

RAIL REALTY LLC

To

TOWN OF BROOKHAVEN INDUSTRIAL DEVELOPMENT AGENCY  
(TOWN OF BROOKHAVEN, NEW YORK)

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RECAPTURE AGREEMENT

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Dated as of February 1, 2015

Town of Brookhaven Industrial Development Agency  
(Rail Realty LLC 2015 Facility)

Property Address: 23 and 25 Texaco Avenue, Port Jefferson, New York 11777

Tax Map No.: 0206-021.00-04.00-022.006 and 0206-021.00-04.00-030.000

Record and return to:  
Nixon Peabody LLP  
1300 Clinton Square  
Rochester, New York 14604  
Attention: Jessica L. Paulin, Esq.

## RECAPTURE AGREEMENT

THIS RECAPTURE AGREEMENT, made and entered into as of February 1, 2015 (this “**Recapture Agreement**”), is from RAIL REALTY LLC, a limited liability company, organized and existing under the laws of the State of New York, having an office 414 Main Street, Suite 102, Port Jefferson, New York 11777 (the “**Company**”), to the TOWN OF BROOKHAVEN INDUSTRIAL DEVELOPMENT AGENCY, a public benefit corporation of the State of New York, having its office at 1 Independence Hill, 3rd Floor, Farmingville, New York 11738 (the “**Agency**”).

### RECITALS:

WHEREAS, Title 1 of Article 18-A of the General Municipal Law of the State of New York was duly enacted into law as Chapter 1030 of the Laws of 1969 of the State of New York; and

WHEREAS, the aforesaid act authorizes the creation of industrial development agencies for the Public Purposes of the State of New York (the “**State**”); and

WHEREAS, the aforesaid act further authorizes the creation of industrial development agencies for the benefit of the several counties, cities, villages and towns in the State and empowers such agencies, among other things, to acquire, reconstruct, construct, refurbish, equip, lease, sell and dispose of land and any building or other improvement, and all real and personal property, including but not limited to, machinery and equipment deemed necessary in connection therewith, whether now in existence or under construction, which shall be suitable for manufacturing, warehousing, research, commercial, recreation or industrial facilities, in order to advance job opportunities, health, general prosperity and the economic welfare of the people of the State and to improve their standard of living; and

WHEREAS, pursuant to and in accordance with the provisions of the aforesaid act, as amended, together with Chapter 358 of the Laws of 1970 of the State, as amended (collectively, the “**Act**”), the Agency was created and is empowered under the Act to undertake the providing, financing and leasing of the Facility defined below; and

WHEREAS, the Agency has agreed to assist in the acquisition, demolition, construction, equipping and furnishing an industrial development facility which will occur in two phases over the next three to five years as follows: (A) Phase I will consist of (i) the acquisition of five (5) parcels of land with seven (7) tax lots aggregating approximately 1.643 acres and having the following addresses: 14 and 18 Sheep Pasture Road, 103 Texaco Avenue, 28 Linden Place and a vacant parcel of land located at the corner of Texaco Avenue and Linden Place, all located in the Village of Port Jefferson, Town of Brookhaven, Suffolk County, New York (further identified as Tax Map Nos. Section 021.00 Block 04.00 Lots 11.000, 12.000, 19.100, 20.000, 22.100, 22.200 and 30.000) (collectively, the “**Land**”), together with existing structures located thereon, (ii) the demolition of existing structures located on the Land, and (iii) the construction and equipping of an approximately 54,829 square foot 3-story building over an underground parking garage, containing approximately 38 multi-family apartment units and known as Rail Realty Apartment Complex (collectively,

the “**Phase I Facility**”), (B) Phase II will consist of the construction and equipping of an approximately 51,687 square foot 3-story building over an underground parking garage, containing approximately 36 multi-family apartment units (the “**Phase II Facility**”; and, together with the Phase I Facility, the “**Facility**”), all to be leased by the Agency to the Company and used by the Company as a market-rate residential apartment complex for residents of the Town of Brookhaven; and

WHEREAS, the Company has agreed to lease the Land and the Improvements to the Agency pursuant to and in accordance with a certain Company Lease Agreement, dated as of February 1, 2015 (the “**Company Lease**”), by and between the Company and the Agency; and

WHEREAS, the Company has agreed to transfer to the Agency title to the Equipment pursuant to a Bill of Sale, dated the Closing Date (the “**Bill of Sale**”); and

WHEREAS, the Agency has agreed to sublease and lease the Facility to the Company pursuant to a certain Lease Agreement, dated as of February 1, 2015 (the “**Lease Agreement**”), by and between the Agency and the Company; and

WHEREAS, in order to define the Company’s obligations regarding payments-in-lieu-of taxes with respect to the Facility, the Agency and the Company have agreed to enter into a Payment-in-Lieu-of-Tax Agreement, dated as of February 1, 2015 (the “**PILOT Agreement**”), by and between the Agency and the Company; and

WHEREAS, the Agency has conferred on the Company in connection with the acquisition, construction, equipping, furnishing, financing and leasing of the Facility certain benefits, tax exemptions and other financial assistance more particularly described in Section 1(c) hereof, consisting of, among other things, sales and use tax exemptions on the acquisition, construction, equipping and furnishing of the Facility and real property tax abatements (pursuant to the PILOT Agreement), and, if requested, mortgage recording tax exemptions; and

WHEREAS, the Agency requires, as a condition and as an inducement for it to enter into the transactions contemplated by the PILOT Agreement and the Lease Agreement, that the Company provide assurances with respect to the recapture of certain benefits granted under the PILOT Agreement, the Lease Agreement and the other Agency agreements on the terms herein set forth.

## AGREEMENT

### 1. Recapture of Agency Benefits.

(a) It is understood and agreed by the parties hereto that the Agency is entering into the Lease Agreement and the PILOT Agreement in order to provide financial assistance to the Company for the Facility and to accomplish the Public Purposes of the Act. In consideration therefor, the Company hereby agrees as follows:

- (i) If there shall occur a Recapture Event after February 23, 2015, but on or before December 31, 2018, the Company shall pay to the Agency, or to the State of New York, if so directed by the Agency (except as otherwise specified below) as a return of public benefits conferred by the Agency, one hundred percent (100%) of the Recaptured Benefits (as defined below);
- (ii) If there shall occur a Recapture Event on or after January 1, 2019 but on or before December 31, 2020, the Company shall pay to the Agency, or to the State of New York, if so directed by the Agency (except as otherwise specified below) as a return of public benefits conferred by the Agency, seventy-five percent (75%) of the Recaptured Benefits;
- (iii) If there shall occur a Recapture Event on or after January 1, 2021 but on or before December 31, 2022, the Company shall pay to the Agency, or to the State of New York, if so directed by the Agency (except as otherwise specified below) as a return of public benefits conferred by the Agency, fifty percent (50%) of the Recaptured Benefits;
- (iv) If there shall occur a Recapture Event on or after January 1, 2023 but on or before December 31, 2024, the Company shall pay to the Agency, or to the State of New York, if so directed by the Agency (except as otherwise specified below) as a return of public benefits conferred by the Agency, twenty-five percent (25%) of the Recaptured Benefits; and
- (v) If there shall occur a Recapture Event on or after January 1, 2025, the Company shall not be obligated to pay to the Agency, or to the State of New York, any of the Recaptured Benefits.

(b) The term “Recaptured Benefits” shall mean all direct monetary benefits, tax exemptions and abatements and other financial assistance received by the Company, if any, derived solely from the Agency’s participation in the transaction contemplated by the PILOT Agreement and the Lease Agreement including, but not limited to, the amount equal to 100% of:

- (i) any exemption from any applicable mortgage recording tax with respect to the Facility on mortgages granted by the Agency on the Facility at the request of the Company (the “**Mortgage Recording Tax Exemption**”); and
- (ii) Sales Tax Exemption savings realized by or for the benefit of the Company, including any savings realized by any Agent pursuant to the Lease Agreement and each Sales Tax Agent Authorization Letter issued in connection with the Facility (the “**Sales Tax Savings**”); and
- (iii) real property tax abatements granted under the PILOT Agreement (the “**Real Property Tax Abatements**”);

which Recaptured Benefits from time to time shall upon the occurrence of a Recapture Event in accordance with the provisions of Section 1(c) below and the declaration of a Recapture Event by notice from the Agency to the Company be payable directly to the Agency or the State of New York if so directed by the Agency.

(c) The term “**Recapture Event**” shall mean any of the following events:

(1) A material default by the Company under the PILOT Agreement (other than as described in clauses (d) or (e) below) which remains uncured beyond any applicable notice and/or grace period, if any, provided thereunder; or

(2) The occurrence and continuation of an Event of Default under the Lease Agreement (other than as described in clause (d) or (e) below) which remains uncured beyond any applicable notice and/or grace period, if any, provided thereunder; or

(3) The Facility shall cease to be a “Project” within the meaning of the Act, as in effect on the Closing Date through the act or omission of the Company; or

(4) The sale of the Facility (excluding any sale, assignment or subletting provided for in Section 9.3 of the Lease Agreement) or closure of the Facility and/or departure of the Company from the Town of Brookhaven, except as due to casualty, condemnation or force majeure as provided below; or

(5) Failure of the Company to create or cause to be maintained the number of full time equivalent (“FTE”) jobs at the Facility as defined in Section 8.13 of the Lease Agreement, which failure is not reflective of the business conditions of the Company or the subtenants of the Company, including without limitation loss of major sales, revenues, distribution or other adverse business developments and/or local, national or international economic conditions, trade issues or industry wide conditions; or

(6) Any significant and adverse deviations from the material information and data provided to the Agency in the Company’s application for assistance which would constitute a significant diminution of the Company’s activities in, or commitment to, the Town of Brookhaven, Suffolk County, New York; or

(7) The Company receives Sales Tax Savings in connection with the acquisition, demolition, construction and equipping of the Facility in excess of the Maximum Sales Tax Savings Amount; provided, however, that the foregoing shall constitute a Recapture Event with respect to the Sales Tax Savings in excess of the Maximum Sales Tax Savings Amount only. It is further provided that failure to repay such excess Sales Tax Savings within thirty (30) days shall constitute a Recapture Event with respect to all Recapture Benefits.

(d) Provided, however, if a Recapture Event has occurred due solely to the failure of the Company to create or cause to be maintained the number of FTEs at the Facility as provided in Section 8.13 of the Lease Agreement in any Tax Year but the Company has created or caused to be maintained at least 90% of such required number of FTEs for such Tax Year, then in lieu of recovering the Recaptured Benefits provided above, the Agency

may, in its sole discretion, adjust the payments due under the PILOT Agreement on a pro rata basis so that the amount payable under the PILOT Agreement will be adjusted upward retroactively for such Tax Year by the same percentage as the percentage of FTEs that are below the required FTE level for such Tax Year. Such adjustments to the payments due under the PILOT Agreement may be made each Tax Year until such time as the Company has complied with the required number of FTEs pursuant to Section 8.13 of the Lease Agreement; or

(e) Furthermore, notwithstanding the foregoing, a Recapture Event shall not be deemed to have occurred if the Recapture Event shall have arisen as a result of (i) a “force majeure” event (as more particularly defined in the Lease Agreement), (ii) a taking or condemnation by governmental authority of all or part of the Facility, (iii) the inability or failure of the Company after the Facility shall have been destroyed or damaged in whole or in part (such occurrence a “Loss Event”) to rebuild, repair, restore or replace the Facility to substantially its condition prior to such Loss Event, which inability or failure shall have arisen in good faith on the part of the Company or any of its affiliates so long as the Company or any of its affiliates have diligently and in good faith using commercially reasonable efforts and after prudent decision making, pursued the rebuilding, repair, restoration or replacement of the Facility or part thereof or (iv) the period of any rebuilding, restoration or replacement after the occurrence of a Loss Event.

(f) The Company covenants and agrees to furnish the Agency with written notification (i) within sixty (60) days of the end of each Tax Year the number of FTEs located at the Facility for such Tax Year, and (ii) within thirty (30) days of actual notice of any facts or circumstances which would likely lead to a Recapture Event or constitute a Recapture Event hereunder. The Agency shall notify the Company of the occurrence of a Recapture Event hereunder, which written notification shall set forth the terms of such Recapture Event.

(g) In the event any payment owing by the Company under this Section shall not be paid within 10 days’ written notice by the Agency, such payment shall bear interest from the date of such demand at a rate equal to one percent (1%) plus the Prime Rate, but in no event at a rate higher than the maximum lawful prevailing rate, until the Company shall have made such payment in full, together with such accrued interest to the date of payment, to the Agency (except as otherwise specified above).

(h) The Agency shall be entitled to deduct all reasonable out of pocket expenses of the Agency, including without limitation, reasonable legal fees, incurred with the recovery of all amounts due under this Recapture Agreement, from amounts received by the Agency pursuant to this Recapture Agreement.

## 2. Obligations Unconditional.

(a) The obligations of the Company under this Recapture Agreement shall be absolute and unconditional and shall remain in full force and effect until the PILOT Agreement and the Lease Agreement have expired or been terminated or the Lease Agreement has been assigned with the consent of the Agency, and such obligations shall not

be affected, modified or impaired by any state of facts or the happening from time to time of any event, whether or not with notice to or the consent of the Company.

(b) It is hereby expressly agreed that the Company's obligations under this Recapture Agreement are not limited in any manner, and the Company shall be liable for the payment of all recapture amounts with respect to the entire Facility.

(c) Reserved.

(d) The Company and the Agency hereby agree that the obligations and liabilities of the Company hereunder are the absolute and unconditional obligations and liabilities of the Company.

3. Condition to Reconveyance of Facility. The parties hereto agree that the Agency shall have no obligations to surrender its leasehold interest in the Facility to the Company pursuant to the Lease Agreement until all payments to the Agency and the Taxing Jurisdictions under Sections 5.3, 11.2 and 11.3 of the Lease Agreement, under the PILOT Agreement and hereunder have been paid in full. If such payments are not paid in full by the Company within ninety (90) days of the date when due and owing, then the Agency shall offer its interest in the Facility for sale pursuant to the Agency's Real Property Disposition Policy adopted pursuant to the Public Authorities Accountability Act, as amended.

4. Recordation of Recapture Agreement. The parties hereto agree that this Recapture Agreement shall be recorded as a lien against the Facility and as a covenant and restriction running with the Land until this Recapture Agreement has been discharged by the Agency.

5. Terms Defined. All of the capitalized terms used in this Recapture Agreement and not otherwise defined herein shall have the meanings assigned thereto in the Schedule of Definitions attached to the Lease Agreement as Schedule A.

6. Directly or Indirectly. Where any provision in this Recapture Agreement refers to action to be taken by any Person, or which such Person is prohibited from taking, such provision shall be applicable whether such action is taken directly or indirectly by such Person.

7. Survival. All warranties, representations, and covenants made by the Company herein shall be deemed to have been relied upon by the Agency and shall survive the delivery of this Recapture Agreement to the Agency regardless of any investigation made by the Agency.

8. Binding Effect. This Recapture Agreement shall inure to the benefit of and be binding upon the successors and assigns of each of the parties.

9. Notices. All notices, certificates and other communications under this Recapture Agreement shall be in writing and shall be deemed given when delivered personally or when sent by certified mail, postage prepaid, return receipt requested, or

delivered by any national overnight express delivery service (in each case, postage or delivery charges paid by the party giving such communication) addressed as follows or to such other address as any party may specify in writing to the other:

To the Agency

Town of Brookhaven Industrial Development Agency  
1 Independence Hill, 3rd Floor  
Farmingville, New York 11738  
Attention: Chief Executive Officer

With a copy to:

Town of Brookhaven, Town Attorney's Office  
1 Independence Hill, 3rd Floor  
Farmingville, New York 11738  
Attention: Annette Eaderesto, Esq.

To the Company:

Rail Realty LLC  
414 Main Street, Suite 202  
Port Jefferson, New York 11777  
Attention: Anthony J. Gitto, Managing Member

With a copy to:

Vanbrunt, Juzwiak & Russo, P.C.  
140 Main Street  
Sayville, New York 11782  
Attention: Eric Russo, Esq.

10. Entire Understanding; Counterparts. This Recapture Agreement constitutes the entire agreement and supersedes all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof and may be executed simultaneously in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

11. Amendments. No amendment, change, modification, alteration or termination of this Recapture Agreement shall be made except in writing upon the written consent of the Company and the Agency.

12. Severability. The invalidity or unenforceability of any one or more phrases, sentences, clauses or sections in this Recapture Agreement or the application thereof shall not affect the validity or enforceability of the remaining portions of this Recapture Agreement or any part thereof.



13. Governing Law. This Recapture Agreement shall be governed by, and construed in accordance with, the laws of the State, without regard or reference to its conflict of laws principles.

14. Section Headings. The headings of the several Sections in this Recapture Agreement have been prepared for convenience of reference only and shall not control, affect the meaning of or be taken as an interpretation of any provision of this Recapture Agreement.

15. Waiver of Trial by Jury. The parties do hereby expressly waive all rights to trial by jury on any cause of action directly or indirectly involving the terms, covenants or conditions of the Recapture Agreement or any matters whatsoever arising out of or in any way connected with the Recapture Agreement.

(Remainder of Page Intentionally Left Blank – Signature Page Follows)

IN WITNESS WHEREOF, the Company has caused this Recapture Agreement to be duly executed and delivered as of the day and year first above written.


**RAIL REALTY LLC**



By: \_\_\_\_\_  
Name: Anthony J. Gitto  
Title: Managing Member

ACCEPTED:

**TOWN OF BROOKHAVEN INDUSTRIAL  
DEVELOPMENT AGENCY**

By: 

Name: Lisa MG Mulligan  
Title: Chief Executive Officer

Recapture Agreement  
Signature Page 1 of 2

STATE OF NEW YORK    )  
                                  : SS:  
COUNTY OF NASSAU    )

On the 23rd day of February in the year 2015 before me, the undersigned, personally appeared **Anthony J. Gitto**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the within instrument, the individual, or the person or entity on behalf of which the individual acted, executed the instrument.

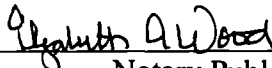
  
\_\_\_\_\_  
Notary Public

DIANE E. EDGAR  
Notary Public, State of New York  
No. 01ED5026642  
Qualified in Suffolk County  
Commission Expires April 25, 2018

STATE OF NEW YORK    )  
                                  : SS:  
COUNTY OF NASSAU    )

On the 23rd day of February in the year 2015, before me, the undersigned, personally appeared **Lisa MG Mulligan**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the within instrument, the individual, or the person or entity on behalf of which the individual acted, executed the instrument.

ELIZABETH A. WOOD  
Notary Public, State of New York  
Registration # 01WO6103025  
Qualified in Monroe County  
Certificate Filed in Monroe County  
Commission Expires: 12/15/2015

  
\_\_\_\_\_  
Notary Public

Recapture Agreement  
Signature page 2 of 2

EXHIBIT A

LEGAL DESCRIPTION OF REAL PROPERTY

# Safe Harbor Title Agency, Ltd.

## Schedule A

Title Number **SH156419**  
Underwriter **638-S-12622**

Page 1

ALL that certain plot, piece or parcel of land, situate, lying and being at the Village of Port Jefferson, The Town of Brookhaven, County of Suffolk and State of New York, more particularly bounded and described as follows:

BEGINNING at a point, said point being the intersection of the southerly side Sheep Pasture Road and the easterly side of Texaco Street;

RUNNING THENCE easterly from said point or place of beginning, by and with the southerly side of Sheep Pasture Road, the following two (2) courses and distances to a point:

1. North 50 degrees 29 minutes 20 seconds East 53.25 feet
2. North 54 degrees 23 minutes 33 seconds East 75.68 feet

RUNNING THENCE southerly from said point, the following seven courses and distances to a point on the northerly side of Linden Street:

1. South 33 degrees 18 minutes 20 seconds East 41.92 feet;
2. South 32 degrees 42 minutes 56 seconds East 88.69 feet;
3. South 30 degrees 57 minutes 44 seconds East 65.82 feet;
4. South 63 degrees 51 minutes 40 seconds West 50.41 feet;
5. South 23 degrees 27 minutes 09 seconds East 64.61 feet;
6. South 64 degrees 42 minutes 00 seconds West 18.64 feet;
7. South 13 degrees 36 minutes 00 seconds East 163.93 feet;

RUNNING THENCE westerly from said point, by and with the northerly side of Linden Street, South 76 degrees 50 minutes 00 seconds West 129.69 feet to a point;

RUNNING THENCE along an arc to the right, having a radius of 25.00 feet, a distance of 41.34 feet to a point on the easterly side of Texaco Street;

RUNNING THENCE northerly from said point, by and with the easterly side of Texaco Street, the following two (2) courses and distances:

1. North 08 degrees 25 minutes 00 seconds West 237.48;
2. North 09 degrees 16 minutes 40 seconds West 112.35 feet to the point or place of BEGINNING.

For Conveyancing Only, if intended to be conveyed.

Together with all right, title and interest of, in and to any streets and roads abutting the above described premises, to the center line thereof.

