcy Code**” has the meaning set forth in Section 9.07.

“**Business Day**” means any day on which the Exchange is open for trading.

“**Calculation Agent**” means JPMorgan Chase Bank, National Association.

“**Common Stock**” has the meaning set forth in Section 2.01.

“**Communications Procedures**” has the meaning set forth in Annex A hereto.

“**Contract Period**” means the period commencing on and including the Execution Date and ending on and including the date all payments or deliveries of shares of Common Stock pursuant to Article 3 or Section 7.03 have been made.

“**Default Notice Day**” has the meaning set forth in Section 7.02(a).

“**De-Listing**” has the meaning set forth in Section 7.01(c).

“**Disrupted Day**” means a Scheduled Trading Day during the Contract Period that, as a result of the definition of Trading Day (whether because of a suspension of transactions pursuant to Section 4.02 of this Master Confirmation or otherwise), is not a Trading Day.

“**Early Termination Date**” has the meaning set forth in Section 14 of the Agreement.

“**Event of Default**” has the meaning set forth in Section 14 of the Agreement.

“**Exchange**” means the NASDAQ National Market.

“**Exchange Act**” means the Securities Exchange Act of 1934, as amended.

“**Execution Date**” has the meaning set forth in Section 2.01.

“**Expiration Date**” means the first Scheduled Trading Day following the number of days following the Hedging Period as set forth on the applicable Supplemental Confirmation under the heading “Number of Days in Averaging Period” (the “**Scheduled Expiration Date**”); *provided, however*, if any Scheduled Trading Day during the Contract Period is a Disrupted Day, then the Expiration Date shall be extended by one Scheduled Trading Day for each such Disrupted Day; *provided, further*, if more than eight Scheduled Trading Days during the Contract Period are Disrupted Days, then on the eighth Scheduled Trading Day following the Scheduled Expiration Date, if a Valuation Completion Date has not yet occurred, an Additional Termination Event shall occur in respect of which the Purchaser is the sole Affected Party and a Transaction is the sole Affected Transaction.

“**Extraordinary Cash Dividend**” means the per share cash dividend or distribution, or a portion thereof, declared by the Purchaser on shares of Common Stock that is classified by the board of directors of the Purchaser as an “extraordinary” dividend.

“**Hedging Completion Date**” means the Trading Day on which the Seller completes the establishment of its initial hedge position with respect to a Transaction.

“**Hedging Price**” means the volume weighted average of the per share prices at which the Seller (or an affiliate of the Seller) purchases shares of Common Stock during the Hedging Period to establish Seller’s initial hedge position with respect to a Transaction.

“**Hedging Period**” has the meaning set forth in Section 2.04(a).

“**Indemnified Person**” has the meaning set forth in Section 9.02.

“**Indemnifying Party**” has the meaning set forth in Section 9.02.

“**Initial Payment Date**” means the first Business Day immediately following the Execution Date.

“**Master Confirmation**” has the meaning set forth in the first paragraph of this letter agreement.

“**Merger Event**” has the meaning set forth in Section 7.01(d).

“**Minimum Delivery Number**” means the number of shares of Common Stock, rounded down to the nearest integer, equal to (A) the Purchase Price divided by (B) the Upside Threshold.

“**Nationalization**” has the meaning set forth in Section 7.01(e).

“**Obligations**” has the meaning set forth in Section 9.02.

“**Purchase Price**” has the meaning set forth in Section 2.01.

“**Purchaser**” has the meaning set forth in the first paragraph of this Master Confirmation.

“**Regulation M**” means Regulation M under the Exchange Act.

“**Rule 10b-18**” means Rule 10b-18 promulgated under the Exchange Act (or any successor rule thereto).

“**Scheduled Trading Day**” means any day on which each national securities exchange on which any securities of the Purchaser are traded is scheduled to be open for trading for their respective regular trading sessions.

“**SEC**” means the Securities and Exchange Commission.

“**Securities Act**” means the Securities Act of 1933, as amended.

“**Seller**” has the meaning set forth in the first paragraph hereto.

“**Seller Termination Share Purchase Period**” has the meaning set forth in Section 7.03.

“**Share De-listing Event**” has the meaning set forth in Section 7.01(c).

“**Successor Exchange**” has the meaning set forth in Section 7.01(c).

“**Supplemental Confirmation**” has the meaning set forth in the first paragraph of this Master Agreement.

“**Termination Amount**” has the meaning set forth in Section 7.02(a).

“**Termination Event**” has the meaning set forth in Section 14 of the Agreement.

“**Termination Price**” means the value of an Alternative Termination Delivery Unit to the Seller, as determined by the Calculation Agent.

“**Trading Day**” means (x) any Scheduled Trading Day (i) during which trading of any securities of the Purchaser on any national securities exchange has not been suspended, (ii) during which there has not been, in the Seller’s reasonable judgment, a material limitation in the trading of Common Stock or any options contract or futures contract related to the Common Stock, and (iii) during which there has been no suspension pursuant to Section 4.02 of this Master Confirmation, or (y) any day that, notwithstanding the occurrence of events contemplated in clauses (i), (ii) and (iii) of this definition, the Calculation Agent determines to be a Trading Day.

“**Transaction**” has the meaning set forth in the first paragraph of this Master Confirmation.

“**Upside Threshold**” means, subject to the proviso contained in Section 2.04(b), such percent of the Hedging Price as set forth in the applicable Supplemental Confirmation under the heading “Upside Threshold Percent.”

“**Upside Threshold Percent**” shall mean the percent set forth in the applicable Supplemental Confirmation under the heading “Upside Threshold Percent.”

“**Valuation Completion Date**” means the Trading Day, during the period commencing on the tenth (10th) Business Day following the Hedging Completion Date and ending on and including the Expiration Date, specified as such by the Seller, in its sole judgment, by delivering a notice designating such Trading Day as a Valuation Completion Date by the close of business on the Business Day immediately following such Business Day; *provided, however,* that if the Seller fails to validly designate the Valuation Completion Date prior to the Expiration Date, the Valuation Completion Date shall be the Expiration Date.

“**Valuation Number**” has the meaning set forth in Section 3.01(b) of this Master Confirmation.

“**Valuation Price Adjustment Amount**” shall mean the dollar amount set forth on the applicable Supplemental Confirmation representing the discount from the average of the 10b-18 VWAPs for all Trading Days in the Averaging Period.

“**VWAP Termination Price**” shall be the price per share set forth on the applicable Supplemental Confirmation under the heading “VWAP Termination Price.”

ARTICLE 2 purchase of the stock

Section 2.01 *Purchase of the Stock*. Subject to the terms and conditions of this Master Confirmation, the Purchaser agrees to purchase from the Seller, and the Seller agrees to sell to the Purchaser, on such date as set forth on the applicable Supplemental Confirmation under the heading “Execution Date” or on such other Business Day as the Purchaser and the Seller shall otherwise agree (the “**Execution Date**”), a number of shares of the Purchaser’s common stock, par value \$0.001 per share (“**Common Stock**”), for an aggregate purchase price equal to such dollar amount as set forth on the applicable Supplemental Confirmation under the heading “Purchase Price” (the “**Purchase Price**”). The number of shares of Common Stock purchased by the Purchaser hereunder shall be determined in accordance with the terms of this Master Confirmation.

Section 2.02 *Initial Payments*. On the Initial Payment Date, the Purchaser shall pay an amount equal to the Purchase Price to the Seller.

Section 2.03 *Conditions to Seller's Obligations*. The Seller's obligations under this Agreement are subject to the conditions that (a) the representations and warranties made by the Purchaser in this Agreement shall be true and correct as of the date hereof and the Initial Payment and (b) the Seller shall have received an opinion of the counsel for the Purchaser, as of the date of this Master Confirmation, substantially to the effect set forth in **Exhibit D**.

Section 2.04 *Hedging Period*. (a) On each Trading Day beginning on the first Trading Day immediately following the Initial Payment Date and ending on the Hedging Completion Date, an affiliate of the Seller shall effect, for the account of the Seller, purchases of shares of Common Stock to establish Seller's initial position to hedge the Seller's price and market risk in connection with a Transaction (the period of consecutive Trading Days on which such purchases for a Transaction are effected being collectively referred to as the "**Hedging Period**" for a Transaction).

(b) At the conclusion of the Hedging Period, based on the amounts and prices at which an affiliate of the Seller effects purchases of shares of Common Stock during the Hedging Period to establish Seller's initial hedge position in connection with a Transaction, the Calculation Agent shall determine the Hedging Price, the Upside Threshold and the Minimum Delivery Number for a Transaction.

(c) On the first Business Day following the Hedging Completion Date, in addition to satisfying its obligations under Section 3.01(a), the Seller shall deliver to the Purchaser a pricing supplement to the applicable Supplemental Confirmation, substantially in the form of **Exhibit B** attached hereto, setting forth the Hedging Price, the Upside Threshold, the Minimum Delivery Number and the first day of the Averaging Period for such Transaction.

ARTICLE 3 Share Deliveries

Section 3.01 *Delivery of Shares*. (a) On the first Business Day immediately following the Hedging Completion Date, the Seller shall deliver to the Purchaser the number of shares of Common Stock equal to the Minimum Delivery Number.

(b) On the third Business Day immediately following the Valuation Completion Date, the Seller shall deliver to the Purchaser the number of shares of Common Stock equal to (i) the number of shares of Common Stock, rounded down to the nearest integer, equal to (x) the Purchase Price divided by (y) the average of the 10b-18 VWAPs for all Trading Days in the Averaging Period minus the dollar amount set forth on the applicable Supplemental Confirmation under the heading "Valuation Price Adjustment Amount." (collectively, the "**Valuation Number**"), minus (ii) the Minimum Delivery Number; *provided, however*, that if the Valuation Number is less than the Minimum Delivery Number, the Valuation Number shall be equal to such Minimum Delivery Number.

(c) Delivery pursuant to this Article 3 shall be effected in accordance with the Seller's customary procedures.

ARTICLE 4 Market Transactions

Section 4.01 *Transactions by the Seller*. (a) The parties agree and acknowledge that:

(i) During the Hedging Period, the Averaging Period and any Seller Termination Share Purchase Period, the Seller (or its agent or affiliate) may effect transactions in shares of Common Stock in connection with this Master Confirmation. The timing of such transactions by the Seller, the price paid or received per share of Common Stock pursuant to such transactions and the manner in which such transactions are made, including without limitation whether such transactions are made on any securities exchange or privately, shall be within the sole judgment of the Seller; provided that the Seller shall use good faith efforts to make all purchases of Common Stock in a manner that would comply with the limitations set forth in clauses (b)(2), (b)(3), (b)(4) and (c) of Rule 10b-18 as if such rule were applicable to such purchases.

(ii) The Purchaser shall, at least one day prior to the first day of the Hedging Period, the Averaging Period or the Seller Termination Share Purchase Period, notify the Seller of the total number of shares of Common Stock purchased in Rule 10b-18 purchases of blocks pursuant to the once-a-week block exception set forth in Rule 10b-18(b)(4) by or for the Purchaser or any of its Affiliated Purchasers during each of the four calendar weeks preceding such day and during the calendar week in which such day occurs (“**Rule 10b-18 purchase**” and “**blocks**” each being used as defined in Rule 10b-18), which notice shall be substantially in the form set forth as **Exhibit C** hereto.

(b) The Purchaser acknowledges and agrees that (i) all transactions effected pursuant to Section 4.01 hereunder shall be made in the Seller’s sole judgment and for the Seller’s own account and (ii) the Purchaser does not have, and shall not attempt to exercise, any influence over how, when or whether to effect such transactions, including, without limitation, the price paid or received per share of Common Stock pursuant to such transactions whether such transactions are made on any securities exchange or privately. It is the intent of the Seller and the Purchaser that all Transactions comply with the requirements of Rule 10b5-1(c) of the Exchange Act and that this Master Confirmation and any Supplemental Confirmation shall be interpreted to comply with the requirements of Rule 10b5-1(c)(1)(i)(B) and the Seller shall take no action that results in the Transaction not so complying with such requirements.

(c) Notwithstanding anything to the contrary in this Master Confirmation or any Supplemental Confirmation, the Purchaser acknowledges and agrees that, on any day, the Seller shall not be obligated to deliver or receive any shares of Common Stock to or from the Purchaser and the Purchaser shall not be entitled to receive any shares of Common Stock from the Seller on such day, to the extent (but only to the extent) that after such transactions the Seller’s ultimate parent entity would directly or indirectly beneficially own (as such term is defined for purposes of Section 13(d) of the Exchange Act) at any time on such day in excess of 4.99% of the outstanding shares of Common Stock. Any purported receipt or delivery of shares of Common Stock shall be void and have no effect to the extent (but only to the extent) that after any receipt or delivery of such shares of Common Stock the Seller’s ultimate parent entity would directly or indirectly so beneficially own in excess of 4.99% of the outstanding shares of Common Stock. If, on any day, any delivery or receipt of shares of Common Stock by the Seller is not effected, in whole or in part, as a result of this provision, the Seller’s and Purchaser’s respective obligations to make or accept such receipt or delivery shall not be extinguished and such receipt or delivery shall be effected over time as promptly as the Seller determines, in the reasonable determination of the Seller, that after such receipt or delivery its ultimate parent entity would not directly or indirectly beneficially own in excess of 4.99% of the outstanding shares of Common Stock.

Section 4.02 *Suspension of Transactions in Common Stock.* (a) If the Seller, in its sole judgment, reasonably determines that it is appropriate with regard to any legal, regulatory or self-regulatory requirements or related policies and procedures (whether or not such requirements, policies or procedures are imposed by law or have been voluntarily adopted by the Seller) for the Seller to refrain

from effecting transactions in Common Stock on any Business Day during the Contract Period or to effect such transactions on such Business Day at a volume lower than that otherwise effected by the Seller hereunder, the Seller (or its agent or affiliate) shall not effect transactions in shares of Common Stock with respect to any Transaction on such day or effect such transactions at a volume reasonably determined by the Seller in its sole judgment; provided that if the Seller decides to effect any transaction hereunder at such lower volume, the Calculation Agent shall be entitled to make appropriate adjustments to the term of such Transaction under Section 8.02 to reflect the effect of such diminished volume. The Seller shall notify the Purchaser of the exercise of the Seller's rights pursuant to this Section 4.02(a) upon such exercise and shall subsequently notify the Purchaser on the day the Seller believes that the Seller may resume purchasing or selling or purchasing at the volume level anticipated at the outset of such Transaction, as applicable, Common Stock. The Seller shall not be obligated to communicate to the Purchaser the reason for the Seller's exercise of its rights pursuant to this Section 4.02(a).

(b) The Purchaser agrees that, during the Contract Period, neither the Purchaser nor any of its affiliates or agents shall make any distribution (as defined in Regulation M) of Common Stock, or any security for which the Common Stock is a reference security (as defined in Regulation M) or take any other action that would, in the view of the Seller, preclude purchases by the Seller of the Common Stock or cause the Seller to violate any law, rule or regulation with respect to such purchases.

Section 4.03 *Purchases of Common Stock by the Purchaser*. Without the prior written consent of the Seller, the Purchaser shall not, and shall cause its affiliates and affiliated purchasers (each as defined in Rule 10b-18) not to, directly or indirectly (including, without limitation, by means of a derivative instrument) purchase, offer to purchase, place any bid or limit order that would effect a purchase of, or commence any tender offer relating to, any shares of Common Stock (or equivalent interest, including a unit of beneficial interest in a trust or limited partnership or a depository share) or any security convertible into or exchangeable for shares of Common Stock during the Contract Period.

ARTICLE 5

Representations, Warranties And Agreements

Section 5.01 *Repeated Representations, Warranties and Agreements of the Purchaser*. The Purchaser represents and warrants to, and agrees with, the Seller, (i) on the date hereof, (ii) on any Execution Date and (iii) on any date on which the Purchaser elects to receive any delivery or payment pursuant to this Master Confirmation or any Supplemental Confirmation, that:

(a) **Disclosure; Compliance with Laws**. The reports and other documents filed by the Purchaser with the SEC pursuant to the Exchange Act when considered as a whole (with the more recent such reports and documents deemed to amend inconsistent statements contained in any earlier such reports and documents), do not contain any untrue statement of a material fact or any omission of a material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances in which they were made, not misleading. The Purchaser is not in possession of any material nonpublic information regarding the Purchaser or the Common Stock.

(b) **Rule 10b5-1**. The Purchaser acknowledges that (i) the Purchaser does not have, and shall not attempt to exercise, any influence over how, when or whether to effect purchases of Common Stock by the Seller (or its agent or affiliate) in connection with this Master Confirmation or any Supplemental Confirmation and (ii) the Purchaser is entering into the Agreement, this Master Confirmation and any Supplemental Confirmation in good faith and not as part of a plan or scheme to evade compliance with federal securities laws including, without limitation, Rule 10b-5 promulgated under the Exchange Act. The Purchaser also acknowledges and agrees that any amendment, modification,

waiver or termination of this Master Confirmation or any Supplemental Confirmation must be effected in accordance with the requirements for the amendment or termination of a “plan” as defined in Rule 10b5-1(c) under the Exchange Act. Without limiting the generality of the foregoing, any such amendment, modification, waiver or termination shall be made in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b-5 under the Exchange Act, and no amendment, modification or waiver shall be made at any time at which the Purchaser or any officer or director of the Purchaser is aware of any material nonpublic information regarding the Purchaser or the Common Stock.

(c) **No Facilitation of Distribution.** The Purchaser is not entering into this Master Confirmation or any Supplemental Confirmation to facilitate a distribution of the Common Stock (or any security convertible into or exchangeable for Common Stock) or in connection with a future issuance of securities.

(d) **No Manipulation.** The Purchaser is not entering into this Master Confirmation or any Supplemental Confirmation to create actual or apparent trading activity in the Common Stock (or any security convertible into or exchangeable for Common Stock) or to manipulate the price of the Common Stock (or any security convertible into or exchangeable for Common Stock).

(e) **Regulation M.** The Purchaser is not engaged in a distribution, as such term is used in Regulation M, that would preclude purchases by the Purchaser or the Seller of the Common Stock or cause the Seller to violate any law, rule or regulation with respect to such purchases.

(f) **Board Authorization.** The Purchaser is entering into this Master Confirmation and any Supplemental Confirmation in connection with its share repurchase program, which was approved by its board of directors and publicly disclosed, solely for the purposes stated in such board resolution and public disclosure. There is no internal policy of the Purchaser, whether written or oral, that would prohibit the Purchaser from entering into any aspect of the Transactions contemplated hereby or thereby, including, but not limited to, the purchases of shares of Common Stock to be made pursuant hereto or thereto.

(g) **Due Authorization and Good Standing.** The Purchaser is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. This Master Confirmation has been duly authorized, executed and delivered by the Purchaser and (assuming due authorization, execution and delivery thereof by the Seller) constitutes a valid and legally binding obligation of the Purchaser. The Purchaser has all corporate power to enter into this Master Confirmation and any Supplemental Confirmation and to consummate the transactions contemplated hereby and thereby and to purchase the Common Stock in accordance with the terms hereof and thereof.

(h) **Certain Transactions.** There has not been any public announcement (as defined in Rule 165(f) under the Securities Act) of any merger, acquisition, or similar transaction involving a recapitalization relating to the Purchaser that would fall within the scope of Rule 10b-18(a)(13)(iv).

(i) **Solvency.** The assets of the Purchaser at their fair valuation exceed the liabilities of the Purchaser, including contingent liabilities; the capital of the Purchaser is adequate to conduct the business of the Purchaser and the Purchaser has the ability to pay its debts and obligations as such debts mature and does not intend to, or does not believe that it will, incur debt beyond its ability to pay as such debts mature.

(j) **Required Filings.** The Purchaser has made, and will use its best efforts to make, all filings required to be made by it with the SEC, any securities exchange or any other regulatory body with respect to the Transactions contemplated hereby.

(k) **No Conflict.** The execution and delivery by the Purchaser of, and the performance by the Purchaser of its obligations under, this Master Confirmation and any Supplemental Confirmation, as applicable, and the consummation of the transactions herein or therein contemplated do not conflict with or violate (i) any provision of the certificate of incorporation, by-laws or other constitutive documents of the Purchaser, (ii) any statute or order, rule, regulation or judgment of any court or governmental agency or body having jurisdiction over the Purchaser or any of its subsidiaries or any of their respective assets or (iii) any contractual restriction binding on or affecting the Purchaser or any of its subsidiaries or any of its assets.

(l) **Consents.** All governmental and other consents that are required to have been obtained by the Purchaser with respect to performance, execution and delivery of this Master Confirmation or any Supplemental Confirmation, as applicable, have been obtained and are in full force and effect and all conditions of any such consents have been complied with.

(m) **Investment Company Act.** The Purchaser is not and, after giving effect to the transactions contemplated in this Master Confirmation or any Supplemental Confirmation, as applicable, will not be required to register as an “investment company” as such term is defined in the Investment Company Act of 1940, as amended.

(n) **Commodity Exchange Act.** The Purchaser is an “eligible contract participant,” as such term is defined in Section 1(a)(12) of the Commodity Exchange Act, as amended.

Section 5.02 *Additional Representations, Warranties and Agreements.* The Purchaser and the Seller represent and warrant to, and agree with, each other that:

(a) **Exempt Transaction.** Each party acknowledges that all Transactions pursuant to this Master Confirmation or any Supplemental Confirmation are intended to be exempt from registration under the Securities, by virtue of Section 4(2) thereof and the provisions of Regulation D promulgated thereunder (“**Regulation D**”). Accordingly, each party represents and warrants to the other that (i) it has the financial ability to bear the economic risk of its investment in each Transaction and is able to bear a total loss of its investment, (ii) it is an “accredited investor” as that term is defined under Regulation D, (iii) it will purchase each Transaction for investment and not with a view to the distribution or resale thereof in a manner that would violate the Securities Act, and (iv) the disposition of each Transaction is restricted under this Master Confirmation, the Securities Act and state securities laws.

(b) **Agency.** Each party acknowledges that J.P. Morgan Securities Inc., an affiliate of the Seller (“**JPMSI**”) has acted solely as agent on behalf of the Seller in effecting this Master Confirmation and any Supplemental Confirmation. Each party acknowledges that JPMSI shall have no liability to either party under this Master Confirmation or any Supplemental Confirmation. JPMSI is authorized to act as agent for the Seller.

(c) **Non-Reliance.** Each party has entered into this Master Confirmation solely in reliance on its own judgment. Neither party has any fiduciary obligation to the other party relating to this Master Confirmation nor any Transactions contemplated hereby. In addition, neither party has held itself out as advising, or has held out any of its employees or agents as having the authority to advise, the other party as to whether or not the other party should enter into this Master Confirmation nor any Transactions

contemplated hereby, any subsequent actions relating to this Master Confirmation or any other matters relating to this Master Confirmation. Neither party shall have any responsibility or liability whatsoever in respect of any advice of this nature given, or views expressed, by it or any such persons to the other party relating to Master Confirmation nor any Transactions contemplated hereby, whether or not such advice is given or such views are expressed at the request of the other party. The Purchaser has conducted its own analysis of the legal, accounting, tax and other implications of this Master Confirmation and the Transactions contemplated hereby and consulted such advisors, accountants and counsel as it has deemed necessary.

Section 5.03 *Representations and Warranties of the Seller*. The Seller represents and warrants to the Purchaser that:

(a) **Due Authorization**. This Master Confirmation has been duly authorized, executed and delivered by the Seller and (assuming due authorization, execution and delivery thereof by the Purchaser) constitutes a valid and legally binding obligation of the Seller. The Seller has all corporate power to enter into this Master Confirmation and any Supplemental Confirmation, as applicable, and to consummate the transactions contemplated hereby and to deliver the Common Stock in accordance with the terms hereof or thereof.

(b) **Right to Transfer**. The Seller will, on the first Business Day immediately following the Hedging Completion Date, have the free and unqualified right to transfer the Number of Shares of Common Stock to be delivered by the Seller pursuant to Section 2.01(a) hereof, free and clear of any security interest, mortgage, pledge, lien, charge, claim, equity or encumbrance of any kind.

ARTICLE 6 Additional Covenants

Section 6.01 *Purchaser's Further Assurances*. The Purchaser hereby agrees with the Seller that the Purchaser shall cooperate with the Seller, and execute and deliver, or use its best efforts to cause to be executed and delivered, all such other instruments, and to obtain all consents, approvals or authorizations of any person, and take all such other actions as the Seller may reasonably request from time to time, consistent with the terms of this Master Confirmation, in order to effectuate the purposes of this Master Confirmation and the Transactions contemplated hereby.

Section 6.02 *Purchaser's Hedging Transactions*. The Purchaser hereby agrees with the Seller that the Purchaser shall not, during the Contract Period, enter into or alter any corresponding or hedging transaction or position with respect to the Common Stock (including, without limitation, with respect to any securities convertible or exchangeable into the Common Stock) and agrees not to alter or deviate from the terms of this Master Confirmation.

Section 6.03 *No Communications*. The Purchaser hereby agrees with the Seller that the Purchaser shall not, directly or indirectly, communicate any information relating to the Common Stock or a Transaction (including any notices required by Section 6.04) to any employee of the Seller or J.P. Morgan Securities Inc., other than as set forth in the Communications Procedures attached as **Annex A** hereto.

Section 6.04 *Notice of Certain Transactions*. If at any time during the Contract Period, the Purchaser makes, or expects to be made, or has made, any public announcement (as defined in Rule 165(f) under the Securities Act) of any merger, acquisition, or similar transaction involving a recapitalization relating to the Purchaser (other than any such transaction in which the consideration

consists solely of cash and there is no valuation period, or as to which the completion of such transaction or the completion of the vote by target shareholders has occurred), then the Purchaser shall (i) notify the Seller prior to the opening of trading in the Common Stock on any day on which the Purchaser makes, or expects to be made, or has made any such public announcement, (ii) notify the Seller promptly following any such announcement (or, if later, prior to the opening of trading in the Common Stock on the first day of any Seller Termination Share Payment Period) that such announcement has been made and (iii) promptly deliver to the Seller following the making of any such announcement (or, if later, prior to the opening of trading in the Common Stock on the first day of any Seller Termination Share Payment Period), a certificate indicating (A) the Purchaser's average daily Rule 10b-18 purchases (as defined in Rule 10b-18) during the three full calendar months preceding the date of such announcement and (B) the Purchaser's block purchases (as defined in Rule 10b-18) effected pursuant to paragraph (b)(4) of Rule 10b-18 during the three full calendar months preceding the date of such announcement. In addition, the Purchaser shall promptly notify the Seller of the earlier to occur of the completion of such transaction and the completion of the vote by target shareholders. Accordingly, the Company acknowledges that its actions in relation to any such announcement or transaction must comply with the standards set forth in Section 6.03.

ARTICLE 7 Termination

Section 7.01 *Additional Termination Events*. (a) An Additional Termination Event shall occur in respect of which the Purchaser is the sole Affected Party and a Transaction is the sole Affected Transaction if, on any day, the Seller reasonably determines, in its sole judgment, that it is unable to establish, re-establish or maintain in an economically efficient manner any hedging transactions reasonably necessary in the normal course of such party's business of hedging the price and market risk of entering into and performing under a Transaction, due to market illiquidity, illegality, lack of availability of hedging transaction market participants or any other factor.

(b) An Additional Termination Event shall occur in respect of which the Purchaser is the sole Affected Party and a Transaction is the sole Affected Transaction if (i) a Share De-listing Event occurs; (ii) a Merger Event occurs; (iii) a Nationalization occurs, (iv) any event described in Section 8.02 occurs with respect to which, the Calculation Agent determines in its sole judgment, that it is impracticable to effect any adjustment contemplated by Section 8.02 in order to preserve the fair value of the Transaction to the Seller, (v) the 10b-18 VWAP on any Trading Day following the Execution Date shall have been less than such dollar amount set forth on the applicable Supplemental Confirmation under the heading "**VWAP Termination Price**" (subject to adjustment under Section 8.02) or (vi) an event described in paragraph III of **Annex A** occurs.

(c) A "**Share De-listing Event**" means that at any time during the Contract Period, the Common Stock ceases to be listed, traded or publicly quoted on the Exchange for any reason (other than a Merger Event, a "**De-Listing**") and are not immediately re-listed, traded or quoted as of the date of such de-listing, on another U.S. national securities exchange or a U.S. automated interdealer quotation system (a "**Successor Exchange**"), provided that it shall not constitute an Additional Termination Event if the Common Stock is immediately re-listed on a Successor Exchange upon its De-Listing from the Exchange, and the Successor Exchange shall be deemed to be the Exchange for all purposes. In addition, in such event, the Seller shall make any commercially reasonable adjustments it deems necessary to the terms of the Transaction.

(d) A "**Merger Event**" means the public announcement, including any public announcement as defined in Rule 165(f) of the Securities Act (by the Purchaser or otherwise) at any time

during the Contract Period of any (i) planned recapitalization, reclassification or change of the Common Stock that will, if consummated, result in a transfer of more than 20% of the outstanding shares of Common Stock, (ii) planned consolidation, amalgamation, merger or similar transaction of the Purchaser with or into another entity (other than a consolidation, amalgamation or merger in which the Purchaser will be the continuing entity and which does not result in any such recapitalization, reclassification or change of more than 20% of such shares outstanding), (iii) other takeover offer for the shares of Common Stock that is aimed at resulting in a transfer of more than 20% of such shares of Common Stock (other than such shares owned or controlled by the offeror) or (iv) irrevocable commitment to any of the foregoing.

(e) A “**Nationalization**” means that all or substantially all of the outstanding shares of Common Stock or assets of the Purchaser are nationalized, expropriated or are otherwise required to be transferred to any governmental agency, authority or entity.

Section 7.02 *Consequences of Additional Termination Events*. (a) In the event of the occurrence or effective designation of an Early Termination Date under the Agreement, in lieu of payment of the amount payable in respect of a Transaction pursuant to Sections 6(d) and 6(e) of the Agreement (the “**Termination Amount**”), the Seller shall be obligated to deliver to the Purchaser the Alternative Termination Delivery Units pursuant to Section 7.03, unless the Purchaser elects cash settlement (which election shall be binding), as set forth in Section 7.02(b), and notifies the Seller of such election by delivery of written notice to the Seller on the Business Day immediately following the Purchaser’s receipt of a notice (as required by Section 6(d) of the Agreement following the designation of an Early Termination Date in respect of such Transaction or in respect of all transactions under the Agreement) setting forth the amounts payable by the Seller with respect to such Early Termination Date (the date of such delivery, the “**Default Notice Day**”); provided that the Purchaser’s election to receive the Alternative Termination Delivery Units pursuant to Section 7.03 shall not be valid and cash settlement shall apply if the representations and warranties made by the Purchaser to the Seller in Section 5.01 are not true and correct as of the date the Seller makes such election, as if made on such date.

(b) If cash settlement applies in respect of an Early Termination Date, Section 6 of the Agreement shall apply.

Section 7.03 *Alternative Termination Settlement*. Subject to Section 7.02(a), unless the Purchaser elects cash settlement pursuant to Section 7.02(b), (i) the Seller shall, beginning on the first Trading Day following the Default Notice Day and ending when the Seller shall have satisfied its obligations under this clause (the “**Seller Termination Share Purchase Period**”), purchase (subject to the provisions of Section 4.01 and Section 4.02 hereof) a number of Alternative Termination Delivery Units equal to (A) the Termination Amount divided by (B) the Termination Price; and (ii) the Seller shall deliver such Alternative Termination Delivery Units to the Purchaser on the settlement dates relating to such purchases.

Section 7.04 *Notice of Default*. If an Event of Default occurs in respect of the Purchaser, the Purchaser will, promptly upon becoming aware of it, notify the Seller specifying the nature of such Event of Default.

ARTICLE 8 Adjustments

Section 8.01 *Cash Dividends*. If the Purchaser declares any Extraordinary Cash Dividend that has a record date during the Contract Period, then prior to or on the date on which such Extraordinary

Cash Dividend is paid by the Purchaser to holders of record, the Purchaser shall pay to the Seller an amount in cash equal to the product of (i) the amount of such Extraordinary Cash Dividend and (ii) the theoretical short delta number of shares, as determined by the Calculation Agent, required for the Seller to hedge its exposure to a Transaction.

Section 8.02 *Dilution Adjustments*. If (x) any corporate event occurs involving the Purchaser or the Common Stock (other than an Extraordinary Cash Dividend but including, without limitation, other cash dividends, a spin-off, a stock split, stock or other dividend or distribution, reorganization, rights offering or recapitalization or any other event having a dilutive or concentrative effect on the Common Stock), or (y) as a result of the definition of Trading Day (whether because of a suspension of transactions pursuant to Section 4.02 or otherwise), any day that would otherwise be a Trading Day during the Contract Period is not a Trading Day or on such Trading Day, pursuant to Section 4.02, the Seller effects transactions with respect to shares of Common Stock at a volume lower than originally anticipated with respect to a Transaction or (z) as a result of market conditions, the Seller incurs additional costs in connection with maintaining its hedge position with respect to a Transaction (including, without limitation, the insufficient availability of stock lenders willing and able to lend shares of Common Stock with a borrow cost not significantly greater than the cost as of the date hereof and otherwise on terms consistent with those as of the date hereof), then in any such case, the Calculation Agent shall make corresponding adjustments with respect to any one or more of the Upside Threshold, the Minimum Delivery Number and any other variable or term relevant to the terms of the Transaction, as the Calculation Agent determines appropriate to preserve the fair value of the Transaction to the Seller, and shall determine the effective date of such adjustment.

ARTICLE 9 miscellaneous

Section 9.01 *Successors and Assigns*. All covenants and agreements in this Master Confirmation or any Supplemental Confirmation made by or on behalf of either of the parties hereto shall bind and inure to the benefit of the respective successors and assigns of the parties hereto whether so expressed or not.

Section 9.02 *Purchaser Indemnification*. The Purchaser (the “**Indemnifying Party**”) agrees to indemnify and hold harmless the Seller and its officers, directors, employees, affiliates, advisors, agents and controlling persons (each, an “**Indemnified Person**”) from and against any and all losses, claims, damages and liabilities, joint or several (collectively, “**Obligations**”), to which an Indemnified Person may become subject arising out of or in connection with this Master Confirmation or any Supplemental Confirmation or any claim, litigation, investigation or proceeding relating thereto, regardless of whether any of such Indemnified Person is a party thereto, and to reimburse, within 30 days, upon written request, each such Indemnified Person for any reasonable legal or other expenses incurred in connection with investigating, preparation for, providing evidence for or defending any of the foregoing, *provided, however,* that the Indemnifying Party shall not have any liability to any Indemnified Person to the extent that such Obligations (i) are finally determined by a court of competent jurisdiction to have resulted from the gross negligence or willful misconduct of such Indemnified Person (and in such case, such Indemnified Person shall promptly return to the Indemnifying Party any amounts previously expended by the Indemnifying Party hereunder) or (ii) are trading losses incurred by the Seller as part of its purchases or sales of shares of Common Stock pursuant to this Master Confirmation or any Supplemental Confirmation (unless the Purchaser has breached any agreement, term or covenant herein).

Section 9.03 *Assignment and Transfer*. Notwithstanding the Agreement, the Seller may assign any of its rights or duties hereunder to any one or more of its affiliates without the prior written consent of

the Purchaser. Notwithstanding any other provision in this Master Confirmation or any Supplemental Confirmation to the contrary requiring or allowing Seller to purchase, sell, receive or deliver any shares of Common Stock or other securities to or from the Purchaser, Seller may designate any of its affiliates to purchase, sell, receive or deliver such shares of Common Stock or other securities and otherwise to perform the Seller's obligations in respect of a Transaction and any such designee may assume such obligations. The Seller shall be discharged of its obligations to the Purchaser to the extent of any such performance.

Section 9.04 *Calculation Agent*. All determinations made by the Calculation Agent shall be made in good faith and in a commercially reasonable manner. Following any calculation by the Calculation Agent hereunder, upon a prior written request by the Purchaser, the Calculation Agent will provide to the Purchaser by e-mail to the e-mail address provided by the Purchaser in such a prior written request a report (in a commonly used file format for the storage and manipulation of financial data) displaying in reasonable detail the basis for such calculation.

Section 9.05 *Confidentiality*. The Seller and the Purchaser hereby agree not to issue any press release, articles, advertising, publicity or other matter relating to this Master Confirmation, any Supplemental Confirmation or any Transaction or mentioning or implying the name of the parties hereto or thereto or the subject matter hereof or thereto, except as may be required by law, and then only after providing the other party with an opportunity to review and comment thereon. Notwithstanding the foregoing, there is no limitation on (i) disclosure of the tax treatment or any fact that may be relevant to understanding the purported or claimed Federal income tax treatment of any Transaction or (ii) the filing of this Master Confirmation or any Supplemental Confirmation by the Purchaser with the SEC. The foregoing does not constitute an authorization to disclose the identity of any existing or future party to a Transaction or their representatives or, except relating to any disclosure of the tax structure or tax treatment, any specific pricing terms or commercial or financial information. The Purchaser hereby agrees to use reasonable efforts to seek confidential treatment under Rule 406 of the Securities Act for any pricing terms contained in any Supplemental Confirmation filed by the Purchaser with the SEC.

Section 9.06 *Unenforceability and Invalidity*. To the extent permitted by law, the unenforceability or invalidity of any provision or provisions of this Master Confirmation or any Supplemental Confirmation shall not render any other provision or provisions herein or therein contained unenforceable or invalid.

Section 9.07 *Securities Contract*. The parties hereto agree and acknowledge as of the date hereof that (i) the Seller is a "financial institution" within the meaning of Section 101(22) of Title 11 of the United States Code (the "**Bankruptcy Code**") and (ii) this Master Confirmation and any Supplemental Confirmation shall be deemed a "securities contract," as such term is defined in Section 741(7) of the Bankruptcy Code, entitled to the protection of Sections 362(b)(6) and 555 of the Bankruptcy Code.

Section 9.08 *No Collateral, Netting or Setoff*. Notwithstanding any provision of the Agreement, or any other agreement between the parties, to the contrary, the obligations of the Purchaser hereunder are not secured by any collateral. Obligations under a Transaction shall not be netted, recouped or set off (including pursuant to Section 6 of the Agreement) against any other obligations of the parties, whether arising under the Agreement, this Master Confirmation or any Supplemental Confirmation, under any other agreement between the parties hereto, by operation of law or otherwise, and no other obligations of the parties shall be netted, recouped or set off (including pursuant to Section 6 of the Agreement) against obligations under such Transaction, whether arising under the Agreement, this Master Confirmation, any Supplemental Confirmation, under any other agreement between the parties hereto, by

operation of law or otherwise, and each party hereby waives any such right of setoff, netting or recoupment.

Section 9.09 *Notices*. Unless otherwise specified herein, any notice, the delivery of which is expressly provided for in this Master Confirmation or any Supplemental Confirmation, may be made by telephone, to be confirmed in writing to the address below. Changes to the information below must be made in writing.

(a) If to the Purchaser:
Network Appliance, Inc.
7301 Kit Creek Road
P.O. Box 13917
Research Triangle Park, NC 27709
Attn: Ingemar Lanevi, VP and Corporate Treasurer
Telephone: 919-476-5750
Facsimile:

(b) If to the Seller:
JPMorgan Chase Bank, National Association
c/o J.P. Morgan Securities Inc.
277 Park Avenue
New York, NY 10172
Attention: Eric Stefanik
Title: Operations Analyst
EDG Corporate Marketing
Telephone No: (212) 622-5814
Facsimile No: (212) 622-8534

Please confirm that the foregoing correctly sets forth the terms of our agreement by executing the copy of this Master Confirmation enclosed for that purpose and returning it to us.

Yours sincerely,

J.P. MORGAN SECURITIES INC., as agent for
JPMorgan Chase Bank, National Association,
London Branch

By: /s/ Jason M. Wood
Name: Jason M. Wood
Title: Vice President

Confirmed as of the date first
above written:

NETWORK APPLIANCE, INC.

By: /s/ Steven J. Gomo
Name: Steven J. Gomo
Title: Executive Vice President of Finance and Chief Financial Officer

JPMorgan Chase Bank, National Association
Organised under the laws of the United States as a National Banking Association.
Main Office 1111 Polaris Parkway, Columbus, Ohio 43271
Registered as a branch in England & Wales branch No. BR000746. Registered
Branch Office 125 London Wall, London EC2Y 5AJ
Authorised and regulated by the Financial Services Authority

COMMUNICATIONS PROCEDURES

December 6, 2006

I. Introduction

Network Appliance, Inc., a Delaware corporation (“Counterparty”) and J.P. Morgan Securities Inc., as agent for JPMorgan Chase Bank, National Association, London Branch (“**JPMorgan**”) have adopted these communications procedures (the “**Communications Procedures**”) in connection with entering into the Master Confirmation (the “**Master Confirmation**”) dated as of December 6, 2006 between JPMorgan and Counterparty relating to the sale by JPMorgan to Counterparty of common stock, par value \$0.001 per share, or security entitlements in respect thereof (the “**Common Stock**”) of the Counterparty. These Communications Procedures supplement, form part of, and are subject to the Master Confirmation.

II. Communications Rules

1. From the date hereof until the end of the Contract Period, neither Counterparty, nor any Employee of Counterparty, nor any Designee of Counterparty shall (a) engage in any Program Related Communication with any Personnel, other than any of the Permitted Contact, or (b) in any event disclose any Material Non-Public Information to any Personnel, other than any of the Permitted Contacts, and

2. Subject to the preceding provision, the Counterparty, any Employee of Counterparty and any Designee of Counterparty may at any time engage in any Non-Program Related Communication.

III. Termination

If, in the sole judgment of any Personnel or any affiliate or Employee of JPMorgan participating in any Communication with Counterparty or any Designee of Counterparty, such Communication would not be permitted by these Communications Procedures, such Personnel or such affiliate or Employee of JPMorgan shall immediately terminate such Communication. In such case, or if such Personnel or such affiliate or Employee of JPMorgan determines following completion of any Communication with Counterparty, or any Designee of Counterparty, that such Communication was not permitted by these Communications Procedures, such Personnel or such affiliate or Employee of JPMorgan shall promptly consult with his or her supervisors and with counsel for JPMorgan regarding such Communication. If, in the reasonable judgment of JPMorgan’s counsel following such consultation, there is more than an insignificant risk that such Communication could materially jeopardize the availability of the affirmative defenses provided in Rule 10b5-1 under the 1934 Act with respect to any ongoing or contemplated activities of JPMorgan or its affiliates in respect of the Master Confirmation, it shall be an Additional Termination Event with respect to the Master Confirmation.

IV. Definitions

Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Master Confirmation. As used herein, the following words and phrases shall have the following meanings:

Exh. D-1

“**Communication**” means any contact or communication (whether written, electronic, oral or otherwise) between Counterparty, any Employee of Counterparty or one or more Designees of Counterparty, on the one hand, and JPMorgan or any of its affiliates or Employees, on the other hand.

“**Designee**” means a person designated, in writing or orally, by Counterparty to communicate with JPMorgan on behalf of Counterparty.

“**Employee**” means, with respect to any entity, any owner, principal, officer, director, employee or other agent or representative of such entity, and any affiliate of any of such owner, principal, officer, director, employee, agent or representative.

“**Material Non-Public Information**” means information relating to the Counterparty or the Common Stock that (a) has not been widely disseminated by wire service, in one or more newspapers of general circulation, by communication from the Counterparty to its shareholders or in a press release, or contained in a public filing made by the Counterparty with the Securities and Exchange Commission and (b) a reasonable investor might consider to be of importance in making an investment decision to buy, sell or hold shares of Common Stock. For the avoidance of doubt and solely by way of illustration, information should be presumed “**material**” if it relates to such matters as dividend increases or decreases, earnings estimates, changes in previously released earnings estimates, significant expansion or curtailment of operations, a significant increase or decline of orders, significant merger or acquisition proposals or agreements, significant new products or discoveries, extraordinary borrowing, major litigation, liquidity problems, extraordinary management developments, purchase or sale of substantial assets and similar matters.

“**Non-Program Related Communication**” means any Communication other than a Program Related Communication.

“**Permitted Contact**” Mr. David Aidelson, Ms. Bernadette Barnard, Mr. Elliot Chalom, Mr. Santosh Nabar, Mr. James Rothschild, Mr. James F. Smith, Ms. Fabienne Wilmes and Mr. Jason Wood and any of the persons designated from time to time in writing by the Counterparty or by a Permitted Contact.

“**Personnel**” means Reuben Jacob, Gaurav Arora and any other Employee of the public side of the Equity Derivatives Group or the Special Equities Group of J.P. Morgan Chase & Co.; provided that JPMorgan may amend the list of Personnel by delivering a revised list of Personnel to Counterparty.

“**Program Related Communication**” means any Communication the subject matter of which relates to the Master Confirmation or any Transaction under the Master Confirmation or any activities of Agent (or any of its affiliates) in respect of the Master Confirmation or any Transaction under the Master Confirmation.

**CERTIFICATION PURSUANT TO SECTION 302(a)
OF THE SARBANES-OXLEY ACT OF 2002**

I, Daniel J. Warmenhoven, certify that:

- 1) I have reviewed this quarterly report on Form 10-Q of Network Appliance, Inc.;
- 2) Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
- 3) Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
- 4) The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
- 5) The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

/s/ DANIEL J. WARMENHOVEN

Daniel J. Warmenhoven
Chief Executive Officer

Date: March 6, 2007

**CERTIFICATION PURSUANT TO SECTION 302(a)
OF THE SARBANES-OXLEY ACT OF 2002**

I, Steven J. Gomo, certify that:

- 1) I have reviewed this quarterly report on Form 10-Q of Network Appliance, Inc.;
- 2) Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
- 3) Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
- 4) The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
- 5) The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

/s/ STEVEN J. GOMO

Steven J. Gomo

*Executive Vice President of Finance and
Chief Financial Officer*

Date: March 6, 2007

**CERTIFICATION OF CHIEF EXECUTIVE OFFICER
PURSUANT TO
18 U.S.C. SECTION 1350,
AS ADOPTED PURSUANT TO
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

I, Daniel J. Warmenhoven, certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that the Quarterly Report of Network Appliance, Inc., on Form 10-Q for the quarterly period ended January 26, 2007 fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended, and that information contained in such Quarterly Report on Form 10-Q fairly presents, in all material respects, the financial condition and results of operations of Network Appliance, Inc.

/s/ DANIEL J. WARMENHOVEN

Daniel J. Warmenhoven
Chief Executive Officer

Date: March 6, 2007

**CERTIFICATION OF CHIEF FINANCIAL OFFICER
PURSUANT TO
18 U.S.C. SECTION 1350,
AS ADOPTED PURSUANT TO
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

I, Steven J. Gomo, certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that the Quarterly Report of Network Appliance, Inc., on Form 10-Q for the quarterly period ended January 26, 2007 fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended, and that information contained in such Quarterly Report on Form 10-Q fairly presents, in all material respects, the financial condition and results of operations of Network Appliance, Inc.

/s/ STEVEN J. GOMO

Steven J. Gomo
*Executive Vice President of Finance and
Chief Financial Officer*

Date: March 6, 2007