

## MEMORANDUM

TO: The Florida Polytechnic University Board of Trustees

FROM: Ken Artin

DATE: May 20, 2021

RE: Analysis of Management of Risk under Proposed Agreements related to Research Facility Project

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The University has asked for a memorandum describing the provisions that are to be contained in the Ground Lease Agreement (the "Ground Lease Agreement") between the University and the Ryan Companies USA, Inc., or its successors or assigns ("Ryan") and the Affiliation Agreement (the "Affiliation Agreement") between the University and International Flavors and Fragrances Inc. ("IFF") which is the proposing team of companies selected by the University pursuant to ITN #21-001 related to the development of a research facility on the campus of the University (the "Project"). The Ground Lease Agreement and the Affiliation Agreement are sometimes referred to as the "Agreements." We have reviewed the requirements of the ITN, participated in the negotiations between Ryan and IFF and have prepared the drafts of the Ground Lease Agreement and the Affiliation Agreement. While no agreement can be drafted to eliminate all risk, the provisions of the Agreements we have prepared have attempted to place the University in a neutral position with respect to most of the risks associated with the development, management and maintenance of the Project. Meaning, if Ryan runs into financial difficulty either building the Project or operating the Project after it has been constructed, the risk is borne by the investors in /or lender to Ryan or IFF as the subtenant of the building. The University is not required to contribute any funds towards construction or operation of the Project. IFF, under the terms of the sublease with Ryan is obligated to pay Ryan amounts sufficient to pay its lenders or investors. In addition, the sublease is a triple net lease meaning any and all costs of related to occupancy of the building are borne by IFF.

### During Construction

One of the risks in the construction of any project is having enough money to complete the project. There are several risks that exist. The developer could incur cost over runs, or could

simply misuse the funds and fail to complete the project. The University is protected in two ways if the building is not completed by March 1, 2024, which is one year after the scheduled completion date Ryan is obligated to pay daily liquidated damages until the building is complete. So the university is assured that the building will ultimately be completed. Ryan's failure to pay the liquidated damages is an event of default under the Ground Lease Agreement and subject to the lender's right to step in and cure, the Ground Lease Agreement could be terminated. If the Ground Lease Agreement is terminated, the investors or lenders rights are terminated and they will lose the opportunity to have access to the lease payments from IFF from which they expected to be repaid.

### **During Operation**

Once the Project has been completed and is being operated, the sublease with IFF is for an initial term of twenty years and two five-year extensions. If IFF should terminate their sublease early or fail to renew in the final ten years of the Ground Lease Agreement, Ryan is obligated to find and sublease the Project to a Qualified Subtenant generally defined to mean any subtenant entering into a sublease with Ryan for the purpose of promoting scientific research and development or otherwise supporting the educational mission of the University. In addition, the University has the authority to approve the new subtenant based on the wiliness of the subtenant to enter into an affiliation agreement similar to the Affiliation Agreement with IFF. The University is protected in that it will always have a partner occupying the building with an affiliation agreement which is the primary goal of the ITN #21-001.

Finally, if the sublease with IFF terminates prior to the expiration of the ground lease term, and the University has not exercised either of its options to purchase the building or lease the building as provided in the Ground Lease Agreement, the rent payable under the Ground Lease Agreement steps up to market rate rent if the building is not released within 12 months. This provides an incentive to Ryan to keep the building occupied by a Qualified Subtenant.

### **Specific Ground Lease Agreement Defaults and Remedy Provisions**

The Ground Lease Agreement provides for the following specific Events of Default:

- a. Ryan fails to pay when due Rent, or any other amount to be paid under this Lease by Ryan, and the failure continues for ten (10) business days after receipt by Ryan of written notice from University;
- b. Ryan gives University any report or other information that is knowingly and materially false or misleading, and which false or misleading information causes a material adverse effect to University;
- c. Ryan ceases doing business as a going concern; makes an assignment for the benefit of creditors; is adjudicated an insolvent, files a petition (or files an answer admitting

the material allegations of a petition) seeking relief under any state or federal bankruptcy or other statute, law or regulation affecting creditors' rights; all or substantially all of Ryan's assets are subject to judicial seizure or attachment and are not released within thirty (30) days, or Ryan consents to or acquiesces in the appointment of a trustee, receiver or liquidator for Ryan or for all or any substantial part of Ryan's assets; or

- d. Ryan fails, within sixty (60) days after the commencement of any proceedings against Ryan seeking relief under any state or federal bankruptcy or other statute, law or regulation affecting creditors' rights, to have such proceedings dismissed, or Ryan fails, within sixty (60) days after an appointment, without Ryan's consent or acquiescence, of any trustee, receiver or liquidator for Ryan or for all or any substantial part of Ryan's assets, to have such appointment vacated; or
- e. Ryan fails to fulfill any of the other covenants, agreements or obligations of the Lease, and such default continues for more than thirty (30) days after written notice but if the nature of such default is such that it cannot be cured within the thirty (30) day period, an Event of Default will not be deemed to have occurred if Ryan commences to cure within such thirty (30) day period and diligently proceeds to complete its cure as soon as reasonably possible.

The Ground Lease Agreement also provides that if an Event of Default is not cured within the applicable cure period as stated in the Ground Lease Agreement, then remedies available to the University include the following, subject to the rights of any leasehold mortgagee to step in and cure;

- a. the right, at its option, then or at any time while the Event of Default continues to give a written notice specifying a date on which this Lease shall terminate, and on that date, subject to any provisions of the Lease relating to the survival of Ryan's obligations, the Lease shall terminate and University may re-enter and take complete and peaceful possession of the Property and, with process of law, remove all persons and all furniture, fixtures, equipment and other personal property located on the Property and owned or leased from third parties by Ryan, in which event Ryan shall peacefully and quietly yield up and surrender the Property to University; or
- b. the right, at University's option, then or at any time while the Event of Default continues, subject to applicable Law, to enter the Property and re-let the same for Ryan's account; or
- c. University may, in addition to other remedies specified in the Ground Lease Agreement or at Law, (w) commence proceedings against Ryan for damages and collect all sums or amounts with respect to which Ryan may then be in default and

are accrued up to the date of termination of the Lease (including amounts due under the provisions which survive such termination, if University elects to terminate the Lease); (x) commence proceedings against Ryan under the provisions of the Lease for holdover obligations of Ryan, if any; (y) bring an action for specific performance, including to require Ryan to document the conveyance and transfer set forth in this Lease; or (z) exercise any other right or remedy available at law or in equity.