

When Recorded Return To:

Brian D. Cunningham, Esq.  
SNELL & WILMER L.L.P.  
Gateway Tower West  
15 West South Temple, Suite 1200  
Salt Lake City, Utah 84101

APN: 13-042-0074 and 13-042-0087

01459-7134

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## LEASEHOLD MORTGAGEE CONSENT AND NONDISTURBANCE AGREEMENT

THIS LEASEHOLD MORTGAGEE CONSENT AND NONDISTURBANCE AGREEMENT (this "Agreement") is made as of this 12 day of January 2018, by and by and between **BRIGHTON BANK**, a Utah banking corporation ("Leasehold Mortgagee"), and **WASHINGTON FEDERAL, NATIONAL ASSOCIATION** ("Sub-leasehold Mortgagee").

### WITNESSETH:

WHEREAS, pursuant to that certain Ground Lease, dated January 12, 2007 (as amended and assigned, the "Ground Lease"), by and between **NIMBUS PROPERTIES, L.C.**, a Utah limited liability company ("Ground Lessor"), as landlord, and **DW ASSOCIATES, LLC**, a Utah limited liability company ("DW Associates"), as tenant (as successor-in-interest to DJ Smith Investments, L.C., a Utah limited liability company, and WGT American Fork, LLC, a Utah limited liability company), DW Associates possesses a leasehold interest to certain real property more particularly described in Exhibit A to the Ground Lease ("Parcel 1"). **INNES FAMILY, LLC**, a Utah limited liability company ("Innes") owns fee simple title to certain real property identified as Lease Parcel 2 ("Parcel 2") set forth on Exhibit B to that certain Ground Sublease, dated June 17, 2014, as amended by that certain First Amendment to the Ground Sublease (as further amended and assigned, the "Lease"), between DW Associates and Innes, together as landlord ("Lessor"), and **WDG AMERICAN FORK, LLC**, a Utah limited liability company ("Lessee"). Pursuant to the terms of the Ground Sublease, Lessor has granted a leasehold interest in Parcel 1 and Parcel 2, which property is located in Utah County, Utah (collectively, the "Premises") to Lessee.

WHEREAS, Lessor has executed and delivered to Leasehold Mortgagee that certain Leasehold Deed of Trust, Assignment of Rents and Leases, Security Agreement and Fixture Filing recorded December 12, 2008, as Entry No. 130177:2008 in the official records of Utah County, Utah as modified and extended (the "Leasehold Mortgage"); and

WHEREAS, as security for a loan by Sub-leasehold Mortgagee to Lessee (the "Loan"), Lessee has executed and delivered to Sub-leasehold Mortgagee a Leasehold Deed of Trust, Assignment of Rents, Security Agreement, and Fixture Filing dated January 12, 2018, to be recorded in the official records of Utah County, Utah (the "Sub-leasehold Mortgage").

NOW, THEREFORE, in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby expressly acknowledged, the parties hereto covenant and agree as follows:

1. Consent to Sub-leasehold Mortgage. Notwithstanding anything to the contrary contained in the Leasehold Mortgage, Leasehold Mortgagee hereby consents to the execution, delivery, performance and recordation of the Sub-leasehold Mortgage in favor of Sub-leasehold Mortgagee encumbering Lessee's leasehold interest in the Premises, and Leasehold Mortgagee agrees that the execution, delivery, performance and recordation of the Sub-leasehold Mortgage and any related documents (including UCC financing statements) will not constitute a breach of or default under any of the Leasehold Mortgage.

2. Notices to Sub-leasehold Mortgagee. Leasehold Mortgagee shall provide simultaneously to Sub-leasehold Mortgagee any notice of default that Leasehold Mortgagee serves upon Lessor. Prior to commencing any action or proceeding for the foreclosure of the Leasehold Mortgage and/or the sale of the Premises, Leasehold Mortgagee shall provide at least thirty (30) days' prior written notice to Sub-leasehold Mortgagee of any such action or proceeding. Leasehold Mortgagee agrees not to name Sub-leasehold Mortgagee as a party in any foreclosure of the Leasehold Mortgage.

3. Foreclosure of Leasehold Mortgage. In the event that Leasehold Mortgagee succeeds to the interest of Lessor under the Lease, or if any action or proceeding is commenced by Leasehold Mortgagee for the foreclosure of the Leasehold Mortgage and/or the sale of the Premises, then so long as Lessee is not in default beyond any applicable cure periods under any of the terms, covenants or conditions of the Lease, there shall be no termination, modification or amendment of the Lease by Leasehold Mortgagee without the prior written consent of Sub-leasehold Mortgagee. Leasehold Mortgagee shall, upon succeeding to the interest of Lessor under the Lease, serve a copy of any notice of default that Leasehold Mortgagee serves upon Lessee simultaneously to Sub-leasehold Mortgagee, and no such notice shall be effective unless a copy of such notice is also served upon Sub-leasehold Mortgagee.

4. Sub-leasehold Mortgagee Cure Rights. If any default by Lessee shall occur which, pursuant to any provision of the Lease, the Leasehold Mortgage or applicable law, entitles Leasehold Mortgagee, upon succeeding to the rights of Lessor under the Lease, to terminate the Lease, and if, before the expiration of thirty (30) days from the date of service of notice of default pursuant to paragraph 3 hereof upon Sub-leasehold Mortgagee, Sub-leasehold Mortgagee shall have notified Leasehold Mortgagee of its desire to nullify such notice and shall have paid to Leasehold Mortgagee the rent and other payments provided for in the Lease which are then in default, and shall have complied (or shall have commenced the work of complying) with all of the other obligations of Lessee under the Lease which are then in default, and shall prosecute the same to completion with reasonable diligence, then in such event, Leasehold Mortgagee shall not be entitled to terminate the Lease and any notice of termination theretofore given shall be void and of no effect.

5. Lessee Defaults. If any default by Lessee shall occur which, pursuant to any provision of the Lease, the Leasehold Mortgage or applicable law, entitles Leasehold Mortgagee, upon succeeding to the rights of Lessor under the Lease, to terminate the Lease, Sub-leasehold Mortgagee shall not only have the right to nullify any notice of termination by curing such default, as aforesaid in **paragraph 4** hereof, but shall also have the right to postpone and extend the specified date for the termination of this Lease as fixed by Leasehold Mortgagee in Leasehold Mortgagee's notice of termination for a period of not more than three (3) months, provided that Sub-leasehold Mortgagee shall: (i) cure or cause to be cured any then existing monetary defaults prior to the postponement of the date of termination and meanwhile pay the rent and comply with and perform all of the other terms, conditions and provisions of the Lease on Lessee's part to be complied with and performed; (ii) forthwith take steps to acquire or sell Lessee's interest in the Lease by foreclosure of the Sub-leasehold Mortgage or otherwise and shall prosecute the same to completion with due diligence; and (iii) continue to timely pay or cause to be paid all sums owing by Lessee under the Lease and provided further that there is not outstanding and uncured any default thereunder the continuation of which during such period may: (x) threaten Leasehold Mortgagee's interest in the Premises, (y) have an adverse effect on the value of the Premises, or (z) result in or give rise to any environmental deterioration or degradation of the Premises; such as, for example and without limitation, any failure to insure or any failure to repair or care for the Premises the effect of which is to place the Premises at risk or to increase the ultimate cost of such repair.

6. Right to New Lease. In the event Leasehold Mortgagee succeeds to the interest of the Lessor under the Lease by foreclosure of the Leasehold Mortgage or otherwise, then Leasehold Mortgagee agrees that in the event of any termination of the Lease or of any New Lease (as defined below) prior to its stated expiration date for any reason whatsoever (including, without limitation, by operation of law or the rejection of the Lease or any New Lease (as defined below) by Lessee as debtor in possession or any trustee of Lessee in any bankruptcy, reorganization, arrangement or similar proceeding), Leasehold Mortgagee shall, upon request of Sub-leasehold Mortgagee (or its nominee) enter into a new lease ("*New Lease*") of the Premises with Sub-leasehold Mortgagee (or its nominee) for the remainder of the Lease term, effective as of the date of such termination, at the rent and upon the same terms, provisions, covenants and agreements as contained in the Lease (including, without limitation, all renewal options, and rights of first refusal), and subject only to the same conditions of title as the Lease is subject to on the date of the execution thereof, provided:

(a) Sub-leasehold Mortgagee (or its nominee) shall make request upon Leasehold Mortgagee for such New Lease within thirty (30) days after the date on which the Sub-leasehold Mortgagee has received written notice of the occurrence of such termination; provided that Sub-leasehold Mortgagee (or its nominee) continues to pay or cause to be paid all sums owing by Lessee under the Lease and causes to be performed all of Lessee's obligations set forth in the Lease.

(b) Sub-leasehold Mortgagee (or its nominee) shall pay to Leasehold Mortgagee at the time of the request for the New Lease all sums which would at that time be due pursuant to the Lease but for such termination, less the net income collected by Leasehold Mortgagee subsequent to the date of termination of the Lease and prior to the execution and delivery of the New Lease. The New Lease shall be executed by all parties within thirty (30) days of preparation by Leasehold Mortgagee.

(c) Upon the execution and delivery of the New Lease, all subleases which theretofore may have been assigned and transferred to Leasehold Mortgagee shall thereupon be assigned and transferred (without recourse) by Leasehold Mortgagee to the lessee under the New Lease; and the lessee under the New Lease shall have the benefit of all of the right, title, interest, powers and privileges of Lessee under the Lease in and to the Premises, including specifically assignment of Leasehold Mortgagee's interest in and to any then existing sublease where the sublessee may have attorned to Leasehold Mortgagee and which, at the time of cancellation or termination of the Lease, was prior in right to the lien of the holder of the Sub-leasehold Mortgage or which by separate agreement or by its terms had been granted non-disturbance privileges pursuant to the provisions of the Lease; and Leasehold Mortgagee hereby agrees that, with respect to any such sublease so assigned, Leasehold Mortgagee will not modify or amend any of the terms or provisions thereof, during the period between the expiration or termination of the Lease and the execution and delivery of the New Lease.

7. Termination of Lease or New Lease. Following the termination of the Lease or any New Lease and until the right of the Sub-leasehold Mortgagee (or its nominee) to enter into a New Lease shall have expired without any New Lease having been executed, Leasehold Mortgagee, as successor in interest to Lessor under the Lease:

(a) shall not alter or in any way demolish the buildings or other improvements situated on the Premises; and, during said period, Leasehold Mortgagee shall not remove, replace or change any furniture, furnishing, fixtures or equipment located on the Premises; and

(b) shall not terminate any sublease or the rights of any subtenant under such sublease unless such subtenant shall be in default under such sublease.

8. Non-Disturbance; Direct Lease Between Parties. In the event Leasehold Mortgagee succeeds to the interest of Lessor under the Lease by foreclosure of the Leasehold Mortgage or otherwise and (a) if Sub-leasehold Mortgagee shall enforce the Sub-leasehold Mortgage, (b) if Lessee shall reject the Lease in any

bankruptcy proceeding or (c) if the Premises shall be transferred by deed in lieu of foreclosure, then pursuant to **paragraph 6** above (i) the Lease shall continue in full force and effect as a direct lease agreement between Leasehold Mortgagee and Sub-leasehold Mortgagee, its successors and assigns or any grantee under any deed given as a result of any foreclosure or in lieu of foreclosure, upon and subject to all of the terms, covenants and conditions of the Lease for the balance of the term thereof remaining and any extensions or renewals thereof which may be effected in accordance with any option therefor in the Lease; (ii) Leasehold Mortgagee shall not disturb Sub-leasehold Mortgagee or any other such owner as its lessee; and (iii) Sub-leasehold Mortgagee shall have the right to assign or sublease its interest in the Lease.

9. Assignment of Sub-leasehold Mortgage; Assignment of Lease. Sub-leasehold Mortgagee shall have the right to assign its right, title and interest in the Sub-leasehold Mortgage, the Loan and this Agreement to any third party. Until Sub-leasehold Mortgagee or its assignee has completed a foreclosure of the Sub-leasehold Mortgage or accepted an assignment of the Lease in lieu of foreclosure, neither Sub-leasehold Mortgagee nor its assigns shall be deemed by virtue of this Agreement to have assumed any of Lessee’s obligations under the Lease, and Lessee shall be responsible for all of Lessee’s obligations under the Lease. Sub-leasehold Mortgagee shall have the right to assign its right, title and interest in the Lease, or any new ground lease as provided in paragraph 5 above, to any third party so long as the assignee delivers to Leasehold Mortgagee a written assumption agreement signed by the assignee.

10. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

11. Integration; Etc. This Agreement integrates all of the terms and conditions of the parties’ agreement regarding the other matters contained herein. This Agreement supersedes and cancels all oral negotiations and prior and other writings with respect to such matters contained herein. If there is any conflict between the terms, conditions and provisions of this Agreement and those of any other agreement or instrument, including the Lease, the terms, conditions and provisions of this Agreement shall prevail. This Agreement may not be modified or amended except by a written agreement signed by the parties or their respective successors-in-interest.

12. Notices. All notices given under this Agreement shall be in writing and shall be given by personal delivery, overnight receipted courier or by registered or certified United States mail, postage prepaid, sent to the party at its address appearing below. Notices shall be effective upon receipt (or on the date when proper delivery is refused). Addresses for notices may be changed by any party by notice to all other parties in accordance with this Section.

If to Sub-leasehold Mortgagee: Washington Federal, National Association  
1207 East Draper Parkway  
Draper, Utah 84020  
Attention: James Endrizzi

with a copy to: Snell & Wilmer L.L.P.  
Gateway West Tower  
15 West South Temple, Suite 1200  
Salt Lake City, Utah 84101  
Attention: Brian D. Cunningham, Esq.

If to Leasehold Mortgagee: Brighton Bank  
7101 Highland Drive  
Salt Lake City, Utah 84121

13. Attorneys’ Fees. If any lawsuit or arbitration is commenced which arises out of or relates to this Agreement, the prevailing party shall be entitled to recover from each other party such sums as the court or

arbitrator may adjudge to be reasonable attorneys' fees, including the costs for any legal services by in-house counsel, in addition to costs and expenses otherwise allowed by law.

14. Miscellaneous Provisions. This Agreement shall inure to the benefit of and be binding upon the parties and their respective successors and assigns. This Agreement satisfies any condition or requirement in the Leasehold Mortgage relating to the consent required from Leasehold Mortgagee to the Sub-leasehold Mortgage. As used herein, the word "include(s)" means "include(s), without limitation," and the word "including" means "including, but not limited to." Sub-leasehold Mortgagee, at its sole discretion, may, but shall not be obligated to, record this Agreement. As used herein, the terms "Leasehold Mortgage" and "Sub-leasehold Mortgage" shall include any and all present and future amendments, supplements, extensions and renewals of each such document; the term "Lease" shall include any and all present and future amendments, supplements, extensions and renewals of such document; the terms "Leasehold Mortgagee" and "Sub-leasehold Mortgagee" as used herein shall include the successors and assigns of Leasehold Mortgagee and Sub-leasehold Mortgagee, as applicable, and any person, party or entity which shall become the owner of the Premises by reason of a foreclosure of the Leasehold Mortgage or Sub-leasehold Mortgage, as applicable, or the acceptance of a deed in lieu of foreclosure or otherwise; and the term "Lessor" as used herein shall mean and include the present

15. Jury Waiver. LEASEHOLD MORTGAGEE AND SUB-LEASEHOLD MORTGAGEE HEREBY VOLUNTARILY, KNOWINGLY, IRREVOCABLY AND UNCONDITIONALLY WAIVE ANY RIGHT TO HAVE A JURY PARTICIPATE IN RESOLVING ANY DISPUTE (WHETHER BASED UPON CONTRACT, TORT OR OTHERWISE) BETWEEN LEASEHOLD MORTGAGEE AND SUB-LEASEHOLD MORTGAGEE ARISING OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT, OR ANY RELATIONSHIP BETWEEN LEASEHOLD MORTGAGEE AND SUB-LEASEHOLD MORTGAGEE. THIS PROVISION IS A MATERIAL INDUCEMENT TO SUB-LEASEHOLD MORTGAGEE TO PROVIDE THE FINANCING DESCRIBED HEREIN.

16. Governing Law. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF UTAH WITHOUT GIVING EFFECT TO CONFLICT OF LAWS PRINCIPLES (REGARDLESS OF THE PLACE OF BUSINESS, RESIDENCE, LOCATION OR DOMICILE OF LEASEHOLD MORTGAGEE. SUB-LEASEHOLD MORTGAGEE OR ANY PRINCIPAL THEREOF).

17. Subordination of Non-disturbance Agreement. The parties hereby agree that, to the extent elected by Sub-leasehold Mortgagee, that certain Non-disturbance and Attornment Agreement, between Ground Lessor, DW Associates, Lessee, MJM 5G, LLC, a Nevada limited liability company, and ZAXBY'S FRANCHISING, INC., a Georgia corporation, dated August 13, 2015, and recorded August 28, 2015 as Entry Number 79257:2015 in the official records of Utah County, Utah, are hereby subordinated to Sub-leasehold Mortgagee's rights under this Agreement.

18. Counterpart. This Agreement may be executed in any number of counterparts, each of which shall be an original but all of which shall constitute one and the same instrument.

[Remainder of Page Intentionally Left Blank]

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

**LEASEHOLD MORTGAGEE:**

**BRIGHTON BANK**  
a Utah banking corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**SUB-LEASEHOLD MORTGAGEE:**

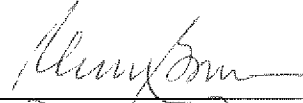
**WASHINGTON FEDERAL, NATIONAL  
ASSOCIATION**  
a national banking association

By:  \_\_\_\_\_  
Name: James Endrizzi  
Title: Division Manager – Sr. Vice President

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

**LEASEHOLD MORTGAGEE:**

**BRIGHTON BANK**  
a Utah banking corporation

By:   
Name: ROBERT M. BOWEN  
Title: PRES/CEO

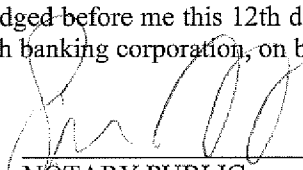
**SUB-LEASEHOLD MORTGAGEE:**

**WASHINGTON FEDERAL, NATIONAL  
ASSOCIATION**  
a national banking association

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF Utah )  
 :ss  
COUNTY OF Salt Lake )

The foregoing instrument was acknowledged before me this 12th day of January, 2018, by Robert M. Bowen, President of **BRIGHTON BANK**, a Utah banking corporation, on behalf of such corporation.

  
\_\_\_\_\_  
NOTARY PUBLIC  
Residing at SALT LAKE CITY

[Seal]



STATE OF UTAH )  
 :ss  
COUNTY OF SALT LAKE )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2018, by \_\_\_\_\_ of **WASHINGTON FEDERAL, NATIONAL ASSOCIATION**.

\_\_\_\_\_  
NOTARY PUBLIC  
Residing at \_\_\_\_\_

[Seal]



STATE OF \_\_\_\_\_ )  
 )  
:SS  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2018, by \_\_\_\_\_, a \_\_\_\_\_ of **BRIGHTON BANK**, a Connecticut corporation, on behalf of such corporation.

\_\_\_\_\_  
NOTARY PUBLIC  
Residing at \_\_\_\_\_

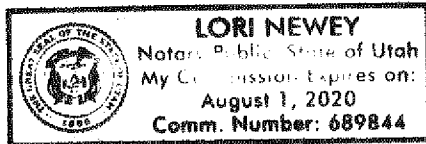
[Seal]

STATE OF UTAH )  
 )  
:SS  
COUNTY OF SALT LAKE )

The foregoing instrument was acknowledged before me this 17<sup>th</sup> day of January, 2018, by JAMES ENDRIZZI, a Division Manager – Sr. Vice President of **WASHINGTON FEDERAL, NATIONAL ASSOCIATION**.

*Lori Newey*  
\_\_\_\_\_  
NOTARY PUBLIC  
Residing at Salt Lake City, UT

[Seal]



**EXHIBIT A****PROPERTY DESCRIPTION**

That certain real property located in Utah County, State of Utah, and more particularly described as follows:

All of the Premises as defined in that certain unrecorded Ground SubLease dated June 17, 2014, between WDG Amercian Fork, LLC as Tenant, and DW Associates, LLC, as Landlord, and First Amendment to the Ground Sublease dated April 30, 2015, by and between WDG American Fork, LLC, Tenant, DW Associates, LLC, Landlord, and Innes Family, LLC, Additional Landlord, and as such Premises are more particularly described as follows:

**Lease Parcel 1:**

A Parcel of land situate in the Northeast Quarter of Section 22, Township 5 South, Range 1 East, Salt Lake Base and Meridian, located in American Fork City, Utah County, State of Utah and being more particularly described as follows:

Beginning at a point North 89°53'25" West, along the Section line, a distance of 874.62 feet and South 00°56'47" East, a distance of 402.33 feet, from the Northeast corner of said Section 22; and running thence South 62°42'42" East 114.56 feet, to use the East line of Parcel 2, as shown on the Hubble Engineering record of survey, on file with the Utah County Surveyors Office; thence South 0°56'47" East, along said East line, a distance of 236.42 feet, to the I-15 controlled access line [UDOT Project Number S-115-6(175)245] Also Described in Warranty Deed recorded as Entry No. 112834:2010 of Official Records; thence Northwesterly along said controlled access line the following two (2) courses: (1) Northwesterly along the arc a 2469.08 foot non-tangent curve to the right, through a central angle of 3°53'05", a distance of 167.41 feet, the long cord of which bears North 61°34'23" West, a distance of 167.38, to a point of curvature; (2) Northwesterly along the arc of a 2005.86 foot non-tangent curve to the right, through a central angle of 0°50'01", a distance of 36.39 feet, the long chord of which bears North 55°21'53" West, a distance of 36.39 feet, to the East line of the In-N-Out Burger Lease Parcel; thence along the said Lease Parcel the following three (3) courses: (1) North 36°09'04" East, a distance of 71.05 feet, (2) North 62°58'03" West, a distance of 53.12 feet; (3) North 35°39'51" East, a distance of 131.76 feet, to the point of beginning.

**Lease Parcel 2:**

A Parcel of land situate in the Northeast Quarter of Section 22, Township 5 South, Range 1 East, Salt Lake Base and Meridian, located in American Fork City, County of Utah, State of Utah and being more particularly described as follows:

Beginning at point North 89°53'25" West, along the Section line a distance of 773.67 feet and South 0°56'47" East, along East line of Parcel 2 shown on the Hubble Engineering Survey, on file with the County Surveyors Office, a distance of 454.67 feet, from the Northeast Corner of said Section 22; and running thence South 62°42'42" East, a distance of 17.03 feet, to a point 15.00 feet East of the said East line of Parcel 2 shown on the Hubble Engineering Record of Survey; thence South 0°56'47" East, parallel with and 15.00 feet Easterly of said Easterly line, a distance of 236.09 feet, to the I-15 controlled access line [UDOT Project Number S-115-6(175)245] Also described in Warranty Deed recorded as Entry No. 44124:2012 of Official Records; thence Northwesterly along the arc of a 2469.08 foot radius non-tangent curve to the right, through a central angle of 0°23'29", a distance of 16.87 feet, the long cord bears North 63°42'41" West, a distance of 16.87 feet, to the aforesaid East line of Parcel 2 shown on the Hubble Engineering record of Survey, thence North 0°56'47" West, along said East line, a distance of 236.42 feet to the point of beginning.

**Parcel 3:**

Benefits, if any, accruing to Lease Parcel 1 and Lease Parcel 2, pursuant to Restrictions and Easements Agreement for ingress, egress and access of vehicular traffic and parking of motor vehicles, recorded September 3, 2009, as Entry No. 96546:2009, of Official Records.

Tax ID: 13-042-0074 and 13-042-0087