

<b>United States Bankruptcy Court</b>		<b>PROOF OF CLAIM</b>									
for the      District of      Delaware											
In re (Name of Debtor) <b>Fleming Companies, Inc</b>		Case Number <b>03-10945</b>									
NOTE This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.											
Name of Creditor <i>(The person or other entity to whom the debtor owes money or property)</i> <b>JPMorgan Chase Bank, as Trustee under the Amended and Restated Declaration of Trust, dated November 13, 2001, as amended, for its Commingled Pension Trust Fund</b>		<input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.									
Name and Address Where Notices Should be Sent <b>J P Morgan Fleming Asset Management (USA) Inc</b> <b>c/o Daniel Sang, Vice President</b> <b>522 Fifth Avenue</b> <b>New York, NY 10036</b>		<input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case.  <input checked="" type="checkbox"/> Check box if this address differs from the address on the envelope sent to you by the court.									
ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR		Check here if this claim <input type="checkbox"/> replaces <input type="checkbox"/> amends } a previously filed claim dated _____									
<b>1 BASIS FOR CLAIM</b> <div style="display: flex; justify-content: space-between;"> <div style="width: 48%;"> <input type="checkbox"/> Goods sold  <input type="checkbox"/> Services performed  <input type="checkbox"/> Money loaned  <input type="checkbox"/> Personal injury/wrongful death  <input type="checkbox"/> Taxes         </div> <div style="width: 48%;"> <input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a)  <input type="checkbox"/> Wages, salaries and compensations (Fill out below)            Your social security number _____            Unpaid compensation for services performed from _____ to _____ (date) to _____ (date)         </div> </div> <input checked="" type="checkbox"/> Other (Describe briefly) <b>Defaults under a Lease, an Adjacent Property Agreement, and a Unity Agreement (see attachment below)</b>											
<b>2 DATE DEBT WAS INCURRED</b> April 1, 1983 and thereafter		<b>3 IF COURT JUDGMENT, DATE OBTAINED</b>									
<b>4 CLASSIFICATION OF CLAIM</b> Under the Bankruptcy Code all claims are classified as one or more of the following: (1) Unsecured nonpriority (2) Unsecured Priority (3) Secured. It is possible for part of a claim to be in one category and part in another. CHECK THE APPROPRIATE BOX OR BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM.											
<input type="checkbox"/> <b>SECURED CLAIM</b> \$ _____ Attach evidence of perfection of security interest. Brief Description of Collateral: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other (Describe briefly) _____  Amount of arrearage and other charges included in secured claim above if any: \$ _____		<input type="checkbox"/> <b>UNSECURED PRIORITY CLAIM</b> \$ _____ Specify the priority of the claim: <input type="checkbox"/> Wages, salaries or commissions (up to \$4,650) earned not more than 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier. 11 U.S.C. § 507(a)(3) <input type="checkbox"/> Contributions to an employee benefit plan - U.S.C. § 507(a)(4) <input type="checkbox"/> Up to \$900 of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6)  <input type="checkbox"/> Taxes or penalties of governmental units - 11 U.S.C. § 507(a)(7) <input type="checkbox"/> Other - 11 U.S.C. §§ 507(a)(2), (a)(5) - (Describe briefly) _____									
<input checked="" type="checkbox"/> <b>UNSECURED NONPRIORITY CLAIM</b> \$ <b>Unliquidated</b>  A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.											
<b>5 TOTAL AMOUNT OF</b> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%;"><b>CLAIM AT TIME</b></td> <td style="width: 25%; text-align: center;">\$ <b>Unliquidated</b> \$</td> <td style="width: 25%; text-align: center;">\$ _____ \$</td> <td style="width: 25%; text-align: center;">\$ <b>Unliquidated</b></td> </tr> <tr> <td><b>CASE FILED</b></td> <td style="text-align: center;">(Unsecured)</td> <td style="text-align: center;">(Secured)</td> <td style="text-align: center;">(Priority) (Total)</td> </tr> </table> <input type="checkbox"/> Check this box if claim includes prepetition charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.				<b>CLAIM AT TIME</b>	\$ <b>Unliquidated</b> \$	\$ _____ \$	\$ <b>Unliquidated</b>	<b>CASE FILED</b>	(Unsecured)	(Secured)	(Priority) (Total)
<b>CLAIM AT TIME</b>	\$ <b>Unliquidated</b> \$	\$ _____ \$	\$ <b>Unliquidated</b>								
<b>CASE FILED</b>	(Unsecured)	(Secured)	(Priority) (Total)								
<b>6 CREDITS</b> The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.		<b>THIS SPACE IS FOR COURT USE ONLY</b>  <div style="font-size: 2em; font-weight: bold; margin: 10px 0;">FILED</div> <div style="font-size: 1.2em; margin: 5px 0;">SEP 17 2003</div> <div style="font-size: 1.5em; font-weight: bold; margin: 10px 0;">RMC</div> <div style="font-size: 0.8em;">Fleming Companies Claim</div> <div style="text-align: center;">11479</div>									
<b>7 SUPPORTING DOCUMENTS</b> Attach copies of supporting documents such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.											
<b>8 TIME-STAMPED COPY</b> To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.											
Date: <b>September 11, 2003</b>		Sign and print the name and title of any of the creditor or other person authorized to file this claim (attach copy of power of attorney if any): <b>Daniel Sang as Vice President of J P Morgan Fleming Asset Management (USA) Inc</b>									

## **ATTACHMENT TO PROOF OF CLAIM**

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re

**FLEMING COMPANIES, INC , et al**

Debtors

Chapter 11

Case No 03-10945 (MFW)  
(Jointly Administered)

**ATTACHMENT TO PROOF OF CLAIM OF JPMORGAN CHASE BANK  
AGAINST FLEMING COMPANIES, INC**

1 On April 1, 2003 (the "Petition Date"), Fleming Companies, Inc ("Fleming") and related debtors and debtors-in-possession (together with Fleming, the "Debtors") filed their voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court")

2 This proof of claim (the "Proof of Claim") is filed by JPMorgan Chase Bank, as Trustee under the Amended and Restated Declaration of Trust, dated November 13, 2001, as amended, for its Commingled Pension Trust Fund (the "Claimant")<sup>1</sup> The Proof of Claim arises from Fleming's defaults under three agreements (i) that certain Lease, dated April 1, 1983, between the Claimant and Fleming, as amended (the "Lease"), (ii) that certain Adjacent Property Agreement, dated January 31, 1996, between the Claimant and Fleming, and related documents (collectively, the "Adjacent Property Agreement"), and (iii) that certain Unity Agreement, dated January 31, 1996, between the Claimant, Fleming, and the City of Dallas, Texas (the "Unity

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<sup>1</sup> The Claimant was identified in both the Lease and the Adjacent Property Agreement as Morgan Guaranty Trust Company of New York , as Trustee under the Declaration of Trust dated December 9, 1960 for the Commingled Pension Trust Fund The Claimant is the successor to that entity

Agreement", and together with the Lease and the Adjacent Property Agreement, the "Agreements") The bases of the Claimant's claims in connection with the Agreements are more fully described below

**A The Lease**

3 Pursuant to the terms of the Lease, the Claimant (as landlord) leased to Fleming (as tenant) certain nonresidential real property located in Dallas, Texas (as more fully described in the Lease, the "Leased Premises") A copy of the Lease is attached hereto as Exhibit A The original term of the Lease was fifteen years with a right to renew upon written notification for an additional extended term The term of the Lease was extended for one five-year period The Lease expired under its own terms on March 31, 2003 Despite the fact that the Lease expired prior to the Petition Date, the Debtors sought an order rejecting the Lease, which the Bankruptcy Court entered on May 6, 2003

4 By this Proof of Claim, the Claimant asserts claims against the Debtors in an unliquidated amount for the damages it suffered in connection with the Debtors' rejection of the Lease At this time, the amount of such damages is not known to the Claimant

5 By this Proof of Claim, the Claimant also asserts claims against the Debtors for damages related to Fleming's failure to repair, renew or replace certain elements of the Leased Premises Fleming's failure constitutes defaults under sections 4 01, 4 02 and 18 05 of the Lease, which respectively, among other things, required Fleming to (i) maintain the Leased Premises in compliance with all laws and all requirements set forth by governmental authorities and insurers that are applicable to the Leased Premises, (ii) keep the Leased Premises in good repair, operating condition and working order, and (iii) surrender and deliver possession of the Leased

Premises to the Claimant in as good order and condition as they were at the time of the execution and delivery of the Lease, reasonable wear and tear and damage by the elements excepted

6 Attached hereto as Exhibit B is a letter (the "Letter"), dated March 31, 2003, sent by the Claimant to Fleming, which details some of Fleming's defaults under the Lease. As stated in the Letter, the fact that the Claimant has not noted any other facts in the Letter which constitute, or form the basis of, a default under the Lease or the Adjacent Property Agreement shall not be construed as a waiver of any such default. At this time, the amount of the damages caused by Fleming's defaults is not known to the Claimant.

**B The Adjacent Property Agreement and the Unity Agreement**

7 The Claimant and Fleming are also parties to that certain Adjacent Property Agreement, dated January 31, 1996 (the "Adjacent Property Agreement"), and that certain Unity Agreement, dated January 31, 1996 (the "Unity Agreement"). Copies of both the Adjacent Property Agreement and the Unity Agreement are attached hereto as Exhibit C. The Adjacent Property Agreement is a separate agreement from the Lease and contains covenants that run with the land with respect to all tracts of land governed by the Adjacent Property Agreement, including the Leased Premises and adjacent land owned by Fleming. The Claimant believes that the Debtors intend to assume the Adjacent Property Agreement and the Unity Agreement.

8 Section 5 of the Adjacent Property Agreement requires Fleming to take certain actions with respect to the Leased Premises upon the termination of the Lease. In the Letter that is attached hereto as Exhibit B, the Claimant directed Fleming to demolish and rebuild the Addition (as that term is defined in the Adjacent Property Agreement), such that (i) the respective parcels owned by the Claimant and Fleming shall be separate legal parcels in compliance with all applicable statutes, laws, rules, ordinances and regulations, and (ii) the land,

structures and improvements on the Claimant's parcel is rebuilt and restored to the sole satisfaction of the Claimant. As of this date, Fleming has not taken the actions directed by the Claimant.

9 The Letter that is attached hereto as Exhibit B also details Fleming's defaults under section 6 of the Adjacent Property Agreement. Section 6 of the Adjacent Property Agreement requires Fleming to obtain and provide to the Claimant a bond (the "Bond") in the amount of \$78,000. In the event that Fleming defaults under the Adjacent Property Agreement or under the Unity Agreement, Section 6 of the Adjacent Property Agreement grants the Claimant the right to collect under the Bond and apply any monies therefrom to cure Fleming's defaults. Fleming has failed to maintain the Bond.

10 At this time, the amount of the damages caused by Fleming's defaults under the Adjacent Property Agreement and the Unity Agreement is not known to the Claimant.

#### **C General**

11 To the best of the Claimant's knowledge, the claims set forth herein are not subject to any setoff or counterclaim.

12 The Claimant expressly reserves its right to amend and/or supplement this Proof of Claim in any respect, including but not limited to amending the monetary amount of the claim and asserting claims for other defaults not mentioned herein. The Claimant also expressly reserves its right to assert claims for payment of cure amounts in connection with the anticipated assumption of the Adjacent Property Agreement and the Unity Agreement.

13 In the event the Bankruptcy Court substantively consolidates the bankruptcy case of Fleming with any of the other Debtors, the Claimant expressly reserves the right to assert the

Claim set forth herein, including any right of setoff to which the Claimant may be entitled,  
against any other consolidated Debtor entities

## **EXHIBIT A**

Lease

L E A S E

MORGAN GUARANTY TRUST COMPANY OF NEW YORK,  
as Trustee Under Declaration of Trust  
Dated December 9, 1960 for the Commingled  
Pension Trust Fund (Fixed Income Direct  
Placements-Mortgage-Real Property)

AND

FLEMING COMPANIES, INC.

Premises: Dallas, Texas

Dated: April 1, 1983

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ditions, restrictions and other interests of persons other than Landlord as now affect Landlord's title to the Premises, including but not limited to those set forth in Exhibit A hereto or incorporated therein by reference;

2. Zoning rules, restrictions, regulations, resolutions, ordinances, building restrictions and governmental regulations now in effect or hereafter adopted by any governmental authority having jurisdiction;

3. Violations (other than any caused by Landlord) of laws, ordinances, orders or requirements that might be disclosed by an examination, inspection or search of the Premises as the same now exist by any federal, state or municipal department or authority having jurisdiction;

4. Any defects of title, encumbrances or encroachments now or hereafter existing except such as may hereafter result from any act or omission of Landlord;

5. All taxes, assessments, water charges and sewer rents, accrued or unaccrued, fixed or not fixed;

6. The present condition and state of repair

LEASE

THIS LEASE dated April 1, 1983 between MORGAN GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under Declaration of Trust dated December 9, 1960 for the Commingled Pension Trust Fund (Fixed Income Direct Placements-Mortgage-Real Property) having an office at 23 Wall Street, New York, New York, (herein called the "Landlord") and FLEMING COMPANIES, INC., a corporation organized and existing under the laws of the State of Oklahoma, having its principal office at 6601 North Broadway, Oklahoma City, Oklahoma (herein called the "Tenant"),

W I T N E S S E T H :

Landlord hereby leases to Tenant, and Tenant hereby hires from Landlord, for the Term, at the rental and subject to the provisions herein set forth, the parcel of land and the buildings and improvements now or hereafter erected thereon located in Dallas, Texas, and more particularly described in Exhibit A attached hereto and made a part hereof, together with all and singular the rights, easements and appurtenances of Landlord thereunto belonging or in any way appertaining;

UNDER AND SUBJECT, NEVERTHELESS, to the following:

1. Such rights, easements, covenants, con-

of the Premises; and

7. Such state of facts as would be disclosed by an accurate survey;

TO HAVE AND TO HOLD the Premises, subject as aforesaid, and subject to the provisions and conditions hereinafter set forth (including but not limited to those for extension or earlier termination of any term hereof), unto Tenant, its successors and assigns, for a term (the "Term") defined in its entirety as follows:

1. A term of fifteen (15) years (the "Initial Term") commencing on the first day of April, 1983 and expiring at 12 o'clock midnight on the last day of March, 1998;

2. If Tenant exercises its applicable options to extend the Term of this Lease pursuant to Article II hereof, successive additional terms, of five (5) years each (each such term being hereafter called an "Extended Term") not to exceed (5) in number, the first of which shall begin on the first day next succeeding the date of the expiration of the Initial Term.

This Lease is made upon the following terms, covenants and conditions and the parties respectively covenant and agree as follows:

## ARTICLE I

### Definitions and Rules for Construction

Section 1.01. As used in this Lease, the following words have the meanings herein specified, unless the context otherwise connotes:

A. "Landlord" means Morgan Guaranty Trust Company of New York, as Trustee under Declaration of Trust dated December 9, 1960 for the Commingled Pension Trust Fund (Fixed Income Direct Placements-Mortgage-Real Property) as well as the owner at any time of the Premises and of the interest of Landlord under this Lease;

B. "Tenant" means Fleming Companies, Inc., as well as the owner at any time of the interest of Tenant under this Lease;

C. "Building" means all buildings presently erected on the land described in Exhibit A and any building or buildings erected in place thereof or in addition thereto;

D. "Premises" means the land described in Exhibit A hereto and the Building and the sidewalks, curbs, gutters and streets adjacent thereto;

E. "Term" means the term commencing on April 1, 1983 and ending at any time in accordance with any provision of this Lease, whether at (i) the expiration of the Initial Term, (ii) the expiration of any Extended Term, or (iii) the earlier termination of the Initial Term or any Extended Term pursuant to any provision hereof;

F. "Initial Term" means the term provided in Section 2.01;

G. "Extended Term" means any of the terms provided in Section 2.02 and hereinabove;

H. "Lease Year" means a period of twelve consecutive months commencing (i) if this Lease is dated the first of a month, on the date hereof or (ii) if this Lease is dated other than the first of a month, on the first day of the first month succeeding the date on which this Lease is dated, and on the anniversary of such date;

I. "Person" means any individual, partnership, firm, corporation or governmental authority;

J. "Landlord's Original Cost" shall, at any date during the Term of this Lease, mean the amount set forth in Section 1 of Exhibit B attached hereto and made a part hereof;

K. "Landlord's Unamortized Cost" means the amount shown in Section 2 of Exhibit B.

L. "Architect" or "engineer" shall mean an architect or engineer selected by Tenant and approved by Landlord.

Section 1.02. No consent, demand, designation, notice, opinion, request, waiver or other communication to be made under this Lease shall be effective unless it be in writing and mailed in the United States, first class mail, postage prepaid, addressed to the addressee as follows:

A. If to Landlord: Morgan Guaranty Trust Company of New York, as Trustee, Post Office Box 1389, Church Street Station, New York, New York 10008, Attention: Administrator's Services or such other address as Landlord designates; and

B. If to Tenant: at the Premises with a copy addressed to Fleming Companies, Inc. at P.O. Box 26647, 6601 North Broadway, Oklahoma City, Oklahoma 73126, Attention: Treasurer's Department or such other address as Tenant designates.

## ARTICLE II

### Initial Term and Extended Terms

Section 2.01. The Initial Term of this Lease shall

be a term of fifteen (15) years beginning on the first day of April, 1983 and expiring on the last day of March, 1998.

Section 2.02. A. If the Tenant notifies Landlord in writing on or before 120 days prior to termination of the Initial Term hereof that it elects to extend the Term of this Lease, and not otherwise, this Lease shall be extended for an Extended Term of five (5) years;

B. If this Lease is extended for the Extended Term as provided in Section 2.02 A, Tenant may at its option extend the Term of this Lease for four additional consecutive Extended Terms of five years each provided Tenant notifies Landlord in writing on or before 120 days prior to the termination of the then current Extended Term that it elects to extend the Term of this Lease for the immediately succeeding Extended Term, and not otherwise. In the event Tenant for any reason shall not exercise its option to extend the Term of this Lease, as herein mentioned, Tenant shall have no further option to extend the Term of this Lease and the Term shall expire and come to an end upon the expiration of the then current Extended Term.

Section 2.03. The right to any extension of this Lease shall be upon the express condition that (1) at the time of the election to extend the Term, and (2) at the beginning of the Extended Term, Tenant shall not be in

the purpose and intent of Landlord and Tenant that the fixed rent shall be absolutely net to Landlord so that this Lease shall yield, net, to Landlord, the fixed rent specified in this Section 3.01 in each year during the Term of this Lease, free of any charges, assessments, or impositions of any kind charged, assessed, or imposed on or against the Premises, and without abatement, deduction or set-off by the Tenant.

Landlord shall not be expected or required to pay any such charge, assessment or imposition, or be under any obligation or liability hereunder except as herein expressly set forth.

All costs, expenses and obligations of any kind relating to the maintenance, preservation, care, repair and operation of the Premises, including all replacements, alterations and additions as hereinafter provided, which may arise or become due during the Term of this Lease shall be paid by Tenant.

The Landlord shall be indemnified and saved harmless by Tenant from and against such costs, expenses and obligations.

Section 3.02. As additional rent, Tenant shall pay, from the commencement date of this Lease (whether ordinary or extraordinary, foreseen or unforeseen and without regard to the nature thereof), all:

A. Taxes, assessments (including special assessments) and other governmental charges payable with respect to the Premises or Landlord's or

Tenant's interest therein except as hereinafter stated in this Section 3.02;

B. Water and sewer rents, water frontage charges, water meter rents and all other charges of a similar kind imposed upon the Premises;

C. Insurance premiums payable with respect to the Premises;

D. Expenses of occupying, operating, altering, maintaining and repairing the Premises and of making any additions thereto (including structural as well as nonstructural alterations, additions and repairs); and

E. Other expenses and charges, which during the Term of this Lease may be levied, assessed or imposed by any governmental authority upon or with respect to, or incurred in connection with, the ownership, possession, occupation, operation, alteration, maintenance, repair and use of the Premises, or the making of any additions thereto. If at any time during the Term of this Lease under the laws of Texas or any political subdivision thereof a tax or excise on rents or other tax, however described, is levied or assessed by said State or political subdivision against the Landlord

or the fixed rent expressly reserved hereunder, Tenant covenants to pay and discharge such tax or excise on rents or other tax, but only to the extent of the amount thereof which is lawfully assessed or imposed upon Landlord and which was so assessed or imposed as a direct result of Landlord's ownership of the Premises, or of this Lease or of the rentals accruing under this Lease, it being the intention of the parties that the fixed rent to be paid hereunder shall be paid to Landlord absolutely net without deduction of any nature whatsoever except as otherwise expressly provided in this Lease. Except as provided in the next succeeding paragraph of this Section 3.02, nothing contained in the Lease shall be construed to require Tenant to pay any franchise, estate, inheritance, succession, capital levy, or transfer tax of Landlord, or any income, excess profits or revenue tax or any other tax or impost charged or levied upon the rentals payable by Tenant under this Lease, except as otherwise provided in this Lease. In the case of any assessment for public improvements wherein the cost of the public improvement is permitted to be paid in install-

ments, then, and in such event, with respect to such assessments and regardless of the date of confirmation, Tenant may pay the same in installments. Any such installments falling due during the Term of this Lease shall be payable by Tenant and any such installments falling due after the expiration of the Term of this Lease shall be payable by Landlord.

At any time during the Initial Term or any Extended Term of this Lease, when Landlord shall have paid any franchise, income, gross receipts or other taxes of whatever kind or description which shall have been levied against Landlord by the State of Texas, or any agency or political subdivision thereof, in connection with Landlord's ownership of the Premises, or in connection with the receipt or accrual of rents derived therefrom, Tenant shall, upon demand by Landlord promptly pay to Landlord an amount equal to such taxes paid by Landlord but only in the amount and to the extent that the same would be payable if the Premises were the only property of the Landlord subject thereto. It is understood, however, that, in the event this Lease is assigned by Landlord to

default under any of the terms, covenants and conditions of this Lease.

### ARTICLE III

#### Rent

Section 3.01. As fixed rent, Tenant shall pay to Landlord, at Post Office Box 1389, Church Street Station, New York, New York 10008, Attention: Administrator's Services and at the times hereinafter set forth, without previous demand therefor and in currency of the United States of America which at the time of payment shall be legal tender for public and private debts, the respective amounts hereinafter set forth and determined in the following manner:

A. During the Initial Term, an amount at the rate of \$134,934.38 per quarter year (i.e. at an annual rate of \$539,737.52).

B. During the first, second, third, fourth and fifth Extended Terms, an amount at the rate of \$46,875.00 per quarter year (i.e. at an annual rate of \$187,500.00).

The fixed rent hereinabove provided for shall be payable in advance on the first business day of each April, July, October and January during said Initial Term and Extended Terms commencing the first day of April, 1983. It is

other than an assignee qualifying for exemption from the payment of federal income taxes under the provisions of Sections 401 and 501 of the Internal Revenue Code of 1954, as amended, or any corresponding provision of any similar law hereafter enacted, Tenant shall thereafter have no liability under this Section; provided, however, that if Landlord shall assign this Lease to any person acting as trustee for the benefit of the Landlord for the purpose of avoiding or otherwise minimizing the amount of any tax levied against Landlord by the State of Texas or any agency or political subdivision thereof, then and in such event the Tenant will bear and pay as additional rent hereunder the reasonable fees of such person for acting as such Trustee. If Landlord should fail to qualify for such exemption for any taxable period by reason of inadvertence or negligence on its part, Tenant shall have no liability under this Section 3.02 for taxes attributable to such period. Any tax, impost or levy based upon or measured by the value of the Premises or measured by or imposed on rents payable under this Lease where the tax so imposed is imposed in lieu of a tax based upon or

measured by the value of the Premises shall be regarded for the purposes of this Lease as payable by the Tenant pursuant to the immediately preceding paragraph of this Section 3.02.

Section 3.03. A. Tenant shall pay each sum payable pursuant to Section 3.02 when the same becomes due and payable; provided, however, that if any authority having jurisdiction or alleging to have jurisdiction assesses real estate taxes or assessments (including special assessments), or levies any other charges against the Premises as contemplated and provided in this Lease and Tenant deems the same or any of them excessive, improper or illegal, and provided further that failure to pay said real estate taxes, assessments (including special assessments) or other charges will not result in a forfeiture of the title to the Premises or a sale thereof for such non-payment, Tenant may defer compliance therewith to the extent permitted by law so long as the validity or amount thereof is contested by Tenant in good faith, in its name, or at Tenant's option, in Landlord's name but at Tenant's expense, in which event Tenant, if requested by Landlord so to do, shall furnish to Landlord a bond, satisfactory to Landlord as to surety, in an amount equal to the taxes, assessments, or other charges so assessed, plus one year's penalties and interest thereon at

the annual rate provided for by law. If any contest shall not have been concluded within one year from the date penalties and interest shall be accruing on the taxes, assessments (including special assessments) or other charges being contested, Tenant shall furnish Landlord, upon demand, with such additional bond as Landlord may reasonably request. In the event that such a bond is furnished by Tenant and there is a sale of the Premises by Landlord at the time that any tax, assessment (including special assessments) or other charge is then being contested, Landlord will assign said bond to the purchaser. Except as provided in this Section 3.03 Landlord may, upon default by Tenant under the terms hereof, pay such real estate taxes, assessments (including special assessments) or other charges and collect the same together with interest thereon computed at the rate of 12 1/2% per annum from the date of any such payment, as additional rent when the next fixed rent thereafter becomes due and payable.

B. Tenant shall pay all sums due hereunder to the persons to whom the same are payable. If any person refuses to accept any payment from Tenant, Tenant shall forthwith notify Landlord thereof and pay such sum to the Landlord; Landlord shall thereupon pay the same to the person or persons entitled thereto, and thereupon Tenant shall be relieved of any further obligation for the payment of any such sum.

C. Landlord for the purpose of the performance of any obligations of Tenant imposed hereunder, appoints Tenant its attorney for making all payments to persons other than Landlord pursuant to this Section 3.03.

Section 3.04. At any time and from time to time upon request of Landlord, Tenant shall exhibit to Landlord a receipted bill for any tax, assessment (including special assessments), governmental charge or water rent which has become due and payable under this Lease, or any other evidence satisfactory to the Landlord of the payment thereof.

#### ARTICLE IV

##### Use, Operation, Maintenance and Alteration

Section 4.01. Tenant shall, at its own expense, comply with, and maintain the Premises in compliance with, all laws and all requirements of all governmental authorities applicable to the Premises and to the use thereof (including those requiring alterations, additions or repairs of a structural as well as a nonstructural nature) and shall maintain the Premises in compliance with the requirements of the insurance companies with which Tenant maintains the insurance required by Section 5.01 hereof.

Section 4.02. Tenant shall, at its own expense, keep the Premises in good repair, operating condition and

working order and shall make all structural, exterior and interior repairs, renewals and replacements necessary to that end, and shall commence promptly and proceed diligently with any repair or restoration required, provided, however, that consideration may be given to the age of the Building.

Section 4.03. Except as provided in this Section 4.03, Tenant shall make no alterations to the structure of the Building or other alterations which will change the character of the Building or its adaptability for use as a warehouse and distribution center without consent of Landlord. Tenant may, however, make alterations not exceeding \$200,000 in cost to Tenant at any one time, and may erect, remove and change partitions not part of the structure of the Building, provided the character and value of the Building is not materially changed. Landlord will not unreasonably withhold its consent to alterations of a cost in excess of \$200,000.

Section 4.04. Except as provided in Sections 3.03 and 18.01, Tenant shall not create, or permit to be created or exist, any lien or encumbrance which might be or become a lien or encumbrance having priority over or ranking on a parity with Landlord's interest in the Premises or under this Lease.

Section 4.05. Tenant will pay and discharge, and

indemnify and save harmless Landlord against and from all liabilities, obligations, damages, penalties, claims, costs, charges and expenses, including reasonable architects' and attorneys' fees, which may be imposed upon or incurred by or asserted against Landlord by reason of any of the following occurring during the Term of this Lease:

(a) any work or thing done in, on or about the Premises or any part thereof;

(b) any use, nonuse, possession, occupation, condition, operation, maintenance or management of the Premises or any part thereof or any street, alley, sidewalk, mall, garden, curb, vault, passageway or space adjacent thereto;

(c) any negligence on the part of Tenant or any of its agents, contractors, servants, employees, licensees, concessionaires or invitees;

(d) any injury or damage to any person or property occurring in, on or about the Premises or any part thereof or any street, alley, sidewalk, mall, garden, curb, vault, passageway or space adjacent thereto; or

(e) any failure on the part of Tenant to perform or comply with any of the covenants, agreements, terms or conditions contained in this Lease

on its part to be performed or complied with.

If any action or proceeding is brought against Landlord by reason of any such claim, Tenant upon written request from Landlord will at Tenant's expense resist or defend such action or proceeding retaining counsel approved by Landlord in writing, which approval shall not be unreasonably withheld.

Section 4.06. Landlord shall be entitled to make inspections of the Premises during business hours, but shall be under no obligation to make any such inspections nor to perform any act or do any thing required to cure any default of Tenant.

Section 4.07. If Tenant decides, during the Initial Term of this Lease, to construct additional buildings and improvements on the Premises or to acquire property adjacent to the Premises and to construct said additional buildings and improvements on such adjacent property or partly on the Premises and partly on such adjacent property (all or any of which being referred to in this Section 4.07 as the "Expansion"), the cost of which is estimated by Tenant to be \$200,000 or more (which cost may include the cost of such adjacent property), and Tenant notifies Landlord of its decision and requests Landlord to finance such Expansion and to reimburse Tenant the cost thereof upon its completion,

Landlord will, within 10 days after receipt of such notice, advise Tenant whether it is willing and able to finance the same. If Landlord is willing and able to finance the Expansion, Landlord and Tenant agree to negotiate in good faith and to use their best efforts to arrive at an agreement for the reimbursement to be made by Landlord to Tenant for the cost of the Expansion. The parties shall amend this Lease in such manner as to preserve the effect of the existing terms, covenants and conditions hereof with respect to Landlord's Original Cost and to make such changes in the amount of rent and other applicable and related matters as are then appropriate in connection with the Expansion and the reimbursement by Landlord of the cost thereof. However, no such amendment shall result in a reduction of the fixed rent (or the percentage thereof in relation to the amount of Landlord's Original Cost) being paid by Tenant to Landlord pursuant to Article III hereof immediately prior to the date of the Expansion. If Landlord advises Tenant that it is unwilling or unable to finance the Expansion or if Landlord is willing and able to finance the Expansion but Landlord and Tenant are unable, within 90 days after Tenant shall have notified Landlord of its decision to make such Expansion, to agree upon the terms and conditions of the agreement for the reimbursement by Landlord to Tenant of the cost of the Expan-

sion and the amendment of this Lease, Tenant shall have the option for 30 days after Landlord's notice that it is unwilling or unable to finance the Expansion or 30 days after the end of such 90 day period, as the case may be, to purchase the Premises from Landlord for a price, in cash, equal to the sum of

(a) the Landlord's Unamortized Cost as shown by Exhibit B hereof to be applicable as of the date of said purchase, and

(b) an amount equal to 6% of Landlord's Original Cost.

Written notice of the exercise of said option shall be given by Tenant to Landlord not later than 30 days after Landlord's advising Tenant that Landlord is unwilling or unable to finance the Expansion or 30 days after the expiration of the aforesaid 90 day period, as the case may be, and shall designate a purchase date which is the last day of a period during the Initial Term of this Lease and which is not less than 30 days nor more than 120 days subsequent to the date of such notice. If Tenant does not exercise such option to purchase the Premises, this Lease shall continue in full force and effect without prejudice to Tenant's right to purchase the Premises as herein provided with respect to any Expansion occurring subsequent to the date of each failure of Tenant to exercise

such option to purchase the Premises, as aforesaid, in the event that Landlord does not make reimbursement to Tenant for the cost of such Expansion as herein provided.

#### ARTICLE V

##### Insurance

Section 5.01. Tenant shall maintain at Tenant's sole cost and expense, for the benefit of Landlord and Tenant, insurance with respect to the Premises, of the following types and in the following amounts:

A. Fire with extended coverage insurance in an amount not less than the full replacement value of the Premises (excluding excavations and foundations) as same is determined at five (5) year intervals by an architect or engineer designated by Tenant and satisfactory to Landlord. Such determination may be made by the engineering department of the insurance carrier then furnishing the largest amount of such insurance, if such services are furnished by said insurance carrier.

B. Boiler damage insurance with a limit of not less than \$1,000,000; or such other coverage as may be reasonably required.

C. Public liability insurance (including elevator insurance if applicable) in the amount of \$10,000,000.

D. At all times when any work is in progress in connection with altering, repairing or making additions to the Premises, pursuant to a written contract with an independent contractor (other than routine upkeep, maintenance and repair work) Tenant at its expense shall either (i) maintain worker's compensation insurance covering all persons engaged in such work and with respect to whom claims for death or bodily injury might be asserted against Landlord, Tenant or the Premises, or (ii) obtain the customary certification from the person with whom the Tenant has contracted to perform such work that such person carries such worker's compensation insurance.

E. Such other insurance as is customarily maintained by owners and operators of similar property, or as may be reasonably required by Landlord from time to time for its protection against any loss, hazard or liability to which Landlord may be exposed.

Notwithstanding the insurance requirements specified in this Section 5.01 or the amounts thereof or the failure of the Landlord to require insurance against any casualty, loss or liability other than as specifically mentioned in this Section 5.01, Tenant covenants to, and hereby does, indemnify Landlord against all injury or damage to the Premises resulting from any casualty whatsoever and against

all loss or liability resulting from any accident or occurrence taking place upon the Premises or upon the areas adjacent thereto in respect to which Landlord or Tenant has the obligation for the care or maintenance thereof, whether pursuant to the terms, covenants and provisions of this Lease or pursuant to any provision of law or statute applicable thereto. Such indemnification shall be in effect whether or not Tenant has placed and maintained the insurance specified in this Section 5.01 and whether or not, such insurance having been placed and maintained, proceeds from such insurance actually are collectible from one or more of the insurance companies; provided, however, that Tenant shall be relieved of its obligation of indemnity herein pro tanto of the amount actually recovered from one or more of the insurance companies by reason of injury or damage to, or loss sustained on, the Premises. If Tenant does not designate an architect or engineer for determination of replacement value as required by this Section 5.01, said architect or engineer may be designated by Landlord.

Tenant may maintain any or all of the insurance provided for in Section 5.01 under a blanket policy or policies covering other property, provided that (1) each such blanket policy shall comply in all respects with the requirements of this Article V, (1i) the protection afforded

Landlord by each such blanket policy shall be not less than would be afforded by a separate policy relating only to the Premises, and (111) each such blanket policy including insurance provided for in Section 5.01 A shall specify therein the portion of the total insurance allocated to the Building (unless such portion is specified in a written statement of the insurer delivered to Landlord) which shall be at least that required by Section 5.01 A, and shall specify therein that any loss payable thereunder with respect to the Building and contents shall be payable first with respect to the Building and the balance with respect to the contents.

Section 5.02. A. Each insurance policy shall:

1. be issued by an insurance company of recognized standing selected by Tenant and which is satisfactory to Landlord;
2. be in the standard form customarily in use in the State of Texas;
3. be carried as respects fire and extended coverage insurance with loss payable to Tenant if loss should be \$100,000 or less, and to Landlord and Tenant, as their interests may appear, if over \$100,000 and as respects other insurance required by Section 5.01 be carried in favor of Landlord and

Tenant as their interests may appear.

B. Tenant shall procure renewals of all insurance policies at least ten (10) days before the expiration thereof.

C. Each policy or certificate therefor obtained by Tenant pursuant to Section 5.01 of this Lease shall to the extent obtainable contain an agreement by the insurer that such policy shall not be cancelled without at least ten (10) days' prior written notice to both Landlord and Tenant.

D. Tenant shall furnish Landlord with originals or copies certified by the insurance companies or certificates of all insurance policies or in lieu thereof, upon receipt of written notice from Landlord and until further written notice from Landlord to the contrary, file with Landlord upon the execution hereof and annually thereafter on the anniversary of such execution, a certificate over the signature of one of its officers that the insurance required hereunder in the form required by Section 5.01 hereof, is in full force and effect as of the date of said certificate.

Section 5.03. Except as provided in Section 5.06 of this Lease, notwithstanding any injury to or destruction of the Premises, Tenant shall not be entitled to any adjustment of rent or of any of Landlord's or Tenant's rights or liabilities under this Lease or to surrender this Lease; and

Tenant shall continue to be liable to pay the full fixed rent and additional rent, and waives any rights with respect to any such injury or destruction, at any time conferred upon it at law, in equity, by statute or otherwise.

Section 5.04. A. In case any Building, or any of the buildings at any time erected on the Premises, shall be damaged or destroyed by fire or other cause covered by the insurance policies provided for in Section 5.01 of this Lease, all insurance monies payable on account of such damage shall be paid to Tenant if \$100,000 or under, and if over \$100,000 to Landlord and Tenant. With respect to any insurance monies payable to Tenant, if at the time the owner of Tenant's interest under this Lease is a person other than Fleming Companies, Inc., Tenant will place the same in a special account dedicated and earmarked for use in connection with the provisions of this Lease. In the case of any insurance monies payable to Landlord and Tenant, Tenant agrees that it will endorse the checks promptly and, if at the time the owner of the Premises and of Landlord's interest under this Lease is a person other than Morgan Guaranty Trust Company of New York, as trustee or agent of any pension trust funds, pension trusts, retirement plans or endowments, the same shall be placed in a special account in the name of Landlord and separate and distinct from all other funds of

Landlord, and said account shall be designated and earmarked for the payment and application of said insurance monies as provided in this Lease. From the insurance monies paid on account of damage as in this Article V provided Tenant shall be entitled to payment or reimbursement for all amounts necessary to make temporary repairs or such work as may be necessary to protect the Premises against further injury and also, pending the adjustment of the insurance, for the preparation for the making of permanent repairs, restoration or reconstruction. In addition, Tenant shall be entitled to payment from such insurance moneys of such part thereof as shall equal the cost of repairing, restoring, or reconstructing the Building or Buildings so that on completion the Building or Buildings will be substantially the same as before in value and character. Payments shall be made promptly which shall equal the cost of labor and materials, architects' and engineers' fees and other charges and such payments shall be made to Tenant upon the delivery of a certificate of the architect engaged to supervise such work (who shall be designated by Tenant but satisfactory to Landlord) in which the architect shall certify that payments are due as herein provided. Each such certificate shall also contain a representation by such architect (1) that the work has been performed in accordance with the plans and

specifications (except as the same may have been altered or changed with the consent of the Landlord) and (11) that the amount covered by such certificate does not include the cost of any of the alterations and rebuilding for which a prior certificate has been issued. Tenant agrees to complete such repairs or restoration free of lien.

B. If the Premises, or any part thereof, shall suffer injury to or destruction in whole or in part from any of the causes provided in this Article V then, Tenant shall notify Landlord within five (5) days after such injury or destruction and shall proceed diligently to repair or restore the injury or destruction pursuant to plans and specifications to be prepared by Tenant and satisfactory to Landlord. Tenant shall thereupon pursue diligently the completion of the repairs or restoration as aforesaid and Landlord will comply with all the requirements provided for in paragraph A of this Section 5.04. Tenant shall not be liable to the Landlord if any contractor or contractors, subcontractors or materialmen are delayed by strikes, riots, fire, acts of God or the public enemy or inability to obtain construction materials due to war or government interference or other conditions unavoidable or beyond the control of the Tenant (hereinafter referred to as "Unavoidable Delays").

C. The provisions of this Section 5.04 shall apply

to the proceeds of insurance derived from policies furnished by Tenant pursuant to the requirements of Section 5.01. If Tenant has provided all policies as required by Section 5.01 and in the further event that Tenant has taken out additional insurance for its own further protection, then, and with respect to such additional insurance, the proceeds thereof shall be deposited and paid over in like manner as applies to the policies furnished by the Tenant pursuant to the requirements of Section 5.01.

D. If, upon completion of the repair, restoration or reconstruction, there are any insurance proceeds in the Landlord's possession, Landlord shall pay the same to Tenant, upon demand. If the insurance proceeds are insufficient to pay the cost of the repair or restoration, Tenant shall nevertheless complete the repair or restoration, as provided in this Article V, at its own cost and expense.

E. If, upon the expiration or termination of this Lease, there are any insurance proceeds in Landlord's possession in excess of the proceeds to which Tenant shall have become entitled under Section 5.04 A, Landlord shall be entitled to retain such excess.

Section 5.05. If Tenant does not commence promptly to repair or restore the injury or destruction, or if, having commenced the repair or restoration, Tenant does not proceed

diligently to complete the same, Landlord shall be entitled (but shall be under no obligation) at any time thereafter to enter the Premises and repair or restore the injury or destruction and to apply any insurance proceeds in Landlord's possession to the payment of the cost thereof; but if the insurance proceeds are insufficient for the cost of the repair, restoration or reconstruction, Tenant shall pay to Landlord, upon demand and as additional rent as the work progresses, such amounts as are necessary to complete the repair, restoration or reconstruction upon delivery of the certificate of an architect or engineer in the form referred to in Section 5.04 A of this Article V.

Section 5.06. Anything in this Article V to the contrary notwithstanding

A. If less than one-half of the then aggregate floor space in the Building shall have been so injured and destroyed and made untenable, Tenant shall at its expense repair, restore and reconstruct the same as nearly as practicable to its value and condition immediately before such damage or destruction, notwithstanding the fact that the proceeds of insurance may not be sufficient to cover the cost of such repair, restoration or reconstruction. Such repair, restoration or reconstruction shall commence within a reasonable time after such notice to Landlord, but not later

than four months after the injury or destruction shall have occurred, and shall be continued diligently until completed, subject in each case to Unavoidable Delays. Tenant shall be entitled to the proceeds of salvage.

B. If one-half or more of the then aggregate floor space in the Building shall have been so injured or destroyed and made unusable, Tenant at its option exercisable by notice to Landlord within three months after the injury or destruction occurred, either shall repair, restore or reconstruct the Building as required by paragraph A of this Section 5.06, or shall terminate this Lease effective as of a date specified in such notice, which shall be at least thirty (30) days after the date such notice is given to Landlord. If Tenant exercises its option to terminate this Lease, it shall purchase the Premises from Landlord on the date of such termination for a price, in cash, equal to the greatest of the following:

1. The Landlord's Unamortized Cost shown by Section 2 of Exhibit B hereto to be applicable as of the date of such purchase; or

2. The sum of (1) the fair market value, as of the date of the commencement of the Initial Term of the land covered by this Lease considered vacant and unimproved land unencumbered by this Lease,

which fair market value is hereby agreed to be \$375,000 compounded at the rate of 2% per year from the date of the commencement of the Initial Term to the date of such purchase, plus (11) Landlord's Original Cost of the Building (hereinbelow defined) reduced at the rate of 2 1/2% per year, computed from the beginning of the Initial Term to the date of such purchase; or

3. The present value of the aggregate amount of all rent not theretofore paid which would have otherwise been payable under Article III hereof if Tenant had exercised all its options to renew this Lease pursuant to Articles II and III, computed as of the date of such purchase on the basis of a discount rate of 8% per year but in no event an amount greater than Landlord's Original Cost.

If Tenant shall purchase the Premises pursuant to the provisions of this paragraph B of Section 5.06, all proceeds of insurance shall belong to and become the sole property of the Tenant.

## ARTICLE VI

### Condemnation

Section 6.01 A. If during the Initial Term a fee simple interest in the entire Premises is taken or condemned under power of eminent domain (such a taking or condemnation being herein called a "Condemnation"), this Lease shall terminate as of the date of Condemnation and Landlord shall be entitled to receive and retain out of the award from the condemning authority, after deducting all expenses incurred in obtaining payment thereof including, but not limited to reasonable fees of counsel and experts (the amount of such award after deduction of such expenses being herein called the "Net Award"), an amount equal to the Landlord's Unamortized Cost, if any, shown by Section 2 of Exhibit B hereto to be applicable as of the date immediately preceding the date of Condemnation. If the Net Award exceeds said Landlord's Unamortized Cost, Landlord shall be entitled to receive and retain the percentage of the excess shown by Exhibit C annexed hereto and made a part hereof to be applicable as of the Lease Year in which the date of Condemnation falls and Tenant shall be entitled to receive and retain the balance of such excess. If the Net Award is less than said Landlord's Unamortized Cost, Tenant shall pay the Landlord the difference, within thirty (30) days after the amount of the Net

Award is finally determined. In each instance Tenant shall also pay the Landlord an additional sum which when added to interest on the Net Award paid by the condemning authority to Landlord and retained by Landlord shall equal interest on Landlord's Unamortized Cost computed at the rate of 12 1/2% per annum from the first day of the month in which such Condemnation shall have occurred to the date of such payment.

B. If during any five year Extended Term a fee simple interest in the entire Property is taken or condemned as aforesaid, this Lease shall terminate as of the date of Condemnation. Landlord shall be entitled to receive and retain the percentage of the Net Award shown by Exhibit C hereto to be applicable as of the Lease Year in which the date of Condemnation falls and Tenant shall be entitled to receive and retain the balance of the Net Award.

Section 6.02. A. If during the Initial Term or any Extended Term a fee simple interest in less than all the Premises is taken or condemned as aforesaid, and Tenant, within six months thereafter, gives Landlord notice that by reason of such Condemnation the continued use of the remainder of the Premises for Tenant's business would be uneconomical or impractical, this Lease shall terminate as of a date ninety (90) days after the date of such notice; Landlord shall convey title to, and Tenant shall accept the

conveyance of, the portion of the Premises not taken or condemned; and the rights of Landlord and Tenant in respect of the division of the Net Award and the obligation of Tenant in respect of payments to Landlord shall be as set forth in Section 6.01 of this Lease.

B. If during the Initial Term or any Extended Term a fee simple interest in less than all the Premises is taken or condemned as aforesaid, and Tenant does not give the notice described in paragraph A of this Section 6.02, this Lease shall continue in effect as to the remainder of the Premises, and Tenant shall restore any damage and make such repairs or alterations to the Building situated thereon as may be necessary to make such Building a separate structural unit capable of being operated independently of any building not situated wholly upon the remainder of the Premises and shall be entitled to the proceeds of salvage. Tenant shall be entitled to receive and retain out of the Net Award an amount equal to the cost of such restoration, repairs or alterations and if the Net Award exceeds such cost, Landlord shall be entitled to receive and retain the percentage of the excess shown by Exhibit C hereto to be applicable as of the Lease Year in which the date of Condemnation falls, and Tenant shall be entitled to receive and retain the balance of such excess. If the Condemnation affects the land but not

the Building so that no restoration, repairs or alterations are necessary, Landlord shall receive and retain the percentage of the Net Award shown by Exhibit C hereto to be applicable as of the Lease Year in which the date of Condemnation falls, and Tenant shall be entitled to receive and retain the balance of the Net Award.

Section 6.03. Condemnation of any or all of the Premises for use or occupancy for a period of temporary or undetermined duration shall not reduce any of Tenant's obligations under this Lease except to the extent that Tenant is prevented by the condemning authority from performing such obligations. If such use or occupancy by the condemning authority does not extend beyond the duration of this Lease (including the Term current when the Condemnation occurs and any succeeding Extended Term or Terms for which Tenant has theretofore exercised or does thereafter exercise its option to extend the Term of this Lease pursuant to Section 2.02), Tenant shall be entitled to the entire Net Award and on termination of such use or occupancy Tenant shall at its sole cost and expense restore the Premises as nearly as practicable to its condition immediately before the Condemnation. If such use or occupancy does extend beyond the duration of this Lease (including such current and succeeding Terms), Landlord shall be entitled to receive and retain from the Net

Award an amount equal to the estimated expense of restoring the Premises as nearly as practicable to its condition immediately before the Condemnation, and the remainder of the Net Award shall be apportioned between Landlord and Tenant as of the date of expiration of this Lease.

Section 6.04. Except to the extent otherwise expressly provided in Article VI of this Lease, this Lease shall not terminate nor shall Tenant be entitled to any abatement of fixed rent or reduction thereof nor shall the respective obligations of Landlord and Tenant be otherwise affected by reason of damage to or destruction of all or any part of the Premises from whatever cause, the taking of said Premises or any portion thereof by condemnation or otherwise, the prohibition of Tenant's use of the Premises, the interference with such use by any private person or corporation, or by reason of any eviction by paramount title, or for any other cause whether similar or dissimilar to the foregoing, any present or future law to the contrary notwithstanding.

Section 6.05. If at the time the owner of the Premises and of Landlord's interest under this Lease is a person other than Morgan Guaranty Trust Company of New York, as trustee or agent of any pension trust funds, pension trusts, retirement plans or endowments, the Net Award shall be deposited by Landlord in a special account in the name of

Landlord and separate and distinct from all other funds of Landlord and said account shall be dedicated and earmarked for the application and payment pursuant to the provisions of this Article VI.

Section 6.06. Anything in this Article VI to the contrary notwithstanding, any award or proceeds for removable trade fixtures or other personal property owned by the Tenant shall be the sole property of the Tenant, and shall not comprise any part of the "Net Award" as hereinabove defined.

#### ARTICLE VII

##### Sales, Mortgages, Assignment and Subleases

Section 7.01. Landlord shall be entitled to convey and otherwise dispose of the Premises and its interest under this Lease at any time, and thereafter shall not be subject to any of the obligations of Landlord under this Lease, provided the assignee assumes all obligations of Landlord hereunder. Landlord shall also be entitled to mortgage the Premises, but the Landlord hereby confirms that this Lease will remain prior in interest to any mortgage which may hereafter during the Term hereof become a lien against the Premises, unless the Tenant in its sole discretion expressly agrees to subordinate this Lease to the lien of such mortgage.

Section 7.02. During a period of one hundred eighty (180) days prior to the expiration of any Term of this Lease, Landlord shall have the right to exhibit the Premises during business hours for the purpose of selling or leasing the same or selling Landlord's interest under this Lease and to attach to the Premises a notice or notices advertising the Premises for sale or lease.

Section 7.03. Tenant may mortgage its interest under this Lease, but any such mortgage shall be subject and subordinate to the provisions of this Lease, and no such mortgage shall impair any of the rights, remedies or interest of Landlord under this Lease. Landlord agrees to give notice of any default hereunder to any mortgagee of this Lease who shall have given Landlord written notice of such mortgage and furnished Landlord with a certified copy thereof, and further agrees to accept performance by such mortgagee of the terms, covenants and conditions of this Lease in the manner and within the time provided for hereunder as if such performance were by Tenant.

Section 7.04. Tenant may assign, sell or otherwise dispose of its interest in this Lease or sublet the whole or any part of the Premises for any lawful purpose not inconsistent with this Lease; provided, however, that no assignment, sale, disposal, or subletting, nor the acceptance of rents or

other payments from, nor any other dealing by the Landlord with any assignee, under-tenant, occupant, or other person, shall release the Tenant from its obligation to pay the rents herein reserved and perform all the terms, covenants and conditions as set forth in this Lease.

#### ARTICLE VIII

##### Default

Section 8.01. If any one or more of the following events (each of which is herein sometimes called "Event of Default") shall happen:

(a) if Tenant defaults in the due and punctual payment of any fixed rent or additional rent or other sums required to be paid under this Lease or any part thereof when and as the same shall become due and payable, and such default shall continue for a period of 10 days after notice thereof be given by Landlord to Tenant; or

(b) if Tenant defaults in the performance of or compliance with any of the covenants, agreements, terms or conditions contained in this Lease other than those referred to in the foregoing paragraph (a), and such default shall continue for a period of 30 days after written notice thereof be

given by Landlord to Tenant, provided, however, that Tenant's time to cure such default shall be extended for such additional time as shall be reasonably required for the purpose if Tenant is proceeding with due diligence during such 30 day period to cure such default and is unable by reason of the nature of the work involved to cure the same within the said 30 days, and if such extension of time does not subject Landlord or Tenant to any liability, civil or criminal, and the interest of Landlord in this Lease shall not be jeopardized by reason thereof;

then and in any event covered by subdivisions (a) and (b) hereof, Landlord at any time thereafter may give written notice to Tenant specifying one or more such Events of Default and, unless such specified Event of Default or Events of Default have been cured by Tenant within five (5) days after such notice, Landlord shall have the rights and remedies hereinafter set forth.

Section 8.02. Upon any such notice and failure to cure, Tenant shall quit and peacefully surrender the Premises to Landlord, and Landlord, upon or at any time after any such notice and failure to cure may without further notice, enter upon and re-enter the Premises and possess and repossess

itself thereof, by force, summary proceedings, ejectment or otherwise, and may dispossess Tenant and remove Tenant and may have, hold and enjoy the Premises and the right to receive all rental income of and from the same.

Section 8.03. At any time or from time to time after any such repossession by Landlord, Landlord may relet the Premises or any part thereof, in the name of Landlord or otherwise, for such Term or Terms (which may be greater or less than the remaining Term of this Lease) and on such conditions (which may include concessions or free rent) as Landlord, in its uncontrolled discretion, may determine and may collect and receive the rent therefor. Landlord shall in no way be responsible or liable for any failure to relet the Premises or any part thereof, or for any failure to collect any rent due upon any such reletting.

Section 8.04. No such repossession or other action by Landlord shall relieve Tenant of its liability and obligations under this Lease and such liability and obligations shall survive until the end of the Term of this Lease unless Landlord shall execute and deliver to Tenant an instrument in writing specifically releasing Tenant from such liability and obligations. In the event of any such notice and failure to cure, whether or not the Premises or any part thereof shall have been relet, Tenant shall pay to Landlord

the fixed rent, additional rent and all other charges required to be paid by Tenant up to the time of such repossession by Landlord, and thereafter Tenant shall be liable to Landlord for, and shall pay to Landlord, as and for liquidated and agreed current damages for Tenant's default:

(a) the equivalent of the amount of the fixed rent and the additional rent and charges which would be payable under this Lease by Tenant if this Lease were still in effect, less

(b) the net proceeds of any reletting effected pursuant to the provisions of Section 8.03 hereof and of amounts collected from tenants, subtenants, concessionaires and occupants of the Premises after deducting all Landlord's expenses in connection with such reletting, including, without limitation, all repossession costs, brokerage commissions, legal expenses, reasonable attorneys' fees, alteration costs, and expenses of preparing the Premises for such reletting.

Tenant shall pay such current damages (herein called "deficiency") to Landlord quarterly on the days on which the fixed rent is payable under this Lease and Landlord shall be entitled to recover from Tenant each quarterly deficiency as the same shall arise. At any time after any such

expiration or termination, Landlord, at its option, shall be entitled to recover from Tenant and Tenant shall pay to Landlord, on demand, as and for liquidated and agreed final damages for Tenant's default, an amount equal to the difference between the fixed rent and all additional rent reserved hereunder for the unexpired portion of the Term demised and the then fair and reasonable rental value of the Premises for the same period. In the computation of such damages the difference between any installment of fixed rent becoming due hereunder after the date of repossession by Landlord and the fair and reasonable rental value of the Premises for the period for which such installment was payable shall be discounted to the date of termination at the rate of 12 1/2% per annum. If the Premises or any part thereof be relet by the Landlord for the unexpired term of this Lease, or any part thereof, before presentation of proof of such liquidated damages to any court, commission or tribunal, the amount of rent reserved upon such reletting shall be deemed prima facie to be the fair and reasonable rental value for the part or the whole of the Premises so relet during the term of the reletting. Nothing herein contained shall limit or prejudice the right of the Landlord to prove for and obtain as liquidated damages by reason of such termination, an amount equal to the maximum allowed by

any statute or rule of law in effect at the time when, and governing the proceedings in which, such damages are to be proved, whether or not such amount be greater, equal to, or less than the amount of the difference referred to above.

Section 8.05. At Landlord's option, upon any such notice and failure to cure, all subleases then in effect shall be deemed assigned to Landlord by Tenant, and Tenant shall, upon notice from Landlord, execute and deliver to Landlord instruments, in proper form for recording, assigning to Landlord Tenant's interest in and to each such sublease. Tenant hereby irrevocably appoints Landlord, in the event of Tenant's failure or refusal to execute any and all such assignments, its true and lawful attorney to execute the same.

Section 8.06. Nothing herein contained shall be interpreted to prohibit the Landlord from terminating this Lease at any time after an Event of Default by Tenant.

Section 8.07. No failure by Landlord to insist upon the strict performance of any covenant, agreement, term or condition of this Lease or to exercise any right or remedy consequent upon a breach thereof, and no acceptance of full or partial rent during the continuance of any such breach, shall constitute a waiver of any such breach or of such covenant, agreement, term or condition. No covenant, agree-

ment, term or condition of this Lease to be performed or complied with by Tenant, and no breach thereof, shall be waived, altered, modified or terminated except by a written instrument executed by Landlord. No waiver of any breach shall affect or alter this Lease, but each and every covenant, agreement, term and condition of this Lease shall continue in full force and effect with respect to any other then existing or subsequent breach thereof.

Section 8.08. In the event of any breach by Tenant of any of the covenants, agreements, terms or conditions contained in this Lease, Landlord, in addition to any and all other rights, shall be entitled to enjoin such breach and shall have the right to invoke any right and remedy allowed at law or in equity or by statute or otherwise for such breach as though re-entry, summary proceedings, and other remedies were not provided for in this Lease.

Section 8.09. All net rent or additional rent in arrears and all amounts collectible hereunder shall bear interest at the rate of 12 1/2% per annum from their respective due dates until paid, provided that this shall in no way limit, lessen or affect any claim for any breach or default by Tenant.

## ARTICLE IX

### Bankruptcy

Section 9.01. Should a court having jurisdiction in the premises enter a decree or order for relief with respect to Tenant in an involuntary case under any applicable bankruptcy, insolvency, or other similar law now or hereafter in effect, or appoint a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of the Tenant or for any substantial part of its property, or order the winding-up or liquidation of its affairs and such decree or order shall remain unstayed and in effect for a period of thirty (30) consecutive days; or should the Tenant commence a voluntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, or consent to the entry of an order for relief in an involuntary case under any such law, or consent to the appointment of or taking possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator (or other similar official) of the Tenant or for any substantial part of its property or make any general assignment for the benefit of creditors, or fail generally to pay its debts as they become due or take any corporate action in furtherance of any of the foregoing, then, in any of such events, Landlord may at Landlord's option cancel and terminate this Lease on the giving to

Tenant of a thirty (30) days' notice in writing.

#### ARTICLE X

##### Invalidity of Particular Provisions

Section 10.01. If any term or provision of this Lease or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remaining terms and provisions of this Lease, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Lease shall be valid and be enforced to the fullest extent permitted by law.

#### ARTICLE XI

##### Covenant of Quiet Enjoyment

Section 11.01. Landlord covenants and agrees that Tenant, upon payment of the rents reserved herein and observing and keeping the covenants, agreements and stipulations of this Lease on its part to be kept, shall lawfully, peaceably and quietly hold, occupy and enjoy the Premises during the Term of this Lease and any extension or extensions thereof, without hindrance, ejection or molestation by Landlord or any person or persons claiming under Landlord.

## ARTICLE XII

### **Machinery, Equipment and Fixtures Installed and Used in Business**

Section 12.01. Tenant from time to time during the Initial Term or any Extended Term may install machinery, equipment and fixtures of various kinds and descriptions for the purpose of carrying on, and used in connection with, its business, and upon any of such machinery, equipment and fixtures being so installed in or placed on the Premises by Tenant, the same shall remain at all times the property of Tenant, and, at any time during the Initial Term or any Extended Term and at the termination of the Lease, Tenant shall be entitled to remove any and all of such machinery, equipment and fixtures; provided, however, that if any machinery, equipment or fixtures are so attached to the Building as not to be readily removable without damage to the Building, then in such event, if Tenant shall remove the same, Tenant shall promptly repair and replace any damage caused to the Building by such removal. At the expiration or other termination of the Term of this Lease, Landlord may require Tenant to remove any and all of such machinery, equipment and fixtures at the expense of the Tenant and Tenant shall promptly repair and replace any damage caused to the Building by such removal. If Tenant shall exercise

its option to extend this Lease as provided in Section 2.02 of this Lease it shall not be necessary for Tenant to reserve its right to such machinery, equipment and fixtures or their removal but such machinery, equipment and fixtures shall remain the property of Tenant. Nothing herein contained shall be deemed to confer upon Tenant any right to remove any equipment or fixtures, including replacements used in the operation of the Premises, other than any equipment or fixtures paid for by Tenant (and not reimbursed for by Landlord) and used by Tenant in the operation of its business conducted on the Premises.

#### ARTICLE XIII

##### Condition of and Title to the Premises

Section 13.01. Tenant represents that the Premises, the title thereto, the sidewalks and structures adjoining the same, any subsurface conditions thereof, and the present uses and non-uses thereof, have been examined by Tenant and that Tenant accepts the same in the condition or state in which they or any of them now are, without representation or warranty, express or implied in fact or by law, by Landlord and without recourse to Landlord, as to the title thereto, the nature, condition or usability thereof or the use or uses to which the Premises or any part thereof may be put.

#### ARTICLE XIV

##### Terms of Purchase by Tenant

Section 14.01. In the event of any sale by Landlord to Tenant and purchase by Tenant from Landlord of the Premises or any part thereof pursuant to any provisions of this Lease:

A. Upon delivery of the applicable notice required by the provisions of this Lease as a condition precedent to such sale and purchase, there shall be in existence, without further action of the parties, a binding agreement, enforceable at law or in equity, for the sale and purchase of the Premises or such part thereof at the applicable price and upon the additional terms and conditions hereinafter set forth;

B. Settlement shall take place at the office of the Landlord upon the date fixed for consummation of such sale and purchase in accordance with the provisions of this Lease pursuant to which such sale and purchase is to be consummated;

C. At settlement, Landlord shall convey the Premises or such part thereof to Tenant by deed in which the Landlord therein shall covenant and agree that the grantor has not done, committed, or know-

ingly or willingly suffered to be done or committed, any act, matter or thing whatsoever whereby the Premises thereby granted or any part thereof is, or has been, charged or encumbered, except at the request or with the consent of the Tenant, and which shall be in sufficient form to be entitled to record;

D. Tenant shall accept title subject to zoning rules, restrictions, regulations, resolutions and ordinances and to any violations of building codes, fire laws, and other laws and regulations;

E. Tenant shall pay all charges incident to the conveyance, including but not limited to escrow fees, if any, recording fees, title insurance premiums, cost of documentary stamps and any applicable state and local taxes and Landlord's and Tenant's reasonable attorneys' fees;

F. There shall be no proration of any taxes, insurance premiums or other charges which Tenant is required to pay under and pursuant to the provisions of this Lease;

G. Tenant, having examined and being familiar with the state of the title to the Premises and the

title examination made for Landlord in connection with its acquisition of title, will accept title to the Premises or such part thereof subject to those matters disclosed by such title examination, except for so much thereof as may have been taken or condemned by eminent domain, and further subject to: (i) this Lease, (ii) any and all taxes, assessments and other charges which Tenant agrees to pay pursuant to the provisions of this Lease, and (iii) any other liens, encumbrances and exceptions not caused by Landlord; and

H. Upon the completion of such purchase and the payment by Tenant of the purchase price plus an amount equal to 12 1/2% per annum thereon computed from the first day of the immediately preceding quarterly period for which fixed rent shall have been paid to the date of settlement, this Lease shall terminate, and Landlord and Tenant shall be released and discharged of all further obligations hereunder, but such termination shall not release or discharge either party from any obligations that have accrued thereunder prior to such termination.

## ARTICLE XV

### Estoppel Certificates

Section 15.01. Tenant agrees at any time and from time to time during the Term of this Lease upon not less than ten (10) days' prior notice by Landlord to execute, acknowledge and deliver to Landlord a statement in writing certifying that this Lease is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating the modifications), and the dates to which the fixed rent and other charges have been paid in advance, if any, and stating whether or not to the best knowledge of the signer of such certificate Landlord is in default in performance of any covenant, agreement or condition contained in this Lease and, if so, specifying each such default of which the signer may have knowledge, it being intended that any such statement delivered pursuant to this Section 15.01 may be relied upon by any prospective purchaser of the fee or any mortgagee thereof, or any prospective assignee thereof.

Section 15.02. Landlord agrees at any time and from time to time during the term of this Lease upon not less than ten (10) days' prior notice by Tenant to execute, acknowledge and deliver to Tenant a statement in writing certifying that this Lease is unmodified and in full force

and effect (or if there shall have been modifications that the same is in full force and effect as modified and stating the modifications) and the dates to which the fixed rent and other charges have been paid in advance, if any, and stating whether or not to the best knowledge of the signer of such certificate Tenant is in default in performance of any covenant, agreement or condition contained in this Lease and, if so, specifying each such default of which the signer may have knowledge, it being intended that any such statement delivered pursuant to this Section 15.02 may be relied upon by any prospective assignee of the Tenant's Interest in this Lease.

#### ARTICLE XVI

##### Discontinuance of Use; Rejection of Option

Section 16.01. If at any time after the expiration of the Fifth Lease Year of the Initial Term and prior to the expiration or earlier termination of the Initial Term, Tenant shall determine that (i) the Premises are no longer suitable or economical for use in Tenant's business operations (or those of any one controlled by Tenant) and (ii) Tenant intends to discontinue its use of the Premises in connection with such business operations (or those of any one controlled by Tenant) without intending to resume such use, Tenant may give Landlord written notice of such determination which

shall be accompanied by an offer to purchase the Premises for a price, in cash, equal to the sum of

(a) the Landlord's Unamortized Cost as shown by Exhibit B hereto to be applicable as of the date of said offer and

(b) an amount equal to 9% of Landlord's Original Cost after the fifth Lease Year of the Initial Term and through the tenth Lease Year of the Initial Term; an amount equal to 8% of Landlord's Original Cost after the tenth Lease Year of the Initial Term and through the fifteenth Lease Year of the Initial Term.

Landlord shall accept or reject said offer by notice to Tenant within 30 days after the date the offer shall be made. If Landlord accepts the offer, Landlord shall sell and Tenant shall purchase the Premises for said price pursuant to the terms of Article XIV on a date for settlement (to be designated by Landlord in said notice of acceptance) which shall be not less than 15 nor more than 45 days after Landlord shall have accepted said offer as aforesaid. If Landlord rejects the offer or if Landlord does not accept the offer within 30 days after the date said offer was made, Tenant may, at its option, terminate this Lease by notice to Landlord, effective as of a date stated in such notice which

shall be at least 30 days after the date such notice is given to Landlord. In the event of such termination, no adjustment or apportionment shall be made with respect to any fixed rent, additional rent or other charges payable by Tenant hereunder which shall have been paid by Tenant covering a period subsequent to the date of such termination. If Tenant does not exercise its option to terminate this Lease, it shall continue in full force and effect as if the offer had not been made, without prejudice to Tenant's right to make subsequent offers pursuant to this Section 16.01.

For the purpose of this Section 16.01 the subletting of the Premises or the assignment of this Lease in whole or in part shall not be deemed to be the discontinuance or use of the Premises for the business operations of Tenant. All expenses of Landlord in connection with any purchase of the Premises pursuant to this Section 16.01, including reasonable attorneys' fees, shall be paid by Tenant.

#### ARTICLE XVII

##### Option to Purchase

Section 17.01. Landlord hereby gives and grants to Tenant the option, exercisable upon not less than 180 days nor more than 360 days prior notice to Landlord, to purchase the fee simple title to the Premises at the expiration of the five Extended Terms, provided that Tenant exercises its

options to extend the Term of this Lease for five additional consecutive Extended Terms pursuant to Section 2.02, for a price equal to the then Fair Market Value of the Premises.

Section 17.02. The term "Fair Market Value of the Premises" means the price at which the Premises would be sold for cash by a willing seller not compelled to sell to a willing buyer not compelled to buy, subject to and having the benefit of all of the then existing encumbrances and other matters affecting the Premises or any part thereof, except this Lease.

Section 17.03. If within 30 days after Tenant gives Landlord notice of the exercise of its option the parties cannot mutually agree on the Fair Market Value of the Premises, then the Fair Market Value of the Premises shall be determined by an appraisal, such appraisal to be conducted as provided in this Article XVII. The parties shall have 10 days from the expiration of the 30 day period, which Landlord and Tenant had to mutually agree on the Fair Market Value, to select a mutually agreed upon appraiser who shall be a member of the American Institute of Real Estate Appraisers or a successor body exercising a similar function. The costs and expenses of a jointly appointed appraiser will be shared equally by Landlord and Tenant. If Landlord and Tenant cannot mutually agree upon an appraiser within said 10 day

period, the appraisal of the Premises for the purposes of this Article XVII will be conducted by a board of three reputable real estate appraisers who shall be members of the American Institute of Real Estate Appraisers or a successor body exercising a similar function, one appointed by Landlord, one appointed by Tenant and the third appointed by the first two appraisers. The costs and expenses of each appraiser appointed separately by Landlord and Tenant will be borne by the party who appointed the appraiser. The costs and expenses of the third appraiser will be shared equally by Landlord and Tenant. The first two appraisers shall be appointed by Landlord and Tenant within 10 days from the expiration date of the 10 day period which Landlord and Tenant had to mutually select an appraiser. The third appraiser shall be appointed by the first two appraisers within 15 days after the appointment of the first two appraisers. If the first two appraisers are unable to agree on a third appraiser, such third appraiser shall be appointed by the senior federal district court judge, or such other federal district court judge as he may designate, for the district in which the Premises is located, acting in his non-judicial capacity. If such federal district court judge refuses to act, the third appraiser shall be appointed pursuant to the rules of the American Arbitration Association.

Section 17.04. If the appraisal is to be conducted by an appraiser appointed jointly by Landlord and Tenant, the appraiser so chosen shall have 30 days from the date of his appointment to appraise the Premises and notify Landlord and Tenant by written notice of the amount of the Fair Market Value of the Premises, which notice shall be accompanied by a copy of his appraisal report. The decision of the appraiser shall in all cases be binding and conclusive upon the parties.

Section 17.05. If the appraisal is to be conducted by a board of three appraisers, each appraiser shall have 30 days from the date of the appointment of the third appraiser to appraise the Premises and notify Landlord and Tenant by written notice of its appraisals of the amount of the Fair Market Value of the Premises, which notices shall be accompanied by a copy of their appraisal reports. If the determinations of the Fair Market Value of the Premises of any two or all three of the appraisers shall be identical in amount, said amount shall be deemed to be the Fair Market Value of the Premises. If such determinations of all three appraisers shall be different in amount, the highest of the three appraised values shall be averaged with the middle of said values (said average being hereafter referred to as "Sum A"), the lowest of said values shall be averaged with the middle

of said values (said average being hereinafter referred to as "Sum B") and the Fair Market Value of the Premises shall be determined as follows

(i) if neither Sum A nor Sum B differs from the middle of said appraised values by more than five percent of the middle value, then the Fair Market Value of the Premises shall be deemed to be the average of the three appraisals;

(ii) if either Sum A or Sum B (but not both of said Sums) differs from the middle value by more than five percent of such middle value, then the Fair Market Value of the Premises shall be deemed to be the average of such middle value and the value closest in amount to such middle value;

(iii) if both Sum A and Sum B differ from such middle value by more than five percent of such middle value, the appraisals shall have no force and effect, and the Fair Market Value of the Premises shall be determined by a new panel of three real estate appraisers qualified, appointed and acting as provided in Sections 17.03 and 17.05.

The Fair Market Value of the Premises determined in accordance with the provisions of this Section 17.05 shall be binding and conclusive on Landlord and Tenant.

Section 17.06. To the extent, and only to the extent, that the rule against perpetuities is applicable to any term or provision of this Lease, the rights and options of Landlord and Tenant shall expire on the earlier of (a) the expiration of the Term, or (b) the date which is twenty (20) years after the date of death of the last to die of (i) the presently living issue of Messrs. R. Randolph Devening and Louis J. Price and (ii) each presently living person that was born in a hospital located in Dallas County, Texas, during the calendar year ending December 31, 1982 and that portion of calendar year 1983 prior to the date this Lease is executed by the first to sign of Landlord or Tenant.

#### ARTICLE XVIII

##### Miscellaneous

Section 18.01. Subject to the provisions of Section 3.03 A of Article III hereof, Tenant, upon prior notice to Landlord, shall be entitled to contest, in good faith, in the name of Landlord or Tenant, but at the expense of Tenant, by appropriate proceedings diligently conducted, the validity or applicability, as the case may be, of any:

A. law or requirement or any proposed law  
or requirement of any governmental authority,

B. tax, assessment (including special assessment) or other governmental charge, or any proposed tax, assessment or any other governmental charge, subject to Section 3.03 hereof,

C. lien or encumbrance,

D. requirement of any insurance carrier, or

E. other expense or charge,

which during the term of this Lease shall be levied, assessed, imposed, demanded or threatened to be levied, assessed, imposed or demanded by any governmental authority (provided non-compliance therewith or non-payment thereof, as the case may be, does not impose any criminal liability upon the Landlord or Tenant) or insurance carrier upon or with respect to, or alleged by any person to have been insured in connection with the possession, occupation, operation, alteration, maintenance, repair or use of the Premises or the making of any additions thereto. The period of any such permitted contest shall be excluded in computing the period during which a default shall be deemed to exist, if such default would not have occurred but for such contest.

Section 18.02. Tenant will not create or permit to be created or to remain, and will discharge, any lien, encumbrance, or charge (levied on account of any imposition or any mechanic's, laborer's or materialman's lien or any

mortgage, conditional sale, title retention agreement or chattel mortgage, or otherwise) which might be or become a lien, encumbrance or charge upon the Premises or any part thereof or the income therefrom, having any priority or preference over or ranking on a parity with the estate, rights and interest of Landlord in the Premises or any part thereof or the income therefrom and Tenant will not suffer any other matter or thing whereby the estate, rights and interest of Landlord in the Premises or any part thereof might be impaired; provided that any imposition may, after the same becomes a lien on the Premises, be paid or contested in accordance with Article XVIII hereof and any mechanic's, laborer's or materialman's lien may be discharged in accordance with Section 18.03 hereof.

Section 18.03. If any mechanic's, laborer's or materialman's lien shall at any time be filed against the Premises or any part thereof, Tenant, within 30 days after notice of the filing thereof, will cause the same to be discharged of record by payment, deposit, bond, order of a court of competent jurisdiction or otherwise. If Tenant shall fail to cause such lien to be discharged within the period aforesaid, then, in addition to any other right or remedy, Landlord may, but shall not be obligated to, discharge the same either by paying the amount claimed to be due or by

procuring the discharge of such lien by deposit or by bonding proceedings, and in any such event Landlord shall be entitled, if Landlord so elects, to compel the prosecution of an action for the foreclosure of such lien by the lienor and to pay the amount of the judgment in favor of the lienor with interest, costs and allowances. Any amount so paid by Landlord and all costs and expenses incurred by Landlord in connection therewith, together with interest thereon at the rate of 12 1/2% per annum from the respective dates of Landlord's making of the payment or incurring of the cost and expense shall constitute additional rent payable by Tenant under this Lease and shall be paid by Tenant to Landlord on demand.

Section 18.04. Nothing contained in this Lease shall be deemed or construed in any way as constituting the consent or request of Landlord, express or implied by inference or otherwise, to any contractor, subcontractor, laborer or materialman for the performance of any labor or the furnishing of any materials for any specific improvement, alteration to or repair of the Premises or any part thereof.

Section 18.05. Upon the expiration of this Lease, or upon the earlier termination of the same in accordance with any of the provisions hereof, Tenant shall surrender and deliver peaceful and immediate possession of the Premises to

Landlord in as good order and condition as they were at the time of the execution and delivery of this Lease, reasonable wear and tear and damage by the elements excepted.

Section 18.06. Tenant will not do or suffer any waste or damage, disfigurement or injury to the Building or any part thereof.

Section 18.07. Vaults and areas, if any, now or hereafter built extending beyond the building line of the Premises are not included within the Premises, but Tenant may occupy and use the same during the Term of this Lease, subject to such laws, permits, rules, and regulations as may be imposed by appropriate governmental authorities with respect thereto.

Section 18.08. No revocation on the part of any governmental department or authority of any license or permit to maintain and use any such vault shall in any way affect this Lease or the amount of the rent or any other charge payable by Tenant hereunder. If any such license or permit shall be revoked, Tenant will, at its sole cost and expense, do and perform all such work as may be necessary to comply with any order revoking the same.

Section 18.09. Each right, power and remedy of Landlord provided for in this Lease shall be cumulative and concurrent and shall be in addition to every other right,

power or remedy provided for in this Lease or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise or beginning of the exercise by Landlord of any one or more of the rights, powers or remedies provided for in this Lease or now or hereafter existing at law or in equity or by statute or otherwise shall not preclude the simultaneous or later exercise by Landlord of any or all such other rights, powers or remedies.

Section 18.10. The headings of the Articles and the numbering of the paragraphs in this Lease are inserted as a matter of convenience to the parties and shall not affect the construction of this Lease.

Section 18.11. This Lease may be executed in any number of counterparts, each of which shall be an original and the counterparts shall constitute but one and the same agreement.


Section 18.12. This Lease shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives, successors and assigns. This Lease may not be modified, altered, terminated or discharged orally but only by an agreement in writing signed by the parties hereto.

Section 18.13. Fleming Companies, Inc. warrants and represents that it will not take any action which would

result in this Lease becoming a nonexempt prohibited transaction within the meaning of Section 406 of the Employee Retirement Income Security Act (ERISA), as amended, or Section 4975 of the Internal Revenue Code, as amended. Fleming Companies, Inc. further warrants and represents that if this Lease becomes a nonexempt prohibited transaction for any reason whatsoever, Fleming Companies, Inc. will apply for and use due diligence to obtain an appropriate exemption from the United States Department of Labor. If Fleming Companies, Inc. cannot obtain such exemption, it will comply with any order of the United States Department of Labor concerning the correction of such a prohibited transaction.

Section 18.14. All expenses of Landlord, including reasonable attorneys' fees, in connection with (i) any negotiated purchase of the Premises not made pursuant to the terms of this Lease, or (ii) the financing of an expansion to the premises in accordance with Article IV herein, or (iii) review at Tenant's request of any documents or instruments whatsoever, including but not limited to those pertaining to partial takings, the granting of easements, and the like, shall be paid by Tenant.

Section 18.15. This Lease shall be governed by and construed in accordance with Texas law.

  
James W. Clark  
Secretary

STATE OF NEW YORK       )  
                                  : ss.:  
COUNTY OF NEW YORK    )

March 2, 1953 This instrument was acknowledged before me on  
by David H. Marchand, Assistant Vice President of  
Morgan Guaranty Trust Company of New York, a New York cor-  
poration, on behalf of said corporation.

Margaret M. Boylan  
Notary Public - New York  
County

My commission expires: \_\_\_\_\_

[Texas acknowledgment]

MARGARET M. BOYLAN  
NOTARY PUBLIC, STATE OF NEW YORK  
No. CC 4731-45  
Qualifies 1/15/53  
Certificate expires 1/15/58  
Commission expires 1/15/58

STATE OF OKLAHOMA )

SS.:

COUNTY OF OKLAHOMA )

This instrument was acknowledged before me on April 1, 1983 by R. Randolph Devening, Executive Vice President of Fleming Companies, Inc., an Oklahoma corporation, on behalf of said corporation.

Geraldyn J. Carter  
Notary Public

Notary Public  
My commission expires: 3/31/86

(Texas acknowledgment)

EXHIBIT A

Annexed to and made a part of  
that certain Lease dated the  
first day of April, 1983  
made by and between Morgan  
Guaranty Trust Company of New  
York, as Trustee, as Landlord,  
and Fleming Companies, Inc.,  
as Tenant.

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Description of the  
Premises

BEING situated in the JOHN J. METCALF SURVEY, ABSTRACT NO. 885, and BEING LOT 1, BLOCK 1/8024 of the SEVENTH SECTION REDBIRD INDUSTRIAL PARK WEST, an Addition to the City of Dallas, Texas, according to the Plat recorded in Volume 79226, Page 2086, of the Deed Records of Dallas County, Texas, and being the same property conveyed to General Merchandise Distributors, Inc. by Deed recorded in Volume 79153, Page 0384, Deed Records of Dallas County, Texas, and being more particularly described as follows:

BEGINNING at a point in the west line of the Robert H. Thomas, Trustee Tract, said point being 438.74 feet south of the south line of Kiest Blvd. and also being 2450 feet west of the center line of Duncanville Road;

THENCE South 00 degrees 15 minutes 50 seconds East, along the west line of said Thomas Tract 1260.85 feet to corner and beginning point of curve;

THENCE in a northerly direction along a curve to the left whose radius bears South 89 degrees 44 minutes 10 seconds West, said curve having a radius of 620.81 feet, a central angle of 07 degrees 09 minutes 10 seconds a distance of 77.50 feet to end of curve;

THENCE North 07 degrees 25 minutes West along the northeast line of a 34 feet easement conveyed to Atchison, Topeka & Santa Fe Railway Company 10.0 feet to beginning point of curve;

THENCE along a curve to the left having a radius of 495.34 feet, a central angle of 82 degrees 07 minutes 10 seconds a distance of 709.95 feet to end of curve;

THENCE North 89 degrees 32 minutes 10 seconds West, 0.69 feet to corner;

THENCE North 00 degrees 15 minutes 50 seconds West along the east line of Dan Morton Drive (64' street) 683.76 feet to beginning point of curve;

THENCE along a curve to the right having a radius of 558 feet, a central angle of 05 degrees 47 minutes 05 seconds a distance of 56.33 feet to corner;

THENCE North 89 degrees 44 minutes 10 seconds East 489.16 feet to PLACE OF BEGINNING.

This tract of land contains 417,700 square feet or 9.5891 acres of land.

## EXHIBIT B

Annexed to and made a part of  
that certain Lease dated the first  
day of April, 1983 made by and  
between Morgan Guaranty Trust Company  
of New York as Trustee, as aforesaid,  
as Landlord, and Fleming  
Companies, Inc., as Tenant.

### Section 1

The Landlord's Original Cost is \$[3,750,000.00]

### Section 2

The amount of "Landlord's Unamortized Cost" as of any date following (1) on and after the date upon which Landlord has received any of the successive payments of quarterly fixed rent pursuant to Section 3.01 of said Lease below in Column I but (11) prior to the date upon which Landlord has received the next of such successive payments of quarterly fixed rent, shall be the amount set forth in Column II opposite the payment of the quarterly fixed rent referred to in (1) above.

#### Column I

#### Column II

Fixed Rent  
Payment Number

Amount

1	3,615,065.62
2	3,593,102.04
3	3,570,452.10
4	3,547,094.35
5	3,523,006.67
6	3,498,166.24
7	3,472,549.56
8	3,446,132.35
9	3,418,889.61
10	3,390,795.53
11	3,361,823.51
12	3,331,946.11
13	3,301,135.05
14	3,269,361.14
15	3,236,594.30
16	3,202,803.49
17	3,167,956.72
18	3,132,020.98

19	3,094,962.26
20	3,056,745.45
21	3,017,334.37
22	2,976,691.69
23	2,934,778.92
24	2,891,556.38
25	2,846,983.14
26	2,801,016.98
27	2,753,614.38
28	2,704,730.45
29	2,654,318.90
30	2,602,331.98
31	2,548,720.48
32	2,493,433.61
33	2,436,419.03
34	2,377,622.75
35	2,316,989.08
36	2,254,460.61
37	2,189,978.12
38	2,123,480.56
39	2,054,904.95
40	1,984,186.35
41	1,911,257.79
42	1,836,050.22
43	1,758,492.40
44	1,678,510.91
45	1,596,030.00
46	1,510,971.56
47	1,423,255.04
48	1,332,797.38
49	1,239,512.91
50	1,143,313.31
51	1,044,107.47
52	941,801.45
53	836,298.37
54	727,498.31
55	615,298.25
56	499,591.95
57	380,269.81
58	257,218.87
59	130,322.57
60	--0--

EXHIBIT C

Annexed to and made a part of that certain Lease dated the first day of April, 1983 made by and between Morgan Guaranty Trust Company of New York as Trustee, as aforesaid, as Landlord, and Fleming Companies, Inc., as Tenant

---

<u>Year</u>	<u>Landlord's Percentage</u>
1	12
2	14
3	16
4	18
5	20
6	22
7	24
8	26
9	28
10	30
11	34
12	38
13	42
14	46
15	50
16	54
17	58
18	62
19	66
20	70

21	72
22	74
23	76
24	78
25	80
26	81
27	82
28	83
29	84
30	85
31	86
32	87
33	88
34	89
35	90
36	92
37	94
38	96
39	98
40	100

L E A S E  
(Short Form)

THIS LEASE is made as of the first day of April, 1983, between Morgan Guaranty Trust Company of New York, as Trustee under Declaration of Trust dated December 9, 1960 for the Commingled Pension Trust Fund (Fixed Income Direct Placements-Mortgage-Real Property), hereinafter referred to as Landlord, and Fleming Companies, Inc., an Oklahoma corporation, hereinafter referred to as Tenant.

1. Landlord hereby leases to Tenant the following described real property situated in City of Dallas, State of Texas more particularly described in Exhibit "A" attached hereto and made a part hereof.

TO HAVE AND TO HOLD for a term of fifteen (15) years commencing on the first day of April, 1983 and expiring at 12 o'clock midnight on the last day of March, 1998.

2. The rentals to be paid by Tenant and all of the obligations and rights of Landlord and Tenant in respect to the above-described property are set forth in that certain Lease dated as of April 1, 1983, executed by the parties hereto covering the above described property. This instru-

I certify the above to be a true  
and correct copy of the original  
instrument

SAFECO LAND TITLE OF DALLAS

E. *Sharon Wheat*

ment is merely a memorandum of said Lease and is subject to all of the terms and conditions thereof. In the event of any inconsistency between the terms of this instrument and said Lease, the terms of said Lease shall prevail as between the parties hereto.

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

MORGAN GUARANTY TRUST COMPANY  
OF NEW YORK, as Trustee Under  
Declaration of Trust Dated  
December 9, 1960 for the  
Commingled Pension Trust Fund  
(Fixed Income Direct Placements  
-Mortgage-Real Property)

[Corporate Seal]

By David H. Marchand

DAVID H. MARCHAND Assistant Vice President

ADDRESS:

c/o Ms. Rhonda Carniol  
Davis Polk & Wardwell, 1 Chase Manhattan  
Plaza, New York, N.Y. 10005 (Landlord)

FLEMING COMPANIES, INC.

[Corporate Seal]

By R. Randolph Devening

R. Randolph Devening  
Executive Vice President  
Finance & Administration

(Tenant)

ADDRESS:

6601 N. Broadway  
Oklahoma City, Oklahoma 73160

ATTEST

James W. Clark  
James W. Clark  
Secretary

EXHIBIT "A"

BEING situated in the JOHN J. METCALF SURVEY, ABSTRACT NO. 885, and BEING LOT 1, BLOCK 1/8024 of the SEVENTH SECTION REDBIRD INDUSTRIAL PARK WEST, an Addition to the City of Dallas, Texas, according to the Plat recorded in Volume 79226, Page 2086, of the Deed Records of Dallas County, Texas, and being the same property conveyed to General Merchandise Distributors, Inc. by Deed recorded in Volume 79153, Page 0384, Deed Records of Dallas County, Texas, and being more particularly described as follows:

BEGINNING at a point in the west line of the Robert H. Thomas, Trustee Tract, said point being 438.74 feet south of the south line of Kiest Blvd. and also being 2450 feet west of the center line of Duncanville Road;

THENCE South 00 degrees 15 minutes 50 seconds East, along the west line of said Thomas Tract 1260.85 feet to corner and beginning point of curve;

THENCE in a northerly direction along a curve to the left whose radius bears South 89 degrees 44 minutes 10 seconds West, said curve having a radius of 620.81 feet, a central angle of 07 degrees 09 minutes 10 seconds a distance of 77.50 feet to end of curve;

THENCE North 07 degrees 25 minutes West along the northeast line of a 34 feet easement conveyed to Atchison, Topeka & Santa Fe Railway Company 10.0 feet to beginning point of curve;

THENCE along a curve to the left having a radius of 495.34 feet, a central angle of 82 degrees 07 minutes 10 seconds a distance of 709.95 feet to end of curve;

THENCE North 89 degrees 32 minutes 10 seconds West, 0.69 feet to corner;

THENCE North 00 degrees 15 minutes 50 seconds West along the east line of Dan Morton Drive (64' street) 683.76 feet to beginning point of curve;

THENCE along a curve to the right having a radius of 558 feet, a central angle of 05 degrees 47 minutes 05 seconds a distance of 56.33 feet to corner;

THENCE North 89 degrees 44 minutes 10 seconds East 489.16 feet to PLACE OF BEGINNING.

This tract of land contains 417,700 square feet or 9.5891 acres of land.

STATE OF OKLAHOMA )  
 : SS.:  
COUNTY OF OKLAHOMA )

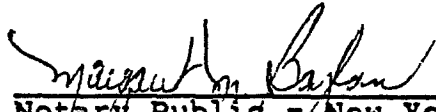
This instrument was acknowledged before me on April 1, 1983 by R. Randolph Devening, Executive Vice President of Fleming Companies, Inc., an Oklahoma corporation, on behalf of said corporation.

Gershon J. Carter  
Notary Public  
My commission expires: 3/31/86

(Texas acknowledgment)

STATE OF NEW YORK     )  
                                  : ss.:  
COUNTY OF NEW YORK    )

March 30, 1983 This instrument was acknowledged before me on  
by David H. Marchand, Assistant Vice President of  
Morgan Guaranty Trust Company of New York, a New York cor-  
poration, on behalf of said corporation.

  
Notary Public - New York  
County

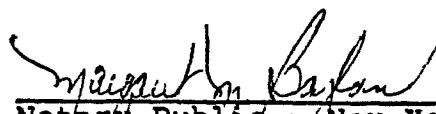
My commission expires: \_\_\_\_\_

[Texas acknowledgment]

MARGARET M. BOYLAN  
NOTARY PUBLIC STATE OF NEW YORK  
No 03-4731446  
Qualified in Bronx County  
Certificate Filed in N. Y. County  
Commission Expires March 30, 1984

STATE OF NEW YORK       )  
                                  : ss.:  
COUNTY OF NEW YORK     )

March 30, 1983 This instrument was acknowledged before me on  
by David H. Marchand, Assistant Vice President of  
Morgan Guaranty Trust Company of New York, a New York cor-  
poration, on behalf of said corporation.

  
\_\_\_\_\_  
Notary Public - New York  
County

My commission expires: \_\_\_\_\_

[Texas acknowledgment]

MARGARET M. BOYLAN  
NOTARY PUBLIC STATE OF NEW YORK  
No 03-4731446  
Qualified in Every County  
Certificate Filed in N. Y. County  
Commission Expires March 30, 1984

AMENDMENT TO LEASE

THIS AMENDMENT TO LEASE is made and entered into this \_\_\_\_ day of February, 1996, by and between Morgan Guaranty Trust Company of New York, as Trustee, under Declaration of Trust dated December 9, 1960 for the Commingled Pension Trust Fund (Fixed Income Direct Placements - Mortgage - Real Property) ("Landlord"), and Fleming Companies, Inc., an Oklahoma corporation ("Tenant"), with respect to the following:

On April 1, 1983, Landlord and Tenant entered into a certain Lease ("Lease") covering the property described on Exhibit A hereto; and

As a consequence of entering into certain agreements with respect to an expansion of the improvements located on the property covered by the Lease, the parties desire to amend the Lease with respect to a requirement that the Tenant maintain a certain bond in the amount of \$78,000 to provide for certain demolition upon the termination of the Lease

NOW THEREFORE, the parties hereto agree as follows

1 Section 2.02 of the Lease is hereby amended by adding subsection C as follows:

C. Together with any notice of exercise of any election to extend the term of this Lease as provided in this Section 2.02, Tenant shall submit to Landlord a bond in the principal amount of \$78,000 in form and substance of the bond attached hereto as Exhibit B (the term of such bond shall be co-terminus with the applicable extended term plus 180 days), which bond shall cover any extended term for which Tenant may notify Landlord of its election to extend

2 In all other respects, the Lease, except as amended herein, shall be and remain in full force and effect.

IN WITNESS WHEREOF the parties have executed this Amendment to Lease this \_\_\_\_ day of February, 1996

Morgan Guaranty Trust Company Of  
New York, as Trustee under Declaration  
of Trust dated December 9,  
1960 for the Commingled Pension  
Trust Fund (Fixed Income Direct  
Placements - Mortgage - Real Prop-  
erty)

By \_\_\_\_\_

Vice President

**J. DANIEL ADKINSON  
VICE PRESIDENT**

Fleming Companies, Inc., an Oklahoma corporation

By E. H. [Signature] Vice President <sup>mw</sup> 3/1/96

STATE OF OKLAHOMA     )  
                                  )   ss.  
COUNTY OF OKLAHOMA    )

      This instrument was acknowledged before me on March 4,  
1996, by E Stephen Davis, as Vice-President of Fleming Companies,  
Inc , an Oklahoma corporation.

(Seal)

*Maura K Walls*  
Notary Public  
My Commission Expires 1-29-2000

## **EXHIBIT B**

Letter

March 31, 2003

**VIA FEDERAL EXPRESS AND  
FIRST CLASS MAIL**

Fleming Companies, Inc  
1945 Lakepointe Drive  
Lewisville, Texas 75057  
**Attention: Treasurer's Department**

and

Fleming Companies, Inc  
1945 Lakepointe Drive  
Lewisville, Texas 75057  
**Attention: Carlos Hernandez, Esq.**

Re: Improved real property (A) located at 3400 Dan Morton Drive, Dallas, Texas (the "Morgan Parcel") as more particularly described in that certain Lease, dated as of April 1, 1983, by and between JPMorgan Chase Bank, as Trustee under the Amended and Restated Declaration of Trust, dated November 13, 2001, as amended, for its Commingled Pension Trust Fund (Mortgage Private Placement), as successor-in-interest to Morgan Guaranty Trust Company of New York, as Trustee under the Declaration of Trust dated December 9, 1960 for the Commingled Pension Trust Fund (Fixed Income Direct Placements - Mortgage - Real Property) ("Landlord"), and Fleming Companies, Inc ("Tenant"), as amended by that certain Amendment of Lease, dated as of February, 1996 (as amended, the "Lease"), and (B) located at 3400 Dan Morton Drive, Dallas, Texas (the "Fleming Parcel"), as more particularly described in that certain Agreement (the "Adjacent Property Agreement"), dated as of January 31, 1996, by and between Landlord and Tenant

Gentlemen

Notice is hereby given under Section 1.02 of the Lease and Section 9 of the Adjacent Property Agreement. Please be advised of the following.

(1) Pursuant to the terms of Section 5(a) of the Adjacent Property Agreement, Landlord hereby directs Tenant to demolish and rebuild the Addition (as defined in the Adjacent Property Agreement) such that after the demolition and reconstruction of the improvement and/or structures on the Morgan Parcel and the Fleming Parcel, such Parcels shall be separate legal parcels in compliance with all zoning statutes, laws, ordinances, rules and regulations of the City of Dallas, and all other requirements of federal, state or local, statutes, laws, rules, ordinances, and regulations and that the improvements, structures, and land on the Morgan

Parcel is rebuilt and restored to the sole satisfaction of Landlord. All of the foregoing work shall be performed subject to and in accordance with the terms of the Adjacent Property Agreement.

(2) This letter constitutes formal notice that Tenant is in default of the terms of among other provisions, Section 4.01, 4.02 and Section 18.05 of the Lease. In violation of the terms of the Lease, the Tenant has failed to repair, renew or replace without limitation the following elements of the Premises:

The roof,  
The sprinkler system,  
The pump,  
The generator,  
The electrical system,  
Sections of the parking lot,  
Sections of the façade and exterior structure,  
Sections of the warehouse flooring, and  
Remedy any environmental conditions effecting the premises

(3) This letter constitute formal notice that Tenant is in default under Section 6 of the Adjacent Property Agreement for failure to maintain the bond required pursuant to the terms of such Section 6.

Demand is hereby made for cure of all of the aforesaid matters.

The fact that Landlord has not noted any other facts which constitute, or form the basis of, a default under the agreements shall not be construed as a waiver of any default, whether now or hereafter existing.

Landlord hereby reserves (i) the right to notify you of any defaults under the Lease and/or the Adjacent Property Agreement (or any other document or instrument related thereto) not noted herein, and (ii) all of Landlord's rights and remedies with respect to any matters under such agreements, whether now or hereafter existing and whether or not noted herein.

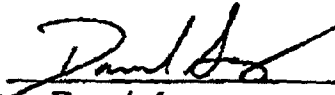
This letter is without prejudice to, and fully and specifically reserves, any and all of the rights and remedies of Landlord, at law or otherwise.

This letter shall not entitle you to any other or further notice, whether in connection with the aforesaid matters or in connection with any other default or noncompliance or otherwise.

Very truly yours,

LANDLORD:

JPMorgan Chase Bank, as Trustee under the Amended and Restated Declaration of Trust, dated November 13, 2001, as amended, for its Commingled Pension Trust Fund (Mortgage Private Placement)

By   
Name Daniel Sang  
Title Vice President

cc. David J. Furman, Esq  
cc Richard Dugoff  
cc Charles Mooney, Esq  
cc Brian Lake  
cc Bill Mee  
cc Leighton Fisk

## **EXHIBIT C**

### **Adjacent Property Agreement and Unity Agreement**

80267487\_2.DOC

Morgan Fleming  
1972, 1973, 1974

AGREEMENT

THIS AGREEMENT is made and entered into this 31st day of January, 1996, by and between MORGAN GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the Declaration of Trust dated December 9, 1960 for the Commingled Pension Trust Fund (Fixed Income - Mortgage Private Placements) ("Morgan") and FLEMING COMPANIES, INC ("Fleming") with respect to the following:

Morgan, as Lessor, and Fleming, as Lessee, entered into a certain lease (the "Lease") dated April 1, 1983, covering certain premises in Dallas, Texas, and

The Lease covers the property described on Exhibit A attached hereto, located at 3400 Dan Morton Drive, Dallas, Texas 75211; zoning district IR; more particularly described in Volume 79226, Page 2086 in the Deed Records of Dallas County, Texas (the "Morgan Parcel"); and

Fleming owns the property described on Exhibit B attached hereto, located at 3400 Dan Morton Drive, Dallas, Texas 75211; zoning district IR; more particularly described in Volume 79226, Page 2086 in the Deed Records of Dallas County, Texas (the "Fleming Parcel") which adjoins the property covered by the Lease, and

Fleming desires to construct an addition (the "Addition") to the improvements on the property covered by the Lease, which Addition will be located partially on the property covered by the Lease and partially on the Fleming Parcel. The construction plans for the Addition and details thereof are specified in the attached Exhibit C; and

Fleming has requested that Morgan execute and deliver a certain Unity Agreement which is in the form of agreement attached here as Exhibit D (the "Unity Agreement"); and

Morgan is willing to execute and deliver the Unity Agreement provided Fleming gives certain assurances with respect to the Addition

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and in the Lease, the parties hereto agree as follows

1 The Addition Morgan consents to the building of such Addition as particularly described in Exhibit C annexed hereto, subject to all the terms and conditions of this Agreement. Fleming acknowledges that it has delivered to Morgan true, correct, and complete copies of all of its plans, drawings, specifications, contracts or proposed contracts, and other documentation in connection with the Addition. Any change

or deviation from the building plans for the Addition from the documents submitted in Exhibit C to Morgan herewith, shall be subject to the prior written consent of Morgan, which consent may be withheld or denied in Morgan's reasonable discretion

2     Execution of Unity Agreement     Provided that Fleming is in complete compliance with all the terms of the Lease, and subject to all the terms and conditions of this Agreement and the Unity Agreement, and after Fleming executes and delivers to Morgan all required copies of the Unity Agreement and this Agreement together with all other documents and information required by Morgan and its counsel, in their sole discretion, that may be required by them to fully protect Morgan's interests in this Agreement, the Unity Agreement, the Lease, the Morgan Parcel or otherwise in any way relating to the Addition, then Morgan shall execute the Unity Agreement and deliver counterparts thereof to Fleming

3.     Building Code Compliance     Subject to the advise of Morgan's counsel, Morgan shall endeavor to give such reasonable consents and acknowledgements as may be required by the City of Dallas with respect to the issuance of and maintenance of a building permit permitting the construction of the Addition. Fleming agrees to give such consents and acknowledgments that as may be required by the City of Dallas with respect to the issuance of an maintenance building permit permitting the construction of the Addition

4     Indemnification     (a) Fleming shall defend, indemnify and hold harmless Morgan and its agents, servants, directors, officers, and employees for all costs, claims, expenses (including, but not limited to, attorneys' fees, professional fees, and expenses), liabilities, taxes, filing fees, increases in insurance, penalties, fines, or otherwise, in any way relating to the Addition, the Lease, the Unity Agreement, this Agreement, the Fleming Parcel and the Morgan Parcel, whether caused by or arising from Fleming, its contractors, servants, employees, agents, officers, directors, subcontractors, materialmen, suppliers, guests, invitees or sublessee or by any of their actions or omissions relating to the Addition, the Lease, the Unity Agreement, this Agreement, the Fleming Parcel and the Morgan Parcel, or arising from, under or in connection with the Unity Agreement, this Agreement, the Lease, the Morgan Parcel, the Fleming Parcel or the use or manner of use of the premises, land and improvements on which the Addition is built or for any activities thereon, including, but not limited to, the construction, operation and maintenance of such Addition

(b) Fleming agrees to defend, indemnify, and hold harmless Morgan from and against all claims, liability and expenses arising out of or in connection with the Unity Agreement, including, but not limited to, attorneys and professionals' fees and expenses, relating to the issuance of

building permits, licenses and certificates of occupancy for the Fleming Parcel, the Morgan Parcel, and the Addition or in anywise relating to the Unity Agreement and this Agreement

5     Demolition of Addition     Upon the termination or expiration of the Lease, the Unity Agreement or this Agreement, whether by default or otherwise, or a default by Fleming of any of its obligations under this Agreement, the Lease or the Unity Agreement, then upon the request and in accordance with the directions of Morgan, Fleming shall, within 30 days of notice from Morgan, in an orderly and workman-like manner, either (a) demolish and rebuild the Addition such that after the demolition and reconstruction of the improvements and/or structures on the Morgan Parcel and the Fleming Parcel, such Parcels shall be separate legal parcels in compliance with all zoning statutes, laws, ordinances, rules and regulations of the City of Dallas, and all other requirements of federal, state or local, statutes, laws, rules, ordinances and regulations and that the improvements, structures, and land on the Morgan Parcel is rebuilt and restored to the sole satisfaction of Morgan or (b) restore the premises, including the land, structures and improvements on both the Fleming Parcel and the Morgan Parcel to the condition that existed prior to the Addition being built and any other work done in connection with this Agreement. All demolition, rebuilding and/or restoration work shall be done with the express prior written approval of Morgan of such plans and specifications and other reasonable requirements of Morgan. Fleming shall perform or cause such work to be performed in compliance with all applicable statutes, laws, rules, regulations, and ordinances applicable thereto. Fleming shall employ in connection with such work only those contractors approved by Morgan, and Morgan shall have the right, at Fleming's sole expense, to employ any architect, engineer or other professional, to review such plans and observe such demolition, rebuilding and/or restoration work. Prior to commencing any work hereunder, Fleming, at its sole cost and expense, shall obtain all necessary licenses and permits and deliver proof of liability insurance, and any contractor's workmen's compensation insurance and other such other insurance, in such amounts as Morgan deems satisfactory, naming Morgan and any other interested parties named by Morgan as additional insureds. All licenses, insurance, permits and work to be performed hereunder, shall be done at Fleming's sole cost and expense.

6     Bonding Requirement     In order to assure Morgan that Fleming will perform its obligations as provided in Section 5 of this Agreement, Fleming shall obtain and provide to Morgan a bond in the amount of \$78,000, in form and substance satisfactory to Morgan, to be paid to Morgan, in the event and to the extent Fleming does not perform its obligations as set forth in Section 5 hereof. Fleming shall deliver such bond to Morgan prior to the commencement of any work under this Agreement. Notwithstanding the preceding sentence, in the event

that Fleming defaults in any of its other obligations under this Agreement or the Unity Agreement, then Morgan shall have the right to collect under the bond and apply the monies therefrom to cure any default of Fleming. Fleming represents to Morgan that the amount of \$78,000 represents a true and accurate estimate of the amount that it would cost to undertake the demolition and rebuilding work set forth in Section 5 herein. The amount of this bond or the bond itself shall not be construed in any way to either limit any rights or remedies of Morgan, or Fleming's obligations or the amount of Fleming's liabilities in connection with this Agreement, the Unity Agreement, the Lease, or otherwise.

7. Ground Rent and Lease During the term of the Lease, including any renewal terms thereof, Fleming shall pay in addition to all other amounts due under the Lease, an additional net annual ground rental to Morgan in the amount of \$3,360 which shall be paid, at the rate of \$840 per quarter year, together with the fixed rent, on the first business day of each April, July, October, and January during the term of the Lease and any extended term of the Lease. Fleming covenants that all obligations, covenants and undertakings on the part of Fleming to be performed under the Lease shall apply with equal force and effect to the Addition and such terms are incorporated herein by reference and shall be deemed part of this Agreement as if fully set forth herein. The first annual rental shall be prorated for the first year of this Agreement.

8. Governing Law This agreement shall be governed in accordance with the laws of the State of Texas.

9. Notices Any notice required herein shall be made in the manner and to the addresses as provided in the Lease.

10. Jurisdiction Fleming waives its right to a jury trial in connection with this Agreement and the Unity Agreement, a copy of which is annexed hereto as Exhibit D.

11. Liens Fleming represents, warrants and covenants that no liens are or will be filed on the Morgan Parcel or any buildings or improvements thereon and that there shall be no liens related in any way to the construction, financing, or demolition of the Addition.

12. Conflict with Lease and/or Unity Agreement. In the event that there is any conflict in any of the terms or provisions among this Agreement, the Lease and/or the Unity Agreement, then as between Morgan and Fleming, the clause or provision providing the greatest benefit or protection to Morgan shall govern and control.

13. Cross Defaults In the event there is a default by Fleming under this Agreement, the Unity Agreement or the Lease, then Morgan at its sole option, may deem such default, a

default under any or all of the other agreements set forth in this paragraph 13, and Morgan shall be entitled to exercise all rights and remedies set forth in such agreements.

14 Occupancy and Use of the Addition. So long as Fleming is not in default of any provision of this Agreement, the Unity Agreement, and the Lease, then Fleming shall be entitled to use and occupy the Addition subject to all terms and conditions of the Lease, the Unity Agreement and this Agreement. It is the intent of the parties hereto that Fleming's right to use and occupy the Addition shall be co-terminus with the term of the Lease.

15 Successors. This Agreement shall be fully binding on any successors, heirs, and assigns of Fleming who acquire any right, title, or interest in or to any part of the Fleming Parcel, the Lease, the Addition, or the Unity Agreement and they shall, jointly and severally, agree to and covenant to abide by and fully perform this Agreement. This Agreement shall inure to the benefit of any successors or assigns of Morgan.

16 Amendments and Modifications. This Agreement may not be modified, altered, terminated or discharged orally but only by an agreement in writing signed by the parties hereto.

17 (a) Contaminants, Pollutants and Hazardous Waste. No contaminant, industrial waste, pollutant, toxic or hazardous waste or substance of any kind or character whatsoever shall be used, generated, stored, processed, disposed of or discharged at or from the Morgan Parcel, Fleming Parcel or the Addition or into the environment.

(1) in such quantity or in such manner as to exceed a level at which any regulatory agency can or may take action under any Environmental Law (as hereinafter defined);

(11) in such quantity or in such manner that Fleming, or any owner or occupant (including, without limitation, Morgan) shall have an obligation to cleanup or remediate the same under any Environmental Law;

(111) in such quantity or in such manner as to obligate Fleming to report any release or discharge under any Environmental Law; or

(1v) into any sanitary sewer, collection or treatment system except in conformity with the Environmental Laws. The term "contaminant" shall mean and refer to any substance the discharge or release of which would constitute air pollution or air contamination under any applicable Environmental Law or regulations thereunder. The term "industrial waste" shall mean any substance which is classified as an industrial waste or which would result in pollution under any applicable Environmental Law or regulation. The term "pollutant"

shall mean and refer to any substance subject to control under any applicable Environmental Law, including without limitation: the Federal Water Pollution Control Act, 33 U.S.C.A. § 1251 et seq , or the Clean Air Act, 42 U.S.C.A. § 7401 et seq , or regulations thereunder. The term "toxic or hazardous waste" shall mean and refer to any chemical, substance or material which is classified by the Environmental Protection Agency as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq , or regulations thereunder, or as a hazardous waste under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 et seq , or regulations thereunder, or which is a petroleum product, or which is classified by the State of Texas, the City of Dallas, or any of their agencies as a hazardous waste or which is defined or classified as "toxic or hazardous waste" under any other applicable Environmental Law, whether now existing or hereafter in effect. Fleming shall advise Morgan in writing of all contaminants, industrial wastes, pollutants, and toxic or hazardous wastes used, generated, stored, processed, disposed of or discharged at or from the Fleming Parcel, the Morgan Parcel or the Addition, or resulting from the activities of Fleming in, on or about the Addition, the Fleming Parcel or the Morgan Parcel.

(b) Environmental Matters

For purposes of this Paragraph 17, the following terms are defined as follows:

"Claim" shall mean and include any demand, cause of action, proceeding, or suit (a) for damages (actual, consequential or punitive), losses, injuries to person or property, damages to natural resources, fines, penalties, interest, contribution or settlement, or (b) for the costs of site investigations, feasibility studies, information requests, health or risk assessments, or Response actions, and (c) for enforcing insurance, contribution, or indemnification agreements.

"Environmental Law" shall mean and include all federal, state and local statutes, ordinances, regulations, and rules relating to environmental quality, health, safety, contamination and clean-up, including, without limitation, the Clean Air Act, 42 U.S.C. § 7401 et seq; the Clean Water Act, 33 U.S.C. § 1251 et seq , and the Water Quality Act of 1987; the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 et seq ; the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1401 et seq ; the National Environmental Policy Act, 42 U.S.C. § 4321 et seq.; the Noise Control Act, 42 U.S.C. , § 4901 et seq ; the Occupational Safety and Health Act, 29 U.S.C. 651 et seq ; the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq.; as amended by the Hazardous and Solid Waste Amendments of 1984; the Safe Drinking Water Act, 42 U.S.C. § 1300f et seq ; the Comprehensive

Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U S C §9601 et seq, as amended by the Superfund Amendments and Reauthorization Act, the Emergency Planning and Community Right-to-Know Act, and Radon Gas and Indoor Air Quality Research Act, the Toxic Substances Control Act ("TSCA"), 15 U S C §2601 et seq, the Atomic Energy Act, 42 U S C. §2011 et seq; and the Nuclear Waste Policy Act of 1982, 42 U.S.C. §10101 et seq; and state super-lien and environmental clean-up statutes, with implementing regulations and guidelines. Environmental Laws shall also include all state, regional, county, municipal, and other local laws, regulations, and ordinances insofar as they are equivalent or similar to the federal laws recited above or purport to regulate Hazardous Materials.

"Hazardous Materials" shall mean and include any hazardous substance, pollutant, contaminant, waste, by-product or constituent including, but not limited to, those regulated under CERCLA; oil and petroleum products and natural gas, natural gas liquids, liquified natural gas, and synthetic gas usable for fuel; pesticides regulated under the FIFRA; asbestos and asbestos-containing materials, PCBs, and other substances regulated under the TSCA; source material, special nuclear material, by-product material, and any other radioactive materials or radioactive wastes, however produced, regulated under the Atomic Energy Act or the Nuclear Waste Policy Act; chemicals subject to the OSHA Hazard Communication Standard, 29 C F R §1910 1200 et seq; and industrial process and pollution control wastes whether or not hazardous within the meaning of RCRA

"Managed" or "Management" means the generation, manufacture, processing, treatment, storage, usage, re-usage, refining, recycling, reclaiming, blending or burning for energy recovery, incinerating, accumulating, transporting, transferring, disposing or abandoning of Hazardous Materials.

"Release" or "Released" shall mean any actual or threatened spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of Hazardous Materials into the environment, as "environment" is defined in CERCLA

"Response" or "Respond" shall mean action taken in compliance with Environmental Laws to correct, remove, remediate, clean up, prevent, mitigate, monitor, evaluate, investigate, access, or abate the Release of a Hazardous Material

(1) During the term of this Agreement and during the term of the Lease (as "Term" is defined in the Lease), Fleming shall, at its own cost and expense, comply with all Environmental Laws; Fleming shall not conduct, authorize or suffer to permit the Management of any Hazardous Materials on the Fleming Parcel or the Morgan Parcel in violation of

Environmental Law; Fleming shall not install, or permit the installation of any underground storage tanks at the Fleming Parcel or the Morgan Parcel, Fleming shall not take any action that would subject the Fleming Parcel or the Morgan Parcel to permit requirements under RCRA for storage, treatment, or disposal of Hazardous Materials; Fleming shall not dispose of Hazardous Materials at the Fleming Parcel or the Morgan Parcel, including without limitation, in dumpsters provided by Morgan for Fleming's use, Fleming shall not discharge Hazardous Materials into drains or sewers located on or at the Fleming Parcel or the Morgan Parcel; Fleming shall not cause or allow the Release of any Hazardous Materials on, to, or from the Fleming Parcel or the Morgan Parcel; and Fleming shall, at its own cost, arrange for the lawful transportation and lawful off-site disposal of all Hazardous Materials that it generates.

During the term of this Agreement and the Lease, Fleming shall promptly provide Morgan with copies of all summons, citations, directives, information inquiries or requests, notices of potential responsibility, notices of violation or deficiency, orders or decrees, Claims, complaints, investigations, judgments, letters, notices of environmental liens or response actions in progress, and other communications, written or oral, actual or threatened, from the United States Environmental Protection Agency, Occupational Safety and Health Administration, Texas Department of Natural Resources, or other federal, state or local agency or authority, or any other entity or individual, concerning (a) any Release of a Hazardous Material on, to or from the Fleming Parcel or the Morgan Parcel; (b) the imposition of any lien on the Fleming Parcel or the Morgan Parcel, or (c) any alleged violation of or responsibility under Environmental Laws

Morgan and Morgan's agents and employees shall have the right to enter the Fleming Parcel and the Morgan Parcel and/or conduct environmental inspections or tests in order to determine Fleming's compliance with Environmental Laws

Upon written request by Morgan, Fleming shall provide Morgan with the results of environmental reports and tests, with transportation and disposal contracts for Hazardous Materials, with any permits issued under Environmental Law, and with any other applicable documents to demonstrate that Fleming is in compliance with all Environmental Law relating to the Addition, the Fleming Parcel, or the Morgan Parcel.

If Fleming's management of Hazardous Materials at the Addition or the Morgan Parcel,

(a) gives rise to liability or to a Claim under any Environmental Law, or

(b) causes an adverse public health effect,  
or

(c) creates a nuisance or a Release,

then, Fleming shall promptly take all necessary or appropriate action in Response.

(2) Fleming agrees to indemnify, protect, defend and hold harmless Morgan and its shareholders, agents, contractors, officers, directors and employees (the "Indemnified Parties"), from and against any and all debts, liens, Claims, administrative orders or notices, costs, personal injuries, losses, damages, liabilities, demands, lost profits, consequential damages, interest fines, penalties or expenses, including attorneys' fees and expenses, consultants' fees and expenses, court costs and all other out-of-pocket expenses, suffered or incurred by the Indemnified Parties resulting, directly or indirectly, from the presence in, upon, under or about the surface of the Addition and the Fleming Parcel and the Morgan Parcel, or in any surface waters or ground waters on the Fleming Parcel and the Morgan Parcel or any migration off the Fleming Parcel and/or the Morgan Parcel, of Hazardous Materials, which Hazardous Materials were Managed or Released by Fleming during the term of the Lease and the term of the Unity Agreement. Fleming agrees to indemnify, protect, defend and hold harmless the Indemnified Parties from and against any and all damages, costs, losses, expenses (including, but not limited to, actual attorneys' fees and disbursements and engineering and environmental consultant fees) arising from or attributable to any breach by Fleming of any of its warranties, representations or covenants in this Paragraph 17. Fleming's obligations hereunder shall survive the expiration or termination of this Agreement and the Lease.

(3) Failure by Fleming to comply with the warranties, representations, and covenants in this Paragraph 17 shall constitute a default under this Agreement.

#### 18 Representations and Warranties

(a) Fleming represents and warrants to Morgan that.

(1) This Agreement and the Unity Agreement constitutes the legal, valid and binding obligation of Fleming, enforceable against Fleming in accordance with their terms. Fleming has taken all necessary action to authorize and approve the execution and delivery of this Agreement and the Unity Agreement and the consummation of the transactions contemplated by this Agreement and the Unity Agreement.

(11) The execution and delivery of this Agreement and the Unity Agreement and the performance by Fleming of its obligations hereunder do not and will not conflict with or violate any law, rule, judgment,

regulation, order, writ, injunction or decree of any court or governmental or quasi-governmental entity with jurisdiction over Fleming or the Fleming Parcel, including, without limitation, the United States of America, the State of Delaware, the State of Texas or any political subdivision of any of the foregoing, or any decision or ruling of any arbitrator to which Fleming is a party or by which Fleming or the Fleming Parcel is bound or affected

(iii) Neither the Fleming Parcel nor Fleming is a party to, or is subject to or bound by, any agreement (other than this Agreement and the Unity Agreement), judgment, order, writ, injunction or decree of any court or governmental body that could prevent the performance of all or any of the terms of this Agreement

(iv) That upon entering into the Unity Agreement, the proposed uses of the Morgan Parcel and the Fleming Parcel will be compliance with all applicable laws, statutes, ordinances, rules and regulations, in the State of Texas and the City of Dallas, including but not limited to chapter 53 of The Dallas Building Code and all zoning laws

(v) That the effect of the Fleming Parcel and the Morgan Parcel becoming one lot pursuant to the Unity Agreement would be effective solely for the purpose of permitting construction of the Addition without regard to required fire resistivity in exterior walls and protected openings at the common property line, and for no other purpose

(vi) That as of the date hereof, the Unity Agreement executed between Morgan, Fleming and the City Attorney and its Building Official, will not be deemed by any government, governmental agency or municipality to create one tax lot for purposes of taxation and will not render Morgan liable for any taxes in connection with the Fleming Parcel

(vii) Fleming owns fee simple title to the Fleming Parcel described in Exhibit B and that no third party has an interest therein or lien thereon

19 Certificate of Occupancy In connection with each of the following events or occurrences: the Addition is built, altered, restored, rebuilt, modified or demolished, Fleming shall promptly obtain, at its sole cost and expense, new or amended certificates of occupancy, permits, licenses and any other documents, as may be required by any governmental agencies, laws, statutes, authorities, ordinances, or otherwise for the Morgan Parcel, the Fleming Parcel and for the Addition.

Upon obtaining same, Fleming shall promptly deliver originals or certified copies of all permits, licenses, certificates of occupancy and other required documents to Morgan

20 Taxes on the Fleming Parcel. Fleming shall, at its sole cost and expense, timely pay all taxes and assessments due in connection with the Fleming Parcel and the Morgan Parcel prior to the same becoming delinquent and the failure to timely pay the same shall constitute a default under this Agreement, the Unity Agreement and the Lease

21 Performance of Covenants If Fleming shall fail to make any payment or perform any of its obligations under this Agreement, the Unity Agreement, or the Lease, within any applicable cure period, Morgan may, without notice or demand and without waiving or releasing Fleming from any of its obligations under this Agreement, the Unity Agreement and/or the Lease or any other agreement, make such payment or perform such obligation in such manner and to such extent as it deems desirable. All sums so paid and all necessary costs and expenses (including reasonable attorneys' fees) incurred in connection with the performance of any such obligation, together with interest thereon at the then Prime Rate plus four percent (4%) per annum or the maximum rate permitted by applicable law, whichever is less, from the date of the making of such expenditure, shall be payable by Fleming on demand. "Prime Rate" shall mean the rate of interest announced from time to time by Citibank, N A , at its New York Office as its "base commercial lending rate" or "prime rate", each change in such rate to become effective hereunder as of the date the change is so announced by Citibank, N A ; it being understood and agreed that such rate is not necessarily the lowest rate of interest offered by Citibank, N A to its customers. Any monetary obligations of Fleming arising or accruing in connection with this Paragraph 21 shall survive the termination of the Lease, this Agreement and the Unity Agreement

22 Recording and Filing Expenses Fleming covenants to file, at its sole cost and expense, a true and correct copy of the Unity Agreement and this Agreement in the Deeds Records of the county or counties in which the Fleming Parcel and the Morgan Parcel are located as soon as practical after the Unity Agreement is approved by both the Building Official and the City Attorney. Prior to the issuance of a building permit or certificate of occupancy by the Building Official for the uses and parcels governed by the Unity Agreement, Fleming agrees to submit two copies of the Unity Agreement that have been file-marked at the appropriate deed records office(s).

23 Irrevocable Power of Attorney Fleming and Morgan acknowledge that the Unity Agreement contains covenants that run with the land with respect to all tracts governed by the Unity Agreement. The Unity Agreement and this Agreement is entered into by Morgan solely to accommodate the request of

Fleming to expand and connect the existing improvements on the aforesaid Fleming Parcel and the Morgan Parcel. At the expiration or termination of the Lease, the Unity Agreement or this Agreement or any renewal or extension thereof, which now or hereafter may be entered into between Morgan and Fleming, Fleming, at its sole cost and expense, upon the request of Morgan may be required to restore the Morgan Parcel and/or the Fleming Parcel to their original condition prior to the execution of this Agreement or the Unity Agreement, or otherwise alter, demolish, rebuild or restore the improvements and/or structures on the Morgan Parcel and the Fleming Parcel to the satisfaction of and with the prior written approval of Morgan or its successor all in accordance with the terms of paragraph 5 of this Agreement. If Morgan requires Fleming to amend and/or terminate the Unity Agreement, or execute any documents pertaining thereto, Fleming agrees to promptly execute and deliver the required documents to Morgan. Fleming hereby irrevocably appoints Morgan as its attorney-in-fact coupled with an interest for the purpose of executing and recording any and all documents for any purpose set forth in this Agreement and/or the Unity Agreement. Fleming represents and warrants to Morgan that this Agreement, without any further documents, constitutes a fully executed and recordable irrevocable power of attorney coupled with an interest for the purpose of permitting Morgan now, and in the future, to execute and record any documents on behalf of Fleming, which Morgan shall deem necessary or desirable, for terminating or amending the Unity Agreement.

24. Easement Fleming hereby grants an irrevocable easement to Morgan for access to the Fleming Parcel to enable Morgan to exercise any rights which Morgan has under this Agreement, the Unity Agreement and the Lease including, but not limited to, Morgan's right to perform any obligation of Fleming after Fleming's failure to perform same within any applicable grace period, without waiving or releasing Fleming from any of its obligations under this Agreement or any other agreement. The terms of this Paragraph 24 shall survive the termination of this Agreement, the Unity Agreement and the Lease.

25. Termination of Agreement Upon the termination or expiration of this Agreement, the Unity Agreement, or the Lease, Fleming shall have no further rights in or to the Morgan Parcel or any structures thereon including, but not limited to the Addition.

26. Specific Performance Morgan shall have such remedies as Morgan shall be entitled to at law and equity, including, but not limited to, specific performance of the terms of this Agreement. The parties acknowledge that this Agreement governs rights and obligations relating to real estate, that the real estate is unique and that damages may be impossible to ascertain in the event of a breach or default of the terms of this Agreement, the Lease or the Unity Agreement.

IN WITNESS WHEREOF the parties hereto have executed  
this agreement the day and year first written above

FLEMING COMPANIES, INC.

By: 

Title

MW 11/21/66

MORGAN GUARANTY TRUST COMPANY OF  
NEW YORK, Trustee under  
Declaration of Trust dated  
December 9, 1960 for the  
Commingled Pension Trust Fund  
(Fixed Income - Mortgage Private  
Placements)

By: 

J Daniel Adkinson

Title: Vice President

STATE OF Oklahoma )  
COUNTY OF Oklahoma ) ss .

This instrument was acknowledged before me on  
January 15, 1996, by E. Stephen Davis as  
ERP Distribution of Fleming Companies, Inc , an Oklahoma  
Corporation

(Seal)

Irena C. Cody  
Notary Public  
My Commission Expires June 9, 1997

STATE OF New York )  
 ) ss  
COUNTY OF New York )

This instrument was acknowledged before me on  
April 11, 1996, by J Daniel Adkinson, as Vice  
President of Morgan Guaranty Trust Company of New York, a New  
York Corporation, as Trustee

(Seal)

Carolann T. Perkins

Notary Public

My Commission Expires: \_\_\_\_\_

CAROLANN T PERKINS  
Notary Public State of New York  
No 41 4881352  
Qualified in Queens County  
Cert Filed in New York County  
Commission Expires Dec 29, 1996

EXHIBIT "A"

BEING situated in the JOHN J METCALF SURVEY, ABSTRACT NO. 885, and BEING LOT 1, BLOCK 1/8024 of the SEVENTH SECTION REDBIRD INDUSTRIAL PARK WEST, an Addition to the City of Dallas, Texas, according to the Plat recorded in Volume 79226, Page 2086, of the Deed Records of Dallas County, Texas, and being the same property conveyed to General Merchandise Distributors, Inc. by Deed recorded in Volume 79153, Page 0384, Deed Records of Dallas County, Texas, and being more particularly described as follows.

BEGINNING at a point in the west line of the Robert H. Thomas, Trustee Tract, said point being 438.74 feet south of the south line of Kiest Blvd. and also being 2450 feet west of the center line of Duncanville Road;

THENCE South 00 degrees 15 minutes 50 seconds East, along the west line of said Thomas Tract 1260 85 feet to corner and beginning point of curve;

THENCE in a northerly direction along a curve to the left whose radius bears South 89 degrees 44 minutes 10 seconds west, said curve having a radius of 620 81 feet, a central angle of 07 degrees 09 minutes 10 seconds a distance of 77.50 feet to end of curve;

THENCE North 07 degrees 25 minutes West along the northeast line of a 34 feet easement conveyed to Atchison, Topeka & Santa Fe Railway Company 10.0 feet to beginning point of curve;

THENCE along a curve to the left having a radius of 495.34 feet, a central angle of 82 degrees 07 minutes 10 seconds a distance of 709 95 feet to end of curve,

THENCE North 89 degrees 32 minutes 10 seconds West, 0.69 feet to corner;

THENCE North 00 degrees 15 minutes 50 seconds West along the east line of Dan Morton Drive (64' street) 683 76 feet to beginning point of curve,

THENCE along a curve to the right having a radius of 558 feet, a central angle of 05 degrees 47 minutes 05 seconds a distance of 56.33 feet to corner,

THENCE North 89 degrees 44 minutes 10 seconds East 489.16 feet to PLACE OF  
BEGINNING

This tract of land contains 417,700 square feet or 9 5891 acres of land

## EXHIBIT B

A tract of land at the southeast intersection of Kiest Boulevard, and Dan Morton Drive in the City of Dallas, Texas.

Being situated in the John J. Metcalf Survey Abstract No. 885, and located in City Block 8024, City of Dallas, Dallas County, Texas, and being more particularly described as follows:

Beginning at a point in the south line of Kiest Boulevard, said point being 10.0 feet east of the east line of Dan Morton Drive;

Thence S  $89^{\circ} 48' 27''$  E along the south line of Kiest Boulevard (120 feet street) 374.01 feet to corner;

Thence S  $0^{\circ} 15' 50''$  E along the west line of the Robert H. Thomas, Trustee, Tract, 438.74 feet to corner;

Thence S  $89^{\circ} 44' 10''$  W 489.16 feet to corner;

Thence in a northeasterly direction along the southeast line of Dan Morton Drive, a proposed 64 foot street, along a curve to the right whose radius bears S  $84^{\circ} 28' 45''$  E, said curve having a radius of 558 feet through a central angle of  $18^{\circ} 54' 30''$  a distance of 184.15 feet to point of reverse curve;

Thence along a curve to the left having a radius of 622 feet, a central angle of  $24^{\circ} 14' 25''$  a distance of 263.15 feet to end of curve and corner;

Thence N  $45^{\circ} 11'$  E, 14.14 feet to place of beginning.

This tract of land contains 189,137 square feet or 4.3420 acres of land.

**EXHIBIT C**

That certain set of Construction Plans submitted by Fleming Companies, Inc to J P. Morgan Investment Management Inc designated

Fleming Companies, Inc , Dallas GMD Expansion, 3400 Dan Morton Drive,  
Dallas TX 75211, JE Dunn Construction Company, Project No 4770-95023,

Dated 1 June 1995, Revised 29 June 1995 (PR-#3) consisting of

- C 1 1 Horizontal Control Paving Plan
- C 2 1 Drainage Area Map
- C 3 1 Grading/Dramage Plan
- C 3 2 Drainage Profiles
- C 4 1 Erosion Control Plan
- C 5 1 TxDOT Paving Details
- A 1 1 Site Plan
- A 2 1 Floor Plan & Details
- A 2 2 Roof Plan
- A 4 1 Building Elevations
- A 5 1 Wall Sections
- A 5 2 Details
- S 1 1 General Notes
- S 2 1 Ground Floor & Foundation Plans
- S 2 2 Roof Framing Plan
- S 2 3 Conveyor Support Plan
- S 3 1 Concrete Details
- S 3 2 Panel Details
- S 3 3 Steel & Misc Details
- L 1 1 Landscape Plan
- L 2 1 Irrigation Plan

## EXHIBIT D

### UNITY AGREEMENT

WHEREAS, the following Applicants by this instrument desire to use all or a portion of the tracts described below for purposes of meeting the requirements of Section(s) 504 of CHAPTER 53, "THE DALLAS BUILDING CODE," of the Dallas City Code, as amended,

NOW, THEREFORE, KNOW ALL PERSONS BY THESE PRESENTS.

#### I

That MORGAN GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE ("Applicant A") is the owner of the below described real property ("Tract A"). Street Address 3400 Dan Morton Drive, Dallas, Texas 75211 Zoning District IR, more particularly described in volume 79226, Page 2086 in the Deed Records of Dallas County, Texas, and in the attached "Exhibit A," which is made a part of this agreement for all purposes The following use is located on Tract A: Food Distribution Center.

#### II

That FLEMING COMPANIES, INC ("Applicant B") is the owner of the below described real property ("Tract B"): Street Address 3400 Dan Morton Drive, Dallas, Texas Zoning District IR, more particularly described in Volume 79226, Page 2086 in the Deed Records of Dallas County, Texas, and in the attached "Exhibit B," which is made a part of this agreement for all purposes The following use is located on Tract B: Proposed Addition to Food Distribution Center.

#### III

In order that all uses of Tract A and Tract B may operate in compliance with CHAPTER 53, "THE DALLAS BUILDING CODE," as amended ("Code"), of the City of Dallas ("City") and derive all the benefits from such compliance, and for such other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, as Applicant A and Applicant B (collectively referred to as the Applicants") have agreed upon, and the Applicants understand and agree that Tract A and Tract B shall be considered one lot, pursuant to Section 514 of the Code, solely for the purpose of meeting the requirements of Section(s) 504 of the Code, as briefly summarized below:

The occupancy of the existing and proposed warehouse is B2 Based on Table No 5A "Wall and opening protection based on location on property" the exterior wall is to be "1 hour less than 20 feet". Also, openings in the exterior wall are "not permitted less

than 5 feet and protected less than 10 feet" The requirements are hereby waived to allow construction of the expansion facility without fire resistivity in an exterior wall and without protected openings at the common property line

#### IV

The Applicants understand and agree that this agreement is for the purpose of authorizing the Building Official of the City to issue building permits and/or certificates of occupancy for Tract A and Tract B. The Applicants further understand and agree that this agreement neither affects the ability of the City to strictly enforce any and all provisions of the Code, nor restricts the right of the City Council of the City to exercise its legislative duties and powers insofar as zoning of the tracts is concerned.

#### V

The Applicants agree to defend, indemnify, and hold harmless the City from and against all claims or liabilities arising out of or in connection with this agreement and the issuance of the building permits and/or certificates of occupancy for Tract A and Tract B by reason of this agreement.

#### VI

Unless stated otherwise in this agreement, the definitions and provisions of CHAPTER 53, "THE DALLAS BUILDING CODE," as amended, apply and are incorporated into this agreement as if recited in it.

#### VII

The Applicants agree to file, at their own expense, a true and correct copy of this agreement in the Deed Records of the county or counties in which the tracts are located as soon as practicable after this agreement is approved by both the Building Official and the City Attorney. Prior to the issuance of a building permit or certificate of occupancy by the Building Official for the uses and tracts governed by this agreement, the Applicants agree to submit two copies of this agreement that have been file-marked at the appropriate deed records office(s).

#### VIII

The Applicants understand and agree that this agreement shall be governed by the laws of the State of Texas.

IX

The Applicants understand and agree that this agreement shall be a covenant running with the land with respect to all tracts governed by this agreement, and that this agreement shall fully bind any successors, heirs, and assigns of the Applicants who acquire any right, title, or interest in or to any of the tracts, or any part thereof, that are governed by this agreement. Any person who acquires any right, title, or interest in or to any of the tracts, or any part thereof, governed by this agreement, thereby agrees and covenants to abide by and fully perform this agreement.

X

In the event that Tract A and Tract B become owned by the same person or entity, the Doctrine of Merger shall not apply.

XI

The Applicants understand and agree that this agreement may be amended or terminated only by an instrument that is signed by the owners of both Tract A and Tract B (including by Power of Attorney), approved by the Building Official, and approved as to form by the City Attorney. The Building Official shall approve a properly signed instrument amending or terminating this agreement if:

- (1) a written request to amend or terminate this agreement is made by Applicant A, Applicant B, or a successor, heir, or assign of Applicant A or Applicant B, and
- (2) all uses and tracts governed by this agreement fully comply with the applicable provisions of the Dallas Building Code described in paragraph III of this agreement.

The Applicants shall file the amending or terminating instrument in the Deed Records of the county or counties in which the tracts are located at the sole cost and expense of Applicant B. After filing the amending or terminating instrument in the Deed Records, the Applicants shall file two copies of the instrument with the Building Official. No amendment or termination of this agreement is effective until the amending or terminating instrument is filed in accordance with this paragraph.

XII

Applicant A and Applicant B each certify and represent that there are no liens, other than liens for ad valorem taxes, against their respective tracts if there are no signatures of lienholders for those tracts

XIII

The invalidation of any provision of this agreement by any court shall in no way affect any other provision, which shall remain in full force and effect, and to this end the provisions are declared to be severable

1996 EXECUTED on this the 31 day of January,

MORGAN GUARANTY TRUST COMPANY  
OF NEW YORK, Trustee

FLEMING COMPANIES, INC ,

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

By E. J. [Signature] MW 1/12/96  
Title V.P. Distribution

CONSENT AND CONCURRENCE OF LIENHOLDERS.

None  
Tract A Lienholder  
By. \_\_\_\_\_  
Title. \_\_\_\_\_

None  
Tract B Lienholder  
By \_\_\_\_\_  
Title \_\_\_\_\_

APPROVED

APPROVED AS TO FORM.  
SAM A LINDSAY, CITY ATTORNEY

\_\_\_\_\_  
Building Official

\_\_\_\_\_  
Assistant City Attorney

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ ) ss :

This instrument was acknowledged before me on \_\_\_\_\_  
\_\_\_\_\_, 1995, by \_\_\_\_\_, as \_\_\_\_\_ of Morgan  
Guaranty Trust Company of New York, Trustee

(Seal)

\_\_\_\_\_  
Notary Public  
My Commission Expires \_\_\_\_\_

# GIBSON, DUNN & CRUTCHER LLP

## LAWYERS

A REGISTERED LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATIONS

200 Park Avenue New York, New York 10166-0193

(212) 351-4000

[www.gibsondunn.com](http://www.gibsondunn.com)

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September 11, 2003

Direct Dial  
(212) 351-2365  
Fax No  
(212) 351-5238

Client No  
R 46215-00017

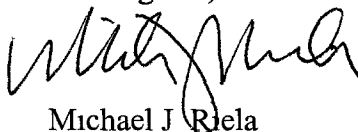
Bankruptcy Management Corporation  
1330 East Franklin Avenue  
El Segundo, CA 90245

Re *Proof of Claim filed by JPMorgan Chase Bank in the Fleming Companies,  
Inc Chapter 11 Cases*

Dear Sir or Madam

Please file the enclosed proof of claim on behalf of JPMorgan Chase Bank, in the Fleming Companies, Inc chapter 11 case. Also enclosed is a copy of the proof of claim form. Please date-stamp this copy and return it to me at the address provided on the self-addressed stamped envelope. Please contact me by phone or email if you have any questions. Thank you very much for your assistance.

Best regards,



Michael J. Riela

MJR/mjr  
Enclosure(s)

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