

## ARTICLE VII

### Seller's Covenants

Except and to the extent Buyer may otherwise permit in writing, Seller covenants and agrees as follows:

7.1 Conduct of Business Pending Closing. Subject to any obligations as a debtor in possession under the Bankruptcy Code and except as otherwise expressly contemplated by any Order of the Bankruptcy Court or with the prior written consent of Buyer (which consent shall not be unreasonably withheld or delayed) or except as contemplated on *Schedule 7.1*, from the date hereof until the Closing for a Store Property, Seller shall continue to operate such Store Property substantially in the manner as heretofore conducted. Without limiting the generality of the foregoing, subject to any obligations as a debtor in possession under the Bankruptcy Code and except as otherwise expressly contemplated by this Agreement, any Order of the Bankruptcy Court or with the prior written consent of Buyer (which consent shall not be unreasonably withheld or delayed), with respect to each Store Property, from the date hereof until the Closing, Seller shall:

- (a) Use, preserve and maintain the Acquired Assets at such Store Property on a basis consistent with past practice and not cause damage to or destruction or loss of any of such Acquired Assets;
- (b) Continue to maintain the insurance covering the Acquired Assets at such Store Property in effect as of the date of this Agreement;
- (c) Pay all debts and obligations incurred by it in the operation of the Store Property in the ordinary course of business consistent with Seller's practice since April 1, 2003;
- (d) Not commit any act or omit to do any act, nor permit any act or omission to act, which may cause a material breach of any of the Material Acquired Contracts related to such Store Property;
- (e) Maintain its books, accounts and records with respect to such Acquired Assets and the Store Property in the usual manner and on a basis consistent with past practice;
- (f) Not enter into any agreement or agreements for the sale of a material amount of any of the Acquired Assets relating to such Store Property, except as provided in *Section 9.14* or except for sales of Equipment, provided that, any item of Equipment sold shall be replaced with an item of Equipment of like value and quality;
- (g) Not, without prior consent of Buyer, grant any raises or bonuses to Employees, except (i) in the ordinary course of business and in accordance with past

practices, (ii) the raises or bonuses set forth on *Schedule 7.1(g)*, or (iii) raises, bonuses, or other fringe benefits provided in any key employee retention plan or other employee incentive or severance plan that may be approved by the Bankruptcy Court prior to the Closing, or amend any existing or enter into any new collective bargaining agreements with Employees;

(h) Attempt to maintain Inventory (other than Excluded Inventory) for such Store Property in a manner adequate to support customer demand;

(i) Not create, assume or permit to exist any Lien upon the Acquired Assets relating to such Store Property except for Permitted Exceptions; and

(j) Except as provided in *Section 9.14*, not enter into any contract or agreement to do any of the foregoing.

#### 7.2 Reserved.

7.3 Further Assurances. Subject to the terms and conditions of this Agreement, Seller will use all reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, all things necessary, proper or advisable under applicable Laws and regulations to consummate and make effective the transactions contemplated by this Agreement, the Ancillary Agreements and the other documents and instruments to be delivered pursuant hereto.

7.4 Schedule Updates. No later than five Business Days prior to the anticipated Initial Closing Date (but no earlier than 10 days prior to the anticipated Initial Closing Date), Seller shall deliver to Buyer updated Schedules to this Agreement to reflect changes occurring following the date of this Agreement, which updated Schedules shall be deemed to modify the representations and warranties of Seller set forth in this Agreement unless such changes would have a Material Adverse Effect, other than material adverse effects relating to or resulting from (a) economic conditions applicable to industry-wide occurrences, (b) the execution of this Agreement or the transactions contemplated hereby, or (c) any change or effect resulting, directly or indirectly, from the commencement or continuation of the Chapter 11 Case.

#### 7.5 Reserved.

7.6 Removal of Excluded Inventory and Excluded Equipment. Seller shall coordinate the removal of the Excluded Inventory and the Excluded Equipment with Buyer in order to minimize disruption to the operation of the business at each of the Store Properties and Seller shall remove such items in a manner so as to avoid damage to the Store Properties from such removal.

#### 7.7 Bankruptcy Actions.

(a) As promptly as practicable after the date hereof, Seller will file with the Bankruptcy Court a motion, supporting papers and a proposed Bidding Procedures Order, seeking the Bankruptcy Court's approval of, *inter alia*, this Agreement pending the Sale Hearing,

the scheduling of the Sale Hearing, the Auction, the Bidding Procedures, the terms of **Section 9.14** of this Agreement and Seller's observance and performance of such terms during the pendency of the Chapter 11 Case.

(b) As promptly as practicable after the execution of this Agreement, Seller will file with the Bankruptcy Court a motion, supporting papers and a form of Sale Order, all in form and substance reasonably satisfactory to Buyer after its review prior to their filing, seeking the Bankruptcy Court's approval of this Agreement, Seller's performance under this Agreement and the assignment and the purchase of the Acquired Assets.

7.8 Equipment List. Prior to the Initial Closing, Seller shall prepare and deliver to Buyer an itemized listing of the Equipment at each Store Property. Buyer may participate in the preparation of this listing at its option.

## ARTICLE VIII

### Covenants of Buyer

Except and to the extent Seller may otherwise permit in writing, Buyer covenants and agrees as follows:

8.1 Third-Party Consents. Buyer shall give all notices to Governmental Entities and any other Person required to be given by it in connection with the transactions contemplated hereby. In order to facilitate the orderly assignment and transfer of all rights and privileges necessary to own and operate the Store Properties, Buyer shall proceed after the execution of this Agreement to timely prepare, file and prosecute each request and application therefor together with such information as may be necessary and appropriate to effect such approvals. Buyer acknowledges that it may need to enter into direct agreements with franchising authorities, other Governmental Entities or other third parties.

8.2 Discharge of Assumed Liabilities. Buyer shall pay, perform and discharge the Assumed Liabilities as they become due, including, without limitation, the discharge and performance when due of each and every obligation of Seller to be satisfied or performed on or after the applicable Closing Date relating to the Acquired Contracts.

8.3 Confidentiality. Buyer covenants and agrees that for a period of two years after the Final Closing Date, it will not, directly or indirectly, except in connection with the transactions contemplated hereby or to the extent required by Law, regulatory process or proceeding or Order (provided prior timely notice has been provided to Seller to permit Seller to limit such disclosure or to seek appropriate protective orders), make use of or divulge, or permit any of its agents or employees to make use of or divulge, nonpublic information concerning the business, financial or other affairs of or any of the methods of doing business used by Seller or any of its Affiliates. The obligations contained in this **Section 8.3** are in addition to and independent of the obligations contained in the Non-Disclosure Agreement.

8.4 Access.

(a) Seller, Seller's counsel and any other professionals employed in the Chapter 11 Case shall, for a period of three years from the Final Closing Date, have access to, and the right to copy, at its expense, for bona fide business purposes or for purposes related to the continued administration of the Chapter 11 Case and during usual business hours upon reasonable prior notice to Buyer, all books and records relating to the operation of each Store Property prior to the Closing for each Store Property. Buyer may discard or destroy any such books or records, provided that Buyer shall so notify Seller and allow Seller, within 30 days of such notification, to elect to take possession of such books and records.

(b) For a period of 180 days after Closing (the "Access Period"), upon reasonable advance notice to Buyer, Seller and its officers, attorneys and other representatives, as well as the attorneys and other representatives of any official committee in the Chapter 11 Case, shall have reasonable access to the Store Properties during normal business hours to inspect or copy records, data or other information for periods prior to the Closing Date as reasonably necessary to comply with orders of the Bankruptcy Court and other administrative requirements in connection with the conduct of the Chapter 11 Case, including, without limitation, objecting to claims and liquidating causes of action, or to wind up Seller's affairs. Any other provision of this Agreement notwithstanding, Seller's rights under this **Section 8.3** are fully assignable by Seller to any official committee, trustee, litigation trust or similar Person empowered by the Bankruptcy Court or applicable law to discharge any administrative rights or duties in the Chapter 11 Case.

**8.5 Bonds, Letters of Credit, Etc.** Buyer shall take all necessary steps, and execute and deliver all necessary documents, to ensure that on the Initial Closing Date Buyer has in place the bonds, letters of credit, indemnity agreements and similar items necessary in connection with the Acquired Contracts, if any, including such bonds, letters of credit, indemnity agreements and similar items set forth on **Schedule 8.5** or necessary to cause the release of Seller from any and all obligations related to the foregoing.

**8.6 Further Assurances.** Subject to the terms and conditions of this Agreement, Buyer will use all reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, all things necessary, proper or advisable under applicable Laws and regulations to consummate and make effective the transactions contemplated by this Agreement, the Ancillary Agreements and the other documents and instruments to be delivered pursuant hereto.

**8.7 Intellectual Property.** Buyer shall promptly return to Seller and shall not use any Intellectual Property, including any Third Party Intellectual Property, or any Trademarks of which Buyer acquires possession in connection with the Acquired Assets and which is not the subject of an Acquired Contract that has been rightfully transferred to Buyer.

**8.8 Deposits; Prepaid Expenses.** From the date hereof until the date that is 45 days after the Closing Date for each Store Property, Buyer shall replace all of Seller's security, vendor, utility, leasehold, and other similar deposits, prepaid rent and prepaid expenses related to the Acquired Assets for such Store Property (collectively, "Seller's Prepaid Expenses") with Buyer's deposits or prepayments and shall use its commercially reasonable efforts to cause Seller to be released from all liability under such Seller's Prepaid Expenses for events which occur on

and after the Closing Date for such Store Property. No later than 45 days after the Closing Date for such Store Property, Buyer shall reimburse Seller for the full amount of all Seller Prepaid Expenses applicable to such Store Property as of such Closing Date.

8.9 Reserved.

8.10 Temporary Liquor Permit. At least ten (10) Business Days prior to the Closing, Buyer shall apply to transfer the Liquor Licenses for each Liquor License listed on *Schedule 2.1(h)* and Buyer agrees to use its best efforts to timely obtain the temporary liquor permits. In addition, prior to the Closing Date for a Store Property, Buyer agrees to provide Seller an update with respect to the status of the temporary liquor permit for each Store Property, as may reasonably be requested by Seller.

8.11 Reserved.

8.12 Required Permit Applications. Except to the extent already obtained, no later than five (5) Business Days after the later to occur of (i) the date hereof and (ii) the date Buyer receives the information from Seller that is required to be provided, if any, with respect to each Store Property, Buyer shall timely make the following applications in the appropriate jurisdiction for each Store Property: (A) the application for California Women Infant and Children Supplemental Nutrition Program, (B) the application for Food Stamp Program, and (C) any city business license applications (collectively, the "Required Permits"). In addition, Buyer agrees to use its best efforts to timely obtain the Required Permits and, prior to the Closing Date for a Store Property, Buyer agrees to provide Seller an update with respect to the status of the Required Permits for each Store Property, as may reasonably be requested by Seller.

## ARTICLE IX

### Additional Agreements

#### 9.1 Employees of Seller in the Store Properties.

(a) Store Employees. Buyer shall offer employment to a sufficient number of the personnel of each Store Property (the "Store Employees") effective as of the Closing Date for such Store Property so as not to trigger any WARN Act or California Act notice obligations to those Store Employees not offered employment by Buyer. Buyer shall indemnify and hold harmless Seller from any and all liability arising under the WARN Act and the California Act with respect to the transactions carried out pursuant to this Agreement. Except as set forth above, all obligations and liabilities to the Store Employees arising or accruing prior to the Closing Date, including wages, earned vacations, employee benefits, severance payments, withholding and reporting obligations, all laws relating to the employment of labor and the employer's share of payroll or other employment taxes and other obligations (collectively, the "Employee Obligations"), shall be the obligation of Seller, and all such Employee Obligations arising or accruing from and after the Closing Date and thereafter to those Store Employees who are hired by

Buyer (the "New Employees") shall be the obligation of Buyer. At such time as the initial public disclosure is made of the transaction contemplated by this Agreement in accordance with **Section 17.12** hereof, Buyer's representatives shall be permitted to meet and speak with the Store Employees. Seller hereby specifically agrees not to transfer any of the Store Employees (including without limitation the Store Employees which manage the operations of the Store Properties) to any other locations of Seller not comprising the Store Properties between the date hereof and the Closing. Buyer shall deliver to Seller within ten (10) Business Days after the Closing Date for each respective Store Property a complete list of all Store Employees at such Store Property to whom Buyer has offered employment.

(b) Buyer's Obligation to Store Employees. Buyer shall be liable to and responsible for the New Employees for all Employee Obligations arising and accruing from and after the Closing Date (premised upon Buyer's and not Seller's plans in respect of such Employee Obligations). Buyer shall hold Seller harmless from and indemnify Seller against, any and all such Employee Obligations to such New Employees.

(c) No Third Party Beneficiaries. The obligations of Seller and Buyer hereunder to the New Employees are for the sole benefit of either Seller or Buyer, and no inference should be drawn that any New Employee is a beneficiary of any of the terms, provisions and obligations hereunder; and the ability to enforce the obligations of Seller and/or Buyer hereunder with respect to such New Employees shall be the right of either Seller or Buyer, as applicable, but not any New Employee.

(d) Agreement to Cooperate. Subject to any restrictions that would limit Seller's participation or disclosure of material, Seller agrees to cooperate with Buyer prior to the Final Closing Date to the extent reasonably necessary for Buyer to evaluate Seller Benefit Plans in connection with Buyer's evaluation of which Store Employees it wishes to offer employment to.

## 9.2 Benefit Plans.

(a) Seller's 401(k) Plan. Seller sponsors a defined contribution plan which provides, in part, deferrals of compensation under Section 401(k) of the Code entitled "Fleming Companies, Inc. Matching 401(k) Plan" (the "Seller's 401(k) Plan"). The Store Employees for each Store Property will be deemed 100% vested and nonforfeitable in their respective benefits in Seller's 401(k) Plan as of the Closing for such Store Property. Effective as of the Closing for each Store Property, Seller shall cause all accruals of benefits in respect of the Store Employees for such Store Property under Seller's 401(k) Plan to cease.

(b) Seller's Pension Plan. Seller sponsors a pension plan entitled "Fleming Companies, Inc. Pension Plan" ("Seller's Pension Plan"). The Store Employees of each Store Property will be deemed 100% vested and nonforfeitable in their respective benefits in Seller's Pension Plan as of the Closing for such Store Property. Effective as of the Closing for each Store Property, the Store Employees for such Store Property shall be

deemed, for all purposes in applying Seller's Pension Plan, to have terminated their service with Seller on that date. Benefits earned under Seller's Pension Plan as of each Closing shall be paid and distributed in accordance with the terms of Seller's Pension Plan. No further benefits shall accrue under Seller's Pension Plan with respect to the Store Employees after each Closing Date.

(c) Benefit Plans. The Store Employees of each Store Property shall cease active participation in the Seller's Benefit Plans as of the Closing for such Store Property. In no event shall any Store Employee of a Store Property continue to be covered under Seller's Benefit Plans after the Closing for such Store Property except as required by applicable Law, including, without limitation, COBRA. Seller agrees that it shall make the appropriate COBRA notice to the Store Employees.

Buyer shall be liable for and agrees to indemnify and hold Seller harmless from any and all costs, expenses, payments, claims and liabilities of whatever nature associated with or related to any medical expenses and liabilities (the "Medical Liabilities") attributable to the New Employees of each Store Property which were or are attributable to medical services provided to the New Employees under Buyer's medical plan. Buyer's responsibility to any New Employee for Medical Liabilities shall be limited to the coverage provided under Buyer's medical and health care plans which are applicable to Buyer's similarly situated employees.

(d) Vacation. Buyer agrees with Seller to provide vacation seniority to all of the full-time New Employees of each Store Property, i.e., each full-time New Employee shall be able to tack service with Buyer with his/her employment with Seller for the sole purpose of determining his/her number of days of vacation accruing after the Closing of such Store Property.

### 9.3 Non-Competition

(a) As a condition to entering into this Agreement, Seller hereby agrees, and shall cause its Affiliates to agree, not to (and to cause its Affiliates not to) own, operate, license, franchise, commence construction of, or control, directly or indirectly, any price impact retail supermarkets or pharmacies (a "Retail Food Store") within a radius of four miles of any of the Store Properties that transfer to Buyer (the "Prohibited Area") for five (5) years following the Initial Closing Date; provided, however, Seller or its Affiliates may acquire and operate a Retail Food Store in the Prohibited Area (i) through judicial or administrative process from a retail grocery store owner/operator indebted to Seller or an Affiliate of Seller, (ii) through assignment in lieu of judicial or administrative process from a retail grocery store owner/operator indebted to Seller or an Affiliate of Seller, or (iii) by the exercise of a right of first refusal or similar right of acquisition of a retail grocery store from a retail grocery store owner/operator. Provided, further, that this **Section 9.3** shall not prohibit Seller or its Affiliates from (i) owning and operating limited assortment retail stores, including without limitation the stores currently owned and operated by Seller under the name yes!LESS® or any stores owned by third parties and operated under franchise or license agreements with Seller or any of its Affiliates or (ii)

owning and operating any Store Property that does not transfer to Buyer pursuant to the provisions of *Section 4.6*.

(b) Seller agrees that the period of time provided in *Section 9.3(a)*, and the territorial restrictions of the Prohibited Area and other provisions and restrictions set forth above, are necessary to protect Buyer in the use and employment of the goodwill associated with the Store Properties and the Acquired Assets.

(c) Seller agrees that damages cannot compensate Buyer in the event of a violation of the above restrictive covenants, and that in such event injunctive relief shall be essential for the protection of Buyer. Accordingly, Seller agrees and consents that, in the event any of said restrictive covenants shall be violated or breached, Buyer shall be entitled to obtain injunctive relief upon proper showing against the party or parties violating such covenants, upon due notice, in addition to such further or other relief as may appertain at equity or law and without the posting of any security or bond. Procurement of such an injunction by Buyer shall not be considered an election of remedies or a waiver of any right to assert any other remedies which Buyer has at law or in equity. No waiver of any breach or violation hereof shall be implied from forbearance or failure by Buyer to take action thereon. Seller agrees that, if any provision hereof shall be adjudicated to be invalid or unenforceable, such provision shall be deleted from this Agreement with all other provisions remaining in full force and effect, but such deletion is to apply only with respect to the operation of such provision in the particular jurisdiction in which such adjudication is made; provided, further, that to the extent any provision hereof is deemed unenforceable by virtue of its scope in terms of area or length of time, but may be made enforceable by limitations thereon, Seller agrees that the same shall be enforceable to the fullest extent permissible under the laws and public policies applied in such jurisdiction in which the enforcement is sought.

(d) Buyer acknowledges and agrees that Seller and its Affiliates conduct wholesale distribution operations and that the provisions of this *Section 9.3* do not apply to Seller's or its Affiliates' ownership and operation of such wholesale distribution business.

**9.4 Consents and Permits.** At the request of Buyer from time to time, Seller hereby agrees for a period not to exceed 90 days following the Final Closing Date to use its good faith efforts at Buyer's cost and expense to assist Buyer in obtaining all Permits required for Buyer's ownership and operation (including maintenance and repairs) of the Store Properties following the date of this Agreement. The licenses (other than the Liquor Licenses) held for use primarily in relation to the Store Properties and owned by Seller shall, if requested by Buyer and provided Buyer has made application in Buyer's name and in substantial compliance with all applicable rules and regulations therefor, be transferred to Buyer to the extent (but only to the extent) (i) such licenses are transferable in accordance with Law by Seller, and (ii) such licenses relate primarily to the Store Properties.

**9.5 Liquor License Application** With respect to any liquor (or similar) license, liquor assets or liquor or other alcoholic beverage inventory conveyed hereunder, the Parties shall



comply with all applicable Laws. Buyer agrees to complete and file the Liquor License transfer applications with the California Department of Alcoholic Beverage Control (the "CABC") no later than ten (10) Business Days after the date hereof. The Parties shall cooperate in executing and delivering any documentation necessary to effect the Liquor License transfer applications. The Parties acknowledge and agree that the Liquor License Assets for each Store Property shall be transferred upon the approval of the CABC. If the CABC fails to approve the transfer of the Liquor License Assets, then, except as otherwise agreed to by the Parties in writing, the failure shall not (i) constitute a default by Seller of this Agreement, (ii) affect or impair the terms or conditions of this Agreement, or (iii) provide Buyer with any rights or remedies to rescind, cancel or modify this Agreement or the transactions contemplated hereby.

9.6 Reserved.

9.7 Buyer's Rights of Access.

(a) Access and Right of Inspection. Between the date of this Agreement and the Closing Date, Buyer shall have reasonable access to (i) the Store Properties and (ii) as reasonably related to the Store Properties or the Acquired Assets, those representatives of Seller set forth on *Schedule 9.7*, and, to the extent permitted by Law, Seller shall furnish to Buyer such nonproprietary, nonconfidential information related to the Store Properties as Buyer shall from time to time reasonably request for the purposes of inspecting the Store Properties and preparing for the transition of the Store Properties from Seller to Buyer; *provided, however*, that any such investigation shall be conducted (a) during normal business hours, (b) in such a manner as not to interfere with the operation of the Store Properties by Seller, and (c) with respect to any physical inspection of any Store Property, after giving reasonable notice to Seller. With respect to its right to inspect the Store Properties, Buyer may make a market analysis of each Store Property and may make inquiries to Governmental Entities for purposes of its due diligence review. Without the prior written consent of Seller, which consent shall not be unreasonably withheld, Buyer shall not conduct any environmental test of the soil, groundwater or ambient air at or under any Store Property and, in the event Seller grants its consent to any such test, any report regarding such test shall contain a statement that the report was prepared for the benefit of, and may be relied upon by, Seller and Buyer. Buyer agrees to repair any material damage to each Store Property due to such inspection and to indemnify and hold Seller harmless of and from any claim for physical damages or physical injuries arising from Buyer's inspection of each Store Property, and notwithstanding anything to the contrary in this Agreement, such obligations to repair and to indemnify shall survive the Final Closing Date or any termination of this Agreement. Except for the contact permitted in this *Section 9.7*, Buyer will not contact any employee, customer or supplier of Seller with respect to this Agreement without the prior written consent of Seller. Buyer acknowledges that any information made available to Buyer pursuant to this *Section 9.7* is subject to the terms of the Non-Disclosure Agreement and *Section 8.3*.

(b) Commitment for Title Insurance. As soon as possible after the date hereof, Buyer may cause Chicago Title (the "Title Company") to deliver to Buyer: (a) a

current title commitment covering a Store Property (collectively, the "Title Commitments"), showing all matters affecting title to such Store Property and binding the Title Company to issue at the applicable Closing a standard California form Leasehold Policy of Title Insurance for such Store Property (collectively, the "Owner's Policies"), and (b) legible copies of all instruments (the "Exception Instruments") referenced in Schedule B of each Title Commitment.

(c) Survey. Seller has previously delivered to Buyer copies of Seller's most current survey, if any, of each Store Property (collectively, the "Existing Surveys"). Buyer, at Buyer's option and expense, shall have the right to enter upon each Store Property prior to the Closing Date to have the Existing Surveys updated or to prepare new surveys (collectively, the "New Surveys") of each Store Property.

9.8 Amendment to Facility Standby Agreement. Simultaneously with the execution of this Agreement, the Parties agree to enter into an amendment to that certain Facility Standby Agreement, dated as of January 28, 2003, by and between the Parties (the "Amendment No. One to Facility Standby Agreement" in the form attached hereto as **Exhibit C**) pursuant to which Seller shall be the supplier of food, grocery and related products to the Store Properties.

9.9 Interim Franchise Licenses. The Parties agree to enter into an interim franchise license to use the Food 4 Less name for a period of 180 days following the Closing Date of each Store Property pursuant to the terms and conditions of an interim franchise agreement (the "Franchise Agreement") in the form to be agreed upon by the Parties within ten (10) Business Days from the date hereof and to be attached hereto as **Exhibit D**. If Buyer elects to extend the term of the Franchise Agreement with respect to any Store Property, Buyer and Seller may enter into a franchise agreement on terms mutually agreeable to the Parties.

9.10 Gift Certificates. The Parties agree that to the extent authorized by the Bankruptcy Court, Buyer shall honor all gift certificates issued by Seller and its franchisees ("Seller Gift Certificates") that are presented for payment to any of the Store Properties following the Closing for such Store Property. Within ten (10) Business Days after the end of each month in which Seller Gift Certificates are received for payment at Store Properties following the Closing for such Store Properties, Buyer shall submit to Seller an accounting of the total amount of such Seller Gift Certificates honored by such Store Properties during the prior month and Seller shall reimburse Buyer for such total amount.

9.11 Utilities. Promptly following the Closing of each Store Property, the Parties shall notify the gas, water, telephone, electric and other utility companies servicing such Store Property that Buyer shall be responsible for the payment of, and shall promptly pay all obligations incurred therefor on or after the Closing Date for such Store Property. In the event that any provider of phone, gas, water, electric or other utilities seeks payment from Seller of unpaid phone, gas, water, electric or other utilities at any Store Property for any services rendered prior to the Closing Date for such Store Property, Buyer shall pay such unpaid amounts as promptly as permitted under the Bankruptcy Code (after reasonable notice from Seller), and Seller shall reimburse Buyer for the cost of such payments.

**9.12 Right of First Refusal and Supply Agreement.** In the event one of Seller's retailers who is doing business as Food 4 Less in California from Bakersfield north to the California/Oregon border notifies Seller of its intent to sell such retailer's store or stores, which triggers Seller's right of first refusal with respect to such retail store or stores, Seller agrees to notify Buyer within five (5) Business Days after receipt of such notice. Seller's notice shall include the notice from the retailer and all documentation sent with such notice as well as the relevant provision or provisions under the agreement by which such right of first refusal arises, provided that if any such documentation is subject to a confidentiality agreement, Seller shall be allowed to excerpt or redact the material as necessary. In the event Buyer wants Seller to exercise such right of first refusal, Buyer shall notify Seller within twenty (20) Business Days of Buyer's receipt of the notice from Seller and, subject to Bankruptcy Court approval, Seller shall exercise such right of first refusal on Buyer's behalf and assign any such interest Seller receives upon such exercise to Buyer. In the event Buyer requests Seller to exercise any right of first refusal, Buyer agrees to (i) indemnify Seller for any claim, loss, damage, or expense incurred with respect to Buyer's exercise of the right of first refusal and (ii) enter into a distribution agreement with Seller for such retail store (a "ROFR Supply Agreement") on substantially the same terms and conditions as the Amendment No. 1 to Facility Standby Agreement, including volume requirements per square foot as calculated pursuant to Amendment No. 1 to Facility Standby Agreement, except that any ROFR Supply Agreement shall have a term that is the greater of (i) three (3) years and (ii) the remaining term of the Amendment No. 1 to Facility Standby Agreement. If on the twenty-first (21st) Business Day after Buyer's receipt of notice from Seller (i) Buyer has not notified Seller, Buyer shall be deemed to waive any and all rights as provided in this **Section 9.12** as to the store or stores included in Seller's notice or (ii) Buyer notifies Seller that it does not intend to exercise its rights with respect to Seller's right of first refusal, then from and after the twenty-first (21st) Business Day after Buyer's receipt of notice from Seller, Seller shall have the right to exercise such right of first refusal for its own behalf in accordance with the terms of such right. If Seller elects not to exercise its right of first refusal and the retailer whose store or stores were the subject of the notice does not then sell the stores and they again become subject to a right of first refusal on the behalf of Seller, the terms and conditions of this **Section 9.12** will continue to apply.

**9.13 Infringement.**

(a) Notwithstanding anything in this Agreement to the contrary, Seller shall have no obligation to defend, indemnify or hold harmless Buyer or any of its Affiliates from damages, costs or expenses resulting from any obligation, suit or proceeding based upon any claim that any activity subsequent to the Closing Date engaged in by Buyer, a customer of Buyer's or anyone claiming under Buyer constitutes direct or contributory infringement, misuse or misappropriation of or inducement to infringe any Third Party Intellectual Property.

(b) Buyer shall defend, indemnify and hold harmless Seller and any of its Affiliates from and against any and all Indemnifiable Losses resulting from any obligation, proceeding or suit based upon any claim alleging or asserting direct or contributory infringement, misuse or misappropriation of or inducement to infringe by, Seller or any of its Affiliates of any Third Party Intellectual Property to the extent that such claim is based on, or would not have arisen but for, activity conducted or engaged in

subsequent to the Closing Date by Buyer, a customer of Buyer's or anyone claiming under Buyer.

9.14 Right to Market; Alternative Transaction. The Parties agree that Seller shall have the right, with the assistance of its representatives, to market the Store Properties to Third Parties. The Parties agree that Seller shall be entitled to consider and enter into one or more Alternative Transactions with Third Parties consistent with its fiduciary obligations as a debtor in possession in the Chapter 11 Case.

9.15 Interest Payment. In the event the Governmental Authority reviewing the Parties' HSR filings does not permit Buyer to purchase at least one of the Store Properties, the Parties agree that the Escrow Agent under the Escrow Agreement dated as of January 28, 2003 between the Parties shall release \$10,000.00 to Buyer in accordance with the terms of any Bankruptcy Court Order, if applicable.

## ARTICLE X

### Conditions to Seller's Obligations

The obligation of Seller to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment, prior to or at the Closing for any Store Property, of each of the following conditions unless waived by Seller in writing:

10.1 Buyer's Representations and Warranties. Each representation and warranty made by Buyer in *Article VI* hereto shall be true and correct in all material respects on and as of the Initial Closing Date with the same effect as though each such representation or warranty had been made or given on and as of the Initial Closing Date, other than representations and warranties made as of a specific date, which shall be true and correct as of such specific date.

10.2 Buyer's Covenants. Buyer shall have performed and complied, in all material respects, with all of the covenants set forth herein which are to be performed or complied with by it before or as of the Closing Date for any Store Property.

10.3 Consents. Any waiting period (and any extension thereof) under the HSR Act applicable to the purchase of the Acquired Assets contemplated hereby shall have expired or shall have been terminated, and no action shall have been instituted by any Governmental Entity with jurisdiction over the enforcement of antitrust laws challenging or seeking to enjoin the consummation of the transfer of the Acquired Assets as contemplated by this Agreement or the Ancillary Agreements which such action shall not have been withdrawn or terminated.

10.4 Buyer's Deliveries. At the Initial Closing, Buyer shall have executed and delivered to Seller the Buyer Ancillary Agreements and other documents and items referred to in *Article XIV* hereof.

10.5 No Proceedings. No action, suit or proceeding which has a reasonable likelihood of success is pending or threatened by or before any Governmental Entity to enjoin, restrain,

prohibit or obtain substantial damages in respect of the transfer of the Acquired Assets as contemplated by this Agreement or the Ancillary Agreements, or which would be reasonably likely to prevent or make illegal the consummation of any transactions contemplated by this Agreement.

10.6 Liquor License Transfer Applications and Permit. At the Initial Closing, Buyer shall have applied for the Liquor License transfer applications and obtained temporary permits from the CABC for the Store Properties included in the Initial Closing.

10.7 Bankruptcy Condition. The Bidding Procedures Order and the Sale Order shall have been entered by the Bankruptcy Court, and such orders shall be in form and substance reasonably satisfactory to Seller. At a minimum, the Sale Order shall (i) provide that the Acquired Assets are being sold to Buyer free and clear of all liens, claims and encumbrances pursuant to section 363(f) of the Bankruptcy Code, and (ii) find that Buyer is a good faith purchaser entitled to the protection of section 363(m) of the Bankruptcy Code. Any motion for rehearing or reconsideration of the Bidding Procedures Order or the Sale Order shall have been denied or withdrawn, and the time allowed under Federal Rules of Bankruptcy Procedure 6004(g) for appeals of the Bidding Procedures Order or the Sale Order shall have expired without any appeal having been taken or, if the Bidding Procedures Order or the Sale Order shall have been appealed, no stay shall be in effect.

10.8 Seller's Board Approval. Seller's Board of Directors shall have approved the transactions contemplated by this Agreement no later than May 6, 2003.

## ARTICLE XI

### Conditions to Buyer's Obligations

The obligation of Buyer to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment, prior to or at the Closing for any Store Property, of each of the following conditions unless waived by Buyer in writing:

11.1 Seller's Representations and Warranties. Each representation and warranty made by Seller in *Article V* hereof shall be true and correct in all material respects on and as of the Initial Closing Date with the same effect as though each such representation and warranty had been made or given on and as of the Initial Closing Date other than (i) representations and warranties made as of a specific date, which shall be true and correct as of the earlier of such specific date or the Initial Closing Date, and (ii) any breach of a representation or warranty that (a) has not, individually or in the aggregate, resulted in a Material Adverse Effect, or (b) is related to or resulted from either (x) economic conditions applicable to industry-wide occurrences, (y) the execution of this Agreement or the transactions contemplated hereby, or (z) commencement or continuation of the Chapter 11 Case.

11.2 Seller's Covenants. Except as would not have a Material Adverse Effect, Seller shall have performed and complied with all of the covenants set forth herein which are to be performed by or complied with by it before or as of the Closing Date for any Store Property.

11.3 Consents. Any waiting period (and any extension thereof) under the HSR Act applicable to the purchase of the Acquired Assets contemplated hereby shall have expired or shall have been terminated, and no action shall have been instituted by any Governmental Entity with jurisdiction over the enforcement of antitrust laws challenging or seeking to enjoin the consummation of the transfer of the Acquired Assets as contemplated by this Agreement or the Ancillary Agreements which such action shall not have been withdrawn or terminated.

11.4 Seller's Deliveries. At the Initial Closing, Seller shall have executed and delivered to Buyer the Seller Ancillary Agreements and other documents referred to in *Article XIII* hereof.

11.5 No Proceedings. No action, suit or proceeding which has a reasonable likelihood of success is pending or threatened by or before any Governmental Entity to enjoin, restrain, prohibit or obtain substantial damages in respect of the transfer of the Acquired Assets as contemplated by this Agreement or the Ancillary Agreements, or which would be reasonably likely to prevent or make illegal the consummation of any transactions contemplated by this Agreement or the Ancillary Agreements.

11.6 Bankruptcy Condition.

(a) The Bidding Procedures Order and the Sale Order shall have been entered by the Bankruptcy Court and such orders shall be in form and substance reasonably satisfactory to Buyer. The Sale Order shall (i) approve this Agreement and the transactions contemplated hereby, (ii) provide that the Acquired Assets are being sold to Buyer free and clear of all liens, claims and encumbrances pursuant to section 363(f) of the Bankruptcy Code, (iii) approve the assumption and assignment to Buyer of the Assumed Leases and Assumed Contracts and (iv) find that Buyer is a good faith purchaser entitled to the protection of section 363(m) of the Bankruptcy Code. Any motion for rehearing or reconsideration of the Bidding Procedures Order or the Sale Order shall have been denied or withdrawn, and the time allowed for appeals under Federal Rules of Bankruptcy Procedure 6004(g), the Bidding Procedures Order or the Sale Order shall have expired without any appeal having been taken or, if the Bidding Procedures Order or the Sale Order shall have been appealed, no stay shall be in effect.

(b) Notwithstanding *Section 11.6(a)*, nothing in this Agreement shall preclude Buyer or Seller from consummating the transactions contemplated herein if Buyer, in its sole discretion, waives the requirement that the Bidding Procedures Order, the Sale Order or any other Order shall have become final orders. No notice of such waiver of this or any other condition to Closing need be given except to Seller, it being the intention of the parties hereto that Buyer shall be entitled to, and is not waiving, the protection of section 363(m) of the Bankruptcy Code, the mootness doctrine and any similar statute or body of law if the Closing occurs in the absence of final orders.

11.7 Buyer's Board Approval. Buyer's Board of Directors shall have approved the transactions contemplated by this Agreement no later than May 6, 2003.

## ARTICLE XII

### Closing and Termination

#### 12.1 Closing.

(a) The initial closing of the transactions contemplated by this Agreement (the "Initial Closing" and the date on which the Initial Closing occurs is referred to herein as the "Initial Closing Date") shall be held on the seventh (7th) Business Day after the date of entry of the Sale Order by the Bankruptcy Court. Subject to the satisfaction or waiver of the conditions set forth in *Articles X and XI*, unless otherwise agreed to in writing by the Parties, the Initial Closing and any Closing, will take place on the dates established in accordance with *Schedule 12.1(a)*. The Initial Closing or any Closing, as the case may be, will take place at a location mutually agreed to by the Parties at 2:00 p.m. Pacific Standard Time on such date. Each date on which a closing (each a "Closing") of the transactions contemplated by this Agreement as they relate to a Store Property occurs is referred to herein as a "Closing Date."

(b) Seller and Buyer shall meet in person or by telephone on the date preceding the Initial Closing Date and each Closing Date, as the case may be, to conduct a pre-Closing at which all deliveries to be made at the Initial Closing or the Closing, as the case may be, will be reviewed by the Parties and placed in escrow. At 11:59 p.m. in the jurisdiction in which the corresponding Store Property operates on the date preceding the Initial Closing Date, or the Closing Date, as the case may be, Seller shall terminate its operation of such Store Property. At 12:01 a.m. in the jurisdiction in which such Store Property operates on the Initial Closing Date or the Closing Date, as the case may be, Buyer shall commence operation of the Store Property. At 2:00 p.m. on the Initial Closing Date or the Closing Date, as the case may be, Pacific Standard Time, all instruments and payments held in escrow shall be distributed and disbursed to Seller and Buyer, and the Initial Closing or any Closing, as the case may be, shall be consummated.

12.2 Termination This Agreement (and the transactions contemplated hereby) may not be terminated with respect to any Store Property except as follows:

(a) Upon the mutual written consent of Seller and Buyer;

(b) By Seller, if (i) Buyer is in material breach of this Agreement, and (ii) such breach has not been cured within 10 days following the delivery of notice thereof to Buyer;

(c) By Buyer, if (i) Seller is in material breach of this Agreement, (ii) such breach has not been cured within 10 days following the delivery of notice thereof to Seller and (iii) such breach constitutes a Material Adverse Effect;

(d) By either Party, if the Initial Closing has not occurred on or before June 17, 2003, unless such date has been extended by the mutual, written agreement of the Parties and provided that the terminating party is in compliance with the terms of this Agreement;

(e) By either Party, if any Governmental Authority with jurisdiction over the antitrust laws notifies the Parties that it will not permit the sale of at least the Required Stores pursuant to this Agreement;

(f) By either Party, if the Parties have not received any approval or denial from the Governmental Authority that is currently reviewing the Parties' HSR filings by close of business on May 23, 2003, which date is subject to extension as agreed by the Parties;

(g) By either Party, if the Bankruptcy Court approves an Alternative Transaction; or

(h) By Buyer, if the Bankruptcy Court has not approved the Fifth Side Letter by the close of business on May 23, 2003.

### 12.3 Effect of Termination

(a) Upon the termination of this Agreement with respect to any Store Property in accordance with *Section 12.2* hereof, and except as set forth in *Sections 12.3(b)* and *12.4* below, the Parties shall be relieved of any further obligations or liability under this Agreement other than (1) confidentiality obligations contained in *Section 8.3* and *Section 16.12*, (2) confidentiality obligations under the Non-Disclosure Agreement, (3) the expense allocation provisions under *Section 16.1*, (4) the jurisdiction provisions of *Section 16.3*, and (5) obligations for breaches of this Agreement occurring prior to such termination.

(b) Notwithstanding anything to the contrary contained herein, the provisions of this *Section 12.3* and *Article XVI* shall survive any termination of this Agreement.

12.4 Termination Fee. If the Bidding Procedures Order has been entered and has become a final order and this Agreement is terminated pursuant to *Section 12.2(g)*, Seller shall pay the Termination Fee to Buyer in immediately available funds upon the closing of the Alternative Transaction. The Termination Fee shall be paid as an administrative expense of Seller pursuant to *Section 507(a)(1)* of the Bankruptcy Code. The Termination Fee shall be payable out of the cash proceeds resulting from the closing of the Alternative Transaction. Seller hereby acknowledges that the Termination Fee shall survive termination of this Agreement. Any such fee paid or payable as aforesaid is in the nature of liquidated damages and is in lieu of any other payments or damages hereunder; provided, however, that this does not waive any pre-petition claim Buyer may have with respect to \$4,800,000.00 paid by Buyer to Seller as a Cash Deposit pursuant to



that certain Asset Purchase Agreement, dated as of November 13, 2002, by and among the Parties.

### ARTICLE XIII

#### Seller's Deliveries at the Initial Closing

At the Initial Closing, Seller shall deliver the following to Buyer:

13.1 Bring-Down Certificate. A bring-down certificate executed by an executive officer of Seller certifying that the conditions specified in *Sections 11.1* and *11.2* have been satisfied.

13.2 Secretary's Certificate. A certificate executed on behalf of Seller by Seller's Secretary or Assistant Secretary certifying as to the incumbency, and authenticating the signatures of, officers executing this Agreement and certificates delivered hereunder on behalf of Seller, and certifying as to the adoption and continuing effect of appropriate resolutions authorizing Seller's execution, delivery and performance of this Agreement.

13.3 Seller Ancillary Agreements. The Seller Ancillary Agreements duly executed by Seller.

13.4 Non-Foreign Affidavit. Seller shall deliver to Buyer a non-foreign affidavit (the "Non-Foreign Affidavit") in the form of *Exhibit E* confirming that it is not a "foreign corporation" for purposes of Section 1445 of the Code. In the event Seller fails to deliver an appropriate Non-Foreign Affidavit, Buyer shall withhold the appropriate amount of U.S. Federal and state Tax from the Cash Purchase Price (and pay such amount to the appropriate Governmental Entity) and Seller shall remain obligated to proceed with the Closing.

### ARTICLE XIV

#### Buyer's Deliveries at the Initial Closing

At the Initial Closing, Buyer shall deliver the following to Seller:

14.1 Cash Payment. The Cash Purchase Price as specified in *Section 4.2(a)* and *(b)* hereof shall be paid to Seller. The Remaining Asset Purchase Price as specified in *Section 4.2(d)* hereof and the Remaining Inventory Purchase Price as specified in *Section 4.2(c)* hereof shall be paid to the Asset Escrow Agent in accordance with the terms of this Agreement and the Asset Escrow Agreement.

14.2 Bring-Down Certificate. A bring-down certificate executed by an executive officer of Buyer certifying that the conditions specified in *Sections 10.1* and *10.2* have been satisfied.

14.3 Secretary's Certificate. A certificate executed on behalf of Buyer by Buyer's Secretary or Assistant Secretary certifying as to the incumbency, and authenticating the signatures of, officers executing this Agreement and certificates delivered hereunder on behalf of Buyer, and certifying as to the adoption and continuing effect of appropriate resolutions authorizing Buyer's execution, delivery and performance of this Agreement.

14.4 Buyer Ancillary Agreements. The Buyer Ancillary Agreements duly executed by Buyer.

## ARTICLE XV

### Tax Matters

15.1 Filing of Returns. In connection with the preparation and filing of Tax Returns as of and after the Initial Closing Date, Buyer and Seller shall cooperate and exchange information as reasonably required to accomplish the matters contemplated by this *Article XV*.

15.2 Access to Books and Records. After the Initial Closing, upon reasonable notice, and subject to *Section 8.3* hereof, each Party will give to the representatives, employees, counsel and accountants of the other Party, access, during normal business hours, to records relating to periods prior to or including the Initial Closing Date, and will permit such persons to examine and copy such records, in each case to the extent reasonably requested by the other Party in connection with Tax and financial reporting matters, audits, legal proceedings, governmental investigations and other business purposes (including such financial information and any receipts evidencing payment of Taxes as may be requested by Seller to substantiate any claim for Tax credits or refunds); *provided, however*, that nothing herein will obligate any Party to take actions that would unreasonably disrupt the normal course of its business or violate the terms of any Contract to which it is a party or to which any of its assets is subject. Seller and Buyer will cooperate with each other in the conduct of any Tax audit or similar proceedings involving or otherwise relating to the Acquired Assets or the Store Properties (or the income therefrom or assets thereof) with respect to any Tax and each will execute and deliver such powers of attorney and other documents as are necessary to carry out the intent of this *Section 15.2*.

15.3 Reserved.

15.4 Transaction Taxes. To the extent the transactions contemplated by this Agreement are not exempt under Section 1146(c) of the Bankruptcy Code, Buyer and Seller shall each pay 50% of any sales, use, stamp, transfer, documentary, registration, business and occupation and other similar taxes (including related penalties (civil or criminal), additions to tax and interest) imposed by any Governmental Entity with respect to the transfer of the operations of the Store Properties and any Acquired Assets to Buyer ("Transaction Taxes"), regardless of whether the Tax authority seeks to collect such taxes from Seller or Buyer. Buyer and Seller shall also be responsible for (i) defending or pursuing any proceedings related to such Transaction Taxes and (ii) paying any expenses related thereto. Each Party shall give prompt written notice to the other Party of any proposed adjustment or assessment of any Transaction Taxes with respect to the transactions contemplated hereby and in the Ancillary Agreements. In

any proceedings, whether formal or informal, each Party shall permit the other Party to participate in the defense of such proceeding with respect to such Transaction Taxes, and shall take all actions and execute all documents required to allow such participation.

**15.5 Tax Prorations for Periodic Taxes.** As to any Acquired Asset acquired by Buyer, Seller and Buyer shall apportion the liability for real and personal property taxes, ad valorem taxes, and similar taxes ("Periodic Taxes") for all Tax periods including but not beginning or ending on the Closing Date for the Store Property to which such Acquired Assets relate (all such periods of time being hereinafter called "Proration Periods"). The Periodic Taxes described in this **Section 15.5** shall be apportioned between Seller and Buyer as of the applicable Closing Date, with Buyer liable for that portion of the Periodic Taxes equal to the Periodic Tax for the Proration Period multiplied by a fraction, the numerator of which is the number of days remaining in the applicable Proration Period including and after the applicable Closing Date, and the denominator of which is the total number of days covered by such Proration Period. Seller shall be liable for that portion of the Periodic Taxes for a Proration Period for which Buyer is not liable under the preceding sentence. Buyer and Seller shall pay or be reimbursed for real and personal property taxes (including instances in which such property taxes have been paid before the applicable Closing Date) on this prorated basis. If a payment on a tax bill is due after the applicable Closing, the Party that is legally required to make such payment shall make such payment and promptly forward an invoice to the other party for its pro rata share, if any. If the other Party does not pay the invoice within 30 calendar days of receipt, the amount of such payment shall bear interest at the rate of 6% per annum. The Party responsible under applicable Law for paying a Tax described in this **Section 15.5** shall be responsible for administering the payment of (and any reimbursement for) such Tax. For purposes of this **Section 15.5**, the Proration Period for ad valorem taxes and real and personal property taxes shall be the fiscal period for which such taxes were assessed by the Tax jurisdiction.

**15.6 Tax Returns; Payment of Taxes other than Transaction Taxes and Periodic Taxes.** Seller will (i) prepare and timely file with each applicable Tax authority all Tax Returns which include all income, gains, losses, deductions and credits attributable to the Store Properties, the Acquired Assets, and the operations relating thereto for any period or portion of a period ending before the respective Closing Dates for such Store Properties and (ii) make timely payments of all Taxes required to be reflected on such Tax Returns and all other Taxes relating to the Store Properties, the Acquired Assets, and the operations relating thereto for any taxable period or portion of a Proration Period ending the day before the respective Closing Dates for such Store Property. Buyer will (a) prepare and timely file with each applicable tax authority all Tax Returns which include all income, gains, losses, deductions and credits attributable to the Store Properties, the Acquired Assets and the operations relating thereto for any period or portion of a period after the respective Closing Dates for such Store Properties and (b) make timely payments of, and indemnify and hold the Company harmless against, all Taxes required to be reflected on such Tax Returns and all other Taxes relating to the Store Properties, the Acquired Assets, and the operations relating thereto for any taxable period or portion of a Proration Period beginning on the respective Closing Dates for such Store Properties. The determination of the portion of any Taxes imposed on or connected with the Store Properties, the Acquired Assets, or the operations relating thereto which is allocable to the portion of a Proration Period ending the day before the respective Closing Dates for such Store Properties and to the portion of a Proration

Period beginning on the respective Closing Dates for such Store Properties, shall be made, in the case of all Taxes other than Transaction Taxes and Periodic Taxes, by assuming that the portion of a Proration Period ending the day before the Closing Date and the portion of a Proration Period beginning on the Closing Date constitute separate taxable periods and by taking into account the actual taxable events occurring during such separate periods.

15.7 Tax Refunds. Any Tax refunds (including any interest related thereto) received by Buyer, its affiliates or successors relating to Tax periods (or portions thereof) ending before an applicable Closing Date shall be for the account of Seller, and Buyer shall pay over to Seller any such amount within five (5) Business Days of receipt thereof. Buyer shall, if Seller so requests and at Seller's direction and expense, file or cause its Affiliates to file for and obtain any Tax refunds with respect to Tax periods or portions thereof ending before any applicable Closing Date.

## ARTICLE XVI

### Miscellaneous

16.1 Expenses. Except as otherwise expressly provided for elsewhere in this Agreement, each Party hereto shall pay its own expenses and costs relating to the negotiation, execution and performance of this Agreement. Seller and Buyer shall each bear all of its cost and expense incurred in securing the appropriate governmental approvals to the assignment of the Acquired Contracts.

16.2 Governing Law. This Agreement shall be governed by the laws of the State of Delaware regardless of the laws that might otherwise govern under applicable conflicts of law principles.

16.3 Jurisdiction; Disputes; Mediation, Arbitration

(a) Until the Fleming Debtor Entities' Chapter 11 Case is closed with the Bankruptcy Court, Buyer and Seller irrevocably submit to the exclusive jurisdiction of the Bankruptcy Court for the purposes of any suit, action or other proceeding arising out of this Agreement or any of the Ancillary Agreements or any transaction contemplated hereby or thereby. Buyer and Seller irrevocably and unconditionally waive any objection to the laying of venue of any action, suit or proceeding arising out of this Agreement or any of the Ancillary Agreements or the transactions contemplated hereby or thereby in the Bankruptcy Court and hereby further irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum. Further, the Parties agree to and hereby waive the right to a jury trial for any action, cause of action or claim arising under or in any way related to this Agreement. The Parties agree that the Bankruptcy Court SHALL NOT HAVE THE POWER TO AWARD CONSEQUENTIAL, INDIRECT OR PUNITIVE DAMAGES (INCLUDING LOST

PROFITS) unless the Bankruptcy Court determines that this limitation, under the circumstances, violates public policy.

(b) Once the Fleming Debtor Entities' Chapter 11 Case is closed with the Bankruptcy Court, any dispute, controversy or claim of whatever nature arising out of or relating to this Agreement or any Ancillary Agreement (the "Dispute") shall be resolved in the manner set forth below:

(i) Referral to Senior Officers. Either Party may deliver to the other Party written notice of the Dispute with supporting documentation as to the circumstances leading to the Dispute (the "Notice of Dispute"). The Notice of Dispute shall include a schedule of the availability of the notifying Party's senior officers duly authorized to settle the Dispute (the "Senior Officers") during the thirty (30) day period following the delivery of the Notice of Dispute. Within three (3) Business Days after delivery of the Notice of Dispute, the other Party shall provide a schedule of the availability of such other Party's Senior Officers during the remainder of the thirty (30) day period following the delivery of the Notice of Dispute. Following delivery of the Senior Officers' schedules of availability, the Senior Officers shall meet and confer as often as they deem reasonably necessary during the remainder of the thirty (30) day period in good faith negotiations to resolve the Dispute amicably.

(ii) Mediation. If the Dispute is not resolved within thirty (30) days of the delivery of the Notice of Dispute, then either Party may submit the Dispute to mediation in Delaware by a sole mediator in accordance with the Commercial Mediation Rules of the American Arbitration Association ("AAA"). The AAA shall appoint the Mediator within three (3) Business Days of the delivery of the request for mediation (the "Mediation Notice").

(iii) Arbitration. If the Dispute is not resolved within thirty (30) days of the delivery of the Mediation Notice, then either party may submit the Dispute to final and binding arbitration in Delaware in accordance with the Commercial Arbitration Rules of the AAA. To the extent they are available, arbitrators shall be selected from the AAA with food industry experience. In any dispute involving a claim in excess of \$1,000,000, three arbitrators shall be employed. Absent a showing of good cause, the hearing shall be conducted within 90 days from the service of the statement of claim. All proceedings shall be governed by the Federal Arbitration Act.

Each Party shall bear the expense of their own attorneys, experts and out of pocket costs as well as fifty percent of the expense of administration and arbitrator fees.

The Parties agree that the arbitrators SHALL NOT HAVE THE POWER TO AWARD CONSEQUENTIAL, INDIRECT OR PUNITIVE DAMAGES (INCLUDING LOST PROFITS) unless the arbitrator(s) or a court of competent

jurisdiction determines that this limitation, under the circumstances, violates public policy.

Depositions, other than those taken in lieu of live testimony, shall not be taken except upon the arbitrator(s) finding of special need. Parties shall be entitled to conduct document discovery in accordance with a procedure where responses to information requests shall be made within twenty days from their receipt.

Either Party shall be entitled to pursue remedies for emergency judicial relief in any court of competent jurisdiction, except that immediately following the preliminary adjudication of such request for emergency relief, the Parties hereby consent to a stay of the judicial proceedings pending a determination of the dispute on the merits by arbitration as herein provided.

(iv) Anything to the contrary contained herein notwithstanding, if for any reason the provisions of this **Section 16.3** regarding resolution of disputes should be determined to be unenforceable by a court of competent jurisdiction, Buyer and Seller irrevocably submit to the exclusive jurisdiction of any Delaware state court and any United States Federal court located in Delaware (collectively the "Delaware Courts") for the purposes of any suit, action or other proceeding arising out of this Agreement or any of the Ancillary Agreements or any transaction contemplated hereby or thereby. Buyer and Seller irrevocably and unconditionally waive any objection to the laying of venue of any action, suit or proceeding arising out of this Agreement or any of the Ancillary Agreements or the transactions contemplated hereby or thereby in the Delaware Courts and hereby further irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum. Further, the parties agree to and hereby waive the right to a jury trial for any action, cause of action or claim arising under or in any way related to this Agreement.

16.4 **Notices.** All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given when personally delivered, delivered by overnight courier or transmitted by facsimile, or five days after mailed, certified or registered mail, with postage prepaid addressed as follows (or to such other person or address as the Party to receive such notice may have designated from time to time by notice in writing pursuant hereto):

If to Seller:

Fleming Companies, Inc.  
1945 Lakepointe Drive  
Lewisville, Texas 75029  
Attn: General Counsel  
Fax Number: (972) 906-1860

With a copy to:

Baker Botts L.L.P.  
2001 Ross Avenue  
Dallas, Texas 75201  
Attn: C. Neel Lemon  
Fax Number: (214) 661-4954

and

Kirkland & Ellis  
200 East Randolph Drive  
Chicago, Illinois 60601  
Attn: Geoffrey A. Richards  
Fax Number: (312) 861-2200

If to Buyer:

Save Mart Supermarkets  
P.O. Box 4278  
Modesto, California 95352-4278  
Attn: Chairman and CEO  
Fax Number: (209) 577-3857

With a copy to:

Save Mart Supermarkets  
P.O. Box 4278  
Modesto, California 95352-4278  
Attn: Vice President – Human Resources and Law  
Fax Number: (209) 577-3857

16.5 Definition of Agreement. Unless the context clearly otherwise requires, as used herein, the term "Agreement" means this Agreement and the Schedules, Annexes and Exhibits hereto. The words "herein", "hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section, Paragraph or other subdivision.

16.6 Headings, Gender. The headings to Articles and Sections of this Agreement are for reference only and shall not be used in construing or interpreting the provisions hereof or otherwise affect the meaning hereof. The use of the neuter pronoun "it" shall also refer to, as appropriate, the masculine and/or feminine gender. The use of the singular herein shall, where appropriate, be deemed to include the plural and vice versa.

16.7 Counterparts; Third Party Beneficiaries. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. No provision of this Agreement, other than as expressly provided in an indemnification provision, is intended to (i) confer upon any Person other than the Parties hereto and their successors and permitted assigns, any rights or remedies hereunder, (ii) relieve or discharge the obligation or liability of any third party or (iii) give any third party any right of subrogation or action against Seller or Buyer.

16.8 Entire Agreement. This Agreement, the Ancillary Agreements and the Non-Disclosure Agreement embody the entire agreement and understanding between Seller and Buyer with respect to the subject matter hereof and supersede all prior agreements and understandings related to the subject matter hereof. There are no representations, warranties, covenants, promises or agreements on the part of either Party to the other hereto which are not explicitly set forth herein.

16.9 Modifications. Any modification, amendment or waiver of or with respect to any provision of this Agreement or any agreement, instrument or document delivered pursuant hereto shall not be effective unless it shall be in writing and signed by an authorized representative of each of Seller and Buyer and shall designate specifically the terms and provisions so modified.

16.10 Assignment and Binding Effect. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and permitted assigns, but (except as provided for in this **Section 16.10**) neither this Agreement nor any of the rights, interests or obligations hereunder shall be assigned by Buyer or Seller without the prior written consent of the other (i) except that the rights and interests hereunder may be assigned to a trustee appointed under chapter 11 or chapter 7 of the Bankruptcy Code and (ii) this Agreement may be assigned to any entity pursuant to a confirmed chapter 11 plan.

16.11 Schedules. Any matter disclosed on any one Schedule hereto shall be deemed to be disclosed on all other Schedules hereto.

16.12 Public Announcements; Confidentiality. Prior to the Final Closing Date, Seller and Buyer will consult with each other before issuing or prior to the issuance by any Affiliate of, and will provide each other the opportunity to review and comment upon, any press release or other public statements (or relevant portions thereof) relating to the transactions contemplated by this Agreement and shall not issue, and shall ensure that their respective Affiliates shall not issue, any such press release or make any such public statement prior to such consultation, except as may be required by applicable Law, court process or by obligations pursuant to any listing agreement with any national securities exchange. The obligations contained in this **Section 16.12** are in addition to and independent of the obligations contained in the Non-Disclosure Agreement.

16.13 Right to Specific Performance. The Parties acknowledge that the unique nature of **Section 8.3** (Confidentiality), **Section 8.4** (Access), **Section 8.7** (Intellectual Property), **Section 9.1** (Employees), **Section 9.3** (Non-Competition), **Section 9.4** (Consents and Permits), **Section 9.12** (Right of First Refusal and Supply Agreement) and **Section 9.13** (Infringement) may render



money damages an inadequate remedy for the breach by either Party of its obligations pursuant to such sections. Each Party agrees that in the event of such breach, (i) the non-breaching Party may, upon proper action instituted by it, be entitled to seek a decree of specific performance of this Agreement related to one of the specific sections noted in this **Section 16.13**, and (ii) such rights are cumulative and in addition to any other remedy to which the Parties may be entitled at law or equity.

16.14 **Bulk Sales Laws.** Buyer and Seller waive compliance with applicable Laws under any version of Article 6 of the Uniform Commercial Code adopted by any state or any similar law relating to the sale of inventory, equipment or other assets in bulk in connection with the sale of the Acquired Assets or the operation of the Store Properties.

16.14 **Severability.** Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction.

16.15 **No Survival of Representations, Warranties, Covenants and Agreements.** Each and every representation and warranty of Seller contained in this Agreement shall expire with, and be terminated and extinguished by the Closing or the termination of this Agreement pursuant to the terms hereof. In addition, upon the expiration and extinguishment of such representations and warranties, neither Seller nor any of its Affiliates shall have any liability whatsoever arising out of or with respect to this Agreement or any breach of any covenant, except for the following covenants, which shall survive the Closing until performance is no longer required by the express provisions contained in such covenants: Article III, **Section 7.6** (Removal of Excluded Inventory and Excluded Equipment), **Section 8.2** (Buyer's Discharge of Assumed Liabilities), **Section 8.3** (Confidentiality), **Section 8.4** (Access), **Section 8.7** (Intellectual Property), **Section 8.8** (Deposits; Prepaid Expense), **Section 9.1** (Employees), **Section 9.3** (Non-Competition), **Section 9.4** (Consents and Permits), **Section 9.9** (Interim Franchise Licenses), **Section 9.10** (Gift Certificates), **Section 9.11** (Utilities), **Section 9.12** (Right of First Refusal and Supply Agreement), **Section 9.13** (Infringement), and Article XVI.

*[Remainder of page intentionally left blank. Signature page follows.]*

IN WITNESS WHEREOF, the Parties, acting through their duly authorized representatives, have executed this Agreement as of the date first above written.

FLEMING COMPANIES, INC.,  
an Oklahoma corporation

By: William May  
Name: William E. May, Jr.  
Title: Executive Vice-President

RICHMAR FOODS, INC.,  
a California corporation

Ken By: Kenneth Fuhrman  
Name: Kenneth Fuhrman  
Title: Chief Financial Officer

SAVE MART SUPERMARKETS,  
a California corporation

By: \_\_\_\_\_  
Name: Robert M. Piccinini  
Title: CEO and President

IN WITNESS WHEREOF, the Parties, acting through their duly authorized representatives, have executed this Agreement as of the date first above written.

FLEMING COMPANIES, INC.,  
an Oklahoma corporation

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

RICHMAR FOODS, INC.,  
a California corporation

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

SAVE MART SUPERMARKETS,  
a California corporation

By:  \_\_\_\_\_  
Name: Robert M. Piccinini  
Title: CEO and President

## INDEX OF SCHEDULES

Schedule 1.1(a)	Acquired Contracts
Schedule 1.1(b)	Seller's Knowledge
Schedule 2.1(e)	Permits and licenses
Schedule 2.1(g)	Retail Leases and Subleases
Schedule 2.1(h)	Liquor Licenses
Schedule 2.2(c)	Excluded Equipment
Schedule 4.1(a)	Specific Store Property Value Schedule
Schedule 4.3(b)	Inventory Procedure
Schedule 4.6	Asset Purchase Price Reduction
Schedule 4.8	Allocation of Cash Payments
Schedule 5.3	No Breach or Conflict
Schedule 5.4	Material Consents
Schedule 5.5(a)	Leased Real Property
Schedule 5.5(d)	Leased Real Property--Improvements in Compliance with Applicable Laws
Schedule 5.7	Claims, Litigation and Disputes
Schedule 5.8	Acquired Contracts
Schedule 5.9	Compliance with Laws
Schedule 5.10	Taxes
Schedule 5.12(a)	Employee Benefit Plans
Schedule 5.12(b)	Employees
Schedule 5.12(c)	Employee Matters
Schedule 6.9	Use of Store Properties
Schedule 7.1	Conduct of Business Pending Closing
Schedule 7.1(g)	Conduct of Business Pending Closing—Raises or Bonuses
Schedule 8.5	Bonds, Letters of Credit, Etc.
Schedule 9.7	Representatives of Seller
Schedule 12.1(a)	Closing Schedule

## INDEX OF EXHIBITS

Exhibit A	Assignment and Assumption Agreement
Exhibit B	Bill of Sale
Exhibit C	Amendment No. One to Facility Standby Agreement
Exhibit D	Reserved
Exhibit E	Affidavit of Non-Foreign Status
Exhibit F	Asset Escrow Agreement
Exhibit G	Reserved
Exhibit H	Reserved
Exhibit I	Franchise Agreement

## INDEX OF ANNEXES

Annex I	Store Properties
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TO OBTAIN COPIES OF THESE SCHEDULES, EXHIBITS AND ANNEXES  
PLEASE CONTACT DEBTORS' COUNSEL