



## Second Defense

1. GHDI admits the allegations in Paragraph 1 of the Complaint.
2. GHDI admits that Plaintiff is a Guam limited liability company, and does not have knowledge or sufficient information to form a belief as to its status as a “corporation qualified and authorized to operate and transact business in Guam,” and therefore, denies all allegations in Paragraph 2 of the Complaint not specifically admitted.
3. GHDI admits the allegations in Paragraph 3 of the Complaint.
4. In response to Paragraph 4, GHDI admits that Defendant owns the Medical Arts Building, and does not have knowledge or sufficient information to form a belief as to CWH’s business related to development, sale and lease of real estate in Guam, and therefore, denies all allegations in Paragraph 4 of the Complaint not specifically admitted.
5. In response to Paragraph 5, GHDI admits that a Development and Lease Agreement with an effective date of June 10, 2021 (“Lease”) was signed by Cesar C. Cabot on behalf of CW Holdings, LLC, and by Jose Xavier B. Gonzales on behalf of GHDI, and that a Memorandum of Lease with an effective date of October 10, 2021 was recorded with the Department of Land Management, Government of Guam, on October 10, 2021 under Instrument No. 966166, and denies all other allegations in Paragraph 5 of the Complaint not specifically admitted. The validity and continuation of the Lease was subject to a condition precedent -- the successful placement of a bond offering.
6. In response to Paragraph 6, Defendant admits that Sections 1.1 (Demise) and 1.2 (Common Areas) of the Lease include lease provisions as stated in the Lease, and denies all other allegations in Paragraph 6 of the Complaint not specifically admitted.

7. In response to Paragraph 7 GHDI admits that the Lease states that the “Effective Date” is June 10, 2021, and denies all other allegations in Paragraph 7 of the Complaint not specifically admitted.

8. GHDI denies the allegations in Paragraph 8 of the Complaint.

9. In response to Paragraph 9, GHDI admits that it received a copy of Partial Occupancy Permit and other documents attached on or around January 31, 2022, and denies all other allegations in Paragraph 9 of the Complaint not specifically admitted.

10. In response to Paragraph 10, GHDI admits that it received a document called Notice of Hand-Over on or around January 31, 2022, and denies all other allegations in Paragraph 10 of the Complaint not specifically admitted.

11. In response to Paragraph 11, GHDI admits that Defendant received certain documents from CWH on or around March 16, 2022, and denies all other allegations in Paragraph 11 of the Complaint not specifically admitted.

12. GHDI admits that it paid a total amount of \$1,800,000.00 to Plaintiff between December 13, 2021 and June 6, 2023, and denies all other allegations in Paragraph 12 of the Complaint not specifically admitted.

13. GHDI admits Section 3.2 of the Lease (Rent) contains provisions relating to rental payments, and denies all other allegations in Paragraph 13 of the Complaint not specifically admitted.

14. GHDI denies the allegations in Paragraph 14 of the Complaint.

15. GHDI denies the allegations in Paragraph 15 of the Complaint.

16. GHDI denies the allegations in Paragraph 16 of the Complaint.

17. GHDI denies the allegations in Paragraph 17 of the Complaint.

18. GHDI denies the allegations in Paragraph 18 of the Complaint.
19. GHDI denies the allegations in Paragraph 19 of the Complaint.
20. GHDI denies the allegations in Paragraph 20 of the Complaint.
21. GHDI denies the allegations in Paragraph 21 of the Complaint.
22. GHDI denies the allegations in Paragraph 22 of the Complaint.
23. In response to Paragraph 23, GHDI admits that Section 3.5 of the Lease contains a header "Default Interest," and denies all allegations not specifically admitted.
24. In response to Paragraph 24, GHDI admits that Section 24.2(f) of the Lease contains the header "Recovery of Enforcement Costs," and denies all other allegations not specifically admitted.
25. In response to Paragraph 25, GHDI admits that Sections 9.1 of the Lease contains the header "Tenant's Minimum Acceptable Insurance Coverage Requirement" and 9.2 of the Lease contains the header "Other Tenant Insurance." GHDI denies all allegations not specifically admitted.
26. GHDI denies the allegations in Paragraph 26 of the Complaint.
27. GHDI denies the allegations in Paragraph 27 of the Complaint.
28. GHDI admits that it received a document called Notice of Default dated July 21, 2023 on or around July 21, 2023, and denies all other allegations not specifically admitted.
29. GHDI admits that it received a document called Notice of Default dated August 4, 2023 on or around August 4, 2023, and denies all other allegations not specifically admitted.
30. GHDI denies the allegations in Paragraph 30 of the Complaint.
31. GHDI denies the allegations in Paragraph 31 of the Complaint.
32. GHDI denies the allegations in Paragraph 32 of the Complaint.

33. GHDI denies the allegations in Paragraph 33 of the Complaint.

34. GHDI realleges its responses in Paragraphs 1 to 33 herein.

35. In response to Paragraph 35, GHDI admits that a Lease bearing signatures of Gonzalez and Cabot with a stated effective date of June 10, 2021 exists, and denies any all other allegations not specifically admitted.

36. In response to Paragraph 36, GHDI admits that a Lease bearing signatures of Gonzalez and Cabot with a stated effective date of June 10, 2021 exists, and denies any all other allegations not specifically admitted.

37. GHDI denies the allegations in Paragraph 37 of the Complaint.

38. GHDI denies the allegations in Paragraph 38 of the Complaint.

39. GHDI denies the allegations in Paragraph 39 of the Complaint.

40. GHDI denies the allegations in Paragraph 40 of the Complaint.

41. GHDI denies the allegations in Paragraph 41 of the Complaint.

42. GHDI denies the allegations in Paragraph 42 of the Complaint.

43. GHDI realleges its responses in Paragraphs 1 to 33 herein.

44. In response to Paragraph 44, GHDI avers that the Medical Arts Building does not meet building code and standards, is not in any condition for tenant occupancy, that CWH breached the Lease and GHDI is therefore not required to make payments to Plaintiff under the Lease, and denies all other allegations not specifically admitted.

45. In response to Paragraph 45, GHDI avers that the Medical Arts Building does not meet building code and standards, is not in any condition for tenant occupancy, that GHDI did not accept possession nor did it occupy the Premises, and denies all other allegations not specifically admitted.

46. GHDI denies the allegations in Paragraph 46 of the Complaint.
47. GHDI denies the allegations in Paragraph 47 of the Complaint.
48. GHDI denies the allegations in Paragraph 48 of the Complaint.
49. GHDI denies the allegations in Paragraph 49 of the Complaint.
50. GHDI realleges its responses in Paragraphs 1 to 33 herein.
51. GHDI denies the allegations in Paragraph 51 of the Complaint.
52. In response to Paragraph 52, GHDI admits that Section 4.5 of the Lease contains the header “Skybridge Work” and denies all other allegations not specifically admitted.
53. In response to Paragraph 53, GHDI admits that it informed Mr. Cabot to cease design of the Skybridge which Mr. Cabot agreed to do. GHDI denies all other allegations not specifically admitted.
54. GHDI denies the allegations in Paragraph 54 of the Complaint.
55. GHDI denies the allegations in Paragraph 55 of the Complaint.
56. GHDI denies the allegations in Paragraph 56 of the Complaint.
57. GHDI denies the allegations in Paragraph 57 of the Complaint.
58. GHDI realleges its response in Paragraphs 1 to 33.
59. GHDI denies the allegations in Paragraph 59 of the Complaint.
60. GHDI denies the allegations in Paragraph 60 of the Complaint.
61. GHDI denies the allegations in Paragraph 61 of the Complaint.
62. GHDI denies the allegations in Paragraph 62 of the Complaint.

## **II. AFFIRMATIVE DEFENSES**

GHDI asserts the following affirmative defenses.

**First Affirmative Defense**

The Complaint and each claim are barred, in whole or in part, by CWH's breaches of the Lease.

**Second Affirmative Defense**

The Complaint and each claim are barred, in whole or in part, due to CWH's anticipatory breach, and excuse of performance by GHDI due to prior non-performance by CWH.

**Third Affirmative Defense**

To the extent the Court finds that CWH is entitled to any recovery, such recovery must be reduced because of CWH's failure to mitigate its damages in an amount to be proven at trial.

**Fourth Affirmative Defense**

The Complaint and each claim are barred, in whole or in part, because allowing CWH to recover would result in unjust enrichment.

**Fifth Affirmative Defense**

The Complaint and each claim are barred, in whole or in part, by the doctrine of waiver.

**Sixth Affirmative Defense**

The Complaint and each claim are barred, in whole or in part, by the doctrine of estoppel (promissory and equitable estoppel).

**Seventh Affirmative Defense**

The Complaint and each claim are barred, in whole or in part, by the doctrine of unclean hands.

**Eighth Affirmative Defense**

The Complaint and each claim are barred, in whole or in part, by the doctrine of laches.

**Ninth Affirmative Defense**

The Complaint and each claim are barred, in whole or in part, due to lack of and/or failure of consideration.

**Tenth Affirmative Defense**

The Complaint and each claim are barred, in whole or in part, due to failure of condition precedent.

**Eleventh Affirmative Defense**

The Complaint and each claim are barred, in whole or in part, due to payment, set-off / off-set.

**Twelfth Affirmative Defense**

The Complaint and each claim are barred, in whole or in part, due to the statute of frauds.

GHDI gives notice that it intends to rely upon any other matters constituting an avoidance or affirmative defense as set forth in Rule 8(c) of the Guam Rules of Civil Procedure, and that it intends to seek leave to amend its Answer to allege those defenses of which it may become aware during the course of discovery or trial of this action.

**III. PRAYER**

WHEREFORE, Defendant GHDI prays for relief as follows:

1. That the Complaint be dismissed, that judgment be entered against CWH and that CWH take nothing thereby;
2. That GHDI recover its attorney's fees and the cost of suit; and
3. That GHDI be granted such further relief as this Court deems appropriate.

**IV. COUNTERCLAIM FOR DAMAGES, RESTITUTION, ACCOUNTING, AND ATTORNEY'S FEES**

1. Counterclaim Plaintiff Guam Healthcare Development, Inc. ("GHDI") asserts the following counterclaims against Counterclaim Defendant C.W. Holdings, LLC ("CWH"), and alleges as follows:

**Parties**

2. Counterclaim Plaintiff GHDI is and was at all times relevant hereto, a corporation licensed to do business in Guam.

3. Counterclaim Defendant C.W. Holdings, LLC ("CWH") is and was at all times relevant hereto, a corporation licensed to do business in Guam.

**Jurisdiction**

4. This Court has jurisdiction over the counterclaims pursuant to 7 G.C.A. §3105.

**General Allegations**

***The Medical Arts Center Building***

5. The Medical Arts Center Building ("MAC Building") is a three-story building located adjacent to the GHDI hospital property.

6. The MAC Building was constructed on Lot No. 5009-2-21 ("Property") and is owned by CWH.

7. CWH was formed on November 18, 2015 by Cesar Cabot ("Cabot") and Michael J. Wirges ("Wirges"). At formation, Cabot contributed \$1,723,975.00 in exchange for 55% membership interest in CWH and Wirges contributed \$1,410,525.00 in exchange for the remaining 45% membership interest in CWH.

8. At the time of formation of CWH, Cabot was appointed the Managing Member.

9. On information and belief, Wirges was the principal and owner of Sterling Design, the contractor CWH engaged to construct the MAC Building.

10. On May 16, 2016, a building permit was issued to Sterling Design, as the prime contractor and CWH as the owner, for the construction of the MAC Building with a reported contract price of \$8,017,081.98. The scope of work for the MAC Building attached to the building permit provided a break down of the work and the agreed upon cost for the work:

Sterling Design Construction						
<b>Project Name</b>		<b>Medical Arts Building</b>				
<b>Date</b>		<b>2/18/2014</b>				
Description	Labor	Material	Equipment	Subcontractor		Total
General Conditions						\$484,177.50
Civil						\$531,373.73
Masonry/Steel						\$2,207,528.48
plumbing						\$511,088.79
Electrical						\$520,180.00
Flooring						\$135,000.00
Tile						\$240,000.00
equipment						\$340,000.00
Fin Carpentry						\$295,800.00
Drywall						\$286,489.00
Paint and finish						\$281,129.00
Mechanical						\$810,000.00
Glass Store front						\$459,337.50
elevators						\$390,000.00
lights						\$125,000.00
Fire/Alarm						\$300,000.00
scaping						\$100,000.00
<b>Total</b>						<b>\$8,017,081.98</b>
<b>Cost of Work</b>						
total sq ft	\$50,330.00		159.29			

11. On information and belief, construction work on the MAC Building began in 2016 with Sterling Design as the prime contractor.

12. On April 12, 2018, Sterling Design, Inc. applied for a Building Permit for "Design Revision & Change of Architect/Engineer."

13. In early 2020, work on the shell of the MAC Building was still being constructed and had not been completed. At that time, construction work on the MAC Building ceased for prolonged periods due to, among other things, the COVID Pandemic.

### *The Bank of Guam Loan*

14. On January 25, 2017, CWH caused to be recorded a *Fee Simple Mortgage on Real Property with Power of Sale and Security Agreement* with the Department of Land Management, Government of Guam, under Instrument No. 902441, encumbering the MAC Building property to secure a \$9,500,000 loan from the Bank of Guam (“BOG Loan”).

15. The BOG Loan was personally guaranteed by Cabot and Wirges.

16. On February 25, 2019, CWH caused to be recorded a *Notice of Additional Advance (\$1,264,000.00) Under Mortgage with Power of Sale* with the Department of Land Management, Government of Guam, under Instrument No. 933017, in consideration for an advance of \$1,264,000 to CWH, which increased the principal amount due under the BOG Loan to \$10,764,000.

17. On or about July 7, 2020, Wirges transferred his 45% membership interest in CWH to Cabot pursuant to a *Memorandum of Agreement* dated July 7, 2020, for the sum of \$10.00. The transfer of Wirges’ 45% membership interest was confirmed in that certain “*Transfer of LLC Interests CW Holdings, LLC (Re: Michael Wirges)*” filed for record with the Department of Revenue & Taxation, General Licensing & Registration Branch under Instrument A99-331253.

18. On May 12, 2022, the outstanding principal due under the BOG Loan was \$10,203,951.05.

19. On May 13, 2022, CWH caused to be recorded a *Second Notice of Additional Advance (\$4,796,048.95) Under Mortgage with Power of Sale and of Amendment to Mortgage to Provide Additional Property Subject to the Mortgage* with the Department of Land Management, Government of Guam, under Instrument No. 974172. In consideration for the guaranty of Cabot

and additional collateral in the form three parcels of real property, namely, Lots No. 5009-2-19, 5009-2-20, and 5009-2-R21, the Bank of Guam loaned CWH an additional \$4,796,048.95, thus increasing the principal amount due under the BOG Loan to \$15,000,000.

*The Term Sheet*

20. In early 2020, at the beginning of the COVID pandemic, GHDI and CWH began discussions for GHDI to lease of the 2<sup>nd</sup> and 3<sup>rd</sup> floors of the MAC Building (“Premises”).

21. In January 2021, the parties agreed to lease terms that was memorialized in a Term Sheet regarding the Leased Premises (“Term Sheet”).

22. The Terms Sheet provides, in relevant part, that:

- A. CWH will lease 31,984 rentable square feet of space (27,684 usable square feet) to GHDI for an initial term of thirty years commencing on the Lease Commencement Date.
- B. *Rental Commencement Date* (the date rental payments will commence) is defined as the later of: 6 months from the Lease Commencement Date or upon substantial completion of Landlord’s Work and the Common Area Work. “In the event Substantial Completion is delayed, Rent Commencement Date will be postponed. Landlord shall have no liability for failure to timely complete work.”
- C. Tenant may use the premises for general office, medical use or any other permitted-use-under the certificate of occupancy.
- D. The annual *Base Rent* is calculated at \$3.61 per rentable square feet. “The total annual rent amount of \$1,385,657 payable in 12 equal monthly installments.”

E. "Landlord will construct interiors of Premises pursuant to plans and specifications of the Landlords' architect as of the date herein, to include at Landlord's expense, as base building work ("Base Work"):

- i. Deliver electrical and plumbing capped to the floor.
- ii. Provide interior demising wall of the Premises.
- iii. Provide a connection point for life/safety requirements; and
- iv. Provide access to Building's base level HVAC systems.

F. Landlord was also required to complete the Common Area Work, which is defined as:

"Construction of the ground floor lobby, elevators, building systems for the Building, demising walls for the Premises on the floor, and hallways and restrooms on the floors. Tenant will be presented with the Landlord's plans for the Common Area Work and shall have no further right to comment upon or approve the plans for this work. Landlord agrees to notify and consult with Tenant in the event of a material change to the plans for the Common Area Work (but Tenant shall have no right to approve such changes)."

G. Any Tenant Upgrades work shall be paid by the Tenant (i.e., the Tenant Fit-Outs).

However, Landlord will pay for the Tenant Upgrades and Tenant will compensate the Landlord for the Upgrades by amortizing the Upgrade Total Cost over ten years ("UTC")

H. The Tenant will pay Landlord the sum of the Base Rent and UTC in twelve equal monthly installments.

I. Tenant will pay prepaid rent in the amount of eighteen (18) months of average Base Rent ("Prepaid Rent"). The Landlord had planned to use the Prepaid Rent to fund completion of the Landlord's Base Work and Common Area Work.

*The Lease*

23. GHDI entered into the Development and Lease Agreement to Lease the Premises which had an effective date of June 10, 2021 (“Lease”).

24. Section 5.1 of the Lease provides that the Landlord is required to, among other things, diligently proceed to complete “Landlord’s Work” to achieve:

- A. **Premises Completion**, on or before the Premises Completion Date, and Final Premises Completion within forty-five (45) days thereafter (the “Premises Final Completion Date”); and
- B. **Facility Completion**, on or before the Facility Completion Date, and Final Facility Completion within forty-five (45) days thereafter (the “Facility Final Completion Date”).

25. “Landlord’s Work” is defined in Exhibit F of the Lease as including any and all work, equipment and services relating to the Base Building, the Premises, the Common Area Work, and to insure the building systems were commissioned and operational.

26. The Base Building work requires CWH to provide a “Base-Build Construction for the Building, comprised of a high-grade quality, three-story (with roof top deck), concrete medical/office building. The Building will contain a gross building area of 50,968± square feet and a rentable area of 47,977± square feet. The interiors will be in shell condition with plumbing, electrical and other Utilities connections required under this Lease capped to the floor or demising walls; build-out of demising walls of Premises; Landlord to provide a connection point for Life/Safety requirements; and provision of access points to Building’s base-level HVAC systems to be provided at Premises Completion stage. Landlord shall provide two (2) each-10’ x 10’ elevators to accommodate gurneys and a backup generator which will provide 24 hour

emergency service with auto transfer switch (both of which shall be fully functional by Facility Completion Date).”

27. The Premises Work requires CWH to construct interiors of, and connections to, the Premises pursuant to the Landlord’s Work Plans and had to be completed by the Premises Completion Date, which included:

- Delivering electrical and plumbing capped to the floor
- Providing interior demising wall of the Premises
- Providing a connection point for life/safety requirements; and
- Providing access to Building’s base level HVAC systems.

28. The Common Area Work requires CWH to construct the ground floor lobby, elevators, building systems for the Building, demising walls for the Premises on the floor, and hallways and restrooms on the floors. The interior finish required metal doors, gypsum board ceilings for common area, tiled floor for common area, vanity mirror with sink, toilet, ceramic floor and wall tiling, energy efficient lighting.

29. The Landlord’s Work also required CWH to ensure the MAC Building systems were commissioned and operational by the Facility Completion Date. The systems include: HVAC central A/C system, fully sprinklered fire protection system, two 10x10 fully functional elevators, and a 100% 24 hour ATS back-up generator system

30. In order to achieve Premises Completion, Sections 29.1(bbbbb) & (ddddd) of the Lease provide that CWH is required to complete, satisfy and achieve all of the following conditions by no later than the Premises Completion Outside Date of June 30, 2022:

- A. “all of Landlord’s Work in, about or pertaining to the Premises, and otherwise required to use, occupy and operate the Premises for its Permitted Use, but excluding Punchlist Items and the Skybridge Work,”
- B. Issuance of an Occupancy Permit - Temporary for such Landlord’s Work, as well as any other Permits and Consents required for such Landlord’s Work,
- C. Deliver a certificate of Completion with respect to such Landlord’s Work,
- D. Completion and good working order of all Utility Hook-ups,
- E. Premises are free and clear of all mechanic’s liens and the right to file such liens,
- F. Landlord has tendered actual vacant possession in accordance with the Lease.

31. In order to achieve Facility Completion, Sections 29.1(uu) & (ww) provide that CWH is required to complete, satisfy and achieve all of the following conditions by no later than the Facility Completion Outside Date of December 31, 2022:

- A. complete of all of Landlord’s Work, Punchlist for the Premises, and Common Areas Work, and other Landlord Work required for Tenant to access, use, occupy and operate the Premises,
- B. issuance and delivery of an Occupancy Permit – Temporary for all of Landlord’s Work as well as any other Permits and Consents; and
- C. deliver a building that is free and clear of all construction and mechanic’s liens.

***CWH Failed to Achieve Premises Completion  
and Facility Completion***

32. CWH has not had a project manager for years, and the construction on the MAC Building since the COVID Pandemic was intermittent, irregular, and disorganized.

33. Among other things, the MAC Building project has suffered setbacks from poor project execution, planning and design, lack of construction management, lack of funding, and

the COVID Pandemic. There are numerous construction deficiencies which were not remedied and continue to exist.

34. During an inspection on February 10, 2022, by GHDI representatives, they observed building and code deficiencies, which included, but are not limited to: interior walls were not covered by gypsum, floors were not tiled, utilities wiring were exposed, many windows were not properly installed and sealed resulting in water leakage throughout the building, the life/safety requirements (fire sprinkler, pump and fire detection systems) had not been inspected and were not operational, there were a number of temporary doors installed that did not meet the code requirements, the elevators had not been installed and were not operational, the common areas were not completed (ceilings were exposed), the public bathrooms had exposed ceilings, partial tiling, and did not have any sinks or toilets.

35. During an inspection on June 1, 2023, by GHDI representations and HDR, Inc., following Typhoon Mawar, there was substantial damage to the building because a number of the windows in the 2<sup>nd</sup> and 3<sup>rd</sup> floor had not been sealed and the floors flooded. The elevator was flooded, and there was standing water on all spaces. Water damage to gypsum boards were noted in many framed walls in the 2<sup>nd</sup> floor, 3<sup>rd</sup> floor, and electrical room frame. Windows on the second floor were torn out of their frame, and there was no flashing around the exposed window openings. The AC Duct penetration through the roof slab was completely exposed when the duct was blown away. Rainwater penetrated through the opening causing substantial damage to the interior of the building on the 3<sup>rd</sup> floor. The South HVAC chiller was displaced completed off its dunnage and all of the conduits and ductwork to the interior were severed. The fire suppression system pump room with water storage facility was flooded and infiltrated by excessive and dangerous mold growth creating an environmental hazard.

36. In October of 2022, Cabot contacted Ted Constantino, the CFO of GHDI, offering to sell the HVAC chillers because the chillers units purchased for the MAC Building were undersized for the MAC Building. GHDI inspected the HVACs shortly thereafter and declined the offer. CWH proceeded to install the undersized HVAC chiller units for the MAC Building.

37. As of September 27, 2023, CWH has not installed a 24 hour backup generator as required under the Lease.

38. In or around January 2022, CWH provided GHDI with a copy of a Certificate of Occupancy dated January 25, 2022 issued by the Department of Public Works "TO SECURE CERTIFICATE OF OCCUPAN[C]Y SHELL ONLY" for a building with area of 47,424 s.f. ("Shell Certificate of Occupancy"). The applicant for the Shell Certificate of Occupancy was LTP Construction.

39. The Shell Certificate of Occupancy states the Department of Public Works inspected the MAC Building on January 31, 2022 and noted in the Inspection Report under "Remarks: To secure occupancy permit (shell only)."

40. The Shell Certificate of Occupancy specifically states that the following agencies had not inspected and approved the MAC Building: (a) Guam Environmental Protection Agency ("GEPA"), (b) Guam Waterworks Authority ("GWA"), and (b) Fire Prevention Bureau ("FPB").

41. CWH failed to arrange for the inspections and approvals by GEPA, GWA and FPB for Landlord's Work as required under the Lease.

42. The Shell Certificate of Occupancy was incomplete and did not meet the requirements of the Lease.

43. Landlord also agreed in Section 5.1(c) of the Lease that "[n]otwithstanding the foregoing or anything to the contrary set forth in this Lease: (A) Premises Final Completion shall

occur no later than the Premises Completion Outside Date, unless otherwise expressly permitted under this Lease; and (B) Facility Final Completion shall occur no later than the Facility Completion Outside Date, unless otherwise expressly permitted under this Lease.”

44. As a condition of achieving Premises Final Completion, the Premises was required to be free and clear of all mechanic’s liens and the right to file such liens. The Premises Final Completion could not be achieved as of the June 30, 2022 date because a Mechanic’s Lien was recorded by Chris Brub against the property at the Department of Land Management on February 3, 2022, under Instrument No. 970101, and was not released until October 7, 2022.

45. CWH failed to achieve Premises Completion by not later than June 30, 2022, as required under the Lease.

46. CWH failed to achieve Facility Completion by no later than December 31, 2022 as required under the Lease.

47. The Lease Commencement Date is defined in Section 29.1(xxx) of the Lease as the third business day after the later of: the Premises Completion Date or the date Landlord tenders actual vacant possession of the Premises “broom clean and free of all Hazardous Materials, Environmental Conditions and occupants, and in compliance with all applicable laws and this lease.”

48. The Lease states that GHDI will pay Base Rent “(a) [f]rom and after the later to occur of (i) February 1, 2022 or (ii) upon the first day of the first (1<sup>st</sup>) full month after the Premises Completion Date (**the Rent Commencement Date**) ....”

49. CWH failed to achieve Premises Completion and Facility Completion as required under the Lease, therefore GHDI was not required to pay rent under the Lease.

50. The purpose of the Prepaid Rent was to help CWH fund the cost of future GHDI Tenant Upgrades.

51. Except for certain design fees expended for the Skybridge, CWH has not paid for or constructed any Tenant Upgrades on behalf of GHDI.

52. The Landlord's Work (Base Work, Premises Work, Common Area Work, and building systems commissioned and operational) has not been completed and the MAC Building is in no condition for a tenant to occupy or take possession.

***Condition Precedent to Payment of Rent***

53. The parties entered into the First Amendment to Development and Lease Agreement which had an effective date of December 21, 2021 ("First Amendment").

54. The First Amendment amended Section 3.7(a) of the Lease by amending the definition of Prepaid Rent to condition the payment of the Security Deposit and the Prepaid Rent by GHDI to within five (5) business days of the "Financing Closing Date."

55. The term Financing Closing Date is defined in Section 29.1(bbb) of the Lease as the "date on which the closing of the Monetization Transaction occurs, but in no event more than six (6) months from the Effective Date of this Lease."

56. Cabot knew and understood the Monetization Transaction referred to the closing from a successful bond offering by GHDI and that the Financing Closing Date referred to the bond closing date ("Financing Closing").

57. The payments under the Lease were subject to and conditioned upon the Financing Closing.

58. Because the Financing Closing did not happen, GHDI is not obligated to make any payments under the Lease.

*Payments to CWH*

59. GHDI has made payments to CWH between December 13, 2021 and June 6, 2023 totaling \$1,800,000.00.

60. GHDI is entitled to a return of these payments.

*The Settlement Agreement and Promissory Note*

61. The leased Premises is adjacent to GHDI's hospital facility. In connection with CWH's development of its property, CWH agreed to reimburse GHDI for one-half of the construction cost of the traffic control light and access road improvements connecting GHDI's and CWH's facilities to Route 3, Dededo, Guam.

62. A dispute arose between GHDI and CWH relating to CWH's actions in the design and construction of the traffic control light and road improvements and payment.

63. GHDI and CWH settled the dispute and entered into a Settlement and Mutual Release of Claims agreement dated on or around June 10, 2022 ("Settlement Agreement"). Pursuant to the Settlement Agreement, CWH executed a Promissory Note in favor of GHDI dated June 10, 2022 in the amount of \$2,128,788.00, payable in sixty consecutive monthly principal installments of \$41,000 commencing on February 1, 2022 and maturing on January 1, 2027.

64. CWH has failed to pay the amounts due under the Promissory Note when due, and such failure to pay was unremedied for more than 10 business days upon the occurrence thereof, which constitutes an event of default under the Promissory Note. Pursuant to the terms of the Promissory Note, upon the occurrence of an event of default, the principal amount of the Promissory Note together with all accrued interest are "immediately due and payable, without

presentment, demand, notice, protest or other requirements of any kind (all of which are hereby expressly waived by Maker).”

65. As a result of CWH’s default under the Promissory Note, CWH now owes to GHDI the entire outstanding principal amount of the Promissory Note and all accrued interest.

#### **COUNT I – BREACH OF CONTRACT**

66. GHDI reasserts and realleges Paragraphs 1 through 65 of this Counterclaim as if fully set forth herein.

67. CWH materially breached the Lease in failing to achieve Premises Completion as of June 30, 2022, as required under the Lease.

68. CWH materially breached the Lease in failing to achieve Facility Completion as of December 31, 2022, as required under the Lease.

69. CWH materially breached the Lease in failing to complete the Landlord’s Work (Base Work, Premises Work, Common Area Work, and building systems commissioned and operational) and in failing to pay for or construct any Tenant Upgrades on behalf of GHDI, as required under the Lease. The state of the construction of the MAC Building is such that the building is in no condition for a tenant to occupy or take possession, which is a material breach of the Lease by CWH.

70. GHDI has suffered damage as a result of CWH’s material breaches of the Lease, in amounts to be proven at trial.

#### **COUNT II - RESTITUTION**

71. GHDI reasserts and realleges Paragraphs 1 through 65 of this Counterclaim as if fully set forth herein.

72. GHDI made payments of rent under the Lease to CHW, including but not limited to the Prepaid Rent.

73. The purpose of the Prepaid Rent was to help CWH fund the cost of future GHDI Tenant Upgrades.

74. CWH has not paid for or constructed any Tenant Upgrades on behalf of GHDI and has failed to complete the Landlord's Work (Base Work, Premises Work, Common Area Work, and building systems commissioned and operational), and has retained GHDI's payments for CWH's benefit.

75. CWH has been unjustly enriched by GHDI's payments which CWH failed to use to complete the Tenant Upgrades and Landlord's Work.

76. GHDI is entitled to restitution of all amounts paid to CWH, including the Prepaid Rent.

### **COUNT III - ACCOUNTING**

77. GHDI reasserts and realleges Paragraphs 1 through 65 of this Counterclaim as if fully set forth herein.

78. CWH has received funds from GHDI (including the Prepaid Rent) which CWH was required to utilize to complete the Tenant Upgrades and the Landlord's Work (Base Work, Premises Work, Common Area Work, and building systems commissioned and operational).

79. Upon information and belief, CWH has failed to utilize the amounts paid to it by GHDI to complete the Tenant Upgrades and the Landlord's Work.

80. GHDI is entitled to an accounting of amounts CWH received from GHDI under the Lease and how those payments were allocated and utilized by CWH.

#### **COUNT IV – ATTORNEY’S FEES AND COSTS**

81. GHDI reasserts and realleges Paragraphs 1 through 65 of this Counterclaim as if fully set forth herein.

82. Section 28.15 of the Lease provides for recovery of attorney’s fees, costs and expenses.

83. Section 8(b) of the Promissory Note provides for recovery of attorney’s fees, costs and expenses.

84. CWH has breached the Lease and the Promissory Note.

85. GHDI is entitled to recover all attorneys’ fees, costs and expenses incurred under the Lease and the Promissory Note, and in connection with CWH’s breach of the Lease and Promissory Note.

#### **COUNT V – PAYMENT UNDER PROMISSORY NOTE**

86. GHDI reasserts and realleges Paragraphs 1 through 65 of this Counterclaim as if fully set forth herein.

87. On June 10, 2023, CWH signed and delivered a Promissory Note promising to pay GHDI the principal amount of \$2,128,788.00, with interest at a rate per annum equal to the lower of i) the five year US Treasury Bond rate set on January 30th of each year plus 3.27% or ii) 5.50%, payable monthly in arrears. The Promissory Note was payable in sixty consecutive monthly principal installments of \$41,000 commencing on February 1, 2022 and maturing on January 1, 2027.

88. CWH has failed to pay the amount due under the Promissory Note when due, and, as a result of this default in payment, CWH owes to GHDI the full amount of the principal and accrued interest under the Promissory Note.

**PRAYER**

WHEREFORE, GHDI prays for relief on its Counterclaims against CWH as follows:

1. Count I, for judgment against CWH, for breach of contract in an amount according to proof at trial.
2. Count II, for judgment in favor of GHDI, for restitution in an amount according to proof at trial.
3. Count III, for an accounting by CWH of all funds received from GHDI.
4. Count IV, for judgement in favor of GHDI for attorneys' fees, expenses and cost of suit in an amount according to proof at trial.
5. Count V, for judgment against CWH for payment of the amounts due under the Promissory Note in an amount according to proof at trial.
6. For judgment in favor of GHDI against CWH awarding GHDI pre-and post-judgment interest.
7. For judgment in favor of GHDI against CWH for costs of suit and such other further relief as the Court deems appropriate.

Dated: September 28, 2023

**CIVILLE & TANG PLLC**

By: 

**JOYCE C.H. TANG**

*Attorneys for Defendant*

*Guam Healthcare Development, Inc.*