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NO. 60069-9-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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SAMMY ENTERPRISES, INC., AND IMSOON LEE

Appellants,

v.

OPEN AMERICA, INC., OPEN WORKS,  
MICHELLE DUX AND, JOHN DOE DUX,

Respondents.

FILED  
COURT OF APPEALS, DIVISION I  
JAN 11 2011

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**APPELLANTS' BRIEF**

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**ORIGINAL**

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## **I. ASSIGNMENTS OF ERROR**

Appellants Sammy Enterprises, Inc., and Imsoon Lee (collectively “Lee”) assign error to the trial court’s June 13, 2006 decision granting Appellees, Open America, Inc., Michelle Dux and John Doe Dux’s (collectively “OpenWorks”) Motion to Compel Arbitration and rejecting Lee’s arguments that the arbitration provisions contained in the janitorial franchise contract are unconscionable. Lee further assigns error to the trial court’s May 3, 2007 order granting of OpenWorks’ motion to confirm arbitration award thereby rejecting Lee’s request to deny the confirmation based on procedural and substantive unconscionability.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Is a janitorial franchise contract that requires the franchisees to arbitrate all disputes while granting the franchisor with unequal access to court and court remedies substantively and procedurally unconscionable based on lack of mutuality?

## **II. PROCEDURAL STATEMENT OF THE CASE**

On April 18, 2006, Sammy Enterprises, Inc., filed this current action before the Superior Court of King County. The Complaint sought damages for violation of the Washington Franchise Investment Protection Act, Washington Consumer Protection Act, Breach of Contract, Misrepresentation and Fraud. Specifically, the Complaint alleged that

OpenWorks misrepresented the availability of building customer accounts, the amount of monthly income, and that by not providing the monthly dollar volume of business constructively terminated Sammy Enterprises without just compensation. Sammy Enterprises also filed a jury demand for a jury of 12. See Complaint at CP 3-11 and Jury Demand at CP 12.

Rather than answering the Complaint, OpenWorks moved to compel arbitration asserting that paragraph 11.7 of the janitorial franchise agreement between the parties required that the dispute be submitted to binding arbitration. CP 13-17. The Franchise Agreement is CP 92-143 and is attached this brief as Appendix 1. Sammy Enterprises objected to the Motion to Compel Arbitration and asserted that the contract and the arbitration provisions were procedurally and substantively unconscionable because OpenWorks had unequal access to the courts while denying the same to its franchisees. CP 225-237 and CP 250-262. Sammy Enterprises also asserted that the cost of the arbitration was prohibitive therefore illegal under Mendez v. Harbor Homes, Inc., 111 Wn. App. 446, 45 P.3d 594 (2002). CP 23.<sup>1</sup>

On June 13, 2006, Judge Michael Hayden issued an Order granting OpenWorks' Motion to compel arbitration, however, set certain conditions

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<sup>1</sup> Chul Jae Lee, one of the owners of Sammy Enterprises, asserted that he was only earning \$11.00 per hour, working 6 days per week and it was not economically feasible to afford the costs of an arbitration. CP 23.

such as requiring that the arbitration costs (filing, administration and arbitrator's fees) be paid by OpenWorks. CP 269-270. Judge Hayden also ordered that the matter be arranged with former King County Superior Court Judge Steve Scott, with Judicial Dispute Resolutions, LLC. CP 270.<sup>2</sup>

The arbitration hearing was held on January 9 and 10, 2007 with Steve Scott as the arbitrator. On January 18, 2007, the arbitrator issued an award finding in favor of OpenWorks. CP 483. The award was then amended to include Appellant, Imsoon Lee as a party and to include the financial award that included \$10,250 for the cost of the arbitrator. CP 485-486. Lee then filed a Motion for to vacate the award CP 487-495. Judge Hayden denied this request and confirmed the arbitration award, CP 533-534 and entered judgment conforming to the award CP 535-537.<sup>3</sup> Lee filed a notice of appeal on May 30, 2007. CP 538.

### **III. FACTUAL HISTORY OF THE CASE**

A. The Lees are Recent Immigrants to the US with Limited English Proficiency and Limited Economic Means. Imsoon Lee and her husband Chul Jae Lee immigrated to the US from Korea in 1997 with their

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<sup>2</sup> A decision compelling parties to arbitrate is not a final order and therefore not appealable as a matter of right. Teufel Const. Co., v. American Arbitration Assoc., 3 Wn. App. 24, 25, 472 P.2d 572 (1970).

<sup>3</sup> The trial judge excluded the arbitrator's costs based on the trial court's original ruling that OpenWorks shall pay for the cost of the arbitration. CP 536.

two children. CP 18, at ¶ 2. Because of their lack of fluency in English, the Lees had trouble finding work and took on janitorial jobs because it did not require English language fluency. CP 18-19, at ¶ 3. The family, including their two sons, worked as night janitors earning \$7.00 per hour, and in 2003 purchased a janitorial franchise from defendant Open Works. CP 20, at ¶ 8.

B. The Lees Contract with OpenWorks. When the Lees went to inquire about a franchise opportunity with OpenWorks, they met OpenWork's northwest regional director, Defendant/Appellee Michelle Dux. The Lees had a business partner named Kyungsoon Kim, also a Korean immigrant, and because neither Kim nor the Lees were fluent in English, Kim's young daughter acted as an interpreter at the initial meeting. CP 20, at ¶ 8. During this meeting, Dux talked about how OpenWorks was superior to other janitorial franchise companies but did not mention anything about arbitration. CP 21, at ¶ 11. The Lees decided to purchase a franchise with a monthly volume of \$10,000 and for this amount, they had to pay \$27,000 as the franchise fee. CP 21.<sup>4</sup> The people servicing the accounts would be the Lees (family of four) plus Ms. Kim and a friend of Ms. Kim, for a total of six. CP 21, at ¶ 13.

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<sup>4</sup> The contract was first executed by Ms. Kim and was transferred later to the Lees. CP 21, ¶ 14.

At the time the contract was signed, the Lees did not negotiate any of the terms. CP 21, at ¶ 15 and CP 499, at ¶ 5 and 6. The contract was simply given to them to sign when they paid the franchise fee. Dux knew that the Lees were not proficient to understand the contents of the franchise offering circular. CP 479, p. 160, lines 2-4. Dux believed that Kyung Kim understood the contents of the offering circular through Kim's daughter. CP 479, page 160, lines 22-25. According to Kim, although her daughter was present at the initial meeting, her daughter had no prior experience in dealing with business matters or signing written documents. CP 498-499. OpenWorks gave the Lees a copy of the franchise offering circular, but the parties did not discuss any terms regarding arbitration. CP 499, at ¶ 5 and 6.

C. OpenWorks' Janitorial Franchise System. Under the janitorial franchise system, the OpenWorks, as the franchisor, contracts with the building owners/management companies to provide janitorial services. The franchisor also sells "franchises" to the public, based on a monthly dollar volume of income to the franchisees. For OpenWorks, a franchisee can purchase a "package" ranging from monthly volume of \$3,000 to \$25,000.<sup>5</sup> CP 104, See Appendix. OpenWorks bills the

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<sup>5</sup> The monthly volume is not tied to a specific building account and the accounts are often changed by the franchisor. Also, the volume is often comprised of not one single account but several building accounts with smaller dollar volumes. CP 103-105, see Appendix.

customers and collects the money. Prior to paying the franchisees, OpenWorks then deducts various fees such as royalties of 10%, billing and collection services 5%, advertising and marketing, all totaling 20 percent of the gross amounts due to the franchisees. CP 111-112. As independent contractors, the franchisees are responsible for paying their own taxes and receive no benefit of any kind from OpenWorks. CP 120, at ¶ 8.2. Franchisees do not have a direct contractual or other relationship with the building accounts other than servicing them, and as the result, the franchisor exercises complete control over the franchisees like an ordinary employer. CP 19 and 20.

Indeed, despite the “independent contractors” label, using its quality control authority under the contract, the franchisor rigorously monitors and oversees the work of the franchisee. CP 115. OpenWorks has the sole discretion to terminate the franchisee for a variety of reasons, including any complaint and failure to perform to the satisfaction of the customer, or even a failure to be fluent in English. CP 116-117. Although the term of the agreement is for 10 years, CP 103, OpenWorks does not replace accounts “lost” for poor work and does not replace accounts after the initial first year. CP 106.

D. The Franchise Offering Circular and Franchise Agreement.  
OpenWorks’ franchise offering circular is a lengthy legal document. CP

35-224. Prepared by OpenWorks' attorneys in Phoenix, Arizona, the offering circular consists of statements about the janitorial business and a number of other legal documents to be signed by a franchisee. CP 481. The Franchise agreement CP 92-133 is a part of the offering circular along with a Personal Guaranty, CP 140, Promissory Note CP 145-146, Equipment Lease Agreement, CP 151-154 and other agreements such as confidentiality and non competition.

E. The Arbitration Clause and Franchise Agreement.

OpenWorks' arbitration requirement is specified in section 11.7 of the franchise agreement. It states:

**11.7. Arbitration.** Any dispute or claim (a "Claim") arising out of or in connection with this Agreement shall be resolved by arbitration; provided, however, that OpenWorks shall not be required to arbitrate any Claim with respect to the ownership or use of its Trade Names or Marks. The arbitration shall be held in the City of Phoenix, Arizona ... This arbitration clause will not deprive OpenWorks of any right it may otherwise have to seek provisional injunctive relief from a court of competent jurisdiction....You waive any rights you may have to demand trial by jury or to seek punitive damages from OpenWorks or its Affiliates.

CP 129-130.

Initiating the arbitration requires a set of notices and responses:

**11.7.1 Initiation of Arbitration.** In order to initiate an arbitration hereunder, the party wishing to make a Claim (the “Initiator”) shall give a written notice of demand for arbitration hereunder (the “Initial Notice”) to the other party (the “Respondent”) and provide the name of the Initial Arbitrator (as hereinafter defined).

CP 130.

Section 11.7.2 specifies the requirements for the notice, and 11.7.3 provides for requirement for the response.

Despite requiring franchisees to arbitrate all disputes arising under the agreement, however, the franchise agreement provides that OpenWorks may bring a court action for any violation of the same franchise agreement by a franchisee. It states:

**11.8. Injunctive Remedy for Breach.** You recognize that you are a member of a Franchise Network and that your acts and omissions may have a positive or negative effect on the success of other businesses operating under OpenWorks’ Trade Names and in substantial association with its Marks. Your failure to comply with the terms of this Agreement is likely to cause irreparable damage to OpenWorks and to some or all of the other franchisees of OpenWorks. For this reason, you agree that if OpenWorks can demonstrate to a court of competent jurisdiction that there is a substantial likelihood of a breach or threatened breach of any of the terms of this Agreement by you, OpenWorks will be entitled, without posting a bond, to a temporary restraining

order or preliminary injunction enjoining the breach and/or to a decree of specific performance, without showing or proving any actual damage, until a final determination is made by an arbitrator.

CP 131 (underline added).

Section 11.9 sets a 30 day statute of limitations. It states:

**11.9 Limitation of Actions.** No action or arbitration proceeding may be maintained by you against OpenWorks unless (a) a written notice of any claim alleged to exist is delivered by you to OpenWorks within 30 days after the event complained of becomes known to you and (b) an arbitration proceeding is commenced by you within 90 days after such notice.

CP131.

Section 11.10 states that the prevailing party shall recover attorney's fees and costs including the arbitrator's costs.

Section 11.11 governs "severability" of the contract. It provides:

**11.11. Severability.** Each provision of this Agreement will be considered severable. If for any reason, any provision is determined to be invalid or in conflict with any existing or future law or regulation, that provision will not impair the operation of the remaining provisions of this Agreement. The invalid provisions will be deemed not to be a part of this Agreement. However, if OpenWorks determines that the findings of illegality adversely affects the basic consideration for its performance under this

Agreement, OpenWorks may, at its option, terminate it.

CP 132.

Section 10.2 governs termination of a franchisee. It states that OpenWorks may “immediately” terminate for violating a number of provisions including failures to meet standard. However, in section 10.3, a franchisee may only terminate after 90 days written notice if certain conditions are met in full within the specific time periods. Furthermore, after the termination, OpenWorks’ only obligation is “to settle up with respect to payments due and owed prior to the Termination.” However, a franchisee must assign to OpenWorks any Accounts obtained by the franchisee that do not have an existing Maintenance Agreement with OpenWorks. However, unlike a franchisee, OpenWorks may recover “damages for lost profits.”

If the franchise granted in this Agreement is terminated because of your default, the rights of OpenWorks described above will not necessarily be its exclusive remedies, but will instead supplement any other equitable or legal remedies available to OpenWorks. If this Agreement is terminated because of your material default, nothing in this section will be construed to deprive OpenWorks of the right to recover damages as compensation for **lost profits**. Termination of this Agreement will not extinguish any obligation of either party that has accrued prior to Termination...

CP 128-9.

OpenWorks' franchise agreement also includes an English language requirement. Paragraph 7.2.12 states:

You (if the franchisee is an individual) and your Designated Manager must be able to read, speak and write clearly and with proficiency ("Fluent in English") in order to adequately communicate with Accounts and to maintain OpenWorks' professional image. OpenWorks, in its sole discretion, shall determine if you and/or your Designated Manager are fluent in English.

CP 118.

Lack of fluency in English is a cause for losing a customer account under paragraph 7.2.5.

OpenWorks may, at its sole discretion, terminate your right to serve and to Transfer a particular account, and may assign the Account to another franchisee, upon the occurrence of one of the following events:  
...h) If you or your Designated Manager are not fluent in English;

CP 116-117.

F. The Personal Guaranty, Promissory Note and the Equipment Lease Agreements Permit OpenWorks to Avoid Arbitration and Seek Judicial Remedies.

The personal guaranty provides that the franchisee “personally guarantees to OpenWorks that the Franchisee will fully, promptly and faithfully perform and discharge all of its obligations, duties and conditions under the Agreement (franchise)... It further provides

5. Guarantor waives the right of trial by jury in the event of any litigation between the parties to this guaranty in respect of any matter arising under this guaranty and agrees that, should OpenWorks bring any judicial proceeding or arbitration in relation to any such matter, Guarantor will not interpose any counterclaim or set off of any nature.

6. The provisions of the Agreement providing that Arizona law shall govern, and requiring binding arbitration in Phoenix, Arizona shall also apply to this Guaranty and each Guarantor.

CP 140.

The promissory note, executed by franchisees who do not pay the initial franchise fee in full and have the amounts owed to OpenWorks deducted from their pay, states that the Note shall be governed by Arizona law and allows OpenWorks to seek court action in Arizona:

The Note shall be governed by and construed under the laws of the State of Arizona, without giving effect to the application of any Arizona conflicts of law rules. Any proceeding brought by Holder against maker may be brought in Maricopa County, Arizona, and each Maker and endorser hereof waives all questions of personal jurisdiction and venue for the purposes of carrying out this provision...In

the event Holder is required to file any action, legal or other, to enforce its rights under this Note, Holder shall be entitled to an award of its reasonable attorney's fees and costs incurred in connection therewith.

CP 146.

Similarly, under the equipment lease agreement, OpenWorks has the right to exercise all remedies arising under law or equity to enforce its rights arising hereunder. CP 153, ¶ 11.

G. Breach of Promises and Lost Account Volume. After the Lees entered into the franchise agreement, OpenWorks did not provide him with \$10,000 in monthly building accounts as had been promised. The Lees protested and it took OPEN WORKS several months before it offered several small accounts netting only about \$2,000 per month. OpenWorks then gave him another customer account valued at \$4,400 which the Lees accepted because of lack of accounts offered. However, OpenWorks took this account back and offered it to another franchisee alleging that the Lees' work was not satisfactory. Because of OpenWorks' numerous breach of the franchise agreement, the Lees filed current lawsuit.

#### **IV. SUMMARY OF THE ARGUMENT**

1. The Arbitration Agreement lacks mutuality because OpenWorks has permitted itself to receive benefits of court remedies

while denying the same to its franchisees. By stating that any violation of the franchise agreement by a franchisee relates to its trademark, OpenWorks unequally allowed itself to receive judicial relief. Furthermore, due to the realities of the janitorial franchise relationship, it is far more likely that only the franchisees will arbitrate their claims.

2. Under Mendez v. Harbor Homes, Inc., 111 Wn. App. 446 (2002), the Lees are unable to prosecute their claims through arbitration.

3. The unconscionable provisions of OpenWorks' franchise agreement are not severable because they pervade the entire agreement and because of OpenWorks' unilateral right to terminate the agreement.

## **V. ARGUMENT**

### **A. OpenWork's Arbitration Requirement Lacks Mutuality and Represents a Systematic Efforts to Impose an Inferior Forum that Unconscionably Favors OpenWorks.**

Unconscionability requires that courts deny enforcement of all or part of an unfair or oppressive contract based on abuses during the process of forming a contract or within the actual terms of the contract itself. Al Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1258, (9<sup>th</sup> Cir. 2005)(applying Washington law). Lack of meaningful choice, considering all the circumstances surrounding the transaction whether each party had a reasonable opportunity to understand the terms of the contract compels a finding of procedural unconscionability; and overly harsh and one sided

clause or term renders the agreement substantively unconscionable. Adler v. Fred Lind Manor, 153 Wn.2d 331, 344-345, 103, P.3d 773 (2004). Whether a contract is substantively unconscionable is a question of law determined **as of the time the contract was made**, as opposed to the time when the contract is enforced. Schroeder v. Fagoel Motors, Inc., 86 Wn. 2d 256, 262, 544 P.2d 20 (1975)(Emphasis added).

1. OpenWorks' Franchise Agreement is an Adhesion Contract and was Entered Into in a Procedurally Unconscionable Manner.

OpenWorks' Franchise Agreement is a standard form printed contract, prepared only by OpenWorks and submitted to the Lees on take or leave it basis, and the absence of a true equality of bargaining power between OpenWorks and the Lees all merit a finding that it is a classic adhesion contract. Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 393, 858 P.2d 245 (1993). An adhesion contract is relevant for finding of procedural unconscionability. Id. at 393.

OpenWorks admits that its janitorial franchise agreement is prepared only by OpenWorks. It is prepared by OpenWorks' attorneys in Phoenix, Arizona, who are experts in franchise laws and is a part of the Franchise Offering Circular, a 189 page document. Tucked inside the Offering Circular as Exhibit C is the franchise agreement with 4 attachments and the arbitration provision is on page 29, section 11.7 of the

single space franchise agreement. CP 129. As both Kyung Soon Kim and Chul Jae Lee stated, neither of them spoke sufficient English and they did not know that they were even receiving a franchise offering circular with a franchise agreement contained inside. OpenWorks' regional manager, Michelle Dux who performed the sale, admitted that she knew that neither Kim nor Lee were proficient to understand the contents of the offering circular. CP 479. Nevertheless, she still pitched the sale and encouraged them to sign the franchise agreement without mentioning the arbitration provision. Kim also stated:

because of the nature of the relationship with OPEN as the franchisor, and that we would be working under OPEN's supervision and management, we had to accept OPEN's deal and sign the contract if we wanted to proceed...It was not financially feasible for me or Mr. Lee to consult with an attorney or any professional about the details of the franchise offering circular...Besides, I also did not want to seem to cause any issues especially knowing that I would be working under OPEN's supervision and management. Since they control where and how I work, when I would be paid, and control all matters relating to the job, I did not have much choice and did not bargain anything with OPEN.

CP 500.

Similarly, according to Lee, the transaction and the interchange with OpenWorks was one sided:

At the time Ms. Kim signed the franchise agreement, we did not negotiate any of the terms or even discuss them. The contract was simply given to us to sign when we paid the franchise fee and Ms. Kim signed the pre printed agreement. Ms. Dux knew that neither Ms. Kim nor I were fluent in English and could not understand the contract.

CP 21.

Although the Lees were provided with the offering circular prior to their signing as required by law, the practical effects of their lack of fluency in English—which OpenWorks knew and readily acknowledge—and their economic position illustrate that the Lees lacked any bargaining power. The key inquiry, here is whether the Lees had a meaningful choice.<sup>6</sup> As described above, the Lees entered into the franchise agreement without meaningful understanding of what they were purchasing and relied on OpenWorks and lacked any real choice. Furthermore, as stated by both

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<sup>6</sup> The facts of this case are distinguishable from Zuver v. Airtouch Comm., Inc., 153 Wn.2d 293, 305, 103 P.3d 753 (2004). There the Washington Supreme Court found that an employee who signed the arbitration agreement “had a meaningful choice” based on the number of days which passed between the time the employee first received the agreement and also the fact that the arbitration agreement was not “hidden in a maze of fine print.” Id. at 306. Here, however, OpenWorks readily acknowledge that its representative knew that the Lees did not have English proficiency to understand the franchise offering circular. Furthermore, although the front cover page of the offering circular contains a disclaimer about arbitration, OpenWorks did not mention anything about arbitration during their meeting; and unlike in Zuvers, the arbitration provisions in the instant case is not a separate document and specific clause is indeed tucked away well inside the 200 page franchise offering circular document.

Chul Jae Lee and Kyung Soon Kim, OpenWorks as the franchisor held superior power over them. Not only did OpenWorks exercise control over them like any other employer, it also held the Lees' \$27,000 investment which they wanted to avoid jeopardizing. CP 500.

2. The Arbitration Provisions Are Substantively Unconscionable Because OpenWorks has Unfairly Carved Out Its Own Access to Judicial Remedies While Denying Them to the Franchisees.

In Al Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1258, (9<sup>th</sup> Cir. 2005), the 9<sup>th</sup> Circuit, applying Washington law, held that the following arbitration agreements are substantively unconscionable: (1) an arbitration agreement that forces employees to arbitrate claims against the employer while not requiring the employer to arbitrate claims against employees; (2) limiting remedies; (3) splitting costs and fees; (4) imposing a one year statute of limitations; (5) prohibiting class actions; (6) setting the filing fee and waiver of the fee; and (7) giving the employer the unilateral right to terminate or modify the agreement. There, an employee had brought suit claiming discrimination and the employer sought to compel arbitration of the employee's claims. The 9<sup>th</sup> Circuit, in prior decisions, had ruled many of defendant Circuit City's arbitration agreement sections unconscionable.

In the present case, the arbitration provisions are skewed even more in favor of OpenWorks than those held unconscionable in Circuit

City. First, as cited above, section 11.8 of the franchise agreement states that OpenWorks' trade marks are important and if there is a "substantial likelihood of a breach or threatened breach of **any of the terms of this Agreement** by you, OpenWorks will be entitled, without posting a bond, to a temporary restraining order or preliminary injunction enjoining the breach and/or to a decree of specific performance, without showing or proving any actual damage." (Bold added). Whether it is the franchisee's lack of English proficiency or any other, OpenWorks can go to court and get relief because it can bootstrap any alleged breach to its trademark.

There is no similar right to the franchisee and such self declared advantage was declared substantively unconscionable recently by the 9<sup>th</sup> Circuit in Nagrampa v. Mailcoups, Inc., 469 F.3d 1257 (9<sup>th</sup> Cir. 2006) based on lack of mutuality. In Nagrampa, a franchise agreement for a mail coupon advertising business required the franchisee to "submit to arbitration any controversy related to the franchise agreement or any breach thereof, including without limitation, any claim that the agreement or any portion thereof is invalid, illegal or otherwise voidable or void." However, the franchisor reserved for itself the right to obtain and provisional remedy "including, without limitation, injunctive relief from any court of competent jurisdiction, as may be necessary in MailCoups's

sole subjective judgment to protect its Service Marks and proprietary information.” The 9<sup>th</sup> Circuit declared:

This language, read plainly, means that MailCoups could go to court to obtain “any provisional remedy,” even if it related to a claim for breach of contract as long as the claim also implicated MailCoups’s Service Marks or proprietary information. Moreover, it is far more likely that Nagrampa—and not MailCoups—would assert claims related to the invalidity or unenforceability of the non-negotiable contract written by MailCoups. This provision is clearly one-sided, effectively giving MailCoups the right to choose a judicial forum and eliminating such a forum for Nagrampa. California courts consistently have found such arbitration provisions unconscionable.

Id. at 1286-1287.

Washington applies virtually the same definition of substantive unconscionability as California. Al-Safin v. Circuit City Store, Inc., 394 F.3d 1254, 1261 (9<sup>th</sup> Cir. 2005).

One of the principal allegations in the instant case is over OpenWorks’ failures to provide customer accounts CP 6-10 and that OpenWorks had sold more franchise volume to its franchisees than it had acquired in relation to the building customer volume. The Lees claim that OpenWorks did not fulfill their obligation to fill \$10,000 in monthly account volume and despite repeated complaints, OpenWorks took little

action and used a number of franchise contract provisions to disclaim its obligations to the Lees. Thus, as the Nagrampa court held, it is far more likely that the franchisees like the Lees would assert claims related to the invalidity or unenforceability of the non-negotiable contract written by OpenWorks.

Moreover, OpenWorks' unilateral rights to access the judicial system is far more systematic than the franchisor in Nagrampa. As shown above, under its promissory note, CP 145, and under the equipment lease agreement, CP 151, OpenWorks can freely seek a court relief for not just injunctive remedy but for damages for any breach of these two agreements by a franchisee. The promissory note explicitly states that the "Note is governed by and construed under the laws of the State of Arizona...(A)ny proceeding brought by Holder against Maker may be brought in Maricopa County, Arizona, and each Maker and endorser hereof waives all questions of personal jurisdiction and venue for the purposes of carrying out this provision." CP 146. Similarly, section 11 of the Equipment Lease states that "(A)t the time and without any prior notice, O.P.E.N. may exercise all of its remedies arising under **law** or equity to enforce its rights arising hereunder."<sup>7</sup> CP 153.

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<sup>7</sup> Section 14 states "Attorney's fees. In the event of any action or proceedings brought by either party against the other under this Agreement, the prevailing party shall be entitled

Furthermore, the realities of the janitorial franchise business permits OpenWorks to unfairly benefit from a court issued injunctive relief and avoid arbitration. As noted above, all franchisees must either pay their franchise fees up front (like the Lees in this case) or execute a promissory note in favor of OpenWorks that contains a damages lawsuit in Arizona. As the franchisor who acts as the middleman and receives funds from the building customers then deducts its fees prior to paying its franchisees, OpenWorks never has to be concerned about not receiving its share of the financial benefits of the three way relationship it has sandwiched between the actual customer and the franchisees. In other words, OpenWorks never has to arbitrate over money while conversely, the franchisees must seek all of their relief through arbitration. Whether they did not receive money from OpenWorks either because OpenWorks failed to deliver the accounts it had promised, or because OpenWorks wrongfully withheld any portion of monies due to them, the franchisees have no choice but to risk a costly, and in comparison to OpenWorks' rights to injunctive relief, very time consuming arbitration. All the arguments in favor of arbitration, less costly and speedy resolution simply do not apply because OpenWorks has cherry picked the court system to the complete detriment of the franchisees. Simply put, one cannot force a

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to recover for the fees of its attorneys in such action of proceeding in such amount as the **Court** may adjudge reasonable as attorney's fees. (Bold added).

contracting party to prosecute their most critical claims in an arbitration while reserving the benefits of the judicial process for itself (especially after OpenWorks had deliberately carved out for itself court remedies for breach of promissory note and equipment lease in Maricopa County, Arizona). Overall, Washington's and federal policy favoring arbitration grounded on the proposition that arbitration allows litigants to avoid the formalities, expenses, and delays inherent in the court system, *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 464, 45 P.3d 594 (2002), simply do not apply to OpenWorks' arbitration agreement.

Furthermore, the remaining elements of substantive unconscionability held in Circuit City are even more obvious in the current case. Aside from the lack of mutuality discussed above, under section 11.7, OpenWorks prohibits recovery of punitive damages under the Washington Franchise Investment Protection Act, RCW 19.100 et.al, and the Washington Consumer Protection Act, RCW 19.86 et.al. and denies the right to a trial by jury. An agreement that has a tendency to be against the public good, or to be injurious to the public violates public policy and such agreement may be void and unenforceable. Scott v. Cingular Wireless, \_\_\_\_\_ Wn.2d \_\_\_\_\_, 161 P.3d.1000 (2007).

With respect to the unevenness of damages recoverable, under section 10.4, the franchise agreement limits a franchisee's recovery of

monies after termination to “any payment due and owed prior to the termination.” CP 128. However, as noted previously, in its own actions against the franchisees, OpenWorks may recover “loss of profits” stemming from a termination of the agreement. CP 129, section 10.4(e). Regarding splitting costs and fees, under section 11.10, the prevailing party is entitled to recover not only its attorney’s fees, but also the costs of the arbitration including the arbitrator’s compensation.

OpenWorks also imposes a statute of limitation of mere **30 days**. Under section 11.9, the franchise agreement states “(N)o action or arbitration proceeding may be maintained by you against OpenWorks unless (a) written notice of any claim alleged to exist is delivered by you to OpenWorks within 30 days after the event complained of becomes known to you and (b) an arbitration proceeding is commenced by you within 90 days after such notice.<sup>8</sup> The Washington Supreme Court declared 180 days limitation to be substantively unconscionable in Adler v. Fred Lind Manor, 153 Wn.2d 331, 357, 103 P.3d 773, (2004) because such limitation unreasonably favors the employer.

Most critically, under the severance clause, OpenWorks has the unilateral right to terminate the agreement. Section 11.11, CP 132,

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<sup>8</sup> Additionally, the initiation of arbitration and responses thereto contain a complex set of requirements such as the statement of a claim, proposed resolution, and name of arbitrator amongst others. The response must also be made in writing within 30 days and require equally complex specifics in order to be valid.

provides “if OpenWorks determines that the finding of illegality adversely affects the basic consideration for its performance under this Agreement, OpenWorks may, at its option, terminate it.” As will be discussed below in greater detail regarding the ability to sever unconscionable sections of the Agreement, by reserving itself the ultimate right to terminate the Agreement, OpenWorks’ arbitration provisions lack mutuality.

Finally, OpenWorks’ “offensive” use of the franchisee’s ability to speak and write proficient English captures the one-sidedness of its franchise agreement that shocks the conscience. Section 7.2.12 requires the franchisee to be able to read, speak and write clearly and with proficiency (Fluent in English) ...OpenWorks, in its sole discretion, shall determine if you and/or your Designated Manager are fluent in English. CP 118. Section 7.2.5 states that “OpenWorks may, at its sole discretion, terminate your right to serve a particular account “(h) if you or your Designated manager are not fluent in English.” As discussed above, neither the Lees nor Kyungsoon Kim, the Lee’s business partner who signed the franchise agreement, were fluent in English. OpenWorks’ manager, Michelle Dux even admitted in her deposition that she was aware of their lack of proficiency. A key issue in determining whether these provisions are unconscionable is whether the franchisees understood the terms. Here, OpenWorks knew that these franchisees in fact lacked

the language proficiency to comprehend a sophisticated legal document; nevertheless it went ahead and sold them a franchise and took their \$27,000. OpenWorks then insulated itself from any allegation of one sidedness by inserting an English language requirement that its manager knew was clearly false.

B. The Lees' Financial Hardship Creates Additional Basis for Unconscionability.

In *Mendez v. Harbor Homes, Inc.*, 111 Wn.App. 446, 45 P.3d 594 (2002), the Washington courts first recognized the “prohibitive” cost defense to contractually agreed arbitration. In *Mendez*, a purchaser of mobile homes brought suit against the mobile home dealer in Yakima County Superior Court alleging violations of the dealers and manufacturers act and the Consumer Protection Act. Plaintiff submitted information from the American Arbitration Association showing a \$2000 filing fee for three person arbitration. Division Three of Washington Court of Appeals held that it was unconscionable for the plaintiff in that case to pursue arbitration.

The court stated:

(t)he cost of arbitration is so high relative to his financial condition and small size of his primary claim (\$1500) that forcing AAA arbitration with three arbitrators effectively precludes him from pursuing his claim against Palm Harbor. The circumstances here represent the antithesis of access to justice.

*Id.* At 603.

The court further held:

Washington's policy favoring arbitration is grounded on the proposition that arbitration allows litigants to avoid the formalities, expense, and delays inherent in the court system. This policy is defeated when an arbitration agreement triggers costs effectively depriving a plaintiff of limited pecuniary means of a forum for vindicating claims...Goals favoring arbitration of civil disputes must not be used to work oppression. When the goals given in support of contract clauses like this are used as a sword to strike down access to justice instead of as a shield against prohibitive costs, we must defer to the overriding principle of access to justice.

*Id.* At 605.

The Lees in the present case have submitted a Declaration specifying the reasons as to why arbitrating the current dispute with OpenWorks would be cost prohibitive. CP 23. Mr. Lee had been working as a night time janitor and has been making approximately \$11 per hour before taxes. He worked 6 days a week along with his wife and two sons. As stated above, the arbitrator's costs in this case were \$10,250 and like the Plaintiff in Mendez, it is not financially feasible for the Lees to prosecute a case through arbitration.

C. OpenWork's Arbitration Requirements and Lack of Mutuality are Not Severable Despite the Severability Clause.

During the hearing before the trial court on its motion to compel arbitration, OpenWorks asserted that any offending provisions in the franchise agreement could be severed based on the "severability clause" in section 11.11. CP 242. It cited Zuver v. Airtouch Comm., Inc., 153 Wn.2d 293, 103 P.3d 753 (2004).

However, Zuver is distinguishable. There, the court found that the confidentiality provision regarding any settlement or arbitration award was unconscionable and secondly, remedies provision prohibiting punitive damages was unconscionable. The court severed these two provisions. The court did recognize that if the offending provisions "pervade" an agreement, the court may decline to sever and declare the entire arbitration regime unconscionable.

Here, the uneven and unilateral rights of OpenWorks mandate that the arbitration provisions be declared unconscionable. As noted above, the entire franchise agreement is replete with OpenWorks' unilateral and unabashed rights to seek judicial relief both for injunctive relief and also for suit for damages in the judicial courts. Not only the two issues found to be unconscionable in Zuver are also present, OpenWorks' franchise agreement has systematically built in checks and balances to deny the

franchisees same access to the courts that OpenWorks enjoys. Under the guise that any violation of the franchise agreement constitutes an attack on its trade mark, OpenWorks has awarded itself with a speedier injunctive remedy, while denying the same to the franchisees. It also imposes a mere 30 day statute of limitations on its franchisee's claims, while enjoying much longer statute of limitations provided by the Washington legislature. The complicated system of notices for arbitration creates an equally insurmountable hurdle for janitorial franchisees like the Lees who have limited means and English proficiency.

Most significantly, above all, OpenWorks has created an exit for itself. In the very same severability clause, it states: "...However, if OpenWorks determines that the finding of illegality adversely affects the basic consideration for its performance under this Agreement, OpenWorks may, at its option, terminate it."<sup>9</sup> This case is identical to the Circuit City decision because there the 9<sup>th</sup> Circuit found that the employer had reserved for itself the unilateral right to "terminate" the agreement. Al Safin v. Circuit City, id., at 1261. Indeed, as the court noted in Circuit City, "any earnest attempt to ameliorate the unconscionable aspects of arbitration agreement would require this court to assume the role of contract author rather than interpreter." Id. at 1262. OpenWorks' arbitration requirement

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<sup>9</sup> The Lees submit that it is not without coincidence OpenWorks left out this remaining language of its severability clause during the argument before the trial court. See CP 242.

represents “an insidious pattern of seeking to tip the scales in its favor in its dispute by inserting numerous unconscionable provisions in an arbitration agreement and this court must decline to sever the unconscionable provisions.” Adler v. Fred Lind, *supra*, at 358.

## **VI. CONCLUSION.**

OpenWorks has steered its franchisees to not a more economic or less formal resolution of legal claims. Rather, under such pretense, it has created a system of legal resolution in which OpenWorks receives all the benefits of a judicial action, while forcing its franchisees to seek a more onerous and inferior forum. It lacks mutuality and its imposition of an arbitration process is merely a cover for OpenWorks’ desire to suppress any legal challenges to its franchise system and the extent to which OpenWorks has put in place its barriers shocks the conscience. Furthermore, the offending provisions pervade the entire franchise agreement and any effort to sever them would be tantamount to rewriting the entire agreement. The Lees respectfully request to find the arbitration requirement unconscionable.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of August, 2007.

LEE ANAV CHUNG LLP

By 

Samuel S. Chung, WSBA #19373  
Attorneys for Appellants Sammy  
Enterprises, Inc., and Imsoon Lee

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

John Bender  
Gulliver Swenson  
Ryan, Swanson & Cleveland, PLLC  
1201 Third Avenue, Suite 3400  
Seattle, WA 98101

via Legal Messenger  
 via Facsimile

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct on August 13, 2007.

Lacey Blankenship  
Lacey Blankenship

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 AUG 13 PM 3:23

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 JUN 10 AM 9:58

EXHIBIT C

**OPENWORKS**  
**JANITORIAL FRANCHISE**  
**AGREEMENT**

Franchisor may reduce the scope of the obligations under the covenants of this Agreement unilaterally and without the consent of any other person or entity, effective upon giving notice thereof to Franchisee and Recipient.

**5. Remedies.**

**5.1. Recipient's Acknowledgements.** Recipient acknowledges and agrees that in the event of the termination of Recipient's Position with Franchisee, Recipient's experience and capabilities are such that the Recipient can obtain employment and engage in business activities which are of a different or non-competing nature from those of the Position; and that the enforcement of a remedy of injunction will not prevent Recipient from earning a reasonable living. Recipient further acknowledges and agrees that the covenants contained in this Agreement are necessary for the protection of Franchisee's and Franchisor's legitimate business interests and are reasonable in scope and in content.

**5.2. Injunctive Relief.** In the event of an actual or threatened breach by Recipient of any of the provisions of this Agreement, Franchisee and Franchisor, or either of them, or their agents, shall immediately be entitled to injunctive relief restraining Recipient from the breach or threatened breach without having to show any actual damage. It is specifically agreed that Franchisee and Franchisor, or either of them, may incur incalculable and irreparable damage from any such violation, and that Franchisee and Franchisor, or either of them, have no adequate remedy at law and are entitled to injunctive relief, without bond, for any such actual or threatened violation. Nothing herein shall be construed as prohibiting Franchisee and Franchisor, or either of them, from pursuing any other available remedies for such breach.

**6. Survival.** The provisions of this Agreement shall survive the expiration or termination of any agreement or relationship between Franchisee and Recipient for any reason, and shall be enforceable notwithstanding the existence of any claim or cause of action of Recipient against Franchisee and Franchisor, or either of them, predicated on any contract or other basis whatsoever.

**7. Severability.** In the event any term or provision of this Agreement is declared to be invalid or unenforceable for any reason, the provision shall be modified to the extent necessary to make it enforceable, or if it cannot be so modified, then severed, and the remaining terms of this Agreement shall remain in full force and effect, and it is hereby declared the intention of the parties that they would have executed the Agreement as so modified.

**8. Notice.** Any notice to be given to Recipient under this Agreement will be sufficient and deemed delivered if it is in writing and delivered to the U.S. Post Office to be sent prepaid by certified or registered mail addressed to Recipient at his or her residential address as provided below, or to such other residential address as Recipient shall have provided in writing to both Franchisee and Franchisor.

**9. General.** Except as otherwise expressly stated herein, this Agreement contains the entire understanding between the parties with respect to the subjects hereof, and supersedes all prior oral and written negotiations and agreements. Except as provided in Section 4 of this Agreement, this Agreement may be amended only by an instrument in writing signed by Franchisee and Recipient and approved in writing by Franchisor. The waiver of any breach or violation of this Agreement shall not be deemed to amend this Agreement and shall not constitute a waiver of any other or subsequent breach. Headings are for convenience and shall not limit or control interpretation. Words in this Agreement shall be deemed to refer to

whatever number and gender the context requires. This Agreement shall be governed by the laws of the state in which Franchisee's OpenWorks business is conducted. Any claim or dispute arising out of or in connection with this Agreement shall be resolved by arbitration held in the City of Phoenix, Arizona, governed by the United States Arbitration Act 9 U.S.C. § 1-16, and conducted by one or more independent arbitrators who are experienced in franchise matters and have no past or present relationship with any party. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their successors and assigns. Franchisor shall be a third party beneficiary of this Agreement and entitled to enforce it as though Franchisor were a signatory.

**RECIPIENT:**

**FRANCHISEE**, accepting for itself and for its Franchisor, O.P.E.N. America, Inc.:

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Name Printed or Typed)

\_\_\_\_\_  
(Position/Title)

\_\_\_\_\_  
(Residential Street Address)

\_\_\_\_\_  
(City, State, Zip Code)

\_\_\_\_\_  
(Full Legal Name of Franchisee)

By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Name Printed or Typed)

\_\_\_\_\_  
(Position/Title)

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## OPENWORKS FRANCHISE AGREEMENT

### 1. PARTIES.

This Agreement is signed on \_\_\_\_\_, 200\_\_, ("Effective Date") by and between O.P.E.N. America, Inc., an Arizona corporation doing business as OpenWorks ("OpenWorks"), with its principal office in Phoenix, Arizona, and \_\_\_\_\_

hereinafter referred to singularly or collectively as "You" or "Franchisee," a:

Sole Proprietorship,  Partnership,  Corporation,  Limited Liability Company, under the laws of the State of \_\_\_\_\_.

#### Address, Telephone, Social Security # and/or Federal Tax I.D.:

The information below is to be completed for the sole proprietor, or for each individual partner of the partnership, or for each shareholder of the corporation, or for each member of the limited liability company, as indicated above. The Franchisee represents that the following information is true and complete:

| Name | Residential Address | Telephone | E-Mail | Social Security # |
|------|---------------------|-----------|--------|-------------------|
|      |                     |           |        |                   |
|      |                     |           |        |                   |
|      |                     |           |        |                   |

Federal Tax I.D. if a partnership, corporation or limited liability company:  
\_\_\_\_\_

Designated Manager Name: \_\_\_\_\_

#### FRANCHISE SUMMARY

|  |                                |
|--|--------------------------------|
| Franchise Package: _____                 | Down Payment: \$ _____         |
| Territory: _____                         | Amount Financed: \$ _____      |
| Initial Monthly Account Volume: \$ _____ | Terms (years): _____           |
| Fulfillment Period (Days): _____         | Monthly Installments: \$ _____ |

## 2. RECITALS.

2.1. **Ownership of System.** OpenWorks is the owner of certain intellectual property rights, including its Trade Names and the Marks. OpenWorks has spent a considerable amount of time, effort and money to devise, and continues to develop, business methods, technical knowledge and marketing concepts including, but not limited to, trade secrets, commercial ideas, advertising materials, marketing strategies, information on sources of supply, administrative procedures, business forms, and employee training techniques that, taken together, comprise a proprietary System for the operation of Janitorial Services that offer commercial janitorial and other facility services to Accounts pursuant to written contracts ("**Maintenance Agreements**").

2.2. **Objectives of Parties.** OpenWorks wishes to grant you and you wish to accept from OpenWorks a franchise to engage in the Janitorial Services described in this Agreement, using the Trade Names, Marks and System, upon the terms and conditions set forth in this Agreement.

3. **DEFINITIONS.** For purposes of this Agreement, when any of the following terms begin with capital letters, their meanings are as defined in this Article 3 or elsewhere in this Agreement where the term appears in bold type and quotation marks:

3.1. "**Account**" means a customer who has entered into a Maintenance Agreement with OpenWorks for the performance of janitorial and/or other facility services at the customer's premises.

3.2. "**Additional Account Volume**" means the gross dollar volume per month that should be generated by the Additional Accounts that you purchased the rights to service from OpenWorks.

3.3. "**Affiliate**" means people and companies associated with OpenWorks or you, as the context indicates, including, but not limited to, owners, general partners, limited partners owning a Substantial Interest in OpenWorks or you, shareholders owning a Substantial Interest in OpenWorks or you, corporations in which OpenWorks or you have a Substantial Interest, corporations in which any person or entity owning a Substantial Interest in you also has a Substantial Interest, or officers, directors, employees or agents of OpenWorks or you. As used in this paragraph, the phrase "**Substantial Interest**" means the right to 25% or more of the capital or earnings of a partnership or limited liability company, or alternatively, ownership of 25% or more of the voting stock of a corporation.

3.4. "**Agreement**" means this Franchise Agreement, together with its attachments and all amendments hereto.

3.5. "**Confidential Information**" means proprietary and/or confidential information and trade secrets of OpenWorks, including without limitation training materials, programs, methods, techniques, specifications, standards, systems, procedures, sales and marketing programs and strategies, manuals, financial data, knowledge of specifications for and suppliers of equipment, supplies and services, bidding, pricing and billing methods, existing and prospective customer lists and information about them and their service contracts, at any time existing or under consideration, for the operation of OpenWorks regional offices and commercial janitorial and other facility service businesses.

3.6. **"Designated Manager"** means the specific individual who will be responsible for the day-to-day management of the janitorial services.

3.7. **"Effective Date"** means the date of the Agreement as set forth in Article 1.

3.8. **"Franchise Network"** means the interdependent network composed of OpenWorks, all OpenWorks franchisees, its Affiliates, and any other people or business entities that it has licensed to use the Trade Names, Marks, System or any of them.

3.9. **"Franchise Package"** means one of 7 different programs offered by OpenWorks, each generating a different amount of Initial Account Volume.

3.10. **"Good Standing"** means timely compliance by you and your Affiliates with all provisions of this Agreement, the Manual and any other agreement with OpenWorks, specifically including, but not limited to, provisions for timely payment of amounts owed by you to OpenWorks or its Affiliates and for any Account's satisfaction with your Janitorial Service.

3.11. **"Gross Revenue"** means the total amount of money received by OpenWorks and its Affiliates or you from Accounts for all services rendered by you within an accounting period.

3.12. **"Initial Account Volume"** means the gross dollar volume per month that should be generated by the Accounts assigned to you by OpenWorks at the inception of this Agreement.

3.13. **"Janitorial Service"** means the business of providing commercial janitorial and other facility services that OpenWorks has authorized you to conduct under the Trade Names, Marks and System under this Agreement.

3.14. **"Manual"** means the Operations Manual, instructions and other correspondence that OpenWorks will lend or communicate to you during the term of this Agreement, covering the operation of the franchised business, as they may be amended and/or supplemented from time to time. The Manual contains forms and requirements for the establishment, promotion and operation of a Janitorial Service and for use of OpenWorks' Trade Name and Marks.

3.15. **"Marks"** means the word marks "O.P.E.N." and "OpenWorks," the design mark "OpenWorks and design," and other selected trademarks, service marks, trade dress, logotypes, slogans and other commercial symbols licensed by OpenWorks to you under this Agreement from time to time.

3.16. **"OpenWorks"** means O.P.E.N. America, Inc. or any person or entity to which OpenWorks allocates all or part of its rights and obligations under this Agreement.

3.17. **"System"** means the Confidential Information, and the other business methods, technical knowledge and marketing concepts licensed by OpenWorks to you under this Agreement, including, but not limited to, the right to use its processes, purchasing arrangements, commercial ideas, advertising materials, information on sources of supply, administrative procedures and business forms.

3.18. **"Termination"** means the expiration and non-renewal of this Agreement, and the early termination of this Agreement under any circumstances.

3.19. "Territory" means the geographic area identified in Article 1, within which you will operate your Janitorial Service.

3.20. "Trade Names" means the commercial names "O.P.E.N.," "OpenWorks," "OpenWorks of [name of state or other geographic designation]," and other selected trade names licensed by OpenWorks to you under this Agreement from time to time.

3.21. "Transfer" means any sale, gift, or other change in ownership of all or any part of the rights and obligations of this Agreement or of all or substantially all of the assets of the Janitorial Service (including without limitation, Accounts), or of an ownership interest in you (if you are a corporation or other entity) of a magnitude at least as great as that described in this Section. If you are a partnership or limited liability company, then one or more transactions (regardless of whether or not they are related) in which there is a cumulative change in the rights to 34% or more of your capital or profits will be considered to be a Transfer; if you are a corporation, then one or more transactions (regardless of whether or not they are related) in which there is a cumulative change in beneficial ownership of 34% or more of your voting stock will be considered to be a Transfer.

3.22. "You" means the person or entity that is named as you in Article 1 of this Agreement as the context requires. "You" means, in addition, all people or entities that succeed to the interest of the original you by Transfer or operation of law.

#### 4. GRANT OF FRANCHISE.

4.1. **Granting Clause.** OpenWorks grants to you and you accept from OpenWorks a franchise to operate the Janitorial Service described in this Agreement within the Territory using the Trade Names, Marks and System in accordance with the terms of this Agreement. OpenWorks reserves all rights in the Trade Names, Marks and System not expressly granted in this Agreement.

4.2. **Territory.** The Territory is the geographic area identified in Article 1, which is serviced by the OpenWorks office where you purchased your franchise. Your right to operate within the Territory is not exclusive. Other franchisees may compete there.

#### 4.3. Term and Renewal.

4.3.1. **Initial Term.** The initial term of the franchise will begin on the Effective Date and will continue for a period of ten years.

4.3.2. **Renewal.** You will have the right to renew the franchise for your Janitorial Service for two additional ten year terms on the same terms and conditions as those on which OpenWorks is customarily granting new franchises at the time of renewal, if at the time of each renewal the following conditions are fulfilled:

- a) You and your Affiliates are in Good Standing under this Agreement, any other agreement between OpenWorks or its Affiliates and you, and the Manual;
- b) You have notified OpenWorks in writing at least 180 days before the expiration date of the then current agreement of your desire to renew;
- c) You and any Affiliates that have signed this Agreement have signed a copy of the new franchise agreement not less than 30 days prior to the expiration of the then

current agreement or 150 days after you receive a copy of the new Franchise Agreement from OpenWorks, whichever is later; and

- d) You and any Affiliates that are parties to this Agreement have signed a general release of claims in a form satisfactory to OpenWorks with respect to past dealings with OpenWorks and its Affiliates.

You understand that the terms of the standard franchise agreement in use by OpenWorks at the times of renewal may contain materially different terms than those contained in this Agreement, including, but not limited to, increased royalties and Advertising Fund contributions.

**5. SERVICES TO YOU.** OpenWorks agrees to perform the following services for you, at locations selected by OpenWorks, provided that you are, at the time when service is to be rendered, in Good Standing under this Agreement, any other agreement with OpenWorks or its Affiliates, and the Manual:

**5.1. Training.**

**5.1.1. Initial Training.** Before the opening of your Janitorial Service business, OpenWorks will conduct an initial training program in the operation of the Janitorial Service under OpenWorks' System for you and any of your employees who wish to attend at the same time, at no charge to you. You must attend and successfully complete the initial training program to the satisfaction of OpenWorks, as evidenced by a Certificate of Completion of Initial Training awarded by OpenWorks, before you may start operating your Franchise. The initial training program is offered once a month. You must complete the program within 45 days of signing your Franchise Agreement. Any Designated Manager of your Janitorial Service business must also attend and successfully complete the initial training program to the satisfaction of OpenWorks. OpenWorks will charge you a fee for any initial training provided to anyone after the first initial training program.

**5.1.2. Continuing Education.** OpenWorks may offer continuing education programs on matters related to the operation or promotion of the Janitorial Service on an optional or mandatory basis, as it considers appropriate. OpenWorks may charge you for these programs.

**5.2. Offering Accounts.**

**5.2.1. Initial Accounts.** After you have successfully completed the initial training, signed OpenWorks' Certificate of Completion of Initial Training and paid the initial franchise fee, OpenWorks will offer you the Initial Account Volume promised in Section 6.1 of this Agreement within the fulfillment period for the Franchise Package you purchase. OpenWorks' fulfillment periods are as follows for each Franchise Package:

| Package | Initial Monthly Account Volume | Fulfillment Period (Days) |
|---------|--------------------------------|---------------------------|
| OW 3    | 3,000                          | 120                       |
| OW 5    | 5,000                          | 180                       |
| OW 7    | 7,000                          | 240                       |

| Package | Initial Monthly Account Volume | Fulfillment Period (Days) |
|---------|--------------------------------|---------------------------|
| OW 10   | 10,000                         | 330                       |
| OW 15   | 15,000                         | 480                       |
| OW 20   | 20,000                         | 630                       |
| OW 25   | 25,000                         | 780                       |

If OpenWorks does not offer Accounts having the promised Initial Account Volume within the required fulfillment period, you will be entitled upon written request to a refund of a portion of your initial franchise fee, as described in Section 6.1 of this Agreement. Such a refund will fulfill OpenWorks' obligation to offer the remaining portion of the Initial Account Volume. If you do not make a written request for a refund within 30 days after the end of the fulfillment period, you will be deemed to have waived your right to a refund, but OpenWorks will remain obligated to offer you the remaining portion of the Initial Account Volume for the franchise package you selected.

If, during the fulfillment period, you commit any default that would justify termination of an Account or of this Agreement (including but not limited to the performance and noncompliance issues set forth in the Account Satisfaction provisions at Section 7.2.5) OpenWorks may, at its option, suspend the fulfillment period until the default is cured instead of terminating your service to an Account or terminating this Agreement. If it appears, in OpenWorks' reasonable judgment, that you cannot or will not cure the default, OpenWorks may require you to repeat the initial training course. Once you have either cured the default or have successfully completed the retraining course, as applicable, the prior fulfillment period will be cancelled and a new fulfillment period will begin to run.

**5.2.2. Additional Accounts.** You will not have the option to purchase additional franchises. However, you may request Additional Accounts from OpenWorks. "Additional Accounts" are new Accounts, or an increase in the dollar Account volume of an existing Account you are already servicing (through increased occupancy, additional services, or for any other reason), offered to you by OpenWorks over and above the Initial Account Volume, under any of the following scenarios:

- a) You may request OpenWorks to provide you with Additional Accounts;
- b) OpenWorks may offer Additional Accounts to you on its own;
- c) OpenWorks, in conjunction with a proposed increase in an Account you are servicing, may require you to purchase an increase in the dollar Account volume of that Account, in which case OpenWorks may assess a Marketing Fee from you that is based on the increase;
- d) OpenWorks, in conjunction with assigning an Account to you under a previous obligation (Purchase Contract or replacement Account), may require you to purchase the overage if the acceptance of that Account would cause the gross dollar volume under that Purchase Contract to exceed the contract amount.

In each of these cases, you are required to execute an amendment to the Franchise Agreement (a "Purchase Contract"), signifying the purchase of the right to service one or more Additional Accounts, and to pay the appropriate Marketing Fee as provided in Section 6.9.1 of this Agreement. OpenWorks may have outstanding obligations to offer you Accounts under

more than one Purchase Contract at a time. Assignment of a given Account, if of sufficient monthly billing magnitude, may help to fulfill OpenWorks' obligations to offer you Accounts under more than one Purchase Contract.

You agree that OpenWorks is under no obligation to provide you with Additional Accounts and may do so solely at its own discretion.

**5.2.3. Trial Period.** You may refuse up to three separate new Accounts from the Initial Account Volume offered by OpenWorks for any reason whatsoever during the term of this Agreement. However, each refusal of an Account from the Initial Account Volume will extend the fulfillment period by an additional 30 days. After three refusals, any Account from the Initial Account Volume which is initially refused by you or to which you discontinue services after accepting an account will either reduce the Account volume OpenWorks is obligated to offer you or will, at OpenWorks' sole discretion, extend the fulfillment period by an additional 30 days.

You have a trial period of 30 days from the date that service under the Maintenance Agreement for the Account is scheduled to commence to refuse an Account. Your refusal of any Account will not relieve you of any payment obligations to OpenWorks, including without limitation your obligations under promissory notes for installments of your initial franchise fee or any Marketing Fee. You must notify OpenWorks in writing if you wish to refuse the Account, and OpenWorks must actually receive the notice within the 30 day period in order for it to be effective. If you fail to give a written notice of refusal, or if OpenWorks does not actually receive it within the 30 day period, you will have waived your right to refuse the Account. You will lose your right to refuse an Account if at any time that you are obligated to service the Account you fail to do so in accordance with the Maintenance Agreement and work schedule, and the Manual.

If you refuse an Account during the 30 day trial period, OpenWorks will use its reasonable good faith efforts to locate another franchisee to service the Account. **You must continue servicing the Account until the earlier of: (i) the commencement of services by another franchisee, or (ii) 30 days after OpenWorks actually received your notice refusing the Account.**

**5.2.4. Replacement of Accounts.** If any of OpenWorks' initial Accounts terminate their Maintenance Agreements within one year after the Maintenance Agreements commence, OpenWorks will offer you replacement Accounts within 150 days, subject to the conditions set out in this Section. If any of your Additional Accounts terminate their Maintenance Agreements within six months after their Maintenance Agreements commence, OpenWorks will offer you replacement Accounts within 150 days, subject to the conditions set out in this Section. The foregoing guarantees do not apply to Accounts that are terminated as a result of any wrongful act, omission, or negative attitude of you or your agents including but not limited to violations of Section 7.2.5 of this Agreement pertaining to an account's satisfaction with your Janitorial Service. OpenWorks is not obligated to replace any Account lost by you because of the Account's dissatisfaction or request that service be provided by another franchisee. OpenWorks is not obligated to replace replacement Accounts.

Replacement Account(s) will be the same or a greater monthly billing magnitude as the Account(s) they replace. If the monthly billing volume of the replacement Account(s) is greater than the terminated Account(s), OpenWorks may assess a Marketing Fee from you that is based on the overage.

**5.2.5. Account Assignment Agreement.** Each assignment to you of a new Account or an increase in an existing Account, beginning with the assignments of Accounts to fulfill your Initial Account Volume, will be made pursuant to a separate Agreement for Account Assignment or Increase (an "Account Assignment Agreement"), which will have its own date, Account information, and if applicable, Marketing Fee. By signing an Account Assignment Agreement, you agree to all of the applicable terms set forth in this Agreement and in each Account Assignment Agreement, which are hereby incorporated herein by reference, including without limitation, the following:

- a) You acknowledge receiving a copy of the Maintenance Agreement and work schedule for the assigned Account.
- b) You agree to service the Account and comply strictly with the terms of the Maintenance Agreement and work schedule for the assigned Account, all according to the Manual and the standards, procedures and policies established by OpenWorks from time to time.
- c) You certify that you have sufficient resources to service the assigned Account, including working capital to purchase all needed supplies and equipment, and to meet all expected payrolls for the first 45 days.
- d) If any portion of the assigned Account is an Additional Account (additional business in excess of the Initial Account Volume or replacement Account volume OpenWorks is required to provide you), then you agree to pay OpenWorks the Marketing Fee stated in the Account Assignment Agreement.
- e) You acknowledge that OpenWorks has made no representations to you about how long the Account will use your services except as expressly stated in the Maintenance Agreement. You understand that there is no assurance that the Account will renew or extend the Maintenance Agreement. OpenWorks retains all rights as the contracting party with the Account.
- f) If you discontinue services for the assigned Account at any time for any reason, you agree to immediately turn over to OpenWorks the Account's keys, security codes and cards in your possession or the possession of your employees. If you do not do so, you agree to pay OpenWorks all charges assessed by the Account plus \$500 a day until the Account's keys, codes and cards are delivered to OpenWorks.

**5.2.6. Accounts Obtained by You.** You are encouraged to solicit and procure janitorial client Accounts on your own behalf. You must conduct all marketing activities in strict conformity with the guidelines, policies and procedures set forth in the Manual. OpenWorks must sign a Maintenance Agreement with these Accounts and will provide the same administrative services to support these Accounts as it does to support Accounts it procures for you. You will pay all the same types of fees in regard to these Accounts as you do in regard to Accounts procured by OpenWorks for you except that you will not be required to pay a Marketing Fee to OpenWorks for Accounts you obtain solely as the result of your own efforts. Upon the Termination of this Agreement, accounts you have procured must be assigned to OpenWorks if these Accounts do not already have a signed Maintenance Agreement with OpenWorks.

**5.3. Starter Kit.** At no additional charge, OpenWorks will provide you with an equipment and supply kit to commence your Janitorial Service. The current starter kit being

provided by OpenWorks is described in Attachment 1. OpenWorks may substitute different brand names or make changes in specifications, but any substituted or changed item will be of equal or greater value and/or quality.

#### 5.4. Billing, Collection and Payment.

**5.4.1. Billing and Collection Service.** OpenWorks will provide billing and collection service for you. You must use this service and may not bill Accounts yourself. Within 10 days after the end of each month, you must send to OpenWorks a statement of all services rendered by you during that month in the form currently prescribed by OpenWorks. Within 45 days after the end of each month, OpenWorks will send you your Gross Revenue for that month, after deduction of any sums currently due and payable by you to OpenWorks under this Agreement. OpenWorks may adjust the deadlines for reporting by you and payment by OpenWorks if, in its sole discretion, such adjustments are made necessary by general changes in the payment practices of Accounts in the area. You will be notified in writing of any such adjustments.

**5.4.2. Limited Cash Flow Protection Service.** At the time of sending your monthly Gross Revenue to you, OpenWorks will advance you a sum equal to any delinquent payments that should have been, but were not, received by OpenWorks from any Accounts you serviced during the month for which payment is made if the following four requirements are met:

- a) The Account was not delinquent in the immediately preceding month;
- b) OpenWorks had not previously instructed you to terminate service to the Account;
- c) The Account was originally provided by OpenWorks; and
- d) You submitted to OpenWorks the monthly statement of all services rendered by you, including services rendered to the delinquent Account, in a timely manner and in the form prescribed by OpenWorks.

Any such sums advanced to you by OpenWorks must be paid to OpenWorks within 90 days after the date upon which payment was due from the Account whose payment was delinquent. Thereafter, you must repay OpenWorks or it may deduct amounts owed to it by you for such advances from any and all money collected by OpenWorks on your behalf. You must pay OpenWorks interest at the rate of 10% per year on any advances for which OpenWorks has not been reimbursed within 90 days after the date upon which payment was due from the Account.

**5.4.3. Cost of Collection.** OpenWorks is entitled to recover from you any costs it incurs, including but not limited to attorneys' fees, filing fees, delivery and photocopying charges, and costs of discovery, in collecting monies owed you by Accounts for your services. OpenWorks may apply to this obligation any monies paid to OpenWorks by you or for your account.

**5.5. Consultation.** Upon your request, OpenWorks will use its best efforts to make its personnel available to you for consultation regarding operation of the Janitorial Service.

**5.6. Manual.** OpenWorks will lend you a Manual containing information on operational methods, safety, rules and policies, marketing, names of approved suppliers, and other information that OpenWorks believes will be necessary or helpful to you in your operation of the Janitorial Service. OpenWorks may revise the Manual periodically to conform to the

changing needs of the Franchise Network and will distribute updates to you verbally, on the internet, by email or in the form of memoranda containing these revisions.

## 5.7. Advertising.

**5.7.1. Advertising Fund.** OpenWorks has established one, and at its option may establish more, advertising funds (an "Advertising Fund") to pool advertising monies of OpenWorks and each of its franchisees so as to achieve greater benefits for all in promoting the OpenWorks brand and its Trade Names and Marks. You must pay to OpenWorks as a contribution to the Advertising Fund up to 1% of your Gross Revenue, payable at the same times and in the same manner as royalties. If OpenWorks ever provides commercial janitorial and other facility services directly to its Accounts, then OpenWorks will make contributions to the Advertising Fund on the same basis you do. OpenWorks will keep the Advertising Fund in a segregated account.

**5.7.2. Use of Funds.** The Advertising Fund may be used to pay for market research, development, branding, quality assurance, advertising materials, promotion or public relations programs, media placement for a national or regional advertising program, a referral program, or any combination of them, as OpenWorks, in its sole discretion, may deem necessary or appropriate to advertise or promote OpenWorks and to assure and enhance the name, goodwill, reputation and quality of the System and OpenWorks' brand, Trade Names and Marks. Franchisor shall direct all such programs and activities, with sole discretion over the methods, types of support (including without limitation, training, account quality visits and written materials), creative concepts, materials, endorsements and media used, and the timing, placement and allocation thereof. Franchisee agrees that the Advertising Fund may be used to meet any and all costs of maintaining, administering, developing, creating, directing and preparing national, regional or local research, development, quality assurance, advertising and promotion materials, branding programs, advertising programs and activities, including without limitation the costs of creating, preparing and conducting test marketing, surveys, direct mail/distribution, couponing, television, radio, magazine, bill board, newspaper and other media programs and activities, training and inspection programs, updated Manuals and the costs of hiring others to assist OpenWorks. OpenWorks may initiate Advertising Fund projects that are national or regional in scope and may also make allocations of Advertising Fund monies to local groups of franchisees or individual franchisees when OpenWorks considers it desirable. Because the benefits of advertising and promotion are difficult to measure with precision, OpenWorks reserves the unqualified right to determine, in its sole discretion, how Advertising Fund monies will be spent; the sole proviso is that the monies must be used in a manner that is described above.

**5.7.3. Reports.** OpenWorks will prepare an annual summary of the percentages spent on production, media placement, administrative expenses and other categories as appropriate from the Advertising Fund in the prior year. This summary will be made available to you at OpenWorks' regional office within 10 business days from OpenWorks' receipt of your written request.

**5.8. Suggested Suppliers.** OpenWorks will give you, in the Manual or otherwise in writing, a list of names and addresses of suppliers of goods and services that currently meet its standards and specifications. In advising you of suppliers which meet its standards and specifications, OpenWorks expressly disclaims any warranties or representations as to the condition of the goods or services sold by such suppliers, including, but not limited to, expressed or implied warranties as to merchantability or fitness for any intended purpose. You

agree to look solely to the manufacturer of goods or the supplier of services for the remedy for any defect in the goods or services.

## 6. PAYMENTS BY YOU.

**6.1. Initial Fee.** You are required to pay OpenWorks in cashier's check or certified check payable to O.P.E.N. America, Inc. or other form of payment acceptable to OpenWorks, an initial fee determined in accordance with Attachment 2 of this Agreement. You have selected the Package as stated in Article 1 of this Agreement.

The fee schedule in Attachment 2 of this Agreement does not include sales tax which, if applicable, must be paid by you.

If the franchise fee is paid in full before beginning operation, a discount will be awarded in accordance with Attachment 2.

If you wish to finance a portion of the franchise fee, OpenWorks will offer financing at 12% per year or at the highest rate permitted by applicable law, whichever is less, over a two year period. The loan will be memorialized by a promissory note.

The initial franchise fee is non-refundable, unless OpenWorks has been unable to offer a sufficient dollar volume of Accounts to you for the package purchased by you within the fulfillment period specified in Section 5.2.1 of this Agreement. If the dollar volume of Accounts offered to you within the fulfillment period falls short of the amount specified in Section 5.2.1 of this Agreement, then you may elect to receive a partial refund, as follows: The refund will be an amount equal to the difference between the Initial Account Volume of the package and the Account volume of the Account(s) actually offered, multiplied by the package multiplier applicable to the package that was purchased. The package multipliers are as follows:

| <u>PKG.</u> | <u>MULTIPLIER</u> |
|-------------|-------------------|
| OW 3        | 3.67              |
| OW 5        | 2.90              |
| OW 7        | 2.71              |
| OW 10       | 2.56              |
| OW 15       | 2.56              |
| OW 20       | 2.56              |
| OW 25       | 2.56              |

OpenWorks has the right to offset any amounts owed to it by you against the amount of the refund.

The following is an example of recalculations of the initial franchise fee:

*You purchase Package OW 5 for \$18,500, with \$9,500 down and \$9,000 financed. This Package should generate \$5,000 per month. However, OpenWorks offers to you Accounts that generate only \$4,000 per month within the fulfillment period. To calculate your refund, the first step is to subtract the actual Account Volume from the Initial Account Volume for the package purchased, as follows: \$5,000 - \$4,000 = \$1,000. The difference is then multiplied by the multiplier for Package OW 5: \$1,000 X 2.9 = \$2,900. However, since you have an outstanding note balance of \$9,000 payable to OpenWorks (assuming no payments were made), the \$2,900 refund will apply to that balance. Therefore, in this case the*

*promissory note is reduced from \$9,000 to \$6,100 (\$9,000 - \$2,900 = \$6,100) and no actual cash refunds are given.*

The reason why the net cost to you of the Accounts provided to you in example 2, above, is less than it would have been if you had purchased the smaller package in the first place is that the cost per dollar of Initial Account Volume decreases as the size of the package increases. If OpenWorks fails to offer you the requisite Initial Account Volume for the package purchased, your initial franchise fee is still calculated at the same lower cost per dollar of Initial Account Volume as the package that you purchased.

**6.2. Royalties.** OpenWorks will deduct from your Gross Revenue a monthly royalty of 10% of the monthly Gross Revenues of the Janitorial Service, calculated on the basis of your Gross Revenue for the immediately preceding month.

**6.3. Service Fees.** You must pay OpenWorks a monthly service fee of 5% of the monthly Gross Revenue of the Janitorial Service, calculated on the basis of your Gross Revenue for the immediately preceding month. The service fee compensates OpenWorks for the ongoing administrative support it provides to you, including but not limited to Account relations, billing, clerical and bookkeeping services. OpenWorks will deduct the service fee from its monthly remittance of Gross Revenue to you.

**6.4. Special Project Fees.** You agree to pay OpenWorks a "Special Project Fee" of a specified percentage of the total contract price for the job, before deduction of royalty and service fees, of each one-time, non-reoccurring Account service job, such as a carpet cleaning, performed by you for which OpenWorks obtained and/or priced the job (regardless of who originally obtained the Account). If you obtained the job, but OpenWorks priced it, the Special Project Fee is 15% of the total contract price for the job; if OpenWorks obtained the job, but you priced it, the Special Project Fee is 15% of the total contract price for the job; if OpenWorks obtained and priced the job, the Special Project Fee is 30% of the total contract price for the job. If you obtained and priced the job, the Special Project Fee is zero. OpenWorks will deduct the Special Project Fee for assistance rendered during the preceding month from its monthly remittance of Gross Revenue to you.

**6.5. Advertising Fund Contributions.** You must pay a monthly contribution to the Advertising Fund of up to 1% of the monthly Gross Revenue of the Janitorial Service calculated on the basis of your Gross Revenue for the immediately preceding month. OpenWorks will deduct the Advertising Fund contribution from its monthly remittance of Gross Revenue to you.

**6.6. Payment of Royalties and Advertising Fund Contributions.** Your obligations to pay ongoing monthly royalties and monthly Advertising Fund contributions begin on the Effective Date of this Agreement, as defined above.

**6.7. Inspection of Records.** Upon reasonable notice to OpenWorks, you will have the right during normal working hours to inspect the books and records of OpenWorks pertaining to billings and collections for the Accounts assigned to you.

**6.8. OpenWorks' Right to Audit Your Records.** You agree to keep true and accurate records of your business and not to engage in activities in violation of your Franchise Agreement, in particular direct billing of Accounts or provision of services to Accounts, without reporting them to OpenWorks. Furthermore, you agree to keep your books and records open to examination, copying and audit by OpenWorks. Upon OpenWorks' request, you shall prepare and produce all of your business/personal records, bank statements, financial statements, tax

returns and any other relevant document for OpenWorks to verify that all fees due to it are paid by you.

If an examination or audit by O.P.E.N discloses that you have directly billed Accounts or provided services to Accounts without reporting them to OpenWorks, or that you have underreported your Gross Revenues to OpenWorks in any other manner, the total amount of all fees and charges due hereunder as a percentage of such Gross Revenues shall be immediately due and payable to OpenWorks, together with interest on late payments as provided in Section 6.12 of this Agreement. In addition, you must pay OpenWorks all reasonable costs, expenses and overhead incurred by OpenWorks in connection with its examination and/or audit.

## 6.9. Marketing Fee.

**6.9.1. Amount and Payment.** You must pay OpenWorks a Marketing Fee for OpenWorks' services in locating Additional Accounts for you. The Marketing Fee schedule fee is determined as follows and summarized in the chart below:

- a) If the gross monthly billing of the Additional Accounts located by OpenWorks for you is \$5,000 or less, the Marketing Fee shall be 2.85 times one month's gross billing of the Additional Accounts.  $\$1,000.00 \times 2.85 = 2,850.00$
- b) If the gross monthly billing of the Additional Accounts located by OpenWorks for you is between \$5,001 and \$10,000, the Marketing Fee shall be 2.47 times one month's gross billing of the Additional Accounts.
- c) If the gross monthly billing of the Additional Accounts located by OpenWorks for you is greater than \$10,000, the Marketing Fee shall be 1.95 times one month's gross billing of the Additional Accounts.

**The Marketing Fee applicable to any Purchase Contract may be altered at any time before signing of the Purchase Contract, depending on changes in marketing conditions or industry standards or on the type of Account to be offered.**

If you pay the Marketing Fee in full immediately, you will receive a 10% discount. The Marketing Fee may be partially or entirely financed in OpenWorks' sole discretion, considering the size of the transaction, other debt service payable by you to OpenWorks and others, your credit history, and your anticipated cash flow. Any portion of the Marketing Fee that is financed will be memorialized by a promissory note substantially similar to Exhibit D of the Offering Circular. The terms of financing shall be one payment equivalent to a down payment if you do not make the down payment at the time you contract for the Additional Accounts, and 24, 30 or 48 equal monthly payments of the principal balance due plus annual interest of 12%. OpenWorks will deduct the Marketing Fee from its monthly remittance of Gross Revenue to you. The down payment (or first note payment) and the number of monthly payments are determined as follows:

| Monthly Billing |          | Marketing Fee<br>(as a multiple of<br>the full monthly<br>billing) | Down Payment<br>or First Note<br>Payment (as a<br>percentage of<br>the full monthly<br>billing) | Financing Terms                                |                  | Discount (if<br>paid in full<br>at the<br>time of<br>acceptance) |
|-----------------|----------|--|---|--|------------------|--|
| From            | To       |  |   | Number of<br>Additional<br>Monthly<br>Payments | Interest<br>Rate |  |
| \$0             | \$5,000  | 2.85   | 30%   | 24   | 12%              | 10%  |
| \$5,001         | \$10,000 | 2.47   | 15%   | 30   | 12%              | 10%  |
| \$10,001        | No Limit | 1.95   | 5%  | 48   | 12%              | 10%  |

**6.9.2. Refunds.** The Marketing Fee will be refunded to you on a proportionate basis if OpenWorks does not offer the requested Additional Account Volume to you within 120 days after signing of the Purchase Contract or another fulfillment period specified in the Purchase Contract. The fulfillment period may be extended when you refuse an Account you are offered, as described in Section 5.2.3 of this Agreement. Additionally, if you refuse the Additional Account under Section 5.2.3 of this Agreement, any down payment you have made will be either refunded to you by the end of the month after the month in which you refuse the Account or will be credited towards a different Additional Account if you accept a replacement Additional Account. The Marketing Fee is not refundable under any other circumstances. Specifically, the Marketing Fee is not refundable, and OpenWorks has no obligation to offer you replacement Accounts, if an assigned Account is transferred at the request of the Account, or the Account cancels the assigned Account, in either case because of your wrongful act, omission or negative attitude, for the account satisfaction reasons stated in Section 7.2.5, for any reason that you or your employees could have controlled, or for any violation of the Maintenance Agreement or work schedule, your Franchise Agreement or the Manual.

**6.10. Extended Account Guarantee Fee.**

**6.10.1. Guarantee and Replacement of Accounts.** When selected Accounts are assigned to you, OpenWorks may offer you, at its sole discretion, the opportunity to purchase an extended account guarantee on that Account as additional protection to you in case that Account is cancelled. If you accept the offer, and the Maintenance Agreement is terminated by an Account for any reason other than as stated in paragraphs (a) through (i) inclusive of Section 7.2.5 of this Agreement on account satisfaction, then OpenWorks will offer you a replacement account within 150 days. The replacement account will be the same or greater monthly billing magnitude as the Account that it replaces. If the monthly billing volume of the replacement Account is greater than the canceled account, OpenWorks may assess a Marketing Fee from you that is based on the overage. OpenWorks is not obligated to offer you an extended account guarantee fee on the replacement account. You must accept the offer and sign the current form (an example of which is attached to this Agreement as Attachment 5).

**6.10.2. Payment.** You must pay OpenWorks a monthly extended account guarantee fee which is a percentage of the monthly Gross Revenue of the Janitorial Service, calculated on the basis of your Gross Revenue for the immediately preceding month. OpenWorks has the right to change this percentage for new accounts being offered to you but once you purchase an extended account guarantee, the percentage will not change for as long as you have the guarantee on the Account. OpenWorks will deduct the extended account guarantee fee from its monthly remittance of Gross Revenue to you.

**6.10.3. Transfer and Termination.** The extended account guarantee will continue as long as you are servicing the selected Account. If the extended account guarantee is terminated by you or OpenWorks as provided below, you will not receive any refund of the fees paid for the guarantee. You may terminate the extended account guarantee upon 30 days written notice to OpenWorks. If you transfer or sell the Account then the extended account guarantee is terminated without further notice as of the date of your transfer or sale. OpenWorks may, but is not obligated to, offer an extended account guarantee to the transferee upon such a transfer or sale. If OpenWorks terminates your Account for any of the reasons stated in paragraphs (a) through (i) inclusive of Section 7.2.5 of this Agreement, then the extended account guarantee will be terminated without further notice.

**6.11. Transfer Fee.** As a condition of Transfer of an Account or this Franchise, you must pay to OpenWorks a Transfer fee of \$50 per Account for the Transfer of one or more (but less than substantially all) of the Accounts you service, and a Transfer fee of \$2,000 for all other Transfers.

**6.12. Interest on Late Payments.** Any payment not received by OpenWorks when due will bear interest at 21% per year or at the highest rate allowed by applicable law from the date when payment is due, whichever is less. Interest charges on late payments are intended to partially compensate OpenWorks for loss of use of the funds and for internal administrative costs resulting from late payments which would otherwise be difficult to measure with precision. The fact that such charges are imposed should not be construed as a waiver of the right to timely payment.

**6.13. Account Charges.** If you fail to turn over to OpenWorks all Account keys, security codes and cards immediately when you discontinue services to an Account, you must pay OpenWorks all charges assessed by any Account plus \$500 per day until the Account's keys, codes and cards are delivered to OpenWorks.

**6.14. Cancellation Charges.** You must pay OpenWorks a cancellation charge of \$50 if you fail to keep any appointment with OpenWorks or an Account (including but not limited to an appointment for a quality control inspection) unless you give at least 24 hours advance notice that you are canceling the appointment. You must pay OpenWorks a cancellation charge of \$50 if you fail to attend any training class for which you are scheduled.

**6.15. Minimum Account Service Fee.** If you are not actively engaged in providing Janitorial Services for a period of one full calendar month ("**Inactive Month**"), then you must pay OpenWorks a "**Minimum Account Service Fee**" of \$75 per Inactive Month until you either begin providing Janitorial Services or request in writing that OpenWorks terminate your franchise. OpenWorks will bill you directly for this Minimum Account Service Fee. The Minimum Account Service Fee is due and payable on or before the tenth (10<sup>th</sup>) day of each month following each Inactive Month. If you accept an account after any Minimum Account Service Fee is due, OpenWorks may deduct the Minimum Account Service Fee from its monthly remittance of Gross Revenue to you. If you remain inactive for three or more calendar months, even though you have paid the Minimum Service Fee for those months, OpenWorks may terminate your franchise in accordance with Section 10.2.1 of this Agreement. The Minimum Account Service Fee is waived during the fulfillment period.

**6.16. Background Check Fee.** If you finance your initial fee or any Marketing Fee, OpenWorks will evaluate your credit history and charge you its background check fee.

## 7. YOUR OBLIGATIONS.

### 7.1. Use of Trade Name and Marks.

**7.1.1. Context.** You will use the Trade Names and Marks only in the operation of your Janitorial Service. You will not use any other trade names or marks in connection with your Janitorial Service. You cannot use the Trade Name or Marks as part of your legal business name, or with other words, designs or symbols. You may not use the Trade Name or Marks in connection with the sale of unauthorized products or services, or in any manner not authorized by OpenWorks.

**7.1.2. Changes in Trade Names and Marks.** OpenWorks has invested substantial time, energy and money in the promotion and protection of its Trade Names and Marks as they exist on the date this Agreement is signed. It has no present intention of altering them. However, OpenWorks recognizes that rights in intangible property such as the Trade Names and Marks are often difficult to establish and defend and that changes in the cultural and economic environment within which the System operates may make changes in the Trade Names and Marks desirable or necessary. You understand that OpenWorks therefore reserves the right to change any of its Trade Names and Marks and the specifications for each when it believes that such changes will benefit the Franchise Network. You agree that you will promptly conform, at your own expense, to any such changes.

**7.1.3. Advertising.** You agree to submit to OpenWorks copies of all advertising materials that you propose to use at least two weeks before the first time they are distributed, broadcast or published. OpenWorks also has proprietary software that may be used to assist you in producing proposals to render Janitorial Service to your prospective Accounts. All advertising must conform to the standards set out in the Manual. OpenWorks will review the materials and notify you within ten business days whether it approves or rejects them. OpenWorks will not withhold its approval unreasonably. For purposes of this paragraph, advertising materials that differ from previously approved materials only in such variables as date, price or names of products will be considered to be previously approved. However, even if OpenWorks has approved specified materials, it may later withdraw its approval if it reasonably believes it necessary to make the advertising conform to changes in the System or to correct unacceptable features, including, but not limited to, any misrepresentation in the advertising material, whether or not intentional. You may not engage in telemarketing in connection with your Janitorial Service.

**7.1.4. Legal Protection.** You agree to notify OpenWorks immediately in writing if you become aware of any unauthorized use of its Trade Names, Marks or System. You will promptly notify OpenWorks in writing of any claim, demand or suit against you or against your principals based upon or arising in connection with your use of the Trade Names, Marks or System. In any action or proceeding arising from or in connection with any such claim, demand or suit, you agree that OpenWorks may select legal counsel and has the right to control the proceedings.

### 7.2. Quality Control.

**7.2.1. Opening.** You may not begin to operate the Janitorial Service until OpenWorks certifies in writing that you have satisfactorily completed initial training.

**7.2.2. Compliance With Manual.** You must operate the OpenWorks Janitorial Service in complete compliance with the standards and specifications set out in the Manual.

OpenWorks may make changes in these standards and specifications, when, in its reasonable discretion, change is needed for the continued success and development of the System and the Franchise Network. Such changes may necessitate the purchase of equipment (including a computer system), supplies or other goods, completion of additional training by your employees, or other cost to you. You will promptly conform to the modified standards and specifications at your own expense. You must at all times keep your copy of the Manual current by inserting in it revised pages and other changes given to you by OpenWorks and deleting superseded pages. You must also protect its confidentiality by allowing access only by employees with a need to know its contents and by establishing and enforcing procedures to safeguard the Manual in a secure location when it is not in use. If there is any dispute as to the requirements of the Manual at any point in time, the terms of the master copy of the Manual maintained by OpenWorks will control.

**7.2.3. Your Performance.** You will provide Janitorial Services to your Accounts in a workmanlike and professional manner. Great weight will be given to the Accounts' opinions as to what is workmanlike and professional. You will carefully safeguard and protect the keys to your Accounts' buildings and will never give custody of the keys to any person not directly associated with the Janitorial Service or for any unauthorized purpose. You will diligently follow any instructions or warnings made by any Account as to the security of the Account's premises or as to how, when and where you may perform Janitorial Services. Failure to adhere strictly to these requirements will be considered grounds for immediate termination of your right to serve a particular Account. If violation of this Section occurs repeatedly, OpenWorks may terminate this Agreement.

**7.2.4. Services Offered.** You will offer and sell all the services and only the services that OpenWorks has authorized you to provide. You may purchase products that are to be used in the Janitorial Service from any source, as long as the supplier meets the standards established by OpenWorks and the products meet the specifications set out in the current version of the Manual. If you wish to use any product not previously certified by OpenWorks to meet its specifications or which is sold by a supplier not previously approved by OpenWorks, you will advise OpenWorks of this fact and, upon its request, will give OpenWorks product specifications, sample products, and/or information about the supplier. OpenWorks will communicate either its approval or its reasons for withholding its approval to you within ten business days. Silence may not be construed as consent. As a condition of approving a supplier or product, OpenWorks will require you to reimburse it for any expenses reasonably incurred by OpenWorks in inspecting the supplier's premises, checking the supplier's credentials, or testing the product. As a condition of approving a supplier of any product that bears the Trade Names or Marks, OpenWorks may require that the supplier sign a license agreement. OpenWorks may withdraw its approval of a supplier or product if either or both no longer meet its standards or specifications.

**7.2.5. Account Satisfaction.** OpenWorks may, at its sole discretion, terminate your right to serve and to Transfer a particular Account, and may assign the Account to another franchisee, upon the occurrence of one of the following events:

- a) You have repeatedly failed to perform Janitorial Services to an Account's satisfaction and/or in accordance with the Maintenance Agreement and/or OpenWorks' standards;
- b) An Account has lodged an oral or written complaint with OpenWorks regarding you, your service or your employees; OpenWorks has notified you of the substance of the

complaint, and the Account remains dissatisfied for more than five days from the date of the notice;

- c) OpenWorks receives an oral or written request from an Account that the Account be serviced by a different franchisee;
- d) You provide Janitorial Service to an Account in a capacity other than that of an OpenWorks franchisee;
- e) You abandon or fail to provide service to an Account as scheduled or the Account notifies OpenWorks that it is dissatisfied on any 2 days within a period of 60 consecutive days;
- f) You cancel or fail to keep appointments with OpenWorks or an Account for quality control inspections on any 2 occasions within a period of 60 consecutive days;
- g) OpenWorks receives an oral or written request from an Account that its Maintenance Agreement be terminated;
- h) If you or your Designated Manager are not fluent in English;
- i) You fail to maintain an adequate staff of employees sufficient to provide service to an Account; or
- j) You no longer wish to service an Account.

You waive any claim or right to payment for services performed for an Account, and to Transfer such an Account, after OpenWorks terminates your services to the Account under this Section. You agree that you will not be entitled to any payment upon OpenWorks' assignment of the Account to another franchisee, or to any refund or reduction of fees paid or promised to OpenWorks by reason of the termination of your service to any Account under this Section. You agree to successfully assist OpenWorks' managers in the transition or termination of an Account. OpenWorks may also terminate your franchise for events in subsections (a) through (i) inclusive of this Section (see Section 10.2).

**7.2.6. Inspections.** OpenWorks may conduct periodic quality control inspections of your Janitorial Service operation during normal business hours. You must attend each of these inspections with OpenWorks or pay OpenWorks a cancellation charge of \$50. OpenWorks will give you advance notice of the inspections. If there are repeated cancellations or absenteeism, OpenWorks has the right to terminate your services to an Account and/or terminate your Agreement. OpenWorks may also make quality control inspections without prior notice for which you will not have to attend. Alternatively, OpenWorks may require you to conduct such inspections, and promptly provide OpenWorks with written reports of such inspections in the format specified by OpenWorks from time to time. You must promptly correct any deficiencies in your operation which you discover or which are brought to your attention by OpenWorks. If you do not take immediate, effective steps to bring your operation up to OpenWorks' standards, your failure to do so will constitute a material breach of this Agreement. If a deficiency is discovered at any time, during an inspection or following a complaint, OpenWorks has the right to correct the deficiency and charge you OpenWorks' current fees for doing so.

**7.2.7. Notification of Complaints.** You will notify OpenWorks promptly if you are served with a complaint in any legal proceeding that is in any way related to the Janitorial

Service or if you become aware that you are the subject of any complaint to or investigation by a governmental licensing authority or consumer protection agency.

**7.2.8. Employees.** You will maintain a staff of available and trained employees sufficient to operate the Janitorial Service in compliance with OpenWorks' standards.

**7.2.9. Uniforms and Professional Attire.** Your staff of employees must wear a uniform when the employees are on an Account's premises. The uniform must meet the standards set forth in the Manual. You or your Designated Manager must be in professional attire or in business casual attire with an OpenWorks polo shirt with the OpenWorks logo when on the Account's premises during normal business hours. If you are performing the Janitorial Services after normal business hours, then you may choose to be in a uniform, professional business attire or business casual attire with an OpenWorks logo shirt when performing those services.

**7.2.10. Best Efforts.** You must use your best efforts and devote all your productive time and effort to the management and operation of your franchise business on a full-time basis. You must promote OpenWorks in all your actions.

**7.2.11. Designated Manager.** If the franchisee is a corporation or other legal entity, the franchisee agrees that a specific individual will be the Designated Manager. If the franchisee is an individual, then the franchisee may be the Designated Manager or the franchisee may appoint another Designated Manager. The Designated Manager must use his best efforts and personally be responsible for management of the janitorial service business on a day-to-day basis, and you must carefully monitor and be responsible for the performance of any Designated Manager. The appointment or change of a Designated Manager is subject to the prior written approval of OpenWorks. You designate the person listed in Section 1 as the Designated Manager, and OpenWorks approves such a person (subject to such Designated Manager's satisfactory completion of training in Section 5.1). OpenWorks has the right to rely upon instructions from the Designated Manager on matters relating to the franchise until OpenWorks receives a written notification from you changing the Designated Manager. You shall notify OpenWorks in writing of any proposed change in a Designated Manager before the change occurs. OpenWorks will review the request and shall use its best efforts to approve or disapprove of the change within 10 business days of its receipt of the request. If OpenWorks does not disapprove of the change within 10 business days then the change is deemed to be approved. OpenWorks has the right to demand that an entity franchisee promptly remove a designated manager if the designated manager violates any provision of this Agreement or any other agreement with OpenWorks, including but not limited to, provisions in Section 7.2.5 that addresses, among other actions, failure to adequately provide janitorial service, comply with OpenWorks' standards and to be Fluent in English. Upon termination of employment of a designated manager, you (if the franchisee is an individual or a person with an equity interest in a franchisee that is an entity) are required to appoint a successor within 10 days and take on the role of designated manager until OpenWorks approves the proposed designated manager and that person is qualified to take over.

**7.2.12. English Language.** You (if the franchisee is an individual) and your Designated Manager must be able to read, speak and write clearly and with proficiency ("Fluent in English") in order to adequately communicate with Accounts and to maintain OpenWorks' professional image. OpenWorks, in its sole discretion, shall determine if you and/or your Designated Manager are fluent in English.

**7.3. Insurance and Bond.** You must purchase and maintain a policy or policies of comprehensive public liability insurance, including product liability coverage, covering all Janitorial Service assets, personnel and activities on an occurrence basis with a combined single limit for bodily injury, death or property damage of not less than \$2,000,000. In some instances an Account may request additional insurance which you will have to additionally purchase. In addition, you must buy a janitorial service bond in the amount of \$25,000 covering you and your employees and OpenWorks must be named as an additional insured. OpenWorks may increase these minimum coverage requirements annually if necessary to reflect inflation or other changes in circumstances. Failure to maintain the bond or the required amounts and types of insurance may result in a loss of Accounts or termination of your franchise. You must carry casualty insurance in a minimum amount equal to the replacement value of your interest in the Janitorial Service supplies, vehicles and equipment. You must also maintain workers compensation policies for yourself and your employees. In addition, you must maintain policies of disability insurance and any other types of insurance required by applicable law. Each insurance policy that is required under this Agreement will contain a provision that the policy cannot be canceled without ten days' written notice to OpenWorks; it must be issued by an insurance company of recognized responsibility, designate OpenWorks as an additional named insured, and be satisfactory to OpenWorks in form, substance and coverage. You must deliver a certificate of the issuing insurance company evidencing each policy or bond to OpenWorks within ten days after the policy is issued or renewed.

If you fail to purchase the required insurance and bond, as set forth above, OpenWorks may enroll you in any insurance program it sponsors or purchase the insurance and/or bond for your benefit and deduct the premiums and other related costs from your monthly Gross Revenue. If you fail to maintain workers compensation insurance as required by this Agreement, or any disability insurance or other types of insurance required by applicable law, OpenWorks may also terminate this Agreement immediately under Section 10.2.1.

**7.4. Financial and Legal Responsibility.**

**7.4.1. Compliance with Law.** You must comply with all federal, state and local laws and regulations pertaining, directly or indirectly, to the Janitorial Service, including, but not limited to, Occupational Safety and Health Administration ("OSHA") regulations. You must keep current all licenses, permits, bonds and deposits made to or required by any government agency in connection with the operation of the Janitorial Service.

**7.4.2. Payment of Indebtedness.** You must pay promptly when due all taxes and debts that you incur in the conduct of your business.

**7.5. Pre-Existing Accounts.** If you have an existing commercial janitorial or other facility services business prior to entering into this Agreement, the commercial accounts serviced by that business ("**Existing Accounts**") must be identified in Attachment 2 to this Agreement. You shall have two (2) months from the date of this Agreement to convert the Existing Accounts to OpenWorks Accounts for which OpenWorks will provide billing and collection services as provided for in Section 5.4.1 of this Agreement. You must also immediately cease soliciting any commercial janitorial or other facilities services business, except as an OpenWorks franchisee.

**7.6. Variances.** OpenWorks may from time to time approve exceptions or changes from the uniform standards of the System that OpenWorks, in its sole absolute discretion, believes necessary or desirable under particular circumstances. Franchisee understands that he has no right to object to or automatically obtain such variances, and that any exception or

change must be approved in advance by OpenWorks in writing. Franchisee also understands that some franchisees may operate under different forms of agreements due to annual updates and program revisions, and consequently the rights and obligations of such franchisees may differ materially from Franchisee's.

**7.7. Computer System.** You must have a computer system that meets the requirements specified in the Manual, as may be revised from time to time. In order to communicate with OpenWorks you must also have Internet and email access. You must inform OpenWorks of any changes in the email account address listed in Section 1 before the change occurs.

## **8. RELATIONSHIP OF PARTIES.**

**8.1. Interest in Marks and System.** You will not at any time do or cause to be done anything contesting or impairing OpenWorks' interest in its Trade Names, Marks or System. You acquire no rights in any of these things except for your right to use them in accordance with the express terms of this Agreement. OpenWorks retains the right to grant other franchises or licenses to use the Trade Names, Marks and System upon any terms that OpenWorks wishes both within and without the Territory.

**8.2. Independent Status.** You are an independent legal entity and will make this fact clear in your dealings with suppliers, lessors, government agencies, employees, Accounts and others. You will rely on your own knowledge and judgment in making business decisions, subject only to the requirements of this Agreement and the Manual. You may not expressly or impliedly hold yourself out as an employee, partner, shareholder, joint venturer, representative or general agent of OpenWorks, nor may you expressly or impliedly state or suggest that you have the right or power to bind OpenWorks or to incur any liability on its behalf. If you are a corporation, partnership or other form of legal entity, you will not use the Trade Names as part of your entity's name.

**8.3. Display of Disclaimer.** Business cards, stationery, purchase order forms, invoices, leases, tax returns and other documents used by you in your business dealings with suppliers, lessors, government agencies, employees and Accounts must clearly identify you as an independent legal entity.

**8.4. Indemnification.** You agree to indemnify and hold OpenWorks and its Affiliates, and their directors, officers, employees and agents, harmless from all expenses or liabilities of any kind arising from or in any way connected to any of your activities. If OpenWorks or any other indemnified party is made a party to a legal proceeding in connection with an action of yours, OpenWorks or the other indemnified party may hire counsel to protect its interests and you must promptly pay all costs and expenses they incur.

### **8.5. Confidential Information.**

**8.5.1. Ownership.** You acknowledge that OpenWorks is the sole owner of all the Confidential Information; that the Confidential Information is being imparted to you in trust and confidence; and that the Confidential Information is not generally known to the trade or public and is not known to you except by reason of such disclosure. You further acknowledge that you will acquire no interest in the Confidential Information other than the right to utilize it in connection with the performance of your obligations hereunder. In addition, you acknowledge that the use, duplication or disclosure of the Confidential Information except as expressly

permitted by this Agreement will constitute an unfair method of competition and that OpenWorks will suffer irreparable injury thereby.

**8.5.2. Work Product.** You agree that all documents, papers, notes and other material and work product containing or derived from the Confidential Information or connected with your conduct of the Janitorial Service business shall be Confidential Information. You agree that you will have no proprietary interest in any work product developed or used by you and related to this Agreement. You agree, from time to time, as may be requested by OpenWorks, to do all things which may be necessary to establish or document OpenWorks' ownership of any such work product, including without limitation execution of assignments.

**8.5.3. Confidentiality.** All of the Confidential Information and all other information and knowledge about the System which is not in the public domain and such other information and material as OpenWorks may designate as confidential shall be deemed confidential for purposes of this Agreement. You acknowledge that the Confidential Information is disclosed to you solely on the condition that you agree, and you hereby do agree, that you: (a) will use the Confidential Information in strict accordance with the instructions and directions given by OpenWorks from time to time; (b) will not use the Confidential Information in any other business or capacity; (c) will not, at any time, in any manner or form, directly or indirectly, disclose, duplicate, license, sell, reveal, divulge, publish or communicate the Confidential Information, or any portion thereof, to any person or entity other than your employees who need to have such information in connection with their jobs; (d) will not copy any materials containing the Confidential Information, including without limitation the System manuals, without OpenWorks' prior written consent; (e) will observe and implement all reasonable procedures imposed from time to time by OpenWorks to prevent the unauthorized use and disclosure of the Confidential Information; (f) will keep all System manuals and other written materials containing any portion of the Confidential Information in a secure manner and place; and (g) if you are legally compelled to disclose any of the Confidential Information, will do so only if you have used your best efforts to afford OpenWorks the opportunity of obtaining appropriate protective orders or other assurances of confidentiality satisfactory to OpenWorks.

**8.5.4. Return of Confidential Material.** Upon the termination or expiration and non-renewal of this Agreement, you must promptly return to OpenWorks all copies of any materials containing the Confidential Information and all property belonging to OpenWorks, in your possession, custody or control, including any of such items produced or prepared by you.

## **8.6. Noncompetition.**

**8.6.1. Covenant.** You recognize that: (a) the commercial janitorial and other facility services business is very competitive; (b) the OpenWorks System is operated in multiple states and is intended to expand into other geographical areas; (c) by virtue of the performance of this Agreement, you will have access to the Confidential Information and will have close contacts with OpenWorks' Accounts for the purpose of maintaining and further developing the business and goodwill of the System; (d) for these very reasons, you will have the attendant ability to divert customer trade; and (e) consequently, OpenWorks has strong legitimate interests in obtaining the covenant in this Section 8.6 for the protection of the good will of the System. You therefore agree that, without the express prior written consent of OpenWorks, which OpenWorks may withhold in its sole and absolute discretion, you will not, during the Time Period (as defined below), directly or indirectly, engage in, render services or provide financing to, or have any interest in, any Competitive Business (as defined below) located or conducting business within the Area (as defined below).

**8.6.2. Time Period.** For the purposes of Section 8.6.1 of this Agreement, the term "Time Period" shall mean (a) for the period of time that this Agreement is in effect; and (b) beginning when this Agreement is no longer in effect, (i) for a period of six months if OpenWorks has one or more other franchisees to whom OpenWorks can immediately assign the Accounts previously serviced by you so that there will be reasonable time to make the transition and establish good relations between the Accounts and the new franchisee; or (ii) for a period of twelve months if OpenWorks does not have other franchisees to whom OpenWorks can immediately assign the Accounts, so that there will be reasonable time to find, contract with and train new franchisee(s), and to make the transition and establish good relations between the Accounts and the new franchisee(s).

**8.6.3. Competitive Business.** For the purposes of Section 8.6.1 of this Agreement, the term "Competitive Business" shall mean any business providing janitorial services to commercial customers, and if you are or were providing other facility services as part of your Janitorial Service business, then the term Competitive Business shall also include those same types of other facility services.

**8.6.4. Area.** For the purposes of Section 8.6.1 of this Agreement, the term "Area" shall mean (a) the geographical area in which you provide or provided services to Accounts, and (b) a radius of 75 miles from the regional office through which you conduct or conducted your Janitorial Service business, and (c) a radius of 75 miles from any other regional office operated by OpenWorks or any of its master franchisees in the state where you conduct or conducted your Janitorial Service business, and (d) a radius of 75 miles from any other regional office operated by OpenWorks or any of its master franchisees in any other state.

**8.7. Non-Solicitation.**

**8.7.1. Employees.** You agree never to employ or solicit for employment any person who is at the time employed by OpenWorks or any other franchisee in the System, and you agree not to directly or indirectly induce any such person to leave their employment with OpenWorks or any other franchisee in the System.

**8.7.2. Customers.** You agree that while this Agreement is in effect, all solicitations you make relating to janitorial and other facility services will be made on behalf of your Janitorial Service business. You agree that after the expiration and non-renewal or the termination of this Agreement for any reason, you will not solicit as a customer for commercial janitorial or other facility services: (a) any Account you serviced as a franchisee of OpenWorks, or (b) any other Account of OpenWorks or any of its master franchisees serviced by others during the period this Agreement was in effect, or (c) any prospective customers to whom OpenWorks or any of its master franchisees had proposals or bids outstanding at the time this Agreement ended.

**8.8. Modification.** The covenants set forth in Sections 8.1 through 8.7 inclusive of this Agreement shall each be construed as independent of any other covenant or provision of any other agreement. OpenWorks may reduce the scope of the obligations under the covenants of Sections 8.1 through 8.7 inclusive of this Agreement unilaterally and without the consent of any other person or entity, effective upon giving notice to you.

**8.9. Non-Disclosure and Non-Competition Agreements.** You must obtain written non-disclosure and non-competition agreements, in the form of Attachment 4 to this Agreement, signed by each of the individuals who owns 10% or more of your business, and by the

employees who have access to the Confidential Information, and promptly send OpenWorks a copy of each such agreement.

## 9. TRANSFER.

**9.1. Purpose of Conditions for Approval of Transfer.** OpenWorks' grant of this franchise is made in reliance upon your integrity, ability, experience and financial resources. You may not make a Transfer (as defined in Section 3.21 of this Agreement) unless you have first obtained OpenWorks' written consent, which will not be unreasonably withheld if you comply with this Article 9. In order to ensure that no Transfer jeopardizes the Trade Names, the Marks, or OpenWorks' interest in the successful operation of the Janitorial Service, OpenWorks will consent to a Transfer only if you comply with all of the applicable provisions of this Article 9.

**9.2. Notice of Proposed Transfer.** If you wish to make a Transfer, you must submit to OpenWorks: (a) the form of franchise purchase application currently in use by OpenWorks completed by the prospective transferee; and (b) a written notice, setting forth all the terms and conditions of the proposed Transfer.

**9.3. Consent by OpenWorks.** OpenWorks must respond to your written notice within 15 days after receipt of the notice, or, if it requests additional information, within the later date of 15 days after receipt of the additional information or the final day of the original 15 day period. OpenWorks may either consent to the Transfer or state its reason for refusing to consent. Silence will not be construed as consent. If OpenWorks consents to the Transfer, then you may Transfer the interest described in the notice only to the named transferee and only upon the terms and conditions set forth in the notice and OpenWorks' consent. Consent by OpenWorks to a particular Transfer will not constitute consent to any other or subsequent Transfer. You acknowledge that OpenWorks' consent to the Transfer is not a representation to you that any transferred Account will continue as an OpenWorks' Account or that the Account will use your services. OpenWorks has no obligation to you to disclose any concerns, complaints or Maintenance Agreement negotiations it had in the past or might have in the future with respect to any transferred Account. You understand that there is no assurance that any Account will renew or extend its Maintenance Agreement with OpenWorks.

**9.4. Conditions for Consent to Transfer.** Unless a waiver in Section 9.5 applies to some or all of the conditions set forth below in this Section 9.4, every Transfer is subject to all of the following requirements:

- a) Satisfaction of OpenWorks that the proposed transferee meets all of the criteria of character, business experience, financial resources and other standards that OpenWorks customarily applies to new franchisees at the time of Transfer; and if the Transfer is to an existing OpenWorks franchisee, the franchisee must be in Good Standing and fully capable, in OpenWorks' sole reasonable judgment, of servicing the additional business;
- b) Payment of all your outstanding debts to OpenWorks;
- c) Cure of all defaults under the Franchise Agreement, any other agreement between OpenWorks and you, and the Manual;
- d) Signing by the transferee of the then-current form of franchise agreement, amended to waive payment of an initial fee by the proposed transferee to shorten the term to the remainder of your current term; to provide that no supplies will be provided by

OpenWorks; to state that that no training is provided unless the \$250 training fee is paid; to identify whether OpenWorks has fulfilled its obligations on the Initial Account Volume or to state the remaining Initial Account Volume that OpenWorks is obligated to provide; and to clarify any remaining obligations of OpenWorks.

- e) Providing OpenWorks with: (i) the names and residential addresses of the owners and the officers or managers of any entity to whom a Transfer is being made, and their percentages of ownership; and (ii) the address where the entity will keep its business records;
- f) Payment of the Transfer fee of \$2,000, or if only one or more (but not substantially all) of your Accounts are being transferred, a Transfer fee of \$50 for each transferred Account;
- g) Completion by the transferee of OpenWorks' initial training program to its satisfaction, and payment of the \$250 training fee to OpenWorks;
- h) Signing of a Non-Disclosure and Non-Competition Agreement substantially in the form of Attachment 4 to this Agreement by each individual to whom a Transfer is made;
- i) Signing of a Personal Guaranty substantially in the form of Attachment 3 to this Agreement by each individual to whom a Transfer is made (and by each such individual's spouse in a community property state);
- j) Signing of a general release of claims by you in favor of OpenWorks; and
- k) Offering OpenWorks a first right of refusal to acquire the assets and/or interests that are subject to the Transfer, as provided in Section 9.6 of this Agreement.

#### 9.5. Waivers of Some Conditions Upon Certain Types of Transfers.

**9.5.1. Accounts.** In the event of a Transfer of one or more (but not substantially all) of your Accounts, OpenWorks waives the requirements of parts (d), (e), (g), (h) and (i) of Section 9.4.

**9.5.2. Incorporation.** In the event of a Transfer to any corporation or other form of business entity, if the beneficial ownership of the business entity immediately following the assignment is the same and in the same proportions as the beneficial ownership immediately before the assignment, then provided that the original party remains fully obligated under this Agreement, OpenWorks waives all of the requirements of parts (a), (b), (d), (f), (g), (h) and (k) of Section 9.4.

**9.5.3. Transfer of Partial Interest Between Co-Owners.** In the event of a Transfer of a partial ownership interest in your corporation or other legal entity to an existing co-owner, OpenWorks waives all of the requirements of parts (a), (b), (d), (f), (g), (h), (i) and (k) of Section 9.4; except that if the co-owner who will be acquiring a greater ownership interest has not successfully completed OpenWorks' initial training program and will have a controlling interest or will be active in the business, then part (g) of Section 9.4 must be satisfied.

**9.5.4. Transfer of Entire Interest To a Spouse or Child.** In the event of a Transfer of the entire ownership of your Janitorial Service business and all your rights under this Agreement, to your spouse or child, OpenWorks waives all of the requirements of parts (d), (f),

(g) and (k) of Section 9.4; except that if the spouse or child has not successfully completed OpenWorks' initial training program, then part (g) of Section 9.4 must be satisfied.

**9.5.5. Transfer of Minority Interest to a Third Party.** In the event of a Transfer of less than 50% of the ownership interests in your Janitorial Service business of your corporation or other legal entity, to anyone who does not already have an ownership interest in the business or the corporation or other legal entity, OpenWorks waives all of the requirements of parts (d), (f) and (k) of Section 9.4.

**9.5.6. Employee Stock Options.** In the event of a Transfer to any of your employees under any employee stock option plan or stock purchase plan, then provided that the cumulative total amount of such actual and optional ownership interests does not exceed 33% of the current or the possible future ownership interests in your corporation, and that any share certificate distributed under such a plan is marked with a legend describing the restrictions and conditions of Transfer required by this Agreement, OpenWorks waives all of the requirements of parts (a), (b), (d), (e), (f), (g), (h), (i) and (k) of Section 9.4.

**9.5.7. Death or Substantial Disability.** If you die, or become substantially and permanently disabled while this Agreement is in effect, your heirs or representative will have 60 days within which to demonstrate to OpenWorks' satisfaction that they meet all of the criteria of character, business experience, financial responsibility, net worth and other standards that OpenWorks requires of new franchisees at that time. If OpenWorks approves your heirs or representative as transferees, OpenWorks will waive the requirement of part (f) of Section 9.4. If OpenWorks advises your heirs or representative in writing that it will not approve them as transferees of the franchise, or if OpenWorks fails to approve or disapprove the Transfer within 60 days following your death or disability, your heirs or representative will have 120 additional days from the date of disapproval of the Transfer within which to find and notify OpenWorks of a proposed Transfer to a qualified transferee in conformity with the provisions of Sections 9.2, 9.3, 9.4 and 9.5 of this Agreement. If your heirs or representative do not advise OpenWorks of a qualified transferee within the specified period, the franchise will automatically terminate at the end of the period unless a written extension of time has been granted by OpenWorks.

**9.6. OpenWorks' Right of First Refusal.** Except as otherwise provided in Section 9.5 above, if you wish to make a Transfer, you must first give OpenWorks written notice of all the terms of the proposed Transfer and all available information about the proposed transferee, together with copies of all documentation including any written offer. Within 15 days after receipt of the notice and documentation, OpenWorks may, at its option, elect to become (or have its nominee become) the transferee. The exercise of the option shall be upon the terms specified in the notice and documents, subject to a set off for all amounts you owe to OpenWorks. If OpenWorks declines to exercise its option within the time specified, you may thereafter make the Transfer to an approved transferee (but not on more favorable terms than those offered to OpenWorks) provided that all of the requirements of Section 9.4 (subject to the waivers provided for in Section 9.5) are satisfied. If the Transfer is not made within six months from the date of the notice to OpenWorks, then you must give OpenWorks another notice and option as provided in this Section 9.6 before you make any Transfer.

**9.7. Assignment by OpenWorks.** OpenWorks may assign this Agreement or any rights or obligations created by it at any time, including without limitation, the assignment of this Agreement to an OpenWorks master franchisee who will have exclusive rights to administer the OpenWorks Cleaning Systems regional office for your franchised business. Such an assignment may be made without your consent upon condition that the assignee expressly agrees in writing to assume OpenWorks' obligations under this Agreement.

# **BULKY SUB**

**CASE#** 06-2-13191-6 SEA

**SEGMENT** 2 **OF** 2

## 10. TERMINATION OF FRANCHISE.

**10.1. Termination by Consent of the Parties.** This Agreement may be terminated at any time upon the mutual written consent of the parties.

**10.2. Termination by OpenWorks.** In addition to OpenWorks' rights to terminate this Agreement as provided elsewhere in this Agreement, OpenWorks may terminate this Agreement as provided in this Section 10.2.

**10.2.1. Acts of Default.** Upon the occurrence of any of the following defaults by you, OpenWorks, at its option, may terminate this Agreement:

- a) If you or any of your owners or Affiliates has any direct or indirect interest in the ownership or operation of any business that provides commercial janitorial or other facility services to customers;
- b) If you fail to submit to OpenWorks in a timely manner any information you are required to submit under this Agreement;
- c) If you fail to begin operation of a Janitorial Service by the date required in this Agreement, or if you fail to operate a Janitorial Service in accordance with this Agreement and the Manual;
- d) If you act without prior written approval or consent of OpenWorks in regard to a matter for which its prior written approval or consent is expressly required by this Agreement;
- e) If you default in the performance of any material obligation under this Agreement or any other agreement with OpenWorks;
- f) If you are not actively engaged in providing the Janitorial Service, unless: (i) operations are suspended for a period of no more than three months and you have paid the Minimum Account Service Fee due under Section 6.15, or (ii) the suspension was caused by fire, condemnation, or act of God;
- g) If you misuse the Trade Names, Marks or the System or engage in conduct which reflects materially and unfavorably upon the goodwill associated with them, or if you use any names, marks, systems, logotypes or symbols that OpenWorks has not authorized you to use in connection with your Janitorial Service;
- h) If you or your Affiliates have made any material misrepresentation in connection with the assignment of an Account, or to induce OpenWorks to enter into this Agreement;
- i) If you fail to permanently correct a breach of this Agreement or to meet the standards set out in the Manual after being twice requested in writing by OpenWorks to correct the problem in any 12 month period;
- j) If OpenWorks makes a reasonable determination that the operation of the Janitorial Service poses a threat to public health or safety;
- k) If you fail to make any payment when due under this Agreement or any other agreement between you and OpenWorks or an Affiliate of OpenWorks;

- l) Except as otherwise required by the United States Bankruptcy Code, if you become insolvent, are adjudicated as bankrupt, or file or have filed against you a petition in bankruptcy, reorganization or similar proceeding;
- m) If you attempt to assign your rights under this Agreement in any manner not authorized by this Agreement;
- n) If you are convicted of a felony or any criminal misconduct which is relevant to the operation of the Janitorial Service;
- o) If you commit any of the defaults described above and have twice previously, within a 12 month period, been given notice by OpenWorks of the same type of default, whether or not the prior defaults were cured;
- p) If you have taken such action that would permit OpenWorks to terminate your right to service an Account under paragraphs (a) through (i) inclusive of Section 7.2.5. of this Agreement; or
- q) If you fail to maintain policies of workers compensation insurance required in Section 7.3, disability insurance or any other types of insurance required by law.

**10.2.2. Notice of Default.** Termination will be effective automatically 30 days after written notice of default is given to you, specifying any of the defaults described in subsections (b) through (j) inclusive of Section 10.2.1, if the default has not been cured within the 30-day period. For a monetary default described in subsection (k), termination will be effective automatically 5 days after written notice specifying amounts due to OpenWorks is given to you, if the default is not cured within the 5-day period. Termination will be effective immediately upon written notice to you if any of the defaults described above in subsections (a) or (l) through (q) inclusive occurs.

**10.3. Termination by You.** You may terminate this Agreement upon 90 days' written notice to OpenWorks if the conditions of the next Section of this Agreement, entitled "Rights and Obligations After Termination," are met in full within the specified time periods.

**10.4. Rights and Obligations After Termination.** Upon the Termination of this Agreement for any reason, all of your Accounts shall automatically revert to OpenWorks, and the parties will have the following rights and obligations:

- a) OpenWorks will have no further obligations under this Agreement except to settle up with you with respect to payments due and owed prior to the Termination under Section 5.4 and Article 6 of this Agreement;
- b) You must pay OpenWorks, within 30 days after Termination, all payments due to OpenWorks;
- c) You must immediately and permanently cease the use of the Trade Names and Marks or any confusingly similar names or marks, the System, and advertising, signs, stationery and forms that bear identifying marks or colors that might give others the impression that you are associated with the System; and
- d) You must immediately deliver to OpenWorks the Manual, all Accounts' keys, security codes and cards, and any other proprietary material belonging to OpenWorks or any Account which is in your possession or the possession of your employees.

- e) You must assign to OpenWorks any Accounts obtained by you that do not have an existing Maintenance Agreement with OpenWorks.

If the franchise granted in this Agreement is terminated because of your default, the rights of OpenWorks described above will not necessarily be its exclusive remedies, but will instead supplement any other equitable or legal remedies available to OpenWorks. If this Agreement is terminated because of your material default, nothing in this section will be construed to deprive OpenWorks of the right to recover damages as compensation for lost profits. Termination of this Agreement will not extinguish any obligation of either party that has accrued prior to Termination. All obligations of the parties which by their terms or by reasonable implication are to be performed in whole or in part after Termination will survive Termination.

**11. MISCELLANEOUS PROVISIONS.**

**11.1. Construction of Contract.** Section headings in this Agreement are for reference purposes only and will not in any way modify the statements contained in any Section of this Agreement. Each word in this Agreement will be deemed to include any number or gender that the context requires. If there is any conflict between this Agreement and the Manual, this Agreement will control.

**11.2. Governing Law.** Except for matters relating solely to Sections 8.4, 8.6, 8.7 and 8.8 and Attachment 4 of this Agreement, which are governed by the laws of the state where you reside, this Agreement and all matters relating to it, shall be governed by and interpreted by the laws of the State of Arizona; provided, however, that if any of the provisions of this Agreement would not be enforceable under the laws of Arizona, then such provisions shall be governed by the laws of the state where you reside; and provided further that the Uniform Franchise Offering Circular delivered to you contains a State Law Addendum, which is hereby incorporated into this Agreement, referencing and summarizing certain existing local laws of other jurisdictions, and the application of Arizona law shall not abrogate or reduce any of your rights provided for under such existing local laws which by their terms apply and supersede Arizona law (unless local law conflicts with federal law and is preempted).

**11.3. Notices.** Each party to this Agreement shall direct any notice to the other party to the address in Article 1 of this Agreement, or at another address if advised in writing that the address has been changed. Notice may be delivered by facsimile (with simultaneous posting of a copy by first class mail), commercial courier, or first class mail. Notice by facsimile will be deemed delivered upon transmission; by courier, upon delivery; and by first class mail, three days after posting.

**11.4. Amendments.** This Agreement may be amended only by a document signed by all of the parties to this Agreement or by their authorized agents.

**11.5. Waiver.** Waiver of any breach of this Agreement will not be interpreted as a waiver of any subsequent breach.

**11.6. Integration.** This Agreement, any exhibits or attachments to it, and the Uniform Franchise Offering Circular that has been provided to you, constitute the entire agreement between the parties concerning the franchise granted under this Agreement, and supersede all prior and contemporaneous agreements and representations.

**11.7. Arbitration.** Any dispute or claim (a "Claim") arising out of or in connection with this Agreement shall be resolved by arbitration; provided, however, that OpenWorks shall not be

required to arbitrate any Claim with respect to the ownership or use of its Trade Names or Marks. The arbitration shall be held in the City of Phoenix, Arizona, governed by the United States Arbitration Act, 9 U.S.C. §§ 1-16, and conducted by one or more independent arbitrators who are experienced in franchise matters and have no past or present relationship with either party, appointed as set forth in this Section 11.7. This arbitration clause will not deprive OpenWorks of any right it may otherwise have to seek provisional injunctive relief from a court of competent jurisdiction. If proper notice of any hearing has been given, the arbitrator(s) will have full power to proceed to take evidence or to perform any other acts necessary to arbitrate the matter in the absence of any party who fails to appear. You waive any rights you may have to demand trial by jury or to seek punitive damages from OpenWorks or its Affiliates. The arbitrator(s) will have no power to (i) stay the effectiveness of any pending Termination of this Agreement; (ii) assess punitive damages; or (iii) make any award that modifies or suspends any lawful provision of this Agreement. All expenses of arbitration must be paid by the party against whom the arbitrator(s) render a decision. The award made by the arbitrator(s) shall be final, binding and conclusive on all parties to the arbitration for all purposes. Judgment upon any award and/or enforcing any order of the arbitrator may be entered by any court of competent jurisdiction.

**11.7.1. Initiation of Arbitration.** In order to initiate an arbitration hereunder, the party wishing to make a Claim (the "**Initiator**") shall give a written notice of demand for arbitration hereunder (the "**Initial Notice**") to the other party (the "**Respondent**") and provide the name of the Initial Arbitrator (as hereinafter defined).

**11.7.2. Initial Notice.** To be valid, the Initial Notice must include the following: (i) A statement of the Claim; (ii) a proposed resolution ("**Initial Resolution**") of the Claim; (iii) the name of the arbitrator proposed by the Initiator (the "**Initial Arbitrator**"); (iv) the address and phone and facsimile numbers of both the Initiator and the Initial Arbitrator; (v) the date of the Initial Notice; and (vi) the signature of the Initiator. The Initial Notice may include other matters as shall be deemed appropriate by the Initiator, but it may not contain any conditions to the effectiveness of the Initial Notice nor any other matter which affects the validity of the Initial Notice.

**11.7.3. The Response.** The Respondent is bound to respond to the Initial Notice in writing within 30 days of the Initial Notice (the "**Response**") or suffer the consequences, as hereinafter defined. If the Respondent fails to timely respond with a valid Response, the Initial Resolution shall become effective as an arbitration award hereunder. A valid Response must be one of the following (as described more fully below): (i) a Second Notice; (ii) Dispute of the Initial Resolution; or (iii) Acceptance.

a) **Second Notice.** If the Respondent wishes to dispute the Initial Resolution and have a panel of three arbitrators, the Respondent must timely deliver a written notice (the "**Second Notice**") to the Initiator and the Initial Arbitrator, which to be valid, must include the following: (i) A statement of the Response, including the factual disputes with the Initial Notice, and other facts supporting the Respondent's position; (ii) a proposed resolution ("**Second Resolution**") of the Claim, such as alternative amounts of payment or damages or alternative resolutions of the claim; (iii) the name of the arbitrator proposed by the Respondent (the "**Second Arbitrator**"); (iv) the address and phone and facsimile numbers of both the Respondent and the Second Arbitrator; (v) the date of the Response; and (vi) the signature of the Respondent. The Response may include other matters as shall be deemed appropriate by the Respondent, including claims of the Respondent, but it may not contain any conditions to the effectiveness of the Response nor any other matter which affects

the validity of the Response. If a valid Second Notice is timely given, the Second Arbitrator and the Initial Arbitrator shall meet and agree on a third arbitrator. If they do not or cannot within 30 days following the Response, then the Initiator, the Respondent and/or either Arbitrator may request to have the Maricopa Superior Court name the third arbitrator. Upon completing the panel of arbitrators, the panel shall commence the arbitration process. The Arbitrators shall make an award of the Initial Resolution or the Second Resolution or such other award as the Arbitrators decide is just under the facts and applicable law, subject to the terms of this Agreement.

- b) **Dispute of Initial Resolution.** The Respondent may choose to accept the Initial Arbitrator as the sole Arbitrator and only dispute the Initial Resolution. If the Respondent selects this alternative, the Respondent must timely file a Response including the following: (i) a statement that the Respondent accepts the Initial Arbitrator as the sole arbitrator; (ii) a statement of the Response, including the factual disputes with the Initial Notice and other facts supporting the Respondent's position; (iii) a proposed Second Resolution of the Claim, such as alternative amounts of damages or alternative resolutions of the Claim; (iv) the address and phone and facsimile numbers of the Respondent; (v) the date of the Response; and (vi) the signature of the Respondent. The Response may include other matters as shall be deemed appropriate by the Respondent, including claims of the Respondent, but it may not contain any conditions to the effectiveness of the Response nor any other matter which affects the validity of the Response. If a Response does not name the Second Arbitrator, the Initial Arbitrator shall make an award of the Initial Resolution or the Second Resolution or such award as the Initial Arbitrator deems just under the facts and applicable law, subject to the terms of this Agreement.
- c) **Acceptance.** If the Respondent fails to timely give a valid Response, as provided above, or if the Respondent gives a notice of Acceptance of the Initial Resolution, the Initial Arbitrator shall enter the award adopting the Initial Resolution.

**11.7.4. Counterclaim.** The Respondent may include a "Counterclaim" in the Response. If the Respondent makes a Counterclaim, the Initiator shall be obligated to respond in the same time and in the same fashion as required of the Respondent, except that the Initial Arbitrator shall be the Initiator's Arbitrator for both the initial Claim and the Counterclaim.

**11.8. Injunctive Remedy for Breach.** You recognize that you are a member of a Franchise Network and that your acts and omissions may have a positive or negative effect on the success of other businesses operating under OpenWorks' Trade Names and in substantial association with its Marks. Your failure to comply with the terms of this Agreement is likely to cause irreparable damage to OpenWorks and to some or all of the other franchisees of OpenWorks. For this reason, you agree that if OpenWorks can demonstrate to a court of competent jurisdiction that there is a substantial likelihood of a breach or threatened breach of any of the terms of this Agreement by you, OpenWorks will be entitled, without posting a bond, to a temporary restraining order or preliminary injunction enjoining the breach and/or to a decree of specific performance, without showing or proving any actual damage, until a final determination is made by an arbitrator.

**11.9. Limitation of Actions.** No action or arbitration proceeding may be maintained by you against OpenWorks unless (a) written notice of any claim alleged to exist is delivered by you to OpenWorks within 30 days after the event complained of becomes known to you and (b) an arbitration proceeding is commenced by you within 90 days after such notice.

**11.10. Attorneys' Fees and Costs.** If legal action, including any action on appeal, or arbitration is initiated to enforce the terms and conditions of this Agreement, the prevailing party will be entitled to recover reasonable compensation for preparation, investigation and court and/or arbitration costs (including but not limited to, expert witness fees, hearing transcription fees, arbitration fees, arbitrator's compensation, copying costs, delivery expenses and fax charges) and reasonable attorneys' fees, as fixed by a court of competent jurisdiction or by the arbitrator.

**11.11. Severability.** Each provision of this Agreement will be considered severable. If, for any reason, any provision is determined to be invalid or in conflict with any existing or future law or regulation, that provision will not impair the operation of the remaining provisions of this Agreement. The invalid provisions will be deemed not to be a part of this Agreement. However, if OpenWorks determines that the finding of illegality adversely affects the basic consideration for its performance under this Agreement, OpenWorks may, at its option, terminate it.

**11.12. Approval and Guarantees.** If you are a corporation, all officers and shareholders with a 10% or greater interest in you, or if you are a partnership, all your general partners, or if you are a limited liability company, all your managing members and all members with a 10% or greater interest in you, must approve this Agreement, permit you to furnish the financial information required by OpenWorks, and agree to the restrictions placed on them, including restrictions on the transferability of their interests in the franchise and Janitorial Service and limitations on their rights to compete, and sign separately written guarantees of your payments and performance in the form of Attachment 3 to this Agreement.

**11.13. Acceptance by OpenWorks.** This Agreement will not be binding on OpenWorks unless and until it has been signed by an authorized officer of OpenWorks.

**11.14. DISCLAIMER OF REPRESENTATIONS.**

**YOU HEREBY REPRESENT AND WARRANT TO OPENWORKS THAT:**

NO REPRESENTATIONS OR PROMISES OF ANY KIND HAVE BEEN MADE BY OPENWORKS TO INDUCE YOU TO SIGN THIS AGREEMENT EXCEPT THOSE SPECIFICALLY SET FORTH IN THIS AGREEMENT AND IN THE UNIFORM FRANCHISE OFFERING CIRCULAR THAT HAS BEEN DELIVERED TO YOU.

YOU ACKNOWLEDGE THAT NEITHER OPENWORKS NOR ANY OTHER PERSON HAS GUARANTEED THAT YOU WILL SUCCEED IN THE OPERATION OF THE FRANCHISED BUSINESS OR HAS PROVIDED ANY SALES OR INCOME PROJECTIONS OF ANY KIND TO YOU EXCEPT AS STATED IN THE UNIFORM FRANCHISE OFFERING CIRCULAR PROVIDED TO YOU.

YOU HAVE MADE AN INDEPENDENT INVESTIGATION OF ALL IMPORTANT ASPECTS OF THE FRANCHISED BUSINESS.

YOU UNDERSTAND THAT OPENWORKS IS NOT A FIDUCIARY AND HAS NO SPECIAL RESPONSIBILITIES TO YOU BEYOND THE NORMAL RESPONSIBILITIES OF A SELLER IN A BUSINESS TRANSACTION.

IN WITNESS TO THE PROVISIONS OF THIS FRANCHISE AGREEMENT, the undersigned have signed this Franchise Agreement on the date set forth in Article 1.

FRANCHISOR:  
O.P.E.N. AMERICA, INC.

FRANCHISEE:

By: \_\_\_\_\_  
Officer: \_\_\_\_\_

Name: \_\_\_\_\_  
Sign: \_\_\_\_\_

Name: \_\_\_\_\_  
Sign: \_\_\_\_\_

Name: \_\_\_\_\_  
Sign: \_\_\_\_\_

Name: \_\_\_\_\_  
Sign: \_\_\_\_\_

If Franchisee is a Corporation, Partnership  
or Limited Liability Company:

Entity Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Printed Name of Authorized Signer: \_\_\_\_\_

Title: \_\_\_\_\_

The above Franchise Agreement was executed on the date stated above, by the above named parties and in my presence as a witness.

\_\_\_\_\_ Name \_\_\_\_\_ residing at \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_

ATTACHMENT 1

**Current**

**Business Starter Packages**

**Included in the Franchise Packages**

From time to time, OpenWorks may substitute different brand names or change the exact specifications of the supplies and equipment provided to you in your starter kit. Any substitutions will be at equal or greater value and/or quality.

**SILVER BUSINESS PACKAGE**

**Included for the OW 3 Level Franchise Package**

| <b>BUSINESS SUPPLIES</b>  |                 |                             |                 |
|---|-----------------|-----------------------------|-----------------|
| <b>ITEM</b>   | <b>QUANTITY</b> | <b>ITEM</b>                 | <b>QUANTITY</b> |
| Unit Franchise Operating Manual with Environmental Training Section, Safety Section, Franchisee Section and Sales Section | 1               | Employee Applications       | 10              |
|   |                 | Employee Job Description    | 1               |
|   |                 | Special Cleaning Proposals  | 5               |
|   |                 | Approved Vendor List        | 1               |
| Trifold Brochures   | 25              | OpenWorks T-Shirts          | 1 Each          |
| Sales Proposals   | As Needed       | OpenWorks Hats              | 2 Each          |
| MSDS Sheets   | 1 Set           | Business Cards              | 500 Each        |
| Quality Service Audit Sheets  | 10              | Trade Magazine Subscription | 6 Months        |
| OpenWorks Business Form Pack  | 1 Set           |                             |                 |

| <b>EQUIPMENT &amp; CHEMICALS</b>        |                 |                                  |                 |
|---|-----------------|----------------------------------|-----------------|
| <b>ITEM</b>                             | <b>QUANTITY</b> | <b>ITEM</b>                      | <b>QUANTITY</b> |
| Body Fluid Clean-up                     | 1 Each          | Minuteman 290-15 Wet/Dry Vacuum  | 1 Each          |
| Bowl Mop Klean Puff                     | 1 Each          | Mop Combo Pak Yellow             | 1 Each          |
| C-2300 Pop-up Wiper                     | 1 Box           | Mop Dust Frame Swivl Snap 5x24   | 1 Each          |
| 32-oz. Plastic Bottle                   | 4 Each          | Mop Wet Loop 1" Medium Blue      | 2 Each          |
| 32-oz Trigger Sprayer                   | 4 Each          | Mopdust Wash GRN 5 x 24          | 1 Each          |
| 50' Extension Cord                      | 1 Each          | Pad Carpet Bonnet 19"            | 1 Each          |
| Bag Caddy 2642 Yellow                   | 1 Each          | Pad Doodlebug Blue               | 1 Box           |
| Bowl Lava Foam Stick                    | 1 Each          | Pad Doodlebug Brown              | 1 Each          |
| Broom Corn Lobby Broom                  | 1 Each          | Pad Doodlebug White              | 1 Each          |
| Brush Counter 8"                        | 1 Each          | Pad Floor Black 17"              | 5/case          |
| Carpet Cln Spin-A-Way                   | 1 Gallon        | Pad Floor Blue 17"               | 5/case          |
| Crème Cleanser                          | 1 Quart         | Pad Floor Red 17"                | 5/case          |
| Dispenser 1 Gallon Pump                 | 1 Each          | Pad Holder Floor Doodlebug       | 1 Each          |
| Doodle Bug Handle Wood Screw 5 FT       | 1 Each          | Pad White 6x9 #98                | 10 Each         |
| Drive Pad Economy                       | 1 Each          | Plate Clutch                     | 1 Each          |
| Dust Pan Plastic Black 12" #700         | 1 Each          | Pole Aero Furniture Polish Lemon | 1 Can           |
| Duster Lambs-wool Telescope             | 1 Each          | Pole Telescopic 2x4=8FT          | 1 Each          |
| Floor Finish Boast                      | 3 Gallons       | Premium Finish Mop Looped/Banded | 1 Each          |
| Floor Strip Licketystrip                | 2 Gallons       | Protective Eye Goggle            | 1 Each          |
| Glisten Concentrated Glass Cleaner      | 1 Gallon        | Recpt Brute 44GL 2643 Gry        | 1 Each          |
| Glove-Marigold Medium 12" Long          | 1 Dozen         | Recpt Brute Dolly 2640           | 1 Each          |
| Handle Mop Dust Swivl-snap 5'           | 1 Each          | Safety Sign -- Wet Floor         | 1 Each          |
| Handle Primo 60" Vinyl                  | 2 Each          | Scraper Putty Knife              | 1 Each          |
| Highlights D-Neutral Germicidal Cleaner | 1 Gallon        | Unger Handle S/Steel             | 1 Each          |
| Highlights Neutral Floor Cleaner        | 2 Gallons       | Unger 12" Channel/Rubber         | 1 Each          |
| Minuteman 17" Fronrunner                | 1 Each          | Vacuum Backpack SuperCoach       | 1 Each          |

## GOLD BUSINESS PACKAGE

Included in the OW 5 and OW 7 Level Franchise Packages

| <b>BUSINESS SUPPLIES</b>  |           |                             |          |
|---|-----------|-----------------------------|----------|
| ITEM  | QUANTITY  | ITEM                        | QUANTITY |
| Unit Franchise Operating Manual with Environmental Training Section, Safety Section, Franchisee Section and Sales Section | 1         | Employee Applications       | 10       |
|   |           | Employee Job Description    | 1        |
|   |           | Special Cleaning Proposals  | 5        |
|   |           | Approved Vendor List        | 1        |
| Trifold Brochures   | 25        | OpenWorks T-Shirts          | 1 Each   |
| Sales Proposals   | As Needed | OpenWorks Hats              | 2 Each   |
| MSDS Sheets   | 1 Set     | Business Cards              | 500 Each |
| Quality Service Audit Sheets  | 10        | Trade Magazine Subscription | 6 Months |
| OpenWorks Business Forms Pack   | 1 Set     |                             |          |

| <b>EQUIPMENT &amp; CHEMICALS</b>        |           |                                  |          |
|---|-----------|----------------------------------|----------|
| ITEM                                    | QUANTITY  | ITEM                             | QUANTITY |
| Body Fluid Clean-up                     | 1 Each    | Minuteman Electric Burnisher 20" | 1 Each   |
| Bowl Mop Klean Puff                     | 1 Each    | Mop Combo Pak Yellow             | 1 Each   |
| C-2300 Pop-up Wiper                     | 1 Box     | Mop Dust Frame Swivi Snap 5x24   | 1 Each   |
| 32-oz. Plastic Bottle                   | 4 Each    | Mop Wet Loop 1" Medium Blue      | 2 Each   |
| 32-oz Trigger Sprayer                   | 4 Each    | Mopdust Wash GRN 5 x 24          | 1 Each   |
| 50' Extension Cord                      | 1 Each    | Pad Carpet Bonnet 19"            | 1 Each   |
| Bag Caddy 2642 Yellow                   | 1 Each    | Pad Doodlebug Blue               | 1 Box    |
| Bowl Lava Foam Stick                    | 1 Each    | Pad Doodlebug Brown              | 1 Each   |
| Broom Corn Lobby Broom                  | 1 Each    | Pad Doodlebug White              | 1 Each   |
| Brush Counter 8"                        | 1 Each    | Pad Floor Black 17"              | 5/case   |
| Carpet Cln Spin-A-Way                   | 1 Gallon  | Pad Floor Blue 17"               | 5/case   |
| Crème Cleanser                          | 1 Quart   | Pad Floor Red 17"                | 5/case   |
| Dispenser 1 Gallon Pump                 | 1 Each    | Pad Holder Floor Doodlebug       | 1 Each   |
| Doodle Bug Handle Wood Screw 5 FT       | 1 Each    | Pad White 6x9 #98                | 10 Each  |
| Drive Pad Economy                       | 1 Each    | Plate Clutch                     | 1 Each   |
| Dust Pan Plastic Black 12" #700         | 1 Each    | Pole Aero Furniture Polish Lemon | 1 Can    |
| Duster Lambs-wool Telescope             | 1 Each    | Pole Telescopic 2x4=8FT          | 1 Each   |
| Floor Finish Boast                      | 3 Gallons | Premium Finish Mop Looped/Banded | 1 Each   |
| Floor Strip Licketystrip                | 2 Gallons | Protective Eye Goggle            | 1 Each   |
| Glisten Concentrated Glass Cleaner      | 1 Gallon  | Recpt Brute 44GL 2643 Gry        | 1 Each   |
| Glove-Marigold Medium 12" Long          | 1 Dozen   | Recpt Brute Dolly 2640           | 1 Each   |
| Handle Mop Dust Swivi-snap 5'           | 1 Each    | Safety Sign - Wet Floor          | 1 Each   |
| Handle Primo 60" Vinyl                  | 2 Each    | Scraper Putty Knife              | 1 Each   |
| Highlights D-Neutral Germicidal Cleaner | 1 Gallon  | Unger Handle S/Steel             | 1 Each   |
| Highlights Neutral Floor Cleaner        | 2 Gallons | Unger 12" Channel/Rubber         | 1 Each   |
| Minuteman 17" Frontrunner               | 1 Each    | Vacuum Backpack SuperCoach       | 1 Each   |
| Minuteman 290-15 Wet/Dry Vacuum         | 1 Each    |                                  |          |

**PLATINUM BUSINESS PACKAGE**

**Included in the OW-10 Level Franchise Package**

| <b>BUSINESS SUPPLIES</b>  |                 |                             |                 |
|---|-----------------|-----------------------------|-----------------|
| <b>ITEM</b>   | <b>QUANTITY</b> | <b>ITEM</b>                 | <b>QUANTITY</b> |
| Unit Franchise Operating Manual with Environmental Training Section, Safety Section, Franchisee Section and Sales Section | 1               | Employee Applications       | 10              |
|   |                 | Employee Job Description    | 1               |
|   |                 | Special Cleaning Proposals  | 5               |
|   |                 | Approved Vendor List        | 1               |
| Trifold Brochures   | 25              | OpenWorks T-Shirts          | 1 Each          |
| Sales Proposals   | As Needed       | OpenWorks Hats              | 2 Each          |
| MSDS Sheets   | 1 Set           | Business Cards              | 500 Each        |
| Quality Service Audit Sheets  | 10              | Trade Magazine Subscription | 6 Months        |
| OpenWorks Business Forms Pack   | 1 Set           |                             |                 |

| <b>EQUIPMENT &amp; CHEMICALS</b>        |                 |                                    |                 |
|---|-----------------|------------------------------------|-----------------|
| <b>ITEM</b>                             | <b>QUANTITY</b> | <b>ITEM</b>                        | <b>QUANTITY</b> |
| Body Fluid Clean-up                     | 1 Each          | Minuteman 290-15 Wet/Dry Vacuum    | 1 Each          |
| Bowl Mop Klean Puff                     | 1 Each          | Mop Combo Pak Yellow               | 2 Each          |
| C-2300 Pop-up Wiper                     | 1 Box           | Mop Dust Frame Swivl Snap 5x24     | 2 Each          |
| 32-oz. Plastic Bottle                   | 4 Each          | Mop Wet Loop 1" Medium Blue        | 4 Each          |
| 32-oz Trigger Sprayer                   | 4 Each          | Mopdust Wash GRN 5 x 24            | 2 Each          |
| 50' Extension Cord                      | 1 Each          | Pad Carpet Bonnet 19"              | 1 Each          |
| Bag Caddy 2642 Yellow                   | 2 Each          | Pad Doodlebug Blue                 | 1 Box           |
| Bowl Lava Foam Stick                    | 1 Each          | Pad Doodlebug Brown                | 1 Each          |
| Broom Corn Lobby Broom                  | 1 Each          | Pad Doodlebug White                | 1 Each          |
| Brush Counter 8"                        | 1 Each          | Pad Floor Black 17"                | 5/case          |
| Carpet Cln Spin-A-Way                   | 1 Gallon        | Pad Floor Blue 17"                 | 5/case          |
| Crème Cleanser                          | 1 Quart         | Pad Floor Red 17"                  | 5/case          |
| Dispenser 1 Gallon Pump                 | 1 Each          | Pad Holder Floor Doodlebug         | 1 Each          |
| Doodle Bug Handle Wood Screw 5 FT       | 1 Each          | Pad White 6x9 #98                  | 10 Each         |
| Drive Pad Economy                       | 1 Each          | Plate Clutch                       | 1 Each          |
| Dust Pan Plastic Black 12" #700         | 1 Each          | Pole Aero Furniture Polish Lemon   | 1 Can           |
| Duster Lambs-wool Telescope             | 2 Each          | Pole Telescopic 2x4=8FT            | 1 Each          |
| Floor Finish Boast                      | 3 Gallons       | Premium Finish Mop Looped/Banded   | 2 Each          |
| Floor Strip Licketystrip                | 2 Gallons       | Protective Eye Goggle              | 1 Each          |
| Glisten Concentrated Glass Cleaner      | 1 Gallon        | Ramsey Professional Carpet Spotter | 1 Quart         |
| Glove-Marigold Medium 12" Long          | 1 Dozen         | Recpt Brute 44GL 2643 Gry          | 2 Each          |
| Handle Mop Dust Swivl-snap 5'           | 2 Each          | Recpt Brute Dolly 2640             | 2 Each          |
| Handle Primo 60" Vinyl                  | 4 Each          | Safety Sign - Wet Floor            | 1 Each          |
| Highlights D-Neutral Germicidal Cleaner | 1 Gallon        | Scraper Putty Knife                | 1 Each          |
| Highlights Neutral Floor Cleaner        | 2 Gallons       | Unger Handle S/Steel               | 1 Each          |
| Minuteman Electric Burnisher 20"        | 1 Each          | Unger 12" Channel/Rubber           | 1 Each          |
| Minuteman 17" Fronrunner                | 1 Each          | Vacuum Backpack SuperCoach         | 2 Each          |

## DIAMOND BUSINESS PACKAGE

Included for the OW 15, OW 20 and OW 25 Level Franchise Packages

| <b>BUSINESS SUPPLIES</b>  |           |                             |          |
|---|-----------|-----------------------------|----------|
| ITEM  | QUANTITY  | ITEM                        | QUANTITY |
| Unit Franchise Operating Manual with Environmental Training Section, Safety Section, Franchisee Section and Sales Section | 1         | Employee Applications       | 10       |
|   |           | Employee Job Description    | 1        |
|   |           | Special Cleaning Proposals  | 5        |
|   |           | Approved Vendor List        | 1        |
| Trifold Brochures   | 25        | OpenWorks T-Shirts          | 1 Each   |
| Sales Proposals   | As Needed | OpenWorks Hats              | 2 Each   |
| MSDS Sheets   | 1 Set     | Business Cards              | 500 Each |
| Quality Service Audit Sheets  | 10        | Trade Magazine Subscription | 6 Months |
| OpenWorks Business Forms Pack   | 1 Set     |                             |          |

| <b>EQUIPMENT &amp; CHEMICALS</b>        |           |                                    |          |
|---|-----------|------------------------------------|----------|
| ITEM                                    | QUANTITY  | ITEM                               | QUANTITY |
| Body Fluid Clean-up                     | 1 Each    | Minuteman 290-15 Wet/Dry Vacuum    | 1 Each   |
| Bowl Mop Klean Puff                     | 1 Each    | Mop Combo Pak Yellow               | 2 Each   |
| C-2300 Pop-up Wiper                     | 1 Box     | Mop Dust Frame Swivl Snap 5x24     | 2 Each   |
| 32-oz. Plastic Bottle                   | 4 Each    | Mop Wet Loop 1" Medium Blue        | 4 Each   |
| 32-oz Trigger Sprayer                   | 4 Each    | Mopdust Wash GRN 5 x 24            | 2 Each   |
| 50' Extension Cord                      | 1 Each    | Pad Carpet Bonnet 19"              | 1 Each   |
| Bag Caddy 2642 Yellow                   | 2 Each    | Pad Doodlebug Blue                 | 1 Box    |
| Bowl Lava Foam Stick                    | 1 Each    | Pad Doodlebug Brown                | 1 Each   |
| Broom Corn Lobby Broom                  | 1 Each    | Pad Doodlebug White                | 1 Each   |
| Brush Counter 8"                        | 1 Each    | Pad Floor Black 17"                | 5/case   |
| Carpet Cln Spin-A-Way                   | 1 Gallon  | Pad Floor Blue 17"                 | 5/case   |
| Carpet Extractor                        | 1 Each    | Pad Floor Red 17"                  | 5/case   |
| Crème Cleanser                          | 1 Quart   | Pad Holder Floor Doodlebug         | 1 Each   |
| Dispenser 1 Gallon Pump                 | 1 Each    | Pad White 6x9 #98                  | 10 Each  |
| Doodle-Bug Handle Wood Screw 5 FT       | 1 Each    | Plate Clutch                       | 1 Each   |
| Drive Pad Economy                       | 1 Each    | Pole Aero Furniture Polish Lemon   | 1 Can    |
| Dust Pan Plastic Black 12" #700         | 1 Each    | Pole Telescopic 2x4=8FT            | 1 Each   |
| Duster Lambs-wool Telescope             | 2 Each    | Premium Finish Mop Looped/Banded   | 2 Each   |
| Floor Finish Boast                      | 3 Gallons | Protective Eye Goggle              | 1 Each   |
| Floor Strip Licketystrip                | 2 Gallons | Ramsey Professional Carpet Spotter | 1 Quart  |
| Glisten Concentrated Glass Cleaner      | 1 Gallon  | Recpt Brute 44GL 2643 Gry          | 2 Each   |
| Glove-Marigold Medium 12" Long          | 1 Dozen   | Recpt Brute Dolly 2640             | 2 Each   |
| Handle Mop Dust Swivl-snap 5'           | 2 Each    | Safety Sign - Wet Floor            | 1 Each   |
| Handle Primo 60" Vinyl                  | 4 Each    | Scraper Putty Knife                | 1 Each   |
| Highlights D-Neutral Germicidal Cleaner | 1 Gallon  | Unger Handle S/Steel               | 1 Each   |
| Highlights Neutral Floor Cleaner        | 2 Gallons | Unger 12" Channel/Rubber           | 1 Each   |
| Minuteman Electric Burnisher 20"        | 1 Each    | Vacuum Backpack SuperCoach         | 2 Each   |
| Minuteman 17" Fronrunner                | 1 Each    |                                    |          |

**ATTACHMENT 2**

**TERMS**

| Package | Initial Monthly Account Volume | Franchise Fee | 10% Discount | OPENWORKS FINANCING PROGRAMS |                 |                 |                        |                 |
|---------|--------------------------------|---------------|--------------|------------------------------|-----------------|-----------------|------------------------|-----------------|
|         |                                |               |              | STANDARD PROGRAM             |                 |                 | VETERANS PROGRAM       |                 |
|         |                                |               |              | Down Payment                 | Amount Financed | Monthly Payment | Amount of Down Payment | Monthly Payment |
| OW 3    | 3,000                          | 14,000        | 1,400        | 6,500                        | 7,500           | 353.25          | 6,500                  | 353.25          |
| OW 5    | 5,000                          | 18,500        | 1,850        | 9,500                        | 9,000           | 423.90          | 9,500                  | 423.90          |
| OW 7    | 7,000                          | 23,000        | 2,300        | 14,000                       | 9,000           | 423.90          | 11,500                 | 541.65          |
| OW 10   | 10,000                         | 30,000        | 3,000        | 21,000                       | 9,000           | 423.90          | 15,000                 | 706.50          |
| OW 15   | 15,000                         | 41,250        | 4,125        | 32,250                       | 9,000           | 423.90          | 20,625                 | 971.44          |
| OW 20   | 20,000                         | 54,000        | 5,400        | 45,000                       | 9,000           | 423.90          | 27,000                 | 1,271.70        |
| OW 25   | 25,000                         | 67,500        | 6,750        | 58,500                       | 9,000           | 423.90          | 33,750                 | 1,589.63        |

Your selected package: \_\_\_\_\_

**Pre-Existing Accounts.** You have the following pre-existing accounts to provide commercial janitorial or other facility services to the following customers which will be converted to OpenWorks accounts, according to Section 7.5 of this Agreement:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Signature: \_\_\_\_\_

ATTACHMENT 3

**PERSONAL GUARANTY**

1. In order to induce O.P.E.N. America, Inc. ("OpenWorks") to enter into a franchise agreement on this date (the "Agreement"), the undersigned ("Guarantor"), being principals of \_\_\_\_\_ (the "Franchisee") and the respective spouses (collectively "you"), jointly and severally, unconditionally guarantee to OpenWorks that the Franchisee will fully, promptly and faithfully perform and discharge all of its obligations, duties and conditions under the Agreement, and under any and all instruments, documents or other evidence of indebtedness, executed in connection with the Agreement and all related obligations of payment when due, whether by acceleration or otherwise, of any and all liability of yours to OpenWorks (the "Obligations"), together with all interest upon these liabilities and all attorneys' fees, costs and expenses of collection incurred by OpenWorks in enforcing any of these liabilities.

2. This guaranty will remain effective despite any renewal, modification, or waiver by OpenWorks of any of your obligations under this guaranty, and no such modification, renewal or waiver will operate to defeat this guaranty.

3. This guaranty is a continuing one and all liabilities to which it applies or may apply under the terms of this guaranty will be conclusively presumed to have been created in reliance on it.

4. Any and all rights and claims of yours or Guarantor or any of its property, arising by reason of any payment by the undersigned to OpenWorks under the provisions of this guaranty, will be subordinate and subject in right of payment to the prior payment in full of all liabilities of yours or Guarantor to OpenWorks.

5. Guarantor waives the right of trial by jury in the event of any litigation between the parties to this guaranty in respect of any matter arising under this guaranty and agrees that, should OpenWorks bring any judicial proceeding or arbitration in relation to any such matter, Guarantor will not interpose any counterclaim or set off of any nature.

6. The provisions of the Agreement providing that Arizona law shall govern, and requiring binding arbitration in Phoenix, Arizona shall also apply to this Guaranty and each Guarantor.

Date: \_\_\_\_\_, 200\_\_

Name: \_\_\_\_\_

Sign: \_\_\_\_\_

Spouse's Name: \_\_\_\_\_

Sign: \_\_\_\_\_

Name: \_\_\_\_\_

Sign: \_\_\_\_\_

Spouse's Name: \_\_\_\_\_

Sign: \_\_\_\_\_

ATTACHMENT 4

**NON-DISCLOSURE AND NON-COMPETITION AGREEMENT**

This Non-Disclosure and Non-Competition Agreement (this "Agreement") is made as of this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, by and between:

\_\_\_\_\_  
("Franchisee"),  
an OpenWorks Janitorial Franchisee under a janitorial Franchise Agreement (the  
"Franchise Agreement") between Franchisee and O.P.E.N. America, Inc.  
("Franchisor"); and

the undersigned ("Recipient"), who owns 10% or more of the ownership interests in Franchisee, and/or holds or has been offered a position as an employee of Franchisee (any such current and future interest or position held by Recipient is hereinafter referred to as the "Position").

Recipient acknowledges that Franchisee is entering into this Agreement for itself and for the benefit of Franchisor pursuant to the requirements of the Franchise Agreement.

**RECITALS:**

WHEREAS, in connection with his Position, Recipient will have access to, generate, or otherwise come into contact with certain proprietary and/or confidential information and trade secrets of Franchisee and Franchisor (collectively the "Confidential Information"), including without limitation training materials, programs, methods, techniques, specifications, standards, systems, procedures, sales and marketing programs and strategies, manuals, financial data, knowledge of specifications for and suppliers of equipment, supplies and services, bidding, pricing and billing methods, existing and prospective customer lists and information about them and their service contracts, at any time existing or under consideration, for the operation of OpenWorks' regional offices and commercial janitorial and other facility service businesses (the "System"); and

WHEREAS, Recipient, Franchisee and Franchisor desire to prevent the dissemination or misuse of such Confidential Information;

**AGREEMENT:**

NOW, THEREFORE, as an inducement to Franchisor to enter into the Franchise Agreement with Franchisee, or to approve a transfer to or appointment of Recipient, and/or in consideration of Recipient's employment or continued employment by Franchisee, Recipient and Franchisee (on behalf of both Franchisee and Franchisor) agree as follows:

**1. Confidential Information.**

**1.1. Ownership.** Recipient acknowledges that Franchisor and/or Franchisee is/are the sole owner of all the Confidential Information; that the Confidential Information is being imparted to Recipient in trust and confidence and only by reason of Recipient's Position; and that the Confidential Information is not generally known to the trade or public and is not known to Recipient except by reason of such disclosure. Recipient further acknowledges that Recipient shall acquire no interest in the Confidential Information, other than the right to utilize it in connection with the performance of duties associated with Recipient's Position. In addition,

Recipient acknowledges that the use, duplication or disclosure of the Confidential Information except as expressly permitted by this Agreement shall constitute an unfair method of competition and that Franchisor and Franchisee shall suffer irreparable injury thereby.

**1.2. Work Product.** Recipient agrees that all documents, papers, notes and other material and work product containing or derived from the Confidential Information or connected with Recipient's Position with Franchisee shall be Confidential Information. Recipient agrees that he will have no proprietary interest in any work product developed or used by him and arising out of his Position with Franchisee. Recipient will, from time to time, as may be requested by Franchisee or Franchisor, do all things which may be necessary to establish or document Franchisee's or Franchisor's ownership of any such work product, including without limitation execution of assignments.

**1.3. Confidentiality.** All of the Confidential Information and all information and knowledge about the System which is not in the public domain and such other information and material as Franchisor or Franchisee may designate as confidential shall be deemed confidential for purposes of this Agreement. Recipient acknowledges that the Confidential Information is disclosed to Recipient solely on the condition that Recipient agree, and Recipient hereby does agree, that Recipient: (a) will use the Confidential Information in strict accordance with the instructions and directions given by Franchisee or Franchisor from time to time; (b) will not use the Confidential Information in any other business or capacity; (c) will not, at any time, while holding any Position with Franchisee or thereafter, in any manner or form, directly or indirectly, disclose, duplicate, license, sell, reveal, divulge, publish or communicate the Confidential Information, or any portion thereof, to any person or entity other than Franchisee, or employees of Franchisee or Franchisor who need to have such information in connection with their jobs; (d) will not copy any materials containing the Confidential Information, including without limitation the System manuals, without Franchisor's prior written consent; (e) will observe and implement all reasonable procedures imposed from time to time by Franchisor and/or Franchisee to prevent the unauthorized use and disclosure of the Confidential Information; (f) will keep all System manuals and other written materials containing any portion of the Confidential Information in a secure manner and place; and (g) if Recipient is legally compelled to disclose any of the Confidential Information, will do so only if Recipient has used his or her best efforts to afford Franchisor and Franchisee the opportunity of obtaining appropriate protective orders or other assurances of confidentiality satisfactory to Franchisor and Franchisee.

**1.4. Return of Confidential Material.** Upon termination of his or her Position with Franchisee, Recipient shall promptly return to Franchisee all copies of any materials containing the Confidential Information and all property belonging to Franchisee and Franchisor, or either of them, in Recipient's possession, custody of control, including any of such items produced or prepared by Recipient.

## **2. Noncompetition.**

**2.1. Covenant.** Recipient recognizes that: (a) the commercial janitorial and other facility services business is very competitive; (b) the OpenWorks System is intended to expand to be national in scope; (c) Recipient by virtue of his or her Position will have access to the Confidential Information and will have close contacts with OpenWorks customers for the purpose of maintaining and further developing the business and goodwill of the System; (d) for these very reasons, the Position also provides Recipient with the attendant ability to divert customer trade; and (e) consequently, Franchisor and Franchisee each have strong legitimate

interests in obtaining the covenant herein for the protection of the good will of the System. Recipient therefore agrees that, without the express prior written consent of Franchisor and Franchisee, which either may withhold in its sole and absolute discretion, Recipient shall not, during the Time Period (as defined below), directly or indirectly, engage in, render services or provide financing to, or have any interest in, any Competitive Business (as defined below) located or conducting business within the Area (as defined below).

**2.2. Time Period.** For the purposes of Section 2.1 of this Agreement, the term "Time Period" shall mean (a) for the period while Recipient holds a Position with Franchisee; and (b) after the Recipient no longer holds a Position with Franchisee, for a period of (i) twelve months if Recipient is or ever was an owner of 10% or more of Franchisee, or (ii) six months if Recipient was never an owner of 10% or more of Franchisee; provided, however, that in no event shall the Time Period continue beyond the period that this same covenant of noncompetition remains in effect for the Franchisee.

**2.3. Competitive Business.** For the purposes of Section 2.1 of this Agreement, the term "Competitive Business" shall mean any business providing janitorial services to commercial customers, and the term shall also include any other facility services that Franchisee provides or provided to commercial customers while Recipient held a Position with Franchisee.

**2.4. Area.** For the purposes of Section 2.1 of this Agreement, the term "Area" shall mean (a) the geographical area in which Franchisee services or serviced OpenWorks customers, and (b) a radius of 75 miles from the regional office through which Franchisee conducts or conducted its OpenWorks business, and (c) a radius of 75 miles from any other OpenWorks regional office operated by Franchisor or any of its master franchisees in the state where Franchisee conducts or conducted its OpenWorks business, and (d) a radius of 75 miles from any other OpenWorks regional office operated by Franchisor or any of its master franchisees in any other state.

### **3. No Solicitation.**

**3.1. Employees.** Recipient agrees never to employ or solicit for employment any person who is at the time employed by Franchisor, Franchisee or any other franchisee in the OpenWorks System, and Recipient agrees not to directly or indirectly induce any such person to leave their employment with Franchisor, Franchisee or any other franchisee in the OpenWorks System.

**3.2. Customers.** Recipient agrees that during the time Recipient holds a Position with Franchisee, and after Recipient's Position with Franchisee ends, except for solicitations Recipient makes on behalf of Franchisee, Recipient will never solicit as a customer for commercial janitorial or other facility services: (a) any OpenWorks customers serviced by Franchisee during the period Recipient held a Position with Franchisee, or (b) any other persons or entities who were OpenWorks customers serviced by others during the period Recipient held a Position with Franchisee. Recipient also agrees that after Recipient no longer holds any Position with Franchisee, Recipient will not thereafter solicit as a customer for commercial janitorial or other facility services any prospective customers to whom OpenWorks had proposals or bids outstanding at the time Recipient's Position with Franchisee ended.

**4. Modification.** The covenants set forth in this Agreement shall each be construed as independent of any other covenant or provision of any other agreement.