

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

In re)	Chapter 11
)	
FLEMING COMPANIES, INC , <u>et al.</u>)	Case No 03-10945 (MFW)
)	(Jointly Administered)
Debtors)	
)	Hearing Date August 13, 2003 @ 1 00 PM
)	Objections Due August 6, 2003

**MOTION OF RMS PROPERTIES II LLC TO COMPEL PAYMENT OF
POST-PETITION OBLIGATIONS PURSUANT TO 11 U S C. § 365(d)(3)**

PLEASE TAKE NOTICE that RMS Properties II LLC has filed the attached Motion To Compel Payment Of Post-Petition Obligations Pursuant To 11 U S C § 365(D)(3)

HEARING ON THE MOTION will be on AUGUST 13, 2003 at 1 00 P M

OBJECTIONS to the relief requested herein must be filed by AUGUST 6, 2003

At the time of filing any objection, you must also serve a copy of the response upon movant's attorneys

William D Sullivan, Esquire
Charles J Brown, III, Esquire
ELZUFON AUSTIN REARDON
TARLOV & MONDELL, P A
300 Delaware Avenue, 17th Floor
P O Box 1630
Wilmington, DE 19899
(302) 428-3181

Stephen F Gordon
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Gordon Haley LLP
101 Federal Street
Boston, Massachusetts 02110
Tel (617) 261-0100
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IF YOU FAIL TO RESPOND TO THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED WITHOUT A HEARING

DATED July 21, 2003

ELZUFON, AUSTIN, REARDON,
TARLOV & MONDELL, P A

/s/ Charles J Brown, III
William D Sullivan (No 2820)
Charles J Brown (No 3368)
300 Delaware Avenue, 17th Floor
P O Box 1630
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FILED

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Fleming Companies Claim

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**MOTION OF RMS PROPERTIES II LLC TO COMPEL PAYMENT OF
POST-PETITION OBLIGATIONS PURSUANT TO 11 U S C § 365(d)(3)**

RMS Properties II LLC (“RMS”) hereby moves the Court to enter an Order compelling Fleming Companies, Inc (the “Debtor”) to pay its obligations to RMS arising from and after the order for relief (April 1, 2003) in these cases pursuant to an unexpired lease of non-residential real property dated June 28, 2002 for the rental of premises located at 6300 West Brown Deer Road, Milwaukee, Wisconsin (the “Milwaukee Lease”) As grounds for this Motion, RMS states that the Debtor is required under § 365(d)(3) of the Bankruptcy Code to timely perform all obligations under the Milwaukee Lease arising from and after April 1, 2003

FACTS

1 On April 1, 2003, the above-captioned Debtors filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code

2 RMS (and another), as Landlord, and the Debtor as Tenant, are parties to several leases One such lease is the Milwaukee Lease RMS (and another) and the Debtor are also parties to another unrelated lease for premises located in Waukesha, Wisconsin (the “Waukesha Lease”)

3 On May 31, 2003, the Debtor sent a letter to RMS in which the Debtor stated that it was paying only \$2,606.27 for June 2003 rent due on June 1, 2003 under the Milwaukee

Premises and not the \$47,869.55 the Debtor acknowledged in its letter is the amount due pursuant to the terms of the Milwaukee Lease. A copy of the Debtor's May 31, 2003 letter is attached hereto as Exhibit A. The Debtor claimed in its May 31, 2003 letter to RMS that the Debtor was due a "refund" from RMS in the amount of "\$45,263.28 representing Real Estate Taxes on the Rainbow-Waukesha store location (87470040)."

4 On June 10, 2003, and in accordance with the provisions set forth in the Milwaukee Lease, RMS sent the Debtor an invoice for \$2,263.16 in late fees for failure to pay the June, 2003 rent. A copy of the June 10, 2003 invoice is attached hereto as Exhibit B.

5 On June 20, 2003, counsel for RMS sent a letter to Debtor's counsel demanding the full and immediate payment of the June, 2003 rent. A copy of the June 20, 2003 letter is attached hereto as Exhibit C.

6 As of the filing date of this Motion, the Debtor has still not paid its June 2003 rent obligations under the Milwaukee Lease.

7 RMS estimates that it will incur as much as \$8,000.00 in legal fees and expenses to enforce the terms of the Milwaukee Lease post-petition and collect the \$47,526.44 now owed RMS. The Milwaukee Lease requires the Debtor to pay RMS' reasonable legal fees.

ARGUMENT

8 Pursuant to 11 U.S.C. § 365(d)(3), a debtor in possession must timely perform all obligations arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected. 11 U.S.C. § 365(d)(3).

9 It is well established that a debtor cannot offset post-petition rent obligations against any pre-petition deposits or credits. See In re Jarvis Kitchenware of D.C., Inc., 13 B.R. 230, 232 (Bankr. D.D.C. 1981). Here, the Debtor's claimed "credit" is not even on the same

premises or under the same lease In light of 11 U S C § 365(d)(3) and the applicable case law, RMS is entitled to immediate payment of \$47,526 44 for the Debtor's June, 2003 rent obligations for the Milwaukee Premises plus its reasonable legal fees in collection of that amount

10 The Milwaukee Lease states, in pertinent part, "Upon the occurrence of an Event of Default, Landlord at any time thereafter without further notice or demand, may exercise any one or more of the following remedies concurrently or in succession Recover all costs, expenses and reasonable attorneys' fees incurred by Landlord in connection with enforcing this Lease or collecting amounts owed " Milwaukee Lease Section 17 3(d) A copy of the Milwaukee Lease is attached hereto as Exhibit D

Wherefore, RMS prays that the Court enter an Order pursuant to §365(d)(3) compelling the Debtor to immediately pay RMS the amount of \$47,526 44 for post-petition rent obligations under the Milwaukee Lease, plus reasonable attorneys' fees and its costs associated with enforcing the provisions of the Milwaukee Lease, and grant such other and further relief as this Court deems just

Dated July 21, 2003

ELZUFON AUSTIN REARDON
TARLOV & MONDELL, P A

/s/ Charles J Brown, III

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Gordon Haley LLP
101 Federal Street
Boston, Massachusetts 02110
Tel (617) 261-0100
Fax (617) 261-0789

CERTIFICATE OF SERVICE

I, Charles J Brown, III, hereby certify that I caused a copy of the foregoing *Motion of RMS Properties II LLC to Compel Payment of Post-Petition Obligations Pursuant to 11 U S C § 365(D)(3)* to be served upon the following parties via hand delivery or United States Mail postage prepaid

James H M Sprayregan
Richard L Wynne
Kirkland & Ellis
777 South Figueroa Street
Los Angeles, CA 90017

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Dennis Dunne
Paul S Aronzon
Milbank, Tweed, ET AL
One Chase Manhattan Plaza
New York, NY 10005-1413

Under penalty of perjury, I declare that the foregoing is true and correct

Dated July 21, 2003

/s/ Charles J Brown, III
CHARLES J BROWN, III

EXHIBIT A

Fleming.

P.O. Box 26647
Oklahoma City, OK 73126
telephone 405 840 7200

May 31, 2003

RMS Properties II LLC and Heidner Suspenzi Properties, LLC
Gilda Garza
331 B. West Golf Road
Schaumburg, IL 60195-3607

RE: Rainbow Brown Deer
Milwaukee WI (87470041)

Fleming has paid the June 2003 rent for the above referenced location. Our records indicate the monthly rental payment to be \$47,869.55

Our records also indicate Fleming was due a refund from your firm for \$45,263.28 representing Real Estate Taxes on the Rainbow-Waukesha store location (87470040)

Your rental check for June 2003 Brown Deer location is in the amount of \$2,606.27 due to the refund due Fleming for the Waukesha location

Fleming Companies

EXHIBIT B



RMS PROPERTIES
331B West Golf Road
SCHAUMBURG, IL 60195

INVOICE

DATE

INVOICE NO

(847) 310-0900

6/10/2003

3261

BILL TO:

Fleming Companies, Inc.
Attn: Adrienne Cooper, Lease Admin.
1945 Lakepointe Drive
Lewisville, TX 75022

		P.O. NUMBER	TERMS	PROJECT
			On receipt	
QUANTITY	DESCRIPTION	RATE		AMOUNT
	Late Fees. Store #8904, Lease ID W1150, 6300 West Brown Deer Road, Brown Deer, WI; Per Section 3.4 Late Charge of Lease Tenant is to pay 5% of Base Rent Due (\$45,263.28)...	2,263.16		2,263.16
Due upon receipt.		TOTAL		\$2,263.16

EXHIBIT C

GORDON HALEY LLP
COUNSELLORS AT LAW
101 FEDERAL STREET
BOSTON, MASSACHUSETTS 02110-1844
(617) 261-0100
FAX (617) 261-0789

June 20, 2003

Christopher Lhulier, Esq
Pachulski Stang Ziehl Young & Jones PC
919 N Market Street
16th Floor
Wilmington Delaware 19899

Re Fleming Companies, Inc, Debtor-in-Possession, Chapter 11 Case # 03-10945/RMS
Properties, Inc

Dear Mr Lhulier

This office represents RMS Properties, Inc ("Landlord"), which is the landlord to the Debtor-in-Possession, Fleming Companies, Inc pursuant to lease W11150 for the premises located at 6300 West Brown Deer Road, Milwaukee, Wisconsin, store #8904 (the "Milwaukee Premises") Landlord hereby demands payment of \$45,263.28 in rent plus \$2,263.16 in late fees for Fleming Companies, Inc 's June, 2003 rent obligations under the lease for the Milwaukee Premises In the attached letter dated May 31, 2003, in an impermissible attempt to off set a post- petition debt with a claimed pre-petition credit on a totally different lease, your client stated that it had paid only \$2,606.27 as June, 2003 rent for the Milwaukee Premises and not the full payment because it was due a "refund" in the amount of \$45,263.28 The \$45,263.28 figure is an amount which represents a claimed credit for a purported over-payment of pre-petition real estate taxes on a Rainbow-Waukesha store location, not even the Milwaukee Premises

As a most experienced bankruptcy firm, I most certainly needn't call your attention to 11 U.S.C. § 365(d)(3) which requires that a debtor in possession timely perform all obligations arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected It is, of course, well established that a debtor cannot off set post-petition rent obligations against any pre-petition deposits or credits See In re Jarvis Kitchenware of D.C., Inc., 13 B.R. 230, 232 (Bankr. D.D.C. 1981) Here, in addition, the claimed "credit" is not even on the same premises or under the same lease In light of 11 U.S.C. § 365(d)(3) and the applicable case law, RMS Properties, Inc demands immediate payment of \$47,526.44 for Fleming Company, Inc 's June, 2003 rent obligations for the Premises

The lease for the Milwaukee Premises states in pertinent part

GORDON HALEY LLP

17.3 Landlord's Remedies Upon the occurrence of an Event of Default, Landlord at any time thereafter without further notice or demand, may exercise any one or more of the following remedies concurrently or in succession:

- (d) Recover all costs, expenses and reasonable attorneys' fees incurred by Landlord in connection with enforcing this Lease or collecting amounts owed.

If forced to file a Motion to Compel Payment pursuant to 11 U.S.C. § 365(d)(3), we shall seek payment of our attorneys' fees as permitted under the lease for the Milwaukee Premises.

Please contact me with your client's response.

Very truly yours,



Todd B. Gordon
Enclosure

EXHIBIT D

6300 W Brown Deer
Milwaukee, WI

LEASE

between

FLEMING COMPANIES, INC.,
an Oklahoma corporation,

as Tenant,

and

RMS PROPERTIES II, L.L.C.,
an Illinois limited liability company,

and

HEIDNER/SUSPENZI PROPERTIES, LLC,
an Illinois limited liability company,
a joint venture,

as Landlord

Dated: June 28, 2002

QBMKE5264456.5

P. 07

FAX NO. 847 310 0906

JUN-12-2003 THU 02:44 PM RMS PROPERTIES

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LEASE

THIS LEASE (the "Lease") is made and entered into this 28th day of June, 2002, by and between **RMS PROPERTIES II, L.L.C.**, an Illinois limited liability company, and **HEIDNER/SUSPENZI PROPERTIES, LLC**, an Illinois limited liability company, a joint venture ("Landlord") and **FLEMING COMPANIES, INC.**, an Oklahoma corporation ("Tenant").

ARTICLE 1 DEMISE OF 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, for the Term and upon the terms and conditions contained in this Lease, the real property identified as the Premises on the site plan attached as Exhibit A, together with the buildings and other improvements in accordance with this Lease (collectively, the "Premises"). The Premises are located at 6300 West Brown Deer Road, Milwaukee, Wisconsin. The property on which the Premises is located is described on Exhibit B and is referred to herein as the "Property".

ARTICLE 2 TERM

2.1 Term The Term of this Lease shall commence on the Commencement Date and shall continue for ten (10) Lease Years, subject to extension as provided in Section 2.2. The Commencement Date shall be the date of this Lease. The term "Lease Year" means the twelve (12) month period beginning on the Commencement Date in each successive twelve (12) month period thereafter during the Term.

2.2 Extension Options. Provided Tenant is open for business in the Premises (except for "Permitted Closures", as defined in Section 8.1) and no Event of Default then exists, Tenant shall have the right to extend the Term by a total of four (4) successive periods of five Lease Years each (the "Extension Periods"). Each option shall be exercised by written notice of Tenant's election to extend the Term given to Landlord at least one hundred eighty (180) days prior to the date of commencement of the Extension Period.

ARTICLE 3 RENT

3.1 Base Rent Tenant shall pay to Landlord, without demand, deduction or setoff except as specifically provided in this Lease, at such place as Landlord shall designate in writing from time to time, Base Rent as described below. Base Rent shall be payable in advance, in equal monthly installments, on the first day of each calendar month during the Term and shall be proportionately reduced for any partial month during the Term. Base Rent for the month in which the Commencement Date occurs, however, shall be payable on the first day of the following calendar month.

QBMKE\5264456.5

3 2 Base Rent

(a) Amount and Payment. The amount of the Base Rent for the first five Lease Years shall be as shown in the table below

Period	Annual Base Rent	Monthly Installment
Lease Years 1-5	\$388,920.00	\$32,410 00

(b) Effective each Adjustment Date, the Base Rent for the following period of five (5) Lease Years shall be increased by an amount equal to the lesser of (i) the percentage increase in the CPI between the Current Index and the Base Index, or (ii) six percent (6%) Adjustment Date means the first day of the 6th, 11th, 16th, 21st and 26th Lease Years as applicable; CPI means the Consumer Price Index for All Urban Consumers (CPI-U), US City Average, All Items, 1982-1984 equals 100, provided that if the CPI is discontinued, the Index published by the U S Department of Labor that in the parties' reasonably judgment most closely approximates the CPI shall be substituted for the CPI; Current Index is the CPI published for the month that is two (2) months prior to the Adjustment Date; and the Base Index is the CPI published for the month five (5) years prior to the date of publication of the Current Index

3 3 **Payments are Rent.** All amounts payable under this Lease as Base Rent Common Area Costs, Insurance Costs, or Real Estate Taxes and all other amounts payable under this Lease constitute rent.

3 4 **Late Charge.** If any installment of Base Rent is paid more than ten (10) days after the date it is due, Tenant shall pay to Landlord a late charge in the amount of five percent (5%) of the Base Rent then due

ARTICLE 4 COMMON AREA

4.1 **Definition** "Common Area" means those areas of the Property intended for the common use and benefit of tenants or occupants of the Property, their employees, agents, licensees, customers and invitees, including without limitation parking areas, exits, entrances, access roads, driveways, sidewalks, retaining walls, landscaped areas, retention areas, exterior lighting, electrical systems, plumbing and sewage waste systems located outside the buildings and pedestrian malls or courts. Common Area includes Building Areas not yet improved with a building.

4 2 **Use of Common Area.** Tenant, its licensees, sublessees, concessionaires, successors and assigns, and its and their employees, agents, licensees and invitees shall have the non-exclusive right to use the Common Area at all times during the Term. Tenant shall be entitled to enclose (with a temporary fence or barrier) and use the "Outdoor Sales Area" as shown on Exhibit A for seasonal sales purposes, including sales of Christmas trees, provided, however, such periodic sales shall (a) be conducted in a clean, attractive and professional manner and

Tenant shall thoroughly clean the "Outdoor Sales Area" following any such sale, (b) not be conducted more than four (4) times in any twelve month period, and (c) not last for longer than fifteen (15) days in duration for each such sale. All fences or temporary facilities related to such use shall be removed by Tenant upon the conclusion of each such use. Tenant shall be entitled to place shopping cart corrals in the parking areas and to store shopping carts on the sidewalk in front of the Premises. Tenant shall have the exclusive right to place vending machines on the sidewalk in front of the Premises. Any sidewalk sales conducted by any tenant on the Property shall be conducted in a neat and orderly manner and shall not impede pedestrian traffic.

4.3 Location of Buildings and Common Area No buildings or structures shall be constructed by Landlord other than on Outparcels A, B or C as shown on Exhibit A. In addition, no alterations shall be made in the Common Area that would reduce the number of parking stalls on the Premises below 400 based on the current size and configuration of such stalls as shown on Exhibit A. In addition, Landlord shall not permit any change or obstruction in the Common Area that adversely affects access to Tenant's loading dock by delivery trucks or access to the Premises by Tenant's customers.

4.4 Exterior Lighting Landlord shall illuminate during non-daylight hours the parking areas and other Common Area while Tenant remains open for business and for one hour thereafter and shall provide adequate security lighting at all other times.

ARTICLE 5 COMMON AREA COSTS

5.1 Tenant's Share. Initially, Tenant shall reimburse Landlord for Tenant's proportionate share of Common Area Costs within fifteen (15) days following receipt by Tenant of an appropriate invoice therefore and other reasonable documentation. For purposes of this Section, Tenant's proportionate share shall be a fraction, the numerator of which is the Adjusted Stipulated Area of the Premises and the denominator of which is the Adjusted Stipulated Area of the Premises plus the GLA of all other buildings contained on the Property. At such time as Landlord is able to calculate a reasonable estimate of Tenant's proportionate share of Common Area Costs for a calendar year, Landlord shall so inform Tenant and thereafter Tenant shall pay to Landlord Tenant's proportionate share of Common Area Costs in monthly installments based on such estimate. Once such information is available, Tenant's monthly installments of Common Area Costs shall be based on the amount of Common Area Costs actually incurred by Landlord in the previous calendar year.

5.2 Definition. "Common Area Costs" means all costs and expenses (a) incurred by Landlord during the Term to operate, repair, replace and maintain the Common Area including a management fee (in lieu of any other management or administration fee) in the amount of 4% of the other Common Area Costs. Notwithstanding the foregoing, Landlord shall replace the parking lot when necessary at Landlord expense, although Tenant shall pay, as part of Common Area Costs for any parking lot "overlays" or "caps".

5.3 **Audit Rights.** By March 1st of each year, Landlord shall prepare and submit to Tenant a reasonably detailed statement (the "Annual Statement") setting forth the Common Area Costs incurred by Landlord during the previous calendar year, the amount of monthly installments paid by Tenant and Tenant's proportionate share of the actual Common Area Costs for such year. If the amounts paid by Tenant exceed the amount owed, the overpayment shall be refunded to Tenant no later than thirty (30) days after delivery of the Annual Statement. If the amounts paid by Tenant are less than the amounts owed, Tenant shall pay the deficiency as shown on the Annual Statement within thirty (30) days after receipt thereof. The Annual Statement shall be accompanied by a complete set of supporting invoices and other documentation substantiating the amounts shown in the Annual Statement. Landlord shall maintain for a period of at least one year following the date Landlord provides to Tenant each Annual Statement complete and accurate books and records of all Common Area Costs reflected in the Annual Statement. The books and records shall be kept at a location in the continental United States, and Tenant or its auditors shall have the right, with reasonable notice, to inspect, copy and audit such books and records during normal business hours. No calendar year may be audited more than once, but a year that is subject to a review may be subjected to a full audit if apparent errors are discovered. If overpayments are discovered in any such review or audit, Landlord shall refund the overpayment. No Annual Statement shall be subject to review, audit, or adjustment after the expiration of one year after its receipt by Tenant.

ARTICLE 6 TAXES

6.1 **Real Estate Taxes.** Landlord shall pay all real estate taxes and general and special assessments that are levied or assessed by any lawful authority on the Property and costs reasonably incurred by Landlord to contest taxes or valuations (collectively, "Real Estate Taxes"). Landlord shall take advantage of (a) savings available for making early payment, and (b) any law allowing real estate taxes or assessments to be paid in installments, in which case only the installment payable for that year shall be included in Real Estate Taxes for that year. In the event of a conflict between the obligation to realize savings from early payment and the obligation to pay an assessment in installments, Landlord shall consult with Tenant with respect to the election to be made and shall abide by Tenant's decision. 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; or (ii) penalties or late charges. Real Estate Taxes for calendar years falling partially within the Term shall be prorated, and in the case of the first Lease Year, shall be prorated from the Commencement Date.

6.2 **Contests.** Tenant shall be entitled to contest Real Estate Taxes or valuation notices affecting its tax parcel and Landlord shall fully cooperate with Tenant in any such proceeding (including withholding payment of Real Estate Taxes if required by applicable law in connection with a contest), provided, however, that any such contest shall be conducted in accordance with applicable law. Landlord shall furnish Tenant with copies of all tax bills or valuation notices related to the tax parcel on which the Premises is located promptly upon receipt and in sufficient time to allow Tenant to determine whether to pursue a contest. If

Tenant decides to contest, Tenant shall promptly notify Landlord. If Tenant prevails in a tax contest, it shall be entitled to recover the costs of the contest out of the savings achieved.

6.3 Reimbursement by Tenant. For purposes of this Section, Tenant's proportionate share shall be a fraction, the numerator of which is the Adjusted Stipulated Area of the Premises (as defined in Section 7.2) and the denominator of which is the Adjusted Stipulated Area of the Premises plus the GLA of all other buildings contained on the same tax parcel. Tenant shall pay to Landlord on a monthly basis, together with installments of Base Rent, one-twelfth of Tenant's estimated proportionate share of Real Estate Taxes, which shall be based on the actual Real Estate Taxes from the most recently available tax bill. No later than January 31st of each year, Tenant shall pay to Landlord any additional amount due for Real Estate Taxes based on the actual tax bill for the immediately preceding calendar year and Landlord shall refund any overpayments made by Tenant. Tenant's monthly payments hereunder shall be adjusted on January 1st of each year based on the actual tax bill for the immediately preceding year.

6.4 Personal Property Taxes. Tenant shall pay when due all taxes assessed on Tenant's personal property on the Premises.

6.5 Rental Taxes. Tenant shall pay, concurrently with the amounts to which they relate, all federal, state or local sales, use, transaction privilege, rental, or other excise taxes that are imposed or levied upon, or measured by, rent payable under this Lease; excluding, however, Landlord's income taxes.

ARTICLE 7 SQUARE FOOTAGE DEFINITIONS

7.1 Development Standards and Restrictions. The following shall control the development of the Outparcels shown on Exhibit A:

(a) As to Outparcel A: No building shall be more than 130 feet in width and 100 feet in depth and the height of any building shall not exceed the height of the Premises. In addition, non-retail uses on such Outparcel shall not exceed 2,500 square feet in the aggregate.

(b) As to Outparcel B: No building shall be more than 65 feet in width and 190 feet in depth and the height of any building shall not exceed the height of the Premises. In addition, non-retail uses on such Outparcel shall not exceed 2,500 square feet in the aggregate.

(c) As to Outparcel C: Any building must be located within the area shown on Exhibit A and shall not be larger than 3,000 square feet. In addition, no building shall contain more than one-story and shall be no more than 21 feet in height plus an additional 4 feet for architectural elements, features and towers.

(d) The aggregate size of all buildings constructed on Outparcels A and B shall not exceed 13,000 feet.

7.2 Design The architectural design of all buildings on the Property shall be architecturally harmonious and compatible with the design of the Premises, including selection of colors and materials

7.3 Measurement of Floor Area. For all purposes under this Lease, the floor area of the Premises shall be deemed to be the Adjusted Stipulated Area and shall not be subject to increase or decrease based upon a measurement of its actual floor area. "Adjusted Stipulated Area" means 64,820 square feet. The floor area of all other buildings on the Property shall be measured to the exterior surface of exterior walls and to the center of common walls ("GLA").

ARTICLE 8 USE

8.1 Use of Premises. Tenant shall be entitled to use the Premises retail sales of merchandise. In the event Tenant ceases to conduct business at the Premises, Landlord shall have the right to terminate this Lease by giving Tenant thirty (30) days prior written notice of its intention to do so. For purposes of the foregoing, a temporary closure resulting from any breach or default by Landlord or resulting from a casualty or related to remodeling or refurbishment shall not be deemed a violation of this provision.

8.2 Prohibited Uses. Tenant shall not permit the Premises, and Landlord shall not permit any portion of the Property, to be used for any of the following purposes: entertainment or recreation facility (including without limitation bowling alley, bingo parlor, skating rink, theater, amusement park, carnival, circus, video or other game parlor, pool hall, billiard parlor, amusement center, children's recreational facility or party center, disco, dance hall, nightclub, health club or spa, or sporting facility), off-track betting; flea-market; thrift store; church, meeting hall, auditorium, or banquet facility; offices other than retail service offices (such as medical, dental or insurance offices, but excluding a call center and subject to the provisions of Section 7.1) or offices incidental to retail stores; sale or repair of cars, trucks, motorcycles, boats, trailers, or mobile homes (including without limitation automobile, brake, muffler, transmission, tire, lubrication or oil change operation or sale of automobile, truck or boat parts or accessories), funeral parlor; massage parlor; sale or display of pornographic materials; communication or transmission tower; bar; restaurant which serves alcoholic beverages for on-premises consumption in excess of 35% percent of gross sales; lumber yard; manufacturing, or other non-retail business except as allowed in Section 7.1.

8.3 Restricted Uses Until such time as Tenant changes the primary use of the Premises to a purpose other than the operation of a retail supermarket, Landlord shall not permit any part of the Property (other than the Premises) to be used (a) as a supermarket, food store, or a food department store; meat, fish or vegetable market; so-called "convenience store", bakery; delicatessen, for the sale for off-premises consumption of groceries, meats, produce, dairy products, bakery products or other foodstuffs; provided, however that this restriction does not prohibit full-service restaurants, sandwich shops, ice cream or yogurt shops, bagel shops, donut shops, so-called "fast-food" restaurants, or pizza shops and (b) as a drug store, pharmacy, or any business requiring the presence or services of a registered pharmacist.

8.4 **Conflicting Uses** Landlord shall not take any action that may in any manner conflict with the eligibility of the Premises for liquor licenses for the display and sale of beer, wine, and other alcoholic beverages for off-premises consumption. Without limiting the foregoing, Landlord shall not facilitate or cooperate in any manner with the establishment of any educational, religious, or other facility, the location of which, under applicable law, could have the effect of preventing or interfering with Tenant's ability to obtain or maintain all required licenses for display and sale of beer, wine, and other alcoholic beverages from the Premises.

ARTICLE 9 SIGNS

9.1 **Interior and Exterior Signs.** Tenant shall have the right to place and maintain during the Term its usual and customary signs on the exterior and on the interior of the Premises. Tenant shall maintain such signs in good order and repair in compliance with all applicable governmental rules, regulations or ordinances.

9.2 **Name.** Landlord may change the name of the Property at its reasonable discretion provided the new name (i) is in good taste and in keeping with the location of the Property, and (ii) does not employ the name of any other tenant or other occupant of the Property or any competitor of Tenant

9.3 **Sign Criteria** All signs on the Property, including signs on the Premises, shall comply with applicable law

ARTICLE 10 TRANSFERS

10.1 **By Tenant.** Upon any assignment of this Lease or a sublease of all or any part of the Premises, Tenant shall remain liable for performance of Tenant's obligations hereunder. Any assignee shall automatically assume all obligations of Tenant from and after the effective date of the assignment and any sublease shall be subject to all of the terms and conditions of this Lease. Prior to assigning this Lease or subletting the Premises for a primary use other than a retail grocery supermarket, Tenant shall provide written notice (the "Change of Use Notice") to Landlord of the proposed change in primary use. Landlord, at its option, may terminate this Lease by written notice given to Tenant not later than sixty days after receipt of the Change of Use Notice. If Landlord fails to exercise the termination option within that period of time, the termination option shall forever lapse and Tenant need not give any further Change of Use Notice during the balance of the Term.

10.2 **By Landlord** Upon any transfer or sale of Landlord's interest in the Premises, the transferor shall be released from obligations arising prior to the transfer only to the extent those obligations and liabilities are expressly assumed in writing by the transferee. The transferee in any event shall automatically assume and be obligated to perform all obligations of Landlord under this Lease arising or accruing after the transfer. For purposes of this Section, the obligation to refund to Tenant overpayments of Common Area Costs is deemed to arise at the time the Annual Statement is delivered

ARTICLE 11 UTILITIES

11.1 Payment of Charges; Selection of Provider. Tenant shall pay all charges for gas, electricity, communications, water, sewer service, and other utilities used in the Premises during the Term. Tenant shall arrange and pay for its own trash and rubbish removal. Landlord shall cause all tenants of the Property to use closed, properly screened trash containers.

11.2 Installation and Maintenance of Facilities. Landlord shall furnish, install, and maintain in good condition and repair all storm and sanitary sewers, and (except to the extent maintained by the applicable utility providers) all gas, water, electrical power, communications, and electrical facilities and other utilities serving the Property. All expenses in connection therewith shall be Common Area Costs payable by Tenant as provided in Article 4.

11.3 Interruption of Service. Landlord shall have no liability for damage arising from failure or interruption of utility services not caused by Landlord. Landlord shall have no liability for periodic interruptions of service by a utility provider (such as rolling blackouts) and shall have no responsibility to provide alternative service.

ARTICLE 12 MAINTENANCE AND REPAIR

12.1 Tenant's Responsibility. Tenant shall maintain and repair (and replace as necessary) and keep in good condition: (i) all exterior and interior, non-structural portions of the Premises, including the replacement of plate glass in the storefront and doors and the electrical and plumbing facilities located in the interior of the Premises that exclusively serve the Premises, (ii) the heating, ventilating and air conditioning ("HVAC") and electrical, plumbing and sewage systems and other mechanical systems serving the Premises, (iii) all of Tenant's trade fixtures and equipment, including without limitation coolers and refrigeration equipment, and (iv) doors and entrance equipment and mechanisms (including air barriers) and security systems. Tenant shall make all alterations that are required by law at Tenant expense.

12.2 Landlord's Responsibility.

(a) Premises Landlord shall maintain and repair (and replace as necessary) and keep in good condition exterior walls, foundations, roof, and all other structural portions of the Premises. Landlord shall make all alterations that are required by law with respect to improvements that Landlord is responsible for maintaining and repairing. All work performed by Landlord shall be scheduled and performed (with prior notice to Tenant and in consultation with Tenant except in case of emergency) in a manner that minimizes interference with Tenant's business.

(b) Property. Landlord at all times shall maintain or cause to be maintained the Property in first-class condition and repair.

ARTICLE 13 ALTERATIONS AND TRADE FIXTURES

13.1 Requirements Tenant shall have the right to make from time to time alterations and improvements (collectively, "Alterations") to the Premises. Structural Alterations or Alterations that materially affect the exterior appearance of the Premises shall be subject to Landlord's prior consent, which shall not be unreasonably withheld. **NO ALTERATIONS SHALL BE MADE WHICH INCREASE THE SIZE OF THE BUILDING IN ANY WAY.** Any request for consent shall be accompanied by plans and specifications for the proposed Alterations. A failure to respond to a request for consent within thirty days after receipt of written request shall constitute consent. All Alterations shall be performed at Tenant's sole cost and expense, in a good workmanlike manner, and in accordance with applicable laws and codes. All Alterations shall become part of the Premises. Landlord shall make no Alterations to the Premises without Tenant's consent except as may be required by law.

13.2 Mechanics' Liens. Tenant shall pay when due the cost of all Alterations performed by Tenant and shall keep the Premises and the Property free of liens for labor or materials arising from such work. Tenant shall discharge any mechanics' lien arising out of work performed by or for Tenant, by bonding or otherwise, within thirty days after receipt of written notice of such lien. Tenant shall defend, indemnify and hold harmless Landlord from all claims, damages, liabilities, cost, and expense arising from any failure of Tenant to discharge such liens in a timely manner.

13.3 Tenant's Property. 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 (collectively, "Tenant's Property"), including without limitation refrigeration equipment, cash registers, check-out counters, food stands, and solar equipment, shall remain Tenant's property, shall not become a part of the realty, and may be removed by Tenant. Tenant shall repair any damage resulting from removal of Tenant's Property.

13.4 Waiver of Landlord's Liens. Tenant shall have the right to finance, lease, encumber and grant security interests in Tenant's Property. Landlord, on its own behalf and on behalf of all persons claiming through Landlord (including without limitation any Mortgagee) irrevocably waives all statutory or common law liens on Tenant's Property including, but not limited to any landlord's lien or right of distraint for unpaid rent. Landlord shall execute and deliver and shall cause any Mortgagee to execute and deliver such instruments as may be requested from time to time to confirm the foregoing waiver.

ARTICLE 14 INSURANCE

14.1 Required Coverages.

(a) **Property Insurance.** Landlord at all times shall maintain or cause to be maintained special form property insurance coverage on the Property (Insurance Services Office form CP 1030 or its equivalent) in an amount equal to full replacement value. The

policy shall cover the Premises and all Alterations but not Tenant's Property and shall include rental interruption coverage for up to six months. Notwithstanding the foregoing, Tenant may elect, by written notice to Landlord, to maintain the property insurance coverage with respect to the Premises and Alterations. The proceeds of the property insurance policy, whether maintained by Landlord or Tenant, shall be used solely for Restoration in accordance with ARTICLE 15

(b) Landlord's Liability Insurance. Landlord at all times shall maintain or cause to be maintained commercial general liability insurance in respect of the Property, including contractual liability coverage, with the minimum limits of \$3,000,000.00 per occurrence, \$5,000,000.00 annual aggregate, written on an occurrence basis and naming Tenant as an additional insured.

(c) Tenant's Insurance Obligations. Tenant at all times shall maintain with respect to the Premises and Tenant's operations commercial general liability insurance, including contractual liability and liquor liability coverage, with the minimum limits of \$3,000,000.00 per occurrence, \$5,000,000.00 annual aggregate, written on an occurrence basis and naming Landlord and any Mortgagee designated by Landlord as an additional insured. Tenant also shall maintain employers liability insurance and workers' compensation insurance as required by law.

14.2 **Deductibles.** Any permitted or approved deductible amounts actually paid by Landlord and not otherwise recovered by Landlord from a third party shall be included within Insurance Costs.

14.3 **Reimbursement of Insurance Costs.** From and after the Commencement Date, Tenant shall bear Tenant's proportionate share of premiums paid for all insurance coverage maintained by Landlord pursuant to Section 14.1 ("Insurance Costs"). For purposes of this Section, Tenant's proportionate share means a fraction, the numerator of which is the Adjusted Stipulated Area of the Premises and the denominator of which is the Adjusted Stipulated Area of the Premises plus the GLA of all other buildings on the Property. Tenant shall pay to Landlord Tenant's proportionate share of Insurance Costs within thirty days after receipt by Tenant of Landlord's invoice, a copy of the insurance bill, and Landlord's calculation of Tenant's proportionate share; provided, however, that Tenant shall not be obligated to make payment more than fifteen days before payment of the insurance premiums would be delinquent. Upon request, Landlord shall provide to Tenant copies of the policies and all endorsements. Landlord shall maintain records of Insurance Costs, and Tenant shall have the same rights of audit as are provided in Section 5.3 with respect to Common Area Costs.

14.4 **General** Landlord and Tenant shall each list the other as additional parties insured on all policies. From time to time upon request, each party shall deliver to the other certificates evidencing all insurance policies required under this Lease and thereafter shall deliver certificates evidencing renewal or replacements of such policies at least fifteen days prior to the expiration of any existing policy. Each certificate shall describe the insurance coverages in effect and shall provide that if any policy is cancelled before the stated expiration date, the issuing company will endeavor to provide thirty days prior written notice to the holder of the certificate. All insurance policies shall be written by companies that are licensed to write

insurance in the jurisdiction where the Property is located and that have a Best's financial category minimum rating of Class "B+/VII" as shown in the most recent edition of Best's Insurance Report. Any insurance coverage required to be carried under this Lease may be provided under a blanket policy, so long as the minimum coverage required under this Lease is expressly reserved for the benefit of Property and the Premises and, in the case of Landlord's insurance, the premium allocated to the Property does not exceed the premium that would be charged under an individual policy providing the required coverage solely for the Property

14.5 Waiver of Subrogation. 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 waives any and all claims and right of recovery against Landlord, its employees, agents and contractors, for damage, loss or injury caused by or resulting from fire and other perils, to the extent that any such claim for damages, losses or injuries are covered by a special form property insurance policy, without regard to deductible amounts. Landlord hereby releases Tenant from any liability for damage or destruction to the Premises or any other portion of the Property, whether or not caused by acts or omissions of Tenant, its employees, agents or contractors, and waives all claims and right of recovery against Tenant, its employees, agents and contractors, for damage, loss or injury caused by or resulting from fire and other perils, to the extent that any such claims for damages, losses or injuries are covered by a special form property insurance policy that Landlord does or is required to maintain hereunder, without regard to deductible amounts. Landlord and Tenant shall first each look to its respective insurance coverage for recovery of any insured property damage with any balance payable by the other policy. Landlord and Tenant each shall cause its special form property insurance policies to contain a provision or endorsement whereby the insurer waives any rights of subrogation. Landlord and Tenant each shall give to the insurance company that issued its policies of special form property insurance written notice of the foregoing waivers and shall cause the insurance policies to be endorsed, if necessary, to reflect such waivers.

14.6 Indemnities. Subject to Section 14.5, Tenant covenants and agrees to indemnify and hold Landlord harmless for, from and against all losses, claims, demands, damages (but not consequential damages), liabilities or expenses (including reasonable attorneys' fees) resulting from Tenant's use, occupation, repair or alteration of the Premises or the Common Areas or resulting from the breach of this Lease by Tenant, its agents, servants, contractors, invitees or employees or the negligence or willful misconduct of Tenant, its agents, servants, contractors, subcontractors, invitees or employees in the use, occupation, repair or alteration of the Premises. The foregoing shall not apply to any loss, claim, damage, liability or expense arising out of or resulting from any negligent, willful or otherwise wrongful act or omission of Landlord or its agents, contractors, subcontractors or employees. Subject to Section 14.6, Landlord covenants and agrees to indemnify and hold Tenant harmless for, from and against all losses, claims, demands, damages (but not consequential damages), liabilities or expenses (including reasonable attorneys' fees) resulting from Landlord's use, occupancy, operation or maintenance of the Common Area or any portion of the Property other than the Premises or resulting from the breach of this Lease by Landlord, its agents, servants, contractors, subcontractors or employees in the use, occupancy, operation or maintenance of the Common Area or any portion of the Property other than the Premises or the negligence or willful misconduct of Landlord, its agents, servants, contractors or employees. The foregoing shall not

apply to any loss, claim, damage, liability or expense arising out of or resulting from any negligent, willful or otherwise wrongful act or omission of Tenant or its agents, contractors, subcontractors, invitees or employees

ARTICLE 15 DAMAGE OR DESTRUCTION

15.1 Termination Rights If all or part of the Premises is rendered untenable by damage from fire or other casualty, Landlord shall provide to Tenant as soon as practicable after the casualty, written notice (the "Restoration Schedule") setting forth the date by which, in Landlord's reasonable opinion, the Premises can be substantially repaired and restored (a "Restoration") If the Restoration Schedule provides that the Restoration will reasonably require more than three hundred sixty-five (365) days from the date of the casualty, Tenant may elect to terminate this Lease as of the date of the casualty by written notice given to Landlord not later than fifteen (15) days after receipt of the Restoration Schedule

15.2 Restoration. If the Restoration Schedule provides that the Restoration will require three hundred sixty-five days or less from the date of the casualty, or if Tenant does not exercise its right to terminate under Sections 15.1 or 15.4, provided that Landlord's Mortgagee so permits, Landlord shall promptly commence and diligently pursue the Restoration. Restoration by Landlord shall not include repair or replacement of any of Tenant's Property

15.3 Abatement. During any period of Restoration, the Base Rent and all other amounts payable under this Lease shall be proportionately reduced according to the square footage affected directly by the Restoration.

15.4 Additional Termination Rights. Notwithstanding anything to the contrary in Section 15.1, if the casualty occurs during the last year of the Term and the Restoration Schedule indicates that the Restoration will require more than one hundred twenty days from the date of the casualty or in the event Landlord's mortgagee refuses to apply the proceeds of insurance to the Restoration, regardless of when such casualty occurs, then Tenant may elect to terminate this Lease as of the date of the casualty by written notice given to Landlord not later than fifteen days after receipt of the Restoration Schedule.

15.5 Uninsured Casualty. Notwithstanding the foregoing, Landlord shall have no obligation to Restore the Premises in the event the Premises are damaged by any casualty not covered by insurance maintained or required to be maintained by Landlord pursuant to Section 14.1(a), disregarding any deductible or retained risk amount or if Landlord's mortgagee refuses to apply the proceeds of insurance to the Restoration. In such event, Landlord may terminate the Lease upon written notice to Tenant with sixty days after the date of the casualty. Landlord's termination notice shall include a copy of Landlord's contractor's written estimate of the cost of Restoration of the Premises. Tenant shall have the right to nullify Landlord's election to terminate the Lease if Tenant gives Landlord written notice within thirty days after receipt of Landlord's termination notice that Tenant agrees to pay all costs of Restoration of the Premises without recourse against Landlord. In such event, the Lease shall continue in full force and effect and Tenant shall pay its proportionate share of the cost of Restoration of the

Premises on a monthly basis to Landlord during Landlord's contractor's Restoration of the Premises.

ARTICLE 16 EMINENT DOMAIN

16.1 Termination If at any time such portion of the Premises or of the Property shall be taken under power of eminent domain or conveyed by Landlord in lieu of condemnation that Tenant determines that the Premises have been materially and adversely impacted and in consequence are no longer suitable for the operation of Tenant's business, then, at Tenant's option, this Lease shall terminate as of the date that Tenant is required to surrender possession of the Premises, and any unearned rent or other charges paid in advance shall be refunded to Tenant. Notwithstanding the foregoing, Tenant shall not be entitled to terminate this Lease based solely on a taking of Common Area that does not adversely affect any of the Property's access points to adjoining public streets, does not affect access to Tenant's loading docks by delivery vehicles, and does not reduce the parking ratio on the Property below local zoning requirements.

16.2 Restoration and Abatement. In the event of a taking that does not result in a termination pursuant to Section 16.1, Landlord, at Landlord's sole cost and expense, forthwith shall restore the remaining portions of the Premises and the Property, to the extent reasonably possible, to an architectural whole in substantially the same condition as prior to the taking. All of the award payable to Landlord shall be applied first to the costs of such restoration

16.3 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, to Tenant, for the unamortized cost of Tenant's betterments and improvements, moving expenses and the value of Tenant's Property; and further provided that Tenant may apply for and receive an award for the loss of Tenant's leasehold estate (valued as though this Lease had not been terminated) so long as such award does not diminish the amount of the award otherwise payable to Landlord.

ARTICLE 17 DEFAULT AND REMEDIES

17.1 Self Help. If either party fails to perform a material obligation imposed on it by this Lease within the applicable cure period provided in Section 17.2 or 17.5, as applicable, then 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 for any amount paid and any expense or contractual liability so incurred, together with a service charge in the amount of 10% of the amounts paid or incurred. The reimbursement shall be made within thirty days after receipt of an invoice and reasonable supporting documentation.

17.2 Default by Tenant The following shall constitute "Events of Default"

(a) Tenant fails to pay Base Rent or any other amount due under this Lease within five business days after receipt of written notice of nonpayment from Landlord, or

(b) Tenant fails to perform any other obligation under this Lease within fifteen days after receipt of written notice from Landlord of nonperformance; provided, however, that if the breach is of such a nature that it cannot be cured within fifteen days, no Event of Default shall be deemed to have occurred by reason of the breach if cure is commenced promptly and diligently pursued to completion, and provided further, that in the event of a Tenant breach involving an imminent threat to health or safety, Landlord may in its notice of breach reasonably reduce the period for cure to such shorter period as may be reasonable under the circumstances

17.3 Landlord's Remedies Upon the occurrence of an Event of Default, Landlord, at any time thereafter without further notice or demand, may exercise any one or more of the following remedies concurrently or in succession:

(a) Exercise its self-help remedy pursuant to Section 17.1,

(b) Terminate Tenant's right to possession of the Premises by legal process, with or without terminating this Lease, and retake exclusive possession of the Premises;

(c) From time to time relet in a bona fide arm's length transaction all or portions of the Premises, using reasonable efforts to mitigate Landlord's damages. In connection with any reletting, Landlord may relet for a period extending beyond the term of this Lease and may make alterations or improvements to the Premises. Upon a reletting of all or substantially all of the Premises, Landlord shall be entitled to recover all of its then prospective damages for the balance of the Lease Term measured by the net present value (calculated using a discount rate of 10%) of the difference between amounts payable under this Lease and the anticipated net proceeds of reletting including all costs of improvements or alterations required in the reletting which are not reflected in the new rent;

(d) Recover all costs, expenses and reasonable attorneys' fees incurred by Landlord in connection with enforcing this Lease, recovering possession, reletting the Premises or collecting amounts owed, including, without limitation, costs of reasonable and necessary alterations, commercially reasonable brokerage commissions, and other costs reasonably and necessarily incurred in connection with any reletting;

(e) Pursue other remedies available at law or in equity; provided, however, that under no circumstances shall Landlord be entitled to recover damages not yet accrued except as provided in Section 17.3(c).

17.4 Landlord's Default Landlord shall be in default under this Lease if it

(a) Fails to pay any amount owed to Tenant when due and fails to make such payment within five business days after written notice from Tenant that the payment is past due; or

(b) Fails to perform any other obligation under this Lease within fifteen days after receipt of written notice from Tenant of nonperformance; provided, however, that if the breach is of such a nature that it cannot be cured within fifteen days, Landlord shall not be in default of this Lease if cure is commenced promptly and diligently pursued to completion; and provided further, that in the event of a Landlord breach involving an imminent threat to health or safety, Tenant may in its notice of breach reasonably reduce the period for cure to such shorter period as may be reasonable under the circumstances.

17.5 Notice to Mortgagee. Tenant shall provide concurrently to any Mortgagee, provided the name and address of the Mortgagee was previously provided to Tenant, a copy of any written notice of default that Tenant gives to Landlord. Tenant shall accept any cure of a default by Landlord made by a Mortgagee.

17.6 Tenant's Remedies. In the event that Landlord shall at any time be in default beyond the applicable cure period under Section 17.5, Tenant at any time thereafter without further notice or demand, may exercise any one or more of the following remedies concurrently or in succession:

- (a) Exercise its self-help remedy pursuant to Section 17.1,
- (b) Enforce Landlord's obligation by injunction or judicial decree of specific enforcement;
- (c) Recover all costs, expenses and reasonable attorneys' fees incurred by Tenant in connection with enforcing this Lease or collecting amounts owed;
- (d) Deduct and offset the amount owed against up to fifty percent (50%) of each installment of Base Rent (provided, however, if the claim is the subject of pending judicial or arbitration proceedings, the offset shall be suspended pending the outcome of those proceedings and provided further, that no deduction or offset shall be taken unless Landlord shall have failed to pay the amount due within thirty (30) days after written notice of the amount due and demand for payment by Tenant);
- (e) If the breach materially affects Tenant's business in the Premises and Tenant has no other adequate remedy at law or in equity, terminate this Lease by written notice to Landlord; or
- (f) Pursue other remedies available at law or in equity

17.7 Interest. Any amount due under this Lease that is not paid within the applicable cure period under or shall bear interest from the expiration of the cure period until paid at the rate of 12% per annum

17.8 Waiver of Redemption Rights Tenant waives any statutory or common law right to reinstatement or redemption of this Lease following an effective termination of this Lease pursuant to Section 17.2. Nothing in this Section shall be interpreted as a waiver of a right to appeal from any judgment entered in favor of Landlord or a waiver of a right to contest the validity of any purported termination.

ARTICLE 18
COVENANTS AND WARRANTIES

18.1 Assurances. Landlord covenants and warrants to Tenant as follows:

(a) Landlord has full right and lawful authority to enter into and perform Landlord's obligations under this Lease,

(b) Landlord is not a party to any lease or other agreement, the terms of which would prohibit the operation by Tenant of a supermarket at the Premises, and

(c) Subject to Landlord's remedies following an Event of Default, Tenant shall quietly and peaceably hold, possess and enjoy the Premises and the non-exclusive use of the Common Area for the full Term without any hindrance or molestation.

18.2 Tenant Compliance with Law. Tenant, at Tenant's expense, shall comply with all present and future federal, state and local laws, ordinances, orders, rules and regulations (collectively, "Laws"), and shall procure all permits, certificates, licenses and other authorizations required by applicable Law. Tenant shall make all reports and filings required by applicable Laws. Tenant shall defend, indemnify and hold harmless Landlord and Landlord's present and future members, officers, directors, employees, partners and agents from and against all claims, demands, liabilities, fines, penalties, losses, costs and expenses, including but not limited to costs of compliance, remedial costs, and reasonable attorneys' fees, arising out of or relating to any failure to Tenant to comply with applicable Laws.

18.3 Environmental Matters.

(a) Presence of Hazardous Substances. So far as Tenant is aware, except as may be provided in any environmental assessment delivered to Landlord by Tenant prior to the date of this Lease, no substances controlled, regulated, or restricted under applicable state or federal laws regarding environmental contamination ("Hazardous Substances") have been generated, disposed of, released or found in or under the Property, no storage tanks are or have been located in the Property, either above or below ground, and the Property has not been used as a landfill or as a dump for garbage or refuse.

(b) Compliance by Tenant Without limiting the provisions of Section 18.2, Tenant shall comply with all Laws relating to environmental matters and shall defend, indemnify and hold harmless Landlord and Landlord's present and future officers, directors, employees, partners and agents from and against all claims, demands, liabilities, fines, penalties, losses, costs and expenses, including but not limited to costs of compliance, remedial costs, clean-up costs and reasonable attorneys' fees, arising from or related to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling, or the emission, discharge, release or threatened release into the environment, of any Hazardous Substances from, on or at the Premises as a result of any act or omission on the part of Tenant, or as to any cause relating to any period of prior ownership of the property by Tenant, its affiliates or any prior related entities. Tenant's indemnification obligations shall survive the expiration or termination of this Lease.

(c) Compliance by Landlord Without limiting the provisions of Section 18.2, Landlord shall comply with all Laws relating to environmental matters, and shall defend, indemnify and hold harmless Tenant and Tenant's present and future officers, directors, employees, partners and agents from and against all claims, demands, liabilities, fines, penalties, losses, costs and expenses, including but not limited to costs of compliance, remedial costs, clean-up costs and reasonable attorneys' fees, arising from or related to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling, or the emission, discharge release or threatened release into the environment, of any Hazardous Substances from, on or at the Property as a result of any cause other than an act or omission on the part of Tenant. Landlord's indemnification obligations shall survive the expiration or termination of this Lease.

ARTICLE 19 SUBORDINATION AGREEMENTS AND ESTOPPEL CERTIFICATES

19.1 **Subordination.** This Lease shall not be subordinate to any mortgage, deed of trust, deed to secure debt, or other lien or security interest encumbering the Premises or the Property (collectively, a "Mortgage"), except a first Mortgage, the holder of which (the "Mortgagee") has entered into a non-disturbance agreement (a "Non-Disturbance Agreement") pursuant to which: (i) this Lease shall not be terminated or otherwise affected, nor Tenant's continued possession of the Premises nor rights with respect to the Common Area disturbed, by reason of any foreclosure, trustee's sale, deed in lieu of foreclosure or similar proceeding (collectively, a "Foreclosure"); (ii) upon any Foreclosure, the purchaser automatically shall succeed to the interests and obligations of Landlord under this Lease, this Lease shall constitute a direct lease between the purchaser, as landlord, and Tenant, as tenant, and Tenant shall attorn to the purchaser; and (iii) insurance proceeds and condemnation awards shall be used and applied to restoration and repair to the extent required by this Lease. The terms of the Non-Disturbance Agreement shall otherwise be reasonably satisfactory to Tenant and the Mortgagee. Landlord warrants that as of the date of this Lease, no Mortgage encumbers the Property except for the lien of Parkway Bank and Trust Company (the "Existing Lender"). Landlord shall provide to Tenant, within ten days after the execution of this Lease, a Non-Disturbance Agreement from the Existing Lender in form and substance reasonably acceptable to Tenant. Upon request from time to time, Tenant shall execute agreements subordinating this Lease to future first Mortgages provided the subordination agreements contain Non-Disturbance Agreements as provided above. Any subordination agreement may include a provision that any subsequent amendment to this Lease made without the Mortgagee's consent will not be binding upon the Mortgagee or upon any purchaser on Foreclosure.

19.2 **Estoppel Certificates.** Each party shall from time to time upon not less than thirty days' prior written notice from the other execute, acknowledge and deliver a statement in writing (i) certifying that this Lease is unmodified and in full force and effect (or if modified, stating the nature of such modification and certifying that this Lease, as so modified, is in full force and effect) and the dates to which the rental and other charges are paid in advance, if any; (ii) acknowledging that there are not, to the knowledge of the certifying party, any uncured defaults on the part of the other party hereunder, or specifying such defaults if they are claimed; and (iii) certifying such other factual matters relating to this Lease within the knowledge of the

certifying party as the other party may reasonably request. No estoppel certificate shall in any manner modify this Lease or unpose additional covenants on the certifying party. Any such statement may be relied upon by any prospective purchaser or lender. No estoppel certificate shall be combined with a subordination agreement.

ARTICLE 20 GENERAL PROVISIONS

20.1 Unavoidable Delay. If either party shall be delayed or hindered in, or prevented from, the performance of any work, service, or other act required under this Lease and such delay or hindrance is due to strikes, lockouts, acts of God, inclement weather, governmental restrictions, enemy act, civil commotion, fire or other casualty, or other causes of a like nature beyond the control of the party so delayed or hindered, then performance of such work, service, or other act shall be excused for the period of such 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. The provisions of this Section, however, shall not excuse either party from making any payment when due.

20.2 Notices. 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 certified mail (return receipt requested) or sent by air courier, expedited mail service or national overnight delivery service providing receipted delivery, addressed to the other party as follows

(a) If to Tenant:	Fleming Companies, Inc. 1945 Lakepointe Drive Lewisville, TX 75022 Attention: Lease Administration Department
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With a copies to	Fleming Companies, Inc. 1945 Lakepointe Drive Lewisville, TX 75022 Attention: Legal Department
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(b) If to Landlord:	RMS Properties, Inc. 331 B West Golf Road Schaumburg, Illinois Attn: Mr. Ron Shoffet, President
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or at such other address as may be specified from time to time in writing by either party. All notices 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 is given.

20.3 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 C shall be prepared by Tenant, at Tenant's expense, executed by Landlord, and recorded. At the expiration or earlier termination of the Term, Tenant shall execute, acknowledge and deliver to Landlord a

quitclaim deed or such other instrument as Landlord's title company may require to remove the lien of the memorandum of lease from title.

20.4 Surrender and Holding Over. Upon expiration of the Term or termination of this Lease, Tenant shall surrender possession of the Premises to Landlord in good condition and repair, reasonable wear and tear, damage by casualty or condemnation and performance of Landlord's repair and maintenance obligations excepted and in broom-clean condition. Tenant shall remove all Alterations, trade fixtures and personal property unless otherwise agreed to by Landlord. In the event of a holdover with Landlord's consent, Tenant shall occupy the Premises as a tenant from month-to-month at the same Base Rental and subject to all of the other terms and conditions of this Lease. Any holdover without Landlord's consent shall be deemed a month to month tenancy with Base Rent payable at double the last monthly Base Rent, with all remaining terms and conditions of this Lease being in force and effect.

20.5 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.

20.6 Non-Waiver No waiver by Landlord or Tenant of any provision of this Lease or any breach by the other party shall be a waiver of any other provision of this Lease or of any subsequent breach by the other party of the same or any other provision. Any consent or approval given under this Lease requiring consent or approval shall not be deemed to render unnecessary the obtaining of consent to or approval for any subsequent act, whether or not similar to the act so consented to or approved. No act shall be deemed an acceptance of a surrender of the Premises, and no agreement to accept a surrender shall be valid, except a formal acceptance of surrender in writing and signed by Landlord. No acquiescence by either party to any default by the other party 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.

20.7 Successors and Assigns This Lease shall be binding upon and inure to benefit of the parties hereto and their respective heirs, executors, administrators, successors, and assigns. The lease may be assigned by Tenant with Landlord's prior written consent which shall not be unreasonably withheld.

20.8 Time is of the Essence. The time of performance of all of the covenants, conditions, and agreements of this Lease is of the essence of this Lease.

20.9 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.

20.10 Interpretation. This Lease has been fully negotiated by legal counsel for the parties and no provision of this Lease shall be construed strictly against either party. The Exhibits are incorporated into this Lease by this reference. The captions of Articles, Sections, and subsections are for convenience only and do not in any way limit or amplify any term or

provision hereof. 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.

20.11 Entire Agreement. This Lease, including but not limited to the attached Exhibits, constitutes the entire and complete agreement of Landlord and Tenant regarding the subject matter hereof. No provision of this Lease may be waived or modified except in writing signed by the party against whom enforcement of the waiver or modification is sought.

20.12 Governing Law. This Lease shall be governed by and construed under the laws of the state in which the Property is located.


20.13 Landlord's Liability. Notwithstanding anything contained in this Lease to the contrary, 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 the net rents, issues, profits and other income actually received from the operation of the Property as well as Landlord's interest in the Property, and Tenant shall, except as otherwise expressly permitted pursuant to this Section, have no claim against Landlord or any of Landlord's personal assets for satisfaction of any judgment with respect to this Lease. No present or future limited partner, officer, director, employee, trustee, member, investment manager or agent of Landlord shall have any personal liability, directly or indirectly, and recourse shall not be had against any such limited partner, officer, director, employee, trustee, member, investment manager or agent under or in connection with this Lease. Tenant hereby waives and releases any and all such personal liability and recourse.

20.14 Right of Inspection. Landlord and its agents and representatives shall be entitled to enter upon and inspect the Premises at any time during normal business hours upon prior reasonable notice, provided only that such inspection shall not unreasonably interfere with Tenant's business.

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

TENANT:

FLEMING COMPANIES, INC.,
an Oklahoma corporation

By. 
Name: William C. McE
Title: VP

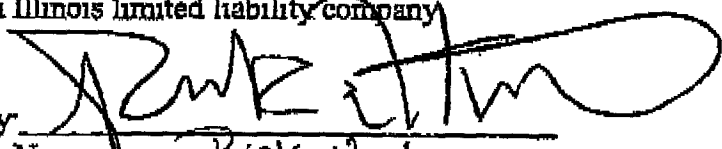
(CORPORATE SEAL)

LANDLORD:

RMS PROPERTIES II, L.L.C.,
an Illinois limited liability company

By. 
Name: Ron Shoflet
Title: Partner

HEIDNER/SUSPENZI
PROPERTIES, LLC,
an Illinois limited liability company

By. 
Name: Rick Heidner
Title: Partner

(SEAL)

FLEMING COMPANIES, INC.

By: W C. Mee
William C. Mee
Vice President

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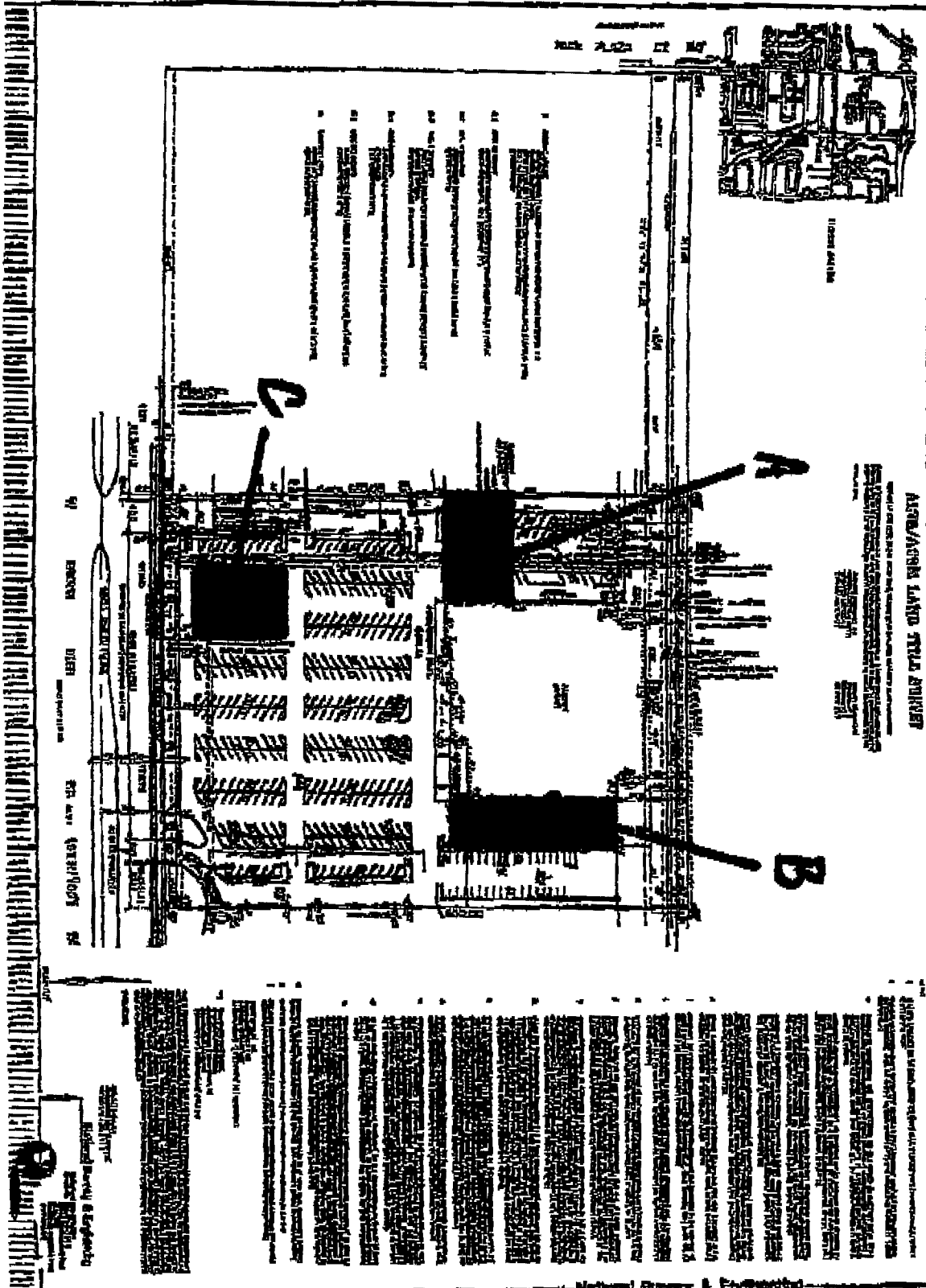
EXHIBIT A

SITE PLAN

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EXHIBIT B
LEGAL DESCRIPTION OF PROPERTY

Parcel 2 of Certified Survey Map No. 4322, being a redivision of Parcel 2 of Certified Survey Map No. 4307, being a part of the Northeast 1/4 and Southeast 1/4 of Section 3, Township 8 North, Range 21 East, in the Village of Brown Deer, Milwaukee County, Wisconsin, recorded on May 18, 1983, as Document No 5618100

Tax Key No. 030-0105-004

EXHIBIT C

(space above line for Clerk's use only)

This instrument *prepared by*
and after recording return to:

Michael D. Zeka, Esq.
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202

MEMORANDUM OF LEASE

THIS MEMORANDUM OF LEASE ("Memorandum") is made and entered into this 28th day of June, 2002, by and between **RMS PROPERTIES II, L.L.C.**, an Illinois limited liability company and **HEIDNER/SUSPENZI PROPERTIES, LLC**, an Illinois limited liability company, a joint venture, with its home office located at 331B West Golf Road, Schaumburg, Illinois 60195-3607 ("Landlord") and **FLEMING COMPANIES, INC.**, an Oklahoma corporation with its home office located at 1945 Lakepointe Drive, Lewisville, Texas 75022, Attention: Real Estate Officer ("Tenant")

WITNESSETH:

1. **Premises.** Landlord leases to Tenant and Tenant leases from Landlord, pursuant to a Lease dated as of June 28, 2002, (the "Lease") certain real property and improvements located at 6300 West Brown Deer Road, Milwaukee, Wisconsin, as legally described on attached Exhibit 1 (the "Premises").

2. **Term.** The Initial Term of the Lease shall be for a period of ten (10) years beginning on the date hereof. The Term of the Lease may be extended by four successive periods of five years each, in accordance with the applicable provisions of the Lease.

3. **Certain Restrictions.** The Lease contains the following restrictions with respect to certain uses, which may not be waived without Tenant's consent:

(a) **Prohibited Uses.** Tenant shall not permit the Premises, and Landlord shall not permit any other part of the property on which the Premises is located, to be used for any of the following purposes: entertainment or recreation facility (including without limitation bowling alley, bingo parlor, skating rink, theater, amusement park, carnival, circus, video or other game parlor, pool hall, billiard parlor, amusement center, children's recreational facility or party center, disco, dance hall, nightclub, health club or spa, or sporting facility), off-track betting;

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flea-market, thrift store; church, meeting hall, auditorium, or banquet facility; offices other than retail service offices (such as medical, dental or insurance offices, but excluding a call center and subject to certain restrictions set forth in the Lease) or offices incidental to retail stores; sale or repair of cars, trucks, motorcycles, boats, trailers, or mobile homes (including without limitation automobile, brake, muffler, transmission, tire, lubrication or oil change operation or sale of automobile, truck or boat parts or accessories); funeral parlor, massage parlor; sale or display of pornographic materials, communication or transmission tower, bar, restaurant which serves alcoholic beverages for on-premises consumption in excess of 35% percent of gross sales; lumber yard, manufacturing, or other non-retail business except as otherwise allowed in the Lease.

(b) **Restricted Uses.** Until such time as Tenant changes the primary use of the Premises to a purpose other than the operation of a retail supermarket, Landlord shall not permit any part of the property on which the Premises is located to be used: (a) as a supermarket, food store, or a food department store; meat, fish or vegetable market, so-called "convenience store", bakery; delicatessen; for the sale for off-premises consumption of groceries, meats, produce, dairy products, bakery products or other foodstuffs; provided, however that this restriction does not prohibit full-service restaurants, sandwich shops, ice cream or yogurt shops, bagel shops, donut shops, so-called "fast-food" restaurants, or pizza shops, and (b) as a drug store, pharmacy, or any business requiring the presence or services of a registered pharmacist.

4 **Development Restrictions.** The Lease also contains certain restrictions on the permitted locations and heights of buildings and on additional development


5. **Incorporation of Lease.** This Memorandum is for informational purposes only and nothing contained herein shall be deemed to in any way to modify or otherwise affect any of the terms and conditions of the Lease, the terms of which are incorporated herein by reference. This instrument is a memorandum or short form of lease and is subject to all of the terms, provisions and conditions of the Lease. In the event of any inconsistency between the terms of the Lease and this instrument, the terms of the Lease shall prevail.

6 **Binding Effect.** The covenants and restrictions contained in the Lease affecting the Premises and the Common Area, including without limitation those described above, shall run with the land and shall be binding upon Tenant, Landlord, and their respective tenants, subtenants, successors and assigns

IN WITNESS WHEREOF, the parties have executed this Memorandum of Lease under seal as of the day and year first written below.

TENANT:

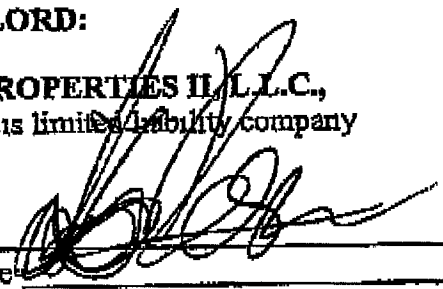
FLEMING COMPANIES, INC.,
an Oklahoma corporation

By 
Name William C. McEl
Title VP

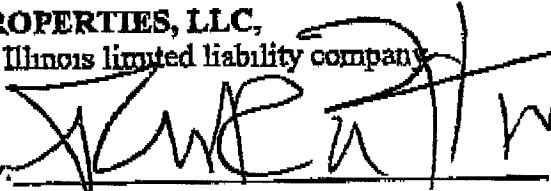
(CORPORATE SEAL)

LANDLORD:

RMS PROPERTIES II, L.L.C.,
an Illinois limited liability company

By 
Name _____
Title _____

**HEIDNER/SUSPENZI
PROPERTIES, LLC,**
an Illinois limited liability company

By 
Name _____
Title _____

STATE OF Oklahoma)
) ss
COUNTY OF Oklahoma)

Personally came before me this 28th day of June, 2002, William C. Ma the
VP of Fleming Companies, Inc., to me known to be the person who executed the
foregoing instrument and acknowledged the same.

[Signature]
Print Name: Leresa D. Hibbard
Notary Public, OK County, OK
My Commission expires: 10-10-04
1200517091

STATE OF Illinois)
) ss
COUNTY OF Cook)

Personally came before me this 28 day of June, 2002, Ron Shoffet the
of RMS Properties II, L L C, to me known to be the person who executed the
foregoing instrument and acknowledged the same.



[Signature]
Print Name: Gilda Garza
Notary Public, _____ County, Cook
My Commission expires: 12/9/05

STATE OF Illinois)
) ss
COUNTY OF Cook)

Personally came before me this 28 day of June, 2002, Rick Hudner the
of Heidner/Suspenzi Properties, LLC, to me known to be the person who
executed the foregoing instrument and acknowledged the same.

[Signature]
Print Name: Gilda Garza
Notary Public, _____ County, Cook
My Commission expires: 12/9/05