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 27, 2006

or

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15d) 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	**77-0307520**
(State or other jurisdiction of incorporation or organization)	*(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 (Check one:).
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.

Class	Outstanding at February 24, 2006
Common Stock	374,164,288

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PART I. FINANCIAL INFORMATION

Item 1. ***Condensed Consolidated Financial Statements (Unaudited)***

NETWORK APPLIANCE, INC.

CONDENSED CONSOLIDATED BALANCE SHEETS
(In thousands — unaudited)

	January 27, 2006	April 30, 2005
ASSETS		
Current Assets:		
Cash and cash equivalents	$ 188,125	$ 193,542
Short-term investments	952,819	976,423
Accounts receivable, net of allowances of $6,201 at January 27, 2006 and $5,445 at April 30, 2005	367,490	296,885
Inventories	64,072	38,983
Prepaid expenses and other	35,768	32,472
Deferred income taxes	35,544	37,584
Total current assets	1,643,818	1,575,889
Property and Equipment, net	492,793	418,749
Goodwill	491,089	291,816
Intangible Assets, net	82,433	21,448
Other Assets	59,817	64,745
	$ 2,769,950	$ 2,372,647
LIABILITIES AND STOCKHOLDERS' EQUITY		
Current Liabilities:		
Accounts payable	$ 99,720	$ 83,572
Income taxes payable	38,226	20,823
Accrued compensation and related benefits	113,067	100,534
Other accrued liabilities	66,790	53,262
Deferred revenue	336,944	261,998
Total current liabilities	654,747	520,189
Long-Term Deferred Revenue	256,528	187,180
Long-Term Obligations	3,427	4,474
Total liabilities	914,702	711,843
Stockholders' Equity:		
Common stock (401,654 shares at January 27, 2006 and 381,509 shares at April 30, 2005)	402	381
Additional paid-in capital	1,743,879	1,347,352
Deferred stock compensation	(29,041)	(15,782)
Treasury stock (29,178 shares at January 27, 2006 and 14,566 shares at April 30, 2005)	(719,222)	(329,075)
Retained earnings	869,209	661,978
Accumulated other comprehensive loss	(9,979)	(4,050)
Total stockholders' equity	1,855,248	1,660,804
	$ 2,769,950	$ 2,372,647

See accompanying notes to unaudited condensed consolidated financial statements.

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NETWORK APPLIANCE, INC.

CONDENSED CONSOLIDATED STATEMENTS OF INCOME
(In thousands, except per share amounts — unaudited)

	Three Months Ended		Nine Months Ended	
	January 27, 2006	January 28, 2005	January 27, 2006	January 28, 2005
Revenues:				
Product revenue	$ 474,236	$ 367,903	$1,293,642	$1,029,334
Service revenue	62,795	44,803	174,853	116,969
Total revenues	537,031	412,706	1,468,495	1,146,303
Cost of Revenues:				
Cost of product revenue	163,505	127,118	438,363	353,060
Cost of service revenue	46,502	33,454	130,530	94,990
Total cost of revenues	210,007	160,572	568,893	448,050
Gross margin	327,024	252,134	899,602	698,253
Operating Expenses:				
Sales and marketing	152,008	118,668	427,526	331,087
Research and development	62,622	43,603	169,462	122,957
General and administrative	24,742	20,136	67,349	54,888
In process research and development	—	—	5,000	—
Stock compensation (1)	4,070	2,189	9,442	6,432
Restructuring charges (recoveries)	117	(270)	(495)	(270)
Total operating expenses	243,559	184,326	678,284	515,094
Income from Operations	83,465	67,808	221,318	183,159
Other Income (Expense), net:				
Interest income	9,891	6,031	28,590	16,216
Other income (expenses), net	1,001	(500)	453	(1,322)
Net gain on investments	—	41	101	41
Total other income, net	10,892	5,572	29,144	14,935
Income before Income Taxes	94,357	73,380	250,462	198,094
Provision for Income Taxes	17,964	13,253	43,231	35,776
Net Income	$ 76,393	$ 60,127	$ 207,231	$ 162,318
Net Income per Share:				
Basic	$ 0.21	$ 0.17	$ 0.56	$ 0.45
Diluted	$ 0.20	$ 0.16	$ 0.54	$ 0.43
Shares Used in per Share Calculations:				
Basic	371,768	362,563	370,069	359,031
Diluted	389,149	385,869	386,991	377,972
(1) Stock compensation includes:				
Sales and marketing	$ 1,325	$ 733	$ 2,851	$ 1,813
Research and development	2,465	1,281	5,929	4,020
General and administrative	280	175	662	599
	$ 4,070	$ 2,189	$ 9,442	$ 6,432

See accompanying notes to unaudited condensed consolidated financial statements.

NETWORK APPLIANCE, INC.

CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS
(In thousands — unaudited)

	Nine Months Ended January 27, 2006	Nine Months Ended January 28, 2005
Cash Flows from Operating Activities:		
Net income	$ 207,231	$ 162,318
Adjustments to reconcile net income to net cash provided by operating activities:		
Depreciation	46,175	39,869
In process research and development	5,000	—
Amortization of intangible assets	11,329	6,999
Amortization of patents	1,487	1,352
Stock compensation	9,442	6,432
Net gain on investments	(101)	(70)
Net loss on disposal of equipment	1,318	907
Allowance for doubtful accounts	921	325
Deferred income taxes	14	730
Deferred rent	301	228
Changes in assets and liabilities:		
Accounts receivable	(70,153)	(40,065)
Inventories	(38,397)	(12,383)
Prepaid expenses and other assets	(6,590)	3,011
Accounts payable	16,072	15,355
Income taxes payable	39,606	24,577
Accrued compensation and related benefits	12,992	16,508
Other accrued liabilities	970	8,008
Deferred revenue	144,737	110,534
Net cash provided by operating activities	382,354	344,635
Cash Flows from Investing Activities:		
Purchases of investments	(450,555)	(669,562)
Redemptions of investments	471,755	456,387
Increase in restricted cash	(1,997)	—
Purchases of property and equipment	(96,476)	(64,756)
Proceeds from sales of investments	130	347
Purchases of equity securities	(7,100)	(125)
Purchase of business, net of cash acquired	(53,747)	—
Net cash used in investing activities	(137,990)	(277,709)
Cash Flows from Financing Activities:		
Proceeds from sale of common stock related to employee stock transactions	141,725	153,460
Tax withholding payments reimbursed by restricted stock	(794)	(43)
Repurchases of common stock	(390,147)	(132,993)
Net cash provided by (used in) financing activities	(249,216)	20,424
Effect of Exchange Rate Changes on Cash and Cash Equivalents	(565)	1,695
Net Increase (Decrease) in Cash and Cash Equivalents	(5,417)	89,045
Cash and Cash Equivalents:		
Beginning of period	193,542	92,328
End of period	$ 188,125	$ 181,373
Noncash Investing and Financing Activities:		
Conversion of evaluation inventory to fixed assets	$ 14,393	$ 8,468
Deferred stock compensation, net of reversals	$ 2,897	$ 512
Income tax benefit from employee stock transactions	$ 22,334	$ 27,829
Acquisition of property and equipment on account	$ 11,158	$ —
Stock issued for acquisition	$ 191,874	$ —
Options assumed for acquired business	$ 38,456	$ —
Supplemental cash flow information:		
Income taxes paid	$ 5,625	$ 11,975
Income taxes refund	$ 2,345	$ 10,588

See accompanying notes to unaudited condensed consolidated financial statements.

NETWORK APPLIANCE, INC.

NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS
(Dollar and share amounts 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. Its 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.

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 first nine months of fiscal 2006 and 2005 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, 2005. The results of operations for the three and nine-month periods ended January 27, 2006 are not necessarily indicative of the operating results to be expected for the full fiscal year or future operating periods. In the following notes to our interim condensed consolidated financial statements, Network Appliance Inc. is also referred to as "we", "our" and "us".

3. Use of Estimates

The preparation of the interim condensed consolidated financial statements in conformity with generally accepted accounting principles 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 Compensation

We account for stock-based compensation in accordance with the provisions of Accounting Principle Board Opinion ("APB") No. 25, *"Accounting for Stock Issued to Employees,"* (APB No. 25) and comply with the disclosure provisions of Statement of Financial Accounting Standards ("SFAS") No. 123, *"Accounting for Stock-Based Compensation"* (SFAS No. 123). Deferred compensation recognized under APB No. 25 is amortized ratably

NETWORK APPLIANCE, INC.

NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

to expense over the vesting periods. We account for stock options issued to non-employees in accordance with the provisions of SFAS No. 123 under the fair value based method.

We amortize deferred stock-based compensation ratably over the vesting periods of the applicable stock purchase rights, restricted stocks and stock options, generally four years. Deferred stock compensation under APB No. 25 and pro forma net income under the provisions of SFAS No. 123 are adjusted to reflect cancellations and forfeitures due to employee terminations as they occur.

We recorded $4,070 and $9,442 of deferred compensation expense for the three and nine-month periods ended January 27, 2006, respectively, and $1,968 and $5,963 for the three and nine-month periods ended January 28, 2005, respectively, primarily related to the amortization of deferred stock compensation from unvested options assumed in the Decru, Alacritus and Spinnaker acquisitions, the retention escrow shares relative to Spinnaker, the grant of stock options to certain highly compensated employees below fair value at the date of grant (discontinued as of December 31, 2004) and the award of restricted stock to certain employees. The net increase in stock compensation expenses reflected primarily higher stock compensation relating to the Decru acquisition and restricted stock awards.

Based on deferred stock compensation recorded at January 27, 2006, estimated future deferred stock compensation amortization for the remainder of fiscal year 2006, fiscal years 2007, 2008, 2009 and 2010 are expected to be $3,925, $14,669, $8,449 and $1,731 and $268, respectively, and none thereafter.

We recorded charges of $45 and $56, in compensation expense, in the three and nine-month periods ending January 27, 2006, respectively, and $221 and $469 in the three and nine-month periods ending January 28, 2005, respectively, for the fair value of options granted to a member of the Board of Directors in recognition for services performed outside of the normal capacity of a board member.

Had compensation expense been determined based on the fair value at the grant date for awards, consistent with the provisions of SFAS No. 123, the impact on net income and net income per share would be as follows:

	Three Months Ended		Nine Months Ended	
	January 27, 2006	January 28, 2005	January 27, 2006	January 28, 2005
Net income as reported	$ 76,393	$ 60,127	$ 207,231	$ 162,318
Add: stock based employee compensation expense included in reported net income under APB No. 25, net of related tax effects	2,442	1,181	5,665	3,578
Deduct: total stock based compensation determined under fair value based method for all awards, net of related tax effects	(24,860)	(21,172)	(74,224)	(61,641)
Pro forma net income	$ 53,975	$ 40,136	$ 138,672	$ 104,255
Basic net income per share, as reported	$ 0.21	$ 0.17	$ 0.56	$ 0.45
Diluted net income per share, as reported	$ 0.20	$ 0.16	$ 0.54	$ 0.43
Basic net income per share, pro forma	$ 0.15	$ 0.11	$ 0.37	$ 0.29
Diluted net income per share, pro forma	$ 0.14	$ 0.10	$ 0.36	$ 0.28

5. Inventories

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

	January 27, 2006	April 30, 2005
Purchased components	$ 30,029	$15,784
Work in process	—	686
Finished goods	34,043	22,513
	$ 64,072	$38,983

6. 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 2005 and concluded that goodwill was not impaired. In the nine month period ended January 27, 2006, there were no indicators that would suggest the impairment of goodwill and intangible assets.

During May 2005, we acquired Alacritus Inc. ("Alacritus") and recorded goodwill of $5,844 and intangible assets of $5,700 resulting from the allocation of the purchase price. See Note 14, "Business Combinations." In the second quarter of fiscal 2006, the Alacritus goodwill was increased by $479 to reflect an adjustment for the deferred tax impact on deferred stock compensation.

During August 2005, we acquired Decru, Inc. ("Decru") and recorded goodwill of $192,949 and intangible assets of $68,100 resulting from the allocation of the purchase price. See Note 14, "Business Combinations."

Identified intangible asset balances as of January 27, 2006 and April 30, 2005 are summarized as follows:

	Amortization Period (Years)	January 27, 2006			April 30, 2005		
		Gross Assets	Accumulated Amortization	Net Assets	Gross Assets	Accumulated Amortization	Net Assets
Intangible Assets:							
Patents	5	$ 10,040	$ (4,952)	$ 5,088	$ 10,040	$ (3,467)	$ 6,573
Existing technology	4 – 5	91,025	(28,432)	62,593	33,525	(20,512)	13,013
Trademarks/tradenames	3 – 6	5,080	(515)	4,565	280	(111)	169
Customer contracts/relationships	1.5 – 5	10,700	(1,900)	8,800	1,100	(885)	215
Covenants not to compete	1.5 – 2	9,510	(8,123)	1,387	7,610	(6,132)	1,478
Total Intangible Assets, Net		$ 126,355	$ (43,922)	$82,433	$ 52,555	$ (31,107)	$21,448

Amortization expense for identified intangible assets is summarized below:

	Three Months Ended		Nine Months Ended	
	January 27, 2006	January 28, 2005	January 27, 2006	January 28, 2005
Patents	$ 495	$ 451	$ 1,487	$ 1,352
Existing technology	3,866	858	7,920	2,574
Other identified intangibles	940	1,475	3,409	4,425
	$ 5,301	$ 2,784	$ 12,816	$ 8,351

Based on the identified intangible assets recorded at January 27, 2006, the future amortization expense of identified intangibles for the remainder of fiscal 2006, the next four fiscal years and thereafter is as follows:

Year Ending April,	Amount
Remainder of Fiscal 2006	$ 5,301
2007	21,188
2008	20,364
2009	17,946
2010	13,133
Thereafter	4,501
Total	$82,433

7. 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 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. For the three and nine-month periods ended January 28, 2005, net gains generated by hedged assets and liabilities totaled $748 and $5,021, respectively, and were offset by losses on the related derivative instruments of $1,388 and $6,596, respectively.

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.

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 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 27, 2006 and January 28, 2005, we did not record any gains or losses related to forecasted transactions that did not occur or became improbable.

As of January 27, 2006, our notional fair values of foreign exchange forward and foreign currency option contracts totaled $305,585. We do not believe that these derivatives present significant credit risks, because the

NETWORK APPLIANCE, INC.

NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

counterparties to the derivatives consist of major financial institutions, and we manage the notional amount of contracts entered into with several counterparties. 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 forward points and premiums paid.

8. 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 common 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 options were antidilutive in the three and nine-month periods ended January 27, 2006 and January 28, 2005 as their exercise prices were above the average market prices in such periods. For the three-month periods ended January 27, 2006 and January 28, 2005, 18,450 and 13,121 shares of common stock options with a weighted average exercise price of $47.83 and $57.67, respectively, were excluded from the diluted net income per share computation. For the nine-month periods ended January 27, 2006 and January 28, 2005, 18,881 and 14,873 shares of common stock options with a weighted average exercise price of $48.04 and $54.05, respectively, were excluded from the diluted net income per share computation.

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 27, 2006	January 28, 2005	January 28, 2005	January 27, 2006
Net Income (Numerator):				
Net income, basic and diluted	$ 76,393	$ 60,127	$207,231	$162,318
Shares Used in Per Share Calculations (Denominator):				
Weighted average common shares outstanding	372,289	363,071	370,543	359,561
Weighted average common shares outstanding subject to repurchase	(521)	(508)	(474)	(530)
Shares used in basic computation	371,768	362,563	370,069	359,031
Weighted average common shares outstanding subject to repurchase	521	508	474	530
Common shares issuable upon exercise of stock options	16,860	22,798	16,448	18,411
Shares used in diluted computation	389,149	385,869	386,991	377,972
Net Income Per Share:				
Basic	$ 0.21	$ 0.17	$ 0.56	$ 0.45
Diluted	$ 0.20	$ 0.16	$ 0.54	$ 0.43

NETWORK APPLIANCE, INC.

NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

9. Stockholders' Equity

Stock Repurchase Program

As of April 30, 2005, $20,925 was available for the repurchase of common shares under the Stock Repurchase Program. On May 24, 2005, our Board approved an incremental stock repurchase program in which up to $300,000 of additional shares may be repurchased. In November 2005, our Board of Directors approved a new $650,000 stock repurchase program which amount includes the $76,361 remaining from all prior authorizations (i.e., the net additional approval amount, without taking into account remaining amounts approved in prior periods, is $573,639).

Share repurchase activities for the three and nine-months ended January 27, 2006 and January 28, 2005, were as follows:

	Three Months Ended		Nine Months Ended	
	January 27, 2006	January 28, 2005	January 27, 2006	January 28, 2005
Shares repurchased	5,025	1,532	14,612	5,580
Cost of shares repurchased	$ 145,583	$ 49,980	$ 390,147	$ 132,993
Average price per share	$ 28.97	$ 32.62	$ 26.70	$ 23.83

At January 27, 2006, $504,417 remained available for repurchases under the plan.

Since the inception of the stock repurchase program through January 27, 2006, we have purchased a total of 29,178 shares of our common stock at an average price of $24.65 per share for an aggregate purchase price of $719,222.

Comprehensive Income

The components of comprehensive income, were as follows:

	Three Months Ended		Nine Months Ended	
	January 27, 2006	January 28, 2005	January 27, 2006	January 28, 2005
Net income	$ 76,393	$ 60,127	$ 207,231	$ 162,318
Currency translation adjustment	(12)	448	(1,996)	30
Change in unrealized gain (loss) on investments	1,327	143	(4,492)	(1,562)
Change in unrealized gain (loss) on derivatives	352	(2,691)	559	(2,789)
Comprehensive income	$ 78,060	$ 58,027	$ 201,302	$ 157,997

The components of accumulated other comprehensive loss were as follows:

	January 27, 2006	April 30, 2005
Accumulated translation adjustments	$ (714)	$ 1,283
Accumulated unrealized loss on available-for-sale investments	(9,935)	(5,444)
Accumulated unrealized gain on derivatives	670	111
Total accumulated other comprehensive loss	$ (9,979)	$(4,050)

NETWORK APPLIANCE, INC.

NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

10. Restructuring Charges

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 workforce and consolidations of facilities. As of January 27, 2006, 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 the second quarter of 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.

During the first quarter of fiscal 2006, we recorded a reduction in restructuring reserve of $1,256 resulting from the execution of new sublease agreement for our Tewksbury facility. 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 second and third quarter of fiscal 2006, we recorded a restructuring charge of $645 and $117, primarily attributed to severance-related amounts and relocation expenses related to the move of our global services center operations.

The following analysis sets forth the changes in the restructuring reserve for the three months ended January 27, 2006:

	Facility Accrual	Severance-Related	Total
Reserve balance at April 30, 2004	$ 5,208	$ —	$ 5,208
Cash payments	(705)	—	(705)
Reserve balance at April 30, 2005	4,503	—	4,503
Cash payments	(90)	—	(90)
Adjustments	(1,256)	—	(1,256)
Reserve balance at July 29, 2005	3,157	—	3,157
Restructuring charges	281	364	645
Cash payments	(451)	(341)	(792)
Reserve balance at October 28, 2005	2,987	23	3,010
Restructuring charges	—	117	117
Cash payments	(175)	(17)	(192)
Reserve balance at January 27, 2006	$ 2,812	$ 123	$ 2,935

Of the restructuring reserve balance at January 27, 2006, $681 was included in other accrued liabilities and the remaining $2,254 was classified as long-term obligations, relating to the facility charges for the second restructuring and the global services center restructuring charges.

11. Short-Term Investments

All our investments are classified as available for sale at January 27, 2006 and April 30, 2005. Available-for-sale investments with original maturities of greater than three months are classified as short-term investments, as these investments generally consist of highly marketable securities that are intended to be available to meet current cash requirements. Investment securities classified as available-for-sale are reported at fair market value, and net unrealized gains or losses are recorded in accumulated other comprehensive loss, a separate component of stockholders' equity. Realized gains or losses on sales of investments are computed based upon specific identification and are included in interest income and other, net. For all periods presented, realized gains and losses on available-for-sale investments were not material. Management evaluates investments on a regular basis to determine if an other-than-temporary impairment has occurred and there were none as of January 27, 2006. The unrealized losses on these investments at January 27, 2006 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 27, 2006.

12. New Accounting Pronouncements

In June 2004, the FASB ratified Emerging Issues Task Force Issue ("EITF") No. 03-1, *"The Meaning of Other-Than-Temporary Impairment and Its Application to Certain Investments."* EITF 03-1 includes new guidance for evaluating and recording impairment losses on debt and equity investments, as well as new disclosure requirements for investments that are deemed to be temporarily impaired. In September 2004, the Financial Accounting Standards Board ("FASB") approved the issuance of a FASB Staff Position to delay the recognition and measurement provisions of EITF 03-1. In June 2005, the FASB decided not to provide additional guidance on the meaning of other-than-temporary impairment under EITF 03-1. The FASB directed the staff to issue FASB Staff Position Paper ("FSP") 115-1, *The Meaning of Other-Than-Temporary Impairment and its Application to Certain Investments* (" FSP 115-1"), superseding EITF 03-1. FSP 115-1 will replace the accounting guidance on the determination of whether an investment is other-than-temporarily impaired as set forth in EITF 03-1 with references to existing other-than-temporary impairment guidance. In November 2005, the FASB issued FASB Staff Position FSP 115-1 which addresses the determination as to when an investment is considered impaired, whether that impairment is other-than-temporary, and the measurement of an impairment loss. This FSP also includes accounting considerations subsequent to the recognition of an other-than-temporary impairment and requires certain disclosures about unrealized losses that have not been recognized as other-than-temporary impairments. The guidance in this FSP amends FASB Statement No. 115, "Accounting for Certain Investments in Debt and Equity Securities" and APB Opinion No. 18, "The Equity Method of Accounting for Investments in Common Stock." The guidance in FSP 115-1 shall be applied to reporting periods beginning after December 15, 2005. We are required to adopt FSP 115-1 beginning January 28, 2006. We are currently evaluating the effect that the adoption of FSP 115-1 will have on our consolidated results of operations and financial condition but do not expect it to have a material impact.

In October 2005, the FASB issued FASB Staff Position ("FSP") FSP Nos. FAS 13-1, *Accounting for Rental Costs Incurred during a Construction Period*, ("FSP 13-1") addresses the accounting for rental costs associated with operating leases that are incurred during a construction period. The adoption of the provisions of FSP 13-1 is not expected to have a material impact on our financial position or results of operations.

In June 2005, the FASB issued SFAS No. 154 *Accounting Changes and Error Corrections: a Replacement of Accounting Principles Board Opinion No. 20 ("APB 20") and FASB Statement No 3* ("SFAS No. 154"). SFAS No. 154 requires retrospective application for voluntary changes in accounting principle unless it is impracticable to do so. Retrospective application refers to the application of a different accounting principle to previously issued financial statements as if that principle had always been used. SFAS No. 154's retrospective-application requirement replaces APB 20's requirement to recognize most voluntary changes in accounting principle by including in net income of the period of the change the cumulative effect of changing to the new accounting principle. This Statement defines retrospective application as the application of a different accounting principle to prior accounting periods as if that principle had always been used or as the adjustment of previously issued financial statements to reflect a change in the reporting entity. This Statement also redefines restatement as the revising of previously issued financial statements to reflect the correction of an error. The requirements are effective for accounting changes made in fiscal years beginning after December 15, 2005 and will only impact the consolidated financial statements in periods in which a change in accounting principle is made.

NETWORK APPLIANCE, INC.

NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

In March 2005, the FASB issued Interpretation No. 47, *"Accounting for Conditional Asset Retirement Obligation."* (Interpretation No. 47). Interpretation No. 47 clarifies that an entity must record a liability for a "conditional" asset retirement obligation if the fair value of the obligation can be reasonably estimated. Interpretation No. 47 also clarifies when an entity would have sufficient information to reasonably estimate the fair value of an asset retirement obligation. Interpretation No. 47 is effective no later than the end of the fiscal year ending after December 15, 2005. We are currently evaluating the provision and do not expect that our adoption in the fourth quarter of fiscal 2006 will have a material impact on our results of operations or financial condition.

In March 2005, the Securities and Exchange Commission ("SEC") issued Staff Accounting Bulletin ("SAB") No. 107, which provides guidance on the implementation of Statement of Financial Accounting Standards ("SFAS") No. 123R, *"Share-Based Payments"* (SFAS No. 123R) (see discussion below). In particular, SAB No. 107 provides key guidance related to valuation methods (including assumptions such as expected volatility and expected term), the accounting for income tax effects of share-based payment arrangements upon adoption of SFAS No. 123R, the modification of employee share options prior to the adoption of SFAS No. 123R, the classification of compensation expense, capitalization of compensation cost related to share-based payment arrangements, first-time adoption of SFAS No. 123R in an interim period, and disclosures in Management's Discussion and Analysis subsequent to the adoption of SFAS No. 123R. SAB No. 107 became effective on March 29, 2005. It did not have a material impact on our consolidated financial statements.

In December 2004, the FASB issued SFAS No. 123R. Generally, the requirements of SFAS No. 123R are similar to those of SFAS No. 123. However, SFAS No. 123R requires companies to now recognize all share-based payments to employees, including grants of employee stock options, in their statements of operations based on the fair value of the payments. Pro forma disclosure will no longer be an alternative. The effective date of the new standard for our consolidated financial statements is the first quarter of fiscal 2007, which begins on May 1, 2006.

SFAS No. 123R permits public companies to adopt its requirements using one of two methods: (1) a "modified prospective" method under which compensation cost is recognized beginning with the effective date based on the requirements of SFAS No. 123R for all share-based payments granted after the effective date and based on the requirements of SFAS No. 123 for all awards granted to employees prior to the effective date of SFAS No. 123R that are unvested on the effective date; or (2) a "modified retrospective" method which includes the requirements of the modified prospective method and also permits companies to restate either all prior periods presented or prior interim periods of the year of adoption using the amounts previously calculated for pro forma disclosure under SFAS No. 123. We have not yet determined which method we will select for our adoption of SFAS No. 123R.

As permitted by SFAS No. 123, we currently account for share-based payments to employees using APB No. 25's intrinsic value method and, as such, generally recognizes no compensation cost for employee stock options through our consolidated statements of operations but rather, discloses the effect in its consolidated financial statement footnotes. Accordingly, the adoption of SFAS No. 123R's fair value method will have a significant impact on our reported results of operations. However, the impact of the adoption of SFAS No. 123R cannot be quantified at this time because it will depend on levels of share-based payments granted in the future as well as other variables that effect the fair market value estimates, which cannot be forecasted at this time.

In January 2005, the FASB issued FASB Staff Position ("FSP") No. FAS 109-1, *"Application of SFAS No. 109 to the Tax Deduction on Qualified Production Activities Provided by the American Jobs Creation Act of 2004."* (FSP No. 109-1) This FSP provides guidance for the accounting of a deduction provided to U.S. manufacturing companies and is effective immediately. We believe the adoption of this position currently will not have a material effect on our financial position or results of operations. However, there is no assurance that there will not be a material impact in the future.

In December 2004, the FASB issued FSP No. FAS 109-2, *"Accounting and Disclosure Guidance for the Foreign Earnings Repatriation Provision within the American Jobs Creation Act of 2004"* (FSP No. 109-2). The American Jobs Creation Act introduces a special one-time dividends received deduction on the repatriation of certain foreign earnings to U.S. companies, provided certain criteria are met. FSP No. 109-2 provides accounting and disclosure guidance on the impact of the repatriation provision on a company's income tax expense and deferred tax liability. We are currently studying the impact of the one-time favorable foreign dividend provision and intend to complete the analysis by the end of our fourth quarter of fiscal 2006. Accordingly, we have not adjusted income tax expense or deferred tax liability to reflect the tax impact of any repatriation of non-U.S. earnings.

In November 2004, the FASB issued SFAS No. 151 "*Inventory Costs"* (SFAS No. 151). This statement amends the guidance in ARB No. 43, Chapter 4, "Inventory Pricing," to clarify the accounting for abnormal amounts of idle facility expense, freight, handling costs, and wasted material (spoilage). SFAS No. 151 requires that those items be recognized as current-period charges. In addition, this Statement requires that allocation of fixed production overhead to costs of conversion be based upon the normal capacity of the production facilities. The provisions of SFAS No. 151 are effective for inventory cost incurred in fiscal years beginning after June 15, 2005. As such, we are required to adopt these provisions at the beginning of fiscal 2007, which begins on May 1, 2006. We do not expect the adoption of SFAS No. 151 to have a material impact on our consolidated financial statements.

13. Commitments and Contingencies

The following summarizes our commitments and contingencies at January 27, 2006, and the effect such obligations may have on our future periods:

Contractual Obligations:	2006	2007	2008	2009	2010	Thereafter	Total
Rent operating lease payments(1)	$ 3,981	$13,979	$13,627	$13,358	$10,133	$ 28,779	$ 83,857
Equipment operating lease payments(1)	1,516	5,849	5,167	2,873	16	—	15,421
Lease payments(2)	—	—	1,651	1,981	1,981	37,017	42,630
Venture capital funding commitments(3)	100	402	389	377	364	381	2,013
Purchase commitments and other(4)	1,348	600	—	—	—	—	1,948
Capital Expenditures(5)	10,858	7,711	—	—	—	—	18,569
Communications & Maintenance(6)	3,169	7,439	5,267	1,521	169	—	17,565
Total Contractual Cash Obligations	$20,972	$35,980	$26,101	$20,110	$12,663	$ 66,177	$182,003

Other Commercial Commitments:	2006	2007	2008	2009	2010	Thereafter	Total
Letters of Credit(7)	$ 450	$ —	$ —	$ —	$ —	$ 337	$ 787
Restricted Cash(8)	1,828	302	748	676	53	2,224	5,831
Total Commercial Commitments	$2,278	$302	$748	$676	$ 53	$ 2,561	$6,618

(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 2015. 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. Sublease income of $58 has been included as a reduction of the payment amounts shown in the table. Rent operating lease payments in the table exclude lease

payments which are accrued as part of our 2002 restructurings and include only rent lease commitments that are over one year.

(2) On December 16, 2005, we ("the Lessee") entered into financing, construction and leasing arrangements with BNP Paribas LLC ("BNP") ("the Lessor"), for office space to be located on land currently owned by us in Sunnyvale, California. This arrangement requires us to ground lease our land to BNP for a period of 50 years to construct approximately 190,000 square feet of office space with $38,500 construction allowance provided by BNP, and, after completion of construction to pay minimum lease payments which vary based on London Interbank Offered Rate ("LIBOR") plus a spread (5.15% at January 27, 2006). We expect to pay lease payments on the completed buildings from BNP on June 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 the 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 2 year period.

Included in the above contractual cash obligations are (a) lease commitments of $1,651 in fiscal 2008, $1,981 in each of the fiscal years 2009, 2010, 2011, 2012 and $330 in fiscal 2013, which are based on the LIBOR rate at January 27, 2006, for a term of 5 years, and (b) at the expiration or termination of the lease, a supplemental payment obligation equal to $32,725 in the event that we elect not to purchase or arrange for a sale of the building.

The lease also requires us to maintain specified financial covenants with which we were in compliance as of January 27, 2006. 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.

(3) Venture capital funding commitments include a quarterly committed management fee based on a percentage of our committed funding to be payable through June 2011.

(4) Amounts included in purchase commitments and other are (a) agreements to purchase component inventory from our suppliers and/or contract manufacturers that are non-cancelable and legally binding against us and (b) commitment related to utilities contracts. Purchase commitments and other exclude (a) purchases of goods and services we expect to consume in the ordinary course of business in the next 12 months; (b) open purchase orders that represent an authorization to purchase rather than a binding agreement; (c) agreements that are cancelable without penalty and costs that are not reasonably estimable at this time.

(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 and a corporate credit card program.

(8) Restricted cash arrangements relate to facility lease requirements, service performance guarantees, customs and duties guarantees, and VAT requirements are included under Prepaid Expenses and Other and Other Assets on our Consolidated Balance Sheets.

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.

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.

14. Business Combinations

Acquisition of Decru

On August 26, 2005, we completed our acquisition of Decru, Inc. ("Decru"), a Delaware corporation that develops and sells encryption software and appliances which encrypt network data. The acquisition resulted in the issuance of approximately 8,270 shares of our common stock with a fair value of approximately $191,874, approximately 1,907 stock options and restricted stock with a fair value of approximately $36,142 and the payment of approximately $54,482 in cash (of which approximately $34,049 has been placed in escrow to secure the Decru stockholders' indemnification obligations to us pursuant to the Merger Agreement), and $711 acquisition-related transaction costs, for a total purchase price of approximately $283,209. The common stock issued in the acquisition was valued at $23.20 per share using a measurement date of August 11, 2005 in accordance with EITF 99-12, *Determination of the Measurement Date for the Market Price of Acquirer Securities Issued in a Purchase Business Combination.* The options were valued using the Black-Scholes option pricing model with the following inputs: volatility factor of 69%, expected life of 3.8 years, risk-free interest rate of 2.9%, and a market value for Network Appliance's stock of $23.20 per share, which was determined as described above. A summary of the total purchase price is as follows:

	Decru
Common stock issued	$191,874
Cash consideration	54,482
Stock options assumed	36,142
Acquisition-related transaction costs	711
	$283,209

In accordance with SFAS 141, we have preliminarily allocated the purchase price to the estimated tangible and intangible assets acquired and liabilities assumed, including in-process research and development, based on their estimated fair values. The excess purchase price over those fair values is recorded as goodwill. Decru's technology will augment our data protection and security solutions and provide for a wide variety of deployments with vendors' storage systems in NAS, DAS, SAN, iSCSI, and even tape backup environments, which will allow us to pursue expanded market opportunities. These opportunities, along with the ability to leverage the Decru 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 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:	Decru	Amortization Period (Years)
Fair value of tangible assets acquired	$ 16,516	
Intangible assets:		
Existing Technology — Hardware	30,100	5
Existing Technology — Software	10,600	4
Patents and Core Technology	11,800	5
Reseller Agreement and Related Relationship	2,400	5
Customer/Distributor Relationships	7,200	5
Non compete agreements	1,200	2
Trademarks and tradenames	4,800	6
Goodwill	192,949	
In process research and development	5,000	Expensed
Fair value of liabilities assumed	(3,087)	
Deferred stock compensation	18,549	
Deferred income taxes	(14,818)	
	$283,209	

Useful lives are primarily based on the underlying assumptions used in the discounted cash flow models. The allocation is preliminary and subject to change if we obtain additional information concerning the fair values of certain acquired assets and liabilities of Decru.

Net Tangible Assets

Decru's assets and liabilities as of August 26, 2005 were reviewed and adjusted, if required, to their estimated fair value. Included in net tangible assets acquired above is $13,277 of cash assumed in connection with the Decru acquisition.

Amortizable Intangible Assets

Our valuation specialists valued the identified intangible assets utilizing a discounted cash flow ("DCF") model, which uses forecasts of future revenues and expenses related to the intangible assets. We are amortizing these intangible assets over 2-6 years on a straight-line basis.

In-process Research and Development ("IPR&D")

Of the total purchase price, $5,000 has been allocated to in-process research and development ("IPR&D") and was expensed in the quarter ended October 28, 2005. Projects that qualify as IPR&D represent those that have not yet reached technological feasibility and which have no alternative future use. Technological feasibility is established when an enterprise has completed all planning, designing, coding, and testing activities that are necessary to establish that a product can be produced to meet its design specifications including functions, features, and technical performance requirement. The value of IPR&D was determined by estimating the stage of completion and risk associated with IPR&D to determine the level of discount rate to be applied, estimating costs to develop the purchased IPR&D into commercially viable products, estimating the resulting net cash flows from the projects when completed and discounting the net cash flows to their present value based on the percentage of completion of the IPR&D projects.

Acquisition of Alacritus

On May 2, 2005, we acquired Alacritus, Inc., a privately held company based in Pleasanton, California, that develops and sells disk-based virtual tape library software for data protection solutions. Under terms of the agreement, we paid Alacritus $11,000 in cash and assumed options to acquire 79 shares of common stock at an average price of $26.37 per share and 43 shares of restricted stock units at $0 per share. We also incurred certain transaction costs and assumed certain operating assets and liabilities. The historical operations of Alacritus were not significant.

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

	Alacritus
Cash consideration	$11,000
Common stock issued	—
Stock options assumed	2,314
Acquisition-related transaction costs	337
	$13,651

Purchase Price Allocation:	Alacritus	Amortization Period (Years)
Fair value of tangible assets acquired	$ 67	
Intangible assets:		
Existing/Core Technology	5,000	5
Non compete agreements	700	2
Goodwill	5,844	
Fair value of liabilities assumed	(810)	
Deferred stock compensation	1,199	
Deferred income taxes	1,651	
	$13,651	

In accordance with FASB Interpretation No. 44, "Accounting for Certain Transactions involving Stock Compensation", we recorded the intrinsic value, measured as the difference between the grant price and fair market value on the acquisition consummation date, of unvested options and restricted stock units assumed in the Alacritus and Decru acquisitions as deferred stock compensation. Such deferred stock compensation which aggregated $1,199 for Alacritus and $18,549 for Decru, are recorded as a separate component of stockholders' equity in the accompanying condensed consolidated balance sheet and will be amortized over the vesting term of the related options. In connection with the Decru merger, we assumed all options to purchase Decru common stock granted under the Decru, Inc. 2001 Equity Incentive Plan that were outstanding at the closing of the Merger, which options shall be exercisable for an aggregate of 1,907 shares of our Common Stock at an average price of $11.86 per share.

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 are 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 expectation that units shipped of the FAS 960, FAS 940 and FAS 920 will continue to decline and gradually be replaced by FAS 3000 units; (2) our expectation that the decline in our high-end products will be mitigated by the introduction of our next-generation high-end products; (3) our belief that our new NearStore® Virtual Tape Library solution will further expand our market opportunity; (4) our expectation that the introduction of our new high-end products, targeted for shipping before the end of our fiscal 2006, will increase both performance and capacity and restore the balance between the sales of our mid-range and high-end products; (5) our plan to invest in the people, processes and systems necessary to best optimize our revenue growth and long-term profitability; (6) our expectation that higher disk content associated with high-end storage systems may negatively affect our gross margin; (7) our estimates regarding future amortization of exiting technology to cost of products revenues relating to our acquisitions; (8) our expectation that service margins will be in the mid 20% range for fiscal 2006; (9) our estimates regarding future amortization of trademarks, tradenames, customer contracts and relationships relating to our acquisitions and included in sales and marketing expenses; (10) our expectation that we will continue to add sales and professional services capacity; (11) our expectation that we will increase sales and marketing expenses commensurate with future revenue growth; (12) our estimates regarding future capitalized patents amortization expenses; (13) our belief that our future performance will depend in on our ability to maintain and enhance our current product line, develop new products, maintain technological competitiveness, and meet an expanding range of customer requirements; (14) our intention to continuously broaden our existing product offerings and introduce new products; (15) our expectation that we will continuously support current and future product development and enhancement efforts and incur corresponding charges; (16) our belief that our research and development expenses will increase in absolute dollars for the remainder of fiscal 2006; (17) our belief that our general and administrative expenses will increase in absolute terms in the remainder of fiscal 2006; (18) our estimates regarding future amortization of covenants not to compete relating to our acquisitions; (19) our expectation that the research and development costs to bring Decru products to technological feasibility will not have a material impact on our future results of operations of our financial condition; (20) our expectation regarding estimated future deferred stock compensation amortization expenses and future amortization of intangible assets; (21) our expectation that interest income will increase in fiscal 2006; (22) our belief that period-to-period changes in foreign exchange gain or losses will continue to be impacted by hedging costs associated with our forward and option activities; (23) our expectation that cash provided by operating activities may fluctuate in future periods as a result of a number of factors; (24) our expectation that we may repatriate foreign earnings and pay taxes under the Jobs Act and our expectation of the amount to be repatriated and the consequent tax liability; (25) our expectations regarding our contractual cash obligations and other commercial commitments at January 27, 2006 for the remainder of fiscal 2006 and fiscal years 2007 through 2010 and thereafter; (26) our expectation that we will complete construction on our Sunnyvale facility by approximately June 2007 and that our estimates regarding future minimum lease payments for the lease term; (27) our expectation that capital expenditures will increase consistent with our business growth; (28) 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, including operating leases, and any required capital expenditures over the next few years will be funded through cash from operations and existing cash and investments; (29) our belief that foreign currency hedging contracts will not subject us to significant credit risk; (30) our belief that our existing liquidity and capital resources are sufficient to fund our operations for at least the next twelve months; (31) our belief that the accounting policies included herein are the policies that most frequently require us to make estimates and judgments, and are therefore “critical”; (32) our belief that the principal competitive factors affecting our markets include certain product benefits and global service and support; (33) our intent to regularly introduce new products and product enhancements; (34) the possibility that we may need to increase our materials purchases, contract manufacturing capacity and internal test and quality functions to meet anticipated demand; (35) our intention to continue to establish and maintain business relationships with technology companies; (36) the possibility that we may continue to engage in future acquisitions; (37) our expectation that we will increasingly rely on our indirect sales channel for a significant portion of our revenue; (38) our expectation that the ultimate costs to resolve any outstanding legal claims or proceedings will not be material to our business; (39) our expectation that companies in the appliance market will increasingly be subject to infringement claims as the industry grows; (40) our expectation that the value of our investments will not decline significantly because of changes in market interest rates, (41) our expectation that our investments in emerging technologies will contribute to our long term growth; and (42) our expectation that we will acquire products and businesses complementary to our business, 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. Actual results could vary from our forward looking statements and as a result of important factors, including those described in the Risk Factors included on page 35.

Third Quarter Fiscal 2006 Overview

We achieved growth in revenue and profitability during the three-month period ended January 27, 2006, driven primarily by our FAS 3000 midrange product line. Product revenues growth was across all geographies. The increase in product revenues year over year was specifically attributable to increased software licenses and software subscriptions, an increase in units shipped of the new FAS 3000 series, and sales of add-on storage shelves, partially offset by declines in units shipped of our FAS 960, FAS 940, FAS 920 and R200 products.

We expect unit shipments of the FAS 960, FAS 940, and FAS 920 to continue to decline in the remainder of fiscal 2006 and be gradually replaced by the FAS 3000 series products. However, this shift to the FAS 3000 may negatively impact our revenue in the near term as the dollar value of our FAS 3000 sales may be lower compared to sales of our FAS 960 and R200 products. In the longer term, we expect this decline in the high-end products to be mitigated by the introduction of our next-generation high-end products, which is targeted for shipping in the fourth quarter of fiscal 2006. We also expect this introduction will increase both performance and capacity compared to the FAS 980, and will restore the balance between the sales of our high-end and mid-range products. Additionally, we believe that our new NearStore Virtual Tape Library solution will further expand our market opportunity as we can now provide Disk-to-Disk backup solutions for all open systems enterprise primary storage.

We continue to make progress in penetrating and expanding our business in enterprise data centers with mission critical partners, expanding our product line innovations to broaden our addressable market, such as flexible volumes, data encryption and virtual tape library. In the remainder of fiscal 2006 we expect to introduce our new high-end products and deliver our next-generation operating system with enhanced storage grid architecture.

Continued revenue growth is dependent on the introduction and market acceptance of our new products. If we fail to timely introduce new products or 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 a decline in revenue. We plan to continue 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 2006 Financial Performance

- Our revenues for the three-month period ended January 27, 2006, were $537.0 million, a 30.1% increase over the three-month period ended January 28, 2005. Our revenues for the nine-month period ended January 27, 2006, were $1,468.5 million, a 28.1% increase over the nine-month period ended January 28, 2005. This year-over-year increase in revenue primarily from our new mid-range FAS 3020 and FAS 3050 was partially offset by a decline in revenue of our FAS 960, FAS 940, FAS 920 and NearStore R200 products compared to the same periods a year ago.
- Our overall gross margins were 60.9% and 61.3% respectively, in the three and nine-month periods ended January 27, 2006 compared to 61.1% and 60.9%, respectively, in the same periods ended January 28, 2005.

NETWORK APPLIANCE, INC.

NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

Overall gross margin for the three and nine-month periods ended January 27, 2006 reflected higher amortization of existing technology from our acquisitions which was partially offset by a favorable change in product and add-on software mix.

- Net income for the three-month period ended January 27, 2006 increased 27.1% to $76.4 million compared to net income of $60.1 million for the same period a year ago. Net income for the nine-month period ended January 27, 2006 increased 27.7% to $207.2 million compared to net income of $162.3 million for the same period a year ago.
- With the exception of long-term restructuring and deferred rent liabilities totaling $3.4 million, our balance sheet as of January 27, 2006 remains debt-free. Cash, cash equivalents and investments declined to $1,140.9 million, compared to $1,170.0 million as of April 30, 2005, due primarily to cash repurchases of our common stock of $390.1 million and net cash paid of $41.2 million in connection with the Decru acquisition partially offset by cash generated from operations. Days Sales Outstanding increased to 62 days as of January 27, 2006 compared to 60 days as of April 30, 2005. Inventory turns were 12.9 times and 17.9 times as of January 27, 2006 and April 30, 2005, respectively. Deferred revenue increased to $593.5 million as of January 27, 2006 from $449.2 million reported as of April 30, 2005 due to higher software subscription and service billings attributable to our continuing shift toward larger enterprise customers. Capital purchases of plant, property and equipment for the nine-month period ended January 27, 2006 were $96.5 million.

Results of Operations

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

	Three Months Ended		Nine Months Ended	
	January 27, 2006	January 28, 2005	January 27, 2006	January 28, 2005
Revenues:	100.0%	100.0%	100.0%	100.0%
Product revenue	88.3	89.1	88.1	89.8
Service revenue	11.7	10.9	11.9	10.2
Cost of Revenues:				
Cost of product revenue	30.4	30.8	29.8	30.8
Cost of service revenue	8.7	8.1	8.9	8.3
Gross margin	60.9	61.1	61.3	60.9
Operating Expenses:				
Sales and marketing	28.3	28.8	29.2	28.8
Research and development	11.7	10.6	11.5	10.7
General and administrative	4.6	4.9	4.6	4.8
In process research and development	—	—	0.3	—
Stock compensation	0.8	0.5	0.6	0.6
Restructuring recoveries	—	(0.1)	—	—
Total operating expenses	45.4	44.7	46.2	44.9
Income from Operations	15.5	16.4	15.1	16.0

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NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

	Three Months Ended		Nine Months Ended	
	January 27, 2006	January 28, 2005	January 27, 2006	January 28, 2005
Other Income (Expense), net:				
Interest income	1.8	1.5	1.9	1.4
Other income (expenses), net	0.2	(0.1)	—	(0.1)
Net gain on investments	—	—	—	—
Total other income, net	2.0	1.4	1.9	1.3
Income before Income Taxes	17.5	17.8	17.0	17.3
Provision for Income Taxes	3.3	3.2	2.9	3.1
Net Income	14.2%	14.6%	14.1%	14.2%

Discussion and Analysis of Results of Operations

Product Revenues — Product revenues increased by 28.9% to $474.2 million for the three-month period ended January 27, 2006, from $367.9 million for the same period in fiscal 2005. Product revenues increased by 25.7% to $1,293.6 million for the nine-month period ended January 27, 2006, from $1,029.3 million for the same period in fiscal 2005.

Product revenues were favorably impacted by the following factors:

- increased revenues from our new and current product portfolio, and in particular, FAS 3020, FAS 3050, and FAS 270 filer products and add-on software;
- increased sales of software subscriptions, which represented 11.3% and 11.7% of total revenues for the three and nine-month periods ended January 27, 2006, respectively, and 10.6% and 10.5% of total revenues for the three and nine-month periods ended January 28, 2005, respectively;
- increased sales through indirect channels, which includes sales through our resellers, distributors and OEM partners, representing 56.9% and 56.0% of total revenues for the three and nine-month periods ended January 27, 2006, respectively, and 50.4% of total revenues for both the three and nine-month periods ended January 28, 2005; and
- increased sales of add-on storage shelves due to data volume growth and year end buying surge.

Product revenues were negatively impacted by the following factors:

- a mix shift to our new midrange FAS 3000 series, causing a decline in unit shipments and revenues from our FAS 960, FAS 940 and NearStore R200 products;
- lower average selling prices associated with the new FAS 3000 series using a mix of ATA and fibre channel drives;
- lower-cost-per-megabyte disks; and
- declining average selling prices and unit sales of our older products.

The overall increase in product revenues for the nine-month period ended January 27, 2006 as compared to the same period ended January 28, 2005 was generally attributed to the same offsetting factors as cited above for the three-month periods ended January 27, 2006 and January 28, 2005. In addition, for the nine-month period ended January 27, 2006, product revenues were also positively impacted by increased revenues from our high-end FAS 980 product.

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The Decru acquisition and the IBM OEM relationship did not have a significant impact on the revenue for the three and nine-month periods ended January 27, 2006. There can be no assurance that IBM and Decru will 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.

Service Revenues — Service revenues, which include hardware support, professional services, and educational services, increased by 40.2% to $62.8 million in the three-month period ended January 27, 2006, from $44.8 million in the same period in fiscal 2005. Service revenues increased by 49.5% to $174.9 million in the nine-month period ended January 27, 2006, from $117.0 million in the same period in fiscal 2005.

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

• an increasing number of enterprise customers which typically purchase more complete and generally longer-term service packages than our non-enterprise customers;

• a growing installed base resulting in new customer support contracts in addition to support contract renewals by existing customers; and

• growth in professional services revenue.

While it is an element of our strategy to expand and offer a more comprehensive, global enterprise support and service solution, we cannot assure you that service revenue will grow at the current rate in the remainder of fiscal 2006.

Service revenues are generally deferred and, in most cases, recognized ratably over the service obligation periods, which are typically one to three years. Service revenues represented 11.7% and 11.9% of total revenues for the three and nine-month periods ended January 27, 2006, respectively, and 10.9% and 10.2% of total revenues for the three and nine-month periods ended January 28, 2005, respectively.

International total revenues — International total revenues (including United States exports) increased by 27.8% and 25.0% for the three and nine-month periods ended January 27, 2006, respectively, as compared to the same periods in fiscal 2005. International total revenues were $239.1 million and $615.1 million, respectively, or 44.5% and 41.9% of total revenues, respectively, for the three and nine-month periods ended January 27, 2006. International total revenues were $187.1 million and $492.0 million, respectively, or 45.3% and 42.9% of total revenues, respectively, for the three and nine-month periods ended January 28, 2005. The increase in international sales in absolute dollars was primarily a result of European and Asia Pacific net revenue growth, driven by increased demand for our solutions, new customers and higher storage spending in certain geographic regions 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 2006.

Product Gross Margin — Product gross margins were 65.5% and 65.4% for the three-month periods ended January 27, 2006, and January 28, 2005, respectively. Product gross margin increased to 66.1% for the nine-month period ended January 27, 2006, from 65.7% for the nine-month period ended January 28, 2005.

Product gross margin was favorably impacted by:

• favorable product and add-on software mix;

• 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 but buy more of the high-value, high-margin systems and associated software to manage their data;

• growth in software subscription upgrades and software licenses due primarily to a larger installed base and an increasing number of new enterprise customers.

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Product gross margin was negatively impacted by:

- sales price reductions due to competitive pricing pressure and selective pricing discounts;
- increased sales through indirect channels, which may have a lower gross margin than our direct sales in certain geographic regions;
- increase in the amount of relatively lower margin add-on storage shelves sold; and
- lower average selling price of certain add-on software options.

Higher disk content associated with high-end storage systems may negatively affect our gross margin in the future if not offset by increases in software revenue or new higher-margin products.

Amortization of existing technology included in cost of product revenues was $3.9 million and $7.9 million for the three and nine-month periods ended January 27, 2006, respectively, and $0.9 million and $2.6 million for the three and nine-month periods ended January 28, 2005, respectively. Based on existing technology recorded at January 27, 2006, estimated future amortization of existing technology to cost of product revenues relating to our acquisitions will be $3.9 million for the remainder of fiscal 2006, $15.5 million for fiscal years 2007 and 2008, $14.7 million for fiscal year 2009; $10.3 million for fiscal year 2010; and $2.8 million thereafter.

Service Gross Margin — Service gross margin increased to 25.9% in the three-month period ended January 27, 2006, as compared to 25.3% in the three-month period ended January 28, 2005. Service gross margin increased to 25.3% in the nine-month period ended January 27, 2006 as compared to 18.8% in the nine-month period ended January 28, 2005. Cost of service revenue increased by 39.0% to $46.5 million in the three-month period ended January 27, 2006, from $33.5 million in the same period in fiscal 2005. Cost of service revenue increased by 37.4% to $130.5 million in the nine-month period ended January 27, 2006, from $95.0 million in the same period in fiscal 2005.

The improvement in service gross margin for the three and nine-month periods ended January 27, 2006 compared to the same periods in fiscal 2005 was primarily due to an increase in services revenue and improved headcount utilization. The increase in the service gross margin was partially offset by the 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 experience some variability over time due to the timing of technical support service initiations and renewals and additional investments in our customer support infrastructure. In fiscal 2006, we expect service margin to be in the mid 20% range, as we continue to scale our service programs and offerings, particularly professional services.

Sales and Marketing — Sales and marketing expenses consist primarily of salaries, commissions, advertising and promotional expenses, and certain customer service and support costs. Sales and marketing expenses increased 28.1% to $152.0 million for the three-month period ended January 27, 2006, from $118.7 million for the same period in fiscal 2005. These expenses were 28.3% and 28.8% of total revenues for the three-month periods ended January 27, 2006 and January 28, 2005, respectively. Sales and marketing expenses increased 29.1% to $427.5 million for the nine-month period ended January 27, 2006, from $331.1 million for the same period in fiscal 2005. These expenses were 29.2% and 28.8% of total revenues for the nine-month periods ended January 27, 2006 and January 28, 2005, 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, and the continued worldwide investment in our sales and global service organizations associated with selling complete enterprise solutions.

Amortization of trademarks/tradenames and customer contracts/relationships relating to our acquisitions included in sales and marketing expenses was $0.7 million and $0.2 million for the three-month periods ended January 27, 2006 and January 28, 2005, respectively, and was $1.4 million and $0.6 million for the nine-month periods ended January 27, 2006 and January 28, 2005, respectively. Based on the intangibles recorded at January 27, 2006, estimated future amortization of trademarks, tradenames, customer contracts and relationships relating to our acquisitions and included in sales and marketing expenses will be $0.7 million for the remainder of fiscal 2006, $2.8 million for fiscal 2007, $2.7 million for fiscal 2008, 2009 and 2010 and $1.7 million thereafter.

Sales and marketing headcount increased to 2,160 at January 27, 2006 from 1,748 at January 28, 2005. 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, and increase product and company awareness. 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, prototype expenses, non-recurring engineering charges, fees paid to outside consultants and amortization of capitalized patents.

Research and development expenses increased 43.6% to $62.6 million for the three-month period ended January 27, 2006, from $43.6 million for the same period ended January 28, 2005. These expenses represented 11.7% and 10.6% of total revenues for the three-month periods ended January 27, 2006 and January 28, 2005, respectively. Research and development expenses increased 37.8% to $169.5 million for the nine-month period ended January 27, 2006 from $123.0 million for the same period ended January 28, 2005. These expenses represented 11.5% and 10.7% of total revenues for the nine-month periods ended January 27, 2006 and January 28, 2005, 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, and higher performance-based payroll expenses due to higher profitability. Research and development headcount increased to 1,095 as of January 27, 2006 compared to 811 as of January 28, 2005 primarily due to new hires and employees from the Decru acquisition. For both the three and nine-month periods ended January 27, 2006 and January 28, 2005, no software development costs were capitalized.

Included in research and development expenses is capitalized patents amortization of $0.5 million and $1.5 million for the three and nine-month periods ended January 27, 2006, respectively, as compared to $0.5 million and $1.4 million, respectively, for the three and nine-month periods ended January 28, 2005. Based on capitalized patents recorded at January 27, 2006, estimated future capitalized patents amortization expenses for the remainder of fiscal 2006 will be $0.5 million, $2.0 million for fiscal years 2007 and 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 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 introduce new products that expand our solutions portfolio.

We believe that our research and development expenses will increase in absolute dollars for fiscal 2006, 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 as compared to fiscal 2005.

General and Administrative — General and administrative expenses increased 22.9% to $24.7 million for the three-month period ended January 27, 2006, from $20.1 million for the same period in fiscal 2005. These expenses represented 4.6% and 4.9% of total revenues for the three-month periods ended January 27, 2006 and January 28, 2005, respectively. General and administrative expenses increased 22.7% to $67.3 million for the nine-month period ended January 27, 2006, from $54.9 million for the same period in fiscal 2005. These expenses represented 4.6% and 4.8% of total revenues for the nine-month periods ended January 27, 2006 and January 28, 2005, respectively. This increase in absolute dollars was primarily due to higher legal expenses and professional fees for general corporate matters including patents, higher performance-based payroll expenses due to higher profitability and higher headcount growth.

General and administrative headcount increased to 514 at January 27, 2006 from 405 at January 28, 2005. We believe that our general and administrative expenses will increase in absolute dollars for fiscal 2006 due to projected general and administrative headcount growth. Amortization of covenants not to compete included in general and administrative expenses was $0.2 million and $2.0 million for the three and nine-month periods ended January 27, 2006, respectively, as compared to $1.3 million and $3.8 million for the three and nine-month periods ended January 28, 2005, respectively. Based on the intangibles recorded at January 27, 2006, estimated future amortization of covenants not to compete relating to our acquisitions will be $0.2 million in the remainder of fiscal 2006, $1.0 million for fiscal year 2007, $0.2 million for fiscal 2008 and none thereafter.

In-process Research and Development — We recorded in-process research and development charges of $5.0 million in the second quarter of fiscal 2006 related to the acquisition of Decru. The purchase price of the transaction was allocated to the acquired assets and liabilities based on their estimated fair values as of the date of the acquisition. Approximately $5.0 million was allocated to in-process research and development and charged to operations, because the acquired technology had not reached technological feasibility and had no alternative uses. The value was determined by estimating the costs to develop the acquired in-process technology into commercially viable products, estimating the resulting future net cash flows from such projects, and discounting the net cash flows back to their present value. The discount rate included a factor that took into account the uncertainty surrounding the successful development of the acquired in-process technology. These estimates are subject to change, given the uncertainties of the development process, and no assurance can be given that deviations from these estimates will not occur. Research and development costs to bring the products from Decru to technological feasibility are not expected to have a material impact on our future results of operations or financial condition.

Stock Compensation — Stock compensation expenses were $4.1 million and $9.4 million in the three and nine-month periods ended January 27, 2006, respectively, as compared to $2.2 million and $6.4 million in the three and nine-month periods ended January 28, 2005, respectively. The net increase in deferred compensation expense year over year reflected higher deferred compensation expense amortization from newly issued restricted stock awards and assumed options from the Alacritus and Decru acquisitions partially offset by the terminated deferred salary compensation program and fully amortized WebManage assumed options. Based on deferred stock compensation recorded at January 27, 2006, estimated future deferred stock compensation amortization expenses are $3.9 million in the remainder of fiscal 2006, $14.7 million in fiscal 2007, $8.4 million in fiscal 2008, $1.7 million in fiscal 2009 and $0.3 million in fiscal 2010 and none thereafter.

Beginning May 1, 2006, we are required to adopt SFAS No. 123R and expense employee stock options in our financial statements. Adoption of SFAS No. 123R will have a significant impact on our reported results of operations. However, the impact of the adoption of SFAS No. 123R cannot be quantified at this time because it will depend on levels of share-based payments granted in the future as well as other variables that will affect the fair market value estimates, which cannot be forecasted at this time.

Restructuring Charges — 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 workforce and consolidations of facilities. As of January 27, 2006, 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 the second quarter of 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.

During the first quarter of fiscal 2006, we recorded a reduction in restructuring reserve of $1.3 million resulting from the execution of new sublease agreement for our Tewksbury facility. 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 second and third quarter of fiscal 2006, we recorded a restructuring charge of $0.6 and $0.1 million, primarily attributed to severance-related amounts and relocation expenses related to the move of our global services center operations.

The following analysis sets forth the changes in the restructuring reserve for the three months ended January 27, 2006:

	Facility Accrual	Severance-Related	Total
Reserve balance at April 30, 2004	$ 5,208	$ —	$ 5,208
Cash payments	(705)	—	(705)
Reserve balance at April 30, 2005	4,503	—	4,503
Cash payments	(90)	—	(90)
Adjustments	(1,256)	—	(1,256)
Reserve balance at July 29, 2005	3,157	—	3,157
Restructuring charges	281	364	645
Cash payments	(451)	(341)	(792)
Reserve balance at October 28, 2005	2,987	23	3,010
Restructuring charges	—	117	117
Cash payments	(175)	(17)	(192)
Reserve balance at January 27, 2006	$ 2,812	$ 123	$ 2,935

Of the reserve balance at January 27, 2006, $0.7 million was included in other accrued liabilities and the remaining $2.3 million was classified as long-term obligations, relating to the facility charges for the second restructuring and the global services center restructuring charges.

Interest Income — Interest income was $9.9 million and $28.6 million for the three and nine-month periods ended January 27, 2006, respectively, as compared to $6.0 million and $16.2 million for the three and nine-month periods ended January 28, 2005, respectively. The increase in interest income was primarily driven by higher average interest rates on our investment portfolio. We expect overall interest income to increase for fiscal 2006 as a result of rising average interest rates, partially offset by lower cash and invested balances due primarily to cash repurchases of our common stock.

Other Income (Expense), Net — Other Income (Expense), Net, included net exchange gains from foreign currency transactions of $1.0 million and $0.4 million for the three and nine-month periods ended January 27, 2006, respectively. Net exchange losses were $0.6 million and $1.6 million in the three and nine-month periods ended January 28, 2005. We believe that period-to-period changes in foreign exchange gain or losses will continue to be impacted by hedging costs associated with our forward and option activities and forecast variance.

Provision for Income Taxes — For the three and nine-month periods ended January 27, 2006, we applied annual tax rates of 19.0% and 17.3%, respectively, to pretax income as compared to 18.1% for the same periods in the prior year. The tax rates for the three and nine-month periods ended January 27, 2006 benefited from discrete provision for income tax items totaling $0.6 million and $5.2 million, respectively. The benefit from the discrete items is attributable primarily to a R&D tax credit study commissioned by us that generated a one time incremental benefit related to prior fiscal years. These rates also reflect a favorable foreign tax ruling for our principal European subsidiary. Our estimate is based on existing tax laws and our current projections of income (loss) and distributions of income (loss) among different entities and tax jurisdictions, and is subject to change, based primarily on varying levels of profitability.

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, other sources and uses of cash flow and potential tax opportunities on our liquidity and capital resources.

Balance Sheet and Other Cash Flows

As of January 27, 2006, as compared to April 30, 2005, our cash, cash equivalents, and short-term investments decreased by $29.0 million to $1,140.9 million due primarily to cash repurchases of our common stock of $390.1 million and net cash paid of $41.2 million in connection with the Decru acquisition, partially offset by cash generated from operations. We derive our liquidity and capital resources primarily from our cash flow from operations and from working capital. Working capital decreased by $66.6 million to $989.1 million as of January 27, 2006, compared to $1,055.7 million as of April 30, 2005 due primarily to a decrease in cash and short-term investments as well as an increase in current liabilities due primarily to a higher deferred revenue balance, partially offset by higher accounts receivable and inventory balances.

During the nine-month period ended January 27, 2006, we generated cash flows from operating activities of $382.4 million as compared with $344.6 million in the same period in fiscal 2005. The largest driver of this increase was the net income of $207.2 million for the nine-month period ended January 27, 2006, as compared to $162.3 million in the same period in fiscal 2005. In addition to higher net income and noncash adjustments in the nine months ended January 27, 2006, the primary factors that impacted the period-to-period change in cash flows relating to operating activities were the following:

- An increase in deferred revenues from higher software subscription and service billings attributable to our continuing shift toward larger enterprise customers, as well as renewals of existing maintenance agreements; and
- Increased income taxes payable, primarily reflecting higher profitability in the nine-month period ended January 27, 2006 as compared to the same period in the prior year and lower tax payments offset by lower tax refunds as compared to the same period in the prior year.

The above factors were partially offset by the effects of:

- Increased accounts receivable balances due primarily to a shipping profile weighted towards the second half of the third quarter of fiscal 2006;
- An increase in inventories due primarily to higher consigned inventory for the IBM sales and increased configured units to meet revenue growth; and
- Increased prepaid expenses in the nine-month period ended January 27, 2006, as compared to a decrease in the same period a year ago due to a tax refund of $9.0 million in connection with a carryback of net operating losses generated in fiscal 2000.

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.

Capital expenditures for the nine-month period ended January 27, 2006 were $96.5 million as compared to $64.8 million in the same period a year ago. We received net proceeds of $21.2 million and used net proceeds of $213.2 million in the nine-month periods ended January 27, 2006 and January 28, 2005, respectively, for net purchases/redemptions of short-term investments. Investing activities in the nine-month period ended January 27,

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2006 also included new investments in privately held companies of $7.1 million. In the first quarter of fiscal 2006, we acquired Alacritus for a purchase price of approximately $13.7 million, including 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, including assumed options, net cash payments of $41.2 million and related transaction costs.

We used $249.2 million and received $20.4 million in the nine-month periods ended January 27, 2006 and January 28, 2005, respectively, from net financing activities, which included sales of common stock related to employee stock transactions net of common stock repurchases. We repurchased 14.6 million and 5.6 million shares of common stock for a total cost of $390.1 million and $133.0 million during the nine-month periods ended January 27, 2006 and January 28, 2005, respectively. Other financing activities provided $141.7 million and $153.5 million in the nine-month periods ended January 27, 2006 and January 28, 2005, respectively, which related to sales of common stock related to employee stock transactions. During the nine-month period ended January 27, 2006, we withheld $0.8 million from certain employees' exercised shares of their restricted stock to reimburse for federal, state, and local withholding taxes obligations.

The change in cash flow from financing activities was primarily due to the effects of higher common stock repurchases partially offset by proceeds from issuance of common stock under employee 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 Sources and Uses of Cash and Tax Opportunities

The American Jobs Creation Act of 2004 ("the Jobs Act") created a temporary 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. The deduction is subject to a number of limitations, and we are currently considering recently issued Treasury and IRS guidance on the application of the deduction. We are not yet in a position to decide whether, and to what extent, foreign earnings that have not yet been remitted to the U.S. may be repatriated. Based on the analysis to date, however, it is reasonably possible that as much as a $355.0 million dividend might be repatriated, with a respective tax liability of up to $15.0 million. We expect to be in a position to finalize our analysis by the end of our fourth quarter of fiscal 2006.

In November 2005, our Board of Directors approved a new stock repurchase program in which up to an additional $650.0 million of shares of our outstanding common stock may be purchased, which amount includes approximately $76.4 million remaining from all prior authorizations (i.e., the net additional approval amount, without taking into account remaining amounts approved in prior periods, is $573.6 million). At January 27, 2006, $504.4 million of shares remained available for repurchases under the plan.

For the nine-month periods ended January 27, 2006 and January 28, 2005, we recorded tax benefits, in the form of reduced payments, of $22.3 million and $27.8 million, respectively, associated with disqualifying dispositions of employee stock options. 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.

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NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

Contractual Cash Obligations and Other Commercial Commitments

The following summarizes our contractual cash obligations and commercial commitments at January 27, 2006, and the effect such obligations are expected to have on our liquidity and cash flow in future periods, (in thousands):

Contractual Obligations:	2006	2007	2008	2009	2010	Thereafter	Total
Rent operating lease payments(1)	$ 3,981	$13,979	$13,627	$13,358	$10,133	$ 28,779	$ 83,857
Equipment operating lease payments(1)	1,516	5,849	5,167	2,873	16	—	15,421
Lease payments(2)	—	—	1,651	1,981	1,981	37,017	42,630
Venture capital funding commitments(3)	100	402	389	377	364	381	2,013
Purchase commitments and other(4)	1,348	600	—	—	—	—	1,948
Capital Expenditures(5)	10,858	7,711	—	—	—	—	18,569
Communications & Maintenance(6)	3,169	7,439	5,267	1,521	169	—	17,565
Restructuring Charges(7)	173	565	579	603	637	378	2,935
Total Contractual Cash Obligations	$21,145	$36,545	$26,680	$20,713	$13,300	$ 66,555	$184,938

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, 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:	2006	2007	2008	2009	2010	Thereafter	Total
Letters of Credit(8)	$ 450	$ —	$ —	$ —	$ —	$ 337	$ 787
Restricted Cash(9)	1,828	302	748	676	53	2,224	5,831
Total Commercial Commitments	$2,278	$302	$748	$676	$ 53	$ 2,561	$6,618

(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 2015. 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. Sublease income of $0.1 million has been included as a reduction of the payment amounts shown in the table. Facilities operating lease payments exclude the leases impacted by the restructurings. The amounts for the leases impacted by the restructurings are included in subparagraph (7) below.

(2) On December 16, 2005, we ("the Lessee") entered into financing, construction and leasing arrangements with BNP ("the Lessor"), for office space to be located on land currently owned by us in Sunnyvale, California. This arrangement requires us to ground lease our land to BNP for a period of 50 years to construct approximately 190,000 square feet of office space with $38.5 million construction allowance provided by BNP, and, after

completion of construction to pay minimum lease payments which vary based on London Interbank Offered Rate ("LIBOR") plus a spread (5.15% at January 27, 2006). We expect to pay lease payments on the completed buildings from BNP on June 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 the 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 2 year period.

Included in the above contractual cash obligations are (a) lease commitments of $1.7 million in fiscal 2008, $2.0 million in each of the fiscal years 2009, 2010, 2011, 2012 and $0.3 million in fiscal 2013, which are based on the LIBOR rate at January 27, 2006 for a term of 5 years, and (b) at the expiration or termination of the lease, a supplemental payment obligation equal to $32.7 million in the event that we elect not to purchase or arrange for a sale of the building.

The lease also requires us to maintain specified financial covenants with which we were in compliance as of January 27, 2006. 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.

(3) Venture capital funding commitments include a quarterly committed management fee based on a percentage of our committed funding to be payable through June 2011.

(4) Amounts included in purchase commitments and other are (a) agreements to purchase component inventory from our suppliers and/or contract manufacturers that are non-cancelable and legally binding against us and (b) commitment related to utilities contracts. Purchase commitments and other exclude (a) purchases of goods and services we expect to consume in the ordinary course of business in the next 12 months; (b) open purchase orders that represent an authorization to purchase rather than a binding agreement; (c) agreements that are cancelable without penalty and costs that are not reasonably estimable at this time.

(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. The restructuring estimated sublease income included various assumptions such as the time period over which the facilities will be vacant, expected sublease terms, and expected sublease rates.

(8) The amounts outstanding under these letters of credit relate to workers' compensation, a customs guarantee and a corporate credit card program.

(9) Restricted cash arrangements relate to facility lease requirements, service performance guarantees, customs and duties guarantees, and VAT requirements, and are included under Prepaid Expenses and Other and Other Assets on our Consolidated Balance Sheets.

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"), 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 27, 2006, we have $0.8 million letters of credit that are related to workers' compensation, a customs guarantee, and a corporate credit card program and were not recorded on our balance sheet.

As of January 27, 2006, the notional fair values of our foreign exchange forward and foreign currency option contracts totaled $305.6 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 forward points and premiums paid.

We offer both recourse and nonrecourse lease financing arrangements to our customers. 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 were to default. We initially defer 100% of the recourse lease receivable and recognize revenue over the term of the lease as the lease payments become due. As of January 27, 2006, and April 30, 2005, the maximum recourse exposure under such leases totaled approximately $9.4 million and $7.0 million, 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.

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 45, *"Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others."*

We have commitments related to a lease arrangement with BNP for approximately 190,000 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 this lease under the provisions of FIN 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 10.3) 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, we are not required to consolidate either the leasing entity or the specific assets that we lease under the BNP lease. See above in “Contractual Obligations” and Note 13, for our future minimum lease payments under all leases at January 27, 2006.

As of January 27, 2006, except for operating leases and other contractual obligations outlined under the “Contractual Cash Obligations” table, we do not have any off-balance sheet financing arrangements or liabilities, retained or contingent interests in transferred assets, or any obligation arising out of a material variable interest in an unconsolidated entity. We also do not have any majority-owned subsidiaries that are not included in the consolidated financial statements. Additionally, we do not have any interest in or relationship with, any special purpose entities.

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 through at least the next 12 months.

Critical Accounting Estimates and Policies

Our consolidated financial statements 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 the Notes to the Consolidated Financial Statements, which are included in our Annual Report on Form 10-K for the fiscal year ended April 30, 2005.

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-down and reserves;

• restructuring accruals;

• impairment losses on investments;

- accounting for stock-based compensation; and
- loss contingencies.

These accounting estimates and policies 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, 2005.

New Accounting Standards

See Note 12 of the Consolidated Condensed 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.

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 and 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, 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 Internet caching devices, and the difficulty in gauging the engineering effort required to produce new products, such products are subject to significant technical risks. However, we cannot assure you that any of our new products will 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.

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

The storage and content delivery markets are intensely competitive and are characterized by rapidly changing technology.

In the storage market, our storage system products and associated data management software portfolio compete primarily with storage systems and data management software offered by EMC Corporation, Hitachi Data Systems, Hewlett-Packard Company, IBM Corporation, and Sun Microsystems, Inc. We also view Dell, Inc. as an emerging competitor in the storage marketplace, primarily due to a business partnership that has been established between Dell and EMC, allowing Dell to resell EMC storage hardware and software products. In addition, we have historically encountered less-frequent competition from companies including Engenio Information Technologies, Inc. (the storage systems group of LSI Logic Corp.), StorageTek Technology Corporation (now operating as a subsidiary of Sun Microsystems), Dot Hill Systems Corporation, and Xiotech Corporation. In the nearline/secondary storage market, which includes the disk-to-disk backup and regulated data storage segments, our NearStore appliances compete primarily against products from EMC and StorageTek and other traditional tape backup solutions in the broader data backup and recovery space.

In the content delivery market, our NetCache® appliances and content delivery software compete against caching appliance and content delivery software vendors including BlueCoat Systems (formerly CacheFlow, Inc.) and Cisco Systems, Inc. Our NetCache business is also subject to indirect competition from content delivery service products such as those offered by Akamai Technologies.

Additionally, a number of new, privately held companies are currently attempting to enter the storage systems and data management software markets, the nearline storage market, and the caching and content delivery markets, some of which may become significant competitors in the future.

We believe that the principal competitive factors affecting the storage and content delivery markets include product benefits such as response time, reliability, data availability, scalability, ease of use, price, multiprotocol capabilities, and global service and support. We must continue to maintain and enhance this technological advantage over our competitors. If those competitors with greater financial, marketing, service, support, technical, and other resources were able to offer products that matched or surpassed the technological capabilities of our products, these competitors would, by virtue of their greater resources, gain a competitive advantage over us that could lead to greater sales for these competitors at the expense of our own market share, which would have a material adverse affect on our business, financial condition, and results of operations.

Increased competition could also result in price reductions, reduced gross margins, and loss of market share, any of which could materially and adversely affect our operating results. Our competitors may be able to respond more quickly than we can to new or emerging technologies and changes in customer requirements or devote greater resources to the development, promotion, sale, and support of their products. 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 of several key components utilized in the assembly of our products. We purchase our disk drives through several suppliers. We purchase computer boards and microprocessors from a limited number of suppliers. 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.

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 27, 2006, 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, data management and content delivery 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, data management and content delivery markets. Accordingly, our future financial performance will depend in large part on continued growth in the storage, data management and content delivery markets and on our ability to adapt to emerging standards in these markets. We cannot assure you that the markets for storage, data management and content delivery 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.

In addition, our business also depends on general economic and business conditions. A reduction in demand for storage, data management and content delivery caused by weakening economic conditions and decreases in corporate spending will result in decreased revenues and lower revenue growth rates. The network storage and content delivery 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, data management and content delivery 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.

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, data management and content delivery products
- Discount levels and price competition
- Direct versus indirect 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 margin may result from various factors such as continued investments in our customer support infrastructure, changes in the mix between technical support services and professional services, as well as the timing of technical support service contract initiations and renewals.

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 realize anticipated synergies, economies of scale, or other value. Integration risks and issues may include, but 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.

Our ability to increase our revenues depends on expanding our direct sales operations and reseller distribution channels and continuing to provide excellent global service and support. If we are unable to effectively develop, retain, and expand our global sales and service workforce or to establish and cultivate relationships with our indirect reseller and distribution channels, our ability to grow and increase revenue could be harmed.

In an effort to gain market share and support our global customers, we will need to expand our worldwide direct sales operations and global service and support infrastructure to support new and existing enterprise customers. Expansion of our direct sales operations, reseller/distribution channels, and global service and support operations may not be successfully implemented, and the cost of any expansion may exceed the revenues generated.

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 derive a significant portion of our revenue from these indirect channel partners. 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 develop and offer products of their own that are competitive to ours. Or, 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 manage effectively 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 materially adverse affect 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 three and nine-month periods ended January 27, 2006, 44.5% and 41.9%, respectively, of our total revenues was 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. 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 flow. 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. 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.

Potentially adverse tax consequences could also 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 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. 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 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.

A significant percentage of our expenses are fixed, which could materially and adversely affect our net income.

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.

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

We experienced growth in the first nine months of fiscal 2006, fiscal 2005 and 2004. 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, systems and processes, and managing our assets. In addition, 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.

The market price 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.

Our business could be materially and adversely affected as a result of a natural disaster, terrorist acts, or other catastrophic events.

Our operations, including our suppliers' and contract manufacturers' operations, are susceptible to outages due to fire, floods, power loss, power shortages, telecommunications failures, break-ins, and similar events. 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.

Weak economic conditions or terrorist actions could lead to significant business interruptions. If such disruptions result in cancellations of customer orders, a general decrease in corporate spending on information technology, or direct impacts on our marketing, manufacturing, financial functions or our suppliers' logistics function, our results of operations and financial condition could be adversely affected.

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, backgrounds, 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, 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.

Our products may contain undetected software, 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 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 changing laws and regulations, environmental legislation and public disclosure that have increased both our costs and the risk of noncompliance. Failure to comply with these new regulations could have an adverse effect on our business and stock price.

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 January 27, 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.

We also face increasing complexity in our product design and procurement operations as we adjust to new and upcoming requirements relating to the materials composition of many of our products. The European Union ("EU") has adopted two directives to facilitate the recycling of electrical and electronic equipment sold in the EU. The first of these is the Waste Electrical and Electronic Equipment (WEEE) directive, which directs EU member states to enact laws, regulations, and administrative provisions to ensure that producers of electrical and electronic equipment are financially responsible for specified collection, recycling, treatment, and environmentally sound disposal of products placed on the market after August 13, 2005, and from products in use prior to that date that are being replaced. The EU has also adopted the Restriction on the Use of Certain Hazardous Substances in Electrical and Electronic Equipment ("RoHS") directive. The RoHS directive restricts the use of lead, mercury, and certain other substances in electrical and electronic products placed on the market in the European Union after July 1, 2006.

In connection with our compliance with such environmental laws and regulations, we could incur substantial costs (including excess component inventory) and be subject to disruptions to our operations and logistics. In addition, we will need to ensure that we can manufacture compliant products, and that we can be assured a supply of compliant components from suppliers. Similar laws and regulations have been or may be enacted in other regions, including in the United States, China, and Japan. Other environmental regulations may require us to reengineer our products to utilize components that are more environmentally compatible, and such reengineering and component substitution may result in additional costs to us. Although we do not anticipate any material adverse effects based on the nature of our operations and the effect of such laws, there is no assurance that such existing laws or future laws will not have a material adverse effect on our business.

Changes in financial accounting standards or practices may cause adverse unexpected fluctuations and affect our reported business and financial results.

In December 2004 the FASB issued SFAS No. 123R (revised 2004), which will require us, beginning in the first quarter of fiscal 2007, to expense employee stock options for financial reporting purposes. Adoption of SFAS No. 123R will result in lower reported earnings per share, which could negatively impact our future stock price. In addition, this could also impact our ability or future practice of utilizing broad-based employee stock plans to attract, reward, and retain employees, which could also adversely impact our operations.

In addition, the FASB requires certain valuation models to estimate the fair value of employee stock options. These models, including the Black-Scholes option-pricing model, use varying methods, inputs, and assumptions selected across companies. 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 of these changes, we could incur losses, and our operating results and gross margins 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. However, government demand is unpredictable, and there is no guarantee of future revenue growth from the U.S. government.

The U.S. government has become an important customer for the storage market and for us. 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.

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

We are exposed to market risk related to fluctuations in interest rates 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 27, 2006, we had short-term investments of $952.8 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 and investment in marketable equity securities in primarily technology companies. These highly liquid investments, consisting primarily of government and 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 27, 2006 would cause the fair value of these short-term investments to decline by approximately $3.3 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.

Foreign Currency Exchange Rate Risk

We hedge risks associated with foreign currency transactions in order 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 27, 2006, 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.

The following table provides information about our foreign exchange forward and option contracts outstanding on January 27, 2006 (in thousands):

Currency	Buy/Sell	Foreign Currency Amount	Contract Value USD	Fair Value in USD
Forward contracts:				
CAD	Sell	17,272	$ 15,032	$ 15,032
CHF	Sell	2,362	$ 1,844	$ 1,844
EUR	Sell	146,497	$ 178,356	$177,874
GBP	Sell	32,928	$ 58,395	$ 58,223
ILS	Sell	14,495	$ 3,124	$ 3,124
ZAR	Sell	9,229	$ 1,494	$ 1,508
AUD	Buy	11,886	$ 8,913	$ 8,913
DKK	Buy	9,215	$ 1,496	$ 1,496
EUR	Buy	11,700	$ 14,312	$ 14,207
GBP	Buy	2,775	$ 4,940	$ 4,906
NOK	Buy	8,308	$ 1,248	$ 1,248
SEK	Buy	19,884	$ 2,611	$ 2,611
Option contracts:				
EUR	Sell	9,000	$ 10,918	$ 11,030
GBP	Sell	2,000	$ 3,536	$ 3,569

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 27, 2006, 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’s 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 information required by this item is on page 35.

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

The table below sets forth activity in the third quarter of fiscal 2006:

Period	Shares Purchased	Average Price Paid per Share	Total Number of Shares Purchased as Part of the Repurchase Program(1)	Approximate Dollar Value of Shares That May yet Be Purchased Under the Repurchase Program(2)
October 29, 2005 – November 25, 2005	—	$ —	24,152,324	$ 650,000,000
November 26, 2005 – December 23, 2005	4,825,463	$ 29.02	28,977,787	$ 509,955,012
December 24, 2005 – January 27, 2006	200,000	$ 27.69	29,177,787	$ 504,416,692

(1) This amount represented total number of shares purchased under our publicly announced repurchase programs since inception.

(2) In May 2005, our Board of Directors approved an incremental stock repurchase program in which up to $300,000,000 of additional shares of our outstanding common stock may be purchased. In November 2005, our Board of Directors approved a new $650,000,000 stock repurchase program which amount includes the $76,361,270 remaining from all prior authorizations. The stock repurchase program may be suspended or discontinued at any time.

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 2005 Annual Meeting of Stockholders.

Item 6. ***Exhibits***

2.1(3) Agreement and Plan of Merger, dated as of November 3, 2003, by and among Network Appliance, Inc., Nagano Sub, Inc., and Spinnaker Networks, Inc.
2.2(3) Amendment to Merger Agreement, dated as of February 9, 2004, by and among Network Appliance, Inc., Nagano Sub, Inc., and Spinnaker Networks, Inc.
2.3(8) 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(1) Certificate of Incorporation of the Company.
3.2(1) Bylaws of the Company.
3.3(6) Certificate of Amendment to the Bylaws of the Company.
4.1(1) Reference is made to Exhibits 3.1 and 3.2.
4.2(4) Spinnaker Networks, Inc. 2000 Stock Plan.

4.3(7)	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.
4.4(7)	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.
4.5(7)	Form of Early Exercise Stock Purchase Agreement under the Decru, Inc. 2001 Equity Incentive Plan.
4.6(7)	Form of Restricted Stock Bonus Grant Notice and Agreement under the Decru, Inc. 2001 Equity Incentive Plan.
10.1(2)	Asset Purchase Agreement dated June 20, 2003, by and between Auspex Systems, Inc. and the Company.
10.2(5)	Purchase and Sale Agreement dated July 27, 2004 by and between Cisco Systems, Inc. and the Company.
10.3	Closing Certificate and Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.4	Construction Management Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.5	Lease Agreement, dated December 15, 2005, by and between BNP Leasing Corporation.
10.6	and the Company. Purchase Agreement, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
10.7	Ground Lease, dated December 15, 2005, by and between BNP Leasing Corporation and the Company.
31.1	Certification of Chief Executive Officer pursuant to Securities Exchange Act Rules 13a-15(e) and 15d-15(e) as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002, dated March 7, 2006.
31.2	Certification of Chief Financial Officer pursuant to Securities Exchange Act Rules 13a-15(e) and 15d-15(e) as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002, dated March 7, 2006.
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 7, 2006.
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 7, 2006.

(1) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated December 4, 2001.

(2) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated September 3, 2003.

(3) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated February 27, 2004.

(4) Previously filed as an exhibit with the Company's Form S-8 registration statement dated March 1, 2004.

(5) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated August 31, 2004.

(6) Previously filed as an exhibit with the Company's Current Report on Form 8-K dated May 4, 2005.

(7) Previously filed as an exhibit with the Company's Form S-8 registration statement dated September 2, 2005.

(8) Previously filed as an exhibit with the Company's Quarterly Report on Form 10-Q dated September 2, 2005.

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 7, 2006

EXHIBIT INDEX

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Exhibit 10.3

CLOSING CERTIFICATE
AND AGREEMENT

BETWEEN

NETWORK APPLIANCE, INC.
("NAI")

AND

BNP PARIBAS LEASING CORPORATION
("BNPPLC")

December 15, 2005

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Exhibits and Schedules

CLOSING CERTIFICATE AND AGREEMENT

This CLOSING CERTIFICATE AND AGREEMENT (this "**Certificate**"), dated as of December 15, 2005 (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 BNPPLC 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 BNPPLC under the Ground Lease, the Permitted Encumbrances and any Liens Removable by BNPPLC. 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 BNPPLC 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 Steven Gomo, Chief Financial Officer 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 BNPPLC 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 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 BNPPLC 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 BNPPLC 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 BNPPLC by independent public accountants of recognized national standing reasonably acceptable to BNPPLC; *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 BNPPLC 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 BNPPLC, 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 Agreement:

"**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 1.50 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 BNPPLC 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 BNPPLC (or any exercise of BNPPLC'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 BNPPLC 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 BNPPLC to confirm such information.

(4) Although the representations required of BNPPLC by this subparagraph

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 as to other accounting *conclusions*.

(B) Other Limited Representations. BNPPLC represents that:

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

(2) *Authority*. The Constituent Documents of BNPPLC permit the execution, delivery and performance of the Operative Documents by BNPPLC, and all actions and approvals necessary to bind BNPPLC under the Operative Documents have been taken and obtained. Without limiting the foregoing, the Operative Documents will be binding upon BNPPLC when signed on behalf of BNPPLC by Lloyd G. Cox, Managing Director of BNPPLC. BNPPLC 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 BNPPLC 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 BNPPLC 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*. BNPPLC is not "insolvent" on the Effective Date (that is, the sum of BNPPLC's absolute and contingent liabilities — including the obligations of BNPPLC under the Operative Documents — does not exceed the fair market value of BNPPLC's assets), and BNPPLC has no outstanding liens, suits, garnishments or court actions which could render BNPPLC insolvent or bankrupt. BNPPLC's capital is adequate for the businesses in which BNPPLC is engaged and intends to be engaged. BNPPLC has not incurred (whether by the Operative Documents or otherwise), nor does BNPPLC 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 BNPPLC's knowledge, against BNPPLC 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 BNPPLC or any significant portion of BNPPLC's property, a reorganization, arrangement, rearrangement, composition, extension, liquidation or dissolution of BNPPLC or similar relief under the federal Bankruptcy Code or any state law. (As used in the Operative Documents, "**BNPPLC's knowledge**" and words of like effect mean the present actual knowledge of Lloyd G. Cox and Barry

Mendelsohn, the current officers of BNPPLC 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 BNPPLC, threatened against or affecting BNPPLC by or before any court or other Governmental Authority. BNPPLC 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 a material adverse effect on BNPPLC or its ability to perform its obligations under the Operative Documents.

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

(6) *Enforceability*. The Operative Documents constitute the legal, valid and binding obligations of BNPPLC 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, BNPPLC 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*. BNPPLC is not a "foreign person" within the meaning of Sections 1445 and 7701 of the Code (i.e. BNPPLC 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 BNPPLC for any evaluation of California or local Applicable Laws upon the transactions contemplated in the Operative Documents, and BNPPLC 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 BNPPLC 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**"); subject, however, to the following terms and conditions:

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

(2) BNPPLC will not be required by this subparagraph 4(C) to incur any expense or make any payment to another Person unless (a) BNPPLC 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 BNPPLC can include such expense or payment in the Outstanding Construction Allowance for purposes of the Construction Management Agreement.

(3) BNPPLC 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 BNPPLC pursuant to this subparagraph 4(C), and such request must be specific and in writing, if required by BNPPLC at the time the request is made.

(5) No action may be required of BNPPLC pursuant to this subparagraph 4(C) that could constitute a violation of any Applicable Laws or compromise or constitute a waiver of BNPPLC'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 BNPPLC.

The actions BNPPLC 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 (other than with NAI or its Affiliates) 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, (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, 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 BNPPLC 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 BNPPLC'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 BNPPLC any present or future obligations greater than the obligations BNPPLC 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, the following will be relevant to the determination of whether the request is reasonable:

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

(ii) whether the relocation 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 BNPPLC to decline the request); and

(iii) whether the relocation is to be accomplished in a manner that will not, when the relocation 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, the following will be relevant to the determination of whether the request is reasonable:

(1) whether the Condominium Regime will create one or more distinct condominium units that include all significant Improvements constructed or to be constructed by NAI for BNPPLC 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 BNPPLC (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**"); and

(B)the land leased to BNPPLC 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;

(3) whether the request itself (if granted) or the proposed Condominium Regime 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

(4) whether the request itself (if granted) or the Condominium Regime will materially limit, or give NAI or its Affiliates discretionary control over, the rights of BNPPLC 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.

Any and all Losses incurred by BNPPLC because of any action taken after the Completion Date pursuant to this subparagraph 4(C) will be covered by the indemnifications of BNPPLC set forth in Construction Management Agreement or in the Lease. Further, for purposes of such indemnification, any such action taken by BNPPLC 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 BNPPLC's Consent. No refusal by BNPPLC 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 BNPPLC and does not thereby create or expand any obligations or restrictions that encumber BNPPLC'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 BNPPLC 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 BNPPLC and does not thereby create or expand any obligations or restrictions that encumber BNPPLC'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 BNPPLC 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. BNPPLC waives any security interest, statutory landlord's lien or other interest BNPPLC 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, BNPPLC 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, BNPPLC 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, BNPPLC acknowledges that the lenders providing such financing may require confirmation from BNPPLC 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 BNPPLC 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, BNPPLC 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 BNPPLC is aware of any default by NAI that may exist under the Operative Documents and confirming BNPPLC'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.]

IN WITNESS WHEREOF, this Closing Certificate and Agreement is executed to be effective as of December 15, 2005.

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 15, 2005]

NETWORK APPLIANCE, INC., a Delaware corporation

By: /s/ Steven Gomo
Steven Gomo, Chief Financial Officer

Closing Certificate and Agreement — Signature Page

Exhibit A

Legal Description

Parcel 1, as shown on that certain Parcel Map which filed for record in the office of the recorder of the County of Santa Clara, State of California on July 7, 1994, in Book 657 of Parcel Maps, Page 9.

APN: 110-32-6

ARB: 110-3-x65

TOGETHER WITH, easements appurtenant to Parcel 1 as described in Exhibit A attached to the Ground Lease.

Exhibit B

Permitted Encumbrances

1. TAXES for the fiscal year 2005-2006, 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 15, 2005 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 (Indiana Property) dated as of February 10, 2005 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

Exhibit 10.4

CONSTRUCTION MANAGEMENT AGREEMENT

BETWEEN

NETWORK APPLIANCE, INC.
(“NAI”)

AND

BNP PARIBAS LEASING CORPORATION
(“BNPPLC”)

December 15, 2005

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Exhibits and Schedules

CONSTRUCTION MANAGEMENT AGREEMENT

This CONSTRUCTION MANAGEMENT AGREEMENT (this "**Agreement**"), dated as of December 15, 2005 (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 4(C)(2)(d), 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC, 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.

"**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).

"**Integral Equipment**" means all furniture, trade fixtures and equipment (including conveyor systems) that will be integral to NAI's use and occupancy of the Improvements for the permitted uses described in subparagraph 2(A) of the Lease and that will be placed or installed and maintained on the Land.

“**Maximum Construction Allowance**” means an amount equal to $38,500,000, 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).

“**Participant Default**” has the meaning indicated in subparagraph.

“**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.

"**Projected Economic Depreciation of Equipment**" means the difference (not less than zero) calculated by subtracting (A) the amount determined by BNPPLC (as provided in subparagraph 4(C)(2)(d)) to equal the projected fair value of Integral Equipment at the end of the scheduled Term of the Lease, from (B) the 97-10/Project Costs attributable to such Integral Equipment.

"**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 BNPPLC 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 18th 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 BNPPLC 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.

"**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 BNPPLC'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 BNPPLC 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 BNPPLC'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 BNPPLC has notified NAI of such judgement and the reasons therefor.

(3) BNPPLC 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 BNPPLC or otherwise purport to bind BNPPLC 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. BNPPLC 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 BNPPLC 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, BNPPLC 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 sightly 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 the earlier of any Termination of NAI's Work or the Completion Date, 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 the earlier of any Termination of NAI's Work or the Completion Date, NAI must also keep all Improvements (including all alterations, additions and changes made to the Improvements) and Integral Equipment 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 BNPPLC 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) BNPPLC may, but will not be obligated to, make proof of loss if not made promptly by NAI after notice from BNPPLC, (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 5, and (iii) BNPPLC 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, 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 insurance proceeds. If any casualty results in damage to or loss or destruction of the Property, NAI must give prompt notice thereof to BNPPLC 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, 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 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 BNPPLC 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 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 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 BNPPLC because the Property does not comply with any Applicable Law, NAI must promptly furnish a copy of such notice or claim to BNPPLC.

(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 BNPPLC, 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 BNPPLC's interest in the Property. (Whether BNPPLC 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 BNPPLC.

(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

(2) 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

(3) 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.

(4) 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:

- 25.0 basis points (25/100 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 BNPPLC in the amount provided in the Term Sheet. Also, to the extent that BNPPLC 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), BNPPLC 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 BNPPLC's Parent or any other Participant agreeing to make or making, funding or maintaining advances to BNPPLC in connection with the Property because of any Banking Rules Change, then BNPPLC may agree or become obligated to pay to BNPPLC's Parent or such other Participant, as the case may be, additional amounts ("**Increased Cost Charges**") sufficient to compensate BNPPLC's Parent or the Participant for such increased costs. Any Increased Cost Charges paid by BNPPLC or for which BNPPLC becomes obligated to pay, prior to the Completion Date, will be added to the Outstanding Construction Allowance by BNPPLC.

(2) BNPPLC's Parent or any other Participant may demand additional payments ("**Capital Adequacy Charges**") if BNPPLC'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 BNPPLC to permit BNPPLC to maintain BNPPLC's investment in the Property or to make Construction Advances. To the extent that BNPPLC's Parent or a Participant demands Capital Adequacy Charges as compensation for the additional capital requirements reasonably allocable to such investment or advances, and BNPPLC pays or becomes obligated to pay to BNPPLC'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 BNPPLC.

(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 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 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,
- subject to the conditions set forth in subparagraph 4(C)(2)(d), the costs of procuring and installing Integral Equipment, and
- costs of offsite and other public improvements required as conditions of governmental approvals for the Construction Project;

(3) the cost of title insurance in favor of BNPPLC 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 BNPPLC 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) Conditions to Funding for the Cost of Integral Equipment. No Construction Advance for the costs of procuring or installing any Integral Equipment will be required of BNPPLC or requested by NAI before (i) NAI has delivered to BNPPLC a reasonably detailed description of such Integral Equipment, sufficient to allow BNPPLC to have it appraised, (ii) BNPPLC has received an appraisal of the same, in form and substance satisfactory to BNPPLC from an appraiser satisfactory to BNPPLC, which sets forth estimates of fair market value for the Integral Equipment, both as new and as projected at the end of the scheduled Term of the Lease, (iii) BNPPLC has reviewed the appraisal and made a determination of the projected fair market value of such Integral Equipment as of the end of the scheduled Term of the Lease, and (iv) NAI has confirmed its approval of such determination by BNPPLC.

(e) 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), BNPPLC 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 BNPPLC 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 BNPPLC to make advances to anyone other than NAI itself.

(F) No Waiver. No funding of Construction Advances and no failure of BNPPLC to object to any Work proposed or performed by or for NAI will constitute a waiver by BNPPLC 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 BNPPLC 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 BNPPLC by BNPPLC's Parent, by an Affiliate of BNPPLC or by any Participant that is made to compensate BNPPLC for any Losses BNPPLC may suffer or incur in connection with this Agreement or the Property. NAI will promptly pay over to BNPPLC 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 BNPPLC from NAI or third parties, will be applied as follows:

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

(2) Second, the proceeds remaining after such reimbursement to BNPPLC (the "**Remaining Proceeds**") will be applied, as hereinafter more particularly provided, either as a Qualified Prepayment or to pay or reimburse NAI or BNPPLC for the actual out-of-pocket costs of repairing or restoring the Property. Until any Remaining Proceeds received by BNPPLC are applied by BNPPLC 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) <u>Advances of Escrowed Proceeds to NAI</u>. 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) <u>Status of Escrowed Proceeds After Commencement of the Term of the Lease</u>. 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 BNPPLC'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 BNPPLC 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 BNPPLC and the Participants in the form of Exhibit F (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 BNPPLC 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 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 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, BNPPLC 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)), BNPPLC 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, BNPPLC may respond with an Increased Funding Commitment or Increased Time Commitment (or both) consistent with such estimate.

(7) If BNPPLC 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 BNPPLC 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, BNPPLC 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 BNPPLC, 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 BNPPLC 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 BNPPLC to approve or consider Scope Changes or an Increased Commitment, and no offer by BNPPLC 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) BNPPLC's Election to Terminate NAI's Work. By notice to NAI BNPPLC may elect to terminate NAI's rights and obligations to continue the Work at any time (i) more than thirty days after BNPPLC has given an FOCB Notice to NAI, or (ii) after BNPPLC'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 BNPPLC under the Ground Lease;

(3) the rights and obligations of NAI and BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC may reasonably request to allow it to decide what steps it should take concerning the contract within BNPPLC'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 BNPPLC from time to time deems appropriate; and

(h) generally do anything that NAI itself might have done if NAI had satisfied or obtained BNPPLC's waiver of the conditions specified therein.

(3) Arrange for Turnkey Construction. Without limiting the generality of the foregoing, BNPPLC may engage any contractor or real estate developer BNPPLC 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 BNPPLC. Notwithstanding any Owner's Election to Continue Construction, BNPPLC 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

BNPPLC 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 BNPPLC will include costs that BNPPLC has become obligated to pay to any third party that is not an Affiliate of BNPPLC (including any construction contractor), even if the payments for which BNPPLC has become so obligated constitute prepayments for work or services to be rendered after payment and notwithstanding that BNPPLC's obligations for the payments may be conditioned upon matters beyond BNPPLC's control. For example, even if a construction contract between BNPPLC and a contractor excuses BNPPLC 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 BNPPLC, for purposes of determining whether BNPPLC has incurred costs considered to be 97-10/Project Costs and Construction Advances, when BNPPLC's obligation to pay it became subject only to NAI's payment of a 97-10/Prepayment or other conditions beyond BNPPLC's control.

(B) Powers Coupled With an Interest. BNPPLC'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 BNPPLC within three Business Days after receipt from BNPPLC of any demand for such a payment. BNPPLC 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 BNPPLC itself completes the Construction Project or causes it to be completed as BNPPLC 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 BNPPLC, NAI must indemnify and defend BNPPLC from and against all of the following Losses ("**Covered Construction Period Losses**"):

(1) Losses suffered or incurred by BNPPLC, 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 BNPPLC 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 BNPPLC that BNPPLC 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 BNPPLC 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 BNPPLC that would not have been incurred but for any bankruptcy proceeding involving NAI.

NAI's obligations under this indemnity will apply whether or not BNPPLC 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, BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC's income taxes because of credits or deductions that are attributable to the BNPPLC's payment or deemed payment of the Corresponding Loss and that are recognized for tax purposes in the same taxable year during which BNPPLC 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 BNPPLC 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 BNPPLC pursuant to subparagraph 10(A).)

(2) *Failure to Maintain a Safe Work Site*. If a third party asserts a claim for damages against BNPPLC 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 BNPPLC 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 BNPPLC'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 BNPPLC to represent BNPPLC. In the event NAI fails to promptly comply with any such direction from BNPPLC, BNPPLC 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 BNPPLC related to the Property, the right of BNPPLC 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 BNPPLC 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 BNPPLC receives a written notice of a claim for taxes or a claim alleging a tort or other unlawful conduct that BNPPLC believes is covered by the indemnity in subparagraph 10(A), then BNPPLC 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 BNPPLC 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 BNPPLC against the Covered Construction Period 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 10(A) 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.

(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 BNPPLC 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 BNPPLC 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 BNPPLC pursuant to subparagraph 10(A) without regard to subparagraph 10(B)(5). If, in connection 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 such interest and as a result of the 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 before NAI paid, reimbursed or advanced the Covered Construction Period Losses refunded to BNPPLC.

(2) *Meaning of Refund*. With respect to Covered Construction Period Losses

incurred or suffered by BNPPLC and paid or reimbursed by NAI on an After Tax Basis, if taxes of BNPPLC 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 BNPPLC 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 15, 2005.

BNP PARIBAS LEASING CORPORATION, a Delaware corporation

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

Construction Management Agreement — Signature Page

[Continuation of signature pages for Construction Management Agreement dated as of December 15, 2005]

NETWORK APPLIANCE, INC., a Delaware corporation

By: /s/ Steven Gomo
Steven Gomo, Chief Financial Officer

Construction Management Agreement — Signature Page

Exhibit A

Legal Description

Parcel 1, as shown on that certain Parcel Map which filed for record in the office of the recorder of the County of Santa Clara, State of California on July 7, 1994, in Book 657 of Parcel Maps, Page 9.

APN: 110-32-6
ARB: 110-3-x65

TOGETHER WITH, easements appurtenant to Parcel 1 as described in Exhibit A attached to the Ground Lease.

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 any site plan, elevations or renderings attached to this Exhibit:

A new office building, five stories tall, containing approximately 190,000 square feet, designed and finished out for general office use.

All of the buildings will be suitable for uses contemplated in the Lease and of a quality, when complete to be considered first class facilities for such uses. Also included in the Construction Project will be the construction of appurtenant parking areas, driveways and other facilities on the Land (or pursuant to appurtenant easements described in Exhibit A to the Ground Lease) of suitable quality for such buildings.

The budget for the Construction Project is as shown on the attached pages.

[Attach, Site Plan, Elevations and Budget]

<u>Exhibit C</u>

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 15, 2005 (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 (*e.g.,* 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]

<u>Exhibit D</u>

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 15, 2005 (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]

<u>Exhibit E</u>

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 15, 2005 (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]

<u>Exhibit F</u>

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 15, 2005 (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 BNPPLC 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 BNPPLC and Participants, no less than forty-five days after the date BNPPLC 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 BNPPLC's receipt of this letter to the effective date of any actual Termination of NAI's Work by NAI or BNPPLC will constitute a Work/Suspension Period under the Construction Management Agreement. During such period BNPPLC'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 BNPPLC 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 BNPPLC may be willing to approve or consider, and regardless of any Increased Commitment BNPPLC may be willing to provide, it would be futile to continue the Construction Project on the Land.

NAI acknowledges and agrees that BNPPLC is entitled to all proceeds of the taking of the Property and all such proceeds must be paid to BNPPLC. NAI has no right and will not assert any right to share in such proceeds. NAI agrees to cooperate with BNPPLC as BNPPLC 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 BNPPLC intends to respond with an Increased Commitment, BNPPLC 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]

<u>**Exhibit G**</u>

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 15, 2005 (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 BNPPLC has previously been notified.

BNP PARIBAS LEASING CORPORATION, a
Delaware corporation

By: ______________________________
Lloyd G. Cox, Managing Director

[cc all Participants]

<u>Exhibit H</u>

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 15, 2005 (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 15, 2005 (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]

Exhibit 10.5

LEASE AGREEMENT

BETWEEN

NETWORK APPLIANCE, INC.
("NAI")

AND

BNP PARIBAS LEASING CORPORATION
("BNPPLC")

December 15, 2005

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Exhibits and Schedules

LEASE AGREEMENT

This LEASE AGREEMENT (this "**Lease**"), dated as of December 15, 2005 (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 BNPPLC, 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 BNPPLC 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 July, 2012\, unless the Term is extended as provided in subparagraph 1(D) or sooner terminated as expressly provided in other provisions of this Lease.

BNPPLC 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 BNPPLC 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 BNPPLC and NAI.

(B) Option of BNPPLC to Terminate. BNPPLC will have the option to terminate this Lease, which BNPPLC may exercise by notice to NAI, at any time after any 97-10/Event or after BNPPLC's receipt of a Pre-lease Force Majeure Notice. Such option may be exercised by BNPPLC 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. 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 BNPPLC 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 BNPPLC, 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:

$$\$50,000,000 \text{ x } [6\% + 1.50\%] \text{ x } 30/360 = \$312,500.$$

(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 BNPPLC 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, BNPPLC will enter into an Interest Rate Swap with BNP Paribas (the "**Fixed Rate Swap**"); except that BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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, BNPPLC 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 BNPPLC any Fixed Rate Settlement Amount charged to BNPPLC 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 BNPPLC is charged penalties or interest because of its failure to make a timely payment required under the Fixed Rate Swap, and if BNPPLC'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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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. BNPPLC 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 BNPPLC elects.

(H) Calculations by BNPPLC Are Conclusive. All calculations by BNPPLC 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 BNPPLC and NAI that Base Rent and other payments herein specified will be absolutely net to BNPPLC 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 BNPPLC 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 BNPPLC under this Lease or any of the other Operative Documents 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, (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 BNPPLC, 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 BNPPLC's failure to remove a Lien Removable by BNPPLC or because of any other default by BNPPLC 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 BNPPLC of any of the express covenants, agreements, conditions or provisions of this Lease which are binding upon BNPPLC (including the confidentiality provisions set forth in subparagraph 22(B) below), or (iii) a decree compelling performance by BNPPLC of any of the express covenants, agreements, conditions or provisions of this Lease which are binding upon BNPPLC.

(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 BNPPLC of the purchase price upon any sale under the Purchase Agreement resulting from any insistence of such taxing authorities that BNPPLC 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 BNPPLC because of additional depreciation deductions or other tax benefits available to BNPPLC 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 BNPPLC in tax years prior to the Year of Sale and resulting from a Forced Recharacterization (“**Prior Year Depreciation Deductions**”) will be considered “available to BNPPLC” 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 BNPPLC to carry over the Prior Year Depreciation Deductions to the Year of Sale by allowing BNPPLC to carry over net operating losses from the years in which the Prior Year Depreciation Deductions were first available to BNPPLC to the Year of Sale.

(4) After any Forced Recharacterization, BNPPLC 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 BNPPLC does determine that an Unexpected Net Tax Benefit has been realized and the amount thereof, BNPPLC 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 BNPPLC (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 BNPPLC. Therefore, BNPPLC makes no representation that NAI will receive any credits or payments pursuant to this provision after any Forced Recharacterization. Also, the determination by BNPPLC of the amount of any Unexpected Net Tax Benefit will be conclusive absent clear and manifest error, as will any determination by BNPPLC 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 BNPPLC 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 BNPPLC from time to time, NAI must furnish BNPPLC 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 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 (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 BNPPLC's Parent or any Participant of agreeing to make or making, funding or maintaining advances to BNPPLC 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 BNPPLC'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 BNPPLC, NAI must pay, reimburse, indemnify, defend, protect and hold harmless BNPPLC 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

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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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC to NAI and for which NAI is required to reimburse BNPPLC, 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 BNPPLC may direct NAI to assume on behalf of BNPPLC 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 BNPPLC to represent BNPPLC or the applicable Interested Party. In the event NAI fails to promptly comply with any such direction from BNPPLC, BNPPLC 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*. 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:

- 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 BNPPLC; 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 BNPPLC to BNPPLC'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 BNPPLC for which it is entitled to be indemnified pursuant to subparagraph 5(C), BNPPLC will consider in good faith any defenses and strategies proposed by NAI with regard to such claim, provided that NAI has delivered to BNPPLC 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 BNPPLC which involves assertions that apply not only to the transactions contemplated by this Lease, but also to other similar transactions in which BNPPLC has participated, then BNPPLC 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 BNPPLC are not financing arrangements as intended by the parties thereto, and on the basis of such assertions the taxing authorities claim that BNPPLC owes income taxes which are not Excluded Taxes, then BNPPLC 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 BNPPLC under another lease agreement with an indemnity provision comparable to subparagraph 5(C). Also, BNPPLC will not grant to another tenant the right to dictate to BNPPLC the tax position BNPPLC must take in regard to the Property or the Operative Documents, except that BNPPLC 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 BNPPLC.

(7) *Indemnified Parties Other than Landlord*. As a condition to making any indemnity payment for Losses directly to any Interested Party other than BNPPLC 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) <u>Refunds and Credits Related to Losses Paid by NAI</u>.

(1) If BNPPLC 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), BNPPLC will promptly pay to NAI the amount of such refund, plus or minus any net tax benefits or detriments realized by BNPPLC 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 BNPPLC (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 BNPPLC 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, 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. BNPPLC 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 BNPPLC, 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 BNPPLC. (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 BNPPLC 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 BNPPLC 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 BNPPLC; provided, that BNPPLC 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 Participants rights to receive payments in respect of Net Cash Flow and Net Sales Proceeds (both as defined in the Participation Agreement);

(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), BNPPLC 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 BNPPLC pursuant to the preceding sentence (including any removal of Hazardous Substances), the cost thereof will be a demand obligation owing by NAI to BNPPLC. As used in this subparagraph, "**Environmental Cure Period**" means the period ending on the earlier 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 BNPPLC (including the Property) because of such breach, (3) the date that any criminal action is instituted or overtly threatened against BNPPLC 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 BNPPLC's interest in the Property pursuant to the Purchase Agreement for a net 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) Environmental Inspections and Reviews. BNPPLC reserves the right to retain environmental consultants to review any report prepared by NAI or to conduct BNPPLC's own investigation to confirm whether NAI is complying with the requirements of this Paragraph 8. NAI grants to BNPPLC and to BNPPLC'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 BNPPLC 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 BNPPLC for the fees of its environmental consultants and the costs of any such inspections and tests; provided, however, BNPPLC'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 BNPPLC 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) BNPPLC has retained the consultant to satisfy any regulatory requirements applicable to BNPPLC or its Affiliates; (4) BNPPLC 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) BNPPLC has retained the consultant because BNPPLC 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 BNPPLC addressing the issues raised by comments (if any) of BNPPLC 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 BNPPLC 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 BNPPLC 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) BNPPLC may, but will not be obligated to, make proof of loss if not made promptly by NAI after notice from BNPPLC, (b) each insurance company concerned is hereby authorized and directed to make payment for such loss directly to BNPPLC (or, if so instructed by BNPPLC, to NAI) for application as required by Paragraph 10, and (c) BNPPLC 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, 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.

(3) 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 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 BNPPLC 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 BNPPLC by BNPPLC's Parent, by an Affiliate of BNPPLC or by any Participant that is made to compensate BNPPLC for any Losses BNPPLC 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 BNPPLC 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 BNPPLC from NAI or third parties, will be applied as follows:

(1) First, proceeds covered by this Paragraph 10 will be used to reimburse BNPPLC for any reasonably costs and expenses, including Attorneys' Fees, that BNPPLC incurred to collect the proceeds.

(2) Second, the proceeds remaining after such reimbursement to BNPPLC (hereinafter, the "**Remaining Proceeds**") will be applied, as hereinafter more particularly provided, either as a Qualified Prepayment or to reimburse NAI or BNPPLC for the actual out-of-pocket costs of repairing or restoring the Property. Until, however, any Remaining Proceeds received by BNPPLC are applied by BNPPLC as a Qualified Prepayment or applied by BNPPLC to reimburse costs of repairs to or restoration of the Property pursuant to this Paragraph 10, 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 10, BNPPLC 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 BNPPLC to assure the completion of such repair or restoration with available funds. So long as any Lease Balance remains outstanding, however, BNPPLC 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 BNPPLC, it being understood that BNPPLC may retain and, after NAI has completed the applicable repair or restoration and been reimbursed to 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, BNPPLC 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 BNPPLC 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 BNPPLC's actual receipt of the notice, BNPPLC may postpone the date of the Qualified Prepayment to any date not later than five Business Days after BNPPLC's receipt of the notice. In any event, BNPPLC 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 BNPPLC upon request for any such Breakage Costs or Fixed Rate Settlement Amount that BNPPLC 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 BNPPLC) reduce the then current "AS IS" market value by less than $1,000,000 and (in the good faith estimation of BNPPLC) 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 BNPPLC 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, BNPPLC 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 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.

(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 sightly 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 sightly condition and pay to BNPPLC for application as a Qualified Prepayment the amount (if any), as determined by BNPPLC, 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, BNPPLC 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 BNPPLC'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 BNPPLC 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 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 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 earlier 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 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, (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 BNPPLC 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 BNPPLC'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 BNPPLC to any further sale, assignment, transfer, mortgage, pledge or hypothecation of this Lease or any interest of NAI hereunder.

13 **Assignment by BNPPLC**.

(A) Restrictions on Transfers. Except by a Permitted Transfer, BNPPLC will not assign, transfer, mortgage, pledge, encumber or hypothecate this Lease or the other Operative Documents or any interest of BNPPLC 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 BNPPLC hereunder because of BNPPLC'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 BNPPLC or any such assignee for the withholding tax.

(B) Effect of Permitted Transfer or other Assignment by BNPPLC. If by a Permitted Transfer BNPPLC sells or otherwise transfers the Property and assigns to the transferee all of BNPPLC's rights under this Lease and under the other Operative Documents, and if the transferee expressly assumes all of BNPPLC's obligations under this Lease and under the other Operative Documents, then BNPPLC 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 BNPPLC for performance of such obligations.

14 **BNPPLC's Right to Enter and to Perform for NAI** .

(A) Right to Enter. BNPPLC and BNPPLC's representatives may, subject to subparagraph 14(C), enter the Property 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 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, BNPPLC 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 (subject to the limitations set forth in subparagraph ?) 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 (I) 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 BNPPLC'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, BNPPLC may notify NAI of BNPPLC'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) BNPPLC 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) BNPPLC, 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, BNPPLC'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 BNPPLC 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 BNPPLC'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, BNPPLC 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 earlier of (i) thirty days after BNPPLC 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 BNPPLC, except and to the extent (1) expressly required by other terms and conditions of the Operative Documents, or (2) requested by BNPPLC in connection with any inspection of the Property pursuant to the various provisions hereof and, in BNPPLC's reasonably determination, required to allow BNPPLC 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 BNPPLC 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 BNPPLC at the time of any on-site visit to the Property or (2) otherwise delivered to BNPPLC 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. BNPPLC will endeavor in good faith to use reasonable precautions to keep confidential any proprietary information that BNPPLC 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 BNPPLC hereunder. This provision will not, however, render BNPPLC 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 BNPPLC 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 BNPPLC so long as BNPPLC 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 BNPPLC or BNPPLC'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 BNPPLC not, to BNPPLC'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 (vii) that are reasonably believed by BNPPLC to be necessary or helpful to the determination or enforcement of any contractual or other rights which BNPPLC has or may have against NAI or its Affiliates or which BNPPLC has or may have concerning the Property (provided, that BNPPLC 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 15, 2005.

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 15, 2005]

NETWORK APPLIANCE, INC., a Delaware corporation

By: /s/ Steven Gomo
Steven Gomo, Chief Financial Officer

Lease Agreement — Signature Page

<u>Exhibit A</u>

Legal Description

Parcel 1, as shown on that certain Parcel Map which filed for record in the office of the recorder of the County of Santa Clara, State of California on July 7, 1994, in Book 657 of Parcel Maps, Page 9.

APN: 110-32-6
ARB: 110-3-x65

TOGETHER WITH, easements appurtenant to Parcel 1 as described in <u>Exhibit A</u> 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 BNPPLC 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 BNPPLC, 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC, 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 BNPPLC, 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 BNPPLC 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.

BNPPLC 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 BNPPLC desire that more than one sale or other disposition of the Mortgaged Property be conducted, BNPPLC 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 BNPPLC 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 BNPPLC in, any part of the Security not sold, until all of the indebtedness secured hereby has been fully paid and satisfied. In the event BNPPLC 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 BNPPLC and Trustee, their agents and counsel, and to pay all expenses, liabilities and advances made or incurred by BNPPLC and Trustee (or either of them) in connection with such sale or sale, together with interest on all such advances made by BNPPLC 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 BNPPLC. In the event a foreclosure hereunder shall be commenced by the Trustee, or his substitute or successor, BNPPLC 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 BNPPLC should institute a suit for the collection of the Secured Obligations and for the foreclosure of this instrument, BNPPLC 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.

BNPPLC AS PURCHASER

BNPPLC 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 BNPPLC 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 BNPPLC.

UNIFORM COMMERCIAL CODE REMEDIES

Upon the occurrence of an Event of Default, BNPPLC 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 BNPPLC, including the sending of notices and the conduct of the sale, but in the name and on behalf of BNPPLC.

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,, BNPPLC 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 BNPPLC, but nothing herein is to be construed to deprive BNPPLC 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 BNPPLC in connection with any such receivership shall be a demand obligation owing by NAI to BNPPLC and shall bear interest from the date of making such advancement by BNPPLC 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.

BNPPLC 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, BNPPLC 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 BNPPLC 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, appraisement, 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 BNPPLC 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 BNPPLC 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.

COMMON DEFINITIONS
AND PROVISIONS AGREEMENT

between

BNP PARIBAS LEASING CORPORATION

and

NETWORK APPLIANCE, INC.

Dated as of December 15, 2005

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COMMON DEFINITIONS
AND PROVISIONS AGREEMENT

This COMMON DEFINITIONS AND PROVISIONS AGREEMENT (this "**Agreement**"), dated as of December 15, 2005 (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 Common Definitions and Provisions Agreement, NAI and BNPPLC are executing the Closing Certificate (as defined below), the Ground Lease (as defined below), the Lease (as defined below), the Construction Management Agreement (as defined below) and the Purchase Agreement (as defined below), all of which concern NAI or the Property (as defined below). Each of the Closing Certificate, the Ground Lease, the Lease, the Construction Management Agreement and the Purchase Agreement (together with this Common Definitions and Provisions Agreement, the "**Operative Documents**") are intended to create separate and independent obligations upon the parties thereto. However, NAI and BNPPLC intend that all of the Operative Documents share certain consistent definitions and other miscellaneous provisions. To that end, the parties are executing this Common Definitions and Provisions Agreement and incorporating it by reference into each of the other Operative Documents.

AGREEMENTS

ARTICLE I — LIST OF DEFINED TERMS

Unless a clear contrary intention appears, the following terms will have the respective indicated meanings as used herein and in the other Operative Documents:

"**97-10/Event**" has the meaning indicated in the Construction Management Agreement.

"**97-10/Maximum Permitted Prepayment**" has the meaning indicated in the Construction Management Agreement .

"**97-10/Prepayment**" has the meaning indicated in the Construction Management Agreement.

"**97-10/Project Costs**"has the meaning indicated in the Construction Management Agreement.

"**97-10/Pronouncement**" has the meaning indicated in the Construction Management Agreement.

“**ABR**” means, for any day, a fluctuating rate of interest per annum (rounded upwards, if necessary, to the next 1/100th of 1%) equal to the higher of (a) the Prime Rate in effect on such day and (b) the Fed Funds Rate in effect one day prior to such day plus 1/4 of 1% per annum. For any period (including any Base Rent Period), “ABR” means the average of the ABR for each day during such period.

Notwithstanding the foregoing, for purposes of computing the Effective Rate for the first short Construction Period that ends on the first day of December, 2005, ABR will equal the average of the daily “cost of funds” rates that BNPPLC’s Parent charges internally to its Houston Branch for the overnight use of funds on each day of such period.

“**ABR Period Election**” means an election to have the Effective Rate for any Construction Period or Base Rent Period calculated by reference to the ABR, rather than by reference to LIBOR or a Fixed Rate. The first Construction Period will be subject to an ABR Period Election, and NAI may (subject to the limitations and qualifications set forth in this definition) make any subsequent Construction Period or Base Rent Period subject to an ABR Period Election by a notice given to BNPPLC in the form attached as Annex 1 at least five Business Days prior to the commencement of such Construction Period or Base Rent Period. After an ABR Period Election becomes effective, it will remain in effect for all subsequent Construction Periods or Base Rent Periods until the Fixed Rate Lock Date for any Fixed Rate Lock or a different election is made in accordance with the provisions of this definition and the definitions of LIBOR Period Election. In no event will changes in any ABR Period Election or LIBOR Period Election become effective except upon the commencement of a new Construction Period or Base Rent Period. (For purposes of the Operative Documents, a Base Rent Period Election for any Construction Period or Base Rent Period will also be considered in effect on the Advance Date, Base Rent Commencement Date or Base Rent Date upon which such period begins.)

“**Active Negligence**” of any Person means, and is limited to, the negligent conduct on the Property (and not mere omissions) by such Person or by others acting and authorized to act on such Person’s behalf in a manner that proximately causes actual bodily injury or property damage for which NAI does not carry (and is not obligated by the Construction Management Agreement or the Lease to carry) insurance. “**Active Negligence**” will not include (1) any negligent failure of BNPPLC to act when the duty to act would not have been imposed but for BNPPLC’s status as owner of any interest in the Land, the Improvements or any other Property or as a party to the transactions described in the Lease or the other Operative Documents, (2) any negligent failure of any other Interested Party to act when the duty to act would not have been imposed but for such party’s contractual or other relationship to BNPPLC or participation or facilitation in any manner, directly or indirectly, of the transactions described in the Lease or other Operative Documents, or

(3) the exercise in a lawful manner by BNPPLC (or any party lawfully claiming through or under BNPPLC) of any right or remedy provided in or under the Lease or the other Operative Documents.

"**Additional Rent**" has the meaning indicated in subparagraph 3(F) of the Lease.

"**Adjusted EBITDA**" has the meaning indicated in subparagraph 3(A) of the Closing Certificate.

"**Administrative Fees**" means the fees identified as such in subparagraph 3(E) of the Lease and subparagraph 3(A) of the Construction Management Agreement.

"**Advance Date**" means, regardless of whether any Construction Advance is actually made on such date, the first Business Day of every calendar month, beginning with the first Business Day in December, 2005 and continuing regularly thereafter to and including the Base Rent Commencement Date, which will be the last Advance Date.

"**Affiliate**" of any Person means any other Person controlling, controlled by or under common control with such Person. For purposes of this definition, the term "control" when used with respect to any Person means the power to direct the management of policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise, and the terms "controlling" and "controlled" have meanings correlative to the foregoing.

"**After Tax Basis**" has the meaning indicated in subparagraph 5(C)(1) of the Lease.

"**Applicable Laws**" means any or all of the following, to the extent applicable to BNPPLC, NAI, the Property or the Operative Documents, after giving effect to the contractual choice of law provisions in the Operative Documents: restrictive covenants; zoning ordinances and building codes; flood disaster laws; health, safety and environmental laws and regulations; the Americans with Disabilities Act and other laws pertaining to disabled persons; and other laws, statutes, ordinances, rules, permits, regulations, orders, determinations and court decisions.

"**Applicable Purchaser**" means any third party designated by NAI to purchase BNPPLC's interest in the Property and in any Escrowed Proceeds as provided in the Purchase Agreement.

"**Arrangement Fee**" has the meaning indicated in the Construction Management Agreement.

"**Attorneys' Fees**" means the expenses and reasonable fees of counsel to the parties incurring the same, including costs or expenses of in-house counsel (whether or not accounted for as general overhead or administrative expenses) and printing, photostating, duplicating and other expenses, air freight charges, and fees billed for law clerks, paralegals, librarians and others not admitted to the bar but performing services under the supervision of an attorney. Such terms will also include all such expenses and reasonable fees incurred with respect to appeals, arbitrations and bankruptcy proceedings, and whether or not any manner of proceeding is brought with respect to the matter for which such fees and expenses were incurred.

"**Balance of Unpaid Construction Period Losses**" has the meaning indicated in the Purchase Agreement.

"**Banking Rules Change**" means either: (1) the introduction of or any change after the Effective Date (other than any change by way of imposition or increase of reserve requirements included in the Eurodollar Rate Reserve Percentage) in any law or regulation applicable to BNPPLC, BNPPLC's Parent or any Participant, or in the generally accepted interpretation by the institutional lending community of any such law or regulation, or in the interpretation of any such law or regulation asserted by any regulator, court or other governmental authority (other than any change by way of imposition or increase of reserve requirements included in the Eurodollar Rate Reserve Percentage) or (2) the compliance by BNPPLC, BNPPLC's Parent or any Participant with any new guideline or new request issued after the Effective Date from any central bank or other governmental authority (whether or not having the force of law).

"**Base Rent**" means the rent payable by NAI pursuant to subparagraph 3(A) of the Lease.

"**Base Rent Commencement Date**" means the first day that is both the first Business Day of a calendar month and more than fifteen days after the Completion Date.

"**Base Rent Date**" means a date upon which Base Rent must be paid under the Lease, all of which dates will be the first Business Day of a calendar month. The *first* Base Rent Date will be determined as follows:

a) If an ABR Period Election or a LIBOR Period Election of one month is in effect on the Base Rent Commencement Date, then the first Business Day of the *first* calendar month following the Base Rent Commencement Date will be the first Base Rent Date.

b) If a LIBOR Period Election of three months or six months is in effect on the Base Rent Commencement Date, then the first Business Day of the *third* calendar month following the Base Rent Commencement Date will be the first Base Rent Date.

Each *successive Base Rent Date after the first Base Rent Date* will be the first Business Day of the first or third calendar month following the calendar month which includes the preceding Base Rent Date, determined as follows:

(1) If an ABR Period Election or a LIBOR Period Election of one month is in effect on a Base Rent Date, or if a Fixed Rate Lock commences or continues on a Base Rent Date, then the first Business Day of the *first* calendar month following such Base Rent Date will be the next following Base Rent Date.

(2) If a LIBOR Period Election of three months or longer is in effect on a Base Rent Date, then the first Business Day of the *third* calendar month following such Base Rent Date will be the next following Base Rent Date.

Thus, for example, if the Base Rent Commencement Date falls on the first Business Day of September, 2006 and a LIBOR Period Election of three months commences on the Base Rent Commencement Date, then the first Base Rent Date will be the first Business Day of December, 2006.

"**Base Rent Period**" means a period for which Base Rent must be paid under the Lease, each of which periods will correspond to the ABR Period Election or LIBOR Period Election for the period (except when a Fixed Rate Lock continues in effect). The first Base Rent Period will begin on and include the Base Rent Commencement Date, and each successive Base Rent Period will begin on and include the Base Rent Date upon which the preceding Base Rent Period ends. Each Base Rent Period, including the first Base Rent Period, will end on but not include the first or second Base Rent Date after the Base Rent Date upon which such period began, determined as follows:

(1) If an ABR Period Election or a LIBOR Period Election of one month or three months is in effect for a Base Rent Period, or if a Fixed Rate Lock commences or continues on the first day of the Base Rent Period, then such Base Rent Period will end on the *first* Base Rent Date after the Base Rent Date upon which such period began.

(2) If a LIBOR Period Election of six months is in effect for a Base Rent Period, then such Base Rent Period will end on the *second* Base Rent Date after the Base Rent Date upon which such period began.

The determination of Base Rent Periods can be illustrated by two examples:

1) If NAI makes a LIBOR Period Election of three months for a hypothetical Base Rent Period beginning on the first Business Day in January, 2007, then such Base Rent Period will end on but not include the first Base Rent Date after it begins; that is, such Base Rent Period will end on the first Business Day in April, 2007, the third calendar month after January, 2007.

2) If, however, NAI makes a LIBOR Period Election of six months for the hypothetical Base Rent Period beginning the first Business Day in January, 2007, then

such Base Rent Period will end on but not include the second Base Rent Date after it begins; that is, the first Business Day in July, 2007.

"**BNPPLC**" means BNPPLC Leasing Corporation, a Delaware corporation.

"**BNPPLC's Parent**" means BNP Paribas, a bank organized and existing under the laws of France, and any successors of such bank.

"**Breakage Costs**" means any and all costs, losses or expenses incurred or sustained by BNPPLC's Parent (as a Participant or otherwise) or any Participant, for which BNPPLC's Parent or the Participant requests reimbursement from BNPPLC, because of:

(1) the resulting liquidation or redeployment of deposits or other funds that were used to make or maintain Funding Advances upon application of a Qualified Prepayment or upon any sale of the Property pursuant to the Purchase Agreement, if such application or sale occurs on any day other than the last day of a Construction Period or Base Rent Period; or

(2) the resulting liquidation or redeployment of deposits or other funds that were reserved to provide a Construction Advance requested by NAI, if and when the Construction Advance is not made as anticipated, either because NAI declined to accept the Construction Advance for any reason or because NAI failed to satisfy any of the conditions to such Construction Advance specified in the Construction Management Agreement; or

(3) the resulting liquidation or redeployment of deposits or other funds that were used to make or maintain Funding Advances upon the acceleration of the end of any Construction Period or Base Rent Period because of an acceleration of the Designated Sale date as described in clauses (2) or (3) of the definition thereof.

Breakage Costs will include, for example, losses on Funding Advances maintained by BNPPLC's Parent or any Participant which are attributable to any decline in LIBOR as of the effective date of any application described in the clause (1) preceding, as compared to the LIBOR used to determine the Effective Rate then in effect. Each determination of Breakage Costs by BNPPLC's Parent or by any Participant, as applicable, will be conclusive and binding upon NAI in the absence of clear and demonstrable error.

"**Break Even Price**" has the meaning indicated in the Purchase Agreement.

"**Business Day**" means any day that is (1) not a Saturday, Sunday or day on which commercial banks are generally closed or required to be closed in New York City, New York, and (2) a day on which dealings in deposits of dollars are transacted in the London interbank market;provided, that if such dealings are suspended indefinitely for any reason, “Business Day” will mean any day described in clause (1).

“**Capital Adequacy Charges**” means any additional amounts BNPPLC’s Parent or any Participant requests BNPPLC to pay as compensation for an increase in required capital as provided in subparagraph 5(B)(2) of the Lease.

“**Carrying Costs**” has the meaning indicated in the Construction Management Agreement.

“**Closing Certificate**” means the Closing Certificate and Agreement dated as of the Effective Date executed by NAI and BNPPLC, as such Closing Certificate and Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Closing Letter**” means the letter agreement dated as of the Effective Date between BNPPLC and NAI confirming the amount of the Initial Advance and the Transactions Expenses paid from the Initial Advance.

“**Code**” means the Internal Revenue Code of 1986, as amended.

“**Commitment Fees**” has the meaning indicated in the Construction Management Agreement.

“**Common Definitions and Provisions Agreement**” means this Agreement, which is incorporated by reference into each of the other Operative Documents, as this Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Completion Date**” has the meaning indicated in the Construction Management Agreement.

“**Completion Notice**” has the meaning indicated in the Construction Management Agreement.

“**Constituent Documents**” of any entity means the organizational documents pursuant to which such entity was created and is governed, such as the articles of incorporation and bylaws of a corporation, the articles of organization and regulations of a limited liability company or the partnership agreement of a partnership.

“**Construction Advances**” has the meaning indicated in the Construction Management Agreement.

“**Construction Advance Request**” has the meaning indicated in the Construction Management Agreement.

“**Construction Allowance**” has the meaning indicated in the Construction Management Agreement.

“**Construction Management Agreement**” means the Construction Management Agreement dated as of the Effective Date between BNPPLC and NAI, as such Construction Management Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Construction Period**” means each successive period of approximately one month, with the first Construction Period beginning on and including the Effective Date and ending on but not including the first Advance Date. Each successive Construction Period after the first Construction Period will begin on and include the day on which the preceding Construction Period ends and will end on but not include the next following Advance Date, until the last Construction Period, which will end on but not include the earlier of the Base Rent Commencement Date or any Designated Sale Date upon which NAI or any Applicable Purchaser purchases BNPPLC’s interest in the Property pursuant to the Purchase Agreement.

“**Construction Project**” has the meaning indicated in the Construction Management Agreement.

“**Covered Construction Period Losses**” has the meaning indicated in the Construction Management Agreement.

“**Default**” means any event or circumstance which constitutes, or which would with the passage of time or the giving of notice or both (if not cured within any applicable cure period) constitute, an Event of Default.

“**Default Rate**” means, a floating per annum rate equal to two percent (2%) above ABR, except that for purposes of computing interest accruing for any period that commences thirty or more days after the Designated Sale Date on any 97-10/Prepayment, Base Rent or Supplemental Payment that has become due, but remains to be paid to BNPPLC by NAI, the Default Rate will mean a floating per annum rate equal to five percent (5%) above ABR. Notwithstanding the foregoing, in no event will the “Default Rate” at any time exceed the maximum interest rate permitted by Applicable Laws.

“**Defective Work**” has the meaning indicated in the Construction Management Agreement.

"**Designated Sale Date**" means the earlier of:

(1) the first Business Day of July, 2012; or

(2) any Business Day designated as the "Designated Sale Date" for purposes of this Agreement and the other Operative Documents in an irrevocable, unconditional notice given by NAI to BNPPLC before any 97-10/Event has occurred; provided, that if the Business Day so designated by NAI as the Designated Sale Date is not at least thirty days after the date of such notice, the notice will be of no effect for purposes of this definition; and provided, further, that to be effective, any such notice must include an irrevocable waiver by NAI of any remaining right it may have under subparagraph 6(B) of the Purchase Agreement to terminate the Supplemental Payment Obligation; or

(3) any Business Day designated as the "Designated Sale Date" for purposes of this Agreement and the other Operative Documents in a notice given by BNPPLC to NAI:

• after an Event of Default and after the Completion Date; or

• after a 97-10/Event or after BNPPLC's receipt of a Pre-lease Force Majeure Notice from NAI or; or

• following any change in the zoning or other Applicable Laws after the Completion Date affecting the permitted use or development of the Property that, in BNPPLC's judgment, materially reduces the value of the Property; or

• following any discovery of conditions or circumstances on or about the Property after the Completion Date, such as the presence of an endangered species, which are likely to substantially impede the use or development of the Property and thereby, in BNPPLC's judgment, materially reduce the value of the Property; or

(4) any date upon which the Lease terminates pursuant to subparagraph 1(B) or subparagraph 1(C) of the Lease.

"**Effective Date**" means December 15, 2005.

"**Effective Rate**" means, for each Construction Period and for each Base Rent Period, a per annum rate determined as follows:

(1) In the case of any Construction Period or Base Rent Period subject to a LIBOR Period Election, the Effective Rate will equal the rate per annum determined by dividing (A) LIBOR for such Construction Period or Base Rent Period, by (B) one

hundred percent (100%) minus the Eurodollar Rate Reserve Percentage for such Construction Period or Base Rent Period.

(2) In the case of any Construction Period or Base Rent Period that is not subject to a LIBOR Period Election, the Effective Rate will equal the ABR for such Construction Period or Base Rent Period.

(3) Notwithstanding the foregoing, for any Base Rent Period that begins on or after the Fixed Rate Lock Date applicable to a Fixed Rate Lock and that ends before or on the date such Fixed Rate Lock is terminated as provided in subparagraph 3(C) of the Lease, the Effective Rate will equal the Fixed Rate.

So long as any LIBOR Period Election remains in effect, as LIBOR or the Eurodollar Rate Reserve Percentage changes from Construction Period to Construction Period or from Base Rent Period to Base Rent Period, the Effective Rate will be automatically increased or decreased, as the case may be, without prior notice to NAI. Also, during any period when no LIBOR Period Election or Fixed Rate Lock is in effect, as the ABR changes from Construction Period to Construction Period or from Base Rent Period to Base Rent Period, the Effective Rate will be automatically increased or decreased, as the case may be, without prior notice to NAI.

If for any reason BNPPLC determines that it is impossible or unreasonably difficult to determine the Effective Rate with respect to a given Construction Period or Base Rent Period in accordance with the foregoing, then the "**Effective Rate**" for that Construction Period or Base Rent Period will equal any published index or per annum interest rate determined in good faith by BNPPLC to be comparable to LIBOR at the beginning of the first day of that period. A comparable interest rate might be, for example, the then existing yield on short term United States Treasury obligations (as compiled by and published in the then most recently published United States Federal Reserve Statistical Release H.15(519) or its successor publication), plus or minus a fixed adjustment based on BNPPLC's comparison of past eurodollar market rates to past yields on such Treasury obligations.

"**Eligible Financial Institution**" means (a) a commercial bank organized under the laws of the United States, or any State thereof or the District of Columbia, and having total assets in excess of $5,000,000,000; (b) a commercial bank organized under the laws of any other country which is a member of the Organization for Economic Cooperation and Development ("OECD") or has concluded special lending arrangements with the International Monetary Fund associated with its General Arrangements to Borrow, or a political subdivision of any such country, and having total assets in excess of $5,000,000,000; provided, that such bank is acting through a branch or agency located in the United States; (c) the central bank of any country which is a member of the OECD; and (d) a finance company, insurance company or other financial institution (whether a corporation, partnership or other entity, but excluding any savings and loan association) which is engaged in making, purchasing or otherwise investing in commercial loans in the ordinary course of its business, and having total assets in excess of $5,000,000,000; provided, however, that in no event shall any bank or other Person qualify as an Eligible Financial Institution at any time when it has outstanding obligations with a credit rating less than investment grade from Standard & Poor's, a division of the McGraw-Hill Companies, or Moody's Investors Service, Inc. or another nationally recognized rating service.

"**Environmental Cutoff Date**" means the later of the dates upon which (i) the Lease terminates or NAI's interests in the Property are sold at foreclosure as provided in Exhibit B attached to the Lease, or (ii) NAI surrenders possession and control of the Property and ceases to have interest in the Land or Improvements or rights with respect thereto under any of the Operative Documents.

"**Environmental Laws**" means any and all existing and future Applicable Laws pertaining to safety, health or the environment, or to Hazardous Substances or Hazardous Substance Activities, including the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, and the Resource Conservation and Recovery Act of 1976, as amended by the Used Oil Recycling Act of 1980, the Solid Waste Disposal Act Amendments of 1980, and the Hazardous and Solid Waste Amendments of 1984.

"**Environmental Losses**" means Losses suffered or incurred by BNPPLC or any other Interested Party, directly or indirectly, relating to or arising out of, based on or as a result of any of the following: (i) any Hazardous Substance Activity that occurs or is alleged to have occurred on or prior to the Environmental Cutoff Date; (ii) any violation of any applicable Environmental Laws relating to the Land or the Property or to the ownership, use, occupancy or operation thereof that occurs or is alleged to have occurred in whole or in part on or prior to the Environmental Cutoff Date; (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 that occurs or is alleged to have occurred in whole or in part on or prior to the Environmental Cutoff Date; or (iv) any claim, demand, cause of action or investigation, or any action or other proceeding, whether meritorious or not, brought or asserted against any Interested Party 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 definition or any allegation of any such matters. For purposes of determining whether Losses constitute "Environmental Losses," as the term is used in the Lease, any actual or alleged Hazardous Substance Activity or violation of Environmental Laws relating to the Land or the Property will be presumed to have occurred prior to the Environmental Cutoff Date unless NAI establishes by clear and convincing evidence to the contrary that the relevant Hazardous Substance Activity or violation of Environmental Laws did not occur or commence prior to the Environmental Cutoff Date.

"**Environmental Report**" means, collectively, the following reports, which were provided by NAI to BNPPLC prior to the Effective Date: (1) Phase I Environmental Site Assessment for 1330-1350 Geneva and 1345-1347 Crossman Avenue, Sunnyvale, California, dated November 1999 by Romig Consulting Engineers, and (2).Phase I Environmental Site Assessment for 1260 Crossman Avenue Property, Sunnyvale, California, dated September 1999 by Romig Consulting Engineers.

"**ERISA**" means the Employee Retirement Income Security Act of 1974, as amended from time to time, together with all rules and regulations promulgated with respect thereto.

"**ERISA Affiliate**" means any Person who for purposes of Title IV of ERISA is a member of NAI's controlled group, or under common control with NAI, within the meaning of Section 414 of the Internal Revenue Code, and the regulations promulgated and rulings issued thereunder.

"**ERISA Termination Event**" means (a) the occurrence with respect to any Plan of (1) a reportable event described in Sections 4043(b)(5) or (6) of ERISA or (2) any other reportable event described in Section 4043(b) of ERISA other than a reportable event not subject to the provision for thirty-day notice to the Pension Benefit Guaranty Corporation pursuant to a waiver by such corporation under Section 4043(a) of ERISA, or (b) the withdrawal of NAI or any ERISA Affiliate from a Plan during a plan year in which it was a "substantial employer" as defined in Section 4001(a)(2) of ERISA, or (c) the filing of a notice of intent to terminate any Plan or the treatment of any Plan amendment as a termination under Section 4041 of ERISA, or (d) the institution of proceedings to terminate any Plan by the Pension Benefit Guaranty Corporation under Section 4042 of ERISA, or (e) any other event or condition which might constitute grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Plan.

"**Escrowed Proceeds**" means, subject to the exclusions specified in the next sentence, any money that is received by BNPPLC from time to time during the Term (and any interest earned thereon) from any party (1) under any property insurance policy as a result of damage to the Property, (2) as compensation for any restriction imposed by any Governmental Authority upon the use or development of the Property or for the condemnation of the Property or any portion thereof (including any indirect condemnation by means of a taking of any of the Land or appurtenant easements), (3) because of any judgment, decree or award for physical damage to the Property or (4) as compensation under any title insurance policy or otherwise as a result of any title defect or claimed title defect with respect to the Property; provided, however, in determining the amount of "Escrowed Proceeds" there will be deducted all expenses and costs of every type, kind and nature (including Attorneys' Fees) incurred by BNPPLC to collect such proceeds. Notwithstanding the foregoing, "Escrowed Proceeds" will not include (A) any payment to BNPPLC by a Participant or an Affiliate of BNPPLC that is made to compensate BNPPLC for the Participant's or Affiliate's share of any Losses BNPPLC may incur as a result of any of the events described in the preceding clauses (1) through (4), (B) any money or proceeds that have been applied as a Qualified Prepayment or to pay any Breakage Costs, Fixed Rate Settlement Amount or other costs incurred in connection with a Qualified Prepayment, (C) any money or proceeds that, after no less than ten days notice to NAI, BNPPLC returns or pays to a third party because of BNPPLC's good faith belief that such return or payment is required by law, (D) any money or proceeds paid by BNPPLC to NAI or offset against any amount owed by NAI, or (E) any money or proceeds used by BNPPLC in accordance with the Lease for repairs or the restoration of the Property or to obtain development rights or the release of restrictions that will inure to the benefit of future owners or occupants of the Property. Until Escrowed Proceeds are paid to NAI pursuant to Paragraph 10 of the Lease, transferred to a purchaser under the Purchase Agreement as therein provided or applied as a Qualified Prepayment or as otherwise described in the preceding sentence, BNPPLC will keep the same deposited in one or more interest bearing accounts, and all interest earned on such account will be added to and made a part of Escrowed Proceeds.

"**Established Misconduct**" of a Person means, and is limited to:

(1) if the Person is bound by the Operative Documents or the Participation Agreement, conduct of such Person that constitutes a breach by it of the express provisions of the Operative Documents or the Participation Agreement, as applicable, and that continues beyond any period for cure provided therein, as determined in or as a necessary element of a final judgment rendered against such Person by a court with jurisdiction to make such determination, and

(2) conduct of such Person or its Affiliates that has been determined to constitute willful misconduct or Active Negligence in or as a necessary element of a final judgment rendered against such Person by a court with jurisdiction to make such determination.

In no event, however, will Established Misconduct include actions of any Person undertaken in good faith to mitigate Losses that such Person may suffer because of a breach or repudiation by NAI of any of the Operative Documents. Further, negligence other than Active Negligence will not in any event constitute Established Misconduct. For purposes of this definition, "conduct of a Person" will consist of (1) the conduct of any employee of that Person to the extent (and only to the extent) that the employee is acting within the scope of his employment by that Person, and (2) the conduct of an agent of that Person (such as an independent environmental consultant engaged by that Person), but only to the extent that the agent is (a) acting within the scope of the authority granted to him by such Person, and (b) not acting with the consent or approval of or at the request of or under the direction of NAI or NAI's Affiliates, employees or agents. Established Misconduct of one Interested Party will not be attributed to a second Interested Party unless the second Interested Party is an Affiliate of the first, and it is understood that BNPPLC has not been authorized, and nothing in the Participation Agreement will be construed as authorizing BNPPLC, to act as an "agent" for any Participant as the term is used in this definition.

“**Eurocurrency Liabilities**” has the meaning indicated in Regulation D of the Board of Governors of the Federal Reserve System, as in effect from time to time.

“**Eurodollar Rate Reserve Percentage**” means, for purposes of determining the Effective Rate for any Construction Period or Base Rent Period, the reserve percentage applicable two Business Days before the first day of such period under regulations issued from time to time by the Board of Governors of the Federal Reserve System (or any successor) for determining the maximum reserve requirement (including any emergency, supplemental or other marginal reserve requirement) for BNPPLC’s Parent with respect to liabilities or deposits consisting of or including Eurocurrency Liabilities (or with respect to any other category or liabilities by reference to which LIBOR is determined) having a term comparable to such period.

“**Event of Default**” means any of the following:

(A) NAI fails to pay when due any installment of Base Rent or Administrative Fees required by the Lease, and such failure continues for three Business Days after NAI is notified in writing thereof.

(B) NAI fails to pay the full amount of any 97-10/Prepayment when due as provided in the Construction Management Agreement or fails to pay the full amount of any Supplemental Payment as provided in the Purchase Agreement on the Designated Sale Date.

(C) NAI fails to pay when first due any amount required by the Operative Documents (other than Base Rent or Administrative Fees required as provided in the Lease, any 97-10/Prepayment required as provided in the Construction Management Agreement or any Supplemental Payment required as provided in the Purchase Agreement) and such failure continues for ten Business Days after NAI is notified thereof.

(D) NAI fails to cause any representation or warranty of NAI contained in any of the Operative Documents that was false or misleading in any material respect when made to be made true and not misleading (other than as described in the other clauses of this definition), or NAI fails to comply with any provision of the Operative Documents (other than as described in the other clauses of this definition), and in either case does not cure such failure prior to the earlier of (A) thirty days after notice thereof is given to NAI or (B) the date any writ or order is issued for the levy or sale of any property owned by BNPPLC (including the Property) or any criminal prosecution is instituted or overtly threatened 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 prosecution is instituted or overtly threatened, the period within which such failure may be cured by NAI will be extended for a further period (not to exceed an additional one hundred twenty days) as is necessary for the curing thereof with diligence, if (but only if) (x) such failure is susceptible of cure but cannot with reasonable diligence be cured within such thirty day period, (y) NAI promptly commences to cure such failure and thereafter continuously prosecutes the curing thereof with reasonable diligence and (z) the extension of the period for cure will not, in any event, cause the period for cure to extend to or beyond the Designated Sale Date.

(E) NAI abandons any material part of the Property.

(F) NAI or any Subsidiary of NAI fails to pay any principal of or premium or interest on any of its Indebtedness which is outstanding in a principal amount of at least $25,000,000 when the same becomes due and payable (whether by scheduled maturity, required prepayment, acceleration, demand or otherwise), and such failure continues after the applicable grace period, if any, specified in the agreement or instrument relating to such Indebtedness; or any other event occurs or condition exists under any agreement or instrument relating to any such Indebtedness and continues after the applicable grace period, if any, specified in such agreement or instrument, if the effect of such event or condition is to accelerate the maturity of such Indebtedness; or any such Indebtedness is declared by the creditor to be due and payable, or required to be prepaid (other than by a regularly scheduled required prepayment), redeemed, purchased or defeased, or an offer to prepay, redeem, purchase or defease such Indebtedness is required to be made, in each case prior to the stated maturity thereof.

(G) NAI or any Subsidiary of NAI is generally not paying its debts as such debts become due, or admits in writing its inability to pay its debts generally, or makes a general assignment for the benefit of creditors; or any proceeding is instituted by or against NAI or any Subsidiary of NAI seeking to adjudicate it a bankrupt or insolvent, or seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency or reorganization or relief of debtors, or seeking the entry of an order for relief or the appointment of a receiver, trustee, custodian or other similar official for it or for any substantial part of its property and, in the case of any such proceeding instituted against it (but not instituted by it), either such proceeding remains undismissed or unstayed for a period of sixty consecutive days, or any of the actions sought in such proceeding (including the entry of an order for relief against, or the appointment of a receiver, trustee, custodian or other similar official for, it or for any substantial part of its property) occurs; or NAI or any Subsidiary of NAI takes any corporate action to authorize any of the actions set forth above in this clause.

(H) Any order, judgment or decree is entered in any proceedings against NAI or any of NAI's Subsidiaries decreeing its dissolution and such order, judgment or decree remains unstayed and in effect for more than sixty days.

(I) Any order, judgment or decree is entered in any proceedings against NAI or any of NAI's Subsidiaries decreeing a divestiture of any of assets that represent a substantial part, or the divestiture of the stock of any of NAI's Subsidiaries whose assets represent a substantial part, of the total assets of NAI and its Subsidiaries (determined on a consolidated basis in accordance with GAAP) or which requires the divestiture of assets, or stock of any of NAI's Subsidiaries, which have contributed a substantial part of the net income of NAI and its Subsidiaries (determined on a consolidated basis in accordance with GAAP) for any of the three fiscal years then most recently ended, and such order, judgment or decree remains unstayed and in effect for more than sixty days.

(J) A judgment or order for the payment of money in an amount (not covered by insurance) which exceeds $25,000,000 is rendered against NAI or any of NAI's Subsidiaries and either (i) enforcement proceedings is commenced by any creditor upon such judgment, or (ii) within thirty days after the entry thereof, such judgment or order is not discharged or execution thereof stayed pending appeal, or within thirty days after the expiration of any such stay, such judgment is not discharged.

(K) Any ERISA Termination Event occurs that BNPPLC determines in good faith would constitute grounds for a termination of any Plan or for the appointment by the appropriate United States district court of a trustee to administer any Plan and such ERISA Termination Event is continuing thirty days after notice to such effect is given to NAI by BNPPLC, or any Plan is terminated, or a trustee is appointed by a United States district court to administer any Plan, or the Pension Benefit Guaranty Corporation institutes proceedings to terminate any Plan or to appoint a trustee to administer any Plan.

(L) NAI enters into any transaction which would cause any of the Operative Documents or any other document executed in connection herewith (or any exercise of BNPPLC's rights hereunder or thereunder) to constitute a non-exempt prohibited transaction under ERISA.

(M) NAI fails to comply with the financial covenants set forth in subparagraph 3(B) of the Closing Certificate.

"**Excluded Taxes**" means:

(A) taxes upon or measured by *net* income to the extent such taxes are payable in respect of Base Rent or other Qualified Income Payments;

(B) transfer or change of ownership taxes assessed because of BNPPLC's transfer or conveyance to any third party of any rights or interest in the Improvements Lease, the Purchase Agreement or the Property (other than any such taxes assessed because of any Permitted Transfer under clauses (1), (4) or (5) of the definition of Permitted Transfer in this Agreement);

(C) federal, state and local income taxes upon any amounts paid as reimbursement for or to satisfy Losses incurred by BNPPLC or any Participant to the extent, but only to the extent, such taxes are offset by a corresponding reduction of BNPPLC's or the applicable Participant's income taxes which are not otherwise subject to reimbursement or indemnification by NAI because of BNPPLC's or such Participant's deduction of the reimbursed Losses from its taxable income or because of any tax credits attributable thereto;

(D) income taxes that are (i) payable by BNPPLC in respect of any Qualified Prepayment or any net sales proceeds paid to BNPPLC upon a sale of the Property because of Forced Recharacterization as described in subparagraph 4(C)(3) of the Lease, and (ii) offset in the same taxable period by a reduction in the taxes of BNPPLC which are not otherwise subject to reimbursement or indemnification by NAI resulting from depreciation deductions or other tax benefits available to BNPPLC only because of the refusal of the tax authorities to treat the Lease and other Operative Documents as a financing arrangement;

(E) any withholding taxes that subparagraph 13(A) of the Lease excuses NAI from paying or requires BNPPLC to pay; and

(F) any franchise taxes payable by BNPPLC, but only to the extent that such franchise taxes would be payable by BNPPLC even if the transactions contemplated by the Lease and the other Operative Documents were characterized for tax purposes as a mere financing arrangement and not as a lease or sale.

It is understood that if tax rates used to calculate income taxes which constitute Excluded Taxes under clause (1) of this definition are increased, the resulting increase will not be subject to reimbursement or indemnification by NAI. If, however, a change in Applicable Laws after the Effective Date, as applied to the transactions contemplated by the Operative Documents on a stand-alone basis, results in an increase in such income taxes for any reason other than an increase in the applicable tax rates (*e.g.*, a disallowance of deductions that would otherwise be available against payments described in clause (1) of this definition), then for purposes of the Operative Documents, the term "Excluded Taxes" will not include the actual increase in such taxes attributable to the change. Accordingly, BNPPLC or any Participant may recover any such net increase from NAI pursuant to subparagraph 5(B) of the Lease.

It is also understood that nothing in this definition of "Excluded Taxes" will prevent any Original Indemnity Payment (as defined in subparagraph 5(C)(1) of the Lease) from being paid on an After Tax Basis.

"**Fed Funds Rate**" means, for any period, a fluctuating interest rate (expressed as a per annum rate and rounded upwards, if necessary, to the next 1/16 of 1%) equal on each day during such period to the weighted average of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers, as published for such day (or, if such day is not a Business Day, for the next preceding Business Day) by the Federal Reserve Bank of New York, or, if such rates are not so published for any day which is a Business Day, the average of the quotations for each day during such period on such transactions received by BNPPLC's Parent from three Federal funds brokers of recognized standing selected by BNPPLC's Parent.

"**Fixed Rate**" means the fixed rate of interest established by BNPPLC's execution of an Interest Rate Swap as described in subparagraph 3(B)(4) of the Lease.

"**Fixed Rate Lock**" shall have the meaning assigned to it in subparagraph 3(B)(4) of the Lease.

"**Fixed Rate Lock Date**" shall have the meaning assigned to it in subparagraph 3(B)(4) of the Lease.

"**Fixed Rate Lock Termination**" means any termination in whole or in part of the Fixed Rate Swap as described in the first and second sentences of subparagraph 3(C) of the Lease.

"**Fixed Rate Lock Termination Date**" means the date upon which a Fixed Rate Lock Termination is effective. In the case of a Fixed Rate Lock Termination that results from BNPPLC's receipt of a Qualified Prepayment, the date such Qualified Prepayment is applied to reduce the Lease Balance shall constitute the Fixed Rate Lock Termination Date. In the case of any Fixed Rate Lock Termination resulting from an acceleration of the Designated Sale Date as provided in clauses (2) or (3) the definition thereof in the this Common Definitions and Provisions Agreement, the Fixed Rate Lock Termination Date shall constitute the Designated Sale Date.

"**Fixed Rate Lock Notice**" shall have the meaning assigned to it in subparagraph 3(B)(4) of the Lease.

"**Fixed Rate Loss**" means an amount reasonably determined in good faith by the Floating Rate Payor to be its total losses and costs in connection with any Fixed Rate Lock Termination. Fixed Rate Loss will include any loss of bargain, cost of funding or, at the election of the Floating Rate Payor but without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or reestablishing any hedge or related trading position. The Floating Rate Payor will be expected to determine the Fixed Rate Loss as of the date of the relevant Fixed Rate Lock Termination Date, or, if that is not reasonably practicable, as of the earliest date thereafter as is reasonably practicable. The Floating Rate Payor may (but need not) determine its Fixed Rate Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets.

"**Fixed Rate Settlement Amount**" means, with respect to any Fixed Rate Lock Termination:

(a) the Market Quotation for such Fixed Rate Lock Termination, if a Market

Quotation can be determined and if (in the reasonable belief of the Floating Rate Payor as the party making the determination) determining a Market Quotation would produce a commercially reasonable result; or

(b) the Fixed Rate Loss, if any, for such Fixed Rate Lock Termination if a Market Quotation cannot be determined or would not (in the reasonable belief of the Floating Rate Payor as the party making the determination) produce a commercially reasonable result.

"**Fixed Rate Swap**" shall have the meaning assigned to it in subparagraph 3(B)(4) of the Lease.

"**Floating Rate Payor**" means BNP Paribas or any successor or assign of BNP Paribas under an Interest Rate Swap.

"**FOCB Notice**" has the meaning indicated in the Construction Management Agreement.

"**Force Majeure Event**" has the meaning indicated in the Construction Management Agreement.

"**Fully Subordinated or Removable**" means, with respect to any Lien encumbering the Land or any appurtenant easement, that such Lien is, either by operation of Applicable Laws or by the express terms of documents which grant or create such Lien:

(1) fully subject and subordinate to the Ground Lease and to all rights and property interests of the BNPPLC under the Operative Documents; or

(2) subject to release and removal by BNPPLC or any subsequent owner of the Property at any time after a Designated Sale Date without any requirement that BNPPLC or the subsequent owner compensate the holder of such Lien or make any other significant payment in connection with such release and removal;

provided, however, a Lien will not qualify as Fully Subordinated or Removable under clause (1) preceding if a purchase of the Land by BNPPLC pursuant to the purchase option set forth in the Ground Lease (as such option may be modified from time to time by agreement of lessor and lessee under the Ground Lease) will not, by operation of law or the express agreement of the holder of the Lien, effectively cut off and terminate such Lien insofar as it applies to or affects the Improvements and the Land purchased by BNPPLC; and, provided further, a Lien will not qualify as Fully Subordinated or Removable under clause (2) preceding if it provides or includes a power of sale or other right or remedy in favor of the holder of such Lien which could result in a foreclosure sale or other forfeiture of BNPPLC's rights or interests under the Ground Lease or in the Property.

“Funded Construction Allowace” has the meaning indicated in the Construction Management Agreement.

“**Funding Advances**” means all advances made by BNPPLC’s Parent or any Participant to or on behalf of BNPPLC to allow BNPPLC to make the Initial Advance and to provide the Construction Allowance or maintain its investment in the Property.

“**Future Work**” has the meaning indicated in the Construction Management Agreement.

“**GAAP**” means generally accepted accounting principles in the United States of America as in effect from time to time, applied on a basis consistent with those used in the preparation of the financial statements referred to in subparagraph 2(A)(4) of the Closing Certificate (except for changes with which NAI’s independent public accountants concur).

“**Governmental Authority**” means (1) the United States, the state, the county, the municipality, and any other political subdivision in which the Land is located, and (2) any other nation, state or other political subdivision or agency or instrumentality thereof having or asserting jurisdiction over NAI or the Property.

“**Ground Lease**” means the Ground Lease of the Land dated as of the Effective Date, from NAI to BNPPLC, as such Ground Lease may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Hazardous Substance**” means (i) any chemical, compound, material, mixture or substance that is now or hereafter defined or listed in, regulated under, or otherwise classified pursuant to, any Environmental Laws as a “hazardous substance,” “hazardous material,” “hazardous waste,” “extremely hazardous waste or substance,” “infectious waste,” “toxic substance,” “toxic pollutant,” or any other formulation intended to define, list or classify substances by reason of deleterious properties, including ignitability, corrosiveness, reactivity, carcinogenicity, toxicity or reproductive toxicity; (ii) petroleum, any fraction of petroleum, natural gas, natural gas liquids, liquified natural gas, synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas), and ash produced by a resource recovery facility utilizing a municipal solid waste stream, and drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources; (iii) asbestos and any asbestos containing material; and (iv) any other material that, because of its quantity, concentration or physical or chemical characteristics, is the subject of regulation under Applicable Law or poses a significant present or potential hazard to human health or safety or to the environment if released into the workplace or the environment.

“**Hazardous Substance Activity**” means any actual, proposed or threatened use, storage, holding, release (including any spilling, leaking, leaching, pumping, pouring, emitting, emptying, dumping, disposing into the environment, and the continuing migration into or through soil, surface water, groundwater or any body of water), discharge, deposit, placement, generation, processing, construction, treatment, abatement, removal, disposal, disposition, handling or transportation of any Hazardous Substance from, under, in, into or on Land or the Property, including the movement or migration of any Hazardous Substance from surrounding property, surface water, groundwater or any body of water under, in, into or onto the Property and any resulting residual Hazardous Substance contamination in, on or under the Property. "**Hazardous Substance Activity**" also means any existence of Hazardous Substances on the Property that would cause the Property or the owner or operator thereof to be in violation of, or that would subject the Land or the Property to any remedial obligations under, any Environmental Laws, assuming disclosure to the applicable Governmental Authorities of all relevant facts, conditions and circumstances pertaining to the Property.

"**Improvements**" means any and all (1) buildings and other real property improvements previously or hereafter erected on the Land, and (2) equipment (*e.g.,* HVAC systems, elevators and plumbing fixtures) attached to the buildings or other real property improvements, the removal of which would cause structural or other material damage to the buildings or other real property improvements or would materially and adversely affect the value or use of the buildings or other real property improvements.

"**Increased Commitment**" has the meaning indicated in the Construction Management Agreement.

"**Increased Funding Commitment**" has the meaning indicated in the Construction Management Agreement.

"**Increased Time Commitment**" has the meaning indicated in the Construction Management Agreement.

"**Indebtedness**" of any Person means (without duplication of any item) Liabilities of such Person in any of the following categories:

(A) Liabilities for borrowed money;

(B) Liabilities constituting an obligation to pay the deferred purchase price of property or services;

(C) Liabilities evidenced by a bond, debenture, note or similar instrument;

(D) Liabilities which (1) would under GAAP be shown on such Person's balance sheet as a liability, and (2) are payable more than one year from the date of creation thereof (other than reserves for taxes and reserves for contingent obligations);

(E) Liabilities constituting principal under leases capitalized in accordance with GAAP;

(F) Liabilities arising under conditional sales or other title retention agreements;

(G) Liabilities owing under direct or indirect guaranties of Liabilities of any other Person or otherwise constituting obligations to purchase or acquire or to otherwise protect or insure a creditor against loss in respect of Liabilities of any other Person (such as obligations under working capital maintenance agreements, agreements to keep-well, or agreements to purchase Liabilities, assets, goods, securities or services), but excluding endorsements in the ordinary course of business of negotiable instruments in the course of collection;

(H) Liabilities (for example, repurchase agreements, mandatorily redeemable preferred stock and sale/leaseback agreements) consisting of an obligation to purchase or redeem securities or other property, if such Liabilities arises out of or in connection with the sale or issuance of the same or similar securities or property;

(I) Liabilities with respect to letters of credit or applications or reimbursement agreements therefor;

(J) Liabilities with respect to payments received in consideration of oil, gas, or other commodities yet to be acquired or produced at the time of payment (including obligations under "take-or-pay" contracts to deliver gas in return for payments already received and the undischarged balance of any production payment created by such Person or for the creation of which such Person directly or indirectly received payment);

(K) Liabilities with respect to other obligations to deliver goods or services in consideration of advance payments therefor; or

(L) Liabilities under any "synthetic" or other lease of property or related documents (including a separate purchase agreement) which obligate such Person or any of its Affiliates (whether by purchasing or causing another Person to purchase any interest in the leased property or otherwise) to guarantee a minimum residual value of the leased property to the lessor.

For purposes of this definition, the amount of Liabilities described in the last clause of the preceding sentence with respect to any lease classified according to GAAP as an "operating lease," will equal the sum of (1) the present value of rentals and other minimum lease payments required in connection with such lease [calculated in accordance with SFAS 13 and other GAAP relevant to the determination of the whether such lease must be accounted for as an operating lease or capital lease], plus (2) the fair value of the property covered by the lease; except that such amount will not exceed the price, as of the date a determination of Indebtedness is required hereunder, for which the lessee can purchase the leased property pursuant to any valid ongoing purchase option if, upon such a purchase, the lessee will be excused from paying rentals or other minimum lease payments that would otherwise accrue after the purchase.

Notwithstanding the foregoing, the "Indebtedness" of any Person will not include Liabilities that were incurred by such Person on ordinary trade terms to vendors, suppliers, or other Persons providing goods and services for use by such Person in the ordinary course of its business, unless and until such Liabilities are outstanding more than 90 days past the original invoice or billing date therefor.

"**Initial Advance** " has the meaning indicated in the Construction Management Agreement.

"**Interested Party**" means each of following Persons and their Affiliates: (1) BNPPLC and its successors and permitted assigns as to the Property or any part thereof or any interest therein, (2) BNPPLC's Parent, and (3) any Participants and their successors and permitted assigns under the Participation Agreement; provided, however, none of the following Persons will constitute an Interested Party: (a) any Person to whom BNPPLC may transfer an interest in the Property by a conveyance that is not a Permitted Transfer and others that cannot lawfully claim an interest in the Property except through or under a transfer by such a Person, (b) NAI and its Affiliates, (c) any Person claiming through or under a conveyance made by NAI after any purchase by NAI of BNPPLC's interest in the Property pursuant to the Purchase Agreement, or (d) any Applicable Purchaser designated by NAI under the Purchase Agreement who purchases the Property pursuant to a sale arranged by NAI and any Person that cannot lawfully claim an interest in the Property except through or under a conveyance from such an Applicable Purchaser.

"**Interest Rate Swap**" means an interest rate exchange transaction, entered into between BNPPLC, as the fixed rate payor, and BNP Paribas, as the swap counterparty and floating rate payor, under the them most recent form of Master Agreement published by the International Swaps and Derivatives Association, Inc., as supplemented by the definitions and such schedules, annexes, exhibits and supplements as are agreed upon by the parties thereto, pursuant to which BNP Paribas agrees to pay monthly to BNPPLC a floating rate of interest equal to LIBOR and BNPPLC agrees to pay monthly to BNP Paribas a fixed rate of interest for a term that commences on the Fixed Rate Lock Date and ends on the last day of the scheduled Term of the Lease. The notional principal amount used for any such interest rate exchange transaction will equal the Lease Balance calculated as of the date such transaction is entered into.

"**Land**" means the land described in Exhibit A attached to the Closing Certificate, the Lease, the Ground Lease and the Purchase Agreement.

“**Lease**” means the Lease Agreement dated as of the Effective Date between BNPPLC, as landlord, and NAI, as tenant, pursuant to which NAI has agreed to lease BNPPLC’s interest in the Property, as such Lease Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Lease Balance**” as of any date means the amount equal to the sum of the Initial Advance, plus the sum of all Construction Advances, Carrying Costs and other amounts added to the Outstanding Construction Allowance as provided in the Construction Management Agreement on or prior to such date, minus all funds actually received by BNPPLC and applied as Qualified Prepayments on or prior to such date. Under no circumstances will any payment of Base Rent or other Qualified Income Payments reduce the Lease Balance.

“**Lease Termination Damages**” has the meaning indicated in subparagraph? of the Lease.

“**Liabilities**” means, as to any Person, all indebtedness, liabilities and obligations of such Person, whether matured or unmatured, liquidated or unliquidated, primary or secondary, direct or indirect, absolute, fixed or contingent, and whether or not required to be considered pursuant to GAAP.

“**LIBOR**” means, for purposes of determining the Effective Rate for any Construction Period or Base Rent Period, the per annum rate equal to:

(a) the offered rate for deposits in U.S. dollars which appears on Moneyline Telerate Page 3750, British Bankers Association Interest Settlement Rates as of 11:00 a.m., London time, on the day that is two London Banking Days (hereinafter defined) prior to the day upon which such Base Rent Period begins (the “Reset Date”), or

(b) if no such rate appears on Moneyline Telerate Page 3750, the rate per annum determined by BNPPLC’s Parent on the basis of rates offered for deposits in U.S. dollars by four major banks in the London interbank market selected by BNPPLC’s Parent (“Reference Banks”) at approximately 11:00 a.m., London time, on the day that is two London Banking Days preceding the Reset Date to prime banks in the London interbank market for a period corresponding as nearly as possible to such Base Rent Period. If this clause (b) applies, BNPPLC’s Parent will request the principal London office of each of the Reference banks to provide a quotation of its rate. If at least two quotations are provided, “LIBOR” for the applicable Base Rent Period will be the arithmetic mean of the quotations. If, however, fewer than two quotations are provided as requested, “LIBOR” for the applicable Base Rent Period will be the arithmetic mean of the rates quoted by major banks in New York selected by BNPPLC’s Parent, at approximately 11:00 a.m., New York time, on the Reset Date for loans in U.S. dollars to leading U.S. banks for a period corresponding as nearly as possible to such Base Rent Period.

As used in this definition, "London Banking Day" means any day on which commercial banks are open for general business (including dealings in foreign exchange and foreign currency deposits) in London, England.

"**LIBOR Period Election**" means an election to have the Effective Rate for any Construction Period or Base Rent Period calculated by reference to LIBOR, rather than by reference to the ABR or the Fixed Rate, and to have such period extend for approximately one month, three months or six months. Subject to the limitations and qualifications set forth in this definition, NAI may make any Construction Period or Base Rent Period subject to a LIBOR Period Election by a notice given to BNPPLC in the form attached as Annex 3 at least five Business Days prior to the commencement of such Construction Period or Base Rent Period. After a LIBOR Period Election becomes effective, it will remain in effect for all subsequent Construction Periods or Base Rent Periods until a different election is made in accordance with the provisions of this definition and the definition of ABR Period Election above. (For purposes of the Construction Management Agreement and the Lease a LIBOR Period Election for any Construction Period or Base Rent Period will also be considered the LIBOR Period Election in effect on the Advance Date, Base Rent Commencement Date or Base Rent Date upon which such period begins.) Notwithstanding the foregoing:

- No LIBOR Period Election for a period of more than one month will be effective prior to the Completion Date.
- No LIBOR Period Election will be effective that would cause a Base Rent Period to extend beyond the end of the scheduled Term or beyond a Fixed Rate Lock Date.
- No LIBOR Period Election will commence or continue during any period that begins on or after the Fixed Rate Lock Date applicable to a Fixed Rate Lock and that ends before or on the date such Fixed Rate Lock is terminated as provided in subparagraph 3(C) of the Lease.
- Changes in any ABR Period Election or LIBOR Period Election will become effective only upon the commencement of a new Construction Period or Base Rent Period.
- In the event BNPPLC determines that it would be unlawful (or any central bank or governmental authority asserts that it would be unlawful) for BNPPLC, BNPPLC's Parent or any Participant to provide or maintain Funding Advances during a Construction Period or Base Rent Period if the Carrying Costs or Base Rent accrued during such period at a rate based upon LIBOR, NAI will be deemed to have made such Construction Period or Base Rent Period subject to an ABR Period Election, not a LIBOR Period Election.

- If for any reason (including BNPPLC's receipt of a notice from NAI purporting to make a LIBOR Period Election that is contrary to the foregoing provisions), BNPPLC is unable to determine with certainty whether a particular Construction Period or Base Rent Period is subject to a specific LIBOR Period Election of one month, three months or six months, or if any Event of Default has occurred and is continuing on the third Business Day preceding the commencement of a particular Construction Period or Base Rent Period, NAI will be deemed to have made an ABR Period Election for that particular Construction Period or Base Rent Period.

"**Lien**" means any mortgage, pledge, security interest, encumbrance, lien or charge of any kind (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature thereof, any agreement to sell receivables with recourse, and the filing of or agreement to give any financing statement under the Uniform Commercial Code of any jurisdiction).

"**Liens Removable by BNPPLC**" means, and is limited to, Liens encumbering the Property that are asserted (1) other than as contemplated in the Operative Documents, by BNPPLC itself or by BNPPLC's Parent, (2) by third parties lawfully claiming through or under BNPPLC (which for purposes of the Operative Documents will include any judgment liens established against the Property because of a judgment rendered against BNPPLC and will also include any liens established against the Property to secure past due Excluded Taxes), or (3) by third parties claiming under a deed or other instrument duly executed by BNPPLC; provided, however, Liens Removable by BNPPLC will not include (A) any Permitted Encumbrances (regardless of whether claimed through or under BNPPLC), (B) the Operative Documents or any other document executed by BNPPLC with the knowledge of (and without objection by) NAI or NAI's counsel contemporaneously with the execution and delivery of the Operative Documents, (C) Liens which are neither lawfully claimed through or under BNPPLC (as described above) nor claimed under a deed or other instrument duly executed by BNPPLC, (D) Liens claimed by NAI or claimed through or under a conveyance made by NAI other than NAI's conveyance of the leasehold estate to BNPPLC under the Ground Lease, (E) Liens arising because of BNPPLC's compliance with Applicable Law, the Operative Documents, Permitted Encumbrances or any written request made by NAI, (F) Liens securing the payment of property taxes or other amounts assessed against the Property by any Governmental Authority, other than to secure the payment of past due Excluded Taxes or to secure damages caused by (and attributed by any applicable principles of comparative fault to) BNPPLC's own Established Misconduct, (G) Liens resulting from or arising in connection with any breach by NAI of the Operative Documents; or (H) Liens resulting from or arising in connection with any Permitted Transfer that occurs more than thirty days after any Designated Sale Date upon which, for any reason, NAI or any Applicable Purchaser does not purchase BNPPLC'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.

“**Local Impositions**” means all sales, excise, ad valorem, gross receipts, business, transfer, stamp, occupancy, rental and other taxes (other than taxes on net income and corporate franchise taxes), levies, fees, charges, surcharges, assessments, interest, additions to tax, or penalties imposed by the State of California or any agency or political subdivision thereof upon BNPPLC or any owner of the Property or any part of or interest in the Property because of (i) the Lease or other Operative Documents, (ii) the status of record title to the Property, (iii) the ownership, leasing, occupancy, sale or operation of the Property or any part thereof or interest therein, or (iv) the Permitted Encumbrances; excluding, however, Excluded Taxes. “**Local Impositions**” will include any real estate taxes imposed because of a change of use or ownership of the Property resulting from, or occurring on or prior to the date of, any sale by BNPPLC pursuant to the Purchase Agreement.

“**Losses**” means the following: any and all losses, liabilities, damages (whether actual, consequential, punitive or otherwise denominated), demands, claims, administrative or legal proceedings, actions, judgments, causes of action, assessments, fines, penalties, costs of settlement and other costs and expenses (including Attorneys’ Fees and the fees of outside accountants and environmental consultants), of any and every kind or character, foreseeable and unforeseeable, liquidated and contingent, proximate and remote, known and unknown.

“**Market Quotation**” means, with respect to any Fixed Rate Lock Termination, an amount determined by the Floating Rate Payor on the basis of quotations from Reference Market-makers. Each quotation will be for an amount, if any, that would be paid by the Floating Rate Payor in consideration of an agreement between it and the quoting Reference Market-maker to enter into a transaction (the “Replacement Transaction”) that would have the effect of preserving for the Floating Rate Payor the economic equivalent of any payment or delivery (whether the underlying obligation was absolute or contingent and assuming the satisfaction of each applicable condition precedent) that would, but for the occurrence of the relevant Fixed Rate Lock Termination, have been required under the Fixed Rate Swap. The Replacement Transaction would be subject to such documentation as such party and the Reference Market-maker may, in good faith, agree. The Floating Rate Payor (or its agent) will request each Reference Market-maker to provide its quotation to the extent reasonably practicable as of the same day and time (without regard to different time zones) on the effective date of or as soon as reasonably practicable after the relevant Fixed Rate Lock Termination. The date and time as of which those quotations are to be obtained will be selected in good faith by the Floating Rate Payor. If more than three quotations are provided, the Market Quotation will be the arithmetic mean of the quotations, without regard to the quotations having the highest and lowest values. If exactly three such quotations are provided, the Market Quotation will be the quotation remaining after disregarding the highest and lowest quotations. For this purpose, if more than one quotation has the same highest value or lowest value, then one of such quotations shall be disregarded. If fewer than three quotations are provided, it will be deemed that the Market Quotation in respect of such Fixed Rate Lock Termination cannot be determined.

“**Material Adverse Effect**” means a material adverse effect on (a) the assets, operations or businesses of NAI, (b) the ability of NAI to perform any of its obligations under the Operative Documents, (c) the rights of or benefits available to the BNPPLC under the Operative Documents, (d) the value, utility or useful life of the Property or (e) the priority, perfection or status of any of BNPPLC’s interests in the Property or in any of the Operative Documents.

“**Maximum Construction Allowance**” has the meaning indicated in the Construction Management Agreement.

“**Maximum Remarketing Obligation**” has the meaning indicated in the Purchase Agreement.

“**Minimum Insurance Requirements**” means the insurance requirements outlined in Annex 4 attached to this Agreement.

“**Multiemployer Plan**” means a multiemployer plan as defined in Section 3(37) of ERISA to which contributions have been made by NAI or any ERISA Affiliate during the preceding six years and which is covered by Title IV of ERISA.

“**Notice of NAI’s Intent to Terminate**” has the meaning indicated in the Construction Management Agreement.

“**Notice of NAI’s Intent to Terminate Because of a Force Majeure Event**” has the meaning indicated in the Construction Management Agreement.

“**Notice of Termination by NAI**” has the meaning indicated in the Construction Management Agreement.

“**Operative Documents**” means the Closing Certificate, the Ground Lease, the Lease, the Construction Management Agreement, the Purchase Agreement and this Common Definitions and Provisions Agreement.

“**Outstanding Construction Allowance**” has the meaning indicated in the Construction Management Agreement.

“**Owner’s Election to Continue Construction**” has the meaning indicated in the Construction Management Agreement.

“**NAI**” means Network Appliance, Inc., a Delaware corporation.

“**NAI’s Estimate of Force Majeure Excess Costs**” has the meaning indicated in the Construction Management Agreement.

"**NAI's Estimate of Force Majeure Delays**" has the meaning indicated in the Construction Management Agreement.

"**NAI's Initial Remarketing Right**" has the meaning indicated in the Purchase Agreement.

"**Participant**" means any Person other than BNPPLC that from time to time, by executing a Participation Agreement or supplements as contemplated therein, becomes a party to the Participation Agreement and thereby agrees to participate in all or some of the risks and rewards to BNPPLC of the Operative Documents; provided, however, no such Person will qualify as a Participant for purposes of the Operative Documents unless approved to be a Participant by NAI. As of the Effective Date, there are no Participants, but BNPPLC may from time to time request NAI's approval for prospective Participants. NAI will not unreasonably withhold or delay any approval required for any prospective Participant which is an Eligible Financial Institution. However, as to any prospective Participant that is not an Eligible Financial Institution, NAI may withhold such approval in its sole discretion. Further, it is understood that if giving such approval will increase NAI's liability for withholding taxes or other taxes not constituting Excluded Taxes under tax laws or regulations then in effect, NAI may reasonably refuse to give such approval.

"**Participation Agreement**" means a Participation Agreement in substantially the form attached to this Agreement as Annex 5, pursuant to which one or more other Persons agree with BNPPLC to participate in the risks and rewards to BNPPLC of the Operative Documents, as such Participation Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms. It is understood, however, that because any such Participation Agreement will expressly make NAI a third party beneficiary of each Participant's obligations thereunder to make advances to BNPPLC in connection with Construction Advances under the Construction Management Agreement, NAI's consent will be required to any amendment of the Participation Agreement that limits or excuses such obligations.

"**Permitted Encumbrances**" means (i) the encumbrances and other matters affecting the Property that are set forth in Exhibit B attached to the Closing Certificate, (ii) any easement agreement or other document affecting title to the Property executed by BNPPLC at the request of or with the consent of NAI, (iii) any Liens securing the payment of Local Impositions which are not delinquent or claimed to be delinquent or which are being contested in accordance with subparagraph 5(A) of the Lease, (iv) statutory liens, if any, in the nature of contractors', mechanics' or materialmen's liens for amounts not past due or claimed to be past due for more than thirty days or which are being contested in accordance with subparagraph 11(B) of the Lease, (v) Liens which are Fully Subordinated or Removable, and (vi) any documents or maps which NAI executes and records, with the consent of BNPPLC as provided in subparagraph 4(C) of the Closing Certificate, to establish a condominium regime that covers the Property and other adjacent properties.

"**Permitted Hazardous Substance Use**" means the use, generation, storage and offsite disposal of Permitted Hazardous Substances in strict accordance with applicable Environmental Laws and with due care given the nature of the Hazardous Substances involved; provided, the scope and nature of such use, generation, storage and disposal will not:

(1) exceed that reasonably required for the construction of the Construction Project in accordance with the Construction Management Agreement or for the use and operation of the Property for the purposes expressly permitted under <u>subparagraph 2(A)</u> of the Lease; or

(2) include any disposal, discharge or other release of Hazardous Substances from the Property in any manner that might allow such substances to reach surface water or groundwater, except (i) through a lawful and properly authorized discharge (A) to a publicly owned treatment works or (B) with rainwater or storm water runoff in accordance with Applicable Laws and any permits obtained by NAI that govern such runoff; or (ii) any such disposal, discharge or other release of Hazardous Substances for which no permits are required and which are not otherwise regulated under applicable Environmental Laws.

Further, notwithstanding anything to the contrary herein contained, Permitted Hazardous Substance Use will not include any use of the Property (including as a landfill, incinerator or other waste disposal facility) in a manner that requires a treatment, storage or disposal permit under the Resource Conservation and Recovery Act of 1976, as amended by the Used Oil Recycling Act of 1980, the Solid Waste Disposal Act Amendments of 1980, and the Hazardous and Solid Waste Amendments of 1984..

"**Permitted Hazardous Substances**" means Hazardous Substances used and reasonably required for the construction of the Construction Project or for the use and operation of the Property by NAI and its permitted subtenants and assigns for the purposes expressly permitted by <u>subparagraph 2(A)</u> of the Lease, in either case in strict compliance with all Environmental Laws and with due care given the nature of the Hazardous Substances involved. Without limiting the generality of the foregoing, Permitted Hazardous Substances will include usual and customary office, laboratory and janitorial products.

"**Permitted Transfer**" means any one or more of the following:

(1) the creation or conveyance by BNPPLC of rights and interests in favor of Participants pursuant to the Participation Agreement;

(2) any lien, security interest or assignment covering the Property or the Rents which is granted by BNPPLC in favor of Participants or an agent appointed for them to secure their rights under the Participation Agreement, and any subsequent assignment or

conveyance made to accomplish a foreclosure of such lien or security interest, provided that such lien, security interest or assignment and any such subsequent assignment or conveyance are all made expressly subject to the rights of NAI under the Operative Documents;

(3) other than as described in the preceding clauses, any conveyance to BNPPLC's Parent or to any Qualified Affiliate of BNPPLC of all or any interest in or rights with respect to the Property or any portion thereof, provided that NAI must be notified before any such conveyance to BNPPLC's Parent or a Qualified Affiliate which will be recorded in the real property records of the county in which the Land is situated;

(4) any assignment or conveyance by BNPPLC requested by NAI or required by any Permitted Encumbrance, by the Purchase Agreement or by Applicable Laws; or

(5) any assignment or conveyance after a Designated Sale Date on which NAI does not purchase or cause an Applicable Purchaser to purchase BNPPLC's interest in the Property and, if applicable, after the expiration of the thirty day cure period specified in Paragraph 3(A) of the Purchase Agreement.

"**Person**" means an individual, a corporation, a partnership, an unincorporated organization, an association, a joint stock company, a joint venture, a trust, an estate, a government or agency or political subdivision thereof or other entity, whether acting in an individual, fiduciary or other capacity.

"**Personal Property**" has the meaning indicated on page 2 of the Lease.

"**Plan**" means any employee benefit or other plan established or maintained, or to which contributions have been made, by NAI or any ERISA Affiliate during the preceding six years and which is covered by Title IV of ERISA, including any Multiemployer Plan.

"**Pre-lease Casualty**" has the meaning indicated in the Construction Management Agreement.

"**Pre-lease Force Majeure Delays**" has the meaning indicated in the Construction Management Agreement.

"**Pre-lease Force Majeure Event**" has the meaning indicated in the Construction Management Agreement.

"**Pre-lease Force Majeure Event Notice**" has the meaning indicated in the Construction Management Agreement.

“**Pre-lease Force Majeure Excess Costs**” has the meaning indicated in the Construction Management Agreement.

“**Pre-lease Force Majeure Losses**” has the meaning indicated in the Construction Management Agreement.

“**Prime Rate**” means the prime interest rate or equivalent charged by BNPPLC’s Parent in the United States of America as announced or published by BNPPLC’s Parent from time to time, which need not be the lowest interest rate charged by BNPPLC’s Parent. If for any reason BNPPLC’s Parent does not announce or publish a prime rate or equivalent, the prime rate or equivalent announced or published by either CitiBank, N.A. or any New York branch or office of Credit Commercial de France as selected by BNPPLC will be used to compute the rate describe in the preceding sentence. The prime rate or equivalent announced or published by such bank need not be the lowest rate charged by it. The Prime Rate may change from time to time after the Effective Date without notice to NAI as of the effective time of each change in rates described in this definition.

“**Prior Work**” has the meaning indicated in the Construction Management Agreement.

“**Projected Cost Overruns**” has the meaning indicated in the Construction Management Agreement.

“**Property**” means the Personal Property and the Real Property, collectively. The fee interest in the Land itself will not be included in the Property, but the leasehold estate conveyed to BNPPLC under the Ground Lease will be included.

“**Purchase Agreement**” means the Purchase Agreement dated as of the Effective Date between BNPPLC and NAI, as such Purchase Agreement may be extended, supplemented, amended, restated or otherwise modified from time to time in accordance with its terms.

“**Purchase Option**” has the meaning indicated in the Purchase Agreement.

“**Qualified Affiliate**” means any Person that, like BNPPLC, (i) is one hundred percent (100%) owned, directly or indirectly, by BNPPLC’s Parent or any successor of such bank, (ii) can make (and has in writing made) the same representations to NAI that BNPPLC has made in subparagraphs 4(A) and 4(B) of the Closing Certificate, and (iii) is an

entity organized under the laws of the State of Delaware or another state within the United States of America.

“**Qualified Income Payments**” means: (A) Base Rent; (B) payments that are made to BNPPLC only because the following amounts are capitalized (*i.e.,*the added to the Lease Balance) as described in subparagraph 3 of the Construction Management Agreement: the Arrangement Fee, Administrative Fees, Commitment Fees, Increased Cost Charges and Capital Adequacy Charges; (C) payments of the following made to BNPPLC to satisfy the Lease: Administrative Fees, Increased Cost Charges and Capital

Adequacy Charges; (D) any interest paid to BNPPLC or any Participant pursuant to subparagraph 3(G) of the Lease; (E) payments by BNPPLC to Participants required under the Participation Agreements because of BNPPLC's receipt of payments described in the preceding clauses (A) through (D).

"**Qualified Prepayments**" means any payments received by BNPPLC from time to time during the Term (1) under any property insurance policy as a result of damage to the Property, (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 (including any indirect condemnation by means of a taking of any of the Land or appurtenant easements), (3) because of any judgment, decree or award for injury or damage to the Property, or (4) under any title insurance policy or otherwise as a result of any title defect or claimed title defect with respect to the Property. For the purposes of determining the amount of any Qualified Prepayment and other amounts dependent upon Qualified Prepayments (*e.g.*, the Lease Balance, the Outstanding Construction Allowance and the Break Even Price):

(i) there shall be deducted all expenses and costs of every kind, type and nature (including taxes and Attorneys' Fees) incurred by BNPPLC with respect to the collection or application of such payments;

(ii) Qualified Prepayments shall not include any payment to BNPPLC by a Participant or an Affiliate of BNPPLC that is made to compensate BNPPLC for the Participant's or Affiliate's share of any Losses BNPPLC may incur as a result of any of the events described in the preceding clauses (1) through (4);

(iii) Qualified Prepayments shall not include any payments received by BNPPLC that BNPPLC has paid or is obligated to pay to NAI for the repair, restoration or replacement of the Property or that BNPPLC is holding as Escrowed Proceeds in accordance with the Paragraph 10 of the Lease or other provisions of the Operative Documents;

(iv) payments described in the preceding clauses (i) through (iii) will be considered as Escrowed Proceeds, not Qualified Prepayments, until they are actually applied as Qualified Prepayments by BNPPLC as provided in Paragraph 10 of the Lease; and

(v) in no event will interest that accrues under the Purchase Agreement on a past due Supplemental Payment constitute a Qualified Prepayment.

For purposes of computing the total Qualified Prepayments (and other amounts dependent upon Qualified Prepayments, such as the Lease Balance, the Outstanding Construction Allowance and the Break Even Price) paid to or received by BNPPLC as of any date, payments described in the preceding clauses (1) through (4) will be considered as Escrowed Proceeds, not Qualified Prepayments, until they are actually applied as Qualified Prepayments by BNPPLC as provided in the Paragraph 10 of the Lease.

"**Real Property**" has the meaning indicated on page of the Lease.

"**Reimbursable Construction-Period Costs**" has the meaning indicated in the Construction Management Agreement.

"**Remedial Work**" means any investigation, monitoring, clean-up, containment, remediation, removal, payment of response costs, or restoration work and the preparation and implementation of any closure or other required remedial plans that any governmental agency or political subdivision requires or approves (or could reasonably be expected to require if it was aware of all relevant circumstances concerning the Property), whether by judicial order or otherwise, because of the presence of or suspected presence of Hazardous Substances in, on, under or about the Property or because of any prior Hazardous Substance Activity.

"**Rent**" means the Base Rent and all Additional Rent.

"**Responsible Financial Officer**" means the chief financial officer, the controller, the treasurer or the assistant treasurer of NAI.

"**Rolling Four Quarters Period**" has the meaning indicated in subparagraph 3(A) of the Closing Certificate.

"**Scope Change**" has the meaning indicated in the Construction Management Agreement.

"**Spread**" means, for Construction Period and for any period beginning on and including the Base Rent Commencement Date or a Base Rent Date and ending on but not including the next Base Rent Date, the amount established as of the date (in this definition, the "**Spread Test Date**") that is two Business Days prior to such period by reference to the pricing grid below, based upon the ratio calculated by dividing (1) Adjusted EBITDA for the then latest Rolling Four Quarters Period that ended prior to (and for which NAI has reported earnings as necessary to compute Adjusted EBITDA) into (2) the Total Debt of NAI and its Subsidiaries (determined on a consolidated basis) as of the end of such Rolling Four Quarters Period. In each case, the Spread will be established at the Level in the pricing grid below which corresponds to such ratio; provided, that:

(a) promptly after earnings are reported by NAI for the latest quarter in any Rolling Four Quarters Period, NAI must notify BNPPLC of any resulting change in the Spread under this definition, and no reduction in the Spread from one period to the next will be effective for purposes of the Operative Documents unless, prior to the Spread Test Date for the next period, NAI shall have provided BNPPLC with a written notice setting forth and certifying the calculation under this definition that justifies the reduction; and

(c) notwithstanding anything to the contrary in this definition, after any 97-10/Event and on any date when an Event of Default has occurred and is continuing, the Unsecured Spread will equal the Default Rate less the Effective Rate.

Levels	Ratio of Total Debt to Adjusted EBITDA	Spread
Level I	less than 0.5	57.5 basis points
Level II	greater than or equal to 0.5, but less than 1.0	75.0 basis points
Level III	greater than or equal to 1.0	95.0 basis points

All determinations of the Spread by BNPPLC will, in the absence of clear and demonstrable error, be binding and conclusive for purposes of the Operative Documents. Further BNPPLC may, but will not be required, to rely on the determination of the Spread set forth in any notice delivered by NAI as described above in clause (a) of this definition.

"**Subsidiary**" means, with respect to any Person, any Affiliate of which at least a majority of the securities or other ownership interests having ordinary voting power then exercisable for the election of directors or other persons performing similar functions are at the time owned directly or indirectly by such Person.

"**Supplemental Payment**" has the meaning indicated in the Purchase Agreement.

"**Supplemental Payment Obligation**" has the meaning indicated in the Purchase Agreement.

"**Tangible Personal Property**" has the meaning indicated on page 2 of the Lease.

"**Target Completion Date**" has the meaning indicated in the Construction Management Agreement.

"**Term**" has the meaning indicated in subparagraph 1(A) of the Lease.

"**Term Sheet**" means the letter dated as of September 7, 2005 from BNPPLC to NAI concerning the Property.

“**Termination of** NAI**’s Work**” has the meaning indicated in the Construction Management Agreement.

“**Third Party Contract**” has the meaning indicated in the Construction Management Agreement.

“**Third Party Contract/Termination Fees**” has the meaning indicated in the Construction Management Agreement.

“**Total Debt**” has the meaning indicated in subparagraph 3(A) of the Closing Certificate.

“**Transaction Expenses**” means costs incurred in connection with the preparation and negotiation of the Operative Documents and related documents and the consummation of the transactions contemplated therein.

“**Unfunded Benefit Liabilities**” means, with respect to any Plan, the amount (if any) by which the present value of all benefit liabilities (within the meaning of Section 4001(a)(16) of ERISA) under the Plan exceeds the market value of all Plan assets allocable to such benefit liabilities, as determined on the most recent valuation date of the Plan and in accordance with the provisions of ERISA for calculating the potential liability of NAI or any ERISA Affiliate under Title IV of ERISA.

“**Work**” has the meaning indicated in the Construction Management Agreement.

“**Work/Suspension Event**” has the meaning indicated in the Construction Management Agreement.

“**Work/Suspension Notice**” has the meaning indicated in the Construction Management Agreement.

“**Work/Suspension Period**” has the meaning indicated in the Construction Management Agreement.

ARTICLE II — SHARED PROVISIONS

The following provisions will apply to and govern the construction of this Agreement and the other Operative Documents (including attachments), except to the extent (if any) a clear, contrary intent is expressed herein or therein:

1. **Notices**. The provision of any Operative Document, or of any Applicable Laws with reference to the sending, mailing or delivery of any notice or demand under any Operative Document or with reference to the making of any payment required under any Operative Document, will be deemed to be complied with when and if the following steps are taken:

(i) All Rent and other amounts required to be paid by NAI to BNPPLC must be paid to BNPPLC in immediately available funds by wire transfer to:

Federal Reserve Bank of New York
BNP Paribas — New York Branch
Favor: BNP Paribas Leasing Corporation
ABA 026 007 689
/AC/ 0200-517000-070-78
Reference: Network Appliance, Inc./California-Lease

or at such other place and in such other manner as BNPPLC may designate in a notice to NAI.

(ii) All advances paid to NAI by BNPPLC under the Construction Management Agreement or in connection therewith will be paid by wire transfer to:

Wells Fargo Bank
San Francisco, CA
ABA#121000248
Acct#4311-790562
Account of: Network Appliance
Reference: BNP Lease

or at such other place and in such other manner as NAI may reasonably designate from time to time by notice to BNPPLC signed by a Responsible Financial Officer of NAI.

(iii) All notices, demands, approvals, consents and other communications to be made under any Operative Document to or by the parties thereto must, to be effective for purpose of such Operative Document, be in writing. Notices, demands and other communications required or permitted under any Operative Document are to be sent to the addresses set forth below (or in the case of communications to Participants, at the addresses set forth in Schedule 1 to the Participation Agreement) and will be given by any of the following means: (A) personal service (including local and overnight courier), with proof of delivery or attempted delivery retained; (B) electronic communication, whether by electronic mail or telecopying (if confirmed in writing sent by United States first class mail, return receipt requested); or (C) registered or certified first class mail, return receipt requested. Such addresses may be changed by notice to the other parties given in the same manner as provided above. Any notice or other communication sent pursuant to clause (A) or (B) hereof will be deemed received upon such personal service or upon dispatch by electronic means, and, if sent pursuant to clause (C) will be deemed received five days following deposit in the mail.

Address of BNPPLC:

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director
Telecopy: (972) 788-9140

Address of NAI:

Network Appliance, Inc.
7301 Kit Creek Road
Research Triangle Park, NC 27709
Attention: Ingemar Lanevi
Telecopy: (919) 476-5750

With a copy to:

Network Appliance, Inc.
495 East Java Drive
Sunnyvale, California 94089
Attention: Mr. Thom Bryant
Telecopy: (408)-822-4463

2. **Severability**. If any term or provision of any Operative Document or the application thereof is to any extent held by a court of competent jurisdiction to be invalid and unenforceable, the remainder of such document, or the application of such term or provision other than to the extent to which it is invalid or unenforceable, will not be affected thereby.

3. **No Merger**. There will be no merger of the Lease or of the leasehold estate created by the Lease or of the mortgage and security interest granted in subparagraph 4(C)(1) of the Lease with any other interest in the Property by reason of the fact that the same person may acquire or hold, directly or indirectly, the Lease or the leasehold estate created hereby or such mortgage and security interest and any other interest in the Property, unless all Persons with an interest in the Property that would be adversely affected by any such merger specifically agree in writing that such a merger has occurred. There will be no merger of the Purchase Agreement or of the purchase options or obligations created by the Purchase Agreement with any other interest in the Property by reason of the fact that the same person may acquire or hold, directly or indirectly, the rights and options granted by the Purchase Agreement and any other interest in the Property, unless all Persons with an interest in the Property that would be adversely affected by any such merger specifically agree in writing that such a merger has occurred.

4. **No Implied Waiver**. The failure of BNPPLC or NAI to insist at any time upon the strict performance of any covenant or agreement or to exercise any option, right, power or remedy contained in any Operative Document will not be construed as a waiver or a relinquishment thereof for the future. The waiver of or redress for any breach of any Operative Document by any party thereto will not prevent a similar subsequent act from constituting a violation. Any express waiver of any provision of any Operative Document will affect only the term or condition specified in such waiver and only for the time and in the manner specifically stated therein. No waiver by any party to any Operative Document of any provision therein will be deemed to have been made unless expressed in writing and signed by the party to be bound by the waiver. A receipt by BNPPLC of any Rent with knowledge of the breach by NAI of any covenant or agreement contained in the Lease or any other Operative Document will not be deemed a waiver of such breach.

5. **Entire and Only Agreements**. The Operative Documents supersede any prior negotiations and agreements between BNPPLC and NAI concerning the Property, and no amendment or modification of any Operative Document will be binding or valid unless expressed in a writing executed by all parties to such Operative Document.

6. **Binding Effect**. Except to the extent, if any, expressly provided to the contrary in any Operative Document with respect to assignments thereof, all of the covenants, agreements, terms and conditions to be observed and performed by the parties to the Operative Documents will be applicable to and binding upon their respective successors and, to the extent assignment is permitted thereunder, their respective assigns.

7. **Time is of the Essence**. Time is of the essence as to all obligations of NAI and BNPPLC and all notices required of NAI and BNPPLC under the Operative Documents.

8. **Governing Law**. Each Operative Document will be governed by and construed in accordance with the laws of the State of California without regard to conflict or choice of laws.

9. **Paragraph Headings**. The paragraph and section headings contained in the Operative Documents are for convenience only and will in no way enlarge or limit the scope or meaning of the various and several provisions thereof.

10. **Negotiated Documents**. All parties to each Operative Document and their counsel have reviewed and revised or requested revisions to such Operative Document, and the usual rule of construction that any ambiguities are to be resolved against the drafting party will not apply to the construction or interpretation of any Operative Documents or any amendments thereof.

11. **Terms Not Expressly Defined in an Operative Document**. As used in any Operative Document, a capitalized term that is not defined therein or in this Agreement, but is defined in another Operative Document, will have the meaning ascribed to it in the other Operative Document.

12. **Other Terms and References**. Words of any gender used in each Operative Document will be held and construed to include any other gender, and words in the singular number will be held to include the plural and vice versa, unless the context otherwise requires. References in any Operative Document to Paragraphs, subparagraphs, Sections, subsections or other subdivisions refer to the corresponding Paragraphs, subparagraphs, Sections, subsections or subdivisions of that Operative Document, unless specific reference is made to another document or instrument. References in any Operative Document to any Schedule or Exhibit refer to the corresponding Schedule or Exhibit attached to that Operative Document, which are made a part thereof by such reference. All capitalized terms used in each Operative Document which refer to other documents will be deemed to refer to such other documents as they may be renewed, extended, supplemented, amended or otherwise modified from time to time, provided such documents are not renewed, extended or modified in breach of any provision contained in the Operative Documents or, in the case of any other document to which BNPPLC is a party or of which BNPPLC is an intended beneficiary, without the consent of BNPPLC. All accounting terms used but not specifically defined in any Operative Document will be construed in accordance with GAAP. The words "this [Agreement]", "herein", "hereof", "hereby", "hereunder" and words of similar import when used in each Operative Document refer to that Operative Document as a whole and not to any particular subdivision unless expressly so limited. The phrases "this Paragraph", "this subparagraph", "this Section", "this subsection" and similar phrases used in any operative document refer only to the Paragraph, subparagraph, Section, subsection or other subdivision described in which the phrase occurs. As used in the Operative Documents the word "or" is not exclusive. As used in the Operative Documents, the words "include", "including" and similar terms will be construed as if followed by "without limitation to". The rule of *ejusdem generis* will not be applied to limit the generality of a term in any of the Operative Documents when followed by specific examples. When used to qualify any

representation or warranty made by a Person, the phrases "to the knowledge of [such Person]" or "to the best knowledge of [such Person]" are intended to mean only that such Person does not have knowledge of facts or circumstances which make the representation or warranty false or misleading in some material respect; such phrases are not intended to suggest that the Person does indeed know the representation or warranty is true.

13. **Execution in Counterparts**. To facilitate execution, each of the Operative Documents may be executed in multiple identical counterparts. It will not be necessary that the signature of, or on behalf of, each party, or that the signature of all persons required to bind any party, appear on each counterpart. All counterparts, taken together, will collectively constitute a single instrument. But it will not be necessary in making proof of any of the Operative Documents to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, each of the parties to such document. Any signature page may be detached from one counterpart and then attached to a second counterpart with identical provisions without impairing the legal effect of the signatures on the signature page. Signing and sending a counterpart (or a signature page detached from the counterpart) by facsimile or other electronic means to another party will have the same legal effect as signing and delivering an original counterpart to the other party. A copy (including a copy produced by facsimile or other electronic means) of any signature page that has been signed by or on behalf of a party to any of the Operative Documents will be as effective as the original signature page for the purpose of proving such party's agreement to be bound.

14. **Not a Partnership, Etc**. Nothing in any Operative Document is intended to create any partnership, joint venture, or other joint enterprise between BNPPLC and NAI.

15. **No Fiduciary Relationship Intended**. Neither the execution of the Operative Documents or other documents referenced in this Agreement nor administration thereof by BNPPLC will create any fiduciary obligations of BNPPLC to NAI Moreover, BNPPLC and NAI disclaim any intent to create any fiduciary or special relationship between themselves under or by reason of the Operative Documents or the transactions described therein or any other documents or agreements referenced therein.

[The signature pages follow.]

IN WITNESS WHEREOF, this Common Definitions and Provisions Agreement is executed to be effective as of December 15, 2005.

BNP PARIBAS LEASING CORPORATION, a Delaware corporation

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

Common Definitions and Provisions Agreement — Signature Page

[Continuation of signature pages for Common Definitions and Provisions Agreement dated as of December 15, 2005]

NETWORK APPLIANCE, INC., a Delaware corporation

By: /s/ Steven Gomo
Steven Gomo, Chief Financial Officer

Common Definitions and Provisions Agreement — Signature Page

<u>Annex 1</u>

Notice of ABR Period Election

[Date]

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director
Telecopy: (972) 788-9140

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement dated as of December 15, 2005, between you, BNP Paribas Leasing Corporation, and the undersigned, Network Appliance, Inc.. This letter constitutes notice of our election to make the first Construction Period or Base Rent Period beginning on or after__________________, 20_________ subject to an ***ABR Period Election***.

We understand that until a different election becomes effective as provided in definitions of "ABR Period Election" and "LIBOR Period Election" in the Common Definitions and Provisions Agreement, all subsequent Construction Periods or Base Rent Periods will also be subject to an ABR Period Election.

<u>NOTE:</u> YOU ARE ENTITLED TO DISREGARD THIS NOTICE IF THE DATE SPECIFIED ABOVE CONCERNING THE COMMENCEMENT OF THE ABR PERIOD ELECTION IS LESS THAN TEN BUSINESS DAYS AFTER YOUR RECEIPT OF THIS NOTICE. HOWEVER, WE ASK THAT YOU NOTIFY US IMMEDIATELY IF FOR ANY REASON YOU BELIEVE THIS NOTICE IS DEFECTIVE.

NETWORK APPLIANCE, INC., a Delaware corporation

By: ______________________________
Name: ______________________________
Title: ______________________________

[cc all Participants]

Annex 2

Fixed Rate Lock Notice

[Date]

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director
Telecopy: (972) 788-9140

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement dated as of December 15, 2005, between you, BNP Paribas Leasing Corporation, and the undersigned, Network Appliance, Inc.. By this letter, which is given pursuant to subparagraph 3(B)(4) of the Lease, NAI requests that BNPPLC promptly establish a Fixed Rate for a notional amount equal to the Lease Balance as of the date of this letter for use in the calculation of the Effective Rate for all Base Rent Periods commencing on or after the following Fixed Rate Lock Date: __________________, 20_________.

As contemplated in the conditions set forth in subparagraph 3(B)(4) of the Lease, such Fixed Rate Lock Date is the first Business Day of a calendar month which falls after the projected Base Rent Commencement Date; such Fixed Rate Lock Date does not fall prior to the end of any Base Rent Period which has commenced or will commence before BNPPLC receives this notice; and NAI expects BNPPLC to receive this notice more than ten days prior to such Fixed Rate Lock Date.

In an earlier phone conversation today between a representative of NAI and _________ at the New York Branch of BNP Paribas, NAI requested an estimate from BNP Paribas of the Fixed Rate that would be established by BNPPLC and BNP Paribas entering into an Interest Rate Swap. The estimate provided by telephone was: _________ percent (_________%) per annum.

By this letter, NAI confirms that it will accept such a rate or any lower rate as the Fixed Rate for purposes of the Lease.

NOTE: BNPPLC shall be entitled to disregard this notice if the conditions to a Fixed Rate Lock, as specified in subparagraph 3(B)(4) of the Lease, have not been satisfied. However, NAI requests that BNPPLC notify NAI immediately if for any reason BNPPLC believes this notice will not be effective.

NETWORK APPLIANCE, INC., a Delaware corporation

By: ______________________________

Name: ______________________________

Title: ______________________________

[cc all Participants]

<u>Annex 3</u>

Notice of LIBOR Period Election

[Date]

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director
Telecopy: (972) 788-9140

Gentlemen:

Capitalized terms used in this letter are intended to have the meanings assigned to them in the Common Definitions and Provisions Agreement dated as of December 15, 2005, between you, BNP Paribas Leasing Corporation, and the undersigned, Network Appliance, Inc.. This letter constitutes notice of our election to make the first Construction Period or Base Rent Period beginning on or after__________________, 20_________ subject to a ***LIBOR Period Election*** of __________________ month(s).

We understand that until a different election becomes effective as provided in definitions of "ABR Period Election" and "LIBOR Period Election" in the Common Definitions and Provisions Agreement, all subsequent Construction Periods or Base Rent Periods will also be subject to the same LIBOR Period Election.

<u>NOTE:</u> YOU ARE ENTITLED TO DISREGARD THIS NOTICE IF THE NUMBER OF MONTHS SPECIFIED ABOVE IS NOT A PERMITTED NUMBER UNDER THE DEFINITION OF "LIBOR PERIOD ELECTION" IN THE COMMON DEFINITIONS AND PROVISIONS AGREEMENT, OR IF THE DATE SPECIFIED ABOVE CONCERNING THE COMMENCEMENT OF THE LIBOR PERIOD ELECTION IS LESS THAN TEN BUSINESS DAYS AFTER YOUR RECEIPT OF THIS NOTICE. HOWEVER, WE ASK THAT YOU NOTIFY US IMMEDIATELY IF FOR ANY REASON YOU BELIEVE THIS NOTICE IS DEFECTIVE.

NETWORK APPLIANCE, INC., a Delaware corporation

By: ______________________________

Name: ______________________________

Title: ______________________________

[cc all Participants]

Annex 4

Minimum Insurance Requirements

A. <u>PROVISIONS APPLICABLE *BOTH BEFORE AND AFTER* THE COMPLETION DATE</u>.

1. <u>Other Requirements Not Affected</u>: The insurance coverages required by this Annex represent minimum requirements of BNPPLC and other Interested Parties and are not to be construed to modify or limit NAI's indemnities or other agreements in the Agreement to which this Annex is attached or in any other Operative Document. Such required coverages do not constitute a representation or determination by BNPPLC of the minimum insurance coverages NAI should maintain for its own protection.

2. <u>Requirements Apply Only to the Property</u>: Further, the insurance coverages required by this Annex apply only to the Property, it being understood that nothing in this Annex is intended to impose minimum insurance requirements upon NAI with respect to other properties owned or leased by NAI.

3. <u>Failure to Obtain</u>: Failure of BNPPLC to demand certificate or other evidence of full compliance with these insurance requirements, or failure of BNPPLC to identify a deficiency from evidence that is provided, will not be construed as a waiver of NAI's obligation to maintain required insurance.

4. <u>Copies of Policies</u>: NAI must provide to BNPPLC, at the offices of NAI, copies of all insurance policies required herein within ten (10) days after receipt of a request for such copies from BNPPLC or as soon as practicable if policies are in the process of being issued by the applicable insurer. Such copies must be certified as complete and correct by an authorized representative of the applicable insurer, subject to availability from the insurance company.

5. <u>Inconsistent Endorsements</u>. The insurance policies maintained to comply with these requirements will contain no endorsements that restrict, limit, or exclude coverages in any manner that is inconsistent with these express requirements without the prior express written approval of BNPPLC.

6. <u>Limits of Liability</u>. The limits of liability necessary to satisfy these requirements may be provided by a single policy of insurance or by a combination of primary and umbrella/excess policies, but in no event will the total limits of liability available for any one occurrence or accident be less than the amount required herein.

7. <u>Additional Insured Status</u>. Additional insured status will be provided in favor of BNPPLC and other Interested Parties on all liability insurance required herein except workers' compensation and employer's liability. ***Such additional insured status will be provided on a basis that neither limits coverage to the additional insured by reason of its negligence (sole or otherwise) nor excludes coverage for completed operations with respect to construction of the Improvements***.

8. Primary Liability. The insurance policies maintained to comply with these requirements will be primary to all insurance available to BNPPLC and other Interested Parties, collectively or individually, with BNPPLC and other Interested Parties' insurance being excess, secondary and non-contributing (except in the case of workers' compensation and employer's liability insurance). Where necessary, coverage will be endorsed to provide such primary liability.

B. PROVISIONS APPLICABLE *BEFORE* THE COMPLETION DATE.

1. General Terms and Conditions.

A. Definitions: For purposes of this Annex:

"Construction Period Policies" means insurance policies that satisfy the minimum requirements set forth in this Annex and that NAI has obtained or required its Contractors to obtain with respect to the Property prior to the Completion Date.

"Contractor" will include subcontractors of any tier.

"ISO" means Insurance Services Office.

B. Status and Rating of Insurance Company. All insurance coverages required herein prior to the Completion Date will be written through insurance companies admitted to do business in the State of California and rated upon each renewal no less than A-: VII in the then most current edition of A.M. Best's Key Rating Guide.

C. Waiver of Subrogation. All insurance coverages carried by NAI with respect to the Construction Project, whether required herein or not, will provide a waiver of subrogation in favor of BNPPLC and other Interested Parties.

D. Release and Waiver: Without limiting other waivers or provisions in favor of BNPPLC and other Interested Parties in any of the Operative Documents or other attachments thereto, NAI hereby releases, and agrees to cause all Contractors performing any Work prior to the Completion Date (other than subcontractors providing goods and/or services with a value of less than $100,000) to release, BNPPLC and all other Interested Parties from any and all claims or causes of action whatsoever that NAI and/or such Contractors might otherwise now or hereafter have resulting from or in any way connected with any loss covered by insurance, whether required herein or not, or which would have been covered by insurance required herein but for a failure of NAI and/or its Contractors to maintain such insurance.

E. Initial Insurance Representations to BNPPLC and Other Interested Parties: NAI represents, acknowledges and agrees that:

1. Any Construction Period Policies not previously obtained will be obtained by NAI (or by the primary Contractor engaged by NAI to perform the Work), and the initial premiums for all Construction Period Policies will be paid, before NAI requests Construction Advances that cause the Lease Balance to exceed $2,000,000; and notwithstanding anything to the contrary in the Construction Management Agreement, BNPPLC may refuse to fund any Construction Advances that would cause the Lease Balance to exceed $2,000,000 prior to such time as BNPPLC is satisfied that NAI has obtained and paid the premiums for the Construction Period Policies. Moreover, in the case of the Builder's Risk Policy, the premium must be paid or prepaid for the entire period through the projected Completion Date before the Lease Balance exceeds $2,000,000.

2. The coverages provided by the Construction Period Policies will not be terminated or modified to reduce, limit or qualify coverages in any material respect without BNPPLC's prior written consent in each case by reason of any act or omission on the part of NAI or anyone acting for or authorized to act for NAI (including any Contractor engaged by NAI to obtain the Construction Period Policies for NAI). Without limiting the foregoing, NAI will not do or authorize any act or omission that could cause the coverage provided with respect to any Improvements by the Builder's Risk Policy to expire or lapse before the Completion Date.

3. NAI must notify BNPPLC with reasonable promptness of any possible damage claims known to NAI that NAI believes are, individually or taken together, reasonably likely to a exceed seventy-five percent (75%) of any aggregate limit of the Builder's Risk Policy required herein.

4. NAI will endeavor in good faith to cause each certificate of

insurance which is provided to BNPPLC by an insurer, or its authorized representative, at the request of NAI in regard to any Construction Period Policies to include the following express provision:

> This is to certify that the policies of insurance described herein have been issued to the Insured for whom this certificate is executed and are in force at this time. In the event of cancellation or non-renewal of coverage affecting the certificate holder, other than by reason of nonpayment of premium, thirty (30) days prior written notice will be given to the certificate holder by certified mail or registered mail, return receipt requested. In the event of cancellation or non-renewal of coverage affecting the certificate holder by reason of nonpayment of premium, ten (10) days prior written notice will be given to the certificate holder by certified mail or registered mail, return receipt requested.

It is understood, however, that an insurer issuing such a certificate may decline to include the foregoing statement in the certificate, in which case NAI will instead deliver the certificate to BNPPLC with a cover letter from NAI itself which states substantially as follows:

> Enclosed is a certificate of insurance, which has been issued by an insurer or its authorized representative, and which we are providing to you to confirm that policies described in the certificate have been issued to NAI or another insured named in the certificate and are in force at this time. NAI also certifies to you that such policies have been issued, and in the event of any cancellation, non- renewal, or reduction in coverage affecting you (BNP Paribas Leasing Corporation) or other Interested Parties, NAI will give you thirty (30) days prior written notice by certified mail or registered mail, return receipt requested.

5. NAI will also endeavor in good faith to cause each Construction Period Policy to be endorsed to provide, in effect, that (A) in the event of cancellation, non-renewal, or reduction in coverage affecting BNPPLC, other than by reason of nonpayment of premium, thirty (30) days prior written notice will be given by the insurer to BNPPLC by certified mail or registered mail, return receipt requested; and (B) in the event of cancellation, non-renewal, or reduction in coverage affecting

BNPPLC by reason of nonpayment of premium, ten (10) days prior written notice will be given by the insurer to BNPPLC by certified mail or registered mail, return receipt requested.

2. <u>Commercial General Liability Insurance</u>. Throughout the period from the Effective Date to the Completion Date, NAI will maintain commercial general liability insurance in accordance with the following requirements:

A. <u>Coverage</u>: Such insurance will cover liability (as to claims covered by the form of CGL policy specified below, including claims for bodily injury and property damage) arising from any occurrence on or about the Land or from any operations conducted on or about the Land, including but not limited to tort liability assumed under any of the Operative Documents. Defense will be provided as an additional benefit and not included within the limit of liability.

B. <u>Form</u>: Commercial General Liability Occurrence form (ISO CG 0001, dated 12 04, or an equivalent substitute form providing the same or greater coverage, and in any case written to provide primary coverage to BNPPLC as provided in ***<u>Part A.8</u>*** above).

C. <u>Amount of Insurance</u>: Coverage will be provided with limits of not less than:

i. Each Occurrence Limit	$1,000,000
ii. General Aggregate Limit	$2,000,000
iii. Product-Completed Operations Aggregate Limit	$2,000,000
iv. Personal and Advertising Injury Limit	$1,000,000

D. <u>Required Endorsements</u>:

i.	<u>Additional Insured</u>.	as required in ***<u>Part A.7</u>*** above.
ii.	<u>Aggregate Per Location</u>	The aggregate limit will apply separately to each location through use of an Aggregate Limit of Insurance Per Location endorsement (ISO CG 2504 1185 or its equivalent).
iii.	<u>Notice of Cancellation,</u>	

Nonrenewal or Reduction in Coverage: Consistent with ***Part B.1.E.5*** above.

iv. Personal Injury Liability: The personal injury contractual liability exclusion will be deleted.

v. Primary Liability: As required in ***Part A.8*** above.

vi. Waiver of Subrogation: As required in ***Part B.1.C*** above.

E. Deductible or Self Insured Retention Under Liability Policies: If a gap in the liability insurance coverage provided to BNPPLC or another Interested Party under any Construction Period Policy results from any deductible, self-insured retention or other similar arrangement to which NAI agrees, then such gap must be covered by one or more other Construction Period Policies, such that liability insurance protection afforded to BNPPLC and other Interested Parties by all such Construction Period Policies, taken together, is no less than it would be if NAI had not agreed to the deductible, self-insured retention or other similar arrangement.

3. Workers' Compensation/Employer's Liability Insurance. Throughout the period from the Effective Date to the Completion Date, NAI will maintain workers' compensation and employer's liability insurance in accordance with the following requirements:

A. Coverage: Such insurance will cover liability arising out of NAI's employment of workers and anyone for whom NAI may be liable for workers' compensation claims.

B. Amount of Insurance: Coverage will be provided with a limit of not less than:

i. Workers' Compensation: Statutory limits.

ii. Employer's Liability: $1,000,000 each accident and each disease.

C. Required Endorsements:

i. Notice of Cancellation, Nonrenewal or Reduction in Coverage: Consistent with ***Part B.1.E.5*** above.

ii. Waiver of Subrogation: As required in ***Part B.1.C*** above.

4. Umbrella/Excess Liability Insurance. Throughout the period from the Effective Date to the Completion Date, NAI will maintain umbrella/excess liability insurance in accordance with the following requirements:

A. Coverage: Such insurance will be excess over and be no less broad than all coverages described in the preceding subsections 1, 2 and 3 and will include a drop-down provision if commercially available.

B. Form: This policy will have the same inception and expiration dates as the commercial general liability insurance required above or a nonconcurrency endorsement.

C. Amount of Insurance: Coverage will be provided with a limit of not less than $10,000,000 per occurrence and in the aggregate.

5. Builders Risk Insurance. Throughout the period from the Effective Date to the Completion Date, NAI will maintain or cause to be maintained property insurance (Builders Risk Insurance) in accordance with the following requirements:

A. Insureds: Protection will extend to BNPPLC as a Named Insured or Additional Named Insured as its interest may appear; and the policy will be modified if necessary so that the protection afforded to BNPPLC is not reduced or impaired by acts or omissions of NAI or any other beneficiary or insured. (Such modification of the policy may be by endorsement comparable to a standard mortgagee clause; not limited, however, by its terms to BNPPLC's rights "as a mortgagee" and not conditioned upon rights of the insurer to be subrogated to BNPPLC's rights under the Operative Documents in the event of a payment of insurance proceeds to BNPPLC.)

B. Covered Property: Such insurance will cover:

i. Improvements and any equipment made or to be made a permanent part of the Property;

ii. structure(s) under construction;

iii. property including materials and supplies on site for installation;

iv. property including materials and supplies at other locations but intended for use at the site;

v. property including materials and supplies in transit to the site for installation; and

vi. temporary structures (*e.g.*, scaffolding, falsework, and temporary buildings) located at the site.

C. Form: Coverage will be on an "all risk" form, will include theft, flood, earthquake, and earthquake sprinkler leakage, and be written on a completed-value basis with no co-insurance provision. No protective safeguard warranty will be permitted.

D. Amount of Insurance: Real property coverage will be provided in an amount equal at all times to the full replacement value, exclusive of land, foundation, footings, excavations and grading.

E. Deductibles. Deductibles applicable to the Builder's Risk Policy will not exceed the following:

i.	All Risks of Direct Damage, Per Occurrence, except flood and earthquake	$50,000
ii.	Delayed Opening Waiting Period	30 Days
iii	Flood, Per Occurrence	$50,000 or excess of NFIP if in Flood Zone A
iv	Earthquake and Earthquake Sprinkler Leakage, Per Occurrence	5% of total project value at risk at the time of the loss, subject to a minimum of $100,000

F. Termination of Coverage: The termination of coverage provision will be endorsed to permit occupancy of the covered property being constructed. Further, NAI will maintain or cause the insurance to be maintained in effect, unless otherwise provided for the Operative Documents, until the earliest of the following dates:

i. the date on which all persons and organizations who are insureds under the policy agree that it is terminated;

ii. any termination or expiration of the Lease upon the Designated Sale Date, which is the date upon which final payment is expected under the Operative Documents; or

iii. the date on which the insurable interests in the Covered Property of all insureds other than NAI have ceased;

G. Required Endorsements and Minimum Sublimits:

i.	Additional Expenses Due To Delay In Completion Project, including but not limited to financing costs including interest expenses, insurance expenses, professional fees and taxes;	Included with specific sublimits (based on an estimated 12 period of indemnity) as follows: $1,900,000 — construction financing interest. $380,000 — real estate taxes $204,000 — insurance premiums
ii.	Agreed Value;	No coinsurance
iii.	Boiler & Machinery on a Comprehensive Basis;	Included without sublimit
iv.	Damage Resulting From or Arising From Error, Omission or Deficiency In Design, Specifications, Workmanship or Materials, Including Collapse;	Included without sublimit
v.	Debris Removal Additional Limit; Debris Removal	$4,000,000 sublimit
vi.	Earthquake including Sprinkler Leakage;	$10,000,000 sublimit
vii.	Expediting Expenses;	$50,000 sublimit
viii.	Flood — Annual Aggregate including Earthquake Sprinkler Leakage;	$10,000,000 sublimit

ix.	Freezing;	$100,000 sublimit
x.	Notice of Cancellation or Reduction;	Consistent with ***Part B.1.E.5*** above
xi.	Occupancy Clause;	Consistent with Part ***B.5.F*** above
xii.	Demolition /Increased Cost of Cost of Construction — Per Occurrence	$1,000,000 sublimit
xiii.	Pollutant Clean-Up and Removal, provided that such condition ensues following a loss from a covered peril;	Included in Debris Removal sublimit
xiv.	Preservation of Property;	Included without sublimit
xv.	Repair, Replace or Re-erect Valuation Clause;	Included without sublimit
xvi.	Testing;	Included without sublimit
xvii.	Waiver of Subrogation.	As required in ***Part B.1.C*** above

6. Evidence of Insurance. NAI will provide confirmation of the insurance required prior to the Completion Date in accordance with the following:

A. Provision of Evidence. Evidence of the insurance coverage required to be maintained by NAI, represented by certificates of insurance or policies and endorsements issued by the insurance company or its legal agent, must be furnished to BNPPLC prior to the Effective Date. New certificates of insurance or policies and endorsements will be provided to BNPPLC prior to or concurrent with the termination date of the current certificates of insurance or policies and endorsements.

B. Form:

i The Builders Risk Insurance will be evidenced by ACORD form 28, "Evidence of Property Insurance", completed in a manner satisfactory to BNPPLC to show compliance with the requirements of this Annex. To the extent requested by BNPPLC, copies of endorsements to such insurance must be attached to such form.

ii. All liability insurance required herein will be evidenced by ACORD form 25, "Certificate of Insurance", in each case completed in a manner satisfactory to BNPPLC to show compliance with the requirements of this Annex. To the extent requested by BNPPLC, copies of endorsements to this insurance must be attached to such form.

C. Specifications: Such certificates of insurance or policies and endorsements will specify:

i. BNPPLC as a certificate holder with correct mailing address as provided by BNPPLC.

ii. Insured's name, which must match that on the Agreement to which this Annex is attached.

iii. Insurance companies affording each coverage, policy number of each coverage, policy dates of each coverage, all coverages and limits described herein, and signature of authorized representative of insurance company.

iv. Producer of the certificate with correct address and phone number listed.

v. Additional or named insured status of BNPPLC as required by this Annex.

vi. Aggregate limits per location (except as to the umbrella liability insurance) required by this Annex.

vii. Amount of any deductibles and/or retentions.

viii. Cancellation, nonrenewal and reduction in coverage notification consistent with ***Part B.1.E.5*** above. Additionally, NAI will endeavor in good faith to cause any insurer issuing to BNPPLC a certificate on ACORD form 25 to delete the words "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon Company, it agents or representatives" from the cancellation provision of such form.

ix. Primary status as required by this Annex.

x. Waivers of subrogation as required by this Annex.

D. Required Endorsements. A copy of each required endorsement will, if and as requested by BNPPLC from time to time, also be provided.

E. Commencement of Construction. Commencement of construction without provision of the required certificate of insurance and/or required policies and endorsements, or without compliance with any other provision of this Annex or the Agreement to which it is attached, will not constitute a waiver by BNPPLC of any rights. BNPPLC will have the right, but not the obligation, of prohibiting NAI or any Contractor from performing any work until such certificate of insurance and/or required policies and endorsements are received by BNPPLC.

7. Contractor's Insurance: To the extent, ***if any***, necessary to preserve or provide liability coverage for BNPPLC and other Interested Parties with regard to operations performed on or about the Property prior to the Completion Date, NAI will require Contractors to provide (or will provide the coverage on behalf of Contractors) similar to that required of NAI by the foregoing provisions of this Annex. In the event NAI requires any Contractor to maintain Construction Period Policies necessary to comply with these insurance requirements, NAI will also require such Contractor to provide and maintain certificates of insurance containing provisions as described herein (modified to recognize the Contractor, rather than NAI, as named insured) enumerating, among other things, the waivers of subrogation, additional or named insured status, and primary liability as required herein; and in such event NAI will cause the Contractor to make those insurance certificates available to BNPPLC upon request.

C. PROVISIONS APPLICABLE *AFTER* THE COMPLETION DATE.

1. Liability Insurance: After the Completion Date and throughout the Term of the Lease, NAI must maintain commercial general liability insurance against claims for bodily injury, death, advertising injury and property damage occurring in or upon or resulting from any occurrence in or upon the Property under one or more insurance policies, all in such amounts, with such insurance companies and upon such terms and conditions (including self-insurance, whether by deductible, retention, or otherwise) as are consistent with NAI's normal insurance practices in the United States. In any event, policies under which NAI maintains such liability insurance must provide, by endorsement or otherwise, that BNPPLC and other Interested Parties are also insured thereunder against such claims with coverage that is not limited by any negligence or allegation of negligence on their part and with coverage that is primary, not merely excess over or contributory with the other commercial general liability coverage they may themselves maintain.

2. Property Insurance: After the Completion Date and throughout the Term of the Lease, 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, all in such amounts, with such insurance companies and upon such terms and conditions (including self-insurance, whether by deductible, retention, or otherwise) as are consistent with NAI's normal insurance practices in the United States. In any event, policies under which NAI maintains such insurance must:

i. show BNPPLC as an additional insured as its interest may appear; and

ii provide that the protection afforded to BNPPLC thereunder is primary (such that any policies maintained by BNPPLC itself will be excess, secondary and noncontributing) and is not to be reduced or impaired by acts or omissions of NAI or any other beneficiary or insured.

3. **Evidence of Insurance.** NAI will provide confirmation of the insurance required after the Completion Date in accordance with the following:

A. Provision of Evidence. Evidence of the insurance coverage required to be maintained by NAI, represented by certificates of insurance, evidence of insurance, and endorsements issued by the insurance company or its legal agent, must be furnished to BNPPLC prior to the Completion Date. New certificates of insurance, evidence of insurance, and endorsements will be provided to BNPPLC prior to or concurrent with the termination date of the current certificates of insurance, evidence of insurance, and endorsements.

B. Form:

i The property insurance will be evidenced by ACORD form 28, "Evidence of Property Insurance", completed in a manner reasonably satisfactory to BNPPLC to show compliance with the requirements of this Annex.

ii. The liability insurance will be evidenced by ACORD form 25, "Certificate of Insurance", in each case completed in a manner reasonably satisfactory to BNPPLC to show compliance with the requirements of this Annex. To the extent requested by BNPPLC, copies of endorsements giving additional insured status to BNPPLC and other Interested Parties must be attached to such form.

C. Specifications: Such certificates of insurance or policies and endorsements will specify:

i. BNPPLC as a certificate holder with correct mailing address as provided by BNPPLC.

ii. Insured's name, which must match that on the Agreement to which this Annex is attached.

iii. Insurance companies affording each coverage, policy number of each coverage, policy dates of each coverage, all coverages and limits described herein, and signature of authorized representative of insurance company.

iv. Producer of the certificate with correct address and phone number listed.

v. Additional or named insured status of BNPPLC as required by this Annex.

vi. Aggregate limits.

vii. Amount of any deductibles and/or retentions.

viii. Primary status as required by this Annex.

ix. Waivers of subrogation as required by this Annex.

Annex 5

Participation Agreement Form

Attached to and made a part of this Annex is a form of Participation Agreement that may be used by BNPPLC to share risks and rewards of the Operative Documents with other parties.

PARTICIPATION AGREEMENT

BETWEEN

BNP PARIBAS LEASING CORPORATION
(“BNPPLC”)

AND

Banks or Other Financial Institutions
Designated as Participants in this Agreement

(“Participants”)

__________________, 200_________

PARTICIPATION AGREEMENT

This PARTICIPATION AGREEMENT (this "**Agreement**"), dated as of ____________________, 200__________, is made by and between BNP PARIBAS LEASING CORPORATION ("**BNPPLC**"), a Delaware corporation, and ***[PARTICIPANTS' NAMES] ("**Participants**").

RECITALS

Contemporaneously with the execution of this Agreement, BNPPLC and Network Appliance, Inc. ("**NAI**"), a Delaware corporation, are executing a Common Definitions and Provisions Agreement dated as of ____________________, 200__________ (the "**Original Effective Date**") (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***.

At the request of NAI, BNPPLC is executing a Ground Lease to acquire from NAI a leasehold estate of less than 35 years in the Land and any existing Improvements on the Land contemporaneously with the execution of this Agreement.

Also contemporaneously with the execution of this Agreement, BNPPLC and NAI are executing a Construction Management Agreement (the "**Construction Management Agreement**"), a Lease Agreement (the "**Lease**") and a Closing Certificate and Agreement (the "**Closing Certificate**"), all dated as of the Original Effective Date. 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 Original Effective Date (the "**Purchase Agreement**") between BNPPLC and NAI, NAI will have the right to purchase, among other things, BNPPLC's leasehold estate under the Ground Lease on and subject to the terms and conditions set forth in the Purchase Agreement.

By this Agreement, the parties desire to evidence the Participants' agreement to participate with BNPPLC in certain of the risks and rewards to BNPPLC of the Common Definitions and Provisions Agreement, the Ground Lease, the Construction Management Agreement, the Lease, the Closing Certificate and the Purchase Agreement (collectively, the "**Operative Documents**"), which participation is to be accomplished through the exchange of promises to make payments computed by reference to the sums paid or received by BNPPLC from time to time pursuant to the Operative Documents, all as more particularly provided below.

AGREEMENTS

Participants agree to participate with BNPPLC in, and BNPPLC agrees to share with the Participants, the risks and rewards of the Operative Documents upon and subject to the following terms, provisions, covenants, agreements and conditions:

16. **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:

(a) "**Anticipated Advances**" means (1) the Initial Funding Advance and other amounts (other than Commitment Fees and Carrying Costs) that are added to the Outstanding Construction Allowance from time to time pursuant to Paragraph 3 of the Construction Management Agreement, and (2) advances of funds by or on behalf of BNPPLC to or on behalf of NAI pursuant to Paragraph 4 of the Construction Management Agreement. Any other amounts paid out-of-pocket by BNPPLC from time to time that BNPPLC is entitled to treat as Construction Advances pursuant to the express terms of the Construction Management Agreement (see subparagraphs 2(G)(2) and 8(A) of the Construction Management Agreement) will constitute Protective Advances, not Anticipated Advances, for purposes of this Agreement.

(b) "**Back to Back Construction-Period Indemnity Claim**" means a claim by BNPPLC against NAI for payment of a Covered Construction Period Loss that BNPPLC may assert under the Construction Management Agreement in order to cover or reimburse a claim made against BNPPLC itself by another Interested Party because of Uncovered Construction-Period Participant Losses suffered by the other Interested Party.

(c) "**Back to Back Construction-Period Indemnity Payment**" means a payment made to BNPPLC by or on behalf of NAI in satisfaction of a Back to Back Construction-Period Indemnity Claim.

(d) "**Bank Specific Lease Charges**" means payments made to BNPPLC by or on behalf of NAI for the account of a Participant or any other Interested Party under subparagraph 5(B) of the Lease. Bank Specific Lease Charges include, for example, payments made to compensate a Participant for an increase in costs related to advances made by the Participant hereunder and attributable to a Banking Rules Change.

(e) "**Base Rent**" means amounts payable as Base Rent under and as defined in the Lease, except that each such amount payable for any period during which a Fixed Rate Lock remains in effect be adjusted, for purposes of calculating the payments required this Agreement, to equal the Base Rent that would have been required for such period under the Lease if such Fixed Rate Lock had not been in effect and a one month LIBOR Period Election had been in effect. In no event, however, will any Fixed Rate Settlement Amounts be included in or deducted from amounts that constitute Base Rent for purposes of this Agreement.

(f) "**Critical Event**" means any of the following:

(i) any failure by NAI to purchase BNPPLC's interest in the Property or to cause an Applicable Purchaser to purchase BNPPLC's interest in the Property when required under the Purchase Agreement;

(ii) any failure by NAI to pay Base Rent which continues for 10 days; or

(iii) any Issue 97-10/Event; or

(iv) any delivery by NAI of a Pre-lease Force Majeure Event Notice; or

(v) any Termination of NAI's Work which may occur as provided in the Construction Management Agreement prior to the Completion Date.

(g) "**Critical Remedy**" means BNPPLC's right to do any of the following: (a) file a lawsuit against NAI to enforce the Operative Documents; (b) send a notice to terminate NAI's rights and obligations to continue Work as provided in subparagraph 7(C) of the Construction Management Agreement; and (c) make the election to accelerate the Designated Sale Date as described in the definition thereof in the Common Definitions and Provisions Agreement.

(h) "**Defaulting Participant**" means any Participant that has failed to make a payment when due to BNPPLC equal to the Participant's Percentage of an Anticipated Advance as required by subparagraph 3(B) below.

(i) "**Deferred Construction-Period Compensation**" means any additional amount paid to BNPPLC pursuant to the Purchase Agreement only because of — and which BNPPLC would not have been paid or allowed to retain but for — Losses that are included in any Balance of Unpaid Construction Period Losses, but that do not qualify as Protective Advances hereunder and do not consist of reductions in Carrying Costs or Base Rent resulting from a Pre-lease Force Majeure Loss. (Should the Property not be sold by BNPPLC until after NAI no longer has any right to purchase or arrange a purchase by an Applicable Purchaser pursuant to the Purchase Agreement, sales proceeds — net of sales expenses — will nevertheless be allocated for purposes of this Agreement among Net Sales Proceeds, Deferred Construction-Period Compensation and Unrecovered Protective Advances as if NAI had arranged the sale pursuant to the Purchase

Agreement.)

(j) "**Distributable Payments**" means any payments ***actually received*** by BNPPLC under the Operative Documents as (or in satisfaction of NAI's obligations for) any of the following or interest on past due amounts thereof:

(i) Base Rent;

(ii) Qualified Prepayments (including 97-10/Prepayments);

(iii) Bank Specific Lease Charges;

(iv) Back to Back Construction-Period Indemnity Payments;

(v) any Supplemental Payment; and

(vi) Net Sales Proceeds and any Deferred Construction-Period Compensation that BNPPLC excluded from sales proceeds received by it for purposes of calculating Net Sales Proceeds.

(k) "**Late Payment Rate**" means (a) for each day (other than as set forth in clause (b) of this sentence) the Fed Funds Rate or (b) for the purpose of computing interest on past due payments for each day following the fifth day after such payments first became due, a rate of three percent (3%) per annum in excess of the Prime Rate then in effect; except that the Late Payment Rate will not, notwithstanding anything to the contrary herein contained, exceed the maximum rate of interest permitted by applicable law.

(l) "**Majority**" means, at the time any determination thereof is required, any of the Participants and BNPPLC, the aggregate Percentages of which equal or exceed sixty-seven percent (67%) of the Percentages of BNPPLC and of all the Participants then entitled to vote under subparagraph 6(A).

(m) "**Net Cash Flow**" means payments ***actually received*** by BNPPLC under the Operative Documents as (or in satisfaction of NAI's obligations for) Base Rent, Qualified Prepayments (including 97-10/Prepayments) or a Supplemental Payment or as interest on past due Base Rent, Qualified Prepayments or a Supplemental Payment; except that the following will be deducted or excluded from such payments for purposes of calculating Net Cash Flow: (a) any Deferred Construction-Period Compensation included in any Supplemental Payment; and (b) any Unrecovered Protective Advances for which any Participant has not fully reimbursed its Percentage to BNPPLC as provided in subparagraph 3(C). By deducting any Unrecovered Protective Advance in the calculation of Net Cash Flow, BNPPLC will be considered to have “recovered” such Protective Advance for purposes of calculating “Excess Reimbursements” under and as defined in subparagraph 3(C). Further, if BNPPLC deducts Unrecovered Protective Advances in the calculation of Net Cash Flow, but later receives payment from NAI (in excess of other amounts then due from NAI) for the same Protective Advances, such payment to BNPPLC by NAI will also constitute Net Cash Flow for purposes of this Agreement.

(n) “**Net Sales Proceeds**” means, subject to the deductions and exclusions described below in this definition:

(1) all payments ***actually received*** by BNPPLC under the Purchase Agreement as (or in satisfaction of NAI’s or an Applicable Purchaser’s obligations for) the purchase price for BNPPLC’s interest in Property or in Escrowed Proceeds; and

(2) if the Property is not sold pursuant to the Purchase Agreement on the Designated Sale Date, then all rents and sales, condemnation and insurance proceeds ***actually received*** by BNPPLC (other than sales proceeds paid or to be paid by BNPPLC to NAI pursuant to Paragraph 3(E) of the Purchase Agreement) from any sale or lease after the Designated Sale Date of any interest in, or because of any subsequent taking or damage to, the Property.

For purposes of calculating Net Sales Proceeds, the following will be deducted or excluded from such payments (without duplication of any item): (i) any excess sales proceeds that BNPPLC is required by the Purchase Agreement to pay over to NAI; (ii) any Deferred Construction-Period Compensation; (iii) any amounts applied by BNPPLC to pay, or received by BNPPLC as reimbursement for, bona fide costs of a sale of the Property; and (iv) any other Unrecovered Protective Advances for which any Participant has not fully reimbursed its Percentage to BNPPLC as provided in subparagraph 3(C). Without limiting the foregoing, after any Designated Sale Date upon which neither NAI nor an Applicable Purchaser purchases BNPPLC’s interest in the Property, BNPPLC may deduct the following as Unrecovered Protective Advances: (x) ad valorem taxes, (y) insurance premiums; and (z) other Losses of every kind suffered or incurred by BNPPLC (other than general overhead) with respect to the ownership, operation or maintenance of the Property after the Designated Sale Date, other than Unrecovered Protective Advances for which all Participants have paid BNPPLC their respective Percentages thereof as required by subparagraph 3(C). By deducting any Unrecovered Protective Advances in the calculation of Net Sales Proceeds, BNPPLC will be considered to have “recovered” such Protective Advances for purposes of calculating Excess Reimbursements under and as defined in subparagraph 3(C). Also, if BNPPLC deducts Unrecovered Protective Advances in the calculation of Net Sales Proceeds, but later receives payment from NAI (in excess of other amounts then due from NAI) for the same Protective Advances, such payment to BNPPLC by NAI will constitute Net Sales Proceeds for purposes of this Agreement.

(o) “**Participants**” means [Participants’ Names] and each of the other undersigned parties designated as Participants in the signature pages to this Agreement, and any other financial institutions which may hereafter become parties to this Agreement (by joining with BNPPLC in completing and executing a Participation Agreement Supplement).

(p) “**Participation Agreement Supplement**” means a Participation Agreement Supplement in substantially the form attached hereto as Exhibit A, completed and executed by BNPPLC and a Participant, adding the Participant as a party to this Agreement and to the Agency Agreement, changing a Participant’s Percentage or removing a Participant as a party to this Agreement.

(q) “**Participation Amount**” of BNPPLC or any Participant means the outstanding balance from time to time of the total investment made by BNPPLC under the Operative Documents or by the applicable Participant hereunder, as determined by BNPPLC. The Participation Amount of BNPPLC and each Participant will equal its share of the outstanding principal balance that would be due from NAI from time to time if BNPPLC had made a loan (and the Participants had participated in the loan) to NAI for NAI’s construction of improvements authorized by the Construction Management Agreement, instead of BNPPLC’s having acquired the Property itself and having leased the same to NAI as provided in the Operative Documents. Absent a failure by any Participant to make a payment required by subparagraph 3(B) or some other unexpected occurrence, it is expected that (a) the Participation Amounts of BNPPLC and the Participants will always be in proportion to their respective Percentages set forth in ***Schedule 1***, and (b) the total Participation Amounts of BNPPLC and all Participants on and prior to the Designated Sale Date will equal the Lease Balance computed from time to time as described in the Common Definitions and Provisions Agreement.

(r) “**Percentage**” of each Participant means, subject to change as provided in subparagraph 4(A) and to change by a Participation Agreement Supplement, the percentage designated as the Participant’s “Percentage” in ***Schedule 1***. “**Percentage**” of BNPPLC means a percentage that, at the time a determination of such Percentage is required hereunder, is equal to 100% less the sum of the Percentages of all the Participants.

(s) “**Protective Advances**” means any payments, other than Anticipated Advances or Excluded Taxes, made by or on behalf of BNPPLC at any time or from time to time because of, arising out of or related to, in whole or in part: (1) the Property or the construction, protection, preservation, operation, ownership or sale thereof; (2) any of the Operative Documents or the transactions contemplated therein; or (3) BNPPLC’s status as a party to any of the Operative Documents or anything done by BNPPLC to enforce the obligations of NAI under the Operative Documents (whether done upon BNPPLC’s own initiative or upon the direction of the Majority). Protective Advances will include any and all payments by BNPPLC (including those paid to attorneys, accountants, experts and other advisors) for which NAI is obligated to indemnify or reimburse BNPPLC by ***Paragraph 5 of the Lease or would be so obligated if the Term of Lease had commenced.

(t) "**Uncovered Construction-Period Participant Loss**" means a Loss incurred or suffered by a Participant (1) for which, if BNPPLC must pay or reimburse such Loss to the Participant, BNPPLC can in turn require payment or reimbursement from NAI under the indemnity against Covered Construction Period Losses set forth in Construction Management Agreement (*e.g.,* Losses arising because of fraud, misapplication of funds, illegal acts, or willful misconduct on the part of the NAI or its employees or agents or any other party for whom NAI is responsible), and (2) for which the Participant is not otherwise indemnified directly by or compensated by NAI or by insurance maintained by NAI.

(u) "**Unrecovered Protective Advances**" means Protective Advances that have not been repaid to BNPPLC by or on behalf of NAI and have not otherwise been previously recovered by BNPPLC through deductions from Net Cash Flow or Net Sales Proceeds as provided in the definitions of those terms above.

17. **Payments From BNPPLC to Each Participant**.

(a) Payments Computed by Reference to Net Cash Flow and Net Sales Proceeds. Upon the ***actual receipt*** of any Net Cash Flow, Net Sales Proceeds or interest thereon, BNPPLC will pay each Participant an amount equal to such Participant's Percentage times such Net Cash Flow, Net Sales Proceeds or interest, as the case may be.

(b) Payments Computed by Reference to Bank Specific Lease Charges. If BNPPLC ***actually receives*** any Bank Specific Lease Charges (or interest thereon) for the account of a particular Participant, then BNPPLC promises to promptly make a payment to such Participant equal to such Bank Specific Lease Charges (or interest thereon). If requested by any Participant, BNPPLC will make a demand upon NAI for payment of any Bank Specific Lease Charges due for the account of such Participant.

(c) Payments Computed by Reference to Back to Back Construction-Period Indemnity Payments. If BNPPLC ***actually receives*** any Back to Back Construction-Period Indemnity Payment (or interest thereon) in satisfaction of a Back to Back Construction-Period Indemnity Claim asserted for Losses for which BNPPLC is obligated to a particular Participant, then BNPPLC promises to make a payment to such Participant equal to such Back to Back Construction-Period Indemnity Payment (or interest thereon). If a Participant incurs or suffers an Uncovered Construction-Period Participant Loss, BNPPLC must compensate such Participant for the Uncovered Construction-Period Participant Loss; ***subject to the condition, however,*** that BNPPLC's obligation to so compensate a Participant will be satisfied only from any Back to Back Construction-Period Indemnity Payments received by BNPPLC on account of such obligation, it being understood that BNPPLC will have no personal liability for any such obligation.

(d) Payments Computed by Reference to Deferred Construction-Period Compensation. If BNPPLC ***actually receives*** any Deferred Construction-Period Compensation, and if any Participant suffered Losses included in the Unpaid Balance of Construction Period Losses for which such Deferred Construction-Period Compensation was paid, BNPPLC promises to pay such Participant a fraction of such Deferred Construction-Period Compensation. The numerator of the fraction will equal the Losses suffered by such Participant (and interest thereon) that are included in the Balance of Unpaid Construction-Period Losses as of the Designated Sale Date, and the denominator will equal the total Losses (and interest thereon) — *other than* Protective Advances and reduced Carrying Costs or Commitment Fees (and interest thereon) — which are included in the Balance of Unpaid Construction Period Losses as of the Designated Sale Date.

(e) Timing; Manner of Payment. Each payment required of BNPPLC by this Article 2 must be made prior to 3:00 p.m., New York time, on the same day that BNPPLC actually receives the corresponding Distributable Payment (in good funds), if BNPPLC's receipt of the corresponding Distributable Payment occurs prior to 2:00 P.M., New York time; if, however, BNPPLC's receipt of the Distributable Payment (in good funds) occurs on any day after 2:00 p.m., New York time, the payments required from BNPPLC to the Participants will not be due until 12:00 noon, New York time, on the next Business Day. All payments from BNPPLC to the Participants will be by transfer of federal funds pursuant to the wiring instructions set forth in ***Schedule 1***. Each payment owing to a Participant by BNPPLC will bear interest from the date it is due until it is paid by BNPPLC at the Late Payment Rate calculated on the basis of a 360-day year. Any payment by BNPPLC to a Participant after the time of day specified herein for such payment will be deemed not paid until the next following Business Day for purposes of this Agreement.

(f) Meaning of Actually Received. As used herein with respect to payments, "actually received" and words of like effect will include not only payments made directly from NAI or any Applicable Purchaser, but also amounts paid by others on NAI's behalf, amounts realized by way of setoff, amounts realized upon the disposition of collateral under any documents that may be given from time to time to secure NAI's obligations under the Lease or Purchase Agreement (net of the costs of disposition and further net of any amounts that must be returned to NAI or any third party having an interest in such collateral), and the fair market value of any property or services accepted in lieu of a cash payment (though it is understood that nothing herein contained will require BNPPLC to accept property or services in lieu of a cash payment required by the Operative Documents and that BNPPLC will not agree to accept property or services in lieu of any cash Distributable Payment without the Participants' prior written consent). Also, with respect to Base Rent included in the definition of Net Cash Flow, any Base Rent that BNPPLC receives as calculated in the Lease during a Fixed Rate Lock Period will be deemed the "actual receipt" of Base Rent as adjusted in accordance with the definition of "Base Rent" set forth above. The phrase "actually received" will not, however, include amounts received by BNPPLC from any of the Participants or from any affiliate of BNPPLC unless the context otherwise indicates. Finally, if payments due to BNPPLC from NAI are reduced only because of credits attributable to a reduction of BNPPLC's taxes not subject to indemnification by NAI, as described in subparagraph 4(C)(4) of the Lease, then the payments that BNPPLC would have received but for the credits will be considered as having been actually received by BNPPLC for purposes of this Agreement.

18. **Payments From the Participants to BNPPLC**.

(a) Initial Funding Advance. Each of the original Participants joining in the execution of this Agreement promises to pay to BNPPLC, contemporaneously with the execution of this Agreement, an initial payment as set forth below such Participant's name on **Schedule 1,** equal to the Participant's Percentage times the outstanding Lease Balance as of the date hereof.

[*DRAFTING NOTE: This provision assumes that the effective date of this Agreement will coincide with the first day of a new Base Rent Period or Construction Period. If that assumption is not correct, an adjustment should be made to address accrued Base Rent not yet paid or Carrying Costs not yet capitalized.]**

BNPPLC will have no obligation hereunder to any of the original Participants that fails to pay such initial payment. Such initial payment will be due no later than 12:00 noon, New York time, on the effective date of this Agreement.

(b) Future Advances. In the event any remaining Anticipated Advances may be required of BNPPLC pursuant to the Construction Management Agreement after the date of this Agreement:

(i) General. Subject to the limitation set forth in subparagraph 3(B)(3), each Participant promises to make payments to BNPPLC equal to such Participant's Percentage (as such Percentage may be adjusted from time to time pursuant to subparagraph 4(A)) times the total amount of each such Anticipated Advance.

(ii) Timing. Before 12:00 noon, New York time, on the third Business Day prior to any date on which BNPPLC expects to make a payment of an Anticipated Advance as provided in Paragraph 4 of the Construction Management Agreement, BNPPLC will notify the Participants of the amount of such payment, and each Participant must pay to BNPPLC such Participant's Percentage times such amount prior to 12:00

noon, New York time, on such date. The failure of any Participant to make a payment required by this subparagraph 3(B) will, for purposes of this Agreement, be deemed to continue until the Participant actually pays all past due amounts required by this subparagraph 3(B), together with interest thereon at the Late Payment Rate.

(iii) Limitation on Advances by Participant. Notwithstanding anything herein to the contrary or any adjustment to any Participant's Percentage pursuant to subparagraph 4(A), the total of all payments required of any Participant to BNPPLC by this subparagraph 3(B) (excluding interest on past due payments required by subparagraph 3(B)(2)) because of Anticipated Advances (in contrast to Protective Advances) will not exceed the amount that would cause such Participant's Participation Amount to exceed the Participation Amount specified for such Participant in **Schedule 1**.

(c) Protective Advances.

(i) General. If NAI fails to pay or reimburse any Protective Advance to BNPPLC within ten days after BNPPLC makes a demand or request therefor, BNPPLC may notify the Participants of such failure. Promptly after receipt of any such notice, each Participant must pay to BNPPLC an amount equal to such Participant's Percentage times the Protective Advance described in the notice, **EVEN IF THE PROTECTIVE ADVANCE WOULD NOT HAVE BEEN PAID BUT FOR ANY ACTUAL OR ALLEGED NEGLIGENCE OF BNPPLC OR ITS AFFILIATES OR REPRESENTATIVES AND EVEN IF THE PROTECTIVE ADVANCE WOULD NOT HAVE BEEN PAID BUT FOR ANY ENVIRONMENTAL LOSSES OR OTHER MATTERS OR CIRCUMSTANCES FOR WHICH BNPPLC MAY BE STRICTLY LIABLE**. After any Participant has paid its respective Percentage times the Protective Advance to BNPPLC, BNPPLC must pay to such Participant an amount equal to its Adjusted Percentage (as defined below) times any subsequent Excess Reimbursement (as defined below) or interest thereon ***actually received*** by BNPPLC for such Protective Advance. As used in this Agreement the "**Adjusted Percentage**" of any Participant will equal (i) such Participant's Percentage, divided by (ii) the sum of BNPPLC's Percentage and the Percentages of all Participants who have paid BNPPLC their respective shares of the Protective Advance at issue. As used in this Agreement, the term "**Excess Reimbursement**" will mean, for the Protective Advance at issue, (A) amounts reimbursed or paid by NAI to (or otherwise recovered by) BNPPLC on account of such Protective Advance, less (B) (i) the total amount of such Protective Advance, times (ii) the Percentages of any Participants that have not paid BNPPLC their respective Percentages of such Protective Advance.

(ii) Exceptions. Notwithstanding the foregoing, no Participant will be required to make any payment pursuant to this subparagraph 3(C) related to a Protective

Advance that is paid only because of a transfer or assignment by BNPPLC of its right to receive Distributable Payments or its rights and interests in and to the Property, the Operative Documents or this Agreement to BNPPLC's Affiliates. Further, nothing in this subparagraph 3(C) will be construed to require a payment by a Participant for that portion or percentage, if any, of a Protective Advance required only because of (and attributed by any applicable principles of comparative fault to): (a) conduct of BNPPLC or a Representative of BNPPLC that has been determined to constitute gross negligence or wilful misconduct in or as a necessary element of a final judgment rendered against BNPPLC or such Representative by a court with jurisdiction to make such determination; (b) any representation made by BNPPLC in the Operative Documents that is false in any material respect and that BNPPLC knew was false at the time of BNPPLC's execution of the Operative Documents; or (c) Liens Removable by BNPPLC. As used in this Agreement, "gross negligence" of BNPPLC will not include any negligent failure of BNPPLC to act when the duty to act would not have been imposed but for BNPPLC's status as owner of the Property or as a party to the Operative Documents or this Agreement.

(d) Method of Payment. All payments made by the Participants to BNPPLC will be made by transfer of federal funds to BNPPLC pursuant to the wiring instructions for BNPPLC set forth on ***Schedule 1***. Each payment owing to BNPPLC by any Participant must be paid to BNPPLC on the date specified herein or, if not specified, on demand and will bear interest from the date due until the date paid by the Participant at the Late Payment Rate calculated on the basis of a 360-day year. Any payment by a Participant to BNPPLC after the time of day specified herein for such payment will be deemed not paid until the next following Business Day for purposes of this Agreement.

19. **Other Adjustments, Deductions and Investments**.

(a) Defaulting Participants.

(i) Adjustments Because of Defaulting Participants. If any Anticipated Advance may be required of BNPPLC after the date of this Agreement, with respect to which any Defaulting Participant fails to make the payment required by subparagraph 3(B), the other Participants will nonetheless be required to make the payments to BNPPLC required by subparagraph 3(B). Further, in such event:

A BNPPLC may reduce any Defaulting Participant's Percentage as needed to prevent the Defaulting Participant from receiving a share of Net Cash Flow or Net Sales Proceeds that is in excess of the percentage computed by dividing the Participation Balance of such Defaulting Participant by the total Participation Balances of BNPPLC and all Participants collectively from time to time. Such reduction in the Defaulting Participant's Percentage will not cure such Participant's default hereunder nor constitute BNPPLC's sole remedy for such default, it being understood that other remedies provided herein or available at law or in equity will be in addition to any such reduction.

B Without limiting BNPPLC's other remedies hereunder, for purposes of computing payments that would otherwise be required to a Defaulting Participant because of BNPPLC's receipt of Net Cash Flow, BNPPLC may deduct from any Net Cash Flow actually received by BNPPLC the amount by which such Net Cash Flow was increased by Commitment Fees that accrued after the date the Defaulting Participant failed to make any payment required by subparagraph 3(B) and before the date upon the Defaulting Participant completely cured any such failure.

(ii) Defaulting Participant's Cure. After a failure to make a payment required by subparagraph 3(B), a Defaulting Participant may cure such failure by paying to BNPPLC all or part of such payment and interest thereon at the Late Payment Rate. In no event, however, will any such failure by a Defaulting Participant be considered cured before BNPPLC has effectively recovered the payment, together with such interest, either by reason of payments made to BNPPLC by the Defaulting Participant or by BNPPLC's exercise of other remedies as provided in subparagraph 4(A)(1)(a) or subparagraph 4(B).

(b) Setoff. In the event that one party to this Agreement has failed to pay to a second party hereto any amount when due hereunder, the second party may deduct such amount and interest thereon at the Late Payment Rate from any payments due from it under this Agreement to the first party. Without limitation, BNPPLC may setoff amounts owed to it by any Defaulting Participant against any termination fee payable to such Defaulting Participant pursuant to subparagraph 6(D) below if BNPPLC elects to reduce such Defaulting Participant's Percentage to zero as provided in subparagraph 6(D).

(c) Sharing of Payments. Each Participant agrees that if for any reason it obtains a payment made by or for NAI that reduces any Distributable Payment, and if such payment will cause such Participant to receive more than it would have received had such payment been made instead to BNPPLC and generated the payments by BNPPLC contemplated in this Agreement, then (1) such Participant must promptly purchase interests in the rights of other parties to this Agreement as necessary to cause BNPPLC and all Participants to share payments as they otherwise would have done under this Agreement, and (2) such other adjustments will be made from time to time as is equitable to ensure that BNPPLC and all Participants share all payments of (or that operate to reduce) Distributable Payments as they otherwise would have done under this Agreement. If, however, the payment received by the purchasing Participant or any part thereof is later recovered from the purchasing Participant, the purchase provided for in this subparagraph will be rescinded, and the price paid by the purchasing Participant to other parties will be repaid by them to the purchasing Participant to the extent of such recovery. Also, if the purchasing Participant is required by court order to pay interest on the payment so recovered, then amounts repaid to the purchasing Participant by the other parties will be repaid with interest, computed in the same manner as the interest required by the court order. Nothing in this subparagraph will in any way affect the right of BNPPLC or any Participant to obtain payment (whether by exercise of rights of banker's lien, set-off or counterclaim or otherwise) of indebtedness or obligations other than those established by this Agreement or any of the Operative Documents.

(d) Withholding Taxes. BNPPLC may deduct any United States withholding tax required on payments to a Participant hereunder from such payments, and the Participant must reimburse BNPPLC for any such taxes BNPPLC is required to pay and that BNPPLC has not deducted. If BNPPLC is uncertain whether United States withholding tax is required, BNPPLC may, after notice to the applicable Participant, deduct the withholding tax except during any period when BNPPLC is excused from such withholding because of the Participant's delivery to BNPPLC of (i) a statement in duplicate conforming to the requirements of United States Treasury Regulation Section 1.1441-5(b) or (ii) two duly completed copies of Internal Revenue Service Form W-8BEN or any successor form thereto ("**Form W-8BEN**") relating to the Participant and claiming complete exemption from withholding tax on all amounts to be received by the Participant pursuant to this Agreement or (iii) a valid United States Internal Revenue Service Form W-8ECI or any successor form thereto ("**Form W-8ECI**") relating to the Participant and claiming complete exemption from withholding tax on all amounts to be received by the Participant pursuant to this Agreement. Any Participant will, if requested by BNPPLC, deliver to BNPPLC subsequent statements with respect to such Treasury Regulation or two additional copies of Form W-8BEN or Form W-8ECI, or the applicable replacement forms, on or before the date that any prior such delivered statements or forms expire or become obsolete. If any such statement or form delivered by a Participant to BNPPLC becomes invalid or inapplicable as to such Participant, such Participant must promptly inform BNPPLC. The obligations of each Participant pursuant to this subparagraph 4(D) will survive the termination of this Agreement.

(e) Order of Application. For purposes of this Agreement, as between BNPPLC and Participants, BNPPLC will be entitled (but not required) to apply payments received from NAI under the Operative Documents or from any sale of the Property or any interest therein or portion thereof to pay or reimburse then outstanding Unrecovered Protective Advances and Fixed Rate Settlement Amounts (and interest thereon), if any, regardless of how NAI may otherwise have designated such payments or may otherwise be entitled to characterize such payments. In addition, BNPPLC may allocate any such payments to reduce various outstanding Unrecovered Protective Advances in such order as BNPPLC deems appropriate.

(f) Investments Pending Dispute Resolution; Overnight Investments. Whenever BNPPLC in good faith determines that it does not have all information needed to determine how payments to the Participants must be made on account of any Distributable Payments, or whenever BNPPLC in good faith determines that there is any dispute among the Participants about payments which must be made on account of Distributable Payments, BNPPLC may choose to defer the payments to Participants which are the subject of such missing information or dispute. However, to minimize any such deferral, BNPPLC must attempt diligently to obtain any missing information needed to determine how payments to the Participants must be made. Also, pending any such deferral, or if BNPPLC is otherwise required to invest funds pending distribution to the Participants, BNPPLC must endeavor to invest the payments at issue. In addition, if BNPPLC receives any Distributable Payment after 2:00 p.m., New York time, on any day and will not make payments to Participants in connection therewith until the next Business Day pursuant to subparagraph 2(E), then BNPPLC must endeavor to invest such payments overnight; however, BNPPLC will have no liability to the Participants if BNPPLC is unable to make such investments. Investments by BNPPLC will be in the overnight federal funds market pending distribution, and the interest earned on each dollar of principal so invested will be paid to the Person entitled to receive such dollar of principal when the principal is paid to such Person.

20. **Nature of this Agreement**.

(a) No Conveyance. **This Agreement is intended to create contractual rights in favor of each Participant to receive payments from BNPPLC, but it is not intended to convey or assign to the Participants any interest in the Property or in the Operative Documents or in the payments to be made to BNPPLC thereunder. In no event will any Participant exercise or attempt to exercise any right or remedy of BNPPLC under the Operative Documents. Nothing in this Agreement will be construed to grant to the Participants any right to enforce NAI's obligations under the Operative Documents, nor is in anything in this Agreement to be construed to all any Participant to collect directly from NAI any payments due under the Operative Documents. Although BNPPLC's obligations for payments to the Participants hereunder will be computed by reference to funds actually received as Distributable Payments, this Agreement will not be construed as an assignment of Distributable Payments themselves or any interest therein, it being understood that (without limiting or expanding the dollar amount of such obligations) BNPPLC may satisfy such obligations from other funds available to it, thereby reserving Distributable Payments for payment to other creditors or for other purposes, as BNPPLC determines in its sole discretion**.

(b) Not a Partnership, Etc. **Neither the execution of this Agreement, nor**

the sharing of risks and rewards under the Operative Documents, nor any agreement to share in profits or losses arising as a result of the transactions contemplated thereby, is intended to be or to create, and the foregoing will be construed not to be or to create any partnership, joint venture, or other joint enterprise between BNPPLC and any Participant. Neither the execution of this Agreement nor the management and administration of the Operative Documents or other related documents by BNPPLC, nor any other right, duty or obligation of BNPPLC under or pursuant to this Agreement is intended to be or to create any fiduciary relationship between BNPPLC and any Participant.

21. **Amendments; Waivers; Exercise of Rights and Remedies Against NAI**.

(a) Limitations Upon the Rights of BNPPLC. Subject to subparagraph 6(C), but notwithstanding anything else to the contrary in this Agreement:

(i) BNPPLC will not:

A without the prior written consent of all Participants, execute any waiver, modification or amendment of the Operative Documents that would: (1) increase the Maximum Construction Allowance under the Operative Documents and thereby increase the amounts the Participants may be required to pay to BNPPLC hereunder; (2) reduce or postpone (or reasonably be expected to reduce or postpone) any payments that any Participant would, but for such modification or amendment, be expected to receive from BNPPLC hereunder (including any extension of the Designated Sale Date); or (3) except as otherwise expressly contemplated in the Operative Documents, release BNPPLC's interest in all or a substantial part of the Property; or

B over the written objection of a Majority, affirmatively make a Decision Not to Sell at a Loss pursuant to the Purchase Agreement.

However, this subparagraph 6(A)(1) will not limit BNPPLC's right to forebear from exercising rights against NAI to the extent BNPPLC determines in good faith that such forbearance is appropriate and is permitted by the following subsections in this subparagraph 6(A). Upon the direction of the Majority, BNPPLC will execute any waiver, modification or amendment of the Operative Documents requested by NAI; subject to the conditions, however, that: (A) the waiver, modification or amendment is not prohibited by the forgoing provisions of this Agreement, (B) the waiver, modification or amendment does not (1) increase the amount BNPPLC may be required to pay to NAI or anyone else, or (2) reduce or postpone (and cannot reasonably be expected to reduce or postpone) any payments that BNPPLC would, but for such modification or amendment, be expected to receive, or (3) release BNPPLC's interest in all or a substantial part of the Property; and (C) BNPPLC is not excused from executing the waiver, modification or amendment by subparagraph 6(C).

(ii) BNPPLC will, with reasonable promptness, provide the Participants with copies of all default notices it sends or receives under the Operative Documents and notify the Participants of any Event of Default under the Lease or Critical Event of which BNPPLC is actually aware and of any other matters known to BNPPLC which, in BNPPLC's reasonable judgment, are likely to materially affect the payments any Participant will be required to make or be entitled to receive under this Agreement, but BNPPLC will not in any event be liable to any Participant for BNPPLC's failure to do so unless such failure constitutes gross negligence or wilful misconduct on the part of BNPPLC.

(iii) Before exercising any Critical Remedy, or if requested in writing by any Participant at any time when a Critical Event has occurred and is continuing, BNPPLC will call a meeting with the Participants to discuss what action by BNPPLC, if any, is appropriate under the Operative Documents and what direction, if any, a Majority may give to BNPPLC. The meeting will be scheduled during regular business hours in the offices of BNPPLC's Parent in Dallas, Texas, or another appropriate location in Dallas, Texas, not earlier than five and not later than twenty Business Days after BNPPLC's receipt of the written request from any Participant. BNPPLC will attempt in good faith and with reasonable diligence to comply with the direction of a Majority if, when a Critical Event or an Event of Default have occurred and be continuing, a Majority directs BNPPLC in writing to do the following, as applicable under the circumstances: (a) send any default notice to NAI required before a Critical Event can become an Event of Default, or (b) exercise any one or more Critical Remedies. However, if BNPPLC is not a member of the Majority voting pursuant to this subparagraph 6(A)(3) in favor of any such action, then BNPPLC may require that it first receive the written agreement (in form reasonably acceptable to BNPPLC) of the members of the Majority so voting to indemnify BNPPLC from and against all costs, liabilities and claims that may be incurred by or asserted against BNPPLC because of the action the Majority directs BNPPLC to take. In no event will any Participant instigate any suit or other action directly against NAI with respect to the Operative Documents or the Property, even if the Participant would, but for this Agreement, be entitled to do so as a party or third party beneficiary under the Operative Documents or otherwise.

(iv) In the event NAI (a) fails to make any 97-10/Prepayment required pursuant to Paragraph 9 of the Construction Management Agreement following a termination of the Supplemental Payment Obligation pursuant to subparagraph 5(B) of the Purchase Agreement, or (b) fails to make any Supplemental Payment when required to do so pursuant to the Purchase Agreement, then BNPPLC must, unless the Participants otherwise agree in writing, bring suit against NAI to enforce the Operative Documents in such form as is recommended by reputable counsel no later than sixty days after the expiration of any applicable cure or grace period given NAI by the express terms of the Purchase Agreement or other Operative Documents, and thereafter BNPPLC must prosecute the suit with reasonable diligence in accordance with the advice of reputable counsel. If BNPPLC acquires the interests of NAI in any of the Property as a result of such suit or otherwise, BNPPLC will thereafter proceed with reasonable diligence to sell the Property in a commercially reasonable manner to one or more bona fide third party purchasers and will in any event have consummated the sale of the entire Property (through a single sale of the entire property or a series of sales of parts) within five years following the date BNPPLC recovers possession of the Property at the best price or prices BNPPLC believes are reasonably attainable within such time. Further, after the Designated Sale Date and prior to BNPPLC's sale of the entire Property, BNPPLC will retain a property management company experienced in the area where the Property is located to manage the operation of the Property and pursue the leasing of any completed improvements which are part of the Property. BNPPLC will not retain an Affiliate of BNPPLC to act as the property manager except under a bona fide, arms-length management contract containing commercially reasonable terms. Further, after the Designated Sale Date and until BNPPLC sells the Property, BNPPLC will (i) endeavor in good faith to maintain, or will obtain the agreement of one or more tenants to maintain, the Property in good order and repair, (ii) procure and maintain casualty insurance against risks customarily insured against by owners of comparable properties, in amounts sufficient to eliminate the effects of coinsurance, (iii) keep and allow the Participants to review accurate books and records covering the operation of the Property, and (iv) pay prior to delinquency all taxes and assessments lawfully levied against the Property.

Notwithstanding the foregoing, any Participants that have failed to fund any amount due hereunder, including any Percentage of a Protective Advance, and that have not corrected such failure within five Business Days after being notified thereof, will have no voting or consent rights under this subparagraph 6(A) and no rights to require BNPPLC to call a meeting pursuant to subparagraph 6(A)(3) until such failure is corrected.

(b) Rights of BNPPLC Generally. Subject to the limitations set forth in subparagraph 6(A):

(i) BNPPLC will have the exclusive right to take any action and to exercise any available powers, rights and remedies to enforce the obligations of NAI under the Operative Documents or to refrain from taking any such action or exercising any such power, right or remedy.

(ii) BNPPLC may (i) give any consent, waiver or approval requested by NAI with respect to any construction or other approval contemplated in the Construction Management Agreement, Lease or other Operative Documents or (ii) waive or consent to any adverse title claims affecting the Property, subject the condition that, in either case, BNPPLC believes in good faith that such action will not have a material adverse effect upon the obligations or ability of NAI to make the payments required under the Operative Documents or upon the rights and remedies, taken as whole, of BNPPLC under the Operative Documents or upon the Participants' hereunder.

(c) Conflicts and Purchase Agreement Defaults. Notwithstanding anything to the contrary herein contained, BNPPLC may, even over the objection of any Participant or the Majority, (A) take any action recommended in writing by reputable counsel and believed in good faith by BNPPLC to be required of BNPPLC by the Operative Documents or any law, rule or regulation to which BNPPLC is subject, (B) refrain from taking any action if BNPPLC believes in good faith that the action is prohibited by the Operative Documents or any law, rule or regulation to which BNPPLC is subject, and if reputable counsel recommends in writing that BNPPLC refrain from taking the action, and (C) after notice to the Participants, bring and prosecute a suit against NAI in the form recommended by and in accordance with advice of reputable counsel at any time when a breach of the Operative Documents by NAI has put BNPPLC (or any of its officers or employees) at risk of criminal prosecution or significant liability to third parties or at any time after NAI or an Applicable Purchaser fails to purchase the Property on the Designated Sale Date pursuant to the Purchase Agreement. (If, however, BNPPLC takes any action or refrains from taking any action over the objection of a Majority pursuant to the preceding sentence, BNPPLC must provide the Majority a written explanation (including a copy of a supporting written recommendation of counsel) of the basis for BNPPLC's conclusion that taking the action, or refraining from taking the action, is permitted by the preceding sentence.) Further, nothing herein contained will be construed to require BNPPLC to agree to modify the Operative Documents or to take any action or refrain from taking any action in any manner that could increase BNPPLC's liability to NAI or others, that could reduce or postpone payments to which BNPPLC is entitled thereunder, or that could reduce the scope and coverage of the indemnities provided for BNPPLC's benefit in the Operative Documents.

(d) Refusal to Give Consents; Failure to Fund. If any Participant declines to consent to any amendment, modification, waiver, release or consent for which the Participant's consent is requested or required by reason of this Agreement, or if any Participant fails to pay any amount owed by it hereunder, BNPPLC will have the right, but not the obligation and without limiting any other remedy of BNPPLC, to reduce such Participant's Percentage to zero and to terminate such Participant's rights to receive any further payments under Article 2 of this Agreement by paying to such Participant a termination fee equal to the total amount it would be entitled to receive from BNPPLC hereunder if the date of such payment were the Designated Sale Date and on such date NAI had itself purchased BNPPLC's interest in the Property pursuant to and in accordance with the Purchase Agreement. No Participant's rights to receive payments equal to such Participant's Adjusted Percentage of any Excess Reimbursement of a Protective Advance or interest thereon as provided in subparagraph 3(C) will be impaired or affected by any termination contemplated in this subparagraph 6(D); accordingly, BNPPLC will not, as a condition to such a termination, be required to reimburse a Participant for any payments the Participant has made in connection with Protective Advances pursuant to subparagraph 3(C).

22. **Required Repayments**. Each Participant must repay to BNPPLC, upon written request or demand by BNPPLC (i) any sums paid by BNPPLC to such Participant under this Agreement from, or that were computed by reference to, any Distributable Payment or other amounts which BNPPLC is required to return or pay over to another party, whether pursuant to any bankruptcy or insolvency law or proceeding or otherwise and (ii) any interest or other amount that BNPPLC is also required to pay to another party with respect to such sums. Such repayment by a Participant will not constitute a release of such Participant's right to receive payments from BNPPLC hereunder upon BNPPLC's receipt of any such Distributable Payment or other amount (or any interest thereon) that BNPPLC may later recover. Without limiting the foregoing, this Paragraph will apply in the case of any reimbursement by BNPPLC to NAI of all or any portion of any Supplemental Payment or 97-10/Prepayment as required by ***subparagraph 3(E)(4) of the Purchase Agreement in the event of a Deemed Sale (as defined in the Purchase Agreement). Accordingly, in the event of any such reimbursement required by reason of a Deemed Sale, each Participant must repay to BNPPLC the amount previously received by it by reason of the Supplemental Payment or 97-10/Prepayment or portion thereof so reimbursed.

23. **NAI Information; Independent Analysis**. Prior to the execution of this Agreement, BNPPLC has provided to the Participants copies of the executed Operative Documents and of various certificates, legal opinions and other documents delivered to BNPPLC by or on behalf of NAI with respect to the Operative Documents. In the future, BNPPLC will provide (A) to all Participants copies of all amendments of the Operative Documents and certificates and legal opinions, if any, delivered by or on behalf of NAI in connection therewith, and (B) to any Participant, as reasonably required to comply with a specific, reasonable written request for information made by the Participant, copies of other information readily available to BNPPLC concerning NAI and the transactions contemplated in the Operative Documents. However, BNPPLC will not be liable for its failure to provide the Participants any of the foregoing documents unless such failure constitutes gross negligence or wilful misconduct on BNPPLC's part, and any Attorney's Fees or other costs of collecting, assembling and providing copies of information requested by a Participant pursuant to clause (B) of the preceding sentence will be reimbursed to BNPPLC by the Participant. Each Participant has entered into this Agreement without reliance upon representations made outside this Agreement by BNPPLC or by any Affiliate, agent or attorney of BNPPLC and only after independently reviewing such documents, independently making such inspections, independently consulting with counsel and

independently collecting and verifying such information, as the Participant determined to be necessary or appropriate. Without limiting the foregoing, each Participant has independently reviewed the Operative Documents and independently made such inquiries and investigations of NAI and the Property as the Participant determined to be necessary or appropriate before executing this Agreement.

24. **Performance through Representatives**. BNPPLC may perform any of its duties hereunder by or through officers, directors, employees, attorneys or agents (collectively, "**Representatives**"), and BNPPLC and its Representatives may rely, and will be fully protected in relying, upon any communication or document believed by it or them to be genuine and correct and to have been signed or made by the proper Person and, with respect to legal matters, upon the opinion of counsel selected by BNPPLC. The Participants acknowledge that BNPPLC's Parent may act as agent for BNPPLC with respect to the administration of this Agreement, and to the extent it does so, it will be a Representative of BNPPLC hereunder.

25. **Duty of Care**. **Neither BNPPLC nor any of its Representatives will be liable or responsible to any Participant or any other Person for any action taken or omitted to be taken by BNPPLC or any of its Representatives under this Agreement or in relation to the Operative Documents or the Property (*even if negligent or related to a matter for which BNPPLC or any of its Representatives may otherwise be strictly liable*)**; except that this provision will not excuse BNPPLC from liability for failing to make timely payments required of BNPPLC to the Participants by the express provisions of Article 2 or subparagraph 3(C) or from liability for actions taken or omitted to be taken by BNPPLC which constitute gross negligence or wilful misconduct. Without limiting the generality of the foregoing, BNPPLC (1) may consult with legal counsel (including counsel for NAI), independent public accountants and other experts selected by it and will not be liable for any action taken or omitted to be taken in good faith by it in accordance with the advice of such counsel, accountants or experts; (2) makes no warranty or representation to the Participants except as provided in Article 12 and will not be responsible to the Participants for any statements, warranties or representations made in or in connection with the Operative Documents; (3) will not have any duty to the Participants to ascertain or to inquire as to the performance or observance of any of the terms, covenants or conditions of the Operative Documents or to inspect the Property or the books and records of NAI; (4) will not be responsible to the Participants for the due execution, legality, validity, enforceability, genuineness, sufficiency or value of the Operative Documents or any instrument or document furnished in connection therewith; (5) may rely upon the representations and warranties of NAI and the Participants in exercising its powers hereunder unless BNPPLC has actual knowledge that such representations and warranties are untrue; and (6) will incur no liability under or in respect of the Operative Documents by acting upon any notice, consent, certificate or other instrument or writing (including any telecopy, telegram, cable or telex) believed by it to be genuine and signed or sent by the proper Person or Persons.

26. **Representations by Each Participant**. Each Participant represents that as of the date it became a party to this Agreement:

(a) Nature of this Agreement. It is the type of financial institution set forth under its name in ***Schedule 1*****,** or in the Participation Agreement Schedule which made it a party to this Agreement, and it is entering into this Agreement for its own account in respect of a commercial transaction made in ordinary course of its business and not with a view to or in connection with any subparticipation, sale or distribution to any Person (other than its Affiliates). Such Participant does not consider the acceptance of the risk participation hereunder to constitute the "purchase" or "sale" of a "security" within the meaning of any federal or state securities statute or law, or any rule or regulations under any of the foregoing.

(b) No Default or Violation. To such Participant's knowledge, the execution, delivery and performance of this Agreement do not and will not contravene, result in a breach of or constitute a default under any material contract or agreement to which the Participant is a party or by which the Participant is bound and do not violate or contravene any law, order, decree, rule or regulation to which the Participant is subject.

(c) No Suits. To such Participant's knowledge, there are no judicial or administrative actions, suits or proceedings involving the validity, enforceability or priority of this Agreement and no such suits or proceedings are threatened.

(d) Organization. Such Participant is duly incorporated and legally existing under the laws of jurisdiction indicated in ***Schedule 1*** or in the Participation Agreement Schedule which made it a party to this Agreement. Such Participant has all requisite power and all material governmental certificates of authority, licenses, permits, qualifications and other documentation necessary to perform its obligations under this Agreement.

(e) Enforceability. This Agreement constitutes a legal, valid and binding obligation of such Participant, enforceable in accordance with its terms, subject to bankruptcy and other laws affecting creditors' rights generally and general equitable principles. The execution and delivery of, and performance under, this Agreement are within such Participant's powers and have been duly authorized by all requisite action and are not in contravention of the powers of the charter or other corporate papers of the Participant.

(f) No Funding With Plan Assets. Such Participant has not and will not provide advances required by this Participation Agreement from the assets of any employee benefit plan (or its related trust).

27. **Representations by BNPPLC**. BNPPLC represents to each Participant, as of the date such Participant became a party to this Agreement, that:

(a) No Default or Violation. To BNPPLC's knowledge, its execution, delivery and performance of this Agreement and the Operative Documents do not contravene, result in a breach of or constitute a default under any material contract or agreement to which BNPPLC is a party or by which BNPPLC is bound and do not violate or contravene any law, order, decree, rule or regulation to which BNPPLC is subject.

(b) No Suits. To BNPPLC's knowledge, there are no judicial or administrative actions, suits or proceedings involving the validity, enforceability or priority of this Agreement and no such suits or proceedings are threatened.

(c) Organization. BNPPLC is duly incorporated and legally existing under the laws of Delaware. BNPPLC has all requisite power and all material governmental certificates of authority, licenses, permits, qualifications and other documentation necessary to perform its obligations under this Agreement.

(d) Enforceability. This Agreement and the Operative Documents constitute legal, valid and binding obligations of BNPPLC, enforceable in accordance with their respective terms, subject to bankruptcy and other laws affecting creditors' rights generally and general equitable principles. BNPPLC's execution and delivery of, and performance under, this Agreement and the Operative Documents are within BNPPLC's powers and have been duly authorized by all requisite action and are not in contravention of the powers of the charter, by-laws or other corporate papers of BNPPLC; except that BNPPLC makes no representation or warranty that conditions imposed by any state or local Applicable Laws to the purchase, ownership, lease or operation of the Property have been satisfied.

(e) Liens Removable by BNPPLC. BNPPLC will not create or permit any Liens Removable by BNPPLC not claimed by, through or under any of the Participants (other than BNPPLC's Affiliates), without NAI's consent.

(f) BNPPLC's Status as a Subsidiary of a Bank Holding Company. As of the effective date of this Agreement, BNPPLC is a "subsidiary" of a "bank holding company" (as those terms are defined in Chapter 17 of Title 12 of the United States Code).

28. **Assignments**.

(a) By the Participants Generally. Except as expressly provided below, no Participant may assign or attempt to assign any interest in or rights under this Agreement without the prior written consent of BNPPLC, which consent will not be unreasonably withheld so long as the Participant requesting the approval is not in default hereunder; however, this provision will not prevent a Participant from transferring its rights hereunder to its Affiliates or to any other Participants who are already parties to this Agreement. Notwithstanding any permitted assignment by a Participant, if the assignment is to any Person that does not qualify as a "Participant" for purposes of the Operative Documents (which, as more particularly provided in the definition of Participant in the Common Definitions and Provisions Agreement, may require the written approval of such Person by NAI), then such Participant's obligations under this Agreement will remain unchanged, such Participant will remain primarily responsible for the performance of its obligations hereunder, and BNPPLC may continue to deal solely and directly with such Participant in connection with all rights and obligations under this Agreement. In the event, however, of a permitted assignment by a Participant to a Person that does qualify as a "Participant" for purposes of the Operative Documents, accomplished by the execution of appropriate Participation Agreement Supplements as herein provided, the assigning Participant will not be liable for any failure by the assignee to fulfill the obligations assumed hereunder by the assignee by reason of such assignment.

(b) By BNPPLC. Except as expressly provided herein, BNPPLC may not assign or attempt to assign any rights under or interest in the Operative Documents or this Agreement or any interest in the Property without all of the Participants' prior written consents, which consents will not be unreasonably withheld. By a Participation Agreement Supplement, BNPPLC may, without the prior written consent of any Participant, assign participations in the Operative Documents or the payments required to BNPPLC thereunder to any then existing Participant and to other financial institutions or Affiliates of financial institutions approved by NAI. In addition, BNPPLC may assign its right to receive Distributable Payments and its rights and interests in and to the Property, the Operative Documents and this Agreement to Affiliates of BNPPLC that do not become Participants, but in such event BNPPLC's obligations under this Agreement will remain unchanged, BNPPLC will remain primarily responsible for the performance of its obligations hereunder, and all Distributable Payments received by any such Affiliates as assignee of BNPPLC will, for purposes of computing payments required to any Participant hereunder, be considered as received by BNPPLC. In addition, BNPPLC will be permitted to transfer any rights or interests as BNPPLC believes in good faith to be necessary to satisfy the Operative Documents or Applicable Laws.

(c) Execution of Participation Agreement Supplements. Promptly after the execution of a Participation Agreement Supplement by BNPPLC and any Participant, BNPPLC will provide a copy thereof to all other Participants, but the other Participants need not join in or approve the Participation Agreement Supplement for it to be effective.

(d) Regulation A. Notwithstanding subparagraphs 13(A) or 13(B), a Participant may assign and pledge all or any portion of its rights under this Agreement to any Federal Reserve Bank as collateral security pursuant to Regulation A of the Board of Governors of the Federal Reserve System and any Operating Circulars issued by such Federal Reserve Bank.

(e) Costs. Each Participant must pay all costs incurred by BNPPLC in connection with any permitted assignment by or through such Participant, including, but not limited to, reasonable fees and disbursements of its counsel, and any transfer taxes or other taxes assessed because of such assignment which NAI is not required to pay under the Lease.

29. **GOVERNING LAW; SUBMISSION TO PROCESS; WAIVER OF JURY TRIAL**. **This Agreement will be deemed a contract made under the laws of the State of Texas and will be construed and enforced in accordance with and governed by the laws of the State of Texas and the laws of the United States of America, without regard to principles of conflict of laws. Each of BNPPLC and the Participants hereby irrevocably submits itself to the non-exclusive jurisdiction of the state and the federal courts sitting in Dallas, Texas, and agrees and consents that service of process may be made upon it in any legal proceeding relating to this Agreement by any means allowed under Texas or federal law. Each of BNPPLC and the Participants hereby waives and agrees not to assert, by way of motion, as a defense or otherwise, that any such proceeding which is brought in a court in Dallas, Texas is brought in an inconvenient forum or that the venue thereof is improper. Each of BNPPLC and the Participants, knowingly, voluntarily and intentionally waives any right to a jury trial of any dispute relating to this agreement and agrees that any such dispute will be tried before a judge sitting without a jury.**

30. **Termination**. This Agreement will terminate on the first date on which all obligations of NAI under the Operative Documents have been indefeasibly paid or otherwise satisfied or excused, BNPPLC has ceased to have any rights in the Property and each party hereto has fully performed its obligations hereunder to the other parties hereto. The agreements of BNPPLC and the Participants in subparagraph 3(C) (which concerns payments by Participants of their respective Percentages of Protective Advances) will survive the termination of this Agreement. Following any sale of the Property by BNPPLC pursuant to the Purchase Agreement and the payment to any Participant of all amounts payable to such Participant hereunder (including, without limitation, such Participant's Percentage of all Net Sales Proceeds payable by NAI and any Applicable Purchaser on the Designated Sale Date), such Participant will execute and deliver such a quitclaim and release (in recordable form) to NAI or any Applicable Purchaser.

31. **Miscellaneous**.

(a) Reliance by Others. None of the provisions of this Agreement will inure to the benefit of any Person other than the Participants and BNPPLC and BNPPLC's Representatives; consequently, no Person other than the Participants and BNPPLC may rely upon or raise as a defense, in any manner whatsoever, the failure of any Participant or BNPPLC to comply with the provisions of this Agreement. None of the Participants nor BNPPLC will incur any liability to any other Person for any act of omission of another.

Notwithstanding the foregoing, however, NAI will be a third party beneficiary of each Participant's obligations to make advances as provided in subparagraph 3(B) above, of the representations of each Participant in Paragraph 11, of each Participant's agreement to provided a release and quitclaim of the Property pursuant to the last sentence of Paragraph 15 and of each Participant's agreements in Paragraph 17. As a third party beneficiary of the obligations of the Participants specified in the preceding sentence, NAI will have standing to exercise any remedies available at law or in equity (including the recovery of monetary damages) against any Participant in NAI's own name if that Participant breaches such obligations. Further, BNPPLC may assign to NAI any claims it may have against a Participant because of the Participant's breach of any of the provisions referenced in this paragraph or because of any adverse title claim made against the Property by, through or under the Participant. Each Participant acknowledges that NAI will be relying on the commitments of the Participant to make payments required by this Agreement, as needed to satisfy any condition to Anticipated Advances concerning funding by Participants set forth in subparagraph 4(G) of the Construction Management Agreement.

(b) Waivers, Etc. No delay or omission by any party to exercise any right under this Agreement will impair any such right, nor will it be construed to be a waiver thereof. No waiver of any single breach or default under this Agreement will be deemed a waiver of any other breach or default. Any waiver, consent, or approval under this Agreement must be in writing to be effective.

(c) Severability. The illegality or unenforceability of any provision of this Agreement will not in any way affect or impair the legality or enforceability of the remaining provisions of this Agreement.

(d) Notices. All notices, demands, approvals, consents and other communications to be made hereunder to or by the parties hereto must, to be effective for purpose of this Agreement, be in writing. Notices, demands and other communications required or permitted hereunder are to be sent to the addresses set forth in ***Schedule 1*** to this Agreement and must be given by any of the following means: (A) personal service, with proof of delivery or attempted delivery retained; (B) electronic communication, whether by telex, telegram or telecopying (if confirmed in writing sent by United States first class mail, return receipt requested); or (C) registered or certified first class mail, return receipt requested. Such addresses may be changed by notice to the other parties given in the same manner as provided above. Any notice or other communication sent pursuant to clause (A) or (C) hereof will be deemed received (whether or not actually received) upon first attempted delivery at the proper notice address on any Business Day between 9:00 A.M. and 5:00 P.M., and any notice or other communication sent pursuant to clause (B) hereof will be deemed received upon dispatch by electronic means.

(e) Construction. Words of any gender used in this Agreement will be held and construed to include any other gender, and words in the singular number will be held to include the plural and vice versa, unless the context otherwise requires. References herein to Paragraphs, subparagraphs or other subdivisions will refer to the corresponding Paragraph, subparagraphs or subdivisions of this Agreement, unless specific reference is made to another document or instrument. References herein to any Schedule or Exhibit will refer to the corresponding Schedule or Exhibit attached hereto, which will be made a part hereof by such reference. All capitalized terms used in this Agreement which refer to other documents will be deemed to refer to such other documents as they may be renewed, extended, supplemented, amended or otherwise modified from time to time so long as the documents are not renewed, extended or modified in breach of any provision contained herein or therein or, in the case of any other document to which BNPPLC is a party or of which BNPPLC is an intended beneficiary, without the consent of BNPPLC. All accounting terms used but not specifically defined herein will be construed in accordance with GAAP. The words "**this Agreement**", "**herein**", "**hereof**", "**hereby**", "**hereunder**" and words of similar import when used in this Agreement refer to this Agreement as a whole and not to any particular subdivision unless expressly so limited. The phrases "**this Paragraph**" and "**this subparagraph**" and "**this subsection**" and similar phrases used herein refer only to the Paragraphs, subparagraphs or subsections hereof in which the phrase occurs. As used herein the word "**or**" is not exclusive. As used herein the words "**include**", "**including**" and similar terms will be construed as if followed by "without limitation to".

(f) Headings. The paragraph and section headings contained in this Agreement are for convenience only and will in no way enlarge or limit the scope or meaning of the various and several provisions hereof.

(g) Entire Agreement. This Agreement (a) embodies the entire agreement between the parties, supersedes all prior agreements and understandings between the parties, if any, relating to the subject matter hereof, and may be amended only by an instrument in writing executed by an authorized representative of each party to be bound by such amendment, and (b) has been executed in a number of identical counterparts, each of which will be deemed an original for all purposes and all of which constitute, collectively, one agreement or certificate; but, in making proof of this Agreement it will not be necessary to produce or account for more than one such counterpart signed by each party thereto.

(h) Further Assurances. Subject to any restriction in the Operative Documents, each of BNPPLC and the Participants will promptly execute and deliver all further instruments and documents and take all further action as any of them may reasonably request in order to evidence the agreements made hereunder and otherwise to effect the purposes of this Agreement.

(i) Impairment of Operative Documents. Nothing herein contained (including the provisions governing the application of payments in subparagraph 4(E) and the provisions authorizing assignments by BNPPLC in subparagraph 13(B)) will impair or modify NAI's rights under the Operative Documents.

(j) Books and Records. BNPPLC will keep accurate books and records in which full, true and correct entries will be promptly made as to all payments made and received concerning the Property and will permit all such books and records (excluding any information that would otherwise be protected by BNPPLC's attorney client privilege) to be inspected and copied by the Participants and their duly accredited representatives at all times during reasonable business hours after five Business Days advance notice. This subparagraph will not be construed as requiring BNPPLC to regularly maintain separate books and records relating exclusively to the Property; however, upon reasonable request of a Participant, BNPPLC will, at the requesting Participant's expense, construct or abstract from its regularly maintained books and records information required by this subparagraph relating to the Property.

(k) Definition of Knowledge. Representations and warranties made in this Agreement but limited to the "knowledge" of BNPPLC or any Participant, as the case may be, will be limited to the present actual knowledge of the officers or other employees of such party primarily responsible for reviewing and negotiating this Agreement. Also, as used herein with respect to the existence of any facts or circumstances after the date of this Agreement, "knowledge" of BNPPLC or a Participant, as the case may be, will be limited to the present actual knowledge at the time in question of the officers or other employees of such party primarily responsible for administering this Agreement. However, none of the officers or employees of any party to this Agreement will be personally liable for any representations or warranties made herein or for taking or failing to take any action required hereby.

(l) Attorneys' Fees. If any party to this Agreement commences any legal action or other proceeding against another party hereto to enforce any of the terms of this Agreement, or because of any breach of the other party or dispute hereunder, the successful or prevailing party will be entitled to recover from the nonprevailing party all Attorneys' Fees incurred in connection therewith, whether or not such controversy, claim or dispute is prosecuted to a final judgment. Any such Attorneys' Fees incurred by any party 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.

32. **Confidentiality Concerning NAI's Proprietary Information**. Each Participant agrees to use reasonable precautions to keep confidential any "proprietary information" of NAI (as defined in the Lease) that such Participant may receive from BNPPLC or NAI or otherwise discover with respect to NAI or NAI's business as a result of Participant's involvement with the transactions contemplated in the Operative Documents, except for disclosures: (i) specifically and previously authorized in writing by NAI; (ii) to any assignee of the Participant as to any interest hereunder 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 the Participant so long as the Participant 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 the Participant (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); and (vi) of information which has previously become publicly available through the actions or inactions of a person other than the Participant not, to the Participant's knowledge, in breach of an obligation of confidentiality to NAI. Further, notwithstanding any other contrary provision contained in this Agreement or any related agreements by which any Participant is bound, BNPPLC and Participants (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 Agreement or the Operative Documents 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.

[The signature pages follow.]

IN WITNESS WHEREOF, this Participation Agreement is executed to be effective as of ____________________________, 200_________.

BNP PARIBAS LEASING CORPORATION, a Delaware corporation

By: ____

Lloyd G. Cox, Managing Director

[Continuation of signature pages for Participation Agreement dated as of ___________________, 200_________.]

[PARTICIPANTS' NAMES], a _________

By: ____
[Officer's Name], [Officer's Title]

A. BNPPLC: BNP PARIBAS LEASING CORPORATION,
a Delaware corporation

1. Amount Retained: $_________

2. Initial Percentage: ___%

3. Address for Notices:

   BNP Paribas Leasing Corporation
   12201 Merit Drive
   Suite 860
   Dallas, Texas 75251

   Attention: Lloyd G. Cox

   Telephone: (972) 788-9191
   Facsimile: (972) 788-9140

4. Payment Instructions:
   Federal Reserve Bank of New York
   ABA 026007689 BNP Paribas
   /BNP/ BNP Houston
   /AC/ 14334000176
   /Ref/ NAI/ _________ Operating Lease

5. Operations Contact:
   BNP Paribas Leasing Corporation
   12201 Merit Drive
   Suite 860
   Dallas, Texas 75251

   Attention: Lloyd G. Cox

   Telephone: (972) 788-9191
   Facsimile: (972) 788-9140

B. Participant: [Participants' Names]

1. Amount of Participation: $__________

2. Percentage: ___%

3. Address for Notices:

   ____
   ____
   ____
   Telephone: (___) ___-____
   Facsimile: (___) ___-____

4. Payment Instructions:

   ***Federal Reserve Bank of New York
   ABA _____________
   ____
   ____
   /Ref/ ____________

5. Operations Contact:

   ____
   ____
   ____
   Telephone: (___) ___-____
   Facsimile: (___) ___-____

6. "Initial Payment" Due from Participant to BNPPLC: An amount equal to the Percentage specified above times the Initial Funding Advance under the Construction Management Agreement.

Exhibit A

SUPPLEMENT TO PARTICIPATION AGREEMENT

[____________, _____]

BNP Paribas Leasing Corporation
12201 Merit Drive, Suite 860
Dallas, Texas 75251
Attention: Lloyd G. Cox, Managing Director
Telecopy: (972) 788-9140

Gentlemen:

Reference is made to the Participation Agreement dated as of _________, 200___(as heretofore amended, the "**Participation Agreement**") between BNP Paribas Leasing Corporation ("**BNPPLC**"), a Delaware corporation, and ***[Participants' Names] and other banks or financial institutions which have or may from time to time become Participants under and as defined in such Participation Agreement (collectively, the "**Participants**"). Unless otherwise defined herein, all capitalized terms used in this Supplement have the respective meanings given to those terms in the Participation Agreement.

[NOTE: THE NEXT TWO PARAGRAPHS, AND THE ADDENDUM TO *SCHEDULE 1* ATTACHED TO THIS EXHIBIT, WILL BE INCLUDED ONLY AS PART OF A SUPPLEMENT THAT ADDS A NEW PARTICIPANT UNDER THE PARTICIPATION AGREEMENT:

The undersigned, by executing and delivering this Supplement to BNPPLC, hereby agrees to become a party to the Participation Agreement referenced therein, in each case as a Participant and agrees to be bound by all of the terms thereof applicable to Participants. The undersigned hereby agrees that its Percentage under the Participation Agreement will be ___ percent (___%), effective as of the date of this letter. Contemporaneously with the execution of this letter, the undersigned is paying to BNPPLC the sum of $_________ in consideration of the rights it is acquiring as a Participant under the Participation Agreement with the foregoing Percentage.

Schedule 1 attached to the Participation Agreement is amended by the addition of an Addendum (concerning the undersigned) in the form attached to this Supplement.]

[NOTE: THE NEXT PARAGRAPH WILL BE INCLUDED ONLY IN A SUPPLEMENT THAT REDUCES AN EXISTING PARTICIPANT'S PERCENTAGE UNDER THE PARTICIPATION AGREEMENT:

In consideration of the payment of $_________ to the undersigned, the receipt and sufficiency of which is hereby acknowledged by the undersigned, the undersigned hereby agrees that its Percentage under the Participation Agreement is reduced to percent (___), effective as of the date of this letter.]

[<u>NOTE:</u> THE NEXT PARAGRAPH WILL BE INCLUDED ONLY IN A SUPPLEMENT THAT INCREASES AN EXISTING PARTICIPANT'S PERCENTAGE UNDER THE PARTICIPATION AGREEMENT:

The undersigned hereby agrees that its Percentage under the Participation Agreement is increased to _________ percent (___%), effective as of the date of this letter. Contemporaneously with the execution of this letter, the undersigned is paying BNPPLC the sum of $_________ in consideration of such increase.]

IN WITNESS WHEREOF, the undersigned has executed this Supplement as of the day and year indicated above.

[NAME]

By: ______________________________

Printed Name: ______________________________

Title: ______________________________

<u>Accepted and agreed</u>:

BNP PARIBAS LEASING CORPORATION

By: ______________________________

Printed Name: ______________________________

Title: ______________________________

Addendum to Schedule 1

Participant: ___________________

1. Amount of Participation: $_________
2. Percentage: ___%
3. Address for Notices:

   ____
   ____
   ____

   Attention: ___________

   Telephone: ___________
   Facsimile: ___________
4. Payment Instructions:

   Bank: ________________________
   Account: ________________________
   Account No.: ________________________
   ABA No.: ________________________
   Reference: ________________________
5. Operations Contact:

   ____
   ____
   ____

   Attention: ___________

   Telephone: ___________
   Facsimile: ___________

Exhibit 10.6

PURCHASE AGREEMENT

BETWEEN

NETWORK APPLIANCE, INC.
(“NAI”)

AND

BNP PARIBAS LEASING CORPORATION
(“BNPPLC”)

December 15, 2005

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Exhibits and Schedules

PURCHASE AGREEMENT

This PURCHASE AGREEMENT (this "**Agreement**"), dated as of December 15, 2005 (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 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. (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 BNPPLC 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 BNPPLC 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 BNPPLC'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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC of (i) all Attorneys' Fees and other costs that will be incurred to defend against such claims, and (ii) the amount for which BNPPLC or the other Interested Party can settle or satisfy such claims.

"**Decision Not to Sell at a Loss**" means a decision by BNPPLC 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 BNPPLC conveys the Property to consummate a sale of the Property to NAI because of BNPPLC's exercise of the Put Option as provided in subparagraph 3(B); or
- any date after the Designated Sale Date upon which BNPPLC 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 BNPPLC 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(D) if no earlier date qualifies as the Final Sale Date and the entire Property is not sold by BNPPLC to NAI or an Applicable Purchaser prior to the second anniversary of the Designated Sale Date.

"**Initial Remarketing Notice**" means a notice delivered to BNPPLC 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 BNPPLC's consent.)

"**Initial Remarketing Price**" means the cash price set forth in an Initial Remarketing Notice delivered by NAI to BNPPLC 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 BNPPLC 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 BNPPLC pursuant to the other Operative Documents but unpaid on the Designated Sale Date, exceeds any Supplemental Payment which was actually paid to BNPPLC 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) BNPPLC'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 BNPPLC (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 BNPPLC during such period from third parties as consideration for any lease or other contracts made by BNPPLC 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
- if NAI delivered an Initial Remarketing Notice to BNPPLC, is for a cash price greater than the Initial Remarketing Price specified therein; 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 possible price at which BNPPLC will be obligated, pursuant to clause (4) of subparagraph 3(E), to reimburse NAI (i) for 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, for 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 F.

"**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 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 NAI will have the right to require BNPPLC to 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, BNPPLC may retain the excess.

If, however, BNPPLC completes any sale and conveyance of the Property ***after*** the Extended Remarketing Period expires or is terminated, BNPPLC 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 BNPPLC After the Designated Sale Date**.

(A) BNPPLC'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 BNPPLC pursuant to Paragraph 2 or Paragraph 3, BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC's successors and assigns with respect to the Property, and BNPPLC'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 BNPPLC itself if BNPPLC had not transferred or sold the Property. Without limiting the foregoing, any purchaser that acquires the Property from BNPPLC 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 BNPPLC itself would have been obligated if not for the sale by BNPPLC 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 BNPPLC's then existing interests in the Property. Any such Permitted Transfer of less than all or substantially all of BNPPLC'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 BNPPLC 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 BNPPLC to an Applicable Purchaser on the Designated Sale Date, then at any time more than thirty days after the Designated Sale Date BNPPLC 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 15, 2005.

BNP PARIBAS LEASING CORPORATION, a Delaware corporation

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

[Continuation of signature pages for Purchase Agreement dated as of December 15, 2005]

NETWORK APPLIANCE, INC., a Delaware corporation

By: /s/ Steven Gomo
Steven Gomo, Chief Financial Officer

Purchase Agreement — Signature Page

Exhibit A

Legal Description

Parcel 1, as shown on that certain Parcel Map which filed for record in the office of the recorder of the County of Santa Clara, State of California on July 7, 1994, in Book 657 of Parcel Maps, Page 9.

APN: 110-32-6
ARB: 110-3-x65

TOGETHER WITH, easements appurtenant to Parcel 1 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 depend 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 the @Implicit Rate, accruing over the period the payment was postponed.

If any determination of Fair Market Value is required, NAI and BNPPLC 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 BNPPLC 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 Lease[1]; 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 BNPPLC 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 BNPPLC agree in writing upon the Fair Market Value (an "**Appraiser's Agreement As To Value")**, such agreement will be binding upon NAI and BNPPLC. Both NAI and BNPPLC 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 BNPPLC delivers its Notice of Appointment:

(a) Either party (NAI or BNPPLC) may deliver another notice to the other (a "**Third Appraisal Notice**"), demanding that the two appraisers appoint a third independent property

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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 BNPPLC 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.

appraiser to help determine Fair Market Value. Immediately after the Third Appraisal Notice is delivered, each of the first two appraisers much 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. <u>Resolution of Issues by the Third Appraiser</u>. 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 NAI 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 BNPPLC'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 BNPPLC'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 BNPPLC's interest in all Improvements will revert to NAI by operation of law, or (B) BNPPLC'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 BNPPLC 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, BNPPLC may assume that NAI has elected instead to have BNPPLC 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 BNPPLC the Acknowledgment of Disclaimer of Representations and Warranties in the form attached as Exhibit C-4.

If an Applicable Purchaser is acquiring BNPPLC's interest in the Improvements and other Property, such interest will be conveyed by BNPPLC'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 BNPPLC 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 15, 2005 and recorded in the official records of Santa Clara County, California (the "Official Records") on or about December 15, 2005 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 15, 2005 (as the same may have been modified, the "Sublease"), which was the subject of that certain Short Form of Sublease, dated as of December 15, 2005 and recorded in the Official Records on or about December 15, 2005 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 15, 2005 (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 15, 2005 and recorded in the Official Records on or about December 15, 2005 as Instrument Number __________.

(4) Common Definitions and Provisions Agreement dated as of December 15, 2005 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. BNPPLC 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, BNPPLC 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, BNPPLC 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 BNPPLC. Except as expressly set forth in the preceding sentence, BNPPLC makes no warranty of title, express or implied.

2. Acknowledgment of Reversion. BNPPLC also acknowledges and agrees that because of the termination of the Ground Lease, all of BNPPLC’s right, title and interest in and to the following property will revert to NAI and BNPPLC 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 BNPPLC are any rights or privileges of BNPPLC under the following are expressly reserved and retained by BNPPLC: (i) the indemnities set forth in the Sublease and the Ground Lease, whether such rights are presently known or unknown, including rights of BNPPLC 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.]

IN WITNESS WHEREOF, BNPPLC and NAI have signed this Agreement Concerning Ground Lease 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.

____

[Continuation of signature pages to Agreement Concerning Ground Lease dated to be effective as of December 15, 2005.]

NETWORK APPLIANCE, INC., a Delaware corporation

By: /s/ Steven J. Gomo
Name: Steven J. Gomo
Title: Chief Financial Officer

STATE OF CALIFORNIA	)	
	)	SS
COUNTY OF SANTA CLARA	)	

On December 16, 2005, before me Lola Rodriguez, a Notary Public in and for the County and State aforesaid, personally appeared Steven Gomo, Chief Financial Officer, 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

[<u>DRAFTING NOTE</u>: 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.]

Parcel 1, as shown on that certain Parcel Map which filed for record in the office of the recorder of the County of Santa Clara, State of California on July 7, 1994, in Book 657 of Parcel Maps, Page 9.

APN: 110-32-6
ARB: 110-3-x65

TOGETHER WITH, easements appurtenant to Parcel 1 as described in <u>Exhibit A</u> 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 15, 2005, 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.

____

[Continuation of signature pages to Assignment of Ground Lease and Improvements dated to be effective as of December 15, 2005.]

[NAI or the Applicable Purchaser]

By: /s/ Steven J. Gomo
Name: Steven Gomo
Title: Chief Financial Officer

STATE OF CALIFORNIA)
) SS
COUNTY OF SANTA CLARA)

On December 16, 2005, before me Lola Rodriguez, a Notary Public in and for the County and State aforesaid, personally appeared Steven Gomo, Chief Financial Officer, 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 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.]

Parcel 1, as shown on that certain Parcel Map which filed for record in the office of the recorder of the County of Santa Clara, State of California on July 7, 1994, in Book 657 of Parcel Maps, Page 9.

APN: 110-32-6
ARB: 110-3-x65

TOGETHER WITH, easements appurtenant to Parcel 1 as described in Exhibit A attached to the Ground Lease.

Annex B

Permitted Encumbrances

[<u>DRAFTING NOTE:</u> 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.

<u>Exhibit C-3</u>

BILL OF SALE AND ASSIGNMENT

Reference is made to: (1) that certain Purchase Agreement dated as of December 15, 2005, (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 15, 2005 (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 <u>Paragraph 6</u> 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.

____

[Continuation of signature pages to Bill of Sale and Assignment dated to be effective as of December 15, 2005.]

[NAI or the Applicable Purchaser]

By: /s/ Steven J. Gomo
Name: Steven Gomo
Title: Chief Financial Officer

STATE OF CALIFORNIA	)	
	)	SS
COUNTY OF SANTA CLARA	)	

On December 16, 2005, before me Lola Rodriguez, a Notary Public in and for the County and State aforesaid, personally appeared Steven Gomo, Chief Financial Officer, 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 15, 2005 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.]

IN WITNESS WHEREOF, Assignor and Assignee have signed this Bill of Sale and Assignment to be effective as of December 15, 2005.

[NAI or the Applicable Purchaser]

By: /s/ Steven J. Gomo
Name: Steven Gomo
Title: Chief Financial Officer

STATE OF CALIFORNIA)
) SS
COUNTY OF SANTA CLARA)

On December 16, 2005, before me Lola Rodriguez, a Notary Public in and for the County and State aforesaid, personally appeared Steven Gomo, Chief Financial Officer, 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 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.]

Name	Title	Signature

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

[**<u>DRAFTING NOTE</u>: INSERT HERE COPIES OF RESOLUTIONS ADOPTED BY THE BOARD OF DIRECTORS OF BNPPLC 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 15, 2005, by and between BNP Paribas Leasing Corporation ("BNPPLC") and **[NAI or the Applicable Purchaser]** ("Purchaser"), BNPPLC 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 BNPPLC, in its best business judgment, deems it in the best interest of BNPPLC and its shareholders that BNPPLC 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 BNPPLC, and each of them, are hereby authorized and directed in the name and on behalf of BNPPLC to cause BNPPLC to fulfill its obligations under the Purchase Agreement.

RESOLVED FURTHER, that the proper officers of BNPPLC, 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: December 15, 2005.

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 15, 2005, (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 BNPPLC 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, BNPPLC 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 BNPPLC 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 BNPPLC an assignment of ground lease and bill of sale that is sufficient to reconvey the Subject Property back to BNPPLC, 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 BNPPLC. (But in no event will BNPPLC 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 BNPPLC.) Contemporaneously with the reconveyance back to BNPPLC, NAI and the Applicable Purchaser must cause possession of the Subject Property to be delivered to BNPPLC, 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 BNPPLC exercises the Repurchase Option will be the lesser of (1) the net cash sales proceeds remaining after the payment of all sales costs that BNPPLC 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 BNPPLC is required by this Agreement, such date will be deferred until the price is determined.

Any reconveyance of the Subject Property back to BNPPLC 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, BNPPLC 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.]

IN WITNESS WHEREOF, the NAI and the Applicable Purchaser have signed this Grant of Repurchase Option and Restrictive Covenants to be effective as of December 15, 2005.

NETWORK APPLIANCE, INC., a Delaware corporation

By: /s/ Steven J. Gomo
Name: Steven Gomo
Title: Chief Financial Officer

STATE OF CALIFORNIA)
) SS
COUNTY OF SANTA CLARA)

On December 16, 2005, before me Lola Rodriguez, a Notary Public in and for the County and State aforesaid, personally appeared Steven Gomo, Chief Financial Officer, 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.

____

[Continuation of signature pages to Grant of Repurchase Option and Restrictive Covenants dated to be effective as of ___, 200___.]

[the Applicable Purchaser]

By: ________________________________
Name: ________________________________
Title: ________________________________

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

[<u>DRAFTING NOTE</u>: 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.]

Parcel 1, as shown on that certain Parcel Map which filed for record in the office of the recorder of the County of Santa Clara, State of California on July 7, 1994, in Book 657 of Parcel Maps, Page 9.

APN: 110-32-6
ARB: 110-3-x65

TOGETHER WITH, easements appurtenant to Parcel 1 as described in <u>Exhibit A</u> 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 15, 2005 (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: /s/ Steven J. Gomo

Name: Steven Gomo

Title: Chief Financial Officer

[cc all Participants]

Exhibit 10.7

GROUND LEASE

BETWEEN

NETWORK APPLIANCE, INC.
("NAI")

AND

BNP PARIBAS LEASING CORPORATION
("BNPPLC")

December 15, 2005

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Exhibits and Schedules

GROUND LEASE

This GROUND LEASE (this "**Ground Lease**"), dated as of December 15, 2005 (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 BNPPLC 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 BNPPLC (rather than NAI) would have acquired if BNPPLC 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 BNPPLC or NAI) are hereinafter sometimes called the "**Improved Property**".

However, the leasehold estate conveyed hereby and BNPPLC'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 BNPPLC 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 BNPPLC and is accepted and is to be used and possessed by BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC to secure an obligation to repay borrowed money or other voluntary obligations, which covers BNPPLC's leasehold estate hereunder or any part thereof or any rents or other charges to be paid to BNPPLC 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 $300,000 per annum, each such monthly payment will be in the amount of $25,000 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 BNPPLC; and

(E) in any certificate provided by NAI, such other factual matters concerning the Leased Property or BNPPLC's rights and obligations under this Ground Lease as are requested by BNPPLC.

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 BNPPLC, and (ii) that there are no uncured defaults in BNPPLC's performance hereunder.

10 **Leasehold Mortgages**.

(A) By Leasehold Mortgage BNPPLC may encumber BNPPLC's leasehold estate in the Leased Property created by this Ground Lease and BNPPLC'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 BNPPLC 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 BNPPLC'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 BNPPLC.

(D) Intentionally Deleted.

(E) Title to Improvements. The leasehold estate created in favor of BNPPLC 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, BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC (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 BNPPLC, 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 BNPPLC). 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 BNPPLC; 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 BNPPLC 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 BNPPLC. 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 BNPPLC 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 BNPPLC 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 BNPPLC 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 BNPPLC because of BNPPLC'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 BNPPLC's interest in the Improved Property pursuant to the Purchase Agreement, and if a use of the Improved Property by BNPPLC or any new Improvements or any removal or modification of Improvements proposed by BNPPLC 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.]

IN WITNESS WHEREOF, this Ground Lease is executed to be effective as of December 15, 2005.

BNP PARIBAS LEASING CORPORATION, a Delaware corporation

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

STATE OF TEXAS §
§
COUNTY OF DALLAS §

On December ___, 2005, before me ___, a Notary Public in and for the County and State aforesaid, personally appeared Lloyd G. Cox, Managing Director of BNP Paribas Leasing Corporation, 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:

____
Notary Public, State of Texas

____
(printed name)

My commission expires:

______________________________.

[Continuation of signature pages for Ground Lease dated as of December 15, 2005]

NETWORK APPLIANCE, INC., a Delaware corporation

By: /s/ STEVEN J. GOMO
Steven Gomo, Chief Financial Officer

STATE OF CALIFORNIA)
) SS
COUNTY OF SANTA CLARA)

On December 16, 2005, before me LOLA RODRIQUEZ, a Notary Public in and for the County and State aforesaid, personally appeared Steven Gomo, Chief Financial Officer 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.

<u>Exhibit A</u>

Legal Description

Parcel 1, as shown on that certain Parcel Map which filed for record in the office of the recorder of the County of Santa Clara, State of California on July 7, 1994, in Book 657 of Parcel Maps, Page 9 ("**Parcel 1**").

APN: 110-32-6

ARB: 110-3-x65

TOGETHER WITH, easements appurtentant to Parcel 1 (the "**Appurtenant Easements**") under, over and across adjacent parcels ("**Adjacent Parcels**") which are owned by Network Appliance, Inc. ("**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 such Parcel 1.

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**").

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 Parcel 1 (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 Parcel 1.

C. The use of Driveways and Parking Areas by the owner of Parcel 1 and its tenants and other invitees will not exceed that reasonably required to provide buildings constructed on such Parcel 1 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 Parcel 1, provides at least 632 parking spaces for buildings on Parcel 1 and also causes the parking ratio for buildings on Parcel 1 to be not less than 1 parking space per 333 square feet of interior building floor area (collectively, the "**Minimimum 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 Parcel 1, 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 Parcel 1 to satisfy Minimum Parking Requirements 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 Parcel 1 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 Parcel 1.)

<u>Exhibit B</u>

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 2005-2006, 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.

<u>Exhibit C</u>

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 <u>unimproved</u> 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 BNPPLC. 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 BNPPLC. Notification in writing of the Option Price shall be made to NAI and BNPPLC within fifteen days following the selection of the third appraiser.

(b) If appraisers must be selected under the procedure set out above and either BNPPLC 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 BNPPLC 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 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.

(d) Either NAI 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 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 BNPPLC.

(e) 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 Dallas, Texas Bar Association who participates in the appraisal process described above will be shared equally by NAI and BNPPLC.

<u>Exhibit D</u>

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 agree that Fair Rental Value is ***$___ per annum.

If NAI and BNPPLC 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 BNPPLC 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 BNPPLC. 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 BNPPLC. Notification in writing of this estimate shall be made to NAI and BNPPLC within fifteen days following the selection of the third appraiser.

(b) If appraisers must be selected under the procedure set out above and either BNPPLC 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 BNPPLC 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 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 twenty days after such choices are submitted to him.

(d) Either NAI or BNPPLC 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 BNPPLC.

(e) 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 Dallas, Texas Bar Association who participates in the appraisal process described above will be shared equally by NAI and BNPPLC.

Exhibit 31.1

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 7, 2006

Exhibit 31.2

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 7, 2006

Exhibit 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

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 27, 2006 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 7, 2006

Exhibit 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

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 27, 2006 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 7, 2006