

LAND COURT SYSTEM

REGULAR SYSTEM

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AFTER RECORDATION, RETURN BY: MAIL , PICK-UP [ ]:

McKeon Sheldon Mehling LLLC  
c/o Shannon Sheldon  
2145 Kaohu Street, Suite 203  
Wailuku, Hawaii 96793

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TMK No. \_\_\_\_\_

Total pages: \_\_\_\_\_

**DELEGATION AND INDEMNITY AGREEMENT**

This Delegation and Indemnity Agreement (“Agreement”) is made as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ (“Effective Date”), by \_\_\_\_\_, with a mailing address of \_\_\_\_\_, as a unit owner (“Owner”) and the Association of Apartment Owners of Wailea Ekahi (the “Association”), acting on behalf of the owners of Wailea Ekahi condominium project (“Project”).

RECITALS

WHEREAS, that certain Declaration of Condominium Property Regime of Wailea Ekahi (the “Declaration”), as amended, created the Project;

WHEREAS, pursuant to the Declaration and Bylaws of Association of Apartment Owners of Wailea Ekahi, the Association is vested with the right and obligation to administer the common elements and certain limited common elements with respect to the Project;

WHEREAS, Owner is the fee simple owner of that certain unit No. \_\_\_\_\_ (“Unit”), located in the Project, and which is more particularly described in the Declaration;

WHEREAS, Owner desires to alter certain common elements in the matter described in Exhibit “A” attached hereto and incorporated herein by reference (“Altered Area”) in accordance with the provisions set forth in the Declaration, Bylaws and rules and regulations of the Project;

WHEREAS, the Association is currently responsible for the maintenance and cost of such maintenance within the Altered Area as set forth in the Declaration, and allocates the cost of such maintenance among the various unit owners in the Project in accordance with the provisions in the Declaration and Bylaws;

WHEREAS, Owner, in consideration for the approval to install and/or alter such structures or elements in the Altered Area and to relieve the Association of the costs and maintenance responsibilities that pertain to the Altered Area has agreed to indemnify, defend and hold harmless the Association from and against any and all claims, damages, liabilities, losses, costs or expenses that may arise from the construction of, addition to, and maintenance of any structures or elements in the Altered Areas;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Owner and Association hereby agree as follows:

**1. Indemnification.** Owner hereby agrees to indemnify, pay, protect, defend and hold Association and its directors, officers, owners, employees, agents and representatives, harmless from and against any and all claims, liabilities, damages, losses, costs and expenses, including attorneys' fees and costs, caused by (directly or indirectly) or otherwise arising from the development, use, construction and maintenance at or of the Altered Area by Owner or any licensee, invitee, guest of Owner or person acting on behalf of Owner. This indemnification is to be interpreted broadly to protect the Association from claims that may arise from the work or use that Owner wishes to accomplish at the Altered Area.

**2. Delegation of Rights and Obligations.** Commencing on the date first written above, Association hereby agrees to temporarily delegate its rights and obligations pertaining to the Altered Area, including but not limited to the maintenance and cost of maintenance in such Altered Area, as set forth in the Declaration, to Owner. Upon the Effective Date of this Agreement, Association shall temporarily delegate and Owner shall assume the Association's rights and obligations pertaining to the Altered Area, which shall include the following obligations:

a. Owner shall be solely responsible for the maintenance, repair, replacement and removal of any and all structures, additions, or elements developed, built or placed in the Altered Area, which must conform with the standard of maintenance practiced by the Association on the common element and shall be done periodically and in a timely fashion to ensure such conformity; provided that Association shall have the right to periodically inspect the Altered Area and all improvements, structures, additions and elements on or at the Altered Area;

b. Owner shall be solely responsible for all costs and expenses relating to or arising from Owner's use of the Altered Area, including any and all damages to any units, limited common elements or common elements at the Project;

c. Owner shall be solely responsible for obtaining the necessary permits and for paying the necessary fees for such permits as required by the laws of the State of Hawaii or the County of Maui; and

d. Owner shall observe, comply and perform all laws, ordinances, rules and regulations, now or hereafter made by any governmental authority applicable to the exercise of Owner's reserved rights described hereinabove.

The Association, in its sole and absolute discretion, shall have the right to withdraw its temporary delegation to the Owner of the rights and responsibilities set forth in this Section and reassume such rights and responsibilities as to such Altered Area as set forth in the Declaration upon ten (10) calendar days' notice to the Owner.

**3. License; Reservation of Association's Rights.**

a. License. The Association hereby grants to Owner an exclusive license ("License") to enter upon the Altered Area and to use, seven (7) days a week, twenty-four hours per day, the Altered Area for the purposes of designing, installing, maintaining, operating, repairing and improving the Altered Area for the purpose identified in Exhibit "A" hereto, and for no other business or purpose and shall not be modified as to use without the express prior written consent of Association. The License commences upon the Effective Date and terminates upon the end of the Term as herein defined. The Association also grants Owner the right to temporarily use additional space within the

project as a staging area during the installation, maintenance, repair, replacement, and improvement at the Altered Area, provided that prior to using such space as a staging area, Owner shall submit plans for such use to the Association, for the Board of Director's prior written approval. The exact location and size of such space shall be determined by mutual agreement between the Parties. In connection with the foregoing license and uses, Owner agrees that it shall not commit or suffer to be committed any strip or waste in or upon the Altered Area nor any unlawful, improper or offensive use of the Altered Area, nor shall Owner maintain any public or private nuisance or do any other action which may interfere with or disturb the quiet enjoyment of the Association and other occupants at the project or which may be deemed by the Association in its sole discretion to be disreputable or hazardous. Owner shall not permit the imposition of a lien or any other encumbrance on the Altered Area or any interest therein.

b. **Sublicense.** Owner is prohibited from granting any sublicenses under this Agreement without written prior consent of the Association. Any sub-licensee shall acknowledge the receipt of this Agreement and agree to the conditions herein.

c. **Reservation of Rights of Association.** Notwithstanding anything contained in paragraph 3(a), the Association shall retain the rights to: (i) use any portion of the Altered Area, whether common or limited rights for any purpose, provided such use does not interfere with Owner's rights under this Agreement; (ii) grant easements to, and enter into any lease and/or license agreements with, third persons, provided that such third persons do not interfere with any of Owner's rights under this Agreement; (iii) place and maintain such equipment and fixtures relating to the Association's operations, including air-conditioning and HVAC units, equipment, vents, and such other infrastructure as may be reasonably located within the Altered Area, provided that it does not interfere with any of Owner's rights under this Agreement; and (iv) permit persons to enter the Altered Area for the purpose of inspecting, maintaining, repairing, removing, replacing, supplementing, and adding to the Altered Area, from time to time, without the necessity of prior notice to Owner.

#### **4. Insurance.**

a. Owner shall obtain insurance coverage from an insurance carrier approved by the Association conveying the loss to any structures or elements in the Altered Area and covering general liability as to the Altered Area, to the extent required by the Association. Such insurance shall also be written in a company or companies lawfully authorized to do business in the State of Hawaii. All insurance policies and renewals thereof shall be in form acceptable to Association and shall specifically be endorsed to name Association as an additional insured. Owner shall procure any other insurance covering the improvements on the premises, any such policy or policies shall likewise be specifically endorsed to name the Association as an additional insured, and will be claimable by Association for application in accordance with this section, and whether or not so made payable may be recovered by Association by any appropriate proceeding.

b. Owner shall provide Association with copies of each and every notice and certificates of insurance concerning the termination or renewal of any policy of insurance obtained in compliance with this Agreement within fourteen (14) calendar days that such notice is issued. Coverage shall not be canceled or materially reduced without at least thirty (30) days prior written notice to Association.

**5. Waiver.** Owner waives Owner's rights to bring any claim or cause of action against Association in the future relating to Owner's development, construction or use in the Altered Area, except for those causes or claims related to Association's own gross negligence or willful misconduct.

**6. Unconditional Obligation.** Owner hereby agrees that its obligations hereunder shall be continuing, absolute and unconditional under any and all circumstances, and shall not be subject to any reduction, limitation, impairment, termination, defense, set-off, or counterclaim in recoupment whatsoever (all of which are hereby expressly waived by Owner), whether by reason of any claim of character whatsoever, including, without limitation, any claim of waiver, release, surrender, alteration or compromise, or by reason of any liability at any time of any person to Owner or otherwise, whether based on any agreement, instrument or document.

**7. Duty to Defend, Attorneys' Fees and Costs.** Upon written request by Association, Owner shall, in accordance with its obligations herein, defend Association by attorneys and other professionals that have been approved

by Association. Notwithstanding the foregoing, Association may, in its sole discretion, engage its own attorneys and other professionals to defend or assist it at the Owner's expense if Association has reason to believe that its interests are not being adequately represented or diverge from other interests being represented by such counsel, and at the option of Association, its attorneys shall control the resolution of any claim or proceeding. Upon demand, Owner shall pay or in the sole discretion of Association, shall reimburse Association for the payment of reasonable fees and disbursements of attorneys, and other professionals in connection therewith. Nothing contained herein shall prevent Association from employing separate counsel in any such action at any time and participating in the defense thereof at its own expense.

All costs incurred through enforcement of this Agreement shall be immediately reimbursable to Association when and as incurred, and in the event of any litigation, claim or other proceeding, without any requirement of waiting for the ultimate outcome of such litigation, claim or proceeding, and Owner shall pay to Association any and all costs within ten (10) days after written notice from Association has been made which notice shall itemize the amounts thereof incurred to the date of such notice. In addition to any other remedy available for the failure of Owner periodically to pay such costs, such costs, if not paid within said ten-day period, shall bear interest a rate of one percent (1%) per month from the end of such ten (10) day period; provided, however that if such interest rate shall exceed the maximum rate allowed by law, then such costs shall bear interest at the maximum rate allowed by applicable law. All costs which remain unpaid for a period of more than thirty (30) days from the end of such ten (10) day period, shall constitute a lien against the Unit, which shall be effectuated in the manner set forth in the declaration and Bylaws for default in payment of assessments.

**8. Term.**

The term of this Agreement is until it is terminated as provided herein.

**9. Termination.**

a. It is understood and agreed that termination of the Agreement by either party on any ground shall be without prejudice to any other rights or remedies which either party may have.

b. Either party may cancel and terminate the Agreement for no cause by giving sixty (60) days' written notice of such termination to Association.

c. In the event of the failure by Owner to perform or observe any material term or covenant or agreement contained in this Agreement, the Association may terminate the Agreement and the other rights granted to Owner under this Agreement by giving notice of termination to Owner (a "Notice of Termination"), which termination shall become effective automatically unless Owner completely cures the breach within thirty (30) calendar days of the giving of the Notice of Termination.

d. The Association may elect, by written notice to Owner, to terminate the Agreement effective upon twenty (20) calendar days prior written notice for the following:

- i. Any required consent by an adjacent owner of the Project is withdrawn in writing;
- ii. Owner institutes bankruptcy proceedings;
- iii. Owner fails to pay regular maintenance fees and/or special assessments for common expenses and does not cure the delinquency within sixty (60) days;
- iv. Owner assigns, attempts to assign, sublicense, attempts to sublicense, or otherwise transfers or attempts to transfer any of its rights or obligations hereunder without the prior written consent of the Association, any such approval by the Association is not to be unreasonably withheld. Any such attempted or completed assignment, sublicense or transfer, whether voluntary or by operation of law, directly or indirectly, will be void and of no force or effect; or

v. A final judgment is entered against Owner, or the occurrence of any other event, which individually or in aggregate, would have a materially adverse effect on the financial condition or otherwise, operations, performance, properties or prospects of Owner or its ability to perform timely its obligations under this Agreement.

e. Upon the expiration or termination of the Agreement for any reason whatsoever, all of the rights of Owner under this Agreement shall forthwith terminate and immediately revert to the Association, and Owner shall forthwith discontinue all use of the Altered Area, and at Owner's sole cost and expense, Owner shall remove any alterations, obstructions or barriers at the Altered Area and restore the Altered Area to the condition existing prior to Owner's alterations.

#### **10. Owners' Obligations.**

a. Owner covenants that Owner has obtained written consent, if necessary, from directly affected unit owners to alter the common elements, and Owner acknowledges and agrees that this Agreement may be terminated if such written consent is withdrawn at the sole discretion of the owner of the affected unit.

b. Owner shall repair any damage to the common elements or damage at his or her unit or any other units which arise from or are in connection with Owner's use of the Altered Area. Owner shall repair and/or replace all damages at Owner's sole expense within thirty (30) calendar days of notification by the Association or its representatives.

**11. Remedies.** This Agreement shall be voidable by Association upon failure of Owner to fulfill any of the obligations to exercise any of the rights set forth in this Agreement up to the standards as determined by the Board, in its sole discretion. In addition, the Association shall have the option to offer Owner the right to cure the noncompliance within thirty (30) days after notice to the Owner of such noncompliance. In the event Owner does not take corrective action once directed to do so by Association, the Association may revoke its temporary delegation of rights and maintenance obligations and shall relieve Association of such rights and obligations pertaining to the Altered Area. The Association may then correct and amend the noncompliance or damage in the Altered Area and charge the expense of remedying such noncompliance or damage to the Owner. All sums charged to Owner, which remain unpaid for a period of more than thirty (30) days from the day Owner receives a bill for such charges shall constitute a lien against the Unit. Such lien shall be effectuated in accordance with the procedures set forth in the Hawaii Revised Statutes, Declaration and Bylaws for default in payment of Assessments.

**12. Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of successors, assignees, personal representatives, heirs and legatees of all of the respective parties hereto.

**13. Governing Law; Venue.** This Agreement shall be governed by, interpreted under, and construed and enforceable in accordance with the laws of the State of Hawaii. Any action to enforce this Agreement shall be venued in the Second Circuit Court on the Island of Maui.

**14. No Warranty.** Owner accepts the Altered Area "as is", "where is" and "with all faults"; the Association makes no representations or warranties with respect to the condition of the Altered Area or its suitability for Owner's purposes, nor has the Association made any commitments to make any improvements or additions to the Altered Area.

**15. Amendment.** No provisions of this Agreement may be changed, waived, discharged or terminated orally or by any other means except by an instrument in writing signed by both parties.

**16. Assignment.** Owner shall not assign this Agreement without first obtaining the prior written consent of Association. Any consent thereto given by Association shall be deemed a consent to only that specific assignment and shall not be deemed a consent to all future assignments.

**17. Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original and said counterparts shall together constitute one and the same document.

**18. Electronic/Facsimile Signatures.** A signature sent via facsimile, electronic mail attachment or similar electronic means shall be the equivalent of and shall have the same force and effect as an original signature.

**19. No Party Shall Be Deemed The Drafter Of This Agreement.** In entering into this Agreement, the Parties represent that they have read this Agreement and that the terms are fully understood and voluntarily accepted by them. The Parties are represented by counsel and their counsel have reviewed and revised, or have had full opportunity to review and revise this Agreement, and it is understood and agreed that the rule of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement or any amendment of it.

**20. Headings.** In this Agreement, the captions or headings of paragraphs and subparagraphs are inserted for convenience, reference, and identification purposes only, and shall neither control, define, limit nor affect any provisions of this Agreement.

IN WITNESS WHEREOF, the undersigned has executed and delivered this Agreement as of the day and year first written above.

“Owner”

By \_\_\_\_\_

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

By \_\_\_\_\_

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

“Association”

ASSOCIATION OF APARTMENT OWNERS OF WAILEA  
EKAHI

By \_\_\_\_\_

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

Its: President

**EXHIBIT "A"**

**ALTERED AREA**

1. The Altered Area shall consist of the area of approximately \_\_\_\_\_ square feet located on/near building \_\_\_\_\_.
2. The purpose for the use of the Altered Area is for installation and maintenance of an air conditioning unit with the following specifications: \_\_\_\_\_, subject to change by the mutual agreement of the parties.

STATE OF HAWAII )  
 ) ss.  
COUNTY OF MAUI )

On \_\_\_\_\_, 20\_\_ before me personally appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn, did say that he is the President of the Association of Apartment Owners of Wailea Ekahi and the said instrument was signed on behalf of said association by authority of its board of directors, and said officer acknowledged said instrument to be the free act and deed of said Association. Said Association has no seal.

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

\_\_\_\_\_  
Print Name:  
Notary Public, State of Hawaii  
My commission expires: \_\_\_\_\_

|                           |                 |
|---------------------------|-----------------|
| Doc. Date: _____          | # Pages: __     |
| Notary Name: _____        | _____ Circuit   |
| Doc. Description: _____   |                 |
| _____<br>Notary Signature | _____<br>Date   |
| NOTARY CERTIFICATION      | (Stamp or Seal) |



STATE OF HAWAII            )  
  ) ss.  
COUNTY OF MAUI            )

On \_\_\_\_\_, 20\_\_ before me personally appeared \_\_\_\_\_, to me known to be the person described in and who executed the foregoing instrument and acknowledged that \_\_\_ executed the same as \_\_\_ free act and deed.

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

\_\_\_\_\_  
Print Name:  
Notary Public, State of Hawaii  
My commission expires: \_\_\_\_\_

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| Notary Name: _____        | _____ Circuit   |
| Doc. Description: _____   |                 |
| _____<br>Notary Signature | _____<br>Date   |
| NOTARY CERTIFICATION      | (Stamp or Seal) |