

## **16. FRANCHISEE'S COVENANTS NOT TO COMPETE**

The restrictive covenants contained in this Section are provided for reasons including, but not limited to, the following: (a) to protect the trade secrets of Franchisor; (b) to induce Franchisor to grant a Franchise to Franchisee; and (c) to protect Franchisor against its costs in training and advising Franchisee and its owners, officers, directors, trustees, executives, managers and professional staff. Franchisor may require Franchisee to have each of its owners, officers, directors, trustees, executives, managers and professional staff sign like restrictive covenants, which shall protect both Franchisor and Franchisee, and, if required, said covenants executed by each of them shall remain on file at the offices of Franchisee and are subject to audit or review as otherwise set forth herein.

### **A. During Term**

Franchisee specifically acknowledges that pursuant to this Agreement, Franchisee will receive valuable training and Confidential Information of Franchisor and the System. Franchisee covenants that, except as otherwise approved in writing by Franchisor, neither Franchisee, nor any owner of Franchisee, nor any Affiliate of Franchisee, nor the Designated Manager, nor any officer, director, member, general partner or any holder of a legal or beneficial interest in Franchisee shall, during the term of this Agreement, either directly or indirectly, for themselves, or through, on behalf of or in conjunction with, any person, persons, partnership, business trust, corporation, limited liability company or other business entity:

1. Divert or attempt to divert any business or customer of the Franchised Business to any competition, by direct or indirect inducement or otherwise, or do or perform, directly or indirectly, any other act injurious or prejudicial to the goodwill associated with the Marks or the System;
2. Own an interest in, manage, operate, act as a consultant with respect to the management or operation of any Competitive Business wherever located.
3. Employ or seek to employ any person who is at that time employed by Franchisor or by any franchisee of Franchisor, or otherwise directly or indirectly induce or attempt to induce such person to leave his or her employment; or
4. Promote, sell, or provide for compensation any products or services offered by the Franchised Business, or otherwise operate the Franchised Business, within a protected territory licensed to another franchisee of Franchisor, or otherwise infringe upon rights granted under franchise agreements with other franchisees of Franchisor.

### **B. After Termination or Expiration**

Franchisee covenants that, except as otherwise approved in writing by Franchisor, neither Franchisee, nor any owner of Franchisee, nor any Affiliate of Franchisee nor the Designated Manager, nor any officer, director, member, trustee, general partner nor any owner of a legal or beneficial interest in Franchisee, executive or professional staff shall, for a period of

two (2) years after the expiration or termination of this Agreement, regardless of the cause of termination, either directly or indirectly, for themselves or through, on behalf of or in conjunction with, any person, persons, partnership, corporation, limited liability company, business trust or other business entity:

1. Own an interest in, manage, operate, act as a consultant with respect to the management, or operation of any Competitive Business within fifty (50) miles of the Franchised Business, or within fifty (50) miles of any other Franchisor or franchisee-owned NITELITES Business; or
2. Solicit or otherwise attempt to induce or influence any employee or other business associate to terminate or modify his, her or its business relationship with Franchisor or to compete against Franchisor.

**C. Reasonableness of Restrictions**

Franchisee acknowledges that the restrictive covenants contained in this Section 16 are essential elements of this Agreement and that without their inclusion, Franchisor would not have entered into this Agreement. Franchisee agrees that each of the terms set forth herein, including the restrictive covenants, are fair and reasonable, and are reasonably required for the protection of Franchisor and the Franchise System.

**D. Remedies**

As any breach by Franchisee of any of the covenants contained in this Section would result in irreparable injury to Franchisor, and as the damages arising out of any such breach would be difficult to ascertain, Franchisee agrees that, in addition to all other remedies provided by law or in equity, Franchisor, in the event of a breach or threatened breach of the covenants herein contained, shall be entitled to seek immediate equitable remedies including, but not limited to, restraining orders, preliminary and permanent injunctions in order to prevent Franchisee, its partners, members, officers, directors or employees from continuing to breach the covenants contained in this Section 16.

**E. Severability**

The foregoing covenants shall be construed as independent of any other covenant or provision of this Agreement. If all or any portion of a covenant in this Section is held unreasonable, then this Section 16 is hereby amended to provide for limitations to the maximum extent provided and permitted by law.

**17. DEFAULT AND TERMINATION**

**A. Termination by Franchisee**

If Franchisee is in substantial compliance with this Agreement and Franchisor materially breaches this Agreement and fails to cure such breach within a reasonable time after written notice thereof is delivered to Franchisor, Franchisee may terminate this Agreement unless the

breach cannot reasonably be cured within thirty (30) days, in which case, Franchisee will have the right to terminate this Agreement if, after receipt of a written notice of default, Franchisor does not promptly undertake and continue efforts to cure such material breach within a reasonable period of time and furnish Franchisee reasonable proof of such efforts. To terminate this Agreement under this paragraph, Franchisee must provide a separate written notice of termination, which will be effective no less than thirty (30) days after delivery of such notice to Franchisor.

**B. Termination by Franchisor**

1. This Agreement shall, at the option of Franchisor, terminate upon written notice to Franchisee and without opportunity to cure, if Franchisee:
  - a. Fails to establish and equip the Franchise Premises and service vehicles as provided in Section 5.C of this Agreement;
  - b. Fails to satisfactorily complete the initial training program as provided in Section 9.A of this Agreement;
  - c. Fails to meet the minimum Local Advertising expenditures required by Section 10.A for two (2) consecutive calendar quarters;
  - d. Has made any material misrepresentation or omission in the application for the Franchise;
  - e. Is convicted of or pleads no contest to a felony or other crime or offense that is likely to adversely affect the reputation of Franchisor, Franchisee or the Franchised Business;
  - f. Makes any unauthorized use, disclosure or duplication of any portion of the Manual or duplicates or discloses or makes any unauthorized use of any trade secret or Confidential Information provided to Franchisee;
  - g. Abandons, fails or refuses to actively operate the Franchised Business for five (5) or more consecutive days, unless the Franchised Business has not been operational for a purpose approved by Franchisor;
  - h. Surrenders or transfers control of the operation of the Franchised Business, makes or attempts to make an unauthorized direct or indirect assignment of the Franchise or an ownership interest in Franchisee, or fails or refuses to assign the Franchise or the interest in Franchisee of a deceased or incapacitated controlling owner thereof as herein required;
  - i. Is adjudicated as bankrupt, becomes insolvent, commits any affirmative act of insolvency or files any action or petition of insolvency; if a receiver (permanent or temporary) of its property or any part thereof is appointed by a court of competent authority; if it makes a general assignment for the

benefit of its creditors; if a final judgment remains unsatisfied of record for thirty (30) days or longer (unless supersedeas bond is filed); if execution is levied against the Franchised Business or its property; if suit to foreclose any lien or mortgage against the premises or equipment is instituted against Franchisee and not dismissed within thirty (30) days or is not in the process of being dismissed;

- j. Materially misuses or makes any unauthorized use of any of the Marks or commits any other act which can reasonably be expected to materially impair the goodwill associated with any of the Marks;
  - k. Fails on three (3) or more separate occasions within any period of twelve (12) consecutive months to submit reports or other information or supporting records when due, to pay Royalty Fees, Marketing Fund Contributions, or other payments when due to Franchisor and any Affiliate of Franchisor, or otherwise fails to comply with this Agreement, whether or not such failures to comply are corrected after notice thereof is delivered to Franchisee;
  - l. Continues to violate any health or safety law, ordinance or regulation after receipt of notice (regardless of the source of the notice), or operates the Franchised Business in a manner that presents a health or safety hazard to its customers or the public; or
  - m. Promotes, sells or provides for compensation any products or services offered by the Franchised Business, or otherwise operates the Franchised Business, within a protected territory licensed to another franchisee of Franchisor, or otherwise infringes upon rights granted under franchise agreements with other franchisees of Franchisor, without the written permission of Franchisor.
2. This Agreement shall terminate, at Franchisor's sole option, upon the occurrence of any of the following events and Franchisee's failure to cure within the specified time periods if:
- a. Franchisee fails or refuses to make payments of any amounts due Franchisor, or any Affiliate of Franchisor, for Royalty Fees, Marketing Fund Contributions, purchases from Franchisor or any Affiliate of Franchisor, or any other amounts due to Franchisor or any Affiliate of Franchisor, and does not correct such failure or refusal within thirty (30) days after written notice of such failure is delivered to Franchisee;
  - b. Fails to meet the Minimum Annual Purchase requirements in Section 13.E, and does not cure the failure by paying Franchisor, within thirty (30) days after the end of the twelve-month period, the difference between the Minimum Annual Purchase required by Section 13.E and Franchisee's actual purchases of NITELITES Products and Equipment for the period;

- c. Franchisee breaches Section 13.D.2, and does not cure the failure by paying Franchisor, within thirty (30) days after receipt of written notice, by paying Franchisor an amount equal to seventy-five percent (75%) of the revenue received by Franchisee from sales of competing or substitute products or equipment.
- d. Franchisee fails or refuses to comply with any other provision of this Agreement not otherwise listed in Section 17.B.1 above, or any mandatory specification, standard or operating procedure prescribed in the Manual or otherwise in writing, and does not correct such failure within thirty (30) days or provide proof acceptable to Franchisor that Franchisee has made all reasonable efforts to correct such failure and shall continue to make all reasonable efforts to cure until a cure is effected; if such failure cannot reasonably be corrected within thirty (30) days after written notice of such failure to comply is delivered to Franchisee.

**C. Right of Franchisor to Discontinue Sales to Franchisee**

If Franchisor delivers to Franchisee a notice of termination pursuant to Section 17.B.2 of this Agreement, or exercises its Option to Terminate pursuant to Section 21.A of this Agreement, in addition to Franchisor's other remedies, Franchisor and its Affiliate(s) reserve the right to discontinue selling to Franchisee any services or products for which they are Approved Suppliers (until such time as Franchisee corrects the default in the case of a termination pursuant to Section 17.B.2).

**D. Reinstatement and Extension**

To the extent that the provisions of this Agreement provide for periods of notice less than those required by applicable law, or provide for termination, cancellation, nonrenewal or the like, other than in accordance with applicable law, to the extent such are not in accordance with applicable law, Franchisor may reinstate or extend the term for the purpose of complying with applicable law by submitting a written notice to Franchisee without waiving any of Franchisor's rights under this Agreement.

**18. RIGHTS AND DUTIES UPON EXPIRATION OR TERMINATION**

**A. Events Upon Termination**

Upon termination or expiration, this Agreement and all rights granted hereunder to Franchisee shall terminate and Franchisee will:

1. immediately cease to operate the Franchised Business under this Agreement and shall not thereafter, directly or indirectly, represent to the public or hold itself out as a present or former franchisee of Franchisor;
2. upon demand by Franchisor, assign (or, if an assignment is prohibited, sublease for the full remaining term and on the same terms and conditions as Franchisee's

lease) its interest in the lease then in effect for the Franchise Premises to Franchisor, and Franchisee shall furnish Franchisor with evidence satisfactory to Franchisor of compliance with this obligation within thirty (30) days after termination or expiration of this Agreement. Franchisor shall have the right to make rental and other payments directly to the landlord or other party to whom such payment is ultimately due;

3. immediately and permanently cease to use the Confidential Information, the System, the Marks and any distinctive forms, slogans, signs, symbols, logos, photographs or devices associated with the Marks or System. In particular, Franchisee shall cease to use, without limitation, all signs, advertising materials, stationery, forms and any other article, which display the Marks;
4. take such action as may be necessary to cancel or assign to Franchisor, at Franchisor's option, any assumed name or equivalent registration filed with state, city or county authorities which contains the name "NITELITES" or any of the Marks, and Franchisee shall furnish Franchisor with evidence satisfactory to Franchisor of compliance with this obligation within thirty (30) days after termination or expiration of this Agreement;
5. pay all sums owing to Franchisor. In the event of termination for any default of Franchisee, such sums shall include, but not be limited to, all damages, costs and expenses, including reasonable attorneys' fees incurred by Franchisor as a result of the default;
6. pay to Franchisor all damages, costs and expenses, including reasonable attorneys' fees, incurred by Franchisor subsequent to the termination or expiration of the Franchise in obtaining injunctive or other relief for the enforcement of any provisions of this Section 18;
7. immediately turn over to Franchisor the Manual, all Confidential Information, all copyrighted or proprietary materials and all other records, files, instructions, brochures, agreements, disclosure statements and any and all other materials provided by Franchisor to Franchisee relating to the operation of the Franchised Business (all of which are acknowledged to be Franchisor's property);
8. assign to Franchisor, at Franchisor's option, all telephone numbers (and associated listings) for the Franchised Business; and
9. comply with all other applicable provisions of this Agreement including the non-compete provisions contained in Section 16 of this Agreement.

**B. Franchisor's Option to Purchase Certain Assets**

Franchisor shall have the right (but not the duty) to be exercised by notice of intent to do so within thirty (30) days after termination or expiration, to purchase for cash, except as provided in this Section 18.B, any or all assets of the Franchised Business containing the

Marks, including leasehold improvements, equipment, supplies and other inventory, advertising materials and any other additional items, at Franchisee's cost or fair market value, whichever is less. If Franchisor elects to exercise any option to purchase as herein provided, it shall have the right to set off all amounts due from Franchisee under this Agreement, if any, against any payment therefor.

**C. If Franchisee Starts Another Business**

In the event Franchisee continues to operate or subsequently begins to operate any other business, Franchisee shall not use any reproduction, counterfeit, copy or colorable imitation of the Marks either in connection with such other business or the promotion thereof, which is likely to cause confusion, mistake or deception, or which is likely to dilute Franchisor's rights in and to the Marks. Franchisee shall not utilize any designation of origin, or description or representation which falsely suggests or represents an association or connection with Franchisor. This Section 18.C is not intended as an approval of Franchisee's right to operate other businesses and in no way is it intended to contradict Section 18.A of this Agreement. Franchisee shall make such modifications or alterations to the Franchise Premises (including, without limitation, the changing of telephone and facsimile numbers) immediately upon termination or expiration of this Agreement as may be necessary to prevent any association between Franchisor or the System and any business thereon subsequently operated by Franchisee or others, and shall make such specific additional changes thereto as Franchisor may reasonably request for that purpose including, without limitation, removal of all distinctive physical and structural features identifying the System. In the event Franchisee fails or refuses to comply with the requirements of this Section 18.C, Franchisor shall have the right to enter upon the Franchise Premises, without being guilty of trespass or any other tort, for the purpose of making or causing to be made such changes as may be required, at the expense of Franchisee, which expense Franchisee shall pay upon demand.

**D. Survival of Certain Provisions**

All obligations of Franchisor and Franchisee, which expressly or by their nature survive the expiration or termination of this Agreement, shall continue in full force and effect subsequent to and notwithstanding their expiration or termination and until satisfied or by their nature expire.

**E. Liquidated Damages**

If termination is the result of Franchisee's default, Franchisee will pay to Franchisor a lump sum payment (as liquidated damages for causing the premature termination of this Agreement and not as a penalty) equal to *One Hundred Thousand Dollars (\$100,000.00)*. The parties agree that a precise calculation of the full extent of the damages that Franchisor will incur on termination of this Agreement as a result of Franchisee's default is difficult and the parties desire certainty in this matter and agree that the lump sum payment provided under this Section is reasonable in light of the damages for premature termination that Franchisor will incur. This payment is not exclusive of any other remedies that Franchisor may have including, equitable remedies, attorneys' fees and costs.

## **F. Remedies**

Franchisee acknowledges that Franchisor shall be entitled to seek immediate equitable remedies including, but not limited to, restraining orders, preliminary and permanent injunctions in order to safeguard the Confidential Information, Marks and System of Franchisor and that money damages alone may not be a sufficient remedy with which to compensate Franchisor for any breach of the terms of this Section 18.

## **19. TRANSFERABILITY OF INTEREST**

### **A. By Franchisor**

This Agreement and all rights hereunder can be assigned and transferred by Franchisor and, if so, shall be binding upon and inure to the benefit of Franchisor's successors and assigns; provided, however, that with respect to any assignment resulting in the subsequent performance by the assignee of the functions of Franchisor, the assignee shall assume the obligations of Franchisor hereunder.

### **B. By Franchisee to a Third Party**

The rights and duties of Franchisee as set forth in this Agreement, and the Franchise herein granted, are personal to Franchisee, and Franchisor has agreed to enter into this contract with Franchisee in reliance upon Franchisee's personal skill and financial ability. Accordingly, neither Franchisee nor any successor of Franchisee, either immediate or remote, to any part of Franchisee's interest in this Agreement may sell, assign, transfer, convey, give away, pledge, mortgage or otherwise encumber any interest in Franchisee, in this Agreement or in the Franchise granted hereby. Any purported assignment or transfer, whether by operation of law or otherwise, or encumbrance of all or any part of Franchisee's rights under this Agreement, or of all or any part of the ownership interests in Franchisee, or of all or any part of the operating control of the Franchised Business, or of fifteen percent (15%) or more of the assets used in the operation of the Franchised Business, shall be null and void and shall constitute a material breach of this Agreement, for which breach Franchisor may then terminate this Agreement without notice or opportunity to cure, unless such assignment, transfer or encumbrance has the prior written consent of Franchisor. If Franchisee desires to sell or transfer any rights or assets described in the preceding sentence to any transferee, Franchisee shall first obtain the written consent of Franchisor to such transaction, which consent will be conditioned upon the satisfaction of the following conditions:

1. All obligations owed to Franchisor and all other outstanding obligations relating to the Franchised Business shall be fully paid and satisfied.
2. Unless prohibited by the law of the state where the Franchised Business is located, Franchisee shall have executed a general release, in a form satisfactory to Franchisor, of any and all claims against Franchisor and its Affiliate(s) and their respective officers, directors, shareholders and employees, in their corporate and individual capacities including, without limitation, claims arising under federal, state or local laws, rules, regulations or ordinances, and any other matters incident to



the termination of this Agreement or to the transfer of Franchisee's interest herein or to the transfer of Franchisee's ownership of all or any part of the entity which operates the Franchised Business. If a general release is prohibited, Franchisee shall give the maximum release allowed by law.

3. The transferee shall have satisfied Franchisor that it meets Franchisor's management, business and financial standards and otherwise possesses the character and capabilities, including business reputation and credit rating, as Franchisor may require, to demonstrate ability to conduct the Franchised Business.
4. The transferee and, at Franchisor's option, all persons owning any interest in the transferee, shall execute the then-current Franchise Agreement for new franchisees, which may be substantially different from this Agreement including, without limitation, differences in Marketing Fund Contributions, required advertising expenditures and contributions, territorial protections and other material provisions. The Franchise Agreement then executed shall be for the term specified in such Agreement.
5. The transferee shall have executed a general release, in a form satisfactory to Franchisor, of any and all claims against Franchisor and its officers, directors, shareholders and employees, in their corporate and individual capacities, with respect to any representations regarding the Franchise or the business conducted pursuant thereto or any other matter that may have been made to the transferee by the transferring Franchisee.
6. Franchisee shall have provided Franchisor with a complete copy of all contracts and agreements and related documentation between Franchisee and the transferee relating to the sale or transfer of the Franchise.
7. Franchisee shall have paid to Franchisor a transfer fee in the amount of *Five Thousand Dollars (\$5,000.00)* to defray Franchisor's costs including, but not limited to, due diligence, legal work and training. A transfer fee shall not be required pursuant to a transfer by Franchisee to an entity controlled by Franchisee under the terms of Section 19.D of this Agreement.
8. The transferee shall have obtained all necessary consents and approvals by third parties (such as the lessor of the Franchise Premises), and the transfer shall be made in compliance with all applicable federal, state and local laws, rules, regulations and ordinances.
9. The transferee must complete the initial training program as provided in Section 9.A of this Agreement.
10. Franchisee shall, and if a business entity have caused all of its equity owners to, execute and deliver to Franchisor a nondisclosure and non-competition agreement in a form satisfactory to Franchisor and, in substance, the same as the non-competition agreement contained in Section 7.D of this Agreement.

**C. Pledge of Franchise**

Notwithstanding any other provision of this Section 19, neither Franchisee nor any shareholder, member or partner of Franchisee, nor any immediate or remote successor to any part of Franchisee's interest in the Franchised Business, shall pledge, mortgage, grant a security interest, or otherwise encumber any interest in this Agreement, in the Franchise granted hereunder, or in Franchisee (whether or not in connection with an absolute transfer of an interest in the Franchised Business). Franchisor shall not be obliged to consent to any such transfer.

**D. Transfer by Franchisee to an Entity Controlled by Franchisee**

If Franchisee wishes to transfer this Agreement or any interest therein to a corporation, limited liability company or other legal entity ("Controlled Entity") controlled by Franchisee, which Controlled Entity is being formed for the financial planning, tax or other convenience of Franchisee, Franchisor's consent to such transfer shall be conditioned upon the following requirements:

1. The Controlled Entity shall be newly organized and its charter shall provide that its activities are confined exclusively to the operation of the Franchised Business.
2. There may be no more than five (5) owners of legal or beneficial interests in the Controlled Entity, and all owners must be individuals.
3. Franchisee shall beneficially own a controlling interest in the Controlled Entity, shall not diminish its ownership interest therein, except as may be required by law, and shall act as the principal officer or officers and directors thereof.
4. All obligations of Franchisee to Franchisor or any Affiliate shall be fully paid and satisfied prior to Franchisor's consent, provided that Franchisee shall not be required to pay a transfer fee, as required, pursuant to Section 19.B.7 of this Agreement for any transfer under this Section 19.D.
5. The Controlled Entity shall enter into a written agreement with Franchisor expressly assuming the obligations of this Agreement and all other agreements relating to the operation of the Franchised Business. If the consent of any other contracting party to any such agreement is required, Franchisee shall have obtained such written consent and provided the same to Franchisor prior to consent by Franchisor.
6. All owners of the stock or other ownership interest of the Controlled Entity shall enter into an agreement with Franchisor, jointly and severally, guaranteeing the full payment of the Controlled Entity's obligations to Franchisor and the performance by the Controlled Entity of all the obligations of this Agreement.
7. Each stock certificate or other ownership interest certificate of the Controlled Entity shall have conspicuously endorsed upon the face thereof of a statement in a form

satisfactory to Franchisor that it is held subject to, and that further assignment or transfer thereof is subject to, all restrictions imposed upon transfers and assignments by this Agreement. If Franchisee is a partnership, limited liability company, or other entity without certificates evidencing ownership, Franchisee shall provide Franchisor with acceptable evidence that its partnership or operating agreement or other organizational documents contain provisions acceptable to Franchisor prohibiting the transfer of any ownership interest in Franchisee other than in compliance with the terms of this Agreement. Franchisee shall not cause or permit any such provision to be deleted or modified during the term of this Agreement.

8. Copies of the Controlled Entity's articles of incorporation or organization, bylaws, operating agreement, and other governing regulations or documents, including resolutions of the board of directors authorizing entry into this Agreement, shall be promptly furnished to Franchisor. Any amendment to any such documents shall also be furnished to Franchisor immediately upon adoption.
9. The term of the transferred franchise shall be the unexpired term of this Agreement.
10. Franchisor's consent to a transfer of any interest in this Agreement or of any ownership interest in the Franchised Business shall not constitute a waiver of any claims Franchisor may have against the transferor or the transferee, nor shall it be deemed a waiver of Franchisor's right to demand compliance with the terms of this Agreement.

**E. Franchisor's Disclosure to Transferee**

Franchisor may, without liability of any kind or nature whatsoever to Franchisee, make available for inspection by any intended transferee of Franchisee all or any part of Franchisor's records relating to this Agreement, the Franchised Business or to the history of the relationship of the parties hereto. Franchisee hereby specifically consents to such disclosure by Franchisor and absolutely releases and agrees to hold Franchisor harmless from and against any claim, loss or injury resulting from an inspection of Franchisor's records relating to the Franchised Business by an intended transferee identified by Franchisee.

**F. For Sale Advertising**

Franchisee shall not, without prior written consent of Franchisor, place in, on or upon the location of the Franchised Business, or in any communication media, any form of advertising relating to the sale of the Franchised Business or the rights granted hereunder.

**G. Death or Incapacity of Franchisee**

Upon the death or incapacity of any person with an interest in this Agreement as determined by a court of competent jurisdiction, the executor, administrator, or personal representative of such person's estate shall transfer its interest to a third party approved by

Franchisor within six (6) months after such death or incapacity. Such transfers including, without limitation, transfers by devise or inheritance, shall be subject to the same conditions as set forth in Section 19.B hereof. However, in the case of transfer by devise or inheritance, if the heirs or beneficiaries of any such person are unable to meet the conditions in this Section 19, the personal representative of the deceased Franchisee shall have six (6) months in which to dispose of the deceased's interest in the Franchise, which disposition shall be subject to all the terms and conditions for transfers contained in this Agreement. If the interest is not disposed of within such six (6) month period, Franchisor may terminate this Agreement.

## **20. RIGHT OF FIRST REFUSAL**

### **A. Submission of Offer**

If Franchisee or its owners propose to sell the Franchised Business (or any of its assets), any ownership interest of Franchisee or any ownership interest in this Agreement or in the Franchise granted hereunder, Franchisee shall obtain and deliver a bona fide, executed written offer or proposal to purchase, along with all pertinent documents including any contract or due diligence materials to Franchisor. The offer must apply only to the approved sale of the above and may not include any other property or rights of Franchisee or its owners.

### **B. Franchisor's Right to Purchase**

Franchisor shall, for thirty (30) days from the date of delivery of all such documents, have the right, exercisable by written notice to Franchisee, to purchase the ownership interest or assets for the price and on the same terms and conditions contained in such offer or proposal to Franchisee. Franchisor may substitute cash for the fair market value of any form of payment proposed in such offer or proposal. Franchisor's credit shall be deemed equal to the credit of any proposed buyer. Franchisor shall be entitled to receive from Franchisee all customary representation and warranties given by Franchisee as the seller of the assets or such ownership interest.

### **C. Non-Exercise of Right of First Refusal**

If Franchisor does not exercise this right of first refusal within thirty (30) days of Franchisor's receipt of all of the pertinent offer documents referenced in Section 20.A above, the offer or proposal may be accepted by Franchisee or its owners, subject to the prior written approval by Franchisor, as provided in Section 19, of the proposed transfer. Should the sale fail to close within one hundred twenty (120) days after the offer is delivered to Franchisor, Franchisor shall again have the right of first refusal herein described. Should a transferee assume the rights and obligations under this Agreement, such transferee shall likewise be subject to Franchisor's right of first refusal under terms and conditions as set forth herein.

## 21. FRANCHISOR'S OPTION TO TERMINATE

### A. Exercise of Option

At any time during the term of this Agreement, Franchisor has the right and option to unilaterally terminate this Agreement (the "Option to Terminate") by refunding the Franchise Fee paid by Franchisee pursuant to Section 3.A of this Agreement, and releasing Franchisee from its post-termination obligations under Section 16.B. To exercise the Option to Terminate, Franchisor shall provide Franchisee with written notice thereof. The notice shall (i) specify a date (the "Termination Date") upon which this Agreement will terminate without further notice or action, and (ii) contain a waiver and release of Franchisee's obligations under Sections 16.B and 18.A of this Agreement (except those portions of Section 18.A reiterated in Section 21.B below). The Termination Date shall be not less than three (3) months (or such longer period as may be required by applicable state law), but not more than six (6) months, after Franchisee's receipt of the notice. Franchisor shall deliver to Franchisee, on or before the Termination Date, a certified or bank check in the amount of the Franchise Fee paid by Franchisee. Franchisor shall have the right to set-off, against the amount due Franchisee under this paragraph, any amounts due Franchisor or any Affiliate from Franchisee, including, by way of illustration and not limitation, any Royalty Fees, Marketing Fund Contributions, interest, late charges or audit expenses.

### B. Franchisee's Obligations Upon Exercise of Option

Upon the termination of this Agreement by Franchisor pursuant to Section 21.A above, this Agreement and all rights granted hereunder to Franchisee shall terminate as of the Termination Date, whereupon Franchisee shall:

1. cease and refrain from directly or indirectly representing to the public or holding itself out as a present or former franchisee of Franchisor;
2. immediately and permanently cease to use the Confidential Information, the System, the Marks and any distinctive forms, slogans, signs, symbols, logos, photographs or devices associated with the Marks or System. In particular, Franchisee shall cease to use, without limitation, all signs, advertising materials, stationery, forms and any other article, which display the Marks;
3. take such action as may be necessary to cancel or assign to Franchisor, at Franchisor's option, any assumed name or equivalent registration filed with state, city or county authorities which contains the name "NITELITES" or any of the Marks, and Franchisee shall furnish Franchisor with evidence satisfactory to Franchisor of compliance with this obligation within thirty (30) days after the Termination Date;
4. pay all sums owing to Franchisor;
5. immediately turn over to Franchisor the Manual, all Confidential Information, all copyrighted or proprietary materials and all other records, files, instructions,

brochures, agreements, disclosure statements and any and all other materials provided by Franchisor to Franchisee relating to the operation of the Franchised Business (all of which are acknowledged to be Franchisor's property);

6. assign to Franchisor, at Franchisor's option, all telephone numbers (and associated listings) for the Franchised Business; and
7. comply with all other applicable provisions of this Agreement except the non-compete provisions in Section 16.B of this Agreement.

## **22. RELATIONSHIP OF THE PARTIES AND INDEMNIFICATION**

### **A. Independent Contractor**

This Agreement does not constitute Franchisee as an agent, legal representative, joint venturer, partner, employee or servant of Franchisor for any purpose whatsoever. Franchisee may not represent to third parties that Franchisee is an agent of Franchisor and it is understood between the parties hereto that Franchisee shall be an independent contractor and is in no way authorized to make any contract, agreement, warranty or representation on behalf of Franchisor, or to create any obligation, express or implied, on Franchisor's behalf. Under no circumstances shall Franchisor be liable for any act, omission, contract, debt or any other obligation of Franchisee. Franchisee specifically acknowledges that Franchisor shall in no way be responsible for any injuries to persons or property resulting from the operation of the Franchised Business. In addition, any third party contractors and vendors retained by Franchisor to perform conversion or construction of the Franchise Premises are independent contractors. During the term of this Agreement and any extension hereof, Franchisee shall hold itself out to the public as an independent contractor operating the Franchised Business pursuant to a franchise from Franchisor. Franchisee shall take such affirmative action as may be necessary to do so including, without limitation, exhibiting a notice of that fact in a conspicuous place at the Franchise Premises and on all forms, stationery or other written materials, the content of which Franchisor reserves the right to specify.

### **B. Indemnification**

Franchisee shall hold harmless and indemnify Franchisor and its Affiliates and their respective members, partners, shareholders, officers, directors, employees and agents and successors or assigns (collectively "Franchisor Indemnitees") from and against all losses, damages, fines, costs, expenses, lost profits, loss, damages, or liability (including attorneys' fees and all other costs of litigation) incurred in connection with any action, suit, demand, claim, investigation, proceeding or inquiry, or any settlement thereof which arises from or is based upon Franchisee's (a) ownership or operation of the Franchised Business; (b) violation, breach or asserted violation or breach of any federal, state or local law, regulation or rule; (c) breach of any representation, warranty, covenant, or provision of this Agreement or any other agreement between Franchisee and Franchisor or Franchisor's Affiliates; (d) libel, slander or other form of defamation of Franchisor or the System by Franchisee; (e) acts, errors or omissions incurred in connection with or arising out of the Franchised Business, including any negligent or intentional

acts; or (f) infringement, violation or alleged infringement or violation of any Mark, patent or copyright or any misuse of the Confidential Information (excluding, however, liabilities caused by (i) Franchisee's proper reliance on or use of procedures or materials provided by Franchisor or (ii) Franchisor's negligence). In addition, Franchisee shall indemnify Franchisor Indemnitees for any and all losses, compensatory damages, exemplary or punitive damages, fines, charges, costs, expenses, lost profits, settlement amounts, judgments, damages to Franchisor's reputation and goodwill, costs of advertising material, media time and space and substituting and replacing the same, all costs of recall, refunds, compensation, all public notices and other such amounts which may arise or result from any of the actions, commissions or items listed in this Section.

### **C. Right to Retain Counsel**

Franchisee agrees to give Franchisor immediate notice of any such action, suit, proceeding, claim, demand, inquiry or investigation that may give rise to a claim by a Franchisor Indemnitee pursuant to Section 22.B. Franchisor shall have the absolute right to retain counsel of its own choosing in connection with any such action, suit, proceeding, claim, demand, inquiry or investigation. In order to protect persons or property or Franchisor's reputation or goodwill of others, Franchisor may, at any time without notice, take such other remedial or corrective actions as it deems expedient with respect to any action, suit, proceeding, claim, demand, inquiry or investigation if, in Franchisor's sole judgment, there are reasonable grounds to believe any of the acts or circumstances listed above have occurred. In the event Franchisor's exercise of its rights under this Section actually results in any of Franchisee's insurers refusing to pay on a third party claim, all cause of action and legal remedies Franchisee might have against such insurer shall automatically be assigned to Franchisor without the need for any further action on either party's part. Under no circumstances shall Franchisor be required or be obligated to seek coverage from third parties or otherwise mitigate losses in order to maintain a claim against Franchisee. Franchisee agrees that the failure to pursue such remedy or mitigate such loss will in no way reduce the amounts recoverable by Franchisor from Franchisee.

## **23. GENERAL CONDITIONS AND PROVISIONS**

### **A. Non-Waiver**

No failure of Franchisor to exercise any power reserved to it hereunder, or to insist upon strict compliance by Franchisee with any obligation or condition hereunder, and no custom or practice of the parties in variance with the terms hereof, shall constitute a waiver of Franchisor's right to demand exact compliance with the terms hereof. Waiver by Franchisor of any particular default by Franchisee shall not be binding unless in writing and executed by the party sought to be charged and shall not affect or impair Franchisor's right with respect to any subsequent default of the same or of a different nature; nor shall any delay, waiver, forbearance or omission of Franchisor to exercise any power or rights arising out of any breach or default by Franchisee of any of the terms, provisions or covenants hereof, affect or impair Franchisor's rights nor shall such constitute a waiver by Franchisor of any right hereunder or of the right to declare any subsequent breach or default. Subsequent acceptance by Franchisor of any payment(s) due to it hereunder shall not be deemed to be a waiver by Franchisor of any preceding breach by Franchisee of any terms, covenants or conditions of this Agreement.

**B. Notices**

Any payments and reports to be made pursuant to this Agreement may be made by ordinary mail, postage prepaid, but the sender assumes all risk of delay or failure of delivery. Unless expressly provided otherwise, all due dates in this Agreement refer to the date of receipt. All notices, requests, demands and other communications required or permitted under this Agreement shall be in writing, shall be addressed as provided below in this Section 23.B, shall be made (i) by personal delivery, (ii) by certified mail, postage prepaid, return receipt requested, or (iii) by overnight delivery service with proof of delivery, and shall be effective upon receipt or refusal thereof. Any notice sent by certified mail as provided in this paragraph, if returned unclaimed, may be re-sent by ordinary mail, postage prepaid, and will be effective seventy-two (72) hours after deposit in the U.S. mail. All notices, requests, demands, payments, reports and other communications shall be addressed as follows, or to such other persons or address as the parties may provide by notice to the other party as provided in this Section 23.B:

to Franchisor: NITELITES FRANCHISE SYSTEMS, INC.  
Attention: President  
6107 Market Avenue  
Franklin, Ohio 45005

to Franchisee: \_\_\_\_\_  
Attention: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**C. Cost of Enforcement or Defense**

If Franchisor or Franchisee is required to enforce this Agreement in a judicial or arbitration proceeding, the prevailing party shall be entitled to reimbursement of its costs, including reasonable accounting and legal fees, in connection with such proceeding.

**D. Guaranty and Assumption of Obligations**

All holders of a legal or beneficial interest in Franchisee of five percent (5%) or greater shall be required to execute the Guaranty and Assumption of Obligations attached hereto as Exhibit F and incorporated herein by reference.

**E. Non-Individual Franchisee**

If Franchisee is other than an individual, it shall comply with the requirements of subparagraphs 1 through 8 below before its execution of this agreement.

1. Franchisee must be newly organized and its charter, articles of organization, bylaws, or operating agreement must provide that its activities are confined exclusively to operating the Franchised Business.



2. There may be no more than five (5) owners of legal or beneficial interests in Franchisee, and all owners must be individuals.
3. Franchisee shall provide Franchisor with written information about each shareholder, member, or partner ("Principal") of Franchisee, and the ownership interest of each, and shall promptly notify Franchisor of any changes in any of that information.
4. Each Principal of Franchisee must enter into an agreement, in a form satisfactory to Franchisor, jointly, severally and unconditionally guaranteeing the full payment and performance of Franchisee's obligations to Franchisor.
5. Each ownership certificate of Franchisee must have conspicuously endorsed upon its face the following legend:

"The transfer, sale or pledge of these shares is subject to the terms and conditions of a Franchise Agreement with NiteLites Franchise Systems, Inc."
6. If Franchisee is a partnership or limited liability company without certificates evidencing ownership, Franchisee shall provide Franchisor with acceptable evidence that its partnership or operating agreement or other organizational documents contain provisions acceptable to Franchisor prohibiting the transfer of any ownership interest in Franchisee other than in compliance with the terms of this agreement. Franchisee shall not cause or permit any such provision to be deleted or modified.
7. Franchisee shall furnish copies of its articles of incorporation or organization, by-laws, partnership agreement, operating agreement, and other governing documents, including the resolutions of its Principals or governing board authorizing the execution of this Agreement, to Franchisor for approval.
8. Franchisee's name may not consist of or contain the words NITELITES, any colorable variation thereof, or any of the other Marks.

#### **F. Approvals**

Whenever this Agreement requires the prior approval or consent of Franchisor, Franchisee shall make a timely written request to Franchisor therefor and, except as otherwise provided herein, any approval or consent granted shall be effective only if in writing. Franchisor makes no warranties or guarantees upon which Franchisee may rely and assumes no liability or obligation to Franchisee or any third party to which it would not otherwise be subject, by providing any waiver, approval, advice, consent or services to Franchisee in connection with this Agreement, or by reason of any neglect, delay or denial of any request therefor.

#### **G. Entire Agreement**

This Agreement, together with the exhibits attached hereto and the documents referred to herein, shall be construed together and constitute the entire, full and complete agreement

between Franchisor and Franchisee concerning the subject matter hereof, and shall supersede all prior agreements. No representation other than those contained herein or in Franchisor's Franchise Offering Circular has induced Franchisee to execute this Agreement and there are no representations, inducements, promises or agreements, oral or otherwise, between the parties not embodied herein, which are of any force or effect with reference to this Agreement or otherwise. No amendment, change or variance from this Agreement shall be binding on either party unless executed in writing by both parties.

#### **H. Severability**

Each paragraph, part, term and/or provision of this Agreement shall be considered severable, and if, for any reason, any paragraph, part, term and/or provision herein is determined to be invalid and contrary to, or in conflict with, any existing or future law or regulation, such shall not impair the operation of or affect the remaining portions, paragraphs, parts, terms and/or provisions of this Agreement, and the latter shall continue to be given full force and effect and bind the parties hereto; and said invalid paragraphs, parts, terms and/or provisions shall be deemed not part of this Agreement; provided, however, that if Franchisor determines that said finding of illegality adversely affects the basic consideration of this Agreement, Franchisor may, at its option, terminate this Agreement. Anything to the contrary herein notwithstanding, nothing in this Agreement is intended, nor shall be deemed, to confer upon any person or legal entity other than Franchisor or Franchisee and such of their respective successors and assigns as may be contemplated by this Agreement, any rights or remedies under or by reason of this Agreement. Franchisee expressly shall be bound by any promise or covenant imposing the maximum duty permitted by law which is contained within the terms of any provision hereof, as though it were separately stated in and made a part of this Agreement, that may result from striking from any of the provisions hereof any portion or portions which a court may hold to be unreasonable and unenforceable in a final decision to which Franchisor is a party, or from reducing the scope of any promise or covenant to the extent required to comply with such a court order.

#### **I. Construction**

All captions herein are intended solely for the convenience of the parties, and none shall be deemed to affect the meaning or construction of any provision hereof.

#### **J. Force Majeure**

Neither party is liable to the other for any failure to perform any obligation under this Agreement due to an event beyond the control of the non-performing party, including, but not limited to, acts of God, war, insurrection, riot, civil unrest, terrorism, acts of civil or military authorities, or regulations imposed by government agencies. Any party affected by such an event shall immediately inform the other party and make all reasonable efforts to comply with this Agreement.

## 24. DISPUTE RESOLUTION

### A. Choice of Law

*This Agreement and the rights of the parties will not take effect unless and until this Agreement is accepted and signed by Franchisor. Except to the extent this Agreement or any particular dispute is governed by the U.S. Trademark Act of 1946, this Agreement shall be interpreted, construed, and enforced in accordance with the laws of the State of Ohio (without reference to its conflict of laws principles), excluding any law regulating the sale of franchises or governing the relationship between a Franchisor and Franchisee, unless the jurisdictional requirements of such laws are met independently without reference to this Section. References to any law or regulation refer also to any successor laws or regulations or any published regulations for any statute as in effect at the relevant time. References to a governmental agency also refer to any successor regulatory body that succeeds the function of such agency.*

### B. Jurisdiction and Venue

*Franchisee acknowledges that this Agreement was accepted and executed by Franchisor in Warren County, Ohio, and that any action, other than an action seeking injunctive relief, sought to be brought by either party shall be brought in the appropriate state court located in Warren County, Ohio, or in the United States District Court for the Southern District of Ohio, located in Cincinnati, Ohio. Franchisee waives all questions of personal jurisdiction or venue for the purposes of carrying out this provision. The exclusive choice of jurisdiction and venue governs except that claims for injunctive relief may be brought by Franchisor where Franchisee is located. This exclusive choice of jurisdiction and venue provisions shall not affect the full faith and credit of any judgment obtained.*

### C. Cumulative Rights and Remedies

*No right or remedy conferred upon or reserved to Franchisor or Franchisee by this Agreement is intended to be, nor shall be deemed, exclusive of any other right or remedy herein or by law or equity provided or permitted, but each shall be in addition to every other right or remedy. Nothing herein contained shall bar Franchisor's right to seek injunctive relief against threatened conduct that shall cause it loss or damages including obtaining restraining orders, preliminary and permanent injunctions.*

### D. Limitations of Claims

*Any claim concerning the Franchised Business or this Agreement or any related agreement will be barred unless an action is commenced within one (1) year from the date on which Franchisee or Franchisor knew or should have known, in the exercise of reasonable diligence, of the facts giving rise to the claim.*

**E. Limitation of Damages**

***Franchisee and Franchisor each waive, to the fullest extent permitted by law, any right or claim for any punitive or exemplary damages against the other, and agree that if there is a dispute with the other, each will be limited to the recovery of actual damages sustained by it including reasonable accounting and/or legal fees as provided in Section 23.C. Franchisee waives and disclaims any right to consequential damages in any action or claim against Franchisor concerning this Agreement or any related agreement. In any claim or action brought by Franchisee against Franchisor concerning this Agreement, Franchisee's contract damages shall not exceed and shall be limited to refund of Franchisee's Franchise Fee payments.***

**F. Waiver of Jury Trial**

***Franchisee and Franchisor each irrevocably waive trial by jury in any action, whether at law or equity, brought by either of them.***

**G. Mediation**

***If a dispute arises between the parties that cannot be settled through negotiation, the parties shall first try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to litigation or other dispute resolution procedure. The mediation proceedings shall take place at the American Arbitration Association location nearest Franchisor's principal place of business (presently Franklin, Ohio).***

**H. Injunctive Relief**

Notwithstanding the provisions of Section 24.G requiring the mediation of all disputes before resorting to litigation, Franchisor expressly reserves the right to seek temporary and permanent injunctions and orders of specific performance from a court of competent jurisdiction to enforce the provisions of this Agreement, without prior mediation, relating to:

1. Franchisee's use of the Marks;
2. Franchisee's obligations upon the termination or expiration of this Agreement;
3. Franchisee's obligations under Section 16 of this Agreement;
4. The assignment of this Agreement or transfer of any ownership interest in violation of Section 19; or
5. As necessary to prohibit any act or omission by Franchisee or its agents:
  - a. that would constitute a violation of any applicable law, ordinance or regulation;

- b. that is dishonest or misleading to Franchisor and/or Franchisor's other franchisees; or
- c. that may harm, tarnish, or impair Franchisor's reputation, name, services or Marks.

## **25. ACKNOWLEDGMENTS**

### **A. Receipt of Agreement**

Franchisee acknowledges that it has received a copy of this Agreement, and all attachments thereto, at least five (5) business days prior to the date on which this Agreement was executed. Franchisee represents and acknowledges that it has received, read and understood this Agreement and that Franchisor has accorded Franchisee ample time and opportunity to consult with advisors of its own choosing about the potential benefits and risks of entering into this Agreement.

### **B. Receipt of Franchise Offering Circular**

Franchisee acknowledges that Franchisee has received the disclosure document required by the Trade Regulation Rule of the Federal Trade Commission entitled *Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures* at least ten (10) business days prior to the date on which this Agreement was executed.

### **C. Consultation by Franchisee**

Franchisee has been advised to consult with its own advisors with respect to the legal, financial and other aspects of this Agreement, the business franchised hereby and the prospects for that business. Franchisee has either consulted with such advisors or has deliberately declined to do so.

### **D. True and Accurate Information**

Franchisee affirms that all information set forth in any and all applications, financial statements and submissions to Franchisor is true, complete and accurate in all respects, with Franchisee expressly acknowledging that Franchisor is relying upon the truthfulness, completeness and accuracy of such information.

### **E. Risk**

Franchisee has conducted an independent investigation of the business contemplated by this Agreement and recognizes that, like any other business, an investment in a NITELITES Business involves business risks and that the success of the venture is dependent, among other factors, upon the business abilities and efforts of Franchisee. Franchisor does not, in this Agreement or otherwise, make any representation or warranty, express or implied, as to the potential success of the business venture contemplated hereby.

**F. No Guarantee of Success**

Franchisee acknowledges that it has not received or relied on any guarantee, express or implied, as to the revenues, profits or likelihood of success of the Franchised Business that it will operate pursuant to this Agreement. Franchisee acknowledges that there have been no representations by Franchisor's directors, employees or agents that are not contained in, or inconsistent with, the statements made in the Uniform Franchise Offering Circular or with the provisions of this Agreement.

**G. Multiple Originals**

Both parties will execute multiple copies of this Agreement, and each executed copy will be deemed an original.

**H. No Violation of Other Agreements**

Franchisee represents that its execution of this Agreement will not violate any other agreement or commitment to which Franchisee is a party.

[The signature page follows this page.]

The parties are signing this Agreement on the dates below.

NITELITES FRANCHISE SYSTEMS, INC.

Date: \_\_\_\_\_

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

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

FRANCHISEE: \_\_\_\_\_

(type/print name)

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature*

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

**EXHIBIT A TO THE FRANCHISE AGREEMENT**

**MAP OR DESCRIPTION OF DESIGNATED AREA**

Franchisee acknowledges that the Designated Area is delineated solely for the purpose of establishing a geographic area within which Franchisee will locate the Franchise Premises for the NITELITES Business and for no other purpose. The Designated Area does not grant to Franchisee any promise of exclusivity or territorial protection.

NITELITES FRANCHISE SYSTEMS, INC.:

FRANCHISEE:

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

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

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

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

Date: \_\_\_\_\_

Date: \_\_\_\_\_



**EXHIBIT B TO THE FRANCHISE AGREEMENT**

**MAP OR DESCRIPTION OF PROTECTED TERRITORY**

In the event of a discrepancy between the map of Franchisee's Protected Territory and the written description thereof, the written description shall be controlling. If any street, road, or highway serves as a boundary of the Protected Territory, the actual boundary shall be the centerline of such street, road, or highway, and only the land and structures within such boundary shall be included in Franchisee's Protected Territory.

NITELITES FRANCHISE SYSTEMS, INC.:

FRANCHISEE:

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

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

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

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

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT C TO THE FRANCHISE AGREEMENT**

**CONVERSION ADDENDUM TO THE  
NITELITES FRANCHISE SYSTEMS, INC. FRANCHISE AGREEMENT**

This Conversion Addendum, made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_, is by and between NITELITES FRANCHISE SYSTEMS, INC. ("Franchisor") and \_\_\_\_\_ ("Franchisee") and is entered into concurrently with that certain NITELITES FRANCHISE SYSTEMS, INC. Franchise Agreement of even date herewith (the "Franchise Agreement").

WITNESSETH:

WHEREAS, Franchisor and Franchisee are concurrently entering into the Franchise Agreement;

WHEREAS, Franchisee is a current or former authorized dealer or distributor of exterior lighting products, ("NITELITES Distributor") and such distributorship is not associated with, a party to a contract with or otherwise obligated to any other company pursuant to a license, franchise, joint venture, marketing or other such agreement;

WHEREAS, Franchisee desires to convert its currently operating NITELITES Distributorship to a Franchised Business<sup>1</sup>;

WHEREAS, Franchisor and Franchisee desire to supplement and amend certain terms and conditions of the Franchise Agreement to better suit the requirements of such conversion; and

WHEREAS, Franchisee acknowledges that by entering into the Franchise Agreement (as amended by this Conversion Addendum), it will be subject to certain restrictions regarding competition and confidentiality both during and after the term of the Franchise Agreement.

NOW, THEREFORE, Franchisor and Franchisee, intending to be legally bound, agree as follows:

1. This Conversion Addendum shall form an integral part of, and be incorporated into, the Franchise Agreement as if fully set forth therein. The provisions of this Conversion Addendum shall govern, control, and supersede any inconsistent or conflicting provisions of the Franchise Agreement.

2. The following sections of the Franchise Agreement are amended or supplemented as indicated:

Section 3.A        this Section is deleted in its entirety and the remaining Sections are renumbered accordingly.

Section 3.D        this Section is deleted in its entirety and the remaining Sections are renumbered accordingly.

Section 5.B        "If Franchisee is a party to a pre-existing lease for the Franchise Premises, Franchisee shall cause such lease to be modified or amended so that such

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<sup>1</sup> Capitalized terms not otherwise defined herein have the meanings given to them in the Franchise Agreement.

lease's terms meet Franchisor's approval and conform with the requirements of this Section 5.B." is inserted after the end of the first sentence of this Section.

Section 5.B.1 this Section is deleted in its entirety and the remaining Sections are renumbered accordingly.

Section 5.B.5 "during the term of this Agreement" is inserted at the end of this Section.

Section 5.D.6 is hereby deleted in its entirety and the following is inserted in its place:

"The Franchised Business shall be considered to have commenced as of the Execution Date of the Franchise Agreement. All modifications required to bring the Franchised Business into compliance with the standards and specifications set forth in the Manual must be completed within three (3) months of the Execution Date of the Franchise Agreement."

Section 9.A "In Franchisor's sole discretion, Franchisee, or its Designated Manager, may be exempt from attendance during certain portions of the initial training program." is inserted at the end of this Section.

Section 10.D this Section is deleted in its entirety and the remaining Sections are renumbered accordingly.

Section 13.B "Immediately after the Execution Date, Franchisee shall cease using and remove from the Franchise Premises all products, supplies and equipment that are not approved by Franchisor or that do not conform with the System" is inserted at the end of this Section.

Section 16.C the last sentence of this Section is deleted and "Franchisee further acknowledges that even though it was previously engaged in the operation of a NITELITES Distributorship, the restrictive covenants contained in this Section are fair and reasonable and are reasonably required for the protection of Franchisor and the System" is inserted in its place.

Section 18.A.2 this Section is deleted in its entirety and the remaining Sections are renumbered accordingly.

Section 25.H "Franchisee represents that it is not associated with, a party to a contract with or otherwise obligated to any other business pursuant to a license, franchise, joint venture, marketing or other such agreement. Franchisee represents that it is not a party to, and its business is not subject to, any mortgages, pledges, assignments, liens, proceedings or judgments that may alter, remove or otherwise interfere with Franchisee's ownership of its business or with Franchisee's operation of a NITELITES Franchise." is inserted at the end of this Section.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have duly executed this Agreement.

NITELITES FRANCHISE SYSTEMS, INC.:

FRANCHISEE:

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

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

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

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

Date: \_\_\_\_\_

Date: \_\_\_\_\_

## EXHIBIT D TO THE FRANCHISE AGREEMENT

### CALL CENTER SERVICE AGREEMENT

This Agreement is between NITELITES FRANCHISE SYSTEMS, INC. ("NFS") and \_\_\_\_\_ ("You"), a NITELITES Franchisee under a franchise agreement with NFS dated \_\_\_\_\_ (the "Franchise Agreement").

- SERVICE FEE.** NFS will provide You with the services described in Section 2 below at no charge beginning on the date Your NITELITES Franchise opens for business until the first day of the second calendar month following the month in which Your NITELITES Franchise opens for business. Beginning on the first day of the second calendar month following the month in which Your NITELITES Franchise opens for business, and thereafter on the first day of each calendar month, for and in consideration of the services provided by NFS as described in Section 2 below, You agree to pay NFS a Call Center Service Fee of \$400.00 per month, in advance. You agree to pay a late payment charge of \$25.00 for each Service Fee payment received by NFS after its due date. You will be solely responsible for all long-distance and forwarding charges associated with forwarding calls to the Call Center. NFS reserves the right to increase the Service Fee if and when necessitated by improvements to the Call Center equipment or service.
- TERMS OF USE.** The Call Center will field incoming calls to Your NITELITES business line between 8:00 a.m. and 8:00 p.m. Eastern Standard Time. You must have both a fax machine AND either a mobile telephone or pager in order to use the Call Center's services. The Call Center will answer incoming calls by identifying your business as "NITELITES," take messages, answer questions related to NITELITES services, products and sales, and if warranted, schedule product demonstrations. The Call Center Service Fee does not include forwarding charges or charges related to outbound telemarketing, for which You are solely responsible. NFS may assign or subcontract any or all of its obligations under this Agreement without notice to You.
- DEFAULT.** If You fail to pay any amounts due hereunder (including, but not limited to, Call Center Service Fees or late charges) within ten days after its due date, or if You default under Your Franchise Agreement, NFS may discontinue Your Call Center service, without notice to You or opportunity to cure, until all past due amounts and applicable interest and late charges are paid in full and all defaults are cured. NFS, in its sole discretion, may permanently discontinue Call Center services upon a third default under this Agreement or the Franchise Agreement. The remedies in this paragraph are in addition to, and not exclusive of, all other remedies NFS may have for default.
- ELECTRONIC FUNDS TRANSFER.** NFS may require that all amounts payable hereunder be paid through an Electronic Depository Transfer Account established at a national banking institution approved by NFS. When requested, You shall establish the account providing for electronic funds transfer as approved by NFS, and NFS shall have access to such account for the purpose of receiving any payments or charges due under this Agreement. You agree to execute any documents that NFS's or Your bank requires to establish and implement the Electronic Depository Transfer Account. Once established, You agree to deposit funds sufficient to meet Your obligations hereunder and not to close the Electronic Depository Transfer Account without NFS's consent.
- NO LIABILITY.** Call Center personnel will endeavor to handle Your business calls in a courteous, professional, and competent manner, but You agree that neither NFS nor any employee or agent of

will be responsible for any damages, expenses, or lost opportunities resulting from any act or omission by Call Center personnel or any employee or agent of NFS.

NITELITES FRANCHISE SYSTEMS, INC.:

\_\_\_\_\_  
Print Your Name

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

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

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

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

Date: \_\_\_\_\_

Date: \_\_\_\_\_

## EXHIBIT E TO THE FRANCHISE AGREEMENT

### **NITELITES PRODUCTS AND EQUIPMENT SUPPLY AGREEMENT**

This agreement is dated \_\_\_\_\_ between NL MANUFACTURING & DISTRIBUTION SYSTEMS, INC., an Ohio corporation ("Seller"), and \_\_\_\_\_, a/an \_\_\_\_\_ ("Customer").

Pursuant to a franchise agreement dated \_\_\_\_\_ (the "Franchise Agreement") with NiteLites Franchise Systems, Inc. ("Franchisor"), an affiliate of Seller, Customer operates a business offering architectural and landscape illumination products and services using Franchisor's unique business format and registered trademark NITELITES® (the "Franchised Business").

Seller has developed and is a distributor of certain architectural and landscape illumination products, some of which bear the NITELITES trademark, which meet Franchisor's standards and specifications for quality (the "Products").

Under the terms of the Franchise Agreement, Customer must purchase its requirements of the Products from Seller or another supplier designated by Franchisor.

This agreement contains the terms and conditions upon which Seller will sell the Products to Customer for subsequent resale.

Therefore the parties agree as follows:

1. Products. The term "Products" means all goods bearing the brand label NITELITES and other brands distributed by Seller for resale in the Franchised Business, including those listed on Seller's "Product and Price List" as stated in the NiteLites Franchise Systems, Inc. Operations Manual from time to time. Customer acknowledges that the Products may be manufactured by Seller or by a third party acting under contract with Seller or an affiliate of Seller.
2. Resale of Products. Customer shall sell the Products only at retail and only through the Franchised Business. Customer may not make any wholesale, Internet or mail order sales of the Products. Seller may suggest retail prices and pricing strategies for the Products, but Customer has sole discretion over the prices it charges for the Products. Customer may resell the Products only in their original state and packaging under the original names and trademarks. Customer may not alter the Products in any way without Seller's prior written consent.
3. Purchasing Procedures.
  - (a) All offers to purchase Products from Seller must be in the form of a written purchase order ("Purchase Order"). The terms and conditions of this agreement are hereby incorporated into and made a part of every Purchase Order. No additional terms or conditions will be deemed to be a part of any Purchase Order unless specifically accepted in writing by Seller. Each Purchase Order received by Seller must include the price, quantity, description of Products, and shipping instructions (i.e., carrier and requested shipping date). Seller will not accept verbal orders for Products.

(b) Purchase Orders placed by Customer are accepted by Seller unless rejected by Seller within two entire business days after Seller's receipt. Seller shall confirm the requested shipping date or specify an alternative shipping date ("Acknowledged Shipping Date"). All shipping dates are subject to Seller's receipt of Customer's payment for the Products. All credit terms of each Purchase Order are subject to approval by Seller.

(c) Seller shall use its best efforts to make all Products available to Customer as ordered. Seller reserves the right to accept or reject any Purchase Order or to ship all or part of any Purchase Order after the requested shipping date, which right shall not be unreasonably exercised. Seller shall not extend or otherwise modify the Acknowledged Shipping Date without Customer's written consent, so long as Seller receives Customer's payment for the Products by that date.

(d) In the event of a shortage of a Product for any reason, Seller may allocate its available supply of the Product among its customers, including Customer and Customer's customers, in whatever manner Seller deems equitable, if Seller notifies Customer of the shortage as soon as practicable. Seller may terminate a Purchase Order, in whole or in part, or extend an Acknowledged Shipping Date for a Product subject to allocation due to shortage, so long as Seller gives Customer written notice of the termination or the new shipping date at least ten entire business days before the Acknowledged Shipping Date. Seller shall not extend or otherwise modify the Acknowledged Shipping Date for more than thirty days without Customer's written consent.

4. Discontinued Products.

(a) Customer may, within thirty days after its receipt of a notification that a Product will be discontinued by Seller, request that Seller allow it to exchange its unused inventory of the discontinued Product for the number of units of its replacement Product, or any other Product in Seller's product line, having an aggregate net purchase price equal to the aggregate net purchase price of the discontinued Product being returned. If there is no replacement Product offered by Seller, Seller, at Customer's option, shall credit Customer's account by the aggregate net purchase price of the discontinued Product. All requests for return must specify the model, quantity, and original shipping date of each Product to be returned. Upon receipt of a request for return that satisfies the above criteria, Seller shall issue a Return Material Authorization ("RMA") number to Customer. Seller is not required to accept the return of any discontinued Product without a valid RMA number. Any Products returned by Customer must be new, unused, and in the original shipping container. The "aggregate net purchase price" of a Product is the purchase price of the Product as shown on the most recent invoice from Seller, or, if no invoice has been issued, the purchase price shown on the Product and Price List then in effect, multiplied by the number of units of the Product being returned or exchanged.

(b) If, after notification that a Product will be discontinued, Seller is unable to fill Customer's order, Customer may cancel the order and return to Seller the discontinued Product without following the procedures set forth in the preceding subparagraph 4(a), if Customer notifies Seller of the cancellation in writing within thirty days after Customer's receipt of the notification that the Product will be discontinued. Customer shall provide Seller with the quantity and model number of the discontinued Products being returned. Upon their return, Seller shall credit Customer's account for aggregate net purchase price of the returned Products.

5. Pricing and Shipping.

(a) Seller shall make the Products available to Customer upon prices that are comparable for products with similar features and of similar quality in the marketplace. Customer shall pay the



prices for Products listed in the most current Product and Price List, which is published periodically by Seller and subject to change. Seller may, in its discretion, establish or modify from time to time the prices, pricing structure, charges, and other terms and conditions governing the sale of Products by giving Customer at least ten days' written notice. Except as provided in subparagraph 5c of this section, any change becomes effective upon the date specified in the notice and applies to each Purchase Order received by Seller on and after that date.

(b) Customer shall pay all shipping costs, insurance, and sales and use taxes in connection with its sale of Products to its customers, as well as duties, value-added, withholding, and other taxes, excises and tariffs, none of which will be included in calculating any credits, refunds, price protection, or other offsets under this agreement. ALL SHIPMENTS OF PRODUCT SHALL BE F.O.B. ORIGIN.

(c) The following billing procedures apply to any Purchase Order not made, accepted or completely shipped by Seller before the effective date of any price change:

(1) Price Increases.

(i) Back-ordered Products under Purchase Orders received before the effective date of the price increase that were scheduled for shipment no later than ten days after the effective date of the price increase, as reflected in the Purchase Order, will be billed at the price in effect before the increase.

(ii) Products scheduled for shipment more than ten days after the effective date of the price increase will be billed at the increased price unless Seller postponed shipment more than thirty days.

(iii) Customer may cancel, at no additional cost to Customer, any Purchase Order for Products subject to a price increase, by notifying Seller in writing within ten business days after the effective date of the price increase.

(2) Price Decreases. A price decrease applies to all unshipped Products under Purchase Orders accepted by Seller before the effective date of the price decrease and to new Purchase Orders accepted by Seller on or after the effective date of the price decrease.

6. Risk of Loss. Customer shall inspect the Products immediately upon receipt, count and verify the accuracy of the shipment, and promptly notify Seller in writing of any visible defects, shortages or spillages. Risk of loss, casualty or damage to the Products passes to Customer as soon as Seller delivers the Products to the carrier for shipment, even if Seller serves as the carrier. Customer shall identify and document any loss or damage directly to the freight company. Seller is not liable to Customer for any failure to deliver or delay in making delivery that results from causes not directly attributable to or controlled by Seller.

7. Payment Terms.

(a) Customer shall pay for all Products prior to delivery by Seller in U.S. dollars by cash, check, prepayment, C.O.D., credit card, wire transfer, electronic funds transfer, or other terms acceptable to Seller. Customer shall pay a finance charge of 1.5% per month, or the highest rate allowed by law, whichever is lower, on any unpaid amount from the date payment is due until the date payment is received by Seller. This does not obligate Seller to accept any payment after the due date or to extend credit to Customer.

(b) If Customer fails to pay any invoice when due or otherwise comply with this agreement, Seller may decline to accept orders for any more Products from Customer or delay the shipment of any orders that have been accepted until payment in full of all sums due and owing to Seller. In addition, Seller may require that amounts owed to Seller be paid through an Electronic Depository Transfer Account established at a national banking institution approved by Seller. When requested, Customer shall establish the account providing for electronic funds transfer as approved by Seller, and Seller shall have access to the account for the purpose of receiving payment for any amounts due for purchases by Customer. Customer shall execute all documents that Seller's or Customer's bank requires to establish and implement the Electronic Depository Transfer Account. Once established, Customer shall deposit funds sufficient to meet its obligations to Seller and shall not close the Electronic Depository Transfer Account without Seller's consent.

(c) Seller may, from time to time, in its sole and absolute discretion, establish and modify, without notice, payment and credit terms based upon Customer's financial condition and payment experience, and Seller may delay or withhold shipment of Products based upon these terms. Customer shall provide Seller with all financial information as Seller may reasonably request from time to time (including, without limitation, verified financial statements with supporting documentation, and adequate assurances of customer orders, bank commitment letters, and the like) for purposes of establishing or reviewing Seller's credit terms. Seller may require Customer to execute security agreements and financing statements to grant or perfect Seller's security interest in Customer's inventory, proceeds, accounts, or other collateral, and may further require Customer's principals personally guaranty Customer's financial obligations to Seller.

8. Seller's Purchase Money Security Interest. If Seller, in its discretion, extends credit to Customer or accepts payment by check, Seller retains and Customer hereby grants Seller a purchase money security interest in Customer's inventory and all proceeds therefrom (including insurance proceeds). Customer hereby authorizes Seller to execute and file, on Customer's behalf, all financing statements to perfect Seller's security interest, and grants Seller an irrevocable power of attorney coupled with an interest for that purpose.

9. Modification of Products. Customer shall use and display the Products only in the form and manner approved by Seller. Customer acknowledges that the Products have a reputation of high quality and that any non-permitted modification in the design or recommended use of any Product may adversely impact the reputation of Seller and the Products. Therefore, Customer may not make any material modifications to any Product without Seller's prior written consent. Any approved modification in the design of a Product is at Customer's sole cost and risk.

10. Relationship of Parties.

(a) Each party is an independent contractor of the other. This agreement does not create any relationship of principal and agent, employer and employee, partnership or joint venture between the parties, and neither party is the agent of the other. Nothing in this agreement grants either party any power, right or authority to assume or create any obligation or responsibility, express or implied, on behalf of or in the name of the other party, or to bind the other party in any manner, and neither party may represent that it has any power, right or authority to do so.

(b) Without limiting the generality of subparagraph 10(a) above, Customer is solely responsible for all federal, state, and local income taxes, unemployment taxes, social security contributions, worker's compensation premiums and insurance, and all other taxes and payments relating to Customer, the Franchised Business, and Customer's employees. Customer and its employees are not eligible for any of Seller's employee benefit programs. Neither Customer nor any

employee of Customer has any claim against Seller for sick leave, retirement benefits, social security, worker's compensation, disability or unemployment benefits.

(c) This agreement does not, and is not intended to, create a franchisor-franchisee relationship between the parties under any state or federal statutes, regulations, or rules, including, without limitation, the Ohio Business Opportunity Plans Act (Chapter 1334 of the Ohio Revised Code) or any similar statute of any jurisdiction. Seller will not secure or provide assistance in securing customer accounts or business locations for the benefit of Customer. Nothing in this agreement restricts Customer's right or power to sell, distribute, and market any goods and services in the operation of its business, so long as Customer does not use Seller's trademarks in connection with the sale and distribution of those goods and services.

11. Intellectual Property Rights. The intellectual property rights associated with or relating to the Products are the valid and exclusive properties of Seller, and Customer has and acquires no rights to those intellectual property rights. Customer does not possess and will not acquire any title or ownership in the technology pertaining to the Products and may not transfer any title to or ownership in that technology. Customer may not take any action that may prejudice the validity of or Seller's title to its intellectual property rights. Customer may not assert the invalidity or contest Seller's ownership of the intellectual property rights associated with or relating to the Products at any time, either as a defense to a claim made by Seller or as a basis of any claim against Seller.

12. Proprietary Information. Customer acknowledges that in the course of performing its duties under this agreement, it may obtain information relating to Seller, the Products, and Seller's business that is confidential and proprietary in nature ("Proprietary Information"). Proprietary Information includes, without limitation, trade secrets, formulas, inventions, innovations, techniques, processes, programs, diagrams, schematics, financial information, product information and plans, and prices, that Seller considers confidential and that is not generally available to the public. Customer may use Proprietary Information only in connection with the performance of its duties under this agreement and shall safeguard all Proprietary Information in strict confidence and exercise due care in its handling and protection, consistent with policies concerning the protection of its own proprietary or trade secret information. Customer may not disclose, divulge, or publish any Proprietary Information for its own benefit or the benefit of any other person or entity; except to those of its employees, representatives, or agents who need access to the Proprietary Information in order to carry out the purposes of this agreement and who have executed a nondisclosure agreement restricting use and strictly prohibiting non-permitted dissemination. Customer may nevertheless disclose Proprietary Information that: (i) is known in the public domain through no fault of Customer; (ii) was lawfully acquired by Customer from sources other than Seller; or (iii) is required to be disclosed by Customer in connection with lawful process (*i.e.*, court or administrative order, or subpoena in conjunction with governmental activity); provided that, before disclosure, Customer gives Seller reasonable advance notice and shall cooperate in seeking a protective order disallowing non-permitted disclosure or restricting disclosure in order to protect confidential and proprietary information.

13. Limited Warranty. Seller warrants each Product delivered to Customer under this agreement only as provided in Seller's limited warranty in effect from time to time for the Product. A copy of Seller's limited warranty will accompany each shipment of Products. Seller may modify its limited warranty from time to time, in its sole and absolute discretion and without liability to Customer. Any modification of Seller's warranty is effective immediately with respect to all Products shipped after the modification, even if ordered before the modification. In no case will Seller's liability exceed the cost of the Products on which a claim for damages is based. Defective parts that are under warranty must be returned to Seller.

14. Warranty Disclaimer. SELLER MAKES NO WARRANTIES OR REPRESENTATIONS AS TO THE PERFORMANCE OF SELLER'S PRODUCTS OR AS TO SERVICE TO CUSTOMER OR TO ANY

OTHER PERSON, EXCEPT AS PROVIDED IN SELLER'S LIMITED WARRANTY ACCOMPANYING EACH SHIPMENT OF PRODUCTS. SELLER RESERVES THE RIGHT TO MODIFY ITS WARRANTY AND THE SERVICE POLICY CONTAINED IN THE WARRANTY, OR OTHERWISE, AT ANY TIME, WITHOUT FURTHER NOTICE AND WITHOUT LIABILITY TO CUSTOMER OR ANY OTHER PERSON. TO THE EXTENT PERMITTED BY APPLICABLE LAW, ALL IMPLIED WARRANTIES INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT, ARE HEREBY EXPRESSLY EXCLUDED. THIS EXCLUSION IS APPLICABLE REGARDLESS WHETHER ANY REMEDY IN THIS AGREEMENT OR IN SELLER'S LIMITED WARRANTY ACCOMPANYING EACH SHIPMENT OF PRODUCTS FAILS OF ITS ESSENTIAL PURPOSE OR FAILS TO COMPENSATE IN FULL FOR THE RESULTING HARM.

15. Limitation of Liability and Remedies. SELLER SHALL NOT BE LIABLE FOR ANY LOST PROFITS, BUSINESS INTERRUPTION, LOST DATA, OR ANY SPECIAL, INCIDENTAL, INDIRECT, CONSEQUENTIAL, PUNITIVE, OR EXEMPLARY DAMAGES OF ANY KIND SUFFERED BY CUSTOMER, ITS CUSTOMERS, OR OTHERS ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE PRODUCTS.

16. Customer Acknowledgment. Customer acknowledges that the limitation of liabilities and remedies, disclaimer of warranties, and disclaimer of liability in this agreement apply regardless of whether Customer has accepted any Products or service under this agreement. Customer acknowledges that Seller has set its prices and entered into this agreement in reliance on the limitation of liabilities and remedies, disclaimer of warranties, and disclaimer of liability in this agreement, and that the intended allocation of risk between the parties (including the risk that a contract remedy may fail of its essential purpose and cause consequential loss) forms an essential consideration and basis of the bargain between the parties.

17. Indemnification by Customer. Customer shall indemnify and defend Seller and hold Seller harmless against and from any and all claims, demands, causes of action or damages, including, without limitation, attorney fees, made against Seller based upon, arising out of, or in any way related to:

- (a) Customer's sale, distribution, or marketing of Products under this agreement;
- (b) Customer's combination, operation, or use of any Product with equipment, data, or programming not supplied by Seller;
- (c) Customer's non-permitted alteration or modification of Products;
- (d) Customer's conduct of the Franchised Business or any other business operated by Customer;
- (e) Customer's ownership or possession of property; or
- (f) any negligent act, misfeasance, nonfeasance, malfeasance, or misconduct by Customer or any of its officers, directors, principals, employees, contractors, servants or agents.

Indemnification includes any and all fees, costs and expenses, including, without limitation, attorney fees incurred by or on behalf of Seller in the investigation of or defense against any of the foregoing claims, consulting and expert fees, transportation, and copying. Further, Customer shall indemnify and defend Seller and hold Seller harmless against and from any and all debts, accounts, obligations, or other liabilities or torts of Customer, its officers, directors, principals, employees or agents, except as may be expressly provided in this agreement. Notwithstanding the foregoing, Customer shall not be obligated to indemnify Seller for any action involving patent, trademark or copyright infringement or other similar

actions arising out of the authorized use by Customer of the Products or Seller's trademarks or promotional materials.

18. Insurance. During the term of this agreement and for a period of two years after the later of (i) the expiration of this agreement or (ii) the date of the last shipment of Products to Customer, Customer shall obtain and maintain product liability insurance suitable to Seller providing protection for Seller, its agents and employees as named insureds, in an amount of coverage not less than \$2,000,000.00, applicable to any claims, demands, causes of action, or damages, including, without limitation, attorney fees, due to, arising out of, or in any way connected to any alleged use of, or alleged defects in, the Products. Customer shall furnish Seller with a certificate of insurance evidencing compliance with the requirements of this paragraph within thirty days after the date of this agreement. The insurance policy must provide Seller with at least thirty days advance written notice of non-renewal or cancellation.

19. Default

(a) Each of the following is an "Event of Default" under this agreement:

- (1) Customer fails to pay when due any invoice for payment for Products sold to Customer under this agreement;
- (2) Customer breaches any provision of this agreement or otherwise fails to perform or observe any of Customer's obligations in this agreement;
- (3) Customer is in default under any other agreement or instrument to which both Customer and Seller (or any affiliate of Seller) are parties, including, but not limited to, the Franchise Agreement and any security agreement, and the default continues beyond the applicable cure period;
- (4) Customer sells, relocates, transfers, or attempts to sell, relocate, or transfer the Products, except in the ordinary course of business;
- (5) the insolvency, appointment of a receiver, assignment for the benefit of creditors, commencement of any proceedings under any bankruptcy or insolvency law, or termination of existence of Customer;
- (6) any attempted garnishment or attachment of the Products;
- (7) a creditor of Customer obtains possession of any Products by any means, including, without limitation, levy, distraint, replevin or self-help.

(b) Upon the occurrence of an Event of Default and without notice to Customer, Seller may accelerate the maturity of any money owed Seller by Customer and declare the same immediately due and payable, proceed to protect and enforce its rights by suit in equity or by action at law, and obtain a judgment or any other relief appropriate to the action or proceeding. Seller shall have all the rights and remedies of a secured party under the Uniform Commercial Code. Without limiting the generality of the foregoing, Seller may immediately, without demand of performance and without other notice to Customer (all of which Customer hereby expressly waives):

- (1) repossess the Products at their location;

- (2) with or without advertisement, sell at public or private sale or otherwise realize upon the whole or, from time to time, any part of the Products, or any interest that Customer may have in them;
- (3) to the full extent permitted by applicable law, enter any premises where the Products are located and take possession and control of them; and
- (4) set-off against any or all amounts owing to Customer by Seller.

All rights and remedies of Seller under this agreement are cumulative and not exclusive of any other rights or remedies available to Seller, and no course of dealing between the parties operates as a waiver of such rights or remedies. Customer shall, on demand, reimburse Seller for all expenses, including reasonable attorney fees and legal expenses, incurred by Seller in connection with the enforcement of this agreement.

20. Term. The terms of this agreement apply to all purchases of Products by Customer. This agreement expires automatically upon the termination or expiration of the Franchise Agreement. The expiration or termination of the Franchise Agreement does not extinguish any obligations that arose under this agreement while it was in force.

21. Assignment. Customer may not assign any of its rights or obligations under this agreement to any other party without Seller's prior written consent. Notwithstanding any permitted or authorized assignment, Customer shall remain liable according to the original tenor of this agreement. Any assignment to an affiliate of Customer is effective only if the affiliate agrees in writing to assume all rights and obligations of Customer under this agreement. Seller may assign its rights and obligations under this agreement pursuant to (by way of example and not by way of limitation) consolidation or merger, a buy-out or asset purchase, stock sale, acquisition, reorganization, or change of business entity.

22. Notices. Any payments to be made pursuant to this agreement may be made by ordinary mail, postage prepaid, but the sender assumes all risk of delay or failure of delivery. Unless expressly provided otherwise, all due dates in this agreement refer to the date of receipt. All notices, requests, demands and other communications required or permitted under this agreement shall be in writing, shall be addressed as provided below in this Section 22, shall be made (i) by personal delivery, (ii) by certified mail, postage prepaid, return receipt requested, or (iii) by overnight delivery service with proof of delivery, and shall be effective upon receipt or refusal thereof. Any notice sent by certified mail as provided in this paragraph, if returned unclaimed, may be re-sent by ordinary mail, postage prepaid, and will be effective seventy-two (72) hours after deposit in the U.S. mail. All notices, requests, demands, payments, reports and other communications shall be addressed as follows, or to such other persons or address as the parties may provide by notice to the other party as provided in this Section 22:

Seller: NL Manufacturing & Distribution Systems, Inc.  
Thomas Frederick, President  
6107A Market Avenue  
Franklin, Ohio 45005

Customer: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

23. Amendment or Modification. This agreement may be modified or amended only by a written instrument that specifically refers to this agreement, recites that an amendment or modification is being made, and is signed by both parties.

24. Binding Effect. The provisions of this agreement are binding upon and inure to the benefit of both parties and their respective heirs, legal representatives, successors, and assigns.

25. Entire Agreement. This agreement constitutes the entire agreement and understanding between the parties and supersedes any prior agreements, understandings, course of dealing, or course of performance. All exhibits and schedules are incorporated by this reference.

26. Waiver. The failure of either party to insist in any one or more instances upon performance of any provision of this agreement or to enforce any of its rights under this agreement is not, and may not be construed as, a continuing waiver of any provisions or the relinquishment or abandonment of any rights, all of which remain in full force and effect. No single or partial exercise by either party of any right or remedy precludes another or further exercise of the right or remedy, or the exercise of any other right or remedy. No waiver is, or may be construed as, a continuing waiver or a waiver of any other breach of any other provision of this agreement.

27. Waiver of Jury Trial. EACH PARTY IRREVOCABLY WAIVES TRIAL BY JURY IN ANY ACTION, WHETHER AT LAW OR IN EQUITY, FILED BY EITHER PARTY.

28. Mediation. If a dispute arises between the parties that cannot be settled through negotiation, the parties shall first try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to litigation or other dispute resolution procedure. The mediation proceedings shall take place at the American Arbitration Association location nearest Seller's principal place of business (presently Franklin, Ohio).

29. Governing Law. The laws of the State of Ohio govern all aspects of this agreement.

30. Jurisdiction and Venue. Except for actions seeking injunctive relief filed by Seller against Customer, which may be brought in any jurisdiction in which Customer is located, any action by either party against the other in any court may be brought only in state courts located in Warren County, Ohio, or the U.S. District Court for the Southern District of Ohio, Western Division, in Cincinnati, Ohio. Each party hereby submits to the jurisdiction of these courts and waives any defense of lack of personal jurisdiction. Venue is proper in any of these courts and each party hereby waives any right to transfer or change the venue.

31. Force Majeure. Neither party is liable to the other for any failure to perform any obligation under this agreement due to an event beyond the control of the non-performing party, including, but not limited to, acts of God, war, insurrection, riot, civil unrest, terrorism, acts of civil or military authorities, or regulations imposed by government agencies. Any party affected by such an event shall immediately inform the other party and make all reasonable efforts to comply with this agreement.

32. Severability. If any provision of this agreement is held to be illegal, invalid or unenforceable in any respect, that term or provision will be deemed to be modified to the extent necessary to permit its enforcement to the maximum extent permitted by applicable law, and the remainder of this agreement will not be affected.

The parties are signing this agreement on the dates below.

NL MANUFACTURING & DISTRIBUTION SYSTEMS, INC.

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

Date: \_\_\_\_\_

CUSTOMER:

\_\_\_\_\_  
Name of Company

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

Date: \_\_\_\_\_

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title



**EXHIBIT F TO THE FRANCHISE AGREEMENT**

**GUARANTY AND ASSUMPTION OF OBLIGATIONS**

THIS GUARANTY AND ASSUMPTION OF OBLIGATIONS is given this \_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_.

In consideration of, and as an inducement to, the execution of that certain Franchise Agreement of even date herewith ("Agreement") by NITELITES FRANCHISE SYSTEMS, INC. ("Franchisor"), each of the undersigned hereby personally and unconditionally guarantees to Franchisor and its successors and assigns, for the term of the Agreement and thereafter as provided in the Agreement, that \_\_\_\_\_

\_\_\_\_\_ ("Franchisee") (a) shall punctually pay and perform each and every undertaking, agreement and covenant set forth in the Agreement; and (b) shall personally be bound by, and personally liable for, the breach of each and every provision in the Agreement, both monetary obligations and obligations to take or refrain from taking specific actions or to engage or refrain from engaging in specific activities including, without limitation, the provisions of Section 16. Each of the undersigned waives: (a) acceptance and notice of acceptance by Franchisor of the foregoing undertakings; (b) notice of demand for payment of any indebtedness or nonperformance of any obligations hereby guaranteed; (c) protest and notice of default to any party with respect to the indebtedness or nonperformance of any obligations hereby guaranteed; (d) any right it may have to require that an action be brought against Franchisee or any other person as a condition of liability; and (e) any and all other notices and legal or equitable defenses to which it may be entitled.

Each of the undersigned consents and agrees that: (a) its direct and immediate liability under this Guaranty shall be joint and several; (b) it shall render any payment or performance required under the Agreement upon demand if Franchisee fails or refuses punctually to do so; (c) such liability shall not be contingent or conditioned upon pursuit by Franchisor of any remedies against Franchisee or any other person; and (d) such liability shall not be diminished, relieved or otherwise affected by any extension of time, credit or other indulgence which Franchisor may from time to time grant to Franchisee or to any other person including, without limitation, the acceptance of any partial payment or performance, or the compromise or release of any claims, none of which shall in any way modify or amend this Guaranty, which shall be continuing and irrevocable during the term of the Agreement.

IN WITNESS WHEREOF, this Guaranty has been entered into the day and year first before written.

**PERSONAL GUARANTOR**

**PERSONAL GUARANTOR**

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Personally and Individually (Printed Name)

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Personally and Individually (Printed Name)

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Personally and Individually (Signature)

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Personally and Individually (Signature)

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IN FRANCHISEE: \_\_\_\_\_ %

TELEPHONE NO.: \_\_\_\_\_  
PERCENTAGE OF OWNERSHIP  
IN FRANCHISEE: \_\_\_\_\_ %

**PERSONAL GUARANTOR**

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Personally and Individually (Printed Name)

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Personally and Individually (Signature)

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**PERSONAL GUARANTOR**

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Personally and Individually (Signature)

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**PERSONAL GUARANTOR**

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Personally and Individually (Signature)

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**PERSONAL GUARANTOR**

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PERCENTAGE OF OWNERSHIP  
IN FRANCHISEE: \_\_\_\_\_%

**EXHIBIT G TO THE FRANCHISE AGREEMENT**

**STATE ADDENDA**