

## **FIFTH AMENDMENT TO LEASE AGREEMENT**

**THIS FIFTH AMENDMENT TO LEASE AGREEMENT (“Amendment”)**, is made and entered into effective on the date stated on the City’s signature page below, and between the **CITY AND COUNTY OF DENVER**, by and for its Department of Aviation, a municipal corporation organized and existing under and by virtue of Article XX of the Constitution of the State of Colorado (“**City**”), **APRO, LLC**, a Delaware limited liability company authorized to do business in Colorado (“**Tenant**”), (collectively “**Parties**”).

### **RECITALS**

**WHEREAS**, the City owns and operates Denver International Airport (“**DEN**”) through its Department of Aviation; and

**WHEREAS**, the City and Conoco, Inc., a Delaware corporation, entered into a Lease Agreement, dated December 6, 1995, which was initially amended by a First Amendment to Lease Agreement dated May 13, 1997, further amended by a Second Amendment to Lease Agreement dated June 24, 2003, fully amended and restated pursuant to an Amended and Restated Lease Agreement dated December 29, 2010, and again amended by the Fourth Amendment dated June 18, 2012 (collectively the “**Agreement**”), for development and operating of certain services at **DEN**; and

**WHEREAS**, City consented to a transfer of the rights and interest in the Agreement to Convenience Retailers, LLC on January 29, 2009, and all rights in the Agreement were assigned to Convenience Retailers, LLC on or about February 1, 2009; and

**WHEREAS**, on or about June 3, 2015, Convenience Retailers, LLC sold its rights and interest in the Agreement to Tenant with City’s consent; and

**WHEREAS**, on or about September 14, 2016, Tenant sub-leased certain rights to operate a Fast Food Restaurant and Food Court Project under the Agreement to Fresquez Concession, Inc. and SevenTwoSeven, LLC, with City’s Consent; and

**WHEREAS**, City and Tenant have consented to the assignment by SevenTwoSeven, LLC of its Sublease for certain rights to Fresquez Concessions, Inc. (“**Concessionaire**”);

**WHEREAS**, the actual performance of Fast Food Restaurant and Food Court Project have not met the economic performance modeling and expectations of Concessionaire and Tenant prior to entering into the sub-lease; and

**WHEREAS**, the Parties believe the economic performance of the Fast Food Restaurant and Food Court Project, without the support of re-fueling services, necessitate adjustment in the compensation structure paid to City; and

**WHEREAS**, the Parties, subject to prior City approval, have agreed to allow the Food Court Project more flexibility to find the appropriate balance of concepts to drive Gross Receipts in accordance with Concessionaire and Tenant’s original expectations; and

**WHEREAS**, Concessionaire desires to change the brands and concepts for two concession spaces contemplated under the Agreement to Auntie Anne's and Schlotzsky's; and

**WHEREAS**, the Parties desire to amend the Agreement to correspond with the understanding as described herein;

**NOW THEREFORE**, for and in consideration of the promises made below and other good and valuable consideration, the Parties agree as follows:

- A. City hereby explicitly consents to Tenant's acquisition of rights and interest in the Agreement from Convenience Retailers, LLC, in accordance with the terms, covenants, conditions, and obligations stated in the Agreement.
- B. All references in the Agreement to "Manager" or "Manager of Aviation" are hereby deleted and replaced with "Chief Executive Officer" or "CEO" as the context may require. "Chief Executive Officer" or "CEO" means the Chief Executive Officer of the City's Department of Aviation having jurisdiction over the management, operation, and control of DEN.
- C. City hereby consents to Concessionaire's change of brands and concepts for Space D and Space E, as contemplated under the Agreement, and such change is deemed to be in satisfaction of the amended and restated Sections 6.15 and 6.21 set forth below. To the extent Concessionaire has not spent \$400,000 in renovations by December 31, 2017, ("Restoration Threshold") to satisfy its requirements under Section 6.16 of the Agreement, any renovations made by Concessionaire to complete the change in brand and concept for Space D and Space E shall count towards the Restoration Threshold which deadline shall be extended to August 31, 2018.
- D. All references in the Agreement to "DIA" or "Airport" are hereby deleted and replaced with "DEN".
- E. All references in the Agreement to "Gross Revenue" are hereby deleted and replaced with "Gross Receipts".
- F. Section 4.03, hereby is amended by deleting and replacing it with the following:

Any exercise of the rights and privileges granted herein by this Lease, with permission of the City, after the Expiration Date shall be on a month-to-month basis with all provisions of this Lease, including compensation, fees, charges, insurance policies, and performance surety, remaining in place until such time City gives notice to Tenant to surrender the Premises. Notice to surrender will be provided in writing not less than thirty (30) days prior to the anticipated surrender date.

Any exercise of the rights and privileges granted herein by this Lease after expiration of the Term or any extension thereof, or after termination of this Lease without the written approval of City constitutes a trespass, in accordance with D.R.M.C. § 38-115. No occupancy of any portion of the Lease Premises by Tenant after the expiration or other termination of this Lease, without City's written approval, extends the Term of such portion of the Lease Premises. Nothing herein shall be construed to give Tenant the right to hold over. In the event of such trespass, Tenant shall indemnify City against all damages

arising out of Tenant's trespass, including but not limited to, any costs incurred by City to evict Tenant, regain possession of the Lease Premises or any portion(s) thereof, and all insurance policies, and surety required to be obtained and maintained by Tenant as set forth in this Lease shall continue in full force and effect.

- G. As of October 31, 2017, Section 5.01 (ii) (B), hereby is amended by deleting and replacing it with the following:

the sum of: (a) ten percent (10%) of the monthly Gross Receipts, as herein defined, received by the Tenant for the calendar month in question from the sale by Tenant to the general public from the Lease Premises of all food, beverages, services, merchandise, and products, other than those set forth in the following subsection, and other than gasoline and fuel, and (b) fifteen percent (15%) of the monthly Gross Receipts derived by Tenant from the sale by Tenant to the general public from the Lease Premises of all alcohol, and (c) twelve percent (12%) of the monthly Gross Receipts derived by Concessionaire from the sale of goods and services from any Fast Food Restaurant operated on the Lease Premises ("Percentage Compensation Fee"); provided, however, notwithstanding the foregoing, no amounts relating to gasoline shall be payable under this subsection (ii), and gasoline and fuel sales shall not be considered in determining amounts owed under this subsection (ii). In January of each calendar year during the Term, commencing January 1, 2012, the annual Monthly Guarantee shall be adjusted to 85% of the Percentage Compensation Fee paid to the City for the prior calendar year under this subsection, but not less than the prior calendar year's Monthly Guarantee.

- H. Section 5.02, hereby is amended by deleting and replacing it with the following:

Gross Receipts include all monies paid or payable to Tenant or Concessionaire or due or received from customers by Tenant or Concessionaire for sales made, services rendered, and customer orders fulfilled at or from the Lease Premises, regardless of when or where the customer order is placed (including outside the Lease Premises). Gross Receipts shall not include:

1. Any taxes imposed by law that are separately stated to and paid by a customer and directly payable to the taxing authority by Tenant or Concessionaire.
2. Amounts and credits received from suppliers for merchandise returned by Tenant or Concessionaire.
3. Cash and credit card refunds to customers for merchandise returned.
4. Amounts and credits received in settlement of claims for loss of, or damage to, merchandise.
5. Insurance proceeds received from the settlement of claims for the loss of or damages to Tenant's or Concessionaire's property at or on the Lease Premises other than the proceeds from business interruption insurance.
6. Inter-company store transfers.

7. United States Postal Service stamp sales.
  8. Uniforms or clothing purchased by employees where such uniforms or clothing are required to be worn by employees.
  9. Reimbursements from Concessionaire to Tenant for any taxes, fees, franchise or license fees, utilities or other services paid or provided by Tenant for or on behalf of Concessionaire; provided, however, that any reimbursement in excess of the actual cost of such taxes, fees, franchise or license fees, utilities or other services shall be included in Gross Receipts.
  10. Compensation, fees, and charges paid to Tenant or Concessionaire by its sub concessionaires pursuant to the provisions of this Lease; provided, however, that any such payment in excess of the amounts required hereunder shall be included in Gross Receipts.
  11. Gift cards sold at the Premises. When a gift card is redeemed or accepted as payment for a purchase at the Lease Premises, the transaction must be reported as part of Gross Receipts.
  12. Amounts for coupons and other forms of discounts including complimentary customer services, such that only the amounts actually received are ultimately included in Gross Receipts.
  13. Gratuities for services performed by employees paid by Tenant or Concessionaire or by its customers except to the extent Tenant or Concessionaire may be entitled to receive a portion of the gratuities.
  14. Rebates and allowances.
- I. Section 5.06, hereby is amended by deleting and replacing it with the following:

All payments due under this Lease shall be paid in lawful money of the United States of America. City may accept payment without prejudice to its right to recover the balance of said amount due and to pursue any other remedies in this Lease or otherwise.

All payments of compensation, fees, charges, and all other damages shall be made by Automated Clearing House or Electronic Fund Transfer or other method as designated in writing by City. Instructions for payments are located at <https://www.denvergov.org/payments/dia/vendors>. Tenant shall provide City with necessary information and authorizations as needed to facilitate such payments.

City may change the designated place of payment upon ten (10) days' written notice to Tenant. Tenant assumes all risk of loss of payments.

- J. Section 5.07, hereby is amended by deleting and replacing the following:

City, or its representative, will have the right through the expiration of the fifth (5th) year after the expiration or termination of this Lease, through its representatives, to review all

books, records, and contracts of Tenant and where applicable, all individuals or other business entities who are party to this Lease, requested by City's representatives to substantiate Tenant's compliance with other provisions of this Lease. This includes, but is not limited to, financial statements, general ledgers, sales journals, daily or periodic summary reports, inventory and purchasing records, cash register or computer terminal tapes or reports, bank deposit slips, bank statements, cancelled checks, tax reports/returns filed with state or federal entities, discount or rebate/allowance contracts, records of refunds or voids, and joint venture or partnership contracts.

Such right of examination shall include cooperation by Tenant personnel (including, but not limited to, cooperation in sending confirmations to Tenant's suppliers or others, assisting City in obtaining from governmental entities official copies of tax reports/returns, and disclosing all bank or other accounts) as reasonably considered necessary by City, or its representative, to complete the engagement. There may be no limitation in the scope of the engagement hindering City in testing the accuracy and completeness of compensation, fees, or charges paid hereunder. All such books, records, and contracts shall be kept for a minimum period of five (5) years after the close of each Contract Year. For the purpose of an engagement instituted hereunder, Tenant waives any claim of confidentiality it may have in connection to its books, records, and contracts for the sole purpose of allowing City or its representative to use said documents in the course of an engagement. Such waiver shall not extend beyond the engagement, Tenant and Concessionaire preserves the right to assert its claim confidentiality to disclosure of its books, records, and contracts to third parties. If City requests and Tenant fails to furnish any records in a timely manner, City reserves the right to, in addition to all other remedies available hereunder, at law, or in equity, have an independent forensic accounting firm attempt to reconstruct the missing records. Tenant covenants to reimburse City for the reasonable cost associated with reconstructing any missing records, including but not limited to, the cost of the independent forensic accounting firm, attorney's fees, and litigation expenses incurred.

Tenant shall not charge City for reasonable use of Tenant's photocopy machine while conducting the engagement, nor for any cost of retrieving, downloading to storage media and/or printing any records or transactions stored in magnetic, optical microform or other media. Tenant shall provide all records and retrievals requested within seven (7) days of the request.

Tenant will include a provision providing City, or its representative, the same rights to initiate and perform audits, inspections, or attestation engagements in any sub Tenant agreement it enters and cause its sub-tenants to include the statements in further sub-leases.

- K. Section 6.15, hereby is amended by deleting and replacing it with the following:
1. Tenant and/or Concessionaire shall not make any improvements or modifications, do any construction work on the Lease Premises, or alter, modify, or make additions, improvements, replacements or repairs, except emergency repairs, to any structure now existing or built without prior written approval of City. Tenant and/or Concessionaire shall not install any fixtures, other than Trade Fixtures, without the prior written approval of City. In the event any construction, improvement, alteration,

modification, addition, repair, excluding emergency repairs, or replacement is made without City approval, or done in a manner other than as approved, City may, at its discretion, (i) terminate this Lease in accordance with the provisions herein; or (ii) require Tenant and/or Concessionaire to remove the same; or (iii) require Tenant and/or Concessionaire to change the same to the satisfaction of City. In case of any failure on the part of Tenant and/or Concessionaire to comply, City may, in addition to any other remedies available to it at law or in equity, effect the removal or change referenced above in this Section and Tenant and/or Concessionaire (whomever was responsible for the construction) shall pay the cost thereof to City plus fifteen percent (15%) of the costs for administration.

2. In its design and construction work on the Lease Premises, Tenant and/or Concessionaire will fully comply with the standards and development guidelines identified in the Tenant Work Permit Handbook. City reserves the right to amend Tenant Work Permit Handbook during the Term. Tenant and/or Concessionaire covenants to comply with Tenant Work Permit Handbook in effect as of the date of any construction it undertakes.
3. Submittal of Plans. Prior to Tenant and/or Concessionaire's commencement of any construction activities on the Lease Premises at any time during the Term, Tenant and/or Concessionaire shall submit plans and specifications that conform to all of the requirements of Tenant Work Permit Handbook to City for review and approval. No construction work shall commence until City has approved the plans and specifications and has issued a Notice to Proceed.
  - a) Tenant and/or Concessionaire shall submit plans and specifications, in the form and number identified in Tenant Work Permit Handbook, for any proposed Fast Food Restaurants or Food Court Project Restaurants. City will review and respond to submittals of plans and specifications within ten (10) days or provide notice to Tenant and/or Concessionaire that the review time has been extended. In the event of disapproval by City of any portion of any submittal of plans and specifications, Tenant and/or Concessionaire shall promptly make modifications and revisions and re-submit for approval by City.
  - b) Disclaimer of Compliance with Laws or Codes. The approval by City of any plans and specifications refers to the conformity of such plans and specifications to City standards. Approval of any plans and specifications by City does not constitute its representation or warranty as to their conformity with applicable laws, statutes, codes, or permits and responsibility therefore at all times remains with Tenant and/or Concessionaire.
  - c) Approvals Extend to Architectural and Aesthetic Matters. Required approval of City will extend to and include architectural and aesthetic matters. City reserves the right to reject any designs submitted by Tenant and/or Concessionaire and to require Tenant and/or Concessionaire, at Tenant's and/or Concessionaire's expense, to make modifications and revisions and to resubmit designs until designs are deemed acceptable and subsequently approved in writing by City.
  - d) Design and Permitting. Tenant and/or Concessionaire shall be responsible, at

its sole cost and expense, for the costs of design and permitting of all improvements within the Lease Premises, and shall not commence any work with respect to an Approved Project until all governmental permits and approvals with respect to the Approved Project have been obtained. At no cost or liability to City, City shall cooperate in all reasonable respects with Tenant's and/or Concessionaire's efforts to obtain such permits and approvals, which cooperation shall include, without limitation, the execution of such instruments as may be required by governmental authorities in order for Tenant and/or Concessionaire to apply for and obtain such permits and approvals.

4. Tenant and/or Concessionaire shall, at its own cost and expense, commence construction of an Approved Project within ten (10) days of the later to occur of: (i) transmission of the Notice to Proceed for such Approved Project; or (ii) receipt of Demolition Permit. Tenant and/or Concessionaire agrees that all construction work to be performed, including all workmanship and materials, shall be of First Class quality and in accordance with the Approved Project. All construction shall be performed in accordance with the requirements of this Lease, the Tenant Work Permit Handbook, and applicable laws, regulations, ordinances, codes and permits including, but not limited to, worker's compensation requirements, City's prevailing wage ordinance, Denver Revised Municipal Code ("D.R.M.C."), §20-76, City's MBE/WBE participation requirements, D.R.M.C. Articles III and VII, and the Americans with Disabilities Act, 42 U.S.C. 12001 et seq., and its regulations. City and its designees shall have the right from time to time to inspect each Approved Project.

Tenant and/or Concessionaire must complete an Approved Project and Open for Business no later than the Required Completion Date for all other Approve Projects, as set forth in the Notice to Proceed for the Approved Project, subject to any extensions that may be approved by City. Tenant and/or Concessionaire acknowledges that if it fails to Open for Business by the Required Completion Date, the delay may cause City to suffer substantial damages that are extremely difficult to ascertain or prove. Therefore, if Concessionaire fails to either complete the Approved Project or open for business by the Required Completion Date, the following will apply:

- a) Tenant and/or Concessionaire shall pay liquidated damages to City, of one thousand dollars (\$1,000) per day, from the Required Completion Date until the date on which the restaurant actually opens to the public for business; and
- b) If the restaurant is not open for business within thirty (30) days after the Required Completion Date, the failure is an Event of Default and City has the right to exercise any and all remedies herein, at law or in equity including but not limited to, the option to terminate this Lease or to remove the applicable restaurant from the Lease Premises.

Notwithstanding the foregoing, the Parties agree that any delay in construction of any improvements due to force majeure or acts solely attributable to City shall extend the Required Completion Date for an Approved Project. City shall have no liability to Tenant and/or Concessionaire for compensation or damages for any such delay.

5. For each Approved Project, Tenant and/or Concessionaire shall conform to Project

Closeout Activities set forth in Tenant Work Permit Handbook. Tenant and/or Concessionaire further agrees that it shall deliver to City within one hundred (120) days of the Required Completion Date for an Approved Project the following:

- a) As Built record documents of the construction, additions and other modifications constructed by Tenant and/or Concessionaire on the Lease Premises. Any DEN maintained assets or systems shall be fully connected and include system and equipment loads on and all facility information. Tenant and/or Concessionaire shall provide connections and service loads at the point of connection to all DEN systems. During the Term, Tenant and/or Concessionaire shall keep said documents current, with all changes or modifications made by Tenant and/or Concessionaire in or to the Lease Premises or additions thereto. Documents shall be forwarded to DEN upon request within fourteen (14) calendar days.
- b) A statement certified by Tenant and/or Concessionaire's chief financial officer specifying the final Capital Investment and final Design related to each of the Approved Project(s) with the level of detail as requested by City.
- c) A certification that construction has been completed in accordance with the approved plans and specifications and in compliance with all laws and other governmental rules, regulations and orders, including but not limited to DSBO approval and the Denver City Auditor's approval.
- d) Certified proof demonstrating that no liens exist on the Premises, including but not limited to, a waiver of lien from all construction Contractors and signed releases from all subcontractors that indicate receipt of payment in full for all work performed or Trade Fixtures delivered.

L. Section 6.21 Remediation Plan is added to the Agreement, as follows:

Remediation Plan. The Parties agree that the financial pro forma, performance standards, and other specific considerations provided by Tenant and Concessionaire during negotiation of this Lease are material parts of the bargain between the Parties. Tenant and Concessionaire acknowledge City relied upon these documents in entering into this Lease. In the event the Parties determine a Fast Food Restaurant and/or Food Court Project Restaurant is performing unsatisfactorily, City will provide written notice to Concessionaire and Tenant. Within thirty (30) days of receipt of such written notice, Concessionaire and/or Tenant shall prepare and submit to City, for its approval, a Remediation Plan, as described below, to improve the performance of the restaurant.

1. The Remediation Plan shall include, but not be limited to, proposed remedial activities such as staff training, staffing changes, merchandise and service modifications, facility refurbishment and repair, and/or replacement of concept or brand. Upon approval by City, Tenant and/or Concessionaire covenants and agrees to diligently implement the approved Remediation Plan and further agrees to submit to City monthly reports on the progress of such implementation. If the approved Remediation Plan includes the replacement of a concept or brand, then City Tenant and Concessionaire will enter into good faith negotiations concerning a concept or brand replacement. Mutual



agreement to the concept or brand change shall be confirmed by letter from the CEO, acknowledged by Concessionaire and Tenant, without need to formally amend this Lease. If approved, the Remediation Plan shall be deemed in satisfaction of the obligations of Section 6.15.

2. In the event City determines, after six (6) months of implementation of a Remediation Plan, the subject restaurant is still performing in an unsatisfactory manner, City reserves the right to require Tenant and/or Concessionaire to replace the underperforming concept or brand, if not already replaced by the Remediation Plan, at Tenant's and/or Concessionaire's expense. Within ninety (90) days of receipt of written notice from City requiring a replacement, Tenant and/or Concessionaire shall submit to City a proposal for a brand or concept replacement plan. Such replacement plan shall include, but not be limited to, a detailed description of the brand or concept, capital expense required to re-brand, sales projections, and the specific timetable to replace the brand or concept. City, in its sole discretion, reserves the right to approve or deny the proposed replacement plan and require Tenant and/or Concessionaire to submit another replacement plan.

- M. References to Exhibit X are hereby deleted and replaced with "Tenant Work Permit Handbook" which shall be defined as follows:

The compilation of City's obligations, standards, procedures, requirements, directions, and instructions governing Tenant's construction activities at DEN, which is incorporated herein by reference. City reserves the right to amend the Tenant Work Permit Handbook during the Term. Any such amendment to the Handbook will be binding on Tenant and sub-tenants without need for amendment of this Agreement, provided any amendment of the Tenant Work Permit Handbook does not conflict with the other terms and conditions of this Lease, in such case this Lease shall control.

- N. Exhibit X is hereby deleted and replaced with the "Tenant Work Permit Handbook Acknowledgement and Agreement," attached hereto.
- O. Except as otherwise provided herein, all of the terms, provisions, and conditions of the Agreement shall remain in full force and effect as though set out in full here, and are hereby ratified and reaffirmed by the Parties.
- P. This Fifth Amendment to Lease Agreement shall not be effective or binding on the City until approved by the Denver City Council and fully executed by all signatories of the City and County of Denver.

**[SIGNATURE PAGE & EXHIBITS FOLLOWS]**

**Contract Control Number:** PLANE-AC59013-05

**Contractor Name:** APRO, LLC

By: *Al Beaudette*

Name: *Al Beaudette*  
(please print)

Title: *Chief Investment Officer*  
(please print)

**ATTEST: [if required]**

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

Name: \_\_\_\_\_  
(please print)

Title: \_\_\_\_\_  
(please print)



**Contract Control Number:**

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at Denver, Colorado as of

SEAL

**CITY AND COUNTY OF DENVER**

ATTEST:

By \_\_\_\_\_

\_\_\_\_\_

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

By \_\_\_\_\_

By \_\_\_\_\_

By \_\_\_\_\_

