

Escrow Number: _____

AGREEMENT CONCERNING FIRPTA WITHHOLDING

THIS AGREEMENT is made this ____ day of _____, 200____, by and among TITLE GUARANTY ESCROW SERVICES, Inc., a HAWAII corporation ("Escrow"), _____ ("Buyer") and _____ ("Seller") concerning real property situated at _____ (the "Property").

R E C I T A L S

- A. Buyer has entered into a contract with Seller to purchase the Property.
- B. Under Section 1445 of the Internal Revenue Code of 1986, as amended (the "Code"), Buyer is obligated to (i) withhold 10% of the total consideration payable to a foreign seller under the purchase contract and (ii) remit such amount to the Internal Revenue Service ("IRS") within twenty (20) days from the date of transfer of the Property to Buyer with FIRPTA Forms 8288 and 8288-A.
- C. Buyer has instructed escrow to withhold 10% of the purchase price of the Property and to send such amount to the IRS, unless Seller provides Escrow with the appropriate certification of non-foreign status as required by Code Section 1445.
- D. Seller is unable to provide Buyer with a certification of non-foreign status as mandated by Code Section 1445 because Seller is not a United States person.
- E. Seller has applied to the IRS for an IRS "Withholding Certificate" that permits the Buyer to withhold a reduced amount of tax. Seller understands that under Treasury Regulations Section 1.1445-3(a), Seller may combine an application for a withholding certificate with an application for an early refund, but Seller desires not to apply for an early refund under Treasury Regulations Section 1.1445-3(g).
- F. Buyer and Seller are requesting that Escrow (i) retain 10% of the purchase price until such time that the IRS responds to Seller's application and (ii) transmit to the IRS within twenty (20) days from the date that the IRS makes a determination on Seller's application, all or a portion of the amount withheld in accordance with said IRS determination.
- G. As a requirement for complying with the request under paragraph F above, Escrow shall charge Seller an additional fee of \$250.00 for performing this service and Escrow shall retain 120% of the required amount to ensure that enough funds are available to pay for any interest and/or penalty that may be assessed by IRS **against Buyer.**

NOW, THEREFORE, the parties hereto agree as follows:

1. The Seller represents and warrants that Seller has retained the services of a lawyer, certified public accountant or person duly enrolled to practice before the Internal Revenue Service as an enrolled agent ("Sellers Representative") to prepare IRS form 8288-B to apply to the IRS for an IRS Withholding Certificate with respect to the sale of the Property. Moreover, Seller's Representative has submitted Form 8288-B to the IRS and has prepared and signed the Preparer's Certification & Notice to Transferee attached hereto as Exhibit "A".

2. Buyer and Seller instruct Escrow to withhold 120% of the amount required under Code Section 1445 (i.e. 12% of the purchase price), but not to report or pay over to the IRS such amount (or a lesser amount as determined by the IRS) until the earlier of (i) Escrow's receipt of the IRS's final determination with respect to the application or (ii) the 100th day from the date of recording of the conveyance document for the transfer of the Property.

The IRS's final determination will be deemed to occur on the day when the copy of the withholding certificate or the copy of the notification denying the request for a withholding certificate is mailed by the IRS to Seller or Seller's Representative.

3. Seller shall arrange to have Seller's Representative provide Escrow with a copy of the IRS's final determination within 7 days of his or her receipt of such determination.

4. Buyer has completed Forms 8288 and 8288-A (except for filling in the amount of withholding) and has deposited same with Escrow. In the event Escrow receives a copy of the IRS's final determination **NO LATER THAN 17 DAYS FOLLOWING THE DATE STATED ON SAID IRS'S FINAL DETERMINATION LETTER**, Escrow shall send to the IRS all amounts requested by the IRS; provided, however, that Escrow shall not be obligated to send to the IRS an amount greater than the amount withheld. A check for the balance of the amount withheld by Escrow, if any, shall be mailed to the Seller at the following address:

5. In the event that Escrow does not receive any notice from Seller or Seller's Representative regarding the IRS's final determination by the 93rd day from the date of recording of the conveyance document for the transfer of the Property, Escrow shall attempt to contact Seller or Seller's Representative to enquire about the status of the IRS determination letter. If (i) Escrow does not receive the IRS determination letter within 7 days from the date of contact with Seller or Seller's Representative or (ii) the date on the IRS determination letter actually received by Escrow is more than 17 days prior to the date of Escrow's receipt of said IRS letter, Escrow shall send to the IRS the Forms 8288, 8288-A **and all of the amount withheld equal to 12% of the purchase price**. Escrow shall report the total 12% amount remitted as the amount withheld with instructions to IRS to credit 2% to any penalty and interest assessed against the Buyer. However, it shall be the sole responsibility of Seller to work out with the IRS the appropriate amount of penalty and/or interest applicable and the amount of Seller's tax refund, if any.

6. Seller understands that it is the responsibility of Seller's Representative to submit a **complete** application (including all supporting documents) for the IRS Withholding Certificate in order to avoid any delays in IRS processing. Seller agrees to take full responsibility to avoid any IRS processing delays and Seller irrevocably instructs escrow to send all of the amount withheld to the IRS on the 100th day from the date of closing **regardless of any IRS letter that may be issued stating that additional time for processing is required**, unless escrow receives the IRS Withholding Certificate as provided in paragraph 5 above.

7. Seller understands that in the event Escrow complies with Paragraphs 5 & 6 above and sends the FIRPTA forms to the IRS without either (i) Seller's Individual Taxpayer Identification Number ("ITIN") or (ii) ITIN application form W-7, the IRS will not process the FIRPTA forms to credit Seller with the amounts withheld until such time that the foreign Seller obtains an ITIN. Since Seller's Representative should be addressing any issue involving Seller's ITIN, Seller and/or Seller's Representative shall be solely responsible for following up with the IRS to obtain (i) an ITIN number, (ii) credit for the FIRPTA amount withheld and (iii) the amount of Seller's tax refund, if any.

8. Buyer and Seller understand that Escrow has no obligation to withhold any tax under Code Section 1445, which is the sole responsibility of the Buyer, and Escrow is acting herein only pursuant of these instructions and agreement. Buyer and Seller hereby agree to indemnify, defend and hold Escrow harmless from any and all loss, claim liabilities, damages, fees, attorney's fees, or costs, arising under or from the transaction contemplated herein; provided, however, that the indemnification and hold harmless covenant shall not extend to any claims, liabilities, cost, etc. which result from Escrow's gross negligence or willful misconduct.

9. Seller acknowledges that Buyer is entering into this agreement solely for the benefit of Seller. Therefore, in the event that the IRS should assess, for any reason whatsoever, a penalty and/or interest against Buyer for failure to timely submit the FIRPTA forms 8288 and 8288-A and the 10% FIRPTA Withholding amount, both Seller and Buyer hereby authorize Escrow to retain an attorney to deal with the IRS to eliminate said penalty and interest against Buyer and **SELLER AGREES TO PAY FOR ALL SUCH ATTORNEY'S FEES, EXPENSES AND ALL IRS PENALTY AND INTEREST ASSESSED AGAINST BUYER** Furthermore, Seller agrees to indemnify, defend and hold Buyer harmless from any and all loss, claim liabilities, damages, fees, attorneys' fees, or cost, arising under or from the transaction contemplated herein.

10. This Agreement may be executed in counterparts, each of which when executed shall, irrespective of the date of its execution and delivery, be deemed an original, and said counterparts together shall constitute one and the same agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

TITLE GUARANTY ESCROW SERVICES, INC.

By: _____
Name:
Its Escrow Officer

Name:
"Buyer"

Name:
"Seller"

ACKNOWLEDGED BY:

By: _____
Principal Broker/Broker-in-Charge

By: _____
Principal Broker/Broker-in-Charge

EXHIBIT "A"

PREPARER'S CERTIFICATION & NOTICE TO TRANSFEREE

I hereby certify and declare for the benefit of Buyer and Escrow the following:

- 1. I am a lawyer duly licensed to practice law, a Certified Public Accountant **or** a person duly enrolled to practice before the Internal Revenue Service as an enrolled agent.
- 2. I am familiar with the requirements for obtaining a "Qualifying Statement" or "Withholding Certificate" from the Internal Revenue Service ("IRS") pursuant to Section 1445(b)(4) of the Internal Revenue Code ("Code"), Treas. Regs Section 1.1445-3, and Revenue Procedure 2000-35, 2000-2 C.B. 211.
- 3. I have prepared a Form 8288-B application for a withholding certificate with respect to the sale of the property by the Seller to the Buyer as described below:

Property: _____

Seller: _____

Buyer: _____

Date of Contract or DROA:

- 4. I have submitted the Form 8288-B application, together with all appropriate accompanying documents, to the IRS on behalf of the Seller on or before the date of this Certification so that Buyer may rely on this Preparer's Certification and attached "Notice to Transferee" (attached hereto and incorporated herein by reference) to avoid the Code Section 1445 penalty for accommodating Seller's request to follow the procedures (concerning pending Form 8288-B applications) described in Treasury Regulation Section 1.1445-1(c)(2)(i)(B) and instructing Escrow accordingly.
- 5. I understand that Title Guaranty Escrow Services, Inc. ("Escrow") will enter into an agreement with both the Buyer and the Seller concerning the FIRPTA withholding amount under Code Section 1445, wherein Escrow will withhold 12% of the sales price of the Property and will distribute all or a portion of said amount to the Seller and/or the IRS in accordance with the terms of said agreement.
- 6. I have requested from the IRS that the Withholding Certificate be sent to me at my address listed below and I intend to send said Withholding Certificate to Escrow at the address indicated below within seven days of my receipt of said IRS Withholding Certificate.

Title Guaranty Escrow Services, Inc.
 235 Queen Street
 1st Floor
 Honolulu, HI 96813
 Attn: Gaile H. Yano (Tel. no (808) 521-0211)

THE UNDERSIGNED HEREBY CERTIFIES THAT ALL OF THE INFORMATION ABOVE IS TRUE AND CORRECT.

Signature: _____

Firm: _____

Name: _____

Address: _____

Telephone: _____

Date: _____

NOTICE TO TRANSFEREE

This notice is hereby provided to the transferee of real estate pursuant to the requirements of Treasury Regulations Section 1.1445-1(c)(2)(i)(B).

The Transferor (name below) has submitted to the Internal Revenue Service a fully completed application Form 8288-B, with all supporting documents, to request for an IRS Withholding Certificate that will reduce or eliminate the 10% FIRPTA withholding amount that transferee is required to withhold and send to the IRS under Section 1445 of the Internal Revenue Code (the "Code"). Therefore, under the procedures established in Treasury Regulation Section 1.1445-1(c)(2)(i)(B), the transferee should withhold 10% of the purchase price for the Property (described below), but should wait to receive from the IRS a copy of the final determination letter and respond within 20 days from the date on said IRS determination letter by sending to IRS the 10% FIRPTA amount (or the lesser amount in the IRS determination letter) with FIRPTA Forms 8288 & 8288-A and returning the balance of the withheld amount to the Transferor.

Transferor's Name: _____

Transferor's Address: _____

Transferor's Taxpayer's Identification Number:* _____

Brief description of Property which is the subject of the application:

Date Form 8288-B was submitted to IRS by Preparer: _____

*If Transferor is a foreign individual with no individual taxpayer identification number ("ITIN"), Preparer hereby certifies that by stating "W-7 application attached to Form 8288-B" in lieu of providing the Transferor's ITIN above, Preparer means that he or she has completed the Form W-7 (to apply for an ITIN), attached all of the supporting documents required by the Form W-7, attached the complete Form W-7 application to the Form 8288-B and sent all of these documents to the IRS ITIN Unit (i.e. Internal Revenue Service, ITIN Operation, P.O. Box 149342, Austin TX 78714-9342 or the more recent applicable address at

_____)

The undersigned hereby certifies that he or she is providing this notice on behalf of Transferor and all of the information above is true and correct.

PREPARER'S SIGNATURE:

END OF EXHIBIT "A"