

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

**PROOF OF CLAIM**



208802

In re.  
FLEMING COMPANIES, INC

Case Number  
03-10945 (MFW)

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 and Address:**

CATELLUS COMMERCIAL 1, L L C 0354888008402  
c/o Keller Rohrback  
Christopher Graver  
3101 N Central Ave  
Ste 900  
Phoenix, AZ 85012-2600

☐ 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.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if this address differs from the address on the envelope sent to you by the court.

If you have already filed a proof of claim with the Bankruptcy Court or BMC, you do not need to file again.

Creditor Telephone Number (602)-230-6326

CREDITOR TAX ID #

ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR.

Check here ☐ replaces or ☐ amends a previously filed claim dated \_\_\_\_\_

**1 BASIS FOR CLAIM**

- ☐ Goods sold ☐ Personal injury/wrongful death ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)  
☐ Services performed ☐ Taxes ☐ Wages, salaries, and compensation (Fill out below)  
☐ Money loaned ☒ Other (describe briefly) Your social security number \_\_\_\_\_

Lease rejection damages

Unpaid compensation for services performed from \_\_\_\_\_ to \_\_\_\_\_  
(date) (date)

**2 DATE DEBT WAS INCURRED** As of 4/1/03

**3 IF COURT JUDGMENT, DATE OBTAINED**

**4 TOTAL AMOUNT OF CLAIM AS OF PETITION DATE** \$ 1,676,967.45 (unsecured) \$ 56,816.49 (secured) \$ (unsecured priority) \$ 1,733,783.94 (total)

If all or part of your claim is secured or entitled to priority, also complete item 5 or 6 below.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

**5 SECURED CLAIM**

☒ Check this box if your claim is secured by collateral (including a right of setoff).

Brief description of collateral:

- ☐ Real Estate  
☐ Motor Vehicle  
☒ Other Amounts due Debtor per lease

Value of collateral \$ 56,816.49

Amount of arrearage and other charges at time case filed included in secured claim above, if any \$ \_\_\_\_\_

**6 UNSECURED PRIORITY CLAIM**

☐ Check this box if you have an unsecured priority claim.

Specify the priority of the claim.

- ☐ Wages, salaries, or commissions (up to \$4,850\*) earned within 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)  
☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4)  
☐ Up to \$2,100\* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6)  
☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7)  
☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8)  
☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a) \_\_\_\_\_

\* Amounts are subject to adjustment on 4/1/01 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

**7 CREDITS** The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

**8 SUPPORTING DOCUMENTS** Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

**9 DATE-STAMPED COPY** To receive an acknowledgment of your claim, please enclose a self-addressed stamped envelope and an additional copy of this proof of claim.

The original of this completed proof of claim form must be sent by mail or hand delivered (FAXES NOT ACCEPTED) so that it is received on or before 4:00 p.m., September 15, 2003, Pacific Daylight Time.

BY MAIL TO  
Bankruptcy Management Corporation  
P O BOX 900  
El Segundo, CA 90245-0900

BY HAND OR OVERNIGHT DELIVERY TO  
Bankruptcy Management Corporation  
1330 East Franklin Avenue  
El Segundo, CA 90245

DATE SIGNED

9-10-03

SIGN and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney if any).

Catellus Commercial 1 LLC c/o Catellus Commercial Development Corp, as managing agent. Anna M. Chapman, it's Director

Penalty for presenting fraudulent claim is a fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 AND 3571

THIS SPACE FOR COURT  
USE ONLY

FILED

SEP 15 2003

BMC

Fleming Companies Claim



12511

See Other Side For Instructions

*In re Fleming Companies, Inc*  
United States Bankruptcy Court for the District of Delaware  
No 03-10945(MFW)

**Attachment to Proof of Claim of Catellus Commercial 1, LLC**

Attached are calculations of the rejection damages claim of Catellus Commercial 1, LLC, for its lease to The Fleming Companies, Inc , of premises at 1990 West Orange Grove Road, Tucson, Arizona, which Lease was rejected by order of the Court as of June 30, 2003 A copy of the Lease is also attached

**Rejection Damages Calculation Under 11 U.S.C. Section 502(b)(6)**

Total remaining rent due during lease term	\$ 11,639,749.00
15%	\$ 1,745,962.35
Rent due during next three years	\$ 1,733,783.94

**Section 502(b)(6) rejection damages claim \$ 1,733,783.94**

**Calculation of secured (setoff right) portion**

CAM	\$ 5,574.49
Expense reimbursement under lease section 4.3	\$ 51,242.00
Total setoff right	\$ 56,816.49

**Total secured rejection damages claim \$ 56,816.49**

**Total unsecured rejection damages claim \$ 1,676,967.45**

**Total rejection damages claim \$ 1,733,783.94**

**Fleming Foods claim calculations**

**Filing Date** 01-Apr-03  
**Rejection Date** 30-Jun-03  
**Lease Commencement** 07-Apr-02  
**Lease Expiration** 30-Apr-22

#	Month	Year	Rent	CAM	Tax	Ins	Notes
1	April	2003	42,061 14	3,307 47		0	1 322 07
2	May	2003	42,061 14	3,307 47		0	1,322 07
3	June	2003	42,061 14	3,307 47		0	1,322 07
							property tax actual for 1/1/03 - 6/30/03 not billed to tenant prior to rejection date - not billable until 7/1/03
4	July	2003	42 061 14	3,307 47	8,560 24	1,322 07	
5	August	2003	42 061 14	3 307 47	0 00	1 322 07	
6	September	2003	42 061 14	3 307 47	0 00	1,322 07	
7	October	2003	42,061 14	3 307 47	0 00	1 322 07	
8	November	2003	42,061 14	3 307 47	0 00	1,322 07	
9	December	2003	42 061 14	3 307 47	0 00	1 322 07	
							estimated taxes due from 8/1/03 - 12/31/03 = actual of 6/30/03 plus 2%
10	January	2004	42,061 14	3,307 47	8,731 44	1 322 07	
11	February	2004	42,061 14	3,307 47	0 00	1,322 07	
12	March	2004	42 061 14	3 307 47	0 00	1 322 07	
13	April	2004	42,061 14	3,307 47	0 00	1 322 07	
14	May	2004	42,061 14	3,307 47	0 00	1,322 07	
15	June	2004	42 061 14	3,307 47	0 00	1,322 07	
							estimated 2nd half to be billed for 1/3/04 - 6/30/04 taxes
16	July	2004	42,061 14	3,307 47	8 731 44	1 322 07	
17	August	2004	42,061 14	3,307 47	0 00	1,322 07	
18	September	2004	42 061 14	3,307 47	0 00	1,322 07	
19	October	2004	42 061 14	3,307 47	0 00	1 322 07	
20	November	2004	42 061 14	3,307 47	0 00	1 322 07	
21	December	2004	42,061 14	3 307 47	0 00	1 322 07	
22	January	2005	42,061 14	3,307 47	8,906 07	1,322 07	est 1st half taxes
23	February	2005	42,061 14	3 307 47	0 00	1,322 07	
24	March	2005	42,061 14	3,307 47	0 00	1 322 07	
25	April	2005	42,061 14	3 307 47	0 00	1 322 07	
26	May	2005	42,061 14	3 307 47	0 00	1 322 07	
27	June	2005	42,061 14	3,307 47	0 00	1 322 07	
28	July	2005	42,061 14	3,307 47	8 906 07	1 322 07	est 2nd half taxes
29	August	2005	42 061 14	3 307 47	0 00	1,322 07	
30	September	2005	42,061 14	3,307 47	0 00	1,322 07	
31	October	2005	42,061 14	3,307 47	0 00	1,322 07	
32	November	2005	42,061 14	3,307 47	0 00	1,322 07	
33	December	2005	42 061 14	3 307 47	9 084 19	1,322 07	est 1st half taxes
34	January	2006	42 061 14	3,307 47	0 00	1,322 07	
35	February	2006	42 061 14	3,307 47	0 00	1,322 07	
36	March	2006	42,061 14	3,307 47	0 00	1,322 07	
<b>SUB TOTAL 3 yrs</b>			<b>1,514,201 04</b>	<b>119,068 92</b>	<b>52,919 46</b>	<b>47,594 52</b>	<b>1,733,783 94</b>

**Calculation of subsequent amounts on an annual basis**

						taxes assumed 2nd half/1st half @ 2%
4/1/06 - 3/31/07	504 733 68	40,483 43	18,350 06	16 182 14	increase each year	
4/1/07 - 3/31/08	516 476 62	41 293 10	18 717 06	16 505 78	1st base rent increase eff 5/1/07	
4/1/08 - 3/31/09	517,544 16	42 118 96	19 091 40	16,835 90		
4/1/09 - 3/31/10	517,544 16	42,961 34	19 473 23	17 172 61		
4/1/10 - 3/31/11	517 544 16	43 820 57	19 862 70	17,516 07		
4/1/11 - 3/31/12	517,544 16	44,696 98	20,259 95	17,866 39		
4/1/12 - 3/31/13	529,287 10	45,590 92	20,665 15	18,223 71	2nd base rent increase eff 5/1/12	
4/1/13 - 3/31/14	530,354 64	46,502 74	21,078 45	18,588 19		
4/1/14 - 3/31/15	530,354 64	47,432 79	21 500 02	18 959 95		
4/1/15 - 3/31/16	530,354 64	48 381 45	21 930 02	19,339 15		
4/1/16 - 3/31/17	530,354 64	49 349 08	22,368 62	19 725 93		
4/1/17 - 3/31/18	541,354 64	50 336 06	22,815 99	20,120 45	final rent increase eff 5/1/17	

4/1/18 - 3/31/19	543 165 24	51 342 78	23,272 31	20,522 86	
4/1/19 - 3/31/20	543,165 24	52,369 64	23 737 76	20,933 32	
4/1/20 - 3/31/21	543 165 24	53 417 03	24 212 51	21,351 99	
4/1/21 - 3/31/22	543,165 24	54,485 37	24,696 76	21,779 03	
<u>4/1/22 - 4/30/22</u>	<u>45,263 77</u>	<u>4,540 45</u>	<u>0 00</u>	<u>1,814 92</u>	final month of term
<b>SUB TOTAL</b>	<b>8,501,371 97</b>	<b>758,122 70</b>	<b>342,032 00</b>	<b>303,438 38</b>	

Total due from petition date	RENT	CAM	TAX	INSURANCE	Grand Total
	10,015,573 01	878,191 62	394,951 47	351,032 90	11,639,749 00

**Offsets/Open A/R balances**

2002 CAM credit	(8 571 58)
2002 tax credit	
2002 ins credit	<u>2,997 09</u>
total credit	(5,574 49)

*Richard J. Gorman*

**COPY**

**LEASE**

**BY AND BETWEEN**

**CATELLUS COMMERCIAL GROUP, LLC,**  
a Delaware limited liability company

**AS LANDLORD,**

**AND**

**FLEMING COMPANIES, INC ,**  
an Oklahoma corporation,

**AS TENANT**

## TABLE OF CONTENTS

ARTICLE I	DEMISE OF PREMISES	1
1 1	Premises	1
ARTICLE II	DEVELOPMENT OF PREMISES AND SHOPPING CENTER	1
2 1	Premises and Common Areas to be Constructed	1
2 2	Plans and Specifications	1
2 3	Construction	2
2 4	Notice of Delivery	2
2 5	Delivery Conditions	3
2 6	Tenant's Blackout Periods	3
2 7	Certain Items to be Provided by Landlord following Delivery	3
2 8	Correction of Defects and Omissions	4
2 9	Signs	4
2 10	Alterations to Shopping Center	4
2 11	Parking	5
2 12	Tenant's Installation of Fixtures and Equipment	5
2 13	[Intentionally Deleted]	5
2 14	[Intentionally Deleted]	5
2 15	[Intentionally Deleted]	5
2 16	Change Requests	5
2 17	[Intentionally Deleted]	6
2 18	Work Schedule	6
2 19	Tenant Delays	6
2 20	Construction of Landlord's Work	6
ARTICLE III	LEASE TERM	6
3 1	Term	6
3 2	Extension Options	7
ARTICLE IV	RENT	7
4 1	Minimum Rent	7
4 2	Late Charge	7
4 3	Reimbursement of Tenant's Administrative Expenses	7
ARTICLE V	TAXES	7
5 1	Real Estate Taxes	7
5 2	Personal Property Taxes	8
ARTICLE VI	COMMON AREAS	8
6 1	Definition	8
6 2	Use of Common Areas	8
6 3	Maintenance	8
6 4	Tenant's Contribution	9
6 5	Audit Rights	10
ARTICLE VII	UTILITIES	10
7 1	Utilities	10
ARTICLE VIII	USE AND ASSIGNMENT	11
8 1	Opening Covenant, and Trade Name	11
8 2	Other Parts of the Shopping Center and Restrictions	11
8 3	Restricted Uses	12
8 4	Non-Operation of Business	13
8 5	[Intentionally Omitted]	13
8 6	Hours for Deliveries	13
8 7	Assignment	13
8 8	Procedures for Change in Use or Assignment	14
8 9	Consent	14
8 10	Continuing Liability of Tenant	14

ARTICLE IX	MAINTENANCE AND REPAIRS	14
9 1	Landlord's Repairs	14
9 2	Tenant Repairs	14
9 3	Alterations	15
9 4	Fixtures	15
9 5	Liens	15
ARTICLE X	INSURANCE	15
10 1	Property Insurance	15
10 2	Landlord's Liability Insurance	16
10 3	Reimbursement of Insurance Costs	16
10 4	Tenant's Insurance	16
10 5	General	17
10 6	Waiver of Subrogation	17
10 7	Indemnities	17
10 8	Failure to Maintain Insurance	18
ARTICLE XI	DAMAGE OR DESTRUCTION	18
11 1	Damage and Destruction	18
11 2	Damage During Last Three Years	19
11 3	Continued Operations	19
11 4	Termination	20
ARTICLE XII	EMINENT DOMAIN	20
12 1	Condemnation	20
12 2	Termination Right	20
12 3	Restoration	20
12 4	Award	21
12 5	Termination	21
12 6	Future Dedication for Street Widening	21
ARTICLE XIII	SELF HELP	21
13 1	Self Help	21
ARTICLE XIV	DEFAULT	22
14 1	Remedies Upon Tenant's Default	22
14 2	Remedies Upon Landlord's Default	23
14 3	Attorney's Fees	24
14 4	Cumulative Remedies	24
ARTICLE XV	COVENANT OF QUIET ENJOYMENT	24
15 1	Quiet Enjoyment	24
15 2	Environmental Matters	24
ARTICLE XVI	SUBORDINATION	26
16 1	Subordination and Attornment	26
ARTICLE XVII	TRANSFERS BY LANDLORD	26
17 1	Transfers of Landlord's Interest	26
17 2	Landlord's Liability	26
17 3	Cure by Lender	26
ARTICLE XVIII	MISCELLANEOUS	27
18 1	Holding Over, Surrender	27
18 2	Non-Waiver of Default	27
18 3	Recording	27
18 4	Notice	27
18 5	Successors and Assigns	28
18 6	Time is of the Essence	28
18 7	Partial Invalidity	28
18 8	Interpretation, Entire Agreement	28
18 9	Headings, Captions and References	28
18 10	Brokerage Commissions	28



18 11	Governing Law	28
18 12	Estoppel Certificates	28
18 13	Unavoidable Delay	29
18 14	Notice to Mortgagee	29
18 15	Reciprocal Easement Agreement ("REA")	29
18 16	Merchant's Association	29
18 17	Trash Removal	29
18 18	[Intentionally Omitted]	29
18 19	Interest on Past Due Obligations	30
18 20	Trade Fixtures, Personal Property and Alterations	30
18 21	Waiver of Trial by Jury	30
18 22	Past Due Sums	30
18 23	Confidentiality	30
18 24	Rules and Regulations	30
18 25	Acquisition of Shopping Center	30
18 26	Street Widening	30

## LEASE

THIS LEASE (hereinafter the "Lease"), is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2001 (the "Effective Date"), by and between CATELLUS COMMERCIAL GROUP, LLC, a Delaware limited liability company, with its home office located at 165 South Union Boulevard, Suite 852, Lakewood, Colorado 80228 (hereinafter the "Landlord") and FLEMING COMPANIES, INC., an Oklahoma corporation with its home office located at 5701 North Shartel, Oklahoma City, Oklahoma 73118, Attention Real Estate Officer (hereinafter the "Tenant")

### ARTICLE I DEMISE OF PREMISES

1.1 Premises For and in consideration of the covenants and agreements contained herein and other valuable consideration, Landlord hereby leases to Tenant and Tenant hereby leases from Landlord, upon the following terms and conditions, that certain store building containing approximately 51,242 square feet of floor area including all space located under the roof as required by Pima County building codes (hereinafter sometimes referred to as the "Premises" or the "Building") to be constructed (in the area outlined and identified as "Pad 1" on the site plan attached hereto as Exhibit "A" (the "Site Plan") and by this reference made a part hereof) in accordance with the Final Plans and Specifications more particularly described in Article II. The Premises shall be situated in the "La Cholla Plaza" shopping center, which shopping center name Landlord may change at its sole discretion provided said new name (i) is in good taste and in keeping with the family orientation of the shopping center and the location of the shopping center, and (ii) does not employ the name of any other tenant or other occupant of the shopping center (hereinafter sometimes referred to as the "Shopping Center"), located in an unincorporated area of Pima County, Arizona, which Shopping Center is more particularly described on Exhibit "B" attached hereto and by this reference made a part hereof, and in the outlined portion of Exhibit "A"

### ARTICLE II DEVELOPMENT OF PREMISES AND SHOPPING CENTER

2.1 Premises and Common Areas to be Constructed Subject to the payment by Tenant of all costs for which Tenant is responsible in accordance with this Lease, Landlord shall construct, or cause to be constructed, the Premises and the Common Areas substantially in accordance with the Final Plans and Specifications (as defined in Section 2.2 below). Landlord covenants to promptly enter into a binding contract with a general contractor approved by Tenant, such approval not be unreasonably withheld or delayed, for the construction of the Premises, the Common Areas and the other buildings comprising the Shopping Center, in accordance with the provisions of this Article II of the Lease.

#### 2.2 Plans and Specifications

(a) Plans Landlord and Tenant each acknowledge that they have mutually approved the plans dated March 5, 2001 prepared by Kubicek Architects as Job No. 00362 and the plans dated March 7, 2001 prepared by EHL Architects as Job No. 00052 (the "EHL Plans"). The foregoing plans are hereinafter referred to as the "Final Plans and Specifications" and the foregoing Architects are hereinafter collectively referred to as the "Architects". The Final Plans and Specifications relate to the construction of the Premises, including the Building shell (the "Shell") and the leasehold improvements desired by Tenant ("Leasehold Improvements"), as well as the Common Area. The Shell and Leasehold Improvements as collectively referred to herein as "Landlord's Work". Notwithstanding anything in the foregoing to the contrary, "Landlord's Work" shall not include, and Tenant shall be solely responsible for the construction/installation of, (i) all improvements, fixtures and/or equipment shown on the four sheets of the EHL Plans entitled "EQ1 0", "EQ2 0", "EQ3 0" and "EQ4 0" and (ii) all fixtures and/or equipment which are shown on sheet "F2 - Equipment Plan" of the EHL Plans as being "Furnished by Owner".

(b) Conditions Regarding Changes Subject to the provisions of Section 2.1.6, Tenant may request reasonable changes to the Final Plans and Specifications and Landlord shall not unreasonably withhold its consent thereto provided (a) no additional area is required for the construction of the Premises other than the area outlined and identified on Exhibit "A", (b) any

and all costs associated with such changes shall be borne by Tenant and shall be paid as set forth below in this Article II, and (c) the estimated Delivery Date specified in the Delivery Notice pursuant to Section 2 4 below and the Completion Date shall be extended and the "Blackout Period" (defined below) shall be reduced (by delaying the commencement thereof) on a day for day basis for each day that Landlord is delayed in delivering the Premises to Tenant as a result of any changes requested by Tenant pursuant to Section 2 16 or other Tenant Delays. Notwithstanding the foregoing, if Tenant requests material changes to the Final Plans and Specifications, Landlord's consent may be given or withheld in Landlord's sole and absolute discretion. Without limiting the definition of "material" changes, changes that in the aggregate will delay the Delivery Date and/or the Completion Date by more than sixty (60) days and/or involve any structural or exterior changes to the Premises shall constitute material changes. As a condition of Landlord's approval of changes that will delay the Delivery Date in addition to all other rights available to Landlord under this Lease, Landlord may accelerate the Commencement Date set forth in Section 3 1 by reducing the Fixturization Period one day for each day that the Delivery Date will be delayed as a result of any material changes requested by Tenant.

(c) Governmental Approvals The Architect has submitted the Final Plans and Specifications to the appropriate governmental agencies for plan checking and the issuance of a building permit. Tenant acknowledges that Landlord's obligations under this Lease shall be contingent upon Landlord obtaining all permits and approvals required for the performance of Landlord's Work and the development and construction of the Shopping Center (the "Approvals"), including, without limitation, approval of the site plan and all building permits. If Landlord has not obtained the Approvals within 180 days from the Effective Date, Landlord and/or Tenant shall have the right to terminate this Lease by written notice to the other party given at any time prior to Landlord obtaining the Approvals. In the event of such termination, neither party shall have any further liability or obligation to the other under this Lease.

The Architect, with Tenant's cooperation, will make any changes to the Final Plans and Specifications which are requested by the applicable governmental authorities to obtain the building permit for the Premises. Tenant hereby acknowledges that any such changes will be subject to the terms of Sections 2 16 below. Landlord's approval of the Final Plans and Specifications shall create no liability or responsibility on the part of Landlord for the completeness of such plans or their design sufficiency or compliance with Laws (as defined in Section 8 1).

2 3 Construction Landlord agrees to (a) commence construction of the Premises not later than ninety (90) days (subject to Tenant Delays (as defined in Section 2 19) and Unavoidable Delays set forth in Section 18 13 below), after the full execution and delivery of this Lease and receipt of the Approvals and (b) deliver physical possession of the Premises to Tenant on or prior to two hundred seventy (270) days after commencement of construction (subject to Unavoidable Delays and Tenant Delays), free and clear of all tenancies and occupancies (the "Completion Date"). If Landlord fails to perform its obligation of completing the construction of the Premises, and 10,000 square feet of shop space in the Shopping Center, and/or the Common Areas on or before the Outside Completion Date (defined as August 1, 2002 as such date may be extended by any Tenant Delays or Unavoidable Delays), then in such event, Tenant may pursue all of its rights and remedies pursuant to law, or in equity or as set forth herein, but Tenant shall have no right to terminate this Lease.

2 4 Notice of Delivery Landlord shall give Tenant written notice ("Delivery Notice") at least sixty (60) days prior to the date on which Landlord estimates that all of the Delivery Conditions (as hereinafter defined) are to be fulfilled. The Delivery Notice shall specify a particular Delivery Date (as hereinafter defined) which shall be subject to extension only if and to the extent of any Unavoidable Delays excused pursuant to Section 18 13 or any Tenant Delays occurring after the date of such notice, and, if all of Delivery Conditions have not been fulfilled on or before such Delivery Date, then, as liquidated damages (which the parties acknowledge will be substantially less than Tenant's actual damages and do not constitute a penalty) Tenant shall be entitled to two (2) days of rent abatement for each day beyond such Delivery Date specified in the Delivery Notice that Landlord is delayed in satisfying all of the Delivery Conditions. Tenant shall enter upon the Premises for all purposes permitted under this Lease from and after the Delivery Date specified in the Delivery Notice, subject to the insurance and indemnity provisions set forth in Article 10 below, and all other terms of this Lease, except for payment of rent. Tenant's occupation of the Premises for fixturization and stocking prior to the satisfaction of all of Delivery Conditions shall not cause the Delivery Date to occur or constitute

waiver or acceptance of or relieve Landlord from any of its obligations hereunder, including without limitation the obligations to complete construction of the Premises and provide any certificates and approvals required for use or occupancy thereof by Tenant

2.5 Delivery Conditions Landlord shall be deemed to have delivered to Tenant possession of the Premises on the date (hereinbefore and hereinafter referred to as "Delivery Date") when all of the following conditions (referred to individually as a "Delivery Condition" and collectively as the "Delivery Conditions") have been satisfied

(a) Actual Possession Actual possession of the Premises shall have been delivered to Tenant in the condition described in Section 2.5(b) below

(b) Completion of Construction Construction of the Premises and the entire Common Area, including but not limited to the paving, striping and curbing of all roadways, driving and parking areas, the connection of utilities to and in the Premises, the installation of all lighting, landscaping and storm and sanitary sewers in the Common Area and the construction of Landlord's pylon or monument structures and installation of Tenant's signage thereon shall have been completed substantially in accordance with the Final Plans and Specifications, all utilities shall be separately metered and in adequate supply for their intended use, the storm and sanitary sewer drainage shall be completed and connected in accordance with the Final Plans and Specifications, the HVAC system, lighting system, sprinkler system and electric and plumbing systems for the Premises and all meters and monitoring devices for such systems shall be fully connected and in good working order, the Common Area shall be usable for the purposes intended, any work remaining to be completed or corrected by Landlord on the Premises or the Common Area shall be of such a nature as not to unreasonably interfere with or prevent Tenant's occupancy of the Premises and the Common Area and the operation of Tenant's business in the Premises and the making of preparations therefor, and Landlord, the Architect and the general contractor shall have signed and delivered to Tenant an AIA Certificate of Substantial Completion confirming all of the foregoing

(c) Environmental The Shopping Center, including, but not limited to the Premises, shall be free from violations of Environmental Laws, and the Premises shall be asbestos free

(d) Survey Landlord agrees, at its expense, prior to the execution of this Lease, to furnish Tenant with Landlord's existing survey

(e) Non-Disturbance Agreement Landlord shall have delivered to Tenant a nondisturbance agreement executed by the holder of any mortgage affecting the Premises and/or the Shopping Center land that satisfies the requirements of Article 16

2.6 Tenant's Blackout Periods If the Delivery Date would otherwise occur at any time on or between July 15<sup>th</sup> and October 1st (the "Blackout Period"), Tenant shall have the option, which may be exercised by giving written notice to Landlord at any time prior to or within ten (10) days following the date when the Delivery Notice is received by Tenant, to postpone the Delivery Date for such period as Tenant may specify in such notice, but not beyond October 1. Notwithstanding anything to the contrary in this Section 2.6, if Tenant approves a Change Request Delay pursuant to Section 2.16, the Blackout Period shall be deemed reduced (by delaying the commencement thereof) on a day for day basis by the number of days of delay set forth in the approved Change Request Delay. So long as the Delivery Date does not occur within any Blackout Period (as adjusted by any Change Request Delay), Tenant shall accept possession of the Premises on the Delivery Date

2.7 Certain Items to be Provided by Landlord following Delivery Within ninety (90) days after the Delivery Date, Landlord shall provide to Tenant the following information and documentation ("Close-Out Documentation") final construction and operating systems documentation, including but not limited to as-built drawings of Premises, manuals for all equipment incorporated into the Premises, spare parts, maintenance materials, the warranties from general contractors, subcontractors and equipment manufacturers or suppliers which are to be assigned to Tenant pursuant to this Lease, copies of all other warranties identified in the Final Plans and Specifications pertaining to any portion of Premises, a temporary certificate of occupancy for the Premises, and any other items required by the Final Plans and Specifications. In addition, Landlord, Tenant and the Architect shall complete the "walk-through" inspection of

the Premises, and the Architect shall prepare and certify an initial punch list of any work remaining to be completed or corrected,

Subsequent to the issuance of the temporary certificate of occupancy for the Premises, Landlord and Tenant shall cooperate in good faith to satisfy any conditions to the issuance of a permanent certificate of occupancy for the Premises

If Landlord fails to provide any Close-Out Documentation within fifteen (15) days after notice of delinquency has been given by Tenant to Landlord, then, in addition to any other right or remedy, Tenant shall have the right to obtain the same, and Landlord shall reimburse to Tenant upon demand all expenses paid or incurred by Tenant for such purpose and interest thereon at the Interest Rate (as hereinafter defined) from the due date until paid in full, in an amount not to exceed \$25,000. If Landlord fails to pay to Tenant such total amount within ten (10) days after receiving Tenant's written demand therefor, Tenant may, in addition to any other right or remedy, elect to deduct such amount from the next payments due to Landlord hereunder until recovered in full.

**2.8 Correction of Defects and Omissions** Within thirty (30) days after the Delivery Date, Tenant shall prepare and deliver to Landlord, with respect to those items not constructed substantially according to the Final Plans and Specifications, a list of defects and omissions in the construction of the Premises, and Landlord shall use its diligent good faith efforts to correct the defects within thirty (30) days after receipt of such list.

## **2.9 Signs**

(a) **Exterior Signs** Subject to Landlord's "Sign Criteria" attached hereto as Exhibit "E", Tenant shall have the right to place and maintain during the Term hereof its usual and customary signs on the exterior of the Premises including Tenant's standard logo, letter and colors. Tenant shall maintain such signs in good order and repair in compliance with all applicable governmental rules, regulations or ordinances.

(b) **Shopping Center Signs** As a part of the construction of the Shopping Center, subject to Landlord obtaining all permits and approvals from applicable governmental authorities, Landlord, subject to reimbursement of Tenant's pro rata share of costs with respect to two monument signs (which share shall be based on the size of Tenant's sign panels as a percentage of the total area on the subject sign upon which sign panels may be installed, and which share shall in no event exceed 50% of such costs) plus reimbursement by Tenant of 100% of the cost of fabricating and installing Tenant's sign panels, shall erect at least two (2) multi-tenant monument signs (the "Shopping Center Signs") in conformity with the Sign Criteria and in the areas designated on Exhibit "A". Tenant shall display its usual and customary sign board and standard logo, lettering and colors, on the Shopping Center Signs in conformity with Exhibit "E". Tenant shall be entitled to the top position on both sides of the Shopping Center Signs, and the size of Tenant's panels shall be as shown on Exhibit "E". Landlord shall maintain, repair and illuminate said Shopping Center Sign during the Term hereof, with the cost of such maintenance, repairs, and illumination being included within the definition of Common Area Costs, provided, however, that sign costs shall be allocated based upon the ratio of the area of a tenant's sign panels on the applicable Shopping Center Sign to the total area on said Shopping Center Sign upon which sign panels may be installed. If Landlord erects more than two monument or pylon signs in the Shopping Center, Tenant shall only have rights to the two monument signs as shown on Exhibit "E".

**2.10 Alterations to Shopping Center** Landlord agrees that the layout and design of the Shopping Center shall be substantially as set forth on Exhibit "A". Landlord shall not (a) alter the area of the Shopping Center or the location or size of any building or improvement in the Shopping Center, (b) change the number, location or layout of parking spaces, (c) construct additional structures or buildings on the Common Area of the Shopping Center, (d) change the main entrances or exits to and from the Shopping Center identified in crosshatching on Exhibit "A", except as may be required by Pima County in connection with the future widening of Orange Grove Road and/or La Cholla Boulevard, as described in the letter dated May 16, 2001 from Benjamin H. Goff to Mark Evans, a copy of which is attached hereto as part of Exhibit G, (e) use any portion of the Common Area for promotional, entertainment or related matters, (f) place permanent or temporary kiosks, displays, carts or stands in the Common Area, or (g) renovate, upgrade or change the shape or size of the Common Area, or add, eliminate or

change the location of improvements to the Common Area including, without limitation, buildings, parking areas, roadways and/or curb cuts, without obtaining Tenant's prior written consent in each instance, which consent shall not be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing, Landlord shall have the right and the obligation to restrain the use of the Common Area by unauthorized persons, and may temporarily close any portion of the Common Area for repairs, improvements or alterations, to discourage noncustomer use, to prevent dedication or an easement by prescription or for any other reason deemed sufficient in Landlord's reasonable judgment, but without unreasonable interference to Tenant's business.

2.11 Parking All Tenant's employees shall be required to park in the employee parking areas as designated from time to time by Landlord and Tenant. Tenant acknowledges that it is important to the operations in the Shopping Center that Tenant's employees, and the employees of Landlord's other tenants, park in the areas designated as employee parking areas. Tenant agrees to cooperate with Landlord's effort in the enforcement of employee parking restrictions.

2.12 Tenant's Installation of Fixtures and Equipment So long as Tenant does not interfere with the completion of the Premises and the Leasehold Improvements as reasonably determined by Landlord, Landlord shall give Tenant access to the Premises prior to the estimated Delivery Date (the "Early Access Period") for purposes of installing Tenant's fixtures and equipment, stocking merchandise and otherwise preparing for the opening of its store ("Tenant's Work"). Tenant's Work shall be performed by Tenant at Tenant's sole cost and expense. Tenant agrees to provide Landlord with prior notice of any such intended early access and shall fully cooperate with Landlord and Landlord's general contractor during the Early Access Period so as not to interfere with the completion of the Premises and the Leasehold Improvements. If Landlord or Landlord's general contractor reasonably and in good faith determines that Tenant's Work is materially interfering with the completion of the Premises and the Leasehold Improvements, Tenant shall cease Tenant's Work immediately upon demand by Landlord and shall not resume Tenant's Work until authorized in writing by Landlord. Tenant's occupancy of the Premises during the Early Access Period shall be subject to all the terms and conditions of the Lease, except that Tenant shall not be required to pay rent. On the Delivery Date, the utility meters in the Premises shall be read and after such reading the permanent utilities shall be changed into Tenant's name, and Tenant's obligation to pay for utility services at the Premises shall commence.

2.13 [Intentionally Deleted]

2.14 [Intentionally Deleted]

2.15 [Intentionally Deleted]

2.16 Change Requests Any changes to the Final Plans and Specifications shall require the prior written approval of Landlord (not to be unreasonably withheld or delayed provided the changes are not material changes as defined above in this Article II). If Tenant desires any change in the Final Plans and Specifications, such changes may only be requested by the delivery to Landlord by Tenant of a proposed written "Change Request" specifically setting forth the requested change. Landlord shall have five (5) business days from the receipt of the proposed Change Request to provide Tenant with Landlord's disapproval of the proposed change stating the reason(s) for such disapproval, or if Landlord approves the proposed change, the following items, as applicable: (i) a summary of any increase in the cost (the "Change Request Cost") or decrease in the cost (the "Change Request Savings") caused by such change, (ii) a statement of the number of days of any delay caused by such proposed change, including a statement of the adjustment of the Blackout Period resulting from such proposed change (the "Change Request Delay"), or of the number of days of any acceleration caused by such proposed change (the "Change Request Acceleration") and (iii) a statement of the cost of the Change Request Delay (the "Change Request Delay Expense"), which Change Request Delay Expense shall be the product of the number of days of delay multiplied by the estimated daily Minimum Rent rate. Tenant shall then have five (5) business days to approve any Change Request Cost, Change Request Delay and/or Change Request Delay Expense. If Tenant approves these items, Tenant shall pay to Landlord the Change Request Cost within fifteen (15) business days after Tenant's approval thereof, and Landlord shall promptly following receipt of such payment execute the Change Request and cause the appropriate changes to the Final Plans and Specifications, as the

case may be, to be made. If Tenant fails to respond to Landlord within said five (5) business day period or if Tenant disapproves any of Landlord's statements, the Change Request Cost, the Change Request Delay and the Change Request Delay Expense shall be deemed disapproved by Tenant and Landlord shall have no further obligation to perform any work set forth in the proposed Change Request. The Change Request Cost or Change Request Savings, as the case may be, shall include all costs and/or savings associated with the Change Request, including, without limitation, architectural fees, engineering fees and construction costs, as reasonably determined by Landlord, together with a reimbursement for all actual out-of-pocket costs incurred by Landlord for administration and coordination of such Change Request by Landlord's construction representative. Any Change Request Delay and/or Change Request Acceleration shall include all delays and/or acceleration caused by the Change Request, including, without limitation, all design and construction delays and/or acceleration, as reasonably determined by the Landlord. Landlord shall pay to Tenant any Change Request Saving within fifteen (15) business days following the date on which Landlord receives from its contractor the credit relating to the Change Request Savings. Tenant shall pay to Landlord all Change Request Delay Expenses concurrently with Landlord's delivery of the Premises to Tenant in the condition described in Section 2.5(b).

Landlord will have the right to decline Tenant's request for a change to the Final Plans and Specifications if all such changes (in the aggregate) would delay construction of Landlord's Work and the Commencement Date of this Lease by more than sixty (60) days.

2.17 [Intentionally Deleted]

2.18 Work Schedule As soon as practicable following the execution of this Lease, Landlord will deliver to Tenant a schedule ("Work Schedule") which will set forth the timetable for the planning and completion of Landlord's Work and the Commencement Date of the Lease. The Work Schedule will set forth each of the various items of work to be done in connection with the completion of Landlord's Work. Landlord may, from time to time during construction of Landlord's Work, modify the Work Schedule as Landlord reasonably deems appropriate, provided Landlord promptly notifies Tenant of such modification.

2.19 Tenant Delays For purposes of this Lease, "Tenant Delays" means any delay in the completion of Landlord's Work resulting from any or all of the following: (a) Tenant's failure to timely perform any of its obligations pursuant to this Lease, including without limitation, any failure to complete, on or before the due date therefor, any action item which is Tenant's responsibility pursuant to the Work Schedule delivered by Landlord to Tenant pursuant to this Lease or pursuant to other time frames set forth in this Lease, (b) Tenant's changes to the Final Plans and Specifications pursuant to Section 2.16, (c) Tenant's request for materials, finishes, or installations which are not readily available, or (d) any other act or failure to act by Tenant, Tenant's employees, agents, architects, independent contractors, consultants and/or any other person performing or required to perform services on behalf of Tenant.

2.20 Construction of Landlord's Work Until Landlord has acquired the land underlying the Shopping Center and secured the Approvals, Landlord will be under no obligation to cause the construction of any of Landlord's Work. Provided the aforementioned conditions have been satisfied, Landlord's contractor will commence and diligently proceed with the construction of the Landlord's Work, subject to Tenant Delays and Unavoidable Delays.

ARTICLE III  
LEASE TERM

3.1 Term The "Term" of this Lease (and the date upon which Tenant shall be obligated to commence its obligations for the payment of Minimum Rent) shall commence on the date (the "Commencement Date") which is the earlier of (a) ninety (90) days following the Delivery Date (the "Fixturation Period") or (b) the date Tenant opens for business in the Premises to the general public, and shall expire on the last day of the twentieth (20<sup>th</sup>) Lease Year thereafter, unless extended as provided in Section 3.2 of the Lease. Notwithstanding the foregoing, the Commencement Date shall be subject to advancement by Landlord as set forth above in Section 2.2(b). The first Lease Year of the Term hereof shall commence on the Commencement Date and shall end on the last day of the twelfth (12<sup>th</sup>) full calendar month from the Commencement Date. Each successive Lease Year shall commence on the first day in the

month following the month in which the anniversary of the Commencement Date occurs and shall end on the last day of the twelfth (12<sup>th</sup>) calendar month thereafter

3.2 Extension Options Tenant shall have the right of extending the Term of this Lease for a total of six (6) successive periods of five (5) years each, upon the same terms and conditions of the original term, except Minimum Rent which shall be determined as set forth in Schedule I hereto. Each such extension period shall occur automatically, and the Term of this Lease shall be extended accordingly without the requirement of any further documentation, unless Tenant notifies Landlord in writing not later than one hundred eighty (180) days prior to the date of commencement of such extension period that Tenant elects not to so extend the Term of the Lease, in which case the Lease will expire at the end of the then-current Term.

#### ARTICLE IV RENT

4.1 Minimum Rent Tenant covenants and agrees to pay Landlord, without notice, demand, deduction or offset, at the above referenced address, or such other place as Landlord shall designate in writing, the amounts set forth on Schedule I attached hereto and by this reference made a part hereof as "Minimum Rent." Minimum Rent shall be payable in advance, in equal monthly installments, on the first day of each and every calendar month during the Term hereof (including the option terms as applicable), and shall be proportionately reduced for any partial month during the Term.

4.2 Late Charge If Tenant fails to pay when the same is due and payable any Minimum Rent or any additional rental due under this Lease on the second occasion in any consecutive 12 month period during the Term, and each time during such 12 month period thereafter, Tenant shall pay to Landlord as additional rental a service charge equal to two and one-half percent (2½ %) of the overdue amount. Landlord and Tenant agree that this charge represents a reasonable estimate of the cost and expenses Landlord will incur and is fair compensation to Landlord for its loss suffered by reason of the late payment by Tenant. Upon accrual, all such late charges shall be deemed additional rental.

4.3 Reimbursement of Tenant's Administrative Expenses As of the date Tenant first opens the Premises for business to the general public, so long as Tenant is not in material default under this Lease, Tenant shall be entitled to receive from Landlord a one-time amount equal to \$1.00 per square foot of the Building (i.e., Fifty One Thousand Two Hundred Forty Two Dollars (\$51,242) based upon 51,242 square feet) as reimbursement for administrative expenses incurred by Tenant in conjunction with this Lease.

#### ARTICLE V TAXES

5.1 Real Estate Taxes Landlord shall in the first instance pay all real estate taxes and assessments ("real estate taxes") for betterments and improvements that are levied or assessed by any lawful authority on the Premises while taking advantage of all savings connected with early payment. Landlord shall take the maximum benefit of any law allowing real estate taxes or assessments to be paid in installments, and in such event only the amount actually paid by Landlord during the applicable tax year shall be included in real estate taxes for purposes of this Article. Real estate taxes shall not include (i) income, profits, intangible, documentary stamp, franchise, corporate, capital stock, succession, estate, gift or inheritance taxes or taxes substituted for or in lieu of the foregoing exclusions, and (ii) any penalties, late charges or the like attributable to the late payment by Landlord of the real estate taxes. Landlord shall furnish Tenant with copies of all tax bills on the Premises promptly upon receipt thereof and in sufficient time to allow Tenant to determine whether or not to contest any increase in real estate taxes, unless due to Tenant's late payment. If Tenant desires to contest any real tax, charge or assessment, Tenant shall promptly notify Landlord and Tenant shall have the right to do so at its expense, and Landlord shall fully cooperate with Tenant in any such proceeding, provided, however, that (i) no such contest shall subject Landlord or the Shopping Center to any risk and Tenant shall indemnify and hold Landlord harmless from and against any and all claims, liability, losses or damages, costs and expenses, actions and causes of action, and judgments arising out of such contest by Tenant, and (ii) Tenant shall give to Landlord such security as Landlord may reasonably require in order to insure the ultimate payment of such real estate tax, charge or assessment, and in order to insure that in no event shall any applicable taxing authority



be permitted to commence sale of the Shopping Center based upon Tenant's contesting of real estate taxes or assessments

The real estate taxes on the Premises shall be, after first deducting all tax refunds, the product of the real estate taxes on the Shopping Center multiplied by a fraction, the numerator of which is 51,242 square feet the agreed upon square footage of the Premises (unless the area of the Premises is subsequently expanded or reduced, in which case, the new square footage of the Premises shall be equal to [i] in the event the Premises are expanded, 51,242 square feet plus the expansion area, or [ii] in the event the area of the Premises is reduced, 51,242 square feet less the reduced area of the Premises), and the denominator of which is the total area available for lease or occupancy in the Shopping Center (hereinafter sometimes referred to as the "Aggregate GLA") Tenant shall reimburse Landlord for all tax payments made by Landlord pursuant to this Section 5.1, within twenty (20) days after the later to occur of (i) receipt by Tenant of Landlord's invoice, which invoice shall include a copy of the tax bill(s) for which Landlord is requesting payment and Landlord's calculation of Tenant's pro rata share calculated as provided herein, or (ii) the due date of payment (including any date in which a discount is available) by Landlord, it being understood and agreed that in addition to the foregoing, Landlord shall provide Tenant, within ten (10) days of Landlord's receipt thereof, with a copy of all paid tax bill(s) for the Shopping Center for which reimbursement was requested

Notwithstanding the foregoing provisions, if the real estate taxes are not levied and assessed against the entire Shopping Center by means of a single tax bill (i.e., if the Shopping Center is separated into two (2) or more separate tax parcels for purposes of levying and assessing the real estate taxes), then, at Landlord's option, Tenant shall pay Tenant's pro rata share of all real estate taxes which may be levied or assessed by any lawful authority against the land and improvements of the separate tax parcel on which the Premises is located. Tenant's pro rata share under such circumstances shall be apportioned according to the leasable floor area of the Premises as it relates to the total leasable floor area of the buildings situated in the separate tax parcel in which the Premises is located. If the Premises are assessed as a separate tax parcel, at Landlord's option, Tenant shall pay one hundred percent of all real estate taxes levied against the Premises directly to the taxing authority prior to the date of delinquency

5.2 Personal Property Taxes Except for real estate taxes as provided for in Section 5.1 above, Tenant shall pay all taxes assessed on Tenant's personal property on the Premises. If Landlord has paid any such tax in the first instance, as required by the applicable taxing authority, Tenant shall reimburse Landlord upon Tenant's receipt of paid invoices for such taxes, provided that Landlord shall use reasonable efforts to give Tenant notice of any such tax prior to paying same. Notwithstanding anything to the contrary contained herein, Landlord and Tenant hereby agree that Tenant shall be liable for the payment of so-called "rent taxes" or the like in the event same shall be assessed by the state in which the Shopping Center is located

#### ARTICLE VI COMMON AREAS

6.1 Definition "Common Areas" shall mean all areas, space, installations and equipment provided from time to time by Landlord for the common use and benefit of the tenants of the Shopping Center, their employees, agents, licensees, customers and other invitees, including without limitation parking areas, exits, entrances, access roads, driveways, sidewalks, retaining walls, loading platforms and ramps, landscaped areas, and pedestrian malls or courts. Landlord agrees that no buildings or structures shall be erected upon the Common Areas, except as shown on Exhibit "A" and that no alterations to the parking areas, exits, entrances or access roads within the Common Areas, as shown on Exhibit "A", shall be made without obtaining Tenant's prior written consent, not to be unreasonably withheld, conditioned or delayed

6.2 Use of Common Areas Landlord hereby grants to Tenant, its licensees, sublessees, concessionaires, successors and assigns, and its and their employees, agents, licensees and invitees the non-exclusive right to use the Common Areas during the Term hereof and any extensions of same, subject to the terms and conditions of this Lease and to the temporary closing of the Common Areas by Landlord in order to prevent any dedication of same to the public

6.3 Maintenance Landlord shall maintain, in keeping with comparable shopping centers in the area in which Shopping Center is located, the Common Areas in clean condition

and good repair, including but not limited to (i) maintaining all signs, landscaped areas, and parking areas and access roads (including restriping, repairing and repaving same when required, and removing any ice, snow or rubbish therefrom) in good condition and repair, (ii) adequately illuminating the parking areas and other Common Areas while Tenant remains open for business and for one (1) hour thereafter, (iii) providing adequate security lighting and fire protection for the Shopping Center as required by applicable code or ordinance, and (iv) maintaining the exterior surfaces of exterior walls of the buildings in the Shopping Center

6.4 Tenant's Contribution Tenant shall pay to Landlord, as additional rent during the Term hereof, Tenant's proportionate share of Landlord's costs of operating the Shopping Center and maintaining the Common Areas (the "Common Area Costs") during the Term hereof. Tenant's proportionate share shall be calculated by multiplying the Common Area Costs for each calendar year during the Term by a fraction, the numerator of which shall be 51,242 square feet, the agreed upon square footage of the Premises (unless the area of the Premises is subsequently expanded or reduced, in which case the new square footage of the Premises shall be equal to (i) in the event the Premises are expanded, 51,242 square feet plus the expansion area, or (ii) in the event the area of the Premises is reduced, 51,242 square feet less the reduced area of the Premises), and the denominator of which shall be the Aggregate GLA as of December 31

Tenant's proportionate share of Common Area Costs for each calendar year and partial calendar year shall be paid in equal monthly installments on the first day of each calendar month, as additional rent, in an amount estimated by Landlord as follows. Landlord will, at least sixty (60) days prior to the beginning of each calendar year (or at least thirty (30) days prior to the Commencement Date with respect to the first calendar year), submit to Tenant an estimated budget ("Budget") of Common Area Costs for the ensuing calendar year, provided, however, Landlord's failure to timely provide Tenant with any such Budget shall not release Tenant of its ultimate obligation to pay Tenant's proportionate share of Common Area Costs. From and after the effective date of such new Budget, Tenant shall pay to Landlord in equal monthly installments Tenant's proportionate share of Common Area Costs based on such Budget. Such Budget amount is merely an estimate and shall be subject to revision by Landlord from time to time. Upon receipt of notice of any such Budget revision by Landlord, Tenant shall pay said monthly installments in accordance with the revised Budget.

Landlord shall furnish Tenant, by March 1 of the succeeding calendar year, with a reasonably detailed statement (prepared in accordance with generally accepted accounting principles and certified as true and accurate by the authorized financial officer of Landlord), including appropriate receipts and materials which verify any such charges, of the Common Area Costs incurred during the previous calendar year (after the Commencement Date) and the methodology employed (including all appropriate numbers) in determining Tenant's proportionate share thereof (the "Reconciliation Statement"). If Tenant requests further clarification of any specific Common Area Costs, Landlord agrees to promptly supply appropriate receipts and materials and verify any such charges. If the total amount paid by Tenant under this Section 6.4 for the previous calendar year is less than the actual amount due from Tenant for the previous calendar year as shown on the Reconciliation Statement, Tenant shall pay to Landlord the difference between the amount paid by Tenant and the actual amount due, such deficiency to be paid within sixty (60) days after the furnishing of the Reconciliation Statement. If the total amount paid by Tenant hereunder for the previous calendar year exceeds such actual amount due from Tenant for the previous calendar year, such excess shall be credited against the next installment(s) due from Tenant to Landlord under this Section 6.4. Even though the Lease Term has expired and Tenant has vacated the Premises, when the final determination is made of Tenant's proportionate share of Common Area Costs for the calendar year or partial calendar year in which this Lease terminates, Tenant shall promptly pay to Landlord an amount as calculated pursuant to the provisions of this Section 6.4, or in the event such final determination indicates that Tenant is entitled to a refund, such refund shall promptly be paid by Landlord to Tenant. The provisions of this Section 6.4 shall survive the expiration or earlier termination of the Lease Term.

As used herein, "Common Area Costs" shall mean all costs and expenses incurred by Landlord in the operation, maintenance, repair, replacement and insurance of the Shopping Center and the Common Areas, including the Shopping Center Signs, and shall include, without limitation, repairs to the parking areas or other Common Areas, landscaping, reasonable tax contests in the event the Premises are not separately assessed, removal of snow and ice, trash, rubbish and other refuse, general comprehensive liability insurance covering the Common Areas,

contractual liability insurance, fire, casualty and extended coverage insurance on the Shopping Center and (subject to the provisions of Article 10) the Premises to the extent of one hundred percent (100%) of the full replacement costs thereof exclusive of foundations, and the cost of leasing or the depreciation on any equipment used to implement the foregoing maintenance but shall not include any Shopping Center administrative or management fees or the like in excess of ten percent (10%), the cost of any item for which Landlord is reimbursed by insurance or otherwise, other than the cost of obtaining such insurance, the cost of any additions to the Common Areas pursuant to an expansion of the Shopping Center's leasable square footage, the cost of any alterations, additions, changes, replacements, improvements and repairs and other items which under generally accepted accounting and auditing principles consistently applied (as pertaining to the real estate industry) are properly classified as capital expenditures (unless such costs are amortized over their useful life, in which event such costs shall be included as Common Area Costs), costs which are made in order to prepare space for occupancy by a new tenant, the cost of any rental loss insurance, the cost of any initial installations for any tenant of the Shopping Center, legal, accounting and other professional fees not related to the use, maintenance or operation of the Common Areas or discharge of Landlord's duties hereunder, interest or amortization payments in connection with the Shopping Center, leasing commissions, advertising expenses and other costs incurred in leasing or attempting to lease any portion of the Shopping Center, the cost of any services performed specifically for certain tenants of the Shopping Center (as opposed to tenants generally), the cost of correcting defects in the construction of the buildings, improvements and equipment of the Shopping Center unless not covered by warranties, the cost of Landlord's membership (and related costs thereto) in any organizations representing Shopping Center owners, any political or charitable contributions, and the cost of electricity for lighting the parking areas of the Shopping Center

6.5 Audit Rights Landlord shall maintain for a period of at least two (2) years following the date Landlord provides to Tenant the Reconciliation Statement for the period to which they pertain complete and accurate books and records of all Common Area Costs paid or incurred by Landlord and all payments of Common Area Costs received from Tenant. Such books and records shall be kept at a location in the continental United States known to Tenant, and Tenant or its auditors shall have the right once each year during the Term, with reasonable notice, to inspect, copy and audit such books and records at any time during normal business hours. Landlord shall promptly repay Tenant for any overpayments which Tenant or its auditors identify together with interest thereon at the Interest Rate from the last day of the accounting period in question until refunded in full. If such overpayments exceed two percent (2%) of Tenant's proportionate share of the Common Area Costs for the period, Landlord shall pay for the cost of the audit within thirty (30) days following receipt of Tenant's invoice therefor.

## ARTICLE VII UTILITIES

### 7.1 Utilities

(a) Utility Charges Tenant shall pay all charges for gas, electricity, water, sewer service, trash removal and other utilities used in the Premises during the Term hereof, plus all charges for electricity for the lighting of Tenant's Protected Parking Area (as shown on the Site Plan), all such utilities to be separately metered (at Landlord's expense) and to be obtained by Tenant from the applicable utility company. From and after the Delivery Date, Tenant agrees to pay directly to the appropriate utility company all charges for utility services supplied to Tenant for which there is a separate meter and/or submeter to the Premises. Tenant agrees to pay to Landlord its share of all charges for utility services supplied to the Premises for which there is no separate meter or submeter upon billing by Landlord of Tenant's share based on Landlord's reasonable estimates of Tenant's allocable share. If no such charges are established by Landlord, then the costs of such utilities shall be included as part of Common Area Costs. Landlord shall have the right at any time and from time to time during the Term to either continue to contract with the existing provider of any utility service for the Premises or to contract with a different company to provide such service.

Landlord hereby agrees that the Shopping Center Sign containing Tenant's sign panels and the overhead parking area lighting for the Common Areas in front of the Premises shall be established in the areas designated on the Site Plan which lighting shall be, at Tenant's option, wired into lighting control panels contained in the Premises and available for Tenant's usage.

(b) Interruption of Service Landlord shall not be liable in damages for any failure or interruption of any utility or service. No failure or interruption of any utility or service shall entitle Tenant to terminate this Lease or discontinue making payments of Minimum Rent or additional rental.

## ARTICLE VIII USE AND ASSIGNMENT

8.1 Opening Covenant, and Trade Name On or before the later of (i) sixty (60) days following the Commencement Date and (ii) the date on which at least 10,000 square feet of space in the Shopping Center has been constructed and is available for lease, Tenant agrees to open for business to the public in the Premises for at least one (1) day, fully stocked, equipped, staffed and fixtured for operation, for use as a first class supermarket consistent with other major chain supermarkets, including, but not limited to, the retail sale of fresh meat, poultry, seafood, grocery items, produce, beer and wine for off premises consumption (subject to Tenant obtaining all necessary governmental licenses and approvals and complying with requirements of all applicable governmental authorities), bakery products and other related supermarket products typically offered by Tenant in its other supermarkets operating under the same trade name. Tenant shall not change the use of the Premises except in compliance with the procedures set forth in Section 8.8 below.

Tenant, at Tenant's expense, shall comply with all present and future laws, ordinances, orders, rules, regulations and requirements of all governmental authorities having jurisdiction, affecting or applicable to the Premises or the occupancy and use of the same, including without limitation, any laws or regulations relating to the use, treatment, storage, disposal and disclosure of hazardous or toxic materials as the same may be defined from time-to-time pursuant to applicable federal, state and local laws or any successor or similar statutes or regulations (collectively the "Laws"). In addition to the foregoing, Tenant shall be responsible for any structural changes to the Premises required by any Laws, which are required solely by virtue of Tenant's specific use of the Premises, or any subsequent alterations to the Premises by Tenant as opposed to changes which would be required regardless of Tenant's use of the Premises, which shall be the responsibility of Landlord. Without limitation on the foregoing, Tenant shall defend, indemnify and hold Landlord harmless from any and all claims, damages, fines, penalties, liabilities, costs and expenses incurred by Landlord in connection with Tenant's failure to comply with Laws, including reasonable attorneys' fees and costs incurred in connection with the defense of any civil, criminal or administrative action. Notwithstanding anything to the contrary in this Section 8.1, Tenant shall be entitled to contest any Laws so long as Tenant indemnifies and holds Landlord harmless from and against any and all liability, costs, damages, expenses (including without limitation, legal fees and court costs), actions and causes of action and judgments arising from Tenant's contest of any Laws. The obligations contained in this Section 8.1 shall survive the expiration or earlier termination of this Lease, provided, however, that nothing in this Section 8.1 shall be construed to require Tenant to make any modifications to the Premises in order to comply with any law or ordinance which does not take effect until after the expiration or earlier termination of this Lease.

8.2 Other Parts of the Shopping Center and Restrictions Subject to the terms and conditions set forth in this Section 8.2, Landlord covenants and agrees, from and after the date hereof, not to lease, rent, occupy, or suffer or permit to be occupied, any part of the Shopping Center other than the Premises, for the purpose of conducting therein or for the "Protected Uses." Protected Uses means the following uses: a supermarket, food store, or a food department store, meat, fish or vegetable market, or so-called "convenience store", or for the sale for off-premises consumption of the following "Protected Items": fresh or frozen groceries, meats, produce, and dairy products or for use as a health and beauty aid store. Notwithstanding the foregoing, the following shall be excluded from the Protected Uses: (a) any restaurant including full service sit down restaurants or so called "quick service" restaurants such as by way of example only, and not in limitation, Chipotle and Panda Express, a sandwich shop, ice cream or yogurt shop, bagel shop, donut shop, pizza shop, coffee house such as, by way of example only and not in limitation, that operated by Starbucks or Seattle's Best, and (b) any full-service hair salon and/or beauty shop which contains less than 2,000 square feet of floor area. Furthermore, the Protected Uses shall not preclude other tenants or occupants of the Shopping Center from selling Protected Items provided that the sale of such items is on an incidental basis and not more than the lesser of ten percent (10%) of the floor area of the party's premises or 500 square feet of such premises is devoted to the sale of any one or more of the Protected Items. The Protected Uses shall be null

and void and of no further force or effect if the Premises ceases to be used for the Protected Uses for a period of six (6) consecutive months or more excluding temporary closures for repairs, refurbishment or remodeling permitted under this Lease and closures arising from Unavoidable Delays

No office use shall be located within 150 feet of the Premises. Within the remainder of the Shopping Center, office use shall be limited to not more than 2,400 square feet of floor area in any one premises and not more than 5,000 square feet of floor area in the aggregate. For purposes of the foregoing, "office use" shall not be deemed to include offices which are incidental to some other use, to the extent that the size of such offices does not exceed ten percent (10%) of the floor area of the subject premises. Up to 3,000 square feet on Pad 5 shown on Exhibit "A" may be used for restaurant purposes. None of the foregoing restrictions on office and restaurant uses shall apply to Pad 4 shown on Exhibit "A," nor to Pad 2 shown on Exhibit "A" provided the entry doors for all businesses located on Pad 2 face Orange Grove Boulevard.

Landlord acknowledges that the covenants set forth above regarding the Protected Uses and the Protected Items (collectively, the "Exclusive") are a material inducement to Tenant entering into this Lease. If Landlord grants in writing to any other tenant or occupant located on that portion of the Shopping Center owned by Landlord any right which is in violation of the Exclusive, or if Landlord consents in writing to or otherwise approves in writing of such tenant's or occupant's use which is in violation of the Exclusive, in addition to any other relief to which Tenant may be entitled, subject to the provisions of Article XIV of this Lease, Tenant shall be entitled, if it so elects, to (A) institute and prosecute proceedings in any court of competent jurisdiction, either at law or in equity, (i) to enforce the specific performance of the Exclusive against Landlord and (ii) to enjoin Landlord from further violations, and (B) subject to the final paragraph of this Section 8.2, abate one hundred percent (100%) of the Minimum Rent and additional rent due under this Lease while the violation is continuing.

Subject to the exclusions and exceptions to the Exclusive set forth above in this Section 8.2, if the Exclusive is violated by any tenant of the Shopping Center (the "Violating Tenant") not as a result of a written grant or consent by Landlord, Landlord shall use commercially reasonable efforts to enforce the Exclusive against the Violating Tenant. If the Violating Tenant has not ceased violating the Exclusive on or before the expiration of the ninety (90) day period following notice from Tenant to Landlord of the violation (the "Cure Period"), then commencing as of the first (1<sup>st</sup>) month following the expiration of the Cure Period, and thereafter while the violation is continuing, Tenant shall be entitled to abate monthly Minimum Rent in cumulative increments of ten percent (10%) as follows: ten percent (10%) for the month following the expiration of the Cure Period, twenty percent (20%) during the second (2<sup>nd</sup>) month following the expiration of the Cure Period, thirty percent (30%) during the third (3<sup>rd</sup>) month following the expiration of the Cure period, forty percent (40%) during the fourth (4<sup>th</sup>) month following the expiration of the Cure Period and so on. Notwithstanding the foregoing, Landlord, at its sole election, by written notice given to Tenant at any time after the sixth (6<sup>th</sup>) month following the expiration of the Cure Period, as same may be extended, may offer Tenant the right to terminate this Lease ("Termination Offer"). Tenant shall have thirty (30) business days following Tenant's receipt of the Termination Offer to respond thereto. If Tenant does not accept Landlord's offer to terminate this Lease within said thirty (30) business day period, Tenant shall automatically be deemed to have rejected the Termination Offer, in which event, Tenant's abatement rights hereunder shall be deemed terminated, and Tenant shall resume payment of one hundred percent (100%) of the Minimum Rent then due and payable under this Lease. If Tenant accepts Landlord's Termination Offer, this Lease shall be deemed null and void on the date set forth in the Termination Offer, and from and after the effective date of such termination, neither party shall have any further liability or obligation to the other under this Lease.

Notwithstanding the foregoing, Tenant acknowledges and agrees that Landlord has made and makes no representation or warranty that the Exclusive is enforceable and that Landlord assumes no risk with respect thereto. If at any time hereafter, the Exclusive is adjudicated unenforceable, Tenant's abatement rights set forth hereinabove in this Section 8.2 shall be deemed null and void, and of no further force or effect, revoked and rescinded as if such rights had never existed. Whereupon Tenant shall pay to Landlord within ten (10) days after demand therefor, the full amount of any rental abatement amounts taken by Tenant under this Section 8.2.

**8.3 Restricted Uses** No portion of the Shopping Center including the Premises shall be used for the following purposes: a training or educational facility (i.e., a beauty school, barber

college, place or instruction, or any other operation catering primarily to students or trainees rather than to customers but excludes employee training by Shopping Center tenants incidental to the conduct of their business within the Shopping Center), a bowling alley, bingo parlor, skating rink, theater, bar, amusement park, carnival, circus, tent program or tent sales, special sales or promotions, children's recreational facility or party center, meeting hall, banquet facility, entertainment facility, disco, or other dance hall, nightclub establishment, health club or gymnasium, sporting events or as sports facilities, for any manufacturing, for wholesale or non-retail operation, for offices in excess of 5,000 aggregate square feet, for the sale or repair of cars, trucks, motorcycles, or boats (new or used), trailers, or mobile homes, any vehicular maintenance facility (including any automobile lubrication, brake, muffler, transmission, tire or oil change operation or operation selling automobile, truck or boat parts or accessories), lumber yard, video or other game parlor, pool hall, billiard parlor, amusement center, off-track betting establishment, flea-market, massage parlor, auditorium, funeral parlor, for the sale and display of pornographic materials, communication or transmission tower, or any so called "social encounter" restaurants which serve alcoholic beverages for on-premises consumption (which alcoholic beverage sales are anticipated to, or do account for, fifty (50%) percent or more of the gross sales of said social encounter restaurant) and whose primary purpose is the meeting and mingling of its patrons

Notwithstanding anything in this Section 8 3 to the contrary, Tenant shall have the right, up to four (4) times in any calendar year, to use that portion of the Common Areas outlined and designated on the Site Plan as the "Seasonal Sales Area" for seasonal sales to be conducted by Tenant ("Seasonal Sales") Tenant's use of the Seasonal Sales Area shall be limited to no longer than thirty (30) days for each Seasonal Sale Tenant shall, at its sole cost and expense, maintain the Seasonal Sales Area in a clean and sanitary condition at all times during its use of same, and shall, at the end of said use, return the Seasonal Sales Area to the condition existing prior to Tenant's use thereof, reasonable wear and tear excluded Tenant's use of the Seasonal Sales Area and its conduct of Seasonal Sales shall be subject to compliance with all city, county and other applicable laws and ordinances and such other reasonable rules and regulations as Landlord may impose on same, and Tenant shall conduct the Seasonal Sales and its use of the Seasonal Sales Area in such a manner as will not interfere with any other tenant's or occupant's use of the Shopping Center and/or the performance by Landlord of its duties with respect to the Common Areas and the remainder of the Shopping Center and will not obstruct ingress or egress to the Shopping Center

8 4 Non-Operation of Business Following Tenant's opening for business as set forth in Section 8 1, Tenant shall not be required to continuously and uninterruptedly operate for business in the Premises Tenant shall have the right to cease supermarket operations at any time Tenant shall deliver sixty (60) days prior written notice thereof to Landlord ("Go Dark Notice") At any time within ninety (90) days following the date Tenant delivers the Go Dark Notice, Landlord shall have the right to terminate the Lease by delivery of written notice to Tenant, such termination to be effective thirty (30) days after Tenant's receipt of such termination notice Additionally, if Tenant does not deliver a Go Dark Notice but actually ceases operation of its business from the Premises for a period exceeding six (6) months (excluding any period during which Tenant is closed for remodeling alterations or repairs to the Premises, not to exceed sixty (60) days), Landlord shall have the right to terminate the Lease by delivering written notice thereof to Tenant at any time prior to Tenant reopening for business, such termination to be effective thirty (30) days after Tenant's receipt of such termination notice

8 5 [Intentionally Omitted]

8 6 Hours for Deliveries Tenant shall use commercially reasonable efforts to cause all deliveries (excluding United Parcel Service or overnight courier services such as Federal Express), loading, unloading and services to the Premises to be completed during the hours required by applicable ordinances or regulations All deliveries, loading, unloading and services to the Premises shall be accomplished within the rear service areas of the Premises

8 7 Assignment Tenant may not transfer, assign, sublet, enter into franchise, license or concession agreements, change ownership or voting control, mortgage, encumber, pledge or hypothecate all or any part of this Lease, Tenant's interest in the Premises or Tenant's business (collectively, "Assignment" or "Assign") without first complying with the provisions of Section 8 8 below

8 8 Procedures for Change in Use or Assignment Should Tenant desire to enter into an Assignment and/or change the use of the Premises, Tenant shall give Landlord at least 30 days prior written notification of the proposed Assignment and/or change in use

Within 30 days after receipt of Tenant's notification, Landlord shall respond in writing and shall have the right to either (a) consent to the proposed Assignment and/or change in use, (b) prohibit the proposed Assignment and/or change in use, but only if (i) the Assignment and/or change in use is unreasonable or (ii) the change in use is to any (A) non-retail use, (B) deep discount store (such as 99 cent Store or McFrugals), or (C) thrift store (such as a Goodwill or Salvation Army store) or other store which sells used goods or (c) notify Tenant of Landlord's election to terminate the Lease effective ninety (90) days after delivery of Landlord's election. Tenant may invalidate Landlord's election to terminate the Lease by withdrawing its request for consent within fifteen (15) days from receipt of Landlord's notice of termination. Upon such termination, Tenant shall vacate the Premises in accordance with the terms and provisions of this Lease. In connection with any proposed Assignment or change in use, Tenant agrees to use reasonable efforts to assist Landlord in obtaining information regarding same relevant to the exercise of Landlord's rights in this Section 8 8

8 9 Consent Any attempted or purported Assignment without Tenant first complying with the provisions of Section 8 8 shall be void and of no force or effect and shall not confer any estate or benefit on anyone

8 10 Continuing Liability of Tenant In the event Tenant shall assign this Lease or sublet the Premises as set forth herein, said assignee or sublessee shall execute, in writing, an assignment and assumption agreement which provides that said assignee or sublessee assume all of Tenant's obligations hereunder, but notwithstanding any such assignment or subletting, Tenant shall remain primarily liable for the fulfillment of the obligations of Tenant hereunder

#### ARTICLE IX MAINTENANCE AND REPAIRS

9 1 Landlord's Repairs Landlord shall maintain in good repair (provided said repairs were not occasioned by the negligence of Tenant or its employees, agents, servants or contractors), the following portions of the Premises: the load-bearing walls, foundations, structural portions of the roof, the exterior surfaces of exterior walls (exclusive of doors, door frames, door checks, windows, window frames and storefronts – all of which shall be maintained by Tenant as set forth in Section 9 2) and all plumbing, electrical, and sewage systems not exclusively serving the Premises. The cost of maintaining the exterior surfaces of the exterior walls of the Premises shall be included in Common Area Costs. In making any repairs hereunder, Landlord shall not unreasonably interfere with Tenant's normal operations in the Premises. Landlord shall have no liability whatsoever for any damage accruing as a result of a failure in the plumbing, electrical, mechanical or sewerage systems which serve the Premises, unless such failure shall have been occasioned by the gross negligence of Landlord, its employees, agents, servants or contractors

In doing any construction work, making any repairs or doing any maintenance in the Shopping Center after Tenant takes possession of the Premises, Landlord shall use its good faith efforts to prevent any interference with the operation of the Shopping Center and the business of Tenant or any subtenant or licensee of Tenant. Without limiting the foregoing, Landlord shall not perform or allow any construction work, other than routine maintenance, on or within the Common Area, on the roof or exterior of Premises, or within the Premises (if Landlord has the right or obligation to do so under any provision of this Lease) during the period of October 15 through January 15, except with Tenant's prior consent or if required by law or in the event of an emergency

9 2 Tenant Repairs Tenant shall be responsible for maintaining in good condition and repair (i) all downspouts, gutters, all interior portions of the Premises, doors, door frames, door checks, window frames, storefronts, all non-structural portions of the Premises and every part thereof, (including, without limitation, the replacement of plate glass in the storefront and doors and the electrical and plumbing located in the interior of the Premises which exclusively serve the Premises), all services areas, truck docks, interior surfaces of exterior walls and ceilings, all Premises fixtures, all of Tenant's signs, and (ii) all maintenance, repairs and replacements to be made to the heating, ventilating and air conditioning ("HVAC") systems

serving the Premises (Landlord agreeing to assign all applicable warranties for said systems to Tenant), which have not been occasioned by the negligence of Landlord or its employees, agents, servants or contractors

9 3 Alterations Tenant shall have the right to make from time to time, at its expense, (i) interior non-structural alterations to the Premises and (ii) interior structural alterations to the Premises which do not impact the roof or potentially cause a roof penetration and will not cost in excess of Fifty Thousand Dollars (\$50,000) in any one instance or One Hundred Fifty Thousand Dollars (\$150,000) in the aggregate (collectively, "Permitted Alterations") without obtaining Landlord's consent, provided Tenant notifies Landlord at least ten (10) days in advance of such Permitted Alterations and concurrently delivers to Landlord the plans and specifications therefor

Tenant shall not make any exterior alterations to the Premises, nor any structural alterations to the Premises which may impact the roof or potentially cause a roof penetration or which will cost more than Fifty Thousand Dollars (\$50,000) in any one instance or One Hundred Fifty Thousand Dollars (\$150,000) in the aggregate, without Landlord's prior written consent, which shall not be unreasonably withheld or delayed

9 4 Fixtures

(a) Any and all trade fixtures and equipment (specifically excluding the HVAC system of the Premises), signs, appliances, furniture and other personal property of whatever nature or kind installed in the Premises at any time by Tenant (all of the foregoing being collectively referred to in this Lease as "Tenant's Property"), including, but not limited to all cash registers or the like, refrigeration equipment, check-out counters, food stands and solar equipment, shall not become a part of the realty and may be removed from the Premises by Tenant at any time during the Term hereof or within thirty (30) days after the termination of the Term hereof, it being agreed that Tenant shall repair any damage (other than screw holes or the like) resulting from Tenant's removal of Tenant's Property Landlord hereby waives any and all liens, claims, demands, or rights, including, but not limited to, rights of levy, execution, sale and distraint for unpaid rent, or any other right, interest or lien which Landlord has or may hereafter acquire in any of Tenant's Property

(b) Tenant shall have the right, without Landlord's consent being required, to finance, lease, encumber and grant security interests in Tenant's Property, but not in its interests under the Lease, except as otherwise expressly permitted herein Landlord, if requested by Tenant or the holder of the security interest in Tenant's Property, shall execute and shall cause the holder of any deed to secure debt or other security instrument covering all or any portion of the Shopping Center or the Premises to execute and deliver a Landlord's and mortgagee's waiver and all other documents required by Tenant's lender or by the holder of a security interest in Tenant's Property

9 5 Liens Each party hereto shall promptly pay when due the entire cost of all work done by it to the Premises and shall keep the Premises free of liens for labor or materials Should mechanics', materialmen's or other liens be filed against the Premises by reason of the acts of either party hereto, such party shall cause the lien to be canceled and discharged of record by bond or otherwise within thirty (30) days of receiving actual notice of such lien Each party hereto shall indemnify and hold harmless the other party from any claims, damages, or liabilities arising as a result of the filing of the aforementioned liens

ARTICLE X  
INSURANCE

10 1 Property Insurance Landlord, either directly or through its agent, shall maintain All Risk Property Insurance (including coverage for earthquake and flood, if Landlord elects, provided, however, that the cost of earthquake coverage does not result in an increase in the premium paid by Landlord for such All Risk Property Insurance), through individual or blanket policies insuring the Building against fire and extended coverage for the full replacement cost of the Building (including the Shell and Leasehold Improvements [whether owned by Landlord or by Tenant] but excluding Tenant's furniture, trade fixtures, equipment, inventory and other personal property of Tenant and any alterations permitted under Section 9 3), (excluding the cost of rental continuation insurance) with deductibles and the form and endorsements of such coverage as selected by Landlord Landlord may also carry such other insurance as Landlord



may deem prudent or advisable, in such amounts, with such deductibles and upon such terms as Landlord shall determine

10.2 Landlord's Liability Insurance Throughout the Term of this Lease or during any period of occupancy prior to the start of the Term, Landlord shall maintain commercial general liability insurance in respect of the Common Area, including contractual liability coverage in the minimum amounts of \$3,000,000.00 per occurrence, with an annual aggregate limit of \$5,000,000.00 for bodily injury and damage to property. Policies providing the coverages required in this Article 10.2 shall be endorsed to (i) name Tenant as additional insured and (ii) stipulate that, pursuant to the indemnity obligations owed to Tenant by Landlord under this Lease, coverages afforded under such policies are primary insurance as respects Tenant and that any other insurance maintained by Tenant is excess and non-contributing with the insurance required hereunder.

10.3 Reimbursement of Insurance Costs The costs to Landlord of all insurance required by this Article are hereinabove and hereinafter called the "Insurance Costs." Upon reasonable request, Landlord shall provide to Tenant a detailed breakdown of the various types and amounts of insurance which it maintains pursuant to this Article X and the respective costs thereof. Landlord shall maintain records of such Insurance Costs and Tenant shall have the same rights of audit as are provided in Section 6.5 hereof with respect to Common Area Costs. From and after the Commencement Date, Tenant shall pay to Landlord one hundred percent (100%) of the Insurance Cost attributable to the Building described in Section 10.1 above and Tenant's proportionate share (as defined in Section 6.4 hereof) of such Insurance Costs attributable to liability insurance on the Common Area described in Section 10.2 above within thirty (30) days following receipt of a statement from Landlord showing the total amount thereof.

10.4 Tenant's Insurance Tenant shall procure, pay for and keep in full force and effect the following types of insurance, at its sole cost and expense, commencing on the date Tenant is given access to the Premises, and continuing during the Term, in at least the amounts and in the form specified below:

(a) Commercial General Liability insurance with coverage limits of not less than \$5,000,000 combined single limit for bodily injury, personal injury, death and property damage liability per occurrence and Products and Completed Operations coverage with a limit of not less than \$5,000,000 per occurrence, insuring against any and all liability of the insureds with respect to the Premises or arising out of the operation of Tenant's business from the Premises (whether within the Premises or outside the Premises, including the Seasonal Sales Area during Tenant's use thereof pursuant to Section 8.3 above) or related to the exercise of any rights of Tenant pursuant to this Lease, subject to increases during the Term in amount(s), if any, Landlord as may reasonably require. All such commercial liability insurance shall specifically insure the performance by Tenant of the indemnity agreement in Section 10.7 as to liability for injury to or death of persons and injury or damage to property. Further, all liability insurance shall include, but not be limited to, personal injury, blanket contractual, cross liability or severability of interest clauses, products/completed operations, broad form property damage, independent contractors, owned nonowned and hired vehicles and, if alcoholic beverages are served, sold, consumed or obtained in the Premises, liquor liability. Policies providing the coverages required in this Article 10.4(a) shall be endorsed to (i) name Landlord, Landlord's property manager ("Manager") and, to the extent required by any applicable lending agreements, Landlord's lenders as additional insureds, and (ii) stipulate that, pursuant to the indemnity obligations owed to Landlord, Manager and any lender of Landlord by Tenant under this Lease, coverages afforded under such policies are primary insurance as respects Landlord, Manager and any lender of Landlord, and that any other insurance maintained by Landlord, Manager and any lender of Landlord are excess and non-contributing with the insurance required hereunder.

(b) Workers' compensation coverage as required by law, together with employer's liability coverage, with a limit of not less than \$1,000,000.00 per each accident for bodily injury by accident, \$1,000,000 per each employee for bodily injury, and \$1,000,000 policy limit for bodily injury by disease.

(c) Insurance covering Tenant's leasehold improvements other than the initial Leasehold Improvements to be constructed by Landlord pursuant to Article II which shall be insured by Landlord, alterations permitted under Section 9.3, Tenant's Property and inventory from time to time located in, or about the Premises, for their full replacement value, from time to

time, providing protection against any peril included within the classification of fire and extended coverage, and sprinkler damage, vandalism, malicious mischief and such other additional perils as covered in an "all risk" or so-called "Special Form" standard insurance policy

10.5 General Each party shall promptly deliver to the other certificates evidencing all insurance policies required under this Lease and shall thereafter deliver to the other party certificates evidencing renewal of such policies at least fifteen (15) days prior to the expiration of any existing policy. For all insurance required to be maintained by the parties under this Lease, each party shall deliver to the other party a certificate of insurance describing such insurance and providing that should the policy/policies be cancelled before the expiration date thereof, the issuing company will provide thirty (30) days prior written notice to all insured parties, provided, however, not more than ten (10) days prior written notice shall be required if cancellation is due to non-payment of premiums, and all insurance policies shall be written by companies licensed to write insurance in the jurisdiction where the Shopping Center is located, provided such companies have a Best's financial category minimum rating of Class "A-VII" by the A.M. Best Company or as otherwise approved by Landlord and Tenant. Each of Tenant and Landlord shall have the right to provide any insurance required to be carried by it hereunder under blanket policies, so long as the minimum amounts of coverage required herein are provided on a per location basis and, in the case of Landlord's insurance, the premium allocated to the Shopping Center shall not exceed the premium otherwise payable for an individual policy covering the Shopping Center. Nothing herein shall prevent either party from maintaining additional amounts or types of insurance coverage at its own sole cost and expense.

Failure of either party to demand evidence of full compliance with these insurance requirements or failure of either party to identify a deficiency from evidence provided will not be construed as a waiver of the other party's obligation to maintain such insurance. Insurance effected or procured by the each party will not reduce or limit their contractual obligation to indemnify and defend the other party as set forth in this Lease.

10.6 Waiver of Subrogation Landlord hereby releases Tenant from any liability for damage or destruction to the Premises or any other portion of the Shopping Center, whether or not caused by acts or omissions of Tenant, its employees, agents or contractors, and Landlord hereby waives any and all claims and right of recovery against Tenant, its employees, agents and/or contractors, for damage, loss or injury caused by or resulting from fire and/or other perils, to the extent that any such liability or claims for damages, losses or injuries are or would be covered by the property insurance required in Section 10.1, without regard to deductible amounts. Tenant hereby releases Landlord from any liability for damage or destruction to Tenant's property, whether or not caused by acts or omissions of Landlord, its employees, agents or contractors, and Tenant hereby waives any and all claims and right of recovery against Landlord, its employees, agents and/or contractors for damage, loss or injury caused by or resulting from fire and/or other perils, to the extent that any such liability or claims for damages, losses or injuries are or would be covered by the property insurance required in Section 10.4(c), or for which Tenant self-insures, without regard to deductible amounts. Landlord and Tenant shall each look to their respective insurance coverage for recovery of any insured property damage. Each of Landlord and Tenant shall cause any property insurance policies which it maintains to contain a provision whereby the insurer waives any (i) rights of subrogation or (ii) rights of recovery against the other party. Both Landlord and Tenant agree to immediately give each insurance company, which has issued to it policies of property insurance, written notice of the terms of said mutual waivers and to cause said insurance policies to be properly endorsed, if necessary, to prevent the invalidation of said waivers and shall furnish to the other party a certificate of insurance or other satisfactory evidence of such waiver upon request of the other party.

10.7 Indemnities "Landlord" for the purposes of this Section 10.6 shall mean and include Landlord and Landlord's directors, officers, shareholders, agents, employees, and Landlord's lender, Manager, and Manager's directors, officers, shareholders, agents and employees. To the fullest extent permitted by law, Tenant covenants with Landlord that Landlord shall not be liable for any damage or liability of any kind or for any injury to or death of persons or damage to property of Tenant or any other person from any cause whatsoever related to the use, occupancy or enjoyment of the Premises (including the Seasonal Sales Area during Tenant's use thereof) by Tenant or any person thereon or holding under Tenant including, but not limited to, damages resulting from any labor dispute, provided that such exculpation shall

not extend to such damage or injury (or proportionate share thereof) to the extent that same is ultimately determined to be attributable to the gross negligence or willful misconduct of Landlord. To the fullest extent permitted by law, Landlord shall indemnify and save Tenant harmless against and from any claims for injury to or death of persons arising within or about the Common Areas of the Shopping Center to the extent caused by the negligence or willful misconduct of Landlord, its agents and/or employees. To the fullest extent permitted by law, Tenant shall pay for, defend, indemnify, and save Landlord harmless against and from any real or alleged damage or injury and from all claims, judgments, liabilities, costs and expenses, including attorney's fees and costs, arising out of or connected with Tenant's use of the Premises and its facilities (including the Seasonal Sales Area during Tenant's use thereof), and/or any repairs, alterations or improvements which Tenant may make or cause to be made upon the Premises, and any breach of this Lease by Tenant, provided however (and though Tenant shall in all cases accept any tender of defense of any action or proceeding in which Landlord is named or made a party and shall, notwithstanding any allegations of negligence or misconduct on the part of Landlord, defend Landlord as provided herein), Tenant shall not be liable for such damage or injury to the extent and in the proportion that the same is ultimately determined to be attributable to the negligence or misconduct of Landlord. This obligation to indemnify set forth above shall include all of the indemnified party's attorneys' fees, litigation costs, investigation costs and court costs and all other costs, expenses and liabilities incurred by the indemnified party or its counsel from the first notice that any claim or demand is to be made or may be made. Tenant's and Landlord's obligations under this Section 10.6 shall survive the termination of this Lease.

The obligations to indemnify set forth in this Section 10.6 shall include reasonable attorney's fees and investigation costs and all other reasonable costs, expenses and liabilities incurred by the indemnified party or its counsel from the first notice that any claim or demand is to be made or may be made.

**10.8 Failure to Maintain Insurance** If Tenant refuses or neglects to secure and maintain insurance policies complying with the provisions of this Article X, Landlord may, after written notice to Tenant and Tenant's failure to cure within 10 days of such notice, secure the appropriate insurance policies and Tenant shall pay, upon demand, the cost of same with interest thereon at the Interest Rate from the date such premiums are paid until repaid by Tenant, as Additional Rental.

## ARTICLE XI DAMAGE OR DESTRUCTION

### 11.1 Damage and Destruction

#### (a) Repair of Damage

(i) Destruction If the Premises shall be destroyed or rendered wholly untenable by fire or other casualty required to be insured against hereunder, Landlord shall, within ninety (90) days after receipt of insurance proceeds and governmental approvals necessary for such restoration, provided Tenant is not in Default hereunder and Tenant was operating prior to such casualty and Landlord is able to obtain all necessary permits and governmental approvals therefor, commence the repair or replacement of the Premises, and shall use reasonable efforts to complete same with reasonable diligence so that Tenant may continue in occupancy. If Landlord is unable, despite its reasonable efforts to commence the repair or restoration within six (6) months of the occurrence of the fire or other casualty, Landlord shall not be in default hereunder and Tenant's sole remedy shall be to terminate this Lease on 30 days' written notice to Landlord, such right to terminate shall only be exercisable within 30 days after the expiration of such six (6) month period.

(ii) Application of Insurance Proceeds All insurance monies recovered on account of damage or destruction less the cost, if any, of such recovery, shall be applied to the payment of the cost of repairing and replacing the Premises. If net available insurance monies (including any commercially reasonable deductible) shall be insufficient to pay the entire cost of such work in the event of a casualty described in paragraph (a) above, then Landlord shall bear the cost thereof in excess of the net available insurance monies and such deductible.

(iii) Uninsured Casualty If the damage or destruction shall be the result of a casualty not required to be insured against hereunder, not otherwise insured against and not covered by either Landlord's or Tenant's indemnity pursuant to Section 10 7 above, Landlord and Tenant shall equally bear the cost and expense of the repair and restoration of the Premises ("Restoration Cost"), provided, however, that the Restoration Cost does not exceed ten percent (10%) of the replacement cost of the Building ("Building Replacement Cost") If the Restoration Cost is more than ten percent (10%) of the Building Replacement Cost, either party shall be entitled to (a) terminate this Lease by providing written notice to the other party, provided, however, that if a party elects to pay the Excess Restoration Cost as set forth in subsection (b) of this sentence, the other party shall have no right to terminate this Lease, or (b) in lieu of termination, elect to pay one hundred percent (100%) of the Restoration Cost in excess of ten percent (10%) of the Building Replacement Cost ("Excess Restoration Cost") plus fifty percent (50%) of ten percent (10%) of the Replacement Cost ("Fixed Share") If either party elects to pay the amounts set forth in subsection (b) of the preceding sentence, this Lease shall continue in full force and effect, and subject to Landlord's receipt of the Excess Restoration Cost from Tenant (if Tenant has elected to pay such cost) and Landlord's receipt from Tenant of Tenant's Fixed Share, Landlord shall restore the Premises In the event of such an uninsured casualty, that portion of the Restoration Cost to be paid by Tenant pursuant to the foregoing provisions of this Section shall be paid to Landlord within thirty (30) days after Tenant's receipt of a statement of the estimated Restoration Cost in such detail as may be reasonably requested by Tenant, specifying the percentage thereof representing Tenant's share and the amount due from Tenant Landlord shall promptly notify Tenant if the estimated Restoration Cost changes If, following restoration, Tenant's share of the actual Restoration Cost pursuant to this paragraph is greater or less than the amount which Tenant has theretofore paid to Landlord pursuant to this paragraph, an adjustment shall be made and Landlord shall promptly pay any excess to Tenant, or Tenant shall promptly pay any shortfall to Landlord, as the case may be

(b) Damage to Shopping Center If, during the Term, any other buildings located within the Shopping Center shall be damaged or destroyed by fire or other casualty covered by a standard fire and extended coverage insurance policy, Landlord shall repair or cause to be repaired and rebuilt such damaged building(s) or remove the same, raze the site and improve such site as a parking or landscaped area to be maintained as part of the Common Area until such time as Landlord elects to construct a new building or improvements on such site Landlord shall commence such restoration or removal work within 90 days after the receipt of insurance proceeds for such damage or destruction and necessary governmental permits for such restoration or removal and shall thereafter diligently prosecute the same to completion

11 2 Damage During Last Three Years Notwithstanding the foregoing provisions of this Article XI, if during the last three (3) years of the Term or any Option Period, the Premises are damaged to the extent of thirty-five (35%) percent or more of the replacement cost (exclusive of the land and foundations) then this Lease may be terminated at the election of either Landlord or Tenant, provided that notice of such election shall be delivered by the electing party to the other within thirty (30) days after the occurrence of such damage or destruction Upon the exercise of such option to terminate by either party hereto, this Lease shall be deemed null and void, the parties shall be released from all further liabilities thereafter arising under this Lease, and all rent or other charges paid by Tenant for periods after the date of destruction shall be promptly refunded Notwithstanding the foregoing, however, if at the time of such damage or destruction Tenant has the right to extend the Term of this Lease, then Tenant may elect to exercise such right within twenty (20) days after receiving notice of Landlord's election to terminate pursuant to this Section 11 2, and in such case Landlord's notice of termination shall be void and Landlord shall repair and restore the Premises as provided in Section 11 1 hereof

11 3 Continued Operations In the event of repair, reconstruction and restoration, as provided in this Article XI, during the period of repair, reconstruction and restoration, Minimum Rent payable hereunder shall be abated proportionately with the degree to which Tenant's use of the Premises is impaired during the period of repair, reconstruction and restoration At its sole discretion, Tenant shall continue the operation of its business on the Premises during any such period to the extent reasonably practicable from the standpoint of prudent business management, and the obligation of Tenant to pay and additional rental shall remain in full force and effect Tenant shall not be entitled to any compensation or damages from Landlord for loss of use of the whole or any part of the Premises or the building of which the Premises are a part, Tenant's personal property or any inconvenience or annoyance occasioned by such damage, repair, reconstruction or restoration

11.4 Termination In the event of any termination of this Lease as the result of the provisions of this ARTICLE XI, the parties, effective as of such termination, shall be released, each to the other, from all liability and obligations thereafter arising under this Lease, it being specifically agreed and understood that no release shall occur in connection with liabilities which shall have arisen prior to the termination of the Lease. Except as provided herein, no destruction or damage to the Premises by fire, windstorm or other casualty, whether insured or uninsured, shall entitle Landlord or Tenant to terminate this Lease. Each party waives any statutory rights of termination which may arise by reason of any partial or total destruction of the Premises.

## ARTICLE XII EMINENT DOMAIN

12.1 Condemnation If after the execution of this Lease and prior to the expiration of the Term hereof, the whole of the Premises shall be taken under power of eminent domain by any public or private authority, or conveyed by Landlord to said authority in lieu of such taking, then this Lease and the Term hereof shall cease and terminate as of the date of such taking, subject, however, to the right of Tenant, at its election, to continue to occupy all or such part of the Premises as Tenant shall determine, subject to the terms and provisions of this Lease, including the payment of Minimum Rent and other charges required hereunder, during the period between the date of such taking and the date when physical possession of the Premises shall be taken by the taking authority. If this Lease is so terminated, any unearned rent or other charges, if any, paid in advance, shall be refunded to Tenant.

12.2 Termination Right If, after the execution of this Lease and prior to the expiration of the Term hereof, any taking under the power of eminent domain by a public or private authority or any conveyance by Landlord in lieu thereof, shall result in

(a) A reduction of ten (10%) percent or more of the gross leasable area of the Premises or fifteen (15%) percent or more of the gross leasable area of the balance of the Shopping Center exclusive of the Premises,

(b) Any reduction in the number of parking spaces within the area identified on Exhibit "A" as "Protected Parking Area" below 90% of the spaces therein shown on Exhibit "A", or any reduction of the parking area for the Shopping Center which causes the ratio of parking spaces for every 1,000 square feet of gross leaseable area ("GLA") in the Shopping Center to fall below 50, which lost parking cannot be replaced by adequate or suitable replacement parking within one hundred twenty (120) days after the date of such reduction, or

(c) A taking that results in the permanent closing of any major entrances or exits to the Shopping Center without similar substitute, or

(d) A permanent taking of either a substantial portion of the Common Area (as herein defined) or the major access roads to the Premises or the Shopping Center without similar substitutes which taking materially impedes or materially interferes with Tenant's business in the Premises,

then Tenant may, at its election, terminate this Lease by giving notice to Landlord of the exercise of Tenant's election within thirty (30) days after Tenant shall receive notice of such taking.

In the event of a termination under the provisions of this Section 12.2, this Lease and the Term hereof shall cease and terminate as of the date of such taking, subject to the right of Tenant, at its election, to continue to occupy the Premises, subject to the terms and provisions of this Lease, including the payment of Minimum Rent and other charges required hereunder, for all or such part, as Tenant may determine, of the period between the date of such taking and the date when possession of the Premises shall be taken by the appropriating authority, and any unearned rent or other charges, if any, paid in advance by Tenant shall be refunded to Tenant.

12.3 Restoration In the event of a taking in respect of which Tenant shall not have the right to elect to terminate this Lease or, having such right, shall not elect to terminate this Lease, this Lease and the Term thereof shall continue in full force and effect and Landlord, at Landlord's sole cost and expense, forthwith shall restore the remaining portions of the Premises to the extent reasonably possible, including any and all improvements made theretofore, together with the remaining portions of the parking areas, to an architectural whole in substantially the

same condition that the same were in prior to such taking. A just proportion of the Minimum Rent reserved hereunder and any other charges payable by Tenant hereunder, according to the nature and extent of the injury to the Premises and to Tenant's business, shall be suspended or abated until the completion of such restoration and thereafter the rent and any other charges shall be reduced to equitably reflect the effect of such taking on Tenant's business. Should Landlord fail to promptly commence and diligently proceed to so restore the remaining portions of the Premises, Tenant may at its option exercise any of the rights granted Tenant for failure by Landlord to repair or restore pursuant to Section 11.1 hereof.

12.4 Award All compensation awarded for any taking, whether for the whole or a portion of the Premises, shall belong to Landlord, provided that Tenant shall be entitled to any award made whether to Landlord or to Tenant, for the moving expenses and further provided that Tenant may apply for and receive an award for the loss of Tenant's leasehold estate (including unamortized cost of any leasehold improvements installed by or on behalf of Tenant at Tenant's sole cost) so long as such award in no way diminishes any award to Landlord or to any mortgagee of Landlord with respect to Landlord's remainder.

12.5 Termination In the event of any termination of this Lease as the result of the provisions of this ARTICLE XII, the parties, effective as of such termination, shall be released, each to the other, from all liability and obligations thereafter arising under this Lease, it being specifically agreed and understood that no release shall occur in connection with liabilities which shall have arisen prior to the termination of the Lease.

12.6 Future Dedication for Street Widening Tenant acknowledges that Pima County is requiring that Landlord execute a covenant, the form of which is attached hereto as Exhibit F, to dedicate to the County up to twenty-five (25) feet of the Shopping Center adjacent to Orange Grove Road and/or La Cholla Boulevards, if requested by the County in connection with any future widening of those streets. Tenant also acknowledges that such a dedication may result in the loss of Common Area, including up to forty-three (43) parking spaces in the Shopping Center, as depicted on Exhibit F. Tenant hereby consents to the covenant and the future dedication and potential loss of Common Area and parking embodied therein, and agrees that Tenant shall not be entitled to any abatement of rent or other compensation for the loss of such parking spaces and/or other Common Area, provided, however, that nothing in the foregoing shall affect or diminish any of Tenant's rights pursuant to Section 12.2 above.

#### ARTICLE XIII SELF HELP

13.1 Self Help If either party defaults in the performance of any obligation imposed on it by this Lease and does not cure such default within thirty (30) days after written notice from the other party specifying the default (or does not within said period commence and diligently prosecute the cure of such default to completion), the other party, without waiver of or prejudice to any other right or remedy it may have, shall have the right, at any time thereafter, to cure such default for the account of the defaulting party, and the defaulting party shall reimburse the other party upon invoice for any reasonable amount paid and any reasonable expense or contractual liability so incurred. If Landlord is the defaulting party and such default pertains to Landlord's repair and maintenance obligations ("Landlord's Repair Obligations"), Tenant shall simultaneously give Landlord and Landlord's mortgagee (provided Tenant has been provided written notice of the address of such mortgagee) written notice specifying such default and containing the following phrase on page 1 of the notice in all capital letters and boldface type (or it shall not be deemed validly given to Landlord) **"YOUR FAILURE TO COMMENCE THE CURE OF LANDLORD'S REPAIR OBLIGATIONS SET FORTH IN THIS NOTICE WITHIN THIRTY (30) DAYS AND DILIGENTLY PROCEED TO CURE SUCH DEFAULT SHALL ENTITLE THE UNDERSIGNED TO CURE SUCH DEFAULT AT LANDLORD'S EXPENSE WITHOUT FURTHER NOTICE"**. Landlord shall thereupon have thirty (30) days in which to cure Landlord's Repair Obligations, provided, however, if Landlord's Repair Obligations are not reasonably capable of being cured in thirty (30) days, Landlord shall be deemed to be in compliance with this Lease if Landlord, with reasonable diligence, commences to cure Landlord's Repair Obligations (which cure shall in any event be commenced within such thirty (30) day period) and diligently and continuously prosecutes such cure to completion. In addition, Landlord's mortgagee shall have the right (but not the obligation) to cure or remedy Landlord's Repair Obligations during the period that is permitted to Landlord hereunder, plus an additional period of fifteen (15) days, and Tenant will accept such

curative or remedial action taken by Landlord's mortgagee with the same effect as if such action had been taken by Landlord. Upon the failure of Landlord or Landlord's mortgagee to cure Landlord's Repair Obligations in accordance with the provisions of this Section 13.1, subject to Section 14.2, Tenant shall be authorized and empowered to cure Landlord's Repair Obligations for and on behalf of Landlord and the cost of any item paid by Tenant in curing Landlord's Repair Obligations for and on behalf of Landlord, together with interest thereon from the date such costs are paid by Tenant until reimbursed or otherwise recovered by Tenant, at the Interest Rate, shall be payable on demand by Landlord to Tenant. If Landlord fails to pay to Tenant the cost of such cure within twenty (20) days following Landlord's (and Landlord's mortgagee) receipt of Tenant's demand therefore, then Tenant may provide to Landlord and Landlord's mortgagee a second written demand therefore ("Second Demand") which contains the following phrase on page 1 of the notice in all capital letters and boldface type (or it shall not be deemed validly delivered to Landlord) **"YOUR FAILURE TO REIMBURSE TENANT AS REQUIRED HEREIN WITHIN TEN (10) DAYS SHALL ENTITLE THE UNDERSIGNED TO EXERCISE CERTAIN OFFSET RIGHTS AS SET FORTH IN THE LEASE WITHOUT FURTHER NOTICE "** If Landlord fails to pay to Tenant the amount due to Tenant within ten (10) days following Landlord's receipt of the Second Demand, then Tenant may offset from the next installments of Minimum Rent the full amount owed by Landlord to Tenant (together with all accrued interest), provided, however, that (i) the amount of offset during any single month shall not exceed the greater of (A) twenty five percent (25%) of the total Minimum Rent payable by Tenant to Landlord for such month or (B) the amount necessary to fully amortize Tenant's cost of cure from the date of completion of such cure to the expiration date of the Term (without regard to any unexercised renewal options), but if so required by a third-party lender, not greater than thirty percent (30%) of the total Minimum Rent for any one month, and (ii) Landlord is not then contesting by court action or by mediation or arbitration proceeding the amounts Tenant is intending to offset (or having contested same, a judgment, decision or ruling in such action, mediation or arbitration has been rendered in favor of Landlord). If Tenant is the defaulting party and fails to reimburse Landlord within ten (10) days after its receipt of written notice, then, without limiting Landlord's remedies for default, the amount due shall accrue interest at the Interest Rate until Landlord has been completely reimbursed for its expenses. Tenant shall have no right to cure any default hereunder unless and until Tenant has given not less than thirty (30) days' prior written notice of such default to the holder of any mortgage or deed of trust on the Premises or the Shopping Center of which Tenant has received notice from Landlord and such holder fails to cure or cause Landlord to cure said default.

In the event of emergencies, or where necessary to prevent injury to persons or damage to property, either party may cure a default by the other before the expiration of the prescribed notice period, but after giving such written or oral notice to the other party as is practical under all of the circumstances.

#### ARTICLE XIV DEFAULT

14.1 Remedies Upon Tenant's Default In the event Tenant (i) does not pay Minimum Rent, additional rent or other charges actually owing pursuant to the provisions of this Lease within ten (10) days of the date due, (ii) does not cure any other breach hereunder within thirty (30) days after receipt of written notice from Landlord specifying the reason for such alleged breach (provided, however, if such breach is incapable of being cured in a reasonable manner within thirty (30) days, Tenant shall not be deemed in default so long as it commences to cure the breach within said thirty (30) day period and thereafter diligently prosecutes the same to completion), (iii) becomes bankrupt (the parties hereto agreeing, however, that Tenant shall not be deemed in default if it dismisses any involuntary bankruptcy hereunder within sixty (60) days of its filing) or files any debtor proceeding or if Tenant shall take action or have action taken against Tenant for the appointment of a receiver for all or a portion of Tenant's assets, or if Tenant shall file a petition for corporate reorganization, or shall make an assignment for the benefit of creditors, then Tenant shall be deemed in default hereunder. In the event of any default of Tenant hereunder, Landlord shall be entitled, at its election, to exercise concurrently or successively, any one or more of the following rights, in addition to all remedies otherwise provided in this Lease and otherwise available in law or equity under the Laws of the United States or the State in which the Shopping Center is located.

(a) Landlord shall have the right to terminate this Lease upon an additional ten (10) business days' written notice to Tenant of Landlord's election to so terminate. If Tenant cures the default within ten (10) business days following receipt of such notice from Landlord, this Lease shall continue in full force and effect, however, should Tenant fail to cure the default within said ten (10) business day period, this Lease shall terminate on the date set forth in Landlord's notice. Upon such termination, Landlord shall have all the rights and remedies of a landlord provided by applicable law, including the right to recover from Tenant (i) the worth at the time of award, of the unpaid rent that had been earned at the time of termination, (ii) the worth at the time of award, of the amount by which the unpaid rent that would have been earned after the date of termination until the time of award exceeds the amount of loss of rent that Tenant proves could have been reasonably avoided, (iii) the worth, at the time of award, of the amount by which the unpaid rent for the balance of the Term after the time of award exceeds the amount of the loss of rent that Tenant proves could have been reasonably avoided, and (iv) any other amount, and court costs, necessary to compensate Landlord for all detriment proximately caused by Tenant's default. The phrase "worth, at the time of award," as used in (i) and (ii) above shall be computed at the Interest Rate, and as used in (iii) above, shall be computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus one percent (1%).

(b) bring suit for the collection of the rent or other amounts for which Tenant may be in default, or for the performance of any other covenant or agreement devolving upon Tenant, all without entering into possession or terminating this Lease,

(c) reenter the Premises with process of law and take possession thereof, without thereby terminating this Lease, and thereupon Landlord may expel all persons and remove all property therefrom, without becoming liable to prosecution therefor, and relet the Premises and receive the rent therefrom, applying the same first to the payment of the reasonable expenses of such reentry and the reasonable cost of such reletting, and then to the payment of the monthly rental accruing hereunder, the balance, if any, to be paid to Tenant. Tenant shall remain liable for any deficiency after such application. Landlord shall use its reasonable efforts to relet the Premises and mitigate Tenant's damages hereunder. The commencement and prosecution of any action by Landlord in forcible entry and detainer, ejectment or otherwise, or the appointment of a receiver, or any execution of any decree obtained in any action to recover possession of the Premises, or any reentry, shall not be construed as an election to terminate this Lease unless Landlord shall, in writing, expressly exercise its election to declare the Term hereunder ended and to terminate this Lease, and, unless this Lease be expressly terminated, such reentry or entry by Landlord, whether had or taken under summary proceedings or otherwise, shall not be deemed to have absolved or discharged Tenant from any of its obligations and liabilities for the remainder of the term of this Lease,

(d) Tenant hereby expressly waives any and all rights of redemption granted by or under any present or future Laws in the event of Landlord's obtaining possession of the Premises by reason of the breach or violation by Tenant of any of the covenants and conditions in this Lease contained

**14.2 Remedies Upon Landlord's Default** In the event that Landlord shall at any time be in default in the observance or performance of any of the covenants and agreements required to be performed and observed by Landlord hereunder and any such default shall continue for a period of thirty (30) days after written notice to Landlord and any mortgagee of Landlord whose name and address are given to Tenant in writing (or if such default is incapable of being cured in a reasonable manner within thirty (30) days, then if Landlord has not commenced to cure the same within said thirty (30) day period and thereafter diligently prosecutes the same to completion), then Tenant shall be entitled, at its election, to exercise concurrently or successively, any one or more of the following rights, in addition to all remedies (other than termination of the Lease) otherwise provided in this Lease and otherwise available in law or equity under the Laws of the United States or the State in which the Shopping Center is located

- (1) sue for injunctive relief, and/or
- (2) sue for specific performance and/or
- (3) sue for damages, and/or



(4) In addition to the above, Tenant shall have the remedy set forth in Article XIII if Landlord fails to perform any obligation under this Lease. Any work performed by or on behalf of Tenant in conjunction with the exercise of Tenant's rights under Article XIII shall be performed in compliance with Laws by licensed, bonded contractors, in a good and workmanlike manner and in a manner so as not to affect any then existing warranties pertaining to the matter to which the work relates. Nothing contained in this Article XIV or elsewhere in this Lease shall be interpreted to mean that Tenant shall be excused from paying rent or any other amount due under this Lease in the event of any alleged default by Landlord. Notwithstanding anything to the contrary contained elsewhere in this Lease, in no event shall Tenant be entitled to recover consequential damages as a result of a default by Landlord under this Lease.

14.3 Attorney's Fees In the event that either Landlord or Tenant commences any suit for the collection of any amounts for which the other may be in default or for the performance of any other covenant or agreement hereunder, the other party shall pay all attorneys' fees and other expenses incurred by the prevailing party enforcing such obligations and/or collecting such amounts, plus interest thereon at the highest legal rate not to exceed twelve (12%) percent per annum.

14.4 Cumulative Remedies All remedies of Landlord and Tenant herein created or remedies otherwise existing at law or equity are cumulative and the exercise of one or more rights or remedies shall not be taken to exclude or waive the right to the exercise of any other, it being specifically agreed and understood that in no event shall an acceleration of rent or other charges ever be permitted in connection with this Lease. All such rights and remedies may be exercised and enforced concurrently and whenever and as often as Landlord and Tenant shall deem necessary.

#### ARTICLE XV COVENANT OF QUIET ENJOYMENT

15.1 Quiet Enjoyment Upon Tenant's payment of Minimum Rent and additional rental and its observation and performance of all of the covenants, terms and conditions of this Lease to be observed and performed by Tenant, Landlord covenants and warrants Tenant shall peaceably and quietly hold and enjoy the Premises from and after delivery thereof to Tenant, subject, however, to (a) the rights of the parties as set forth in this Lease, (b) any mortgage or deed of trust to which this Lease is hereafter subordinate (provided Tenant receives a nondisturbance agreement from the holder thereof as required under Section 16.1), (c) any exceptions of record.

#### 15.2 Environmental Matters

(a) Hazardous Substances Generally Except as may be set forth in the Phase I environmental report prepared by ERM and dated November, 2000, which Landlord has provided to Tenant ("Phase I Report"), Landlord has received no notice of, nor is the Landlord aware of, the existence of any areas in the Shopping Center where any "Hazardous Substances" (defined below in Subsection 15.2[D]) have been generated, disposed of, released or found. Except as may be set forth in the Phase I Report, Landlord has no knowledge of the existence of any such areas for the storage or disposal of any Hazardous Substances in the Shopping Center.

(b) Omitted

(c) Indemnity Landlord shall be solely responsible for and shall indemnify, defend (by counsel reasonably acceptable to Tenant), and hold Tenant harmless from any and all claims, actual damages, fines, judgments, penalties, costs, liabilities or losses (including, without limitation, a decrease in the value of Tenant's interest in and to the Premises, damages caused by loss or restriction of rentable or usable space and any and all sums paid for settlements of claims, attorneys' fees, and consultant and expert fees) arising during or after the Term which result from the breach by Landlord of the representations made in Section 15.2(a) and (b) above, or the leakage, spillage, discharge, or release of any Hazardous Substances caused by Landlord.

(d) Definition "Hazardous Substances" shall mean and include any of the substances, materials, elements or compounds that are contained in the list of hazardous substances adopted by the United States Congress or the EPA or any substances, materials, elements or compounds affected by any other federal, state or local statute, law, ordinance, code,

rule, regulation, order or decree now or at any time hereafter in effect, regulating, relating to, or imposing liability or standards of conduct concerning any hazardous, toxic, dangerous, restricted or otherwise regulated waste, substance or material

(e) Tenant, at its sole cost and expense, shall comply with all Laws relating to the storage, use, handling and disposal of Hazardous Substances. In the event Tenant intends or does store, use, handle or dispose of any Hazardous Substances (other than those customarily handled or sold in supermarkets), Tenant shall notify Landlord in writing at least 10 days prior to their first appearance on the Premises and Tenant's failure to do so shall constitute a default under the Lease. Such notification shall include identification (type and common name) and quantities of all Hazardous Substances, or any combination thereof, which are or are intended to be stored, used, handled or disposed of on, under or about the Premises. Landlord may, if Landlord has reasonable grounds to believe a release of Hazardous Substances has occurred due to Tenant, its contractors, agents or employees, require Tenant to conduct monitoring or evaluation activities with respect to Hazardous Substances on the Premises, at Landlord's sole discretion, and at Tenant's sole cost and expense, performed by environmental specialists approved in advance by Landlord. Such monitoring and/or evaluation activity may include, without limitation, soil testing, air testing, production waste stream analysis, and if necessary, in Landlord's sole discretion, groundwater testing. In the event Tenant intends to store, use, handle or dispose of Hazardous Substances (other than those customarily handled or sold by first class supermarkets), Tenant shall complete, execute and deliver to Landlord an Environmental Questionnaire and Disclosure Statement, in Landlord's then current form ("Environmental Questionnaire"), prior to the execution of this Lease or ten (10) days prior to the first appearance of the Hazardous Substances on the Premises. The completed Environmental Questionnaire shall be deemed incorporated into this Lease for all purposes, and Landlord shall be entitled to rely fully on the information reasonably contained therein. Tenant shall update and resubmit to Landlord the Environmental Questionnaire periodically as reasonably required by Landlord and immediately if Hazardous Substance changes occur in the nature or content of Hazardous Substances being stored, used, handled or disposed of on the Premises.

Tenant shall promptly notify Landlord of, and shall promptly provide Landlord with, true, correct, complete and legible copies of, any environmental reports or notices relating to the Premises which may be filed or prepared by or on behalf of or delivered to or served upon, Tenant, including but not limited to reports filed pursuant to any self-reporting requirements, reports filed pursuant to any applicable Laws or this Lease, all permit applications, permits, monitoring reports, workplace exposure and community exposure warnings or notices and all correspondence and other documents associated with actual or threatened investigation or enforcement action by any governmental entity or third party. In addition, Tenant shall promptly notify Landlord of, and shall promptly provide Landlord with, true, correct, complete and legible copies of environmental items relating to the Premises which may be filed or prepared by or on behalf of, or delivered to or served upon, Tenant. In the event of a release of any Hazardous Substance on the Premises or to the environment from the Premises, Tenant shall promptly notify Landlord and provide Landlord with copies of all reports and correspondence with or from all governmental agencies, authorities or any other persons relating to such release or threatened release.

(f) "Landlord" as used in this Section shall have the same meaning as in Section 10.6. Tenant shall be solely responsible for, shall pay for, defend (with an attorney reasonably acceptable to Landlord), indemnify and hold Landlord harmless against and from all claims, judgments, liabilities, penalties, costs and expenses, including attorneys' fees and costs arising out of or connected with its storage, use, handling or disposal of Hazardous Substances on the Premises. In addition, except with respect to any Hazardous Substances installed in or placed on the Premises by Landlord or any agent, employee or contractor of Landlord, Tenant shall be solely responsible for, shall pay for, defend, indemnify and hold Landlord, and the Premises harmless against and from all claims, judgments, liabilities, penalties, liens, costs and expenses, including attorneys' fees and costs, arising out of or connected with the removal, clean-up and/or restoration work and Substances necessary to return the Premises, and any other property of whatever nature, to their condition existing prior to the appearance of the Hazardous Substances on the Premises if and to the extent such Hazardous Substances were caused by Tenant, its employees, contractors, agents or invitees. Tenant's obligations under this Section 15.2 shall survive the expiration or earlier termination of the Lease.

In the event any Hazardous Substances are released in the Shopping Center which are not caused by Tenant, its employees, contractors, agents or invitees, Landlord shall, if and to the extent required by law and in accordance with the regulations thereof, remediate or cause to be remediated such Hazardous Substances

#### ARTICLE XVI SUBORDINATION

16.1 Subordination and Attornment If Landlord encumbers the Premises with any deed to secure debt, lien, or other security interest affecting the Premises which is superior to this Lease, Landlord shall provide to Tenant within thirty (30) days thereafter, and Tenant shall execute, a written agreement, substantially in the form and content as the agreement attached hereto as Exhibit "C" or otherwise in commercially reasonable form and substance reasonably acceptable to Tenant and its counsel, which provides, among other things, that so long as Tenant is not in default under the terms of this Lease (i.e., beyond any applicable cure periods designated in this Lease or otherwise granted by Landlord), the lender shall not disturb the continued peaceful and quiet enjoyment by Tenant of the Premises and the Common Areas, this Lease shall remain in full force and effect, even if the lender (or a subsequent purchaser at a judicial or non-judicial foreclosure proceeding) becomes the landlord under this Lease by means of foreclosure or otherwise. Additionally, Tenant shall, upon the written request of Landlord, subordinate this Lease to the deed to secure debt, lien, or other security interest of any future mortgagee (a "Future Lender") of the Premises or the Shopping Center, provided that such Future Lender shall enter into a written agreement with Tenant substantially in the form attached hereto as Exhibit "C" or otherwise in a commercially-reasonable form and substance reasonably acceptable to Tenant and its counsel. Should Landlord sell, convey or transfer its interest in the Shopping Center or should any mortgagee of Landlord succeed to Landlord's interest through foreclosure or deed in lieu thereof, then Tenant shall attorn to such succeeding party as its landlord under this Lease promptly upon any such succession, provided that such succeeding party assumes all of Landlord's duties and obligations under this Lease.

#### ARTICLE XVII TRANSFERS BY LANDLORD

17.1 Transfers of Landlord's Interest No transfer or sale of Landlord's interest hereunder shall release Landlord from any of its obligations or duties hereunder arising prior to the date of such transfer. Landlord shall be released of any ongoing obligations hereunder from and after the date of such transfer upon the assumption of all such ongoing obligations and duties by the transferee of Landlord, provided, however, that in no event shall Landlord have the right to transfer or sell its interest hereunder prior to the Delivery Date, except to an entity which controls, is controlled by or is under common control with Landlord or Catellus Development Corporation. Should Landlord sell, exchange or assign this Lease (other than a conditional assignment as security for a loan), then Landlord, as transferor, shall be relieved of any and all obligations on the part of Landlord accruing under this Lease from and after the date of such transfer provided that Landlord's successor in interest shall assume such obligations from and after such date.

17.2 Landlord's Liability If Landlord fails to perform any of the covenants, provisions or conditions contained in this Lease on its part to be performed within 30 days after written notice of default (or if more than 30 days shall be required because of the nature of the default, if Landlord shall fail to diligently proceed to commence to cure the default after written notice), then Landlord shall be liable to Tenant for all damages sustained by Tenant as a result of Landlord's breach and Tenant shall not be entitled to terminate this Lease as a result thereof. It is expressly understood and agreed that any judgment against Landlord resulting from any default or other claim under this Lease shall be satisfied only out of Landlord's interest in the Shopping Center and the net rents, issues, profits and other income actually received from the operation of the Shopping Center, and Tenant shall have no claim against Landlord (as Landlord is defined in Section 10.6) or any of Landlord's personal assets for satisfaction of any judgment with respect to this Lease, unless such judgment is for fraud or misappropriation of insurance proceeds.

17.3 Cure by Lender If any part of the Premises is at any time subject to a mortgage or a deed of trust and this Lease or the rentals due from Tenant hereunder are assigned to a mortgagee, trustee or beneficiary (called "Lender" for purposes of this Article XVII only) and Tenant is given written notice of the assignment, including the post office address of Lender,

then Tenant shall also give written notice of any default by Landlord to Lender, specifying the default in reasonable detail and affording Lender the same opportunity as Landlord to make performance for and on behalf of Landlord

ARTICLE XVIII  
MISCELLANEOUS

18.1 Holding Over, Surrender In the event of Tenant's continued occupancy of the Premises after the expiration of the Term of this Lease or any renewal or extension thereof, such tenancy shall be from month-to-month and such continued occupancy shall not defeat Landlord's right to possession of the Premises. All other covenants, provisions, obligations and conditions of this Lease shall remain in full force and effect during such month-to-month tenancy except that Minimum Rent shall be equal to one hundred twenty five percent (125%) of the Minimum Rent in effect immediately prior to such holding over. This paragraph shall not be construed as Landlord's permission for Tenant to hold over. Acceptance of rent by Landlord following expiration or termination shall not constitute a renewal of this Lease or extension of the Term except as specifically set forth above. If Tenant fails to surrender the Premises upon expiration or earlier termination of this Lease, Tenant shall indemnify and hold harmless Landlord from and against all loss or liability resulting from or arising out of Tenant's failure to surrender the Premises, including, but not limited to, any amounts required to be paid to any tenant or prospective tenant who was to have occupied the Premises after the expiration or earlier termination of this Lease and any related reasonable attorneys' fees and brokerage commissions.

Upon the termination of this Lease or Tenant's right to possession of the Premises, Tenant will surrender the Premises, together with all keys, in good condition and repair, reasonable wear and tear excepted. Conditions existing because of Tenant's failure to perform maintenance, repairs or replacements required by the terms of this Lease shall not be deemed "reasonable wear and tear."

18.2 Non-Waiver of Default No acquiescence by either party to any default by the other party hereunder shall operate as a waiver of its rights with respect to any other breach or default, whether of the same or any other covenant or condition, nor shall the acceptance of rent by Landlord at any time constitute a waiver of any rights of Landlord.

18.3 Recording This Lease shall not be recorded. A short form or memorandum of this Lease in a form substantially similar to the form attached hereto as Exhibit "D", shall be prepared by Tenant, at Tenant's expense, executed by Landlord, and recorded by Tenant, at Tenant's expense no sooner than the date all contingencies of Landlord and Tenant have been satisfied.

18.4 Notice Any notice or consent required to be given by or on behalf of either party to the other shall be in writing and mailed by registered or certified mail, (return receipt requested with postage prepaid) or sent by air courier, expedited mail service or overnight national delivery service providing receipted delivery, addressed to the other party as follows:

- |                    |   |
|--------------------|---|
| (a) If to Tenant   | Fleming Companies, Inc<br>5701 North Shartel<br>Oklahoma City, OK 73118<br>Attention: Lease Administration                  |
| With a copies to   | Fleming Companies, Inc<br>1945 Lakepointe Drive<br>Lewisville, TX 75022<br>Attention: Vice President, Retail Development    |
| (b) If to Landlord | Catellus Commercial Group, LLC<br>165 South Union Boulevard, Suite 852<br>Lakewood, Colorado 80228<br>Attention: Katy Press |
| with a copy to     | Catellus Commercial Group LLC<br>201 Mission Street, 2nd Floor  |

San Francisco, California 94105  
Attention Office of General Counsel

or at such other address as may be specified from time to time in writing by either party All such notices hereunder shall be deemed to have been given on the date marked on the return receipt or delivery confirmation unless delivery is refused or cannot be made, in which case the date of postmark or attempted delivery by the carrier, as applicable, shall be deemed the date notice has been given

18 5 Successors and Assigns All covenants, promises, conditions, representations, and agreements herein contained shall be binding upon, apply, and inure to the parties hereto and their respective heirs, executors, administrators, successors, and permitted assigns

18 6 Time is of the Essence The time of the performance of all of the covenants, conditions, and agreements of this Lease is of the essence of this Agreement

18 7 Partial Invalidity If any provision of this Lease or the application thereof to any person or circumstance shall to any extent be held invalid, then the remainder of this Lease or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby, and each provision of this Lease shall be valid and enforced to the fullest extent permitted by law

18 8 Interpretation, Entire Agreement In interpreting this Lease in its entirety, the printed provisions of this Lease and any additions written or typed thereon shall be given equal weight, and there shall be no inference, by operation of law or otherwise, that any provision of this Lease shall be construed against either party hereto This Lease, including but not limited to the Exhibits appended hereto, constitutes the entire and complete agreement of Landlord and Tenant regarding the subject matter hereof The Exhibits are incorporated into this Lease by reference This Lease may not be amended except by a writing signed by both Landlord and Tenant

18 9 Headings, Captions and References The captions of Articles, Sections, subsections and Paragraphs are for convenience only and do not in any way limit or amplify any term or provision hereof The use of the terms "hereof," "hereunder" and "herein" shall refer to this Lease as a whole, inclusive of the Exhibits, except when noted otherwise, it being understood that this Lease shall not be binding upon the parties hereto until such time as all Exhibits are mutually agreed upon by the parties and attached hereto The use of the masculine or neuter genders herein shall include the masculine feminine and neuter genders and the singular form shall include the plural when the context so requires

18 10 Brokerage Commissions Both Landlord and Tenant represent that they have dealt with no other brokers ("Brokers") other than Phoenix Commercial Advisors ("PCA") representing Landlord and Progressive Realty, Inc ("PRI") representing Tenant in connection with the negotiation, execution and delivery of this Lease Landlord agrees to pay to the Brokers the following commissions to PCA a commission equal to Two Dollars (\$2 00) per square foot in the Premises and to PRI a commission equal to One Dollar (\$1 00) per square foot in the Premises The commissions shall be payable fifty percent (50%) upon signing of the Lease and satisfaction or waiver of all contingencies of Landlord and Tenant contained herein, and the remaining fifty percent (50%) upon payment of the first month's Minimum Rent by Tenant If any person other than the Broker shall assert a claim to a finder's fee, brokerage commission or other compensation on account of alleged employment as finder or broker or performance of services as a finder or broker in connection with this transaction, the party against whom the finder or broker is claiming shall indemnify and hold the other party harmless from and against any such claim and all costs, expenses and liabilities incurred in connection with such claim or any action or proceeding brought thereon, including but not limited to attorneys' fees and court costs in defending such claim

18 11 Governing Law This Lease shall be construed under the Laws of the state in which the Shopping Center is located

18 12 Estoppel Certificates As often as may be requested by a party, the other party shall promptly and without cost, execute and deliver to the requesting party, to its mortgagees,

and/or any other designee, a written estoppel certificate with respect to the Premises and/or this Lease in a form reasonably acceptable to the requesting party

18 13 Unavoidable Delay In the event that either party shall be delayed or hindered in, or prevented from, the performance of any work, service, or other act required under this Lease to be performed by the party and such delay or hindrance is due to strikes, lockouts acts of God, governmental restrictions, enemy act, civil commotion, unavoidable fire or other casualty or other causes of a like nature beyond the control of the party so delayed or hindered ("Unavoidable Delay(s)"), then performance of such work, service, or other act shall be excused for the period of such Unavoidable Delay and the period for the performance of such work, service, or other act shall be extended for a period equivalent to the period of such delay In no event shall such Unavoidable Delay constitute a termination or extension of this Lease The provisions of this Article shall not operate to excuse Tenant from the prompt payment of rent and other charges as due under the provisions hereof

18 14 Notice to Mortgagee Tenant hereby agrees to send a copy of any notice or demand given or made to Landlord, its successors or assigns, pursuant to the provisions of this Lease, which notice involves the invoking of any of Tenant's remedies under the Lease, to the Mortgagee of the Shopping Center (upon being notified in writing at least thirty [30] days in advance of such Mortgagee's name and address) on the same date any such notice or demand is sent to Landlord, its successors or assigns, giving to the Mortgagee or its assignee the same right to cure any default complained of in any said notice or demand as the Landlord has under this Lease, it being agreed that said Mortgagee or its assignee shall be entitled to the benefits of the force majeure provisions of Section 18 13 of the Lease

18 15 Reciprocal Easement Agreement ("REA") Landlord covenants and agrees to impose an REA on the Shopping Center and "Pad 4," as shown on the Site Plan (the "Outparcel"), prior to or simultaneous with any sale of the Outparcel, which REA shall provide, without limitation, for (a) an overall parking ratio for the Shopping Center of 5 0 spaces per 1,000 square feet of GLA, (b) development and use restrictions which shall limit the construction to be performed on the Outparcel to the construction of one building of one story and no more than twenty-one (21) feet in height plus an additional four (4) feet for architectural elements, features and towers, and (c) the enforcement of each of the terms and provisions of this Lease insofar as the same are applicable by their terms to the Outparcel, including, without limitation, the obligations of Landlord contained in Section 8 2 and 8 3 of the Lease The REA shall be subject to Tenant's prior approval which approval Tenant agrees not to unreasonably withhold or delay provided the REA satisfies the requirements of this Section From and after such time as Landlord imposes the REA upon the Shopping Center and the Outparcel, Landlord covenants and agrees that (a) the REA shall not be amended or modified in any manner which materially affects Tenant's rights thereunder without the prior written consent of Tenant, (b) Landlord hereby grants, assigns and conveys to Tenant on a non-exclusive basis during the term of this Lease all of the cross-easements and other rights to be contained in the REA, with the same force and effect as if said rights had been granted directly to Tenant, and (c) Landlord agrees to use all reasonable efforts to enforce the cross-easement rights and other rights to be contained in the REA on Tenant's behalf, and if Landlord fails to enforce said rights on Tenant's behalf within thirty (30) days after written notice thereof from Tenant, Landlord agrees that Tenant shall have the right to enforce said rights on Tenant's behalf under the REA directly Prior to the sale of the Outparcel and creation of the REA, Landlord shall be bound by the restrictions set forth in clause (b) of this Section 18 15, in addition to all other provisions of this Lease which pertain to the Outparcel

18 16 Merchant's Association Tenant shall not be required at any time during the Term of this Lease to join, participate in or contribute to a merchants' association, joint advertising or promotional fund or any similar program, however described or denominated

18 17 Trash Removal Each tenant in the Shopping Center shall pay for the removal of the trash generated by such tenant in the operation of its business, and such cost shall not be included in Common Area Costs Landlord shall ensure that all such trash is secured in appropriate containers behind the Shopping Center Tenant shall have the right to negotiate and hire a trash removal company for trash generated at the Premises

18 18 [Intentionally Omitted]

18 19 Interest on Past Due Obligations The term "Interest Rate," as used in this Lease, shall mean the rate per annum equal to the reference rate of the Bank of America National Trust and Savings Association or its successors from time to time in effect plus 2% During the period of any delinquency the Interest Rate shall be adjusted quarterly In no event shall the rate of interest hereunder be greater than the highest rate then allowable by law

18 20 Trade Fixtures, Personal Property and Alterations Upon the expiration or earlier termination of the Term, Tenant shall remove Tenant's movable trade fixtures, furniture, equipment and signs, at Tenant's sole cost and expense and immediately repair any damage occasioned to the Premises by reason of such removal so as to leave the Premises in a neat and clean condition Tenant may encumber or finance its moveable fixtures and equipment installed on the Premises No such encumbrance or financing shall be deemed an Assignment, provided such encumbrance or financing creates a security interest in such moveable fixtures and equipment only Landlord agrees to execute, upon Tenant's request, Landlord's standard form Owner's Waiver and Consent covering such moveable fixtures and equipment

18 21 Waiver of Trial by Jury Landlord and Tenant desire and intend that any disputes arising between them with respect to or in connection with this Lease be subject to expeditious resolution in a court trial without a jury Therefore, Landlord and Tenant each hereby waive the right to trial by jury of any cause of action, claim, counterclaim or cross-complaint in any action, proceeding or other hearing brought by either Landlord against Tenant or Tenant against Landlord on any matter whatsoever arising out of, or in any way connected with, this Lease, the relationship of Landlord and Tenant, Tenant's use or occupancy of the Premises or any claim of injury or damage, or the enforcement of any remedy under any law, statute, or regulation, emergency or otherwise, now or hereafter in effect

18 22 Past Due Sums Unless otherwise specifically provided in this Lease, any amount due from one party to the other under this Lease which is not paid when due, and any amount due as reimbursement to a party hereunder for costs incurred by such party in performing the obligations of the other upon such party's failure to perform, shall bear interest at the Interest Rate from the date due to and including the date of payment

18 23 Confidentiality Tenant and Landlord shall keep the terms of this Lease confidential, provided, however, Tenant and Landlord may disclose such terms (i) to their attorneys, accountants, lenders, prospective lenders, partners, prospective partners, contractors and architects, (ii) to the extent required by law, and (iii) to the extent necessary to obtain approvals and permits, and (iv) Mortgagees Subject to the preceding sentence, any public announcements pertaining to this Lease shall be subject to Landlord's or Tenant's, as applicable, prior written approval Tenant shall notify Landlord within a reasonable amount of time before any public announcement

18 24 Rules and Regulations Tenant shall comply with such reasonable nondiscriminatory rules and regulations as Landlord may from time to time prescribe for the Shopping Center, provided such rules and regulations are non-discriminatory and do not adversely affect Tenant's rights under this Lease or its ability to operate its business in the Premises

18 25 Acquisition of Shopping Center The effectiveness of this Lease is contingent upon Landlord acquiring title to the land underlying the Shopping Center If Landlord has not acquired such title on or before June 15, 2001, either party may terminate this Lease by providing written notice to the other party prior to Landlord's acquisition of said title

18 26 Street Widening Tenant understands that Pima County is currently planning to widen both Orange Grove Road and La Cholla Boulevard, with construction currently anticipated to begin in late 2002 with completion in late 2003 Tenant also understands that, in connection with said street widening, the County may construct medians such that automobile ingress into and egress from the Shopping Center is available only by making a right turn, except with respect to the easternmost entrance to the Shopping Center, as depicted in Exhibit G hereto, as agreed by Pima County pursuant to the terms of the letter dated May 16, 2001 from Benjamin H Goff to Mark Evans, a copy of which is attached as part of Exhibit G Landlord will use good faith efforts to attempt to persuade the County not to so limit ingress and egress to right turns Landlord will also work in good faith with Tenant and the County to attempt to reasonably minimize any adverse effects (e.g. reductions in access) to the Shopping Center and/or the

Premises caused by the street widening during the period of construction thereof Notwithstanding the foregoing, Tenant acknowledges that such adverse effects during construction and/or such limitation on ingress/egress to right turns only may occur, and neither will constitute a breach by Landlord of this Lease nor a basis for any abatement of rent hereunder

IN WITNESS WHEREOF this Lease has been executed under seal as of the day and year first above written

LANDLORD

CATELLUS COMMERCIAL GROUP, LLC  
a Delaware limited liability company

By Ray C. Pittman  
Name Ray C Pittman  
Title Senior V P

TENANT

FLEMING COMPANIES, INC ,  
an Oklahoma corporation

By Charles L. Hall  
Name Charles L. Hall  
Title Senior Vice President



## SCHEDULE I

Subject to any adjustment made pursuant to Article II, annual Minimum Rent for the first five (5) Lease Years shall be \$9 85 per square foot, i e , \$504,743 55 based on approximately 51,243 square feet of floor area in the Premises. Thereafter, subject to the maximum Minimum Rent rates specified below, Minimum Rent shall be adjusted as follows. Effective on the fifth (5th) anniversary of the Commencement Date and every fifth (5th) year thereafter (the "CPI Adjustment Date(s)"), the Minimum Rent in effect immediately before each CPI Adjustment Date shall be increased in accordance with twice the percentage increase, if any, in the Index (as hereinafter defined), to an amount which is equal to the product of (i) two times the Index for the fourth (4th) month preceding the month in which the applicable CPI Adjustment Date occurs, multiplied by (ii) the Minimum Rent which was in effect immediately prior to the applicable CPI Adjustment Date, divided by (iii) the Basic Index (as hereinafter defined), provided, however, in no event shall the Minimum Rent in effect after any CPI Adjustment Date be less than the Minimum Rent in effect immediately preceding the CPI Adjustment Date or more than the maximum Minimum Rent rate specified below for the applicable period. The parties intend that the foregoing equation result in a compounding of adjustments to Minimum Rent. The "Index" shall mean the Consumer Price Index, All Items, 1982-1984 = 100, All Urban Consumers, for the Los Angeles/Anaheim/Riverside, California Area, as published by the United States Department of Labor, Bureau of Labor Statistics, or its successor index, and the "Basic Index" shall mean the Index published for the fourth (4th) month preceding the month in which the Commencement Date occurs. In the event the compilation or publication of the Index shall be transferred to any other governmental department, bureau or agency or shall be discontinued, the index most nearly the same as the Index shall be used to make such calculation.

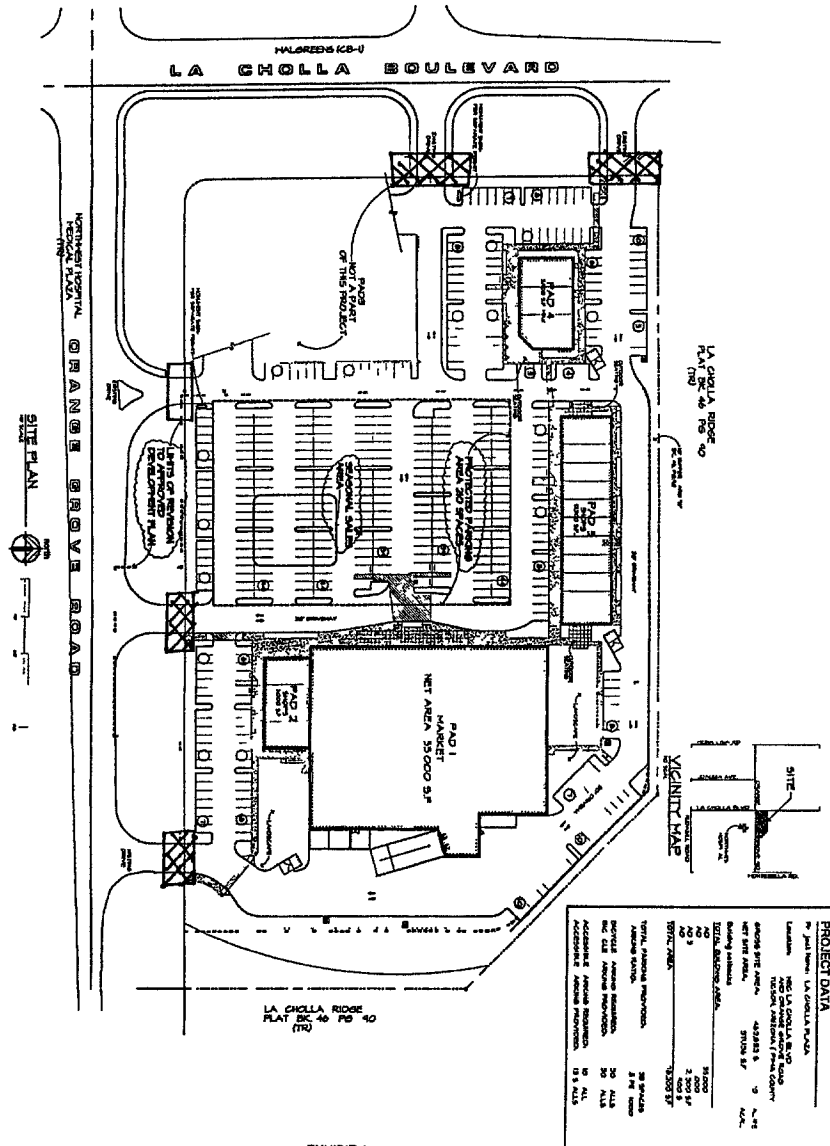
### Initial Term

<u>Lease Years</u>	Maximum Minimum Rent per Square Foot
1-5	\$9 85
6-10	\$10 10
11-15	\$10 35
16-20	\$10 60

### Option Terms

<u>Lease Years</u>	Maximum Minimum Rent per Square Foot
21-25	\$10 85
26-30	\$11 10
31-35	\$11 35
36-40	\$11 60
41-45	\$11 85
46-50	\$12 10

## SITE PLAN

EXHIBIT A  
SITE PLAN[illegible]

**EXHIBIT "B"**

**LEGAL DESCRIPTION OF SHOPPING CENTER**

Blocks 1, 2 and 3 of La Cholla Ridge according to the plat of record in the office of the County Recorder of Pima County, Arizona, in Book 46 of Maps, Page 90, and amended by Declaration of Scriveners Error recorded July 17, 1995 in Docket 10086, Page 289 and recorded July 12, 1996 in Docket 10335, Page 47

Excepting therefrom

A portion of Blocks 1 and 2 of La Cholla Ridge according to the plat of record in the office of the County Recorder of Pima County, Arizona, in Book 46 of Maps, Page 90, and amended by Declaration of Scriveners Error recorded July 17, 1995 in Docket 10086, Page 289 and recorded July 12, 1996 in Docket 10335, Page 47, also lying within the Southwest quarter of the Southwest quarter of Section 3, Township 13 South, Range 13 East of the Gila and Salt River Base and Meridian, Pima County, Arizona and more particularly described as follows

Commencing at a Brass Cap found flush at the intersection of Orange Grove Road and La Cholla Boulevard, also being the Southwest corner of said Section 3,

Thence North 00°06'17" West, along the West line of said Section 3, a distance of 363 44 feet,

Thence departing perpendicular to said West line, North 89°53'43" East, a distance of 100 00 feet to a point on the Easterly Right-of-Way line of La Cholla Boulevard, said point being the POINT OF BEGINNING,

Thence leaving said Easterly Right-of-Way line, North 89°53'17" East, a distance of 42 06 feet,

Thence South 00°06'43" East, a distance of 12 00 feet,

Thence North 89°53'17" East, a distance of 157 69 feet,

Thence South 00°06'43" East, a distance of 209 35 feet,

Thence North 89°53'17" East a distance of 32 00 feet,

Thence South 00°06'43" East, a distance of 42 11 feet to a point an the Northerly right-of-way line of Orange Grove Road,

Thence South 89°53'36" West along, adjoining and adjacent to said Right-of-Way, a distance of 206 78 feet to the beginning of a curve concave Northeasterly with a central angle of 90°00'07" and a radius of 25 00 feet,

Thence Northwesterly along the arc of said curve, an arc distance of 39 27 feet to a point on the Easterly Right-of-Way line of La Cholla Boulevard,

Thence North 00°06'17" West along, adjoining and adjacent to said Right-of-Way, a distance of 238 43 feet to the POINT OF BEGINNING

**EXHIBIT "C"**

RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO

[LENDER]

Real Estate Group (AU #[AU#])  
[OFFICE ADDRESS]  
Attention [LOAN ADMIN'S NAME]

Loan No [LOAN #]

*(Space Above For Recorder's Use)*

**SUBORDINATION AGREEMENT, ACKNOWLEDGMENT OF LEASE ASSIGNMENT,  
ESTOPPEL, ATTORNMENT AND NON-DISTURBANCE AGREEMENT  
(Lease To Deed of Trust)**

**NOTICE THIS SUBORDINATION AGREEMENT RESULTS IN YOUR LEASE  
BECOMING SUBJECT TO AND OF LOWER PRIORITY THAN THE LIEN OF  
THE DEED OF TRUST (DEFINED BELOW)**

THIS SUBORDINATION AGREEMENT, ACKNOWLEDGMENT OF LEASE  
ASSIGNMENT, ESTOPPEL, ATTORNMENT AND NON-DISTURBANCE AGREEMENT  
("Agreement") is made [DATE OF DOCUMENTS] by and between [TRUSTOR] ("Owner"),  
[NAME OF LESSEE] ("Lessee") and [LENDER] ("Lender")

**RECITALS**

A Pursuant to the terms and provisions of a lease dated [DATE OF LEASE]  
("Lease"), Owner, as "Lessor", granted to Lessee a leasehold estate in and to a portion of the  
property described on Exhibit A attached hereto and incorporated herein by this reference (which  
property, together with all improvements now or hereafter located on the property, is defined as  
(the "Property")

B Owner has executed, or proposes to execute, a deed of trust with absolute  
assignment of leases and rents, security agreement and fixture filing ("Deed of Trust") securing,  
among other things, a promissory note ("Note") in the principal sum of [LOAN AMOUNT IN  
WORDS]/100THS DOLLARS (\$[LOAN AMOUNT IN #S]), dated [DATE OF  
DOCUMENTS], in favor of Lender, which Note is payable with interest and upon the terms and  
conditions described therein ("Loan") The Deed of Trust is to be recorded concurrently  
herewith

D As a condition to making the Loan secured by the Deed of Trust, Lender requires  
that the Deed of Trust be unconditionally and at all times remain a lien on the Property, prior and  
superior to all the rights of Lessee under the Lease that the Lessee specifically and  
unconditionally subordinate the Lease and to the lien of the Deed of Trust

E Owner and Lessee have agreed to the subordination, attornment and other  
agreements herein in favor of Lender

NOW THEREFORE, for valuable consideration and to induce Lender to make the Loan,  
Owner and Lessee hereby agree for the benefit of Lender as follows

**SUBORDINATION** Owner and Lessee hereby agree that

**Prior Lien** The Deed of Trust securing the Note in favor of Lender, and any modifications,  
renewals or extensions thereof, shall unconditionally be and at all times remain a lien on the  
Property prior and superior to the Lease,

**Subordination** Lender would not make the Loan without this agreement to subordinate, and

Whole Agreement This Agreement shall be the whole agreement and only agreement with regard to the subordination of the Lease to the lien of the Deed of Trust and shall supersede and cancel, but only insofar as would affect the priority between the Deed of Trust and the Lease, any prior agreements as to such subordination, including, without limitation those provisions, if any, contained in the Lease which provide for the subordination of the Lease to a deed or deeds of trust or to a mortgage or mortgages

AND FURTHER, Lessee individually declares, agrees and acknowledges for the benefit of Lender, that

Use of Proceeds Lender, in making disbursements pursuant to the Note, the Deed of Trust or any loan agreements with respect to the Property, is under no obligation or duty to, nor has Lender represented that it will, see to the application of such proceeds by the person or persons to whom Lender disburses such proceeds, and any application or use of such proceeds for purposes other than those provided for in such agreement or agreements shall not defeat this agreement to subordinate in whole or in part,

Waiver, Relinquishment and Subordination Lessee intentionally and unconditionally waives, relinquishes and subordinates all of Lessee's right, title and interest in and to the Property to the lien of the Deed of Trust and understands that in reliance upon, and in consideration of, this waiver, relinquishment and subordination, specific loans and advances are being and will be made by Lender and, as part and parcel thereof, specific monetary and other obligations are being and will be entered into which would not be made or entered into but for such reliance upon this waiver, relinquishment and subordination

ASSIGNMENT Lessee acknowledges and consents to the assignment of the Lease by Lessor in favor of Lender

ESTOPPEL Lessee acknowledges and represents that

Lease Effective The Lease has been duly executed and delivered by Lessee and, subject to the terms and conditions thereof, the Lease is in full force and effect, the obligations of Lessee thereunder are valid and binding and there have been no modifications or additions to the Lease, written or oral,

No Default To the best of Lessee's knowledge, as of the date hereof (i) there exists no breach, default, or event or condition which, with the giving of notice or the passage of time or both, would constitute a breach or default under the Lease, and (ii) there are no existing claims, defenses or offsets against rental due or to become due under the Lease,

Entire Agreement The Lease constitutes the entire agreement between Lessor and Lessee with respect to the Property, Lessee claims no rights with respect to the Property other than as set forth in the Lease [and Lessee acknowledges that the Lease does not contain any option to purchase the Property or any right of first refusal with respect to the Property], and

No Prepaid Rent No deposits or prepayments of rent have been made in connection with the Lease, except as follows (if none, state "None")

ADDITIONAL AGREEMENTS Lessee covenants and agrees that, during all such times as Lender is the Beneficiary under the Deed of Trust

Modification, Termination and Cancellation Lessee will not consent to any modification or amendment or, except pursuant to the terms of the Lease, termination or cancellation of the Lease (in whole or in part) without Lender's prior written consent and will not make any payment to Lessor in consideration of any modification or, except pursuant to the terms of the Lease, termination or cancellation of the Lease (in whole or in part) without Lender's prior written consent,

Notice of Default Lessee will notify Lender in writing concurrently with any notice given to Lessor of any default by Lessor under the Lease, and Lessee agrees that Lender has the right (but not the obligation) to cure any breach or default specified in such notice within the time periods set forth below and Lessee will not declare a default of the Lease, as to Lender, if Lender cures such default within five (5) days from and after the expiration of the time period provided in the Lease for the cure thereof by Lessor, provided, however, that if such default cannot with

diligence be cured by Lender within such five (5) day period, the commencement of action by Lender within such five (5) day period to remedy the same shall be deemed sufficient so long as Lender pursues such cure with diligence,

No Advance Rents Lessee will make no payments or prepayments of rent more than one (1) month in advance of the time when the same become due under the Lease, and

Assignment of Rents Upon receipt by Lessee of written notice from Lender that Lender has elected to terminate the license granted to Lessor to collect rents, as provided in the Deed of Trust, and directing the payment of rents by Lessee to Lender, Lessee shall comply with such direction to pay and shall not be required to determine whether Lessor is in default under the Loan and/or the Deed of Trust

ATTORNNMENT Lessee agrees for the benefit of Lender (including for this purpose any transferee of Lender or any transferee of Lessor's title in and to the Property by Lender's exercise of the remedy of sale by foreclosure under the Deed of Trust) as follows

Payment of Rent Lessee shall pay to Lender all rental payments required to be made by Lessee pursuant to the terms of the Lease for the duration of the term of the Lease,

Continuation of Performance Lessee shall be bound to Lender in accordance with all of the provisions of the Lease for the balance of the term thereof, and Lessee hereby attorns to Lender as its landlord, such attornment to be effective and self-operative without the execution of any further instrument immediately upon Lender succeeding to Lessor's interest in the Lease and giving written notice thereof to Lessee,

No Offset Lender shall not be liable for, nor subject to, any offsets or defenses which Lessee may have by reason of any act or omission of Lessor under the Lease which occurs prior to the date on which title to the Property is transferred to Lender or Lender's transferee, nor for the return of any sums which Lessee may have paid to Lessor under the Lease as and for security deposits, advance rentals or otherwise, except to the extent that such sums are actually delivered by Lessor to Lender, and

Subsequent Transfer If Lender, by succeeding to the interest of Lessor under the Lease, should become obligated to perform the covenants of Lessor thereunder, then, upon any further transfer of Lessor's interest by Lender all of such obligations shall terminate as to Lender

NON-DISTURBANCE In the event of a foreclosure under the Deed of Trust, so long as there shall then exist no breach or default on the part of Lessee under the Lease, Lender agrees for itself and its successors and assigns that the leasehold interest of Lessee under the Lease shall not be extinguished or terminated by reason of such foreclosure, but rather the Lease shall continue in full force and effect and Lender shall recognize and accept Lessee as tenant under the Lease subject to the terms and provisions of the Lease

#### MISCELLANEOUS

Heirs, Successors, Assigns and Transferees The covenants herein shall be binding upon, and inure to the benefit of the heirs, successors and assigns of the parties hereto

Notices All notices or other communications required or permitted to be given pursuant to the provisions hereof shall be deemed served upon delivery or, if mailed, upon the first to occur of receipt or the expiration of three (3) days after deposit in United States Postal Service, certified mail, postage prepaid and addressed to the address of Lessee or Lender appearing below, provided, however, any party shall have the right to change its address for notice hereunder by the giving of written notice thereof to the other party in the manner set forth in this Agreement

"OWNER"

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

"LENDER"

[LENDER]  
Real Estate Group (AU #[AU #])  
[OFFICE ADDRESS]  
Attn [LOAN ADMIN'S NAME]

"LESSEE"

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Counterparts This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute and be construed as one and the same instrument

Remedies Cumulative All rights of Lender herein to collect rents on behalf of Lessor under the Lease are cumulative and shall be in addition to any and all other rights and remedies provided by law and by other agreements between Lender and Lessor or others

Paragraph Headings Paragraph headings in this Agreement are for convenience only and are not to be construed as part of this Agreement or in any way limiting or applying the provisions hereof

INCORPORATION Exhibit A is attached hereto and incorporated herein by this reference

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

NOTICE THIS SUBORDINATION AGREEMENT CONTAINS A PROVISION WHICH ALLOWS THE OWNER TO OBTAIN A LOAN, THE PROCEEDS OF WHICH MAY BE EXPENDED FOR PURPOSES OTHER THAN THE IMPROVEMENT OF THE PROPERTY

IT IS RECOMMENDED THAT, PRIOR TO THE EXECUTION OF THIS AGREEMENT, THE PARTIES CONSULT WITH THEIR ATTORNEYS WITH RESPECT HERETO

"OWNER"

"LENDER"

[TRUSTOR SIGNATURE BLOCK]

[TRUSTOR SIGNATURE BLOCK]

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

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

"LESSEE"

[LESSEE SIGNATURE BLOCK]

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

(ALL SIGNATURES MUST BE ACKNOWLEDGED)

**EXHIBIT A TO EXHIBIT "C"**

**DESCRIPTION OF PROPERTY**

EXHIBIT A to Subordination Agreement, Acknowledgment of Lease Assignment, Estoppel, Attornment and Non-Disturbance Agreement dated as of [DATE OF DOCUMENTS], executed by [NON-BORROWER TRUSTOR] as "Owner", [NAME OF LESSEE], as "Lessee", and [LENDER], as "Lender"

Blocks 1, 2 and 3 of La Cholla Ridge according to the plat of record in the office of the County Recorder of Pima County, Arizona, in Book 46 of Maps, Page 90, and amended by Declaration of Scriveners Error recorded July 17, 1995 in Docket 10086, Page 289 and recorded July 12, 1996 in Docket 10335 Page 47

Excepting therefrom

A portion of Blocks 1 and 2 of La Cholla Ridge according to the plat of record in the office of the County Recorder of Pima County, Arizona, in Book 46 of Maps, Page 90, and amended by Declaration of Scriveners Error recorded July 17, 1995 in Docket 10086, Page 289 and recorded July 12, 1996 in Docket 10335, Page 47, also lying within the Southwest quarter of the Southwest quarter of Section 3, Township 13 South, Range 13 East of the Gila and Salt River Base and Meridian, Pima County, Arizona and more particularly described as follows

Commencing at a Brass Cap found flush at the intersection of Orange Grove Road and La Cholla Boulevard, also being the Southwest corner of said Section 3,

Thence North 00°06'17" West, along the West line of said Section 3, a distance of 363 44 feet,

Thence departing perpendicular to said West line, North 89°53'43" East, a distance of 100 00 feet to a point on the Easterly Right-of-Way line of La Cholla Boulevard, said point being the POINT OF BEGINNING,

Thence leaving said Easterly Right-of-Way line, North 89°53'17" East, a distance of 42 06 feet,

Thence South 00°06'43" East, a distance of 12 00 feet,

Thence North 89°53'17" East, a distance of 157 69 feet,

Thence South 00°06'43" East, a distance of 209 35 feet,

Thence North 89°53'17" East a distance of 32 00 feet,

Thence South 00°06'43" East, a distance of 42 11 feet to a point an the Northerly right-of-way line of Orange Grove Road,

Thence South 89°53'36" West along, adjoining and adjacent to said Right-of-Way, a distance of 206 78 feet to the beginning of a curve concave Northeasterly with a central angle of 90°00'07" and a radius of 25 00 feet,

Thence Northwesterly along the arc of said curve, an arc distance of 39 27 feet to a point on the Easterly Right-of-Way line of La Cholla Boulevard,

Thence North 00°06'17" West along, adjoining and adjacent to said Right-of-Way, a distance of 238 43 feet to the POINT OF BEGINNING



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

On \_\_\_\_\_, before me, \_\_\_\_\_, a Notary Public  
in and for said state, personally appeared \_\_\_\_\_,  
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person  
whose name is subscribed to the within instrument and acknowledged to me that he/she executed  
the same in his/her authorized capacity, and that by his/her signature on the instrument, the  
person, or the entity upon behalf of which the person acted, executed the instrument

WITNESS my hand and official seal

\_\_\_\_\_  
Notary Public in and for said State

(SEAL)

**EXHIBIT "D"**

RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO

Catellus Commercial Group, LLC  
201 Mission Street, 2<sup>nd</sup> Floor  
San Francisco, California 94105  
Attention Office of General Counsel

(Space Above For Recorder's Use)

**MEMORANDUM OF LEASE**

This MEMORANDUM OF LEASE is made as of April \_\_, 2001 by and between CATELLUS COMMERCIAL GROUP, LLC, a Delaware limited liability company ("Landlord") and FLEMING COMPANIES, INC., an Oklahoma corporation ("Tenant")

1 Lease of Premises For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Landlord hereby leases to Tenant and Tenant hereby leases from Landlord certain premises (the "Premises") containing approximately 51,242 square feet of floor area including all space located under the roof as required by Pima County Building Codes (herein after referred to as the "Premises") to be constructed in the area outlined and identified as "Pad 1" of the Site Plan attached hereto as Exhibit "A" and by this reference made a part hereof. The Premises shall be situated in the "La Cholla Plaza" Shopping Center, located in an unincorporated area of Pima County, Arizona, which shopping center is more particularly described on Exhibit "B" attached hereto and by this reference made a part hereof

2 Term of Lease The terms and conditions of the leasing of the Premises are set forth in a Lease (the "Lease") dated of even date herewith, between Landlord and Tenant, which is incorporated herein by this reference as though fully set forth herein. The term of the Lease is for twenty (20) years, commencing on the "Commencement Date," with six (6) options to extend for terms of five (5) years each, as described in Article III of the Lease

3 Other Lease Terms The Lease contains other terms and conditions pertinent to the legal relationship among the Landlord, Tenant and mortgagees of Landlord, including, without limitation, terms and conditions relating to the occupancy and use of, and otherwise affecting, the Premises, public notice of the existence of the same being hereby given

4 Recordation This Memorandum is to be recorded in the Official Records of Pima County, Arizona, to provide constructive notice of the Lease. This Memorandum in no way modifies the provisions of the Lease. Upon the expiration or earlier termination of the Lease, Tenant agrees to execute and record in the Official Records of Pima County, Arizona, such documentation as may be necessary or appropriate to evidence the expiration or earlier termination of the Lease

IN WITNESS WHEREOF, Landlord and Tenant have executed this Memorandum of Lease as of the day and year first above written

"Landlord"

"Tenant"

CATELLUS COMMERCIAL GROUP, LLC,  
a Delaware corporation

FLEMING COMPANIES, INC.,  
an Oklahoma corporation

By \_\_\_\_\_  
Name \_\_\_\_\_  
Its \_\_\_\_\_

By \_\_\_\_\_  
Name \_\_\_\_\_  
Its \_\_\_\_\_

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

On \_\_\_\_\_, before me, \_\_\_\_\_, a Notary Public  
in and for said state, personally appeared \_\_\_\_\_,  
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person  
whose name is subscribed to the within instrument and acknowledged to me that he/she executed  
the same in his/her authorized capacity, and that by his/her signature on the instrument, the  
person, or the entity upon behalf of which the person acted, executed the instrument

WITNESS my hand and official seal

\_\_\_\_\_  
Notary Public in and for said State

(SEAL)

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

On \_\_\_\_\_, before me, \_\_\_\_\_, a Notary Public  
in and for said state, personally appeared \_\_\_\_\_,  
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person  
whose name is subscribed to the within instrument and acknowledged to me that he/she executed  
the same in his/her authorized capacity, and that by his/her signature on the instrument, the  
person, or the entity upon behalf of which the person acted, executed the instrument

WITNESS my hand and official seal

\_\_\_\_\_  
Notary Public in and for said State

(SEAL)

(SEAL)



**EXHIBIT B TO EXHIBIT "D"**

**Legal Description of Shopping Center**

Blocks 1, 2 and 3 of La Cholla Ridge according to the plat of record in the office of the County Recorder of Pima County Arizona, in Book 46 of Maps, Page 90, and amended by Declaration of Scriveners Error recorded July 17, 1995 in Docket 10086, Page 289 and recorded July 12, 1996 in Docket 10335, Page 47

Excepting therefrom

A portion of Blocks 1 and 2 of La Cholla Ridge according to the plat of record in the office of the County Recorder of Pima County, Arizona, in Book 46 of Maps, Page 90, and amended by Declaration of Scriveners Error recorded July 17, 1995 in Docket 10086, Page 289 and recorded July 12, 1996 in Docket 10335, Page 47, also lying within the Southwest quarter of the Southwest quarter of Section 3, Township 13 South, Range 13 East of the Gila and Salt River Base and Meridian, Pima County, Arizona and more particularly described as follows

Commencing at a Brass Cap found flush at the intersection of Orange Grove Road and La Cholla Boulevard, also being the Southwest corner of said Section 3,

Thence North 00°06'17" West, along the West line of said Section 3, a distance of 363 44 feet,

Thence departing perpendicular to said West line, North 89°53'43" East, a distance of 100 00 feet to a point on the Easterly Right-of-Way line of La Cholla Boulevard, said point being the POINT OF BEGINNING,

Thence leaving said Easterly Right-of-Way line, North 89°53'17" East, a distance of 42 06 feet,

Thence South 00°06'43" East, a distance of 12 00 feet,

Thence North 89°53'17" East, a distance of 157 69 feet,

Thence South 00°06'43" East, a distance of 209 35 feet,

Thence North 89°53'17" East a distance of 32 00 feet,

Thence South 00°06'43" East, a distance of 42 11 feet to a point an the Northerly right-of-way line of Orange Grove Road,

Thence South 89°53'36" West along, adjoining and adjacent to said Right-of-Way, a distance of 206 78 feet to the beginning of a curve concave Northeasterly with a central angle of 90°00'07" and a radius of 25 00 feet,

Thence Northwesterly along the arc of said curve, an arc distance of 39 27 feet to a point on the Easterly Right-of-Way line of La Cholla Boulevard,

Thence North 00°06'17" West along, adjoining and adjacent to said Right-of-Way, a distance of 238 43 feet to the POINT OF BEGINNING

## EXHIBIT E

### SIGN CRITERIA

#### LA CHOLLA PLAZA

### SIGN CRITERIA

These criteria have been established for the purpose of assuring an outstanding shopping center and for the mutual benefit of all Tenants. Conformance will be strictly enforced and any installed nonconforming or unapproved signs must be brought into conformance at the expense of the Tenant.

#### A GENERAL REQUIREMENTS

- 1 All signs and their installation must comply with Pima County (P C ) Sign Ordinance and all local building and electrical codes
- 2 All signs to be individual or pan channel letters No can signs are allowed
- 3 No animated flashing or audible signs will be permitted
- 4 All signage will be designed and constructed in accordance with the Pima County Zoning Ordinance Section 18 79 Sign Standards and all codes applicable at time of permit application Should Owner s criteria be more restrictive than applicable codes and ordinances, Owner s criteria shall prevail
- 5 Each Tenant shall submit or cause to be submitted to the landlord for approval before fabrication at least four (4) copies of detailed drawings indicating the location size layout, design and color of the proposed signs including all lettering and/or graphics
- 6 All permits for signs and their installations shall be obtained by the Tenant or his representative from Pima County per P C Zoning Ordinance Section 18 79 Sign Standards
- 7 Tenant shall be responsible for the fulfillment of all requirements and specifications
- 8 All signs shall be constructed and installed including electrical hook up at Tenant s expense Tenant shall cause his sign to be installed no later than forty five (45) days after Tenant opens for business
- 9 All signs and their installation shall comply with P C Zoning Ordinance Section 18 79 Sign Standards as well as all other building, electrical codes having jurisdiction over this project Nothing in this criteria shall imply a waiver of requirements by the local authorities
- 10 All signs shall be reviewed for conformance with this criteria and overall design quality Approval or disapproval of sign submittals based on esthetics of design shall remain the sole right of the Landlord
- 11 At the end of Tenant s lease term or at the time Tenant vacates the leased premises whichever shall first occurs, Tenant s sign shall remain installed and be a part of Landlord s real property Tenant is not entitled, for any reason whatsoever to remove its sign or any part thereof after Tenant s initial installation of said sign If however Landlord allows Tenant shall patch and repair any damage to the building to landlord s satisfaction

#### B GENERAL SEPCIFICATIONS

- 1 Electrical service to all signs shall be on Tenant s meter at Tenant s expense
- 2 No script will be permitted unless it is part of an established trademark of the Tenant
- 3 All conductors transformers and other equipment shall be concealed within cabinet.
- 4 Tenant shall be responsible for the installation and maintenance of all signs
- 5 All signs are to be installed under the direction of the Landlord or Landlord s superintendent or representative
- 6 Wording of signs shall not include the product sold except as part of Tenant s trade name or logo
- 7 The width of Tenant s fascia sign shall not exceed sixty seven (67%) of Tenant store width Landlord will designate exact location of sign in relation to Tenant s storefront width prior to any installation
- 8 Tenant sign contractors shall repair any damage caused by said Contractors work or by its agents or employees and Tenant shall be liable for Operations of Tenant s Sign Contractor
- 9 No signs perpendicular to the face of the building or storefront will be permitted
- 10 The allowable sign area is one (1) square foot of signage per each lineal foot of store frontage parallel to the sign band. Area shall be figured by multiplying the greatest horizontal dimension by the greatest vertical dimension of each letter or group of letters whichever allows the greater sign area Logos shall be counted as part of the sign area.
- 11 The maximum aggregate sign area is one hundred and fifty (150) square feet per business

## Exhibit E

**C SIGNS TO BE CONSTRUCTED IN ACCORDANCE WITH THE FOLLOWING**

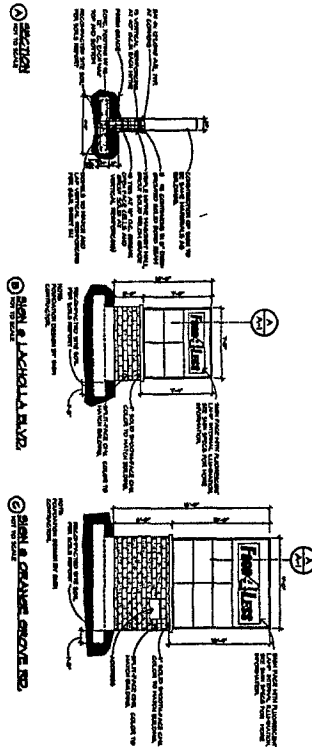
- 1 The maximum height of each letter shall be 24" high. The minimum height of each letter shall be 12". All letters that do not conform to the above statements shall have Landlord and Pima County approval.
- 2 Each individual letter shall be constructed of 22-gauge stretcher leveled pan-lok sheet metal. All interior surfaces shall be primed with rust inhibiting primer and two (2) coats of special light reflecting white. Exterior reveal to be painted dark bronze.
- 3 Illumination shall consist of neon as listed at #10 of this section.
- 4 Sign contractor will stub conduit through fascia for connection to primary feeds by others. Conduit is to be located directly behind each letter and contained within the outer perimeter of each individual letter.
- 5 Logo color shall be tenant's choice. Face of sign shall be 3/16" acrylic plexiglass face acrylic. Copy to be flat cut out or trim capped, all colors subject to Landlord and Pima County's approval. See color list at #10 of this section.
- 6 All signs to be centered on leased storefront.
- 7 No clips, mounting devices or labels (except U.L. Label) shall be visible.
- 8 All signs bear the U.L. label (in an inconspicuous location) and the installation must comply with all applicable building and electrical codes.
- 9 All penetrations of the building structure (to include fascia) required for sign installation shall be sealed in a watertight condition. If at any time during Tenant's occupancy of the leased premises water is found leaking into the building structure via penetrations from Tenant's sign, then Tenant shall cause its sign contractor to make the necessary repairs to stop water leakage; said work shall be Tenant's sole expense.
- 10 All colors and corresponding neon to match the following:
  - 1 Red #209 0 Acrylate with clear red neon illumination.
  - 2 Blue #605 0 Acrylate with powder blue neon illumination.
  - 3 Ivory #047 2 Acrylate with clear white neon illumination.
  - 4 Orange #303 0 Acrylate with clear white neon illumination.
  - 5 Green #506 0 Acrylate with clear white neon illumination.
  - 6 Yellow #407 2 Acrylate with clear white neon illumination.
- 11 All signs to have a maximum of two (2) lines of copy.

**D MISCELLANEOUS REQUIREMENTS**

- 1 Each Tenant shall be permitted to place upon each entrance of its premises not more than 144 square inches of gold leaf or decal application lettering not to exceed two inches (2") in height, indicating hours of business, emergency telephone numbers, etc.
- 2 Except as provided herein, no advertising placards, banners, pennants, names, insignia, trademarks, or other descriptive material shall be affixed or maintained upon the glass panes and supports of the show windows and doors, or upon the exterior walls of buildings or within 24" of show window.
- 3 Each Tenant who has a non-customer door for receiving merchandise may have uniformly applied on said door in location, as directed by the Landlord, in two-inch (2") high block letter the Tenant's name and address. Where more than one Tenant uses the same door, each name and address shall be applied. Color of letters will be as selected by the Landlord.
- 4 Tenant may install on the storefront, if required by the U.S. Post Office, the numbers only for the street address in exact location stipulated by the Landlord. Size, type and color of numbers shall be as stipulated by Landlord.
- 5 Tenants should note that approval action by the Landlord will generally take one week. No installation will be permitted until Tenant has received written approval from Landlord along with a copy of Tenant's detailed sign drawing with Landlord's approval affixed thereto.
- 6 Applicant must secure approval of Landlord prior to submitting a request for a sign permit from Pima County.
- 7 No sign shall be installed or altered after installation except with the permission of the Landlord and with a sign permit from Pima County.

**Exhibit E**

# EXHIBIT E SIGN CRITERIA



## SIGN SPECIFICATIONS

1. GENERAL CONSTRUCTION  
 a. Signs shall be constructed of aluminum, stainless steel, or other durable material.  
 b. Signs shall be painted white with black lettering.  
 c. Signs shall be lettered in a sans-serif font, 2" to 4" high.
2. ELECTRICAL CONSTRUCTION  
 a. Signs shall be constructed of aluminum, stainless steel, or other durable material.  
 b. Signs shall be painted white with black lettering.  
 c. Signs shall be lettered in a sans-serif font, 2" to 4" high.
3. SIGN CONSTRUCTION  
 a. Signs shall be constructed of aluminum, stainless steel, or other durable material.  
 b. Signs shall be painted white with black lettering.  
 c. Signs shall be lettered in a sans-serif font, 2" to 4" high.

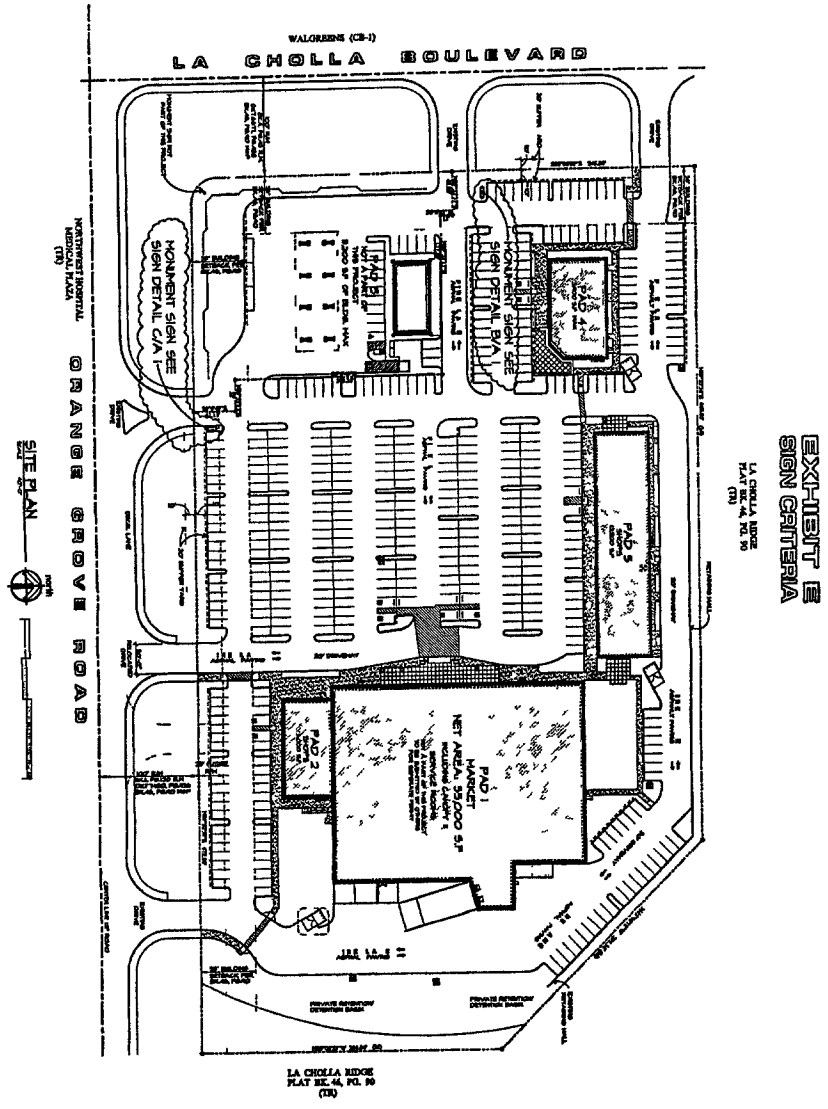
sheet **A-1**  
 of  
 job number  
 Design by  
 Drawn by  
 Check by  
 Date 8-10-01

**LA CHOLLA PLAZA**  
 3000 N. ORANGE GROVE RD.  
 TUCSON, ARIZONA 85705

**ROBERT KUBICEK ARCHITECTS  
 AND ASSOCIATES, INC.**  
 2233 EAST THOMAS ROAD  
 PHOENIX, ARIZONA 85016  
 FAX NO. (602) 955-0495  
 (602) 955-3900







Sheet: **A-2**

Design: **LA CHOLLA PLAZA**

Drawn: **NEO LA CHOLLA BLVD and ORANGE GROVE ROAD**

Check: **TUCSON, ARIZONA (PIMA COUNTY)**

**LA CHOLLA PLAZA**

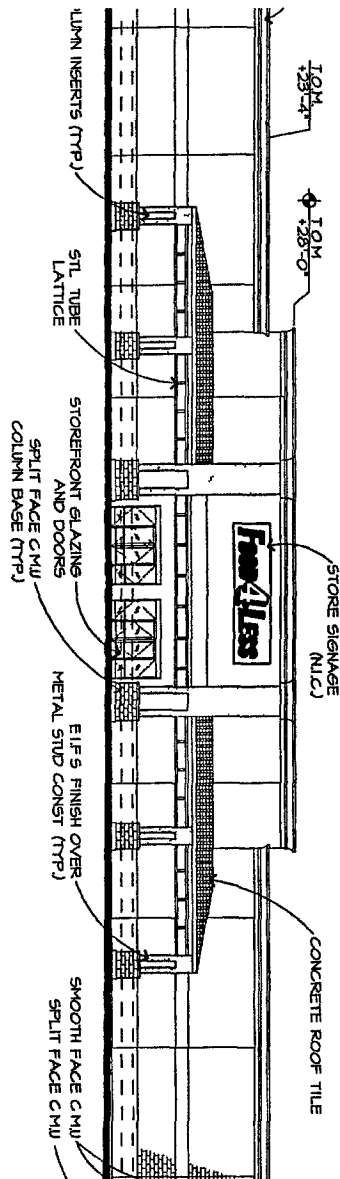
**NEO LA CHOLLA BLVD and ORANGE GROVE ROAD**

**TUCSON, ARIZONA (PIMA COUNTY)**

**ROBERT KUBICEK ARCHITECTS AND ASSOCIATES, INC.**

2233 EAST THOMAS ROAD  
PHOENIX, ARIZONA 85016  
FAX NO. (602) 255-0486  
(602) 255-3900

# EXHIBIT E SIGN CRITERIA



sheet  
**A-3**  
of  
job notes

check ME  
check ME  
check ME

**LA CHOLLA PLAZA**  
NEC LA CHOLLA BLVD  
and ORANGE GROVE ROAD  
TUCSON, ARIZONA (PIMA COUNTY)



**ROBERT KUBICEK ARCHITECTS  
AND ASSOCIATES, INC**  
2233 EAST THOMAS ROAD  
TUCSON, ARIZONA 85718  
FAX NO. (602) 955-0488  
(602) 955-5600



## EXHIBIT F

### COVENANT TO DEDICATE PROPERTY FOR STREET WIDENING

#### COVENANT TO DEDICATE

##### RECITALS

- A. FIDELITY NATIONAL TITLE AGENCY, INC, INC., an Arizona corporation as Trustee under Trust No. 10 601 (the "Owner") owns the property legally described in Exhibit A (the "Property")
- B. Pima County is the owner of Orange Grove Road, and La Cholla Boulevard, public roadways which abut the Property
- C. The Property was the subject of rezoning case CO9-93-35 approved by the Board of Supervisors on December 21 1993 under Ordinance 1994 19, attached hereto as Exhibit B
- D. As a condition of rezoning the Property condition 8.D of Ordinance 1994-19 requires the owner to *Covenant to Dedicate at no cost to Pima County, up to an additional 25 00 feet of right of-way for Orange Grove Road and La Cholla Boulevard, when requested by Pima County for a grade separated intersection.*
- E. Pima County is not yet ready to begin the grade separated intersection at Orange Grove Road and La Cholla Boulevard, but anticipates that final plans for the roadway might not need the maximum dedications required

NOW THEREFORE in consideration of the above recitals Owner covenants and agrees as follows

- 1. Owners shall, within 20 days after a written request by Pima County Department of Transportation, dedicate at no cost, to Pima County for right of-way purposes the following:
  - 1) a maximum of 25 00 feet of the Property in fee; for right of way for Orange Grove Road and La Cholla Boulevard
- 2. These covenants shall run with the land described in Exhibit A, and shall be binding upon Owners, their successors, heirs and assigns

- 3 The recitals contained herein shall survive recordation of these covenants
- 4 Amendment. This covenant may be modified terminated or canceled only by a written agreement executed by all parties and placed of record in the official records of Pima County, Arizona.

For Fidelity National Title Agency Inc an Arizona corporation, as Trustee under Trust No 10 601 only and not otherwise

By Martha L. Hill  
(Type Name Here) Martha L. Hill

As Trust Officer

STATE OF ARIZONA )  
COUNTY OF PIMA ) ss

This instrument was acknowledged before me the undersigned authority on this 22nd day of May, 2008 by Martha L. Hill as Trust Officer of Fidelity National Title Agency Inc an Arizona corporation, as Trustee under Trust No 10 601



Londa Rhyne  
Notary Public

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

Re CO9 93-53  
JR

CO9-93-53 COVENANT TO DEDICATE 2

MAY 24 01 09 04

6029550496

PAGE 05

Order No 40000449 SA

EXHIBIT " A "

Blocks 1 2 and 3 of LA CHOLLA RIDGE according to the plat of record in the office of the County Recorder of Pima County Arizona in Book 46 of Maps and Plats at page 90 and amended by Declaration of Scriveners Error recorded July 17 1995 in Docket 10086 at page 289 and recorded July 12 1996 in Docket 10335 at page 47

EXCEPT that portion of Blocks 1 and 2 conveyed in Docket 11179 at page 2853 Pima County records



**EXHIBIT G**



PIMA COUNTY  
DEPARTMENT OF TRANSPORTATION AND FLOOD CONTROL DISTRICT  
201 NORTH STONE AVENUE, THIRD FLOOR  
TUCSON, ARIZONA 85701 1207

BROOKS A. KEENAN P.E.  
DIRECTOR

(520) 740 6410  
FAX (520) 820-1933

May 16 2001

Mr Mark Evans  
Catellus Development Corporation  
165 South Union Boulevard Suite 852  
Lakewood, Colorado 80228

**Subject Completion of Rezoning Requirements for La Cholla Plaza  
Revised Development Plan (P1201-015)**

Dear Mr Evans

This letter is a recapitulation of our previous discussions regarding financial contributions from the subject property to long term improvements to La Cholla Boulevard and Orange Grove Road. This letter also confirms our discussions related to access and the project's conformance to the rezoning conditions and rezoning ordinance for the original case

**Rezoning Conditions**

The subject property was part of a larger parcel rezoned in 1993 as Pacific International-Orange Grove Road rezoning (Co9 93 35). The rezoning included a ten acre portion of CB1 where your project is located and an additional 27 acres of residential uses. The transportation related conditions of the rezoning were Items 8A through G. These are contained in their entirety in materials you have previously obtained from Development Services Department. In summary the rezoning conditions required that area roads, specifically La Cholla Boulevard and Orange Grove Road, would have sufficient capacity to accommodate the traffic generated by the new development, that access and improvements for the site be approved by the county, that additional right-of way be dedicated or covenanted to dedicate, that the property owners reach a financial contribution agreement for contributions to future road improvements acceptable to the Pima County Department of Transportation and Flood Control District, that building setbacks be adhered to and that there be a traffic study delineating the impacts of the project on area roadways. It is the opinion of the Department of Transportation that the rezoning conditions have or will be met with the completion of the revised Development Plan.

#### Traffic Analysis Reports

The rezoning has been the subject of two traffic impact studies

- Traffic Impact Study for La Cholla Ridge by Urban Engineering, August 1994
- Traffic Impact Analysis for La Cholla Commercial Development, Kimley Horn and Associates, October 1999

While there are differences in the two reports based on development assumptions pertaining at the time they both conclude that the existing Orange Grove Road/La Cholla Boulevard intersection is insufficient to provide for additional development generated traffic at this location within acceptable levels of service, and that additional roadway capacity in the form of through lanes at the Orange Grove Road/La Cholla Boulevard intersection would be necessary. These reports were reviewed and approved by the Department of Transportation.

#### Interim Improvements

Some roadway improvements in the form of turn lanes were made in conjunction with the development of the residential portion of the rezoning by New World Homes on La Cholla Boulevard north of the current commercial development.

More recently New World Homes has completed additional interim improvements to the intersection on both La Cholla Boulevard and Orange Grove Road. This was a cooperative project performed in conjunction with Pima County Department of Transportation. New World Homes was solely responsible for paving improvements on the north side of Orange Grove Road including the median turn lane and improvements on the east side of La Cholla Boulevard north of Orange Grove Road. New World Homes also paid for the redesign of the traffic signal. The construction of the new traffic signal to allow for the interim widening project was jointly funded by New World Homes and Pima County. Pima County funded the cost of road widening on the south side of Orange Grove Road and the east and west sides of La Cholla Boulevard south of the subject intersection. These improvements were completed several months ago. The improvement in existing traffic flow has been documented by staff and has been favorably noted by the public and the Northwest Area Transportation Coalition.

The current conditions at the intersection of La Cholla Boulevard and Orange Grove Road are the limit of improvement that can be feasibly constructed due to topographic and physical constraints. These include the crest of the hill on Orange Grove Road to the west of the intersection and the presence of a large box culvert carrying Nannu Wash under Orange Grove Road at the immediate east boundary of La Cholla Plaza. Until these two major geometric constraints are dealt with, there is no feasible way to provide additional capacity on Orange Grove Road or at the intersection of La Cholla Boulevard.

#### Assessment for Future Improvements

Continued development of the La Cholla Plaza commercial center may proceed subject to your agreement to participate in the future improvements to La Cholla Boulevard and Orange Grove Road.



These improvements are currently under design for Pima County under projects 4LCRIR, La Cholla Boulevard River Road to Omar Drive, and 4OGTCD Orange Grove Road Thornydale Road to Corona Road. Current plans call for both roadways to be six lanes, with raised medians to separate opposing travel and control left turns. Funding for the construction for these improvements will be from a variety of sources but principally, Highway User Revenue Bonds authorized by Pima County voters in 1997. Additional sources of revenue include funds from private development such as the La Cholla Plaza project. Construction of the major road improvements adjacent to La Cholla Plaza is scheduled to begin of fiscal year 2002-2003. It is the department's intent that La Cholla Boulevard and Orange Grove Road intersection from approximately San Joaquin Avenue to Corona Road be constructed at one time. These limits of proposed improvements include all of the La Cholla Plaza frontage on both roadways.

The assessment of the proportionate share of cost attributed to La Cholla Plaza for this major project was based on

- 1 The final configuration and specific uses of the buildings on La Cholla Plaza site as shown in the subject revised development plan and analyzed by Kuntley Horn in materials transmitted to the Department of Transportation on April 23, 2001.
- 2 The net traffic generation for the new development as a percentage of both existing travel and traffic forecasts for the year 2020 on the improved facilities.
- 3 The estimated construction cost of improvements to La Cholla Boulevard and Orange Grove Road intersection.

The net generation of new trips associated with the proposed development is approximately 6,000 vehicles per day. This total excludes the Diamond Shamrock convenience mart gas station already under construction and provides a 27 percent pass-by trip reduction factor for the supermarket. This net new trip generation is equivalent to 13 percent of the existing traffic going through the Orange Grove Road/La Cholla Boulevard intersection. As regional traffic growth continues this percentage will decline to approximately 8 percent in the year 2020. The average impact of the development on the intersection over the 20 year period is equivalent to 10 percent of the travel through the intersection.

The intersection improvements are estimated to cost approximately \$1,000,000. This represents approximately 5 percent of the total \$20.5 million project cost for the full improvements to La Cholla Boulevard from River Road to Omar Drive, including the Orange Grove Road connections. The share of the intersection improvement costs to be assessed against La Cholla Plaza is \$100,000. Payment shall be made in full prior to issuance of Certificate of Occupancy for the subject buildings on the development plan, or alternatively you may enter into a development agreement which would allow for payment over time. However, the maximum term would not be more than three years.

#### Access

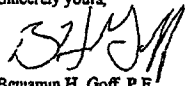
The number of access points to the site were specified in the original rezoning. Driveways have been constructed in accordance with previously approved development plans. The revised development plan proposes relocating the middle driveway on Orange Grove Road to the west. Department of Transportation will assure that there is east bound left turn access in the vicinity of the easternmost driveway to the development with the construction of the full Orange Grove Road improvements. Any modification to the driveways as they may exist at the time of the Pima County roadway improvement project, would be made by Pima County not the property owner. Final details on this access will be resolved during the completion of the design for the Orange Grove Road improvements and will include consultation with the owner. Please note that it is our intent that left turn access for La Cholla Plaza in this vicinity will also serve west-bound left turn access for approved office development on the south side of Orange Grove Road.

#### Area Roadway Capacity

It is the position of the Department of Transportation that the planned improvements to La Cholla Boulevard and Orange Grove Road in the vicinity of this project are sufficiently advanced to satisfy the requirements of rezoning Condition 8A. Funding for the project has been secured. La Cholla Plaza has dedicated right of way and is making a financial contribution for those improvements and development plan approvals and building permits may proceed. Certificate of Occupancy may also be released at the appropriate time subject to completion of all requirements including the financial contribution to La Cholla Boulevard and Orange Grove Road projects.

I believe this covers all of the areas that we had discussed. If you have any further questions please give me a call at (520) 740-6403.

Sincerely yours,



Benjamin H. Goff, P.E.  
Deputy Director  
Department of Transportation

BHG/pbe

c Carmine DeBonis, Director, Development Services Department  
Jonathan Crowe, Transportation Systems Division  
David Petersen, Development Services Department  
Steve Magelli, P.E., Development Review Manager

