

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

PROOF OF CLAIM

Name of Debtor:

JENNIFER CONVERTIBLES, INC.

Case Number:

10-13799-alg

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor (the person or other entity to whom the debtor owes money or property): City of San Marcos

Name and address where notices should be sent:

Gerald P. Kennedy, Esq.

Procopio, Cory, Hargreaves & Savitch LLP

525 B St., Ste. 2200, San Diego, CA 92101

Telephone number: 619-238-1900

☐ Check this box to indicate that this claim amends a previously filed claim.

Court Claim Number: \_\_\_\_\_  
(If known)

Filed on: \_\_\_\_\_

Name and address where payment should be sent (if different from above):

City of San Marcos

c/o IDS Real Estate Group

P.O. Box 511350, Los Angeles, CA 90051-7905

Telephone number:

RECEIVED

AUG 10 2010

BMC GROUP

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Date Case Filed: \$ 19,472.86

If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.

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

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

2. Basis for Claim: Unpaid lease obligations - 565 Grand Avenue, Ste. D-100, San Marcos, CA 92078\*\*  
(See instruction #2 on reverse side.)

3. Last four digits of any number by which creditor identifies debtor: \_\_\_\_\_

3a. Debtor may have scheduled account as: \_\_\_\_\_  
(See instruction #3a on reverse side.)

4. Secured Claim (See instruction #4 on reverse side.)

Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☐ Other  
Describe:

Value of Property: \$ \_\_\_\_\_ Annual Interest Rate \_\_\_\_\_ %

Amount of arrearage and other charges as of time case filed included in secured claim,

if any: \$ \_\_\_\_\_ Basis for perfection: \_\_\_\_\_

Amount of Secured Claim: \$ \_\_\_\_\_ Amount Unsecured: \$ \_\_\_\_\_

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.

7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See instruction 7 and definition of "redacted" on reverse side.)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

Specify the priority of the claim.

☐ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to \$11,725\*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507 (a)(4).

☐ Contributions to an employee benefit plan - 11 U.S.C. §507 (a)(5).

☐ Up to \$2,600\* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507 (a)(7).

☐ Taxes or penalties owed to governmental units - 11 U.S.C. §507 (a)(8).

☐ Other - Specify applicable paragraph of 11 U.S.C. §507 (a)(\_\_\_\_\_).

Amount entitled to priority:

\$ \_\_\_\_\_

\*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

Date: 8/10

Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.  
/s/ Gerald P. Kennedy

FOR COURT USE ONLY

Jennifer Convertibles



00013

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

\*\* Lease terminated and Debtor vacated May 31, 2010.





July 6, 2010

Mr. Edward Seidner  
Jennifer Convertibles, Inc.  
417 Crossways Park Drive  
Woodbury, NY 11797

**RE: Move Out Inspection and Outstanding Balance**  
**565 Grand Avenue, Suite D-100, San Marcos, CA 92078**

Dear Edward:

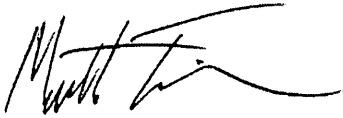
Enclosed please find a completed move out inspection form and security deposit statement for the space Jennifer Convertibles recently vacated at 565 Grand Avenue, Suite D100, San Marcos, CA 92078. Upon terminating the lease at this premises Jennifer Convertibles had a significant rent balance of \$13,507.43. In addition, there are a handful of move out expenses that Jennifer Convertibles is responsible for including the removal of Jennifer's building signage (per Paragraph 12.2 of the lease), replacement of the light fixtures that were removed upon vacating the premises (per Paragraph 13.4 of the lease) and removal of the Jennifer Convertibles window decals on the store front (per Paragraph 12.2 of the lease). The total outstanding balance including rent and move out charges is **\$19,472.86**. Please remit payment for this amount to **The City of San Marcos** and mail to the following address no later than July 15, 2010.

City of San Marcos  
c/o IDS Real Estate Group  
P.O. Box 511350  
Los Angeles, CA 90051-7905

Upon review of the enclosed Move Out Inspection Form, please sign and return a copy to me at the following address at your earliest convenience.

Matt Traino  
IDS Real Estate Group  
629 J Street, Suite 204  
San Diego, CA 92101

Sincerely,

A handwritten signature in black ink, appearing to read "Matt Traino". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Matt Traino  
Real Estate Manager

MT\kh

X:\DOC\PROPERTY\450\Tenants\Jennifer Convertibles\Jennifer Convertibles Move  
out\FinalMoveOutStatement\_\_JenniferConvertibles\_070610.doc





## MOVE-IN/MOVE-OUT INSPECTION FORM

DATE IN: \_\_\_\_\_

PROJECT: Creekside Marketplace BLDG/UNIT: 565 - D100 DATE OUT: 5/26/2010LESSEE: Jennifer Convertibles, Inc. INSPECTED BY: Kelley HoldermanLESSOR: The City of San Marcos SECURITY DEPOSIT HELD: \$0.00

**INSTRUCTIONS:** Check each item as **Acceptable (A)** or **Unsatisfactory (U)**. Recommendations for correction and necessary follow up should be noted. Please indicate whether lessor or lessee is to take the corrective measure and give an estimate of the cost to make such repairs. In addition, describe other items needing attention not listed below, observed during the inspection. Take pictures if needed.

ITEM	A/U	RECOMMENDATIONS AND FOLLOW UP	COST ESTIMATE
<b>FLOORS</b>			
Carpet	A		
Pad	A		
Vinyl	A	Extremely dirty - needs to be cleaned or replaced for next tenant	
Wood	A		
Thresholds	A		
Base	A		
Concrete	A		
Sealed Painted	A		
Other			
<b>WALLS</b>			
Paint	A	Tenant applied own finish to paint - some chipping/ware spots	
Holes	A		
Wall Coverings	A	Tenant left behind posters/pictures on walls that will be tossed	
Water Damage	A		
Other			
<b>CEILINGS</b>			
Tiles	A		
Grid System	A		
Light Fixtures	N/A	Tenant removed all fixtures from the track system. *	\$3,740.00
Water Damage	N/A		
Other	N/A		
Lens Covers			
Office/Warehouse			
Insulation	A		
Skylights			



ITEM	A/U	RECOMMENDATIONS AND FOLLOW UP	COST ESTIMATE
Ceiling Foil	A		
Other			
<b>WINDOW COVERINGS</b>			
Drapes	N/A		
Draperies Liners	N/A		
Draperies Rods	N/A		
Mini-Blinds	N/A		
Window Film	N/A		
Other	A	Tenant left window decals that will need to be scraped and removed	\$100.00
<b>GLASS AND GLAZING</b>			
Glass	A		
Mullions	A		
Closure Details	A		
Locks	N/A		
Alarm Systems	N/A		
Other			
<b>ELECTRICAL</b>			
Duplexes	A		
Switches	A		
Panel/Breakers	A		
Bulbs/Tubes	N/A	Tenant removed all light fixtures from track system (see previous note)	
Ballasts	A		
Switch Plate	A		
Other			
<b>RESTROOMS</b>			
Ceilings	A		
Fan	A		
Plumbing Fixtures	A		
Tissue Holder	A		
Electrical Fixtures	A		
Walls	A		
Other			
<b>DOORS, FRAMES, HARDWARE</b>			
Doors-General	A		



ITEM	A/U	RECOMMENDATIONS AND FOLLOW UP	COST ESTIMATE
Door Stops	A		
Frames	A		
Hardware	A		
Locks	A		
Other			
<b><u>MECHANICAL</u></b>			
Diffusers			
Returns	A		
Duct Work	A		
Thermostat	A		
Evap Units			
A/C Units	A		
Other			
<b><u>PLUMBING</u></b>			
Other Than Restrooms			
Downspouts	A		
Roof Drains	A		
<b><u>MISCELLANEOUS</u></b>			
Signage	N/A	Tenant's sign is still existing and needs to be removed per the lease**	\$1,176.00
Roof	A		
Parking Lot	A		
Building Ext	N/A	Once sign is removed the facade will need to be painted per the lease**	\$950.00
Unauthorized TI's	N/A		
Concrete Flow Line	A		
Asphalt	A		
Exterior Lighting	A		
Landscaping	A		
Sprinkler Sys	A		
Dock Bumpers	N/A		
Gates	N/A		
Fences	N/A		
Pictures Taken	Y		



**OTHER COMMENTS**

\* Bid from White Construction, Inc. to replace light fixtures at \$85 per fixture - approximately 44 fixtures need to be replaced.

Replacement cost is per Paragraph 13.4 of the lease document.

\*\* Cost to remove the sign (\$1,176) and paint the facade where the sign was after removal (\$950) per Paragraph 12.2 of the lease.

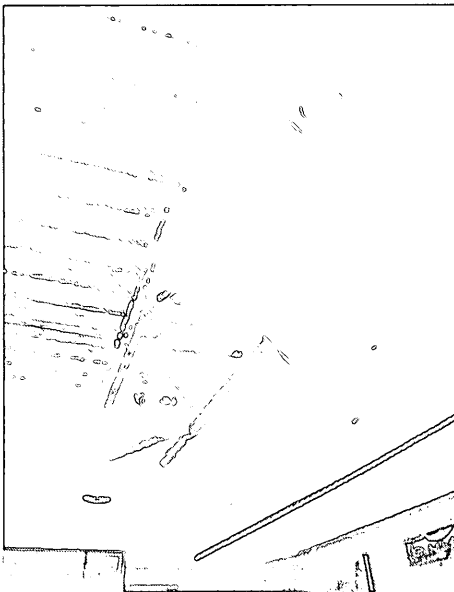
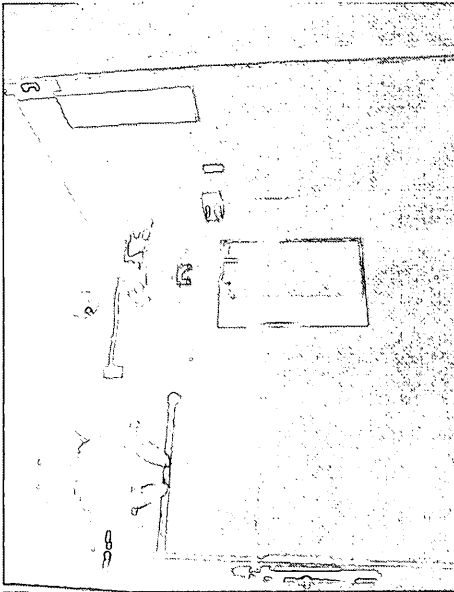
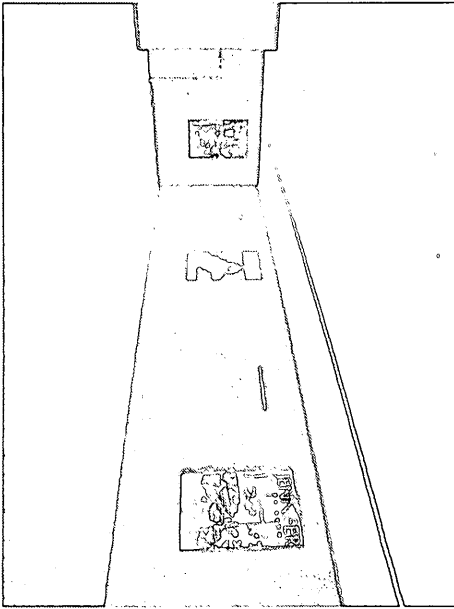
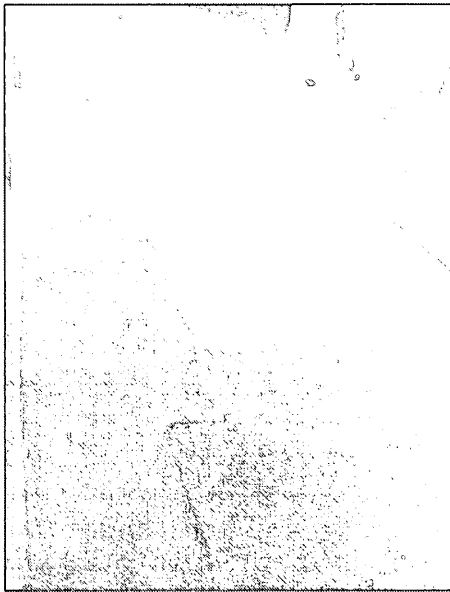
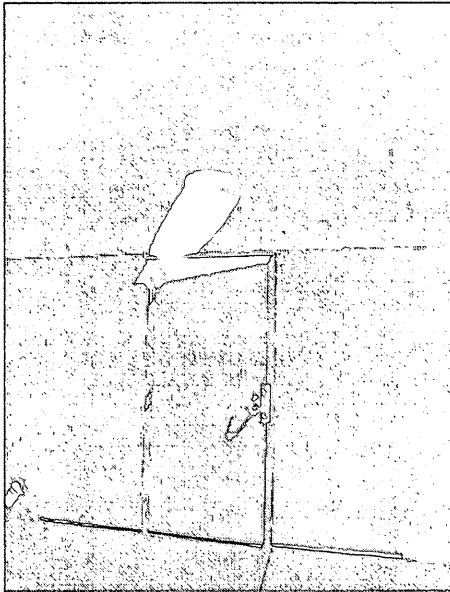
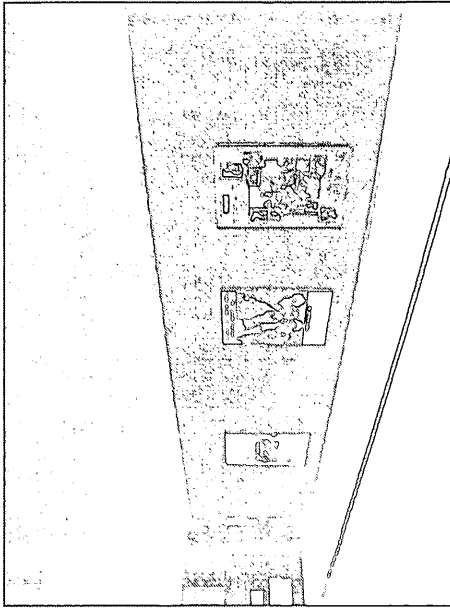
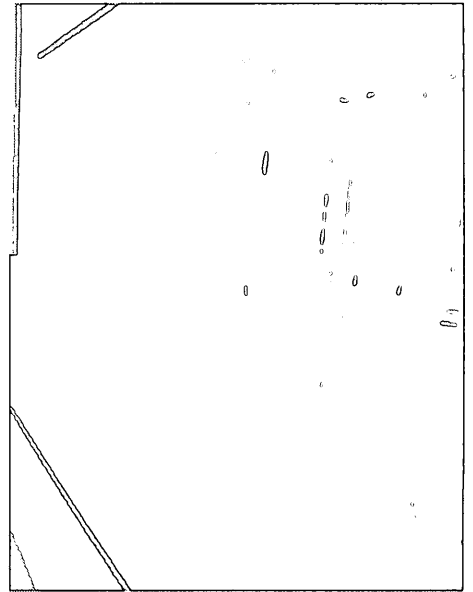
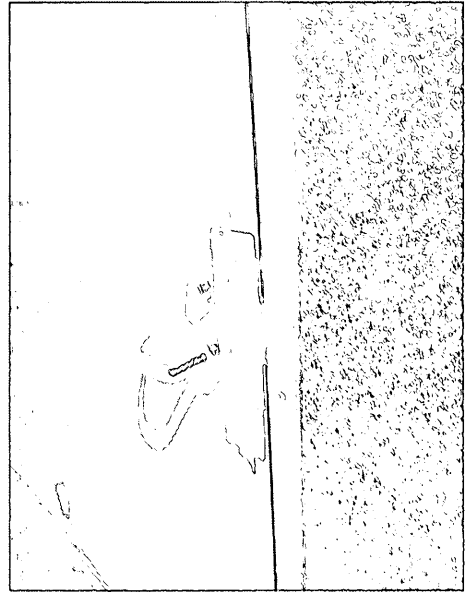
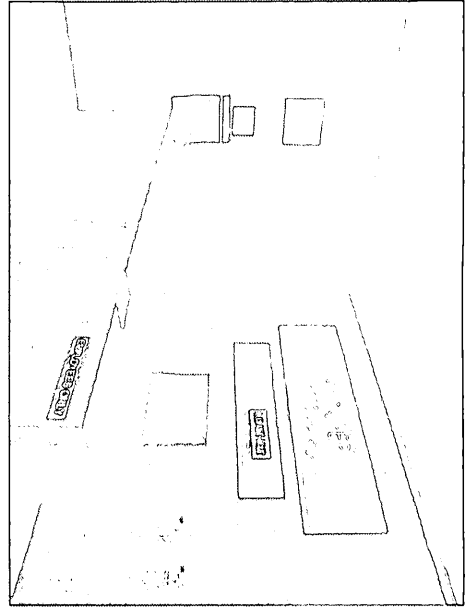
\_\_\_\_\_  
Lessor

\_\_\_\_\_  
Agent

\_\_\_\_\_  
Date

\_\_\_\_\_  
Lessee

\_\_\_\_\_  
Date



Database: IDSRLSTGRP

Aged Delinquencies  
IDS Real Estate Group  
CITY OF SAN MARCOS  
Date: 6/30/2010Page: 1  
Date: 7/6/2010  
Time: 11:12 AM

PROJ: 450

Invoice Date	Category	Source	Amount	Current	30	60	90	120
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45004-JENCON01 JENNIFER CONVERTIBLES, INC. MS. DALE VELTRI				Master Occupant Id: JENCON01-1 00101 Inactive		Day Due: 1	Delq Day:	
						Last Payment:	2/8/2010	1,000.00
11/1/2009	CEX	OPERATING EXPENSES (C/	CH	1,815.86	0.00	0.00	0.00	1,815.86
11/1/2009	RNT	RENT - BASE	CH	6,691.57	0.00	0.00	0.00	6,691.57
12/1/2009	CEX	OPERATING EXPENSES (C/	CH	1,815.86	0.00	0.00	0.00	1,815.86
12/1/2009	RNT	RENT - BASE	CH	6,823.75	0.00	0.00	0.00	6,823.75
1/1/2010	CEX	OPERATING EXPENSES (C/	CH	1,815.86	0.00	0.00	0.00	1,815.86
1/1/2010	RNT	RENT - BASE	CH	6,823.75	0.00	0.00	0.00	6,823.75
1/28/2010	CEX	OPERATING EXPENSES (C/	NC	-3,631.72	0.00	0.00	0.00	-3,631.72
1/28/2010	RNT	RENT - BASE	CH	1,000.00	0.00	0.00	0.00	1,000.00
1/28/2010	RNT	RENT - BASE	NC	-13,647.50	0.00	0.00	0.00	-13,647.50
2/1/2010	RNT	RENT - BASE	CH	1,000.00	0.00	0.00	0.00	1,000.00
3/1/2010	RNT	RENT - BASE	CH	1,000.00	0.00	0.00	0.00	1,000.00
4/1/2010	RNT	RENT - BASE	CH	1,000.00	0.00	0.00	1,000.00	0.00
5/1/2010	RNT	RENT - BASE	CH	1,000.00	0.00	1,000.00	0.00	0.00
6/1/2010	RNT	RENT - BASE	CH	1,000.00	1,000.00	0.00	0.00	0.00
6/11/2010	RNT	RENT - BASE	NC	-1,000.00	-1,000.00	0.00	0.00	0.00

CEX	OPERATING EXPENSES (CAM)	1,815.86	0.00	0.00	0.00	0.00	1,815.86
RNT	RENT - BASE	11,691.57	0.00	0.00	1,000.00	1,000.00	9,691.57
<b>JENNIFER CONVERTIBLES, INC. Total:</b>		13,507.43	0.00	0.00	1,000.00	1,000.00	11,507.43

CEX	OPERATING EXPENSES (CAM)	1,815.86	0.00	0.00	0.00	0.00	1,815.86
RNT	RENT - BASE	11,691.57	0.00	0.00	1,000.00	1,000.00	9,691.57
<b>PROJ 450 Total:</b>		13,507.43	0.00	0.00	1,000.00	1,000.00	11,507.43

CEX	OPERATING EXPENSES (CAM)	1,815.86	0.00	0.00	0.00	0.00	1,815.86
RNT	RENT - BASE	11,691.57	0.00	0.00	1,000.00	1,000.00	9,691.57

<b>Grand Total:</b>		13,507.43	0.00	0.00	1,000.00	1,000.00	11,507.43
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## Kelley Holderman

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**From:** rick.whiteconstructioninc.com [rick@whiteconstructioninc.com]

**Sent:** Friday, June 04, 2010 2:40 PM

**To:** Chris Maurer

**Subject:** RE: Former Jennifer Convertibles Demising Budget

Hello Chris,

1) Is a roof patch included with the new bathroom exhaust?

○ We could tie in the new restroom exhaust ductwork into the existing exhaust vent at the underside of the roof, so no roof repair would be needed.

○ If you require a separate roof penetration for the new restroom exhaust vent the cost would be an additional \$350.00

2) In case we have to put in complete coverage, what is the unit cost to furnish and install the track light fixture?

○ The cost to add light fixtures to the track is an additional \$85.00 per light fixture.

○ There is a package of track in the storeroom to add another track row which could be installed for an additional \$450.00

Please let me know if you have any additional questions,

Rick

Rick Gordon – Senior Project Manager

White Construction, Inc.

2540 Gateway, Carlsbad, CA 92009

Office 760.931.1130

Direct Line 760.448.2308

Cell 760.535.8371

Fax 760.931.1171

www.whiteconstructioninc.com

7/6/2010

# Brad L. Stoner Painting, Inc.

9245 Dowdy Drive, Suite 112 • San Diego, CA 92126

Fax (858) 586-7093 • Lic. #761761-C33

**(858) 586-7751 or (619) 262-9222**

This agreement is made on \_\_\_\_\_ June 11, 2010

Between Brad L. Stoner Painting ("contractor") and I D S Real Estate Group / Jennifer Convertibles -

For work (described below) to be performed at \_\_\_\_\_ 565 Grand Ave. San Marcos, CA 92078

Description of the Project and Description of the Significant Materials to be used is detailed on pages 3 & 4

Approximate Start Date: July 28, 2010 Approximate Completion Date: July 29, 2010

Substantial commencement of the work is defined as contractor's manning the work.

3. **Contract Price:** Owner shall pay contractor the following sum for the performance of the work: \$ 950.00

**Down Payment:** \_\_\_\_\_

**Schedule of progress payments:** The schedule of progress payments must specifically describe each phase of work, including the type and amount of work or services scheduled to be supplied in each phase, along with the amount of each proposed progress payment.

- |             |                                             |        |
|-------------|---------------------------------------------|--------|
| 1. \$ _____ | _____                                       | _____  |
|             | (Work to be performed or material supplied) | (Date) |
| 2. \$ _____ | _____                                       | _____  |
|             | (Work to be performed or material supplied) | (Date) |
| 3. \$ _____ | _____                                       | _____  |
|             | (Work to be performed or material supplied) | (Date) |

**It is against the law for a contractor to collect payment for work not yet completed, or for materials not yet delivered. However, a contractor may require a down payment**

Upon satisfactory payment being made for any portion of the work performed, the contractor upon request of the owner furnish a full and unconditional release from any claim or mechanic's lien pursuant to Section 3114 of the Civil Code for that portion of the work for which payment has been made.

4. By his initials herein ( BLS ) contractor agrees to extend the limited warranty contained in paragraph no. 8 on the reverse, to a total of three (3) years from the date of substantial completion of the work. However this does not include extending the warrantee on any deck, horizontal surface, fence, varnished doors or metal surfaces. All deck, horizontal surface, fence, varnished doors or metal has only a one-year warrantee.

5. Owner has the right to require contractor to obtain a faithful performance and payment bond. The cost of said faithful performance and payment bond is in addition to the contract price set forth above, and will be paid by owner.

6. List of Documents to be incorporated into the contract: Notice concerning Commercial General Liability Insurance (CGL); Notice concerning Worker's Compensation Insurance; Notice of Cancellation; Three-Day Right to Cancel; Mechanic's Lien Warning; Information about Contractors State License Board;

**By signing below, owner agrees that he/she has read the entirety of this agreement and understands it, including the reverse, and the attached notice to owner and notice of cancellation (if applicable and attached), all of which are incorporated herein by reference and become a part of this agreement.**

**You are entitled to a completely filled in copy of this agreement, signed by both you and the contractor, before any work may be started.**

\_\_\_\_\_  
(Owner) (Date Signed)

\_\_\_\_\_  
(Address)

\_\_\_\_\_

\_\_\_\_\_  
Phone Fax/Email

\_\_\_\_\_  
(Date Signed)

**Brad L. Stoner Painting, Inc.**  
**9245 Dowdy Drive Suite 112**  
**San Diego, CA 92126 [brad@bradstonerpainting.com](mailto:brad@bradstonerpainting.com)**  
**(858)-586-7751 Fax (858) 586-7093**  
**State Contractors License # 761761**

Project Manager: \_\_\_\_\_ Page 1 of 7

# Brad L. Stoner Painting, Inc.

9245 Dowdy Drive, Suite 112 • San Diego, CA 92126

Fax (858) 586-7093 • Lic. #761761-C33

**(858) 586-7751 or (619) 262-9222**

**7. Note about Extra Work and Change Orders:** Extra Work and Change Orders become part of the contract once the order is prepared in writing and signed by the parties prior to the commencement of any work covered by the new change order. The order must describe the scope of the extra work or change, the cost to be added or subtracted from the contract, and the effect the order will have on the schedule of progress payments.

8. Limited warranty-- if, within one (1) year of contractor's substantial completion of the work, deficiencies in the work occur due to improper workmanship or materials, contractor agrees to correct the defective portions of the work, which owner agrees will be owner's sole and exclusive remedy. This correction is conditioned upon the contractor receiving from the owner within ten (10) days of first discovery of the defective condition, written notification of the defective condition. This limited warranty shall not apply to defects in the work which result from events or circumstances beyond the control of contractor, including, but not limited to, abuse, wear and tear, acts of god, or the like.

This warranty constitutes the sole and exclusive warranty made by contractor and there are no other warranties, including, but not limited to the implied warranty of the merchantability and warranty of fitness for a particular purpose and all such warranties are expressly disclaimed and excluded by the parties. This warranty also constitutes owner's exclusive remedy against contractor including for alleged negligence of contractor and otherwise, and contractor shall not be liable for any incidental or consequential damage including liquidated, delay damages or other damages.

9. If any permits are required for the work, owner agrees to promptly obtain the permits at owner's cost and expense.

10. Contractor shall not be responsible for the identification, removal, disposal, or rendering harmless of any hazardous material on the job, including, but not limited to, lead based paint, asbestos or polychlorinated biphenyl.

11. Owner shall indemnify and hold harmless contractor, his subcontractors, his suppliers, his employees, and his agents from and against all claims, damages, losses, and expenses arising out of or resulting from activities, facilities, or equipment of owner or owner's other contractors, or his or their suppliers, employees, or agents, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury or to destruction of property including the loss of the use resulting therefrom, and is caused in whole or in part by any negligent act or omission of owner or his other contractors or of his or their suppliers, employees, or agents.

12. Owner shall purchase and maintain property insurance upon the entire work and upon all existing premises at or about which the work is performed to be fully insurable to the fully insurable value thereof, including all risk insurance or physical loss or damage from the perils of fire, extended coverage, theft, vandalism, malicious mischief, collapse and water damage, and loss of use insurance as may be required. The interest of contractor, his subcontractors, and their officers and employees shall be included in such coverages.

13. Contractor shall purchase and maintain contractor's liability insurance to protect him from claims under worker's compensation acts and for damages arising out of his operations under this agreement. Certificates of such insurance shall be furnished to owner upon request.

14. All claims, disputes, and other matters between contractor and owner arising out of or related to this agreement or the breach thereof, shall be decided by arbitration in accordance with the construction industry arbitration rules of the American arbitration association in force at the time the claim, dispute, or matter arises. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with the applicable law in any court having jurisdiction.

15. Venue for all claims, disputes, or other matters arising between contractor and owner related to this agreement in any way, shall be in the county of San Diego, state of California.

16. In the event that one or more of the provisions or portions of this agreement is determined to be illegal or unenforceable, the remainder of this agreement shall not be affected thereby and each remaining provision or portion thereof shall remain and continue to be valid and shall be enforceable to the fullest extent permitted by law.

17. It is expressly understood and agreed that this agreement contains the entire agreement and understanding of the parties concerning this agreement, and the subject matter herein, and supersedes and replaces all prior negotiations and agreements between the parties hereto, whether written or oral, relating hereto. It is further expressly understood and agreed that there have been no promises, agreements, warranties, or inducements, not herein expressed, made to any party. The parties hereby acknowledge that they have read this agreement and have executed it without relying upon any statements, representations or warranties, written or oral, not expressly set forth herein.

**18. STATE LAW REQUIRES ANYONE WHO CONTRACTS TO DO CONSTRUCTION WORK TO BE LICENSED BY THE CONTRACTORS' STATE LICENSE BOARD IN THE LICENSE CATEGORY IN WHICH THE CONTRACTOR IS GOING TO BE WORKING---IF THE TOTAL PRICE OF THE JOB IS \$500 OR MORE (INCLUDING LABOR AND MATERIALS).**

**LICENSED CONTRACTORS ARE REGULATED BY LAWS DESIGNED TO PROTECT THE PUBLIC. IF YOU CONTRACT WITH SOMEONE WHO DOES NOT HAVE A LICENSE, THE CONTRACTORS' STATE LICENSE BOARD MAY BE UNABLE TO ASSIST YOU WITH A COMPLAINT. YOUR ONLY REMEDY AGAINST AN UNLICENSED CONTRACTOR MAY BE IN CIVIL COURT, AND YOU MAY BE LIABLE FOR DAMAGES ARISING OUT OF ANY INJURIES TO THE CONTRACTOR OR HIS OR HER EMPLOYEES.**

**YOU MAY CONTACT THE CONTRACTORS' STATE LICENSE BOARD TO FIND OUT IF THIS CONTRACTOR HAS A VALID LICENSE. THE BOARD HAS COMPLETE INFORMATION ON THE HISTORY OF LICENSED CONTRACTORS, INCLUDING ANY POSSIBLE SUSPENSIONS, REVOCATIONS, JUDGMENTS, AND CITATIONS. THE BOARD HAS OFFICES THROUGHOUT CALIFORNIA. PLEASE CHECK THE GOVERNMENT PAGES OF THE WHITE PAGES FOR THE OFFICE NEAREST YOU OR CALL 1-800-321-CSLB FOR MORE INFORMATION.**

19. Contractors are required by law to be licensed and regulated by the Contractor's State License Board, which has jurisdiction to investigate complaints against contractors if a complaint regarding a patent act or omission is filed within four years of the date of the alleged violation. A complaint regarding a latent act or omission pertaining to structural defects must be filed within 10 years of the date of the alleged violation. Any questions concerning a contractor may be referred to the Registrar, Contractor's State License Board, PO Box 26000, Sacramento, California 95826.

# Brad L. Stoner Painting, Inc.

9245 Dowdy Drive, Suite 112 • San Diego, CA 92126

Fax (858) 586-7093 • Lic. #761761-C33

(858) 586-7751 or (619) 262-9222

This agreement is made on \_\_\_\_\_ June 11, 2010

Between Brad L. Stoner Painting ("contractor") and \_ I D S Real Estate Group / Jennifer Convertibles -

For work (described below) to be performed at \_\_\_\_\_ 565 Grand Ave. San Marcos, CA 92078

Contractor and owner agree as follows:

1. Contractor agrees to perform the following work:

## Exterior Preparation

**STUCCO HOLES** - Holes and cracks are cleaned & re-textured to resemble the stucco.

**MASKING** – We will cover the awnings and floors to prevent spills.

**CLEAN UP** - Work will be completed in a clean and professional manner. Garbage is removed and clean up is performed daily and at completion of job. Touch-up paint may be left in labeled cans for your future convenience.

## Exterior Painting

**PAINTING** – We will apply one coat of Dunn Edwards Flat Exterior paint to

""Painting - we will apply one coat of Dunn Edwards Flat Exterior paint to *match the existing paint color.*""

The entire front of the Jennifer Convertibles storefront

Total price \$ 950.00

This proposal includes: Labor and materials

This proposal excludes:

## Kelley Holderman

---

**From:** Kelley Holderman  
**Sent:** Tuesday, July 06, 2010 11:56 AM  
**To:** Kelley Holderman  
**Subject:** FW: Quote for removal of Jennifer Convertibles sign at Creekside Marketplace  
**Attachments:** IDS--JENNIFER CONVERTIBLES.doc

---

**From:** Kitt Sign Company - Sales [mailto:kittsign@att.net]  
**Sent:** Tuesday, June 08, 2010 9:16 AM  
**To:** Cheryl Ruzo  
**Subject:** Quote for removal of Jennifer Convertibles sign at Creekside Marketplace

## Kitt Sign Company

---

8985 Complex Drive  
San Diego, CA 92123

web: [www.kittsign.com](http://www.kittsign.com)  
e-mail: [kittsign@sbcglobal.net](mailto:kittsign@sbcglobal.net)

Ph: 858-569-4050  
Fax: 858-569-2043

### Signage Quote by: Bob

Notes:

**Rev:** 0  
**Date:** 06/08/10  
**Company:** IDS Real Estate  
**To:** Cheryl Ruzo

**Description:** Remove the Jennifer Convertibles signs.

Sign 1 - Remove face of existing sign cabinet. Flip face over so back side is showing or slide in customer supplied blank.  
(new sign would be extra - i.e. (Available))

Sign 2 - Remove and dispose of channel letters that read: No patching or painting.  
"JENNIFER CONVERTIBLES & LEATHER" located at 565 Grand Avenue, San Marcos, CA.  
Electric shall be capped per NEC.

Disconnect electrical and make safe.

Wall damage resulting from removal of signage will not be the responsibility of Kitt Sign Company.

Hazardous waste disposal. Properly dispose of neon and/or hazardous waste per California State Law. Disposal included.

**Subtotal:** \$1,176.00

**Deposit required to begin project: 50% of total / Balance on completion**

---

**IMPORTANT:** Please note this is a custom order. With your signature, permission is granted to begin production. If any information has been misinterpreted, or you want to make additional changes, we will adjust the pricing accordingly.

Lead time: 1 -2 weeks from the time deposit and signed work order are received. An additional 10% per day rush fee will be applied if the project is to be completed any sooner than the quoted time. Balance of payment due on completion. Lead time on installations can vary due to weather considerations. Due to the current volatile nature of the material costs, quotes are good for a period of 30 days.

UC

*W/ark Holsen*

**LEASE**

**by and between**

**THE CITY OF SAN MARCOS,  
a chartered municipal corporation**

**("Landlord")**

**and**

**JENNIFER CONVERTIBLES, INC.  
a Delaware corporation**

**("Tenant")**

**Creekside Market Place  
San Marcos, California**

**EXHIBITS**

- A. LEGAL DESCRIPTION OF SHOPPING CENTER
- A-1. LEGAL DESCRIPTION OF LAND
- B. SITE PLAN
- B-1. FLOOR PLAN OF TENANT'S PREMISES
- C. CONDITIONS PRECEDENT
- D. PROVISIONS RELATING TO THE DESIGN AND CONSTRUCTION OF TENANT'S PREMISES
- E. SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT
- F. SIGN CRITERIA

## TABLE OF CONTENTS

	Page
<b>I. FUNDAMENTAL LEASE</b>	
<b>TERMS.....</b>	<b>1</b>
<b>1. PREMISES.....</b>	<b>5</b>
1.1 Demise and Description.....	5
1.2 Remeasurement.....	5
1.3 Floor Area.....	5
1.4 Tenant's Proportionate Share.....	6
<b>2. TITLE; QUIET POSSESSION; OPERATING DOCUMENTS.....</b>	<b>6</b>
2.1 Title and Quiet Possession.....	6
2.2 Tenant Acceptance.....	6
2.3 Lease Subject to Operating.....	6
<b>3. TERM; CONDITIONS PRECEDENT.....</b>	<b>7</b>
<b>4. OPTION TO EXTEND.....</b>	<b>7</b>
<b>5. COMPLETION AND DELIVERY OF THE PREMISES AND SHOPPING CENTER.....</b>	<b>8</b>
5.1 Extension of Possession Date.....	8
5.2 Landlord's Work.....	8
5.3 Tenant's Work.....	8

**6. RIGHT OF PRIOR INSTALLATION..**

..... 8

**7.**

**RENT.....**

.... 9

7.1 Base

Rent..... 9

7.2 Additional Rent.....

... 9

7.3 Intentionally omitted.....

.... 9

7.4 Late

Payment..... 9

7.5 Percentage Rent.....

... 10

7.6 Security

Deposit..... 11

**8. USE, NO CONFLICT; OPENING**

**COVENANT..... 11**

8.1 Use, No Conflict

..... 11

8.2 Prohibited Uses.

..... 12

8.3 Open and Operating

Covenant..... 12

8.4 Landlord's Right to Terminate.

..... 13

8.5 Cessation of

Business..... 13

8.6 New

Locations..... 14

**TABLE OF CONTENTS**  
**(continued)**

**9.**

**UTILITIES.....**

..... 14

9.1

Definitions.....

14

9.2 Payment of the Utilities

Charge..... 15

9.3	Access to the	
Premises.....		15
9.4	Landlord Not Responsible for Interruption of	
Service.....		15
9.5	Rights Reserved to	
Landlord.....		16

## **10. REPAIR OF THE**

<b>PREMISES.....</b>		16
10.1	Tenant's	
Obligations.....		16
10.2	Landlord's	
Obligations.....		16
10.3	Tenant's Failure to	
Maintain.....		17
10.4	Right to	
Enter.....		18
10.5	Emergency	
Repairs.....		18
10.6	Modification Required by	
Law.....		18

## **11. ACCESS BY LANDLORD..**

.....		19
-------	--	----

## **12. TENANT'S**

<b>SIGNS.....</b>		19
12.1	In	
General.....		19
12.2	Removal of	
Signs.....		19
12.3	Sign	
Design.....		20
12.4	Signs of	
Others.....		20

## **13 ALTERATIONS TO THE PREMISES, PERSONAL PROPERTY..**

.....		20
13.1	Alterations.....	
.....		20
13.2	Construction Requirements.....	
.....		20
13.3	Personal Property.....	
.....		21
13.4	Fixtures.....	
.....		21
13.5	Landlord's Security Interest.....	

.....	21	
13.6	Personal Property Taxes.....	
.....	21	

<b>14. SURRENDER OF THE PREMISES.....</b>	<b>21</b>
-------------------------------------------	-----------

<b>15. HOLDING OVER.....</b>	<b>21</b>
------------------------------	-----------

<b>16. DEFAULT; REMEDIES UPON DEFAULT.....</b>	<b>22</b>
.....	22
16.1 Tenant	
Default.....	22
16.2 Landlord	
Remedies.....	22
16.3 Landlord	
Default.....	24
16.4	
Fixtures.....	
25	

<b>17. NONWAIVER OF DEFAULT.....</b>	<b>25</b>
--------------------------------------	-----------

## TABLE OF CONTENTS (continued)

<b>18. QUIET ENJOYMENT.....</b>	<b>25</b>
---------------------------------	-----------

<b>19. DAMAGE BY FIRE OF CASUALTY.....</b>	<b>25</b>
--------------------------------------------	-----------

<b>20. WAIVER OF SUBROGATION.....</b>	<b>25</b>
---------------------------------------	-----------

<b>21. EMINENT DOMAIN.....</b>	<b>27</b>
--------------------------------	-----------

<b>22. INSURANCE; INDEMNIFICATION.....</b>	<b>27</b>
--------------------------------------------	-----------

22.1 Tenant's	
Insurance.....	27
22.2 Landlord's	
Insurance.....	28

22.3	Indemnification of	
Landlord.....		28
22.4	Indemnification of	
Tenant.....		29
22.5		
Survival.....		29

## 23. SUBORDINATION, NON-DISTURBANCE AND ATTORNMENENT..... 29

24.	TRANSFER OF	
INTEREST.....		30
24.1	Transfer by	
Landlord.....		30
24.2	Transfer by	
Tenant.....		30
24.3		
Restrictions.....		
31		
24.4	Condition	
Precedent.....		31
24.5		
Procedures.....		
31		
24.6	Documentation and	
Expenses.....		33
24.7		
Nullity.....		
33		
24.8	Non-	
Transfers.....		33

25.	REAL ESTATE	
TAXES.....		33
25.1	Property	
Taxes.....		33

26.	RIGHT OF	
PROTEST.....		35
26.1	Mechanics'	
Liens.....		35
26.2	Right to	
Cure.....		35
26.3	Notice of	
Lien.....		36
26.4	Notice of	
Nonresponsibility.....		36

<b>27. COMMON AREAS.....</b>	<b>36</b>
27.1 Common Areas.....	36
27.2 Landlord's Operating Costs.....	37

<b>28. ALTERATIONS TO SHOPPING CENTER.....</b>	<b>39</b>
------------------------------------------------	-----------

## TABLE OF CONTENTS (continued)

<b>29. HAZARDOUS SUBSTANCES.....</b>	<b>40</b>
29.1 Use, Storage, Handling and Disposal of Hazardous Materials.....	40
29.2 Compliance with Laws.....	41
29.3 Exculpation of Landlord.....	41
29.4 Disclosure and Notification.....	41
29.5 Inspection of Premises.....	42
29.6 Indemnification of Landlord.....	42
29.7 Indemnification of Tenant.....	42
29.8 Remediation.....	43
29.9 Surrender of Premises.....	43
29.10 Definition of hazardous Materials.....	44
29.11 Assignment and Subletting.....	44
<b>30. ESTOPPEL CERTIFICATE.....</b>	<b>44</b>
<b>31.</b>	

.....	<b>PARKING.....</b>	
.....	45	
<b>32.</b>	<b>ATTORNEY'S</b>	
<b>FEES.....</b>		<b>45</b>
<b>33.</b>	<b>BROKERAGE.....</b>	
.....	45	
<b>34.</b>	<b>NOTICES.....</b>	
.....	46	
<b>35.</b>	<b>MISCELLANEOUS.....</b>	
.....	46	
35.1	Severability of	
Provisions.....		46
35.2	Memorandum of	
Lease.....		46
35.3	Entire	
Agreement.....		46
35.4	Relationship of the	
Parties.....		46
35.5	Importance of Each	
Covenant.....		47
35.6		
	Headings.....	
	.....	47
35.7	Parties in	
	Interest.....	47
35.8		
	Counterparts.....	
	.....	47
35.9	Number and	
	Gender.....	47
35.10	Governing	
	Law.....	47
35.11	Force	
	Majeure.....	
	.....	47
35.12	Limitation on	
	Liability.....	47
35.13	Mutual Waiver of Rights to Jury	
	Trial.....	48

## LEASE

THIS LEASE is made and entered into as of the 30th day of September, 2004 (the "Effective Date"), by and between **THE CITY OF SAN MARGOS**, a chartered municipal corporation ("Landlord"), and **JENNIFER CONVERTIBLES, INC.**, a Delaware corporation ("Tenant").

### WITNESSETH:

In consideration of the rents reserved and the covenants and conditions set forth herein, Landlord and Tenant agree as follows:

#### I. FUNDAMENTAL LEASE TERMS.

##### A. Parties

Landlord: The City of San Marcos  
Tenant: Jennifer Convertibles, Inc.  
Guarantor: N/A (Exhibit "G")

##### B. Premises, Building, Land and Shopping Center (Article 1)

Approximately two thousand five hundred seventy-five (2,575) square feet of Floor Area (defined in Section 1.3) with approximate dimensions of 48' wide by 54' deep, and sometimes referred to as Space 100 (the "Premises") located in that certain building ("Building") known as Building D as depicted on the Site Plan and Floor Plan attached as Exhibits "B" and "B-1", respectively. The Premises is located in that commercial center currently known as Creekside Market Place, San Marcos, California (the "Shopping Center"). The Shopping Center is comprised of approximately 25.60 net usable acres. The legal description of the Shopping Center is attached hereto as Exhibit "A" and made a part hereof. The Building is located on that certain land (the "Land") consisting of approximately .94 net usable acres within the Shopping Center. The legal description of the Land is attached hereto as Exhibit "A-1" and made a part hereof. The Building, the Premises, the Land and the Shopping Center are outlined on the site plan (the "Site Plan") attached hereto as Exhibit "B" and made a part hereof. Except as expressly limited by this Lease, Landlord expressly reserves unto itself, and Tenant has no interest in, the area above the ceiling of the Premises, nor any interest in the area below the floor of the Premises; nor any interest whatever in the land beneath the Premises.

The Premises does not include the roof or any use thereof (except as required for the repair or replacement of any heating or air conditioning equipment thereon serving the Premises) or include or extend beyond the exterior faces of the walls which enclose the Premises.

##### C. Term (Articles 3 and 4)

Five (5) Lease Years, with one (1), five (5) year renewal.

**D. Base Rent (Article 7)**

<u>Lease Years</u>	<u>Monthly</u>	<u>Annual</u>	<u>Per Square Foot</u>
Months 1-30	\$77,250.00	\$6,437.50	\$30.00
Months 31-60	\$81,885.00	\$6,823.75	\$31.80
<u>Option 1:</u>			
Months 61- 90	\$86,798.10	\$7,233.18	\$33.71
Months 91 – 120	\$92,005.99	\$7,667.17	\$35.73

**E. Percentage Rent (Article 7.5)**

Intentionally omitted.

**F. Tenant's Proportionate Share and Additional Rent (Section 1.4 and 7.2)**

Any and all sums of money or charges required to be paid by Tenant pursuant to the provisions of this Lease shall be paid as "Additional Rent". Tenant's Proportionate Share as of the Effective Date is thirty-one and 82/100ths percent (31.82%).

**G. Security Deposit and First Month's Base Rent (Section 7.6)**

Security Deposit: Intentionally omitted.

First Month's Base Rent: Six Thousand Four Hundred Thirty-Seven and 50/100 Dollars (\$6,437.50), which deposit is due and payable upon execution of this Lease by Tenant.

**H. Tenant's Use of the Premises: (Section 8.1)**

Tenant shall use and operate the Premises only as a typical Jennifer Convertibles facility which primarily includes the retail sale of leather furniture, sofas, convertible sofas and, as an ancillary portion of Tenant's sales, other furniture, home furnishings and related home accessories. Tenant shall not sell mattresses, except as part of convertible sofas. Tenant shall use the Premises for no other use or purpose.

During the term of the Lease, Landlord shall not lease, rent, occupy or permit to be occupied or used, any space in Buildings D, F, G or L of the Shopping Center for any one or more of the following primary uses: the sale of sofas and convertible sofas (the foregoing is hereinafter collectively referred to as the "Exclusive Item"). The provisions of this Section shall not be construed to prohibit (a) any existing tenant as of the Effective Date hereof within the Shopping Center which has, pursuant to the current terms and provisions of said tenant's lease, the right to handle and sell the Exclusive Item, from handling and selling that certain item or (b) any tenant from selling the Exclusive Item if (i) no more than twenty percent (20%) of the selling floor area of such tenant's space is

devoted to the sale of the Exclusive Item and (ii) the aggregate sales by such tenant of the Exclusive Item does not exceed twenty percent (20%) of the gross sales generated from such tenant's space. Tenant further acknowledges that Landlord is presently negotiating or has executed leases with tenants for (a) a furniture retailer occupying approximately seventeen thousand (17,000) square feet which may sell, as an incidental portion of its business, mattresses from the Premises and (b) a mattress store occupying approximately five thousand five hundred eighteen (5,518) square feet which may sell convertible sofas as a part of its permitted use. Tenant agrees that if these leases are executed that the Exclusive Item provision or any remedies of Tenant associated therewith shall not apply to Landlord's execution of the leases with such tenants.

Notwithstanding the foregoing, Landlord granting Tenant the rights contained in this Section H for the retail sale of Exclusive Item shall automatically become null and void if Tenant defaults under this Lease beyond any applicable cure period, Tenant assigns its rights under this Lease in whole or in part or sublets all or any portion of the Premises; a transfer of the corporate shares or partnership interests of Tenant occurs which would entitle Landlord to terminate this Lease (regardless of whether Landlord actually exercises such right to terminate); or the Premises cease to be used primarily for the sale of the Exclusive Item.

Tenant hereby agrees to indemnify, defend, and hold harmless Landlord from and against any and all claims, demands, actions, causes of action, losses (including but not limited to loss of rents resulting from the termination by another tenant of its lease), damages, costs, and expenses, including court costs and attorney's fees, arising from or related to, wholly or in part, the use of the Premises for any purpose prohibited by this Section H.

**I. Tenant's Trade Name (Section 8.1)**

Tenant shall operate the Premises only under the trade name of Jennifer Convertibles or Jennifer Leather.

**J. Tenancy Date (Article 3)**

The "Tenancy Date" as used herein means the sixtieth (60<sup>th</sup>) day after the substantial completion of the Premises as defined in Exhibit "D" hereof (or the date upon which the Premises would have been substantially completed but for delays in construction caused by a Tenant Delay) and available for Tenant to commence fixture installation and store merchandising.

The estimated date for substantial completion of the Premises (as defined in Exhibit "D") and delivery of the Premises to Tenant is September 1, 2004 ("Possession Date"). If Landlord does not provide Tenant with the Notice of Substantial Completion (as defined in Exhibit "D") on or before February 1, 2005 (subject to extension for Tenant Delay and force majeure pursuant to the provisions of Section 35.11), then Tenant may terminate the Lease by thirty (30) days written notice to Landlord at any time thereafter. In the event of any such

termination, Landlord and Tenant shall have no further rights or obligations hereunder except those, if any, which accrued prior to the date of termination or which by their nature survive the early termination of this Lease. Tenant acknowledges that the above right to terminate constitutes Tenant's sole and exclusive remedy for such delay. Notwithstanding anything to the contrary contained herein, in the event that Landlord provides Tenant with the Notice of Substantial Completion of Landlord's Work prior to Tenant providing notice to Landlord of its election to terminate this Lease, then Tenant's right to terminate this Lease for failure of Landlord to meet the outside date for substantial completion of the Premises set forth above shall be deemed void and of no further force and effect.

In no event shall Tenant be required to accept delivery of the Premises during the time frame December 1, 2004 to January 31, 2005 unless Tenant otherwise agrees in writing, in which case all terms and conditions of this Lease shall be fully applicable during such time frame.

Notwithstanding anything to the contrary contained in this Lease, in the event that Landlord has not delivered possession of the Premises to Tenant, with Landlord's Work completed, by written notice to Tenant given on or before February 28, 2005, then Tenant shall have the right to terminate this Lease, effective upon written notice to Landlord, which notice may be given at any time after February 29, 2005, but prior to the delivery of possession. If Tenant has not provided such notice of termination on or prior to the date Landlord sends out its Notice of Substantial Completion, as defined below, Tenant's right to terminate the Lease as set forth in this Section J shall be null and void.

**K. Addresses (Article 34)**

(i) If to Landlord:

The City of San Marcos  
1 Civic Center Drive  
San Marcos, CA 92069  
Attn: Paul Malone

with a copy to:

Investment Development Services, Inc.  
11828 Rancho Bernardo Road, Suite 201  
San Diego, CA 92128  
Attn: Mark Hoekstra

with a copy to:

Hilding Kipnis Lyon & Kelly  
11975 El Camino Real  
Suite 200  
San Diego, California 92130  
Attn: Michael E. Lyon, Esq.

(ii) If to Tenant:

Jennifer Convertibles, Inc.  
419 Crossways Park Drive  
Woodbury, New York 11797  
with a copy to:

Bernard Wincig, Esq.  
WINCIG & WINCIG  
574 Fifth Avenue  
New York, New York 10036

**L. Construction**

The foregoing provisions of this Article I summarize for convenience only certain key terms of the Lease delineated more fully in the Articles and Sections referenced therein. In the event of a conflict between the provisions of this Article I, Fundamental Lease Terms, and the balance of the Lease, the latter shall control.

**1. PREMISES.**

1.1 Demise and Description. Subject to the terms and conditions of this Lease, Landlord leases to Tenant and Tenant rents from Landlord the Premises as defined in Article I.B. of the Fundamental Lease Terms.

1.2 Remeasurement. Within sixty (60) days after substantial completion of the Premises, Landlord shall have the right but not the obligation to have Landlord's architect at Landlord's expense recalculate the Floor Area of the Premises. If the calculation shows a deviation from the square footage specified in Article I.B. of the Fundamental Lease Terms, the Lease shall be amended so as to reflect the actual Floor Area and a proportionate modification (increase or reduction) of Base Rent and other Additional Rent which is calculated based on Floor Area.

1.3 Floor Area. The term "Floor Area" as used throughout this Lease shall mean and include the square footage of all areas for exclusive use and occupancy by any tenant of Landlord, measured from the exterior surface of building walls and extensions thereof, in the case of the perimeter of the Premises, and from the center line of demising partitions between the

Premises and those adjacent tenants. In addition, in the case of a tenant operating a restaurant or other food service facility and utilizing outdoor seating areas, "Floor Area" shall include the square footage of such outdoor seating area. The Floor Area shall include, without limitation, restrooms, mezzanines, warehousing or storage areas, clerical or office areas and any employee areas.

1.4 Tenant's Proportionate Share. The term "Tenant's Proportionate Share" as used throughout this Lease with respect to reimbursement of Landlord for Landlord's Maintenance Obligations Costs as specified in Section 10.2 below, Landlord's Operating Costs, Taxes, and Insurance obtained by Landlord under this Lease shall mean the ratio of the Floor Area of the Premises to the total Floor Area of the Building, as such areas may be adjusted from time to time. The Tenant's Proportionate Share as of the Effective Date of this Lease is specified in Article I.F. of the Fundamental Lease Terms.

## **2. TITLE; QUIET POSSESSION; OPERATING DOCUMENTS.**

2.1 Title and Quiet Possession. Landlord hereby represents, covenants and warrants to Tenant that it has full right and authority to enter into this Lease in accordance with the terms hereof and that it has good title in fee simple to the Premises.

2.2 Tenant Acceptance. Tenant agrees to accept possession of the Premises from Landlord on the terms and conditions of this Lease upon the full execution hereof by Landlord and Tenant and satisfaction of the conditions precedent set forth in this Lease, subject to all applicable zoning, municipal, county, state and federal laws, ordinances and regulations governing and regulating the use of the Premises. Other than as expressly set forth in this Lease, Tenant acknowledges that neither Landlord nor Landlord's agents have made any representation or warranty as to such matters of record, or as to such laws, ordinances, zoning or regulations, or as to the condition of the Premises or the suitability of the Premises for the conduct of Tenant's business. Subject to the terms and conditions of this Lease, including, without limitation, Landlord's representations and warranties and Landlord's performance of all of its obligations in accordance with this Lease, Tenant agrees to accept the Premises "AS-IS" and "WHERE-IS."

2.3 Lease Subject to Operating Documents. Tenant acknowledges that as of the Effective Date the Premises are or shall be subject to the following: (a) covenants, conditions, restrictions, easements, mortgages or deeds of trust, any ground lease of record, any rights-of-ways of record, and any other matters or documents of record, (hereinafter referred to collectively as the "Operating Documents"); (b) any law, statute, ordinance, regulation, rule, requirement and order, court decision, or procedural requirement of any governmental authority; and (c) general and special taxes not delinquent. As to its leasehold estate, Tenant and all persons in possession thereof will conform to and will not violate the terms of the aforementioned Operating Documents or said matters of record. Except as permitted by this Lease, from and after the Effective Date, Tenant and all persons in possession of the Premises, shall not encumber the Premises, whether involuntarily or otherwise. Tenant acknowledges that any mortgagee or deed of trust trustee or beneficiary has the right to subordinate at any time its interest in this Lease and the leasehold estate to that of Tenant, without Tenant's consent.

Subject to the preceding paragraph, Tenant acknowledges that this Lease is subordinate to the Operating Documents and any amendments or modifications thereof. Notwithstanding the

foregoing, if the Operating Documents, any portion thereof or amendments or modifications thereto, are not of record as of the Effective Date, then this Lease shall automatically become subordinate to the Operating Documents upon recordation of said Operating Documents, and Tenant further agrees to execute and return to Landlord, within twenty (20) days after written demand therefor by Landlord, an agreement in recordable form (substantially in the form of Exhibit "E") subordinating this Lease to said Operating Documents.

### **3. TERM; CONDITIONS PRECEDENT.**

3.1 This Lease shall be effective upon the Effective Date. The term of this Lease (the "Lease Term") shall be for a period as defined in Article I.C of the Fundamental Lease Terms. The Lease Term shall commence on the date (the "Commencement Date") which is the earlier of (i) the "Tenancy Date," as that term is defined in Article I.J. of the Fundamental Lease Terms; provided, however, that all conditions precedent set forth in Exhibit "C" attached hereto and incorporated herein by this reference (the "Conditions Precedent") have been satisfied or waived or (ii) the date Tenant opens for business to the public at the Premises and shall continue thereafter for the period specified herein, unless sooner terminated or extended as hereinafter provided in this Lease.

The term "Lease Year" as used herein shall mean a period of twelve (12) consecutive full calendar months. The first Lease Year shall commence on the Commencement Date and, to the extent the Commencement Date occurs on anything other than the first of the month, shall continue for any partial month, followed by twelve (12) full months. Succeeding Lease Years shall each commence on the first (1st) day following the end of the preceding Lease Year. After the Commencement Date and within ten (10) days after request from the other party, the parties shall jointly execute a statement specifying the Commencement Date of this Lease.

Landlord and Tenant acknowledge and agree that the obligations of Landlord and Tenant under this Lease are expressly subject to those conditions precedent set forth in Exhibit "C" attached hereto and incorporated herein (the "Conditions Precedent") having been satisfied or waived within the time frames set forth in Exhibit "C".

### **4. OPTION TO EXTEND.**

4.1 Tenant is hereby given the right to extend the Lease Term for those periods of time defined in Article I.C. of the Fundamental Lease Terms, upon the same terms and conditions as provided in the original Term of this Lease, provided there does not exist an Event of Default under this Lease at the time of commencement of the applicable extension term, except that the Base Rent payable by Tenant during any such extension term shall be as outlined in Article I.D. hereof and Tenant shall continue to pay all Additional Rent provisions outlined in this Lease ("Option Term"). The right to exercise any or all of the Option Terms is a right which is personal to Tenant. Tenant shall exercise the right granted in the foregoing sentence by notifying Landlord in writing ("Tenant's Renewal Notice") of its intention to extend at least one hundred eighty (180) days prior to the date of commencement of each such extension term, and thereupon this Lease shall be so extended without any further document or act. If Tenant fails to notify Landlord of its exercise of any extension option hereunder as hereinabove provided, its option(s) to extend shall forever terminate and be of no further force or effect. In the event Tenant exercises the option, Tenant agrees to take the Premises in an "AS IS, WHERE IS"

condition with no obligation on the part of the Landlord to undertake any work with regard to the Premises.

**5. COMPLETION AND DELIVERY OF THE PREMISES AND SHOPPING CENTER.**

5.1 Extension of Possession Date. The "Possession Date" (as defined in Article I.J., if a specific date is applicable, and in Exhibit "D" as generally defined) shall be extended on a day-for-day basis for each day of delays in construction caused by a Tenant Delay (as defined in Exhibit "D") or by matters referred to and as provided in Section 35.11 of the Lease (Landlord shall, however, use reasonable diligence to avoid any such delay and to resume construction as promptly as possible after the delay).

5.2 Landlord's Work. Landlord agrees, at its sole cost and expense, to substantially complete the following work on or before the Possession Date, subject however, to extensions for Tenant Delay, as defined in Exhibit "D", and force majeure pursuant to the provisions of Section 35.11:

5.2.1 Construction of the Premises, including "Landlord's Work", as provided in Exhibit "D" hereof,

5.2.2 Construction of all other Common Area elements servicing the Premises including, but not limited to, all access roads located on or serving the Premises, landscaping, parking lot lighting, site drainage, concrete curbs and sidewalks, driveways, utilities, tower and/or monument sign(s) and a finished and fully-improved parking lot.

5.3 Tenant's Work. Tenant shall commence the construction of Tenant's Work as described in Exhibit "D" promptly upon substantial completion of the Premises and shall diligently prosecute such construction to completion and shall open the Premises for business on or before the Tenancy Date.

**6 RIGHT OF PRIOR INSTALLATION.**

6.1 At any time prior to the Commencement Date, Tenant shall have the right to enter the Premises for the purposes of measuring the Premises and installing therein Tenant's fixtures, equipment and merchandise, provided that such operations do not interfere unreasonably with Landlord's completion of the Premises. Any entry by Tenant for the purpose of measuring the Premises or of installing its fixtures and equipment shall not be deemed acceptance of the Premises by Tenant. Such entry upon the Premises shall be subject to all terms and conditions of this Lease except the obligation to pay Base Rent or any Additional Rent.. Tenant hereby indemnifies and holds Landlord, the Premises and the Shopping Center harmless from any and all costs, losses, damages or expenses of any kind or nature arising out of or resulting from such activities upon the Premises or Shopping Center by Tenant, or its agents, employees or contractors. Each party shall cause its contractor to cooperate with the other's contractor to complete Landlord's Work and Tenant's Work in a timely and efficient manner.

7 **RENT.**

7.1 **Base Rent.** Tenant hereby covenants and agrees to pay Landlord as monthly fixed rent for the Premises ("Base Rent") during the Lease Term the sums set forth in Article I.D. hereof. Base Rent and all other sums payable by Tenant under this Lease shall be payable in the lawful currency of the United States of America, in advance and without any abatement, offset, demand or deduction whatsoever on the first day of every calendar month commencing on the Commencement Date and thereafter during the Lease Term, except as expressly permitted herein. Should the rental period commence on a day other than the first day of a calendar month, then the rental for such first fractional month shall be paid within five (5) days following the Commencement Date and shall be computed on a daily basis for the period from the Commencement Date to the end of such calendar month and at an amount equal to one-three hundred sixty-fifth (1/365th) of the said annual rental, and thereafter shall be computed and paid as aforesaid. Tenant shall pay Rent to Landlord at the address provided for Landlord in Article I.K. hereof, unless otherwise notified in writing by Landlord. If the Floor Area of the Premises is in fact more or less than the estimated Floor Area set forth in the description of the Premises in Article I.B. of the Fundamental Lease Terms and as remeasured pursuant to Section 1.2 of this Lease, the Base Rent hereunder shall be proportionately adjusted to reflect the actual Floor Area of the Premises.

7.2 **Additional Rent.** Any and all charges and sums other than the payment of the Base Rent pursuant to this Article 7 payable by Tenant under this Lease (including, but not limited to, insurance premiums, utility expenses, Tenant's Proportionate Share of Landlord's Maintenance Obligations Costs pursuant to Article 10 below, Taxes pursuant to Article 25 below, and Tenant's Proportionate Share of Landlord's Operating Costs pursuant to Article 27 below), shall constitute additional rent hereunder ("Additional Rent"). Base Rent, Percentage Rent, if applicable, and Additional Rent are sometimes hereinafter collectively referred to as "Rent." All Rent shall be absolutely net to Landlord so that this Lease shall, except as expressly provided in this Lease, yield net to Landlord the Rent to be paid each month during the Term of this Lease. Except as otherwise expressly provided herein, all costs, expenses, and obligations of every kind or nature whatsoever relating to the Premises, or any improvements thereon which may arise or become due during the Term of this Lease, shall be paid by Tenant as set forth herein. Tenant's obligation to pay its share of Additional Rent, including its share of Landlord's Operating Costs pursuant to Article 27 below, shall commence on the Commencement Date. Nothing herein contained shall be deemed to require Tenant to pay or discharge any liens or mortgages of any character whatsoever which may exist or hereafter be placed upon the Premises by an affirmative act or omission of Landlord, its contractors, agents or employees.

7.3 **Intentionally omitted.**

7.4 **Late Payments.** Except as provided below, if Tenant shall neglect or fail to pay, within ten (10) days after the date the same is due and payable, any monthly installment of Rent or other amount required to be paid under this Lease by Tenant, Tenant promises to pay to Landlord, in addition to such unpaid amounts, interest upon such unpaid amounts from the date due until the date Landlord receives payment at the lesser of (i) the maximum lawful rate or (ii) the prime rate announced by Bank of America or its successor from time to time plus four (4) percentage points ("Interest Rate"). In addition to such interest, Tenant acknowledges that late

payment by Tenant of any monthly installment of Rent or other amount due hereunder will cause Landlord to incur certain costs and expenses not contemplated under this Lease. The exact amount of such costs and expenses is hereby acknowledged to be difficult and impractical to set. Such costs and expenses include, without limitation, administrative and collection costs, and processing and accounting expenses and other costs and expenses necessary and incidental thereto. Therefore, if any such installment or payment is not received by Landlord from Tenant within ten (10) days after the date that such installment or payment is due, Tenant shall immediately pay to Landlord a late charge equal to five percent (5%) of such amount. Landlord and Tenant agree that this late charge represents a reasonable estimate of such costs and expenses to be incurred by Landlord in the event of Tenant's failure to timely pay Rent or other amounts due hereunder, and is fair compensation to Landlord for its loss suffered by such nonpayment by Tenant. The interest and late charges provided for in this Section 7.4 are in addition to, and in no way represent a diminution of or substitution for, any or all of Landlord's other rights or remedies contained in this Lease or at law or in equity.

7.5 Percentage Rent.

7.5.1 Percentage Rent. Intentionally omitted.

7.5.2 Gross Sales. As used in this Lease, Tenant's "Gross Sales" are defined as the gross selling price of all merchandise, and/or services sold upon or from the Premises by Tenant, its subtenants, licensees and concessionaires, whether for cash or on credit, whether collected or not and whether made by store personnel or by vending machines or by electronic, telephonic, video, computer or other technology based systems, whether existing now or developed in the future.

7.5.3 Statement of Gross Sales. Tenant agrees to furnish or cause to be furnished to Landlord a statement of Tenant's annual Gross Sales within sixty (60) days after the close of each calendar year. Such statements shall be certified as accurate accountings of Tenant's Gross Sales from the Premises by an officer of Tenant. Tenant shall record at the time of each sale transaction, in the presence of the customer, all receipts from sales or other transactions, whether for cash or credit, in a cash register, or in cash registers, having a cumulative total and which shall number consecutive purchases. Tenant shall keep full and accurate books of account, records, and all such cash register receipts concerning Gross Sales, credits, refunds and other transactions made from or upon the Premises (including the Gross Sales of any subtenant, licensee or concessionaire). Such books, receipts and records shall be kept for a period of not less than three (3) years after the close of each calendar year and shall be available for inspection and audit by Landlord or its representatives at all times during regular business hours. In addition, upon request of Landlord, Tenant agrees to furnish Landlord a copy of Tenant's sales tax return (State and Local Sales and Use Tax Return). Any information gained from such statements or inspection shall be confidential and shall not be disclosed, except to carry out the purposes hereof; provided, however, Landlord shall be permitted to divulge the contents of any such statements in connection with any contemplated sales, transfers, assignments, encumbrances or financing arrangements of Landlord's interest in the Premises or in connection with any administrative or judicial proceedings in which Landlord is involved where Landlord may be required to divulge such information.

7.6 Security Deposit. Intentionally omitted.

## **8. USE, NO CONFLICT; OPENING COVENANT.**

8.1 Use, No Conflict. Tenant will use and occupy the Premises and appurtenances in a careful, safe and proper manner, and shall comply with the Use and trade name as defined in Articles I.H. and I.I. respectively, of the Fundamental Lease Terms, the Operating Documents and lawful requirements of the proper public authorities regarding the conduct of Tenant's business, all at Tenant's sole expense. Tenant will not permit the Premises to be used for any unlawful purpose or create any waste or nuisance. Tenant shall not sell any items that are manufactured by or for any other tenant or occupant of the Shopping Center and bearing such tenant's or occupant's label. Notwithstanding the foregoing, Tenant may sell items manufactured by or for another tenant or occupant of the Shopping Center and bearing such tenants or occupants label, if such tenant or occupant enters into a lease at the Shopping Center after the date of this Lease. Tenant, however, agrees to discontinue offering for sale in the Premises such items if Landlord or Tenant receives a written request from such tenant or occupant requesting that Tenant discontinue selling such branded items. In the event that such a request has been made, Tenant shall have ten (10) days after notification to either discontinue selling such items or to present Landlord with written approval to sell such items from the tenant. Tenant's failure to cease selling such items shall be deemed an Event of Default entitling Landlord to all remedies hereunder.

Landlord hereby warrants that, at time of delivery of the Premises to Tenant, the Premises will be free of material or latent defects and in conformance with all then-current applicable building, health, safety, fire, environmental and zoning codes and other laws, ordinances and regulations of all public authorities having jurisdiction over the Premises.

At Tenant's sole expense, Tenant shall procure, maintain and hold available for Landlord's inspection any governmental license or permit required for the proper and lawful conduct of Tenant's business. Tenant shall not use the Premises for any use or purpose in violation of the laws of the United States of America, or the laws, ordinances, regulations and requirements of the State, County and City where the Shopping Center is situated, or of other lawful authorities. Tenant shall keep the Premises, and every part thereof, in a clean and wholesome condition, free from any objectionable noises, odors or nuisances, and shall comply with all health and police regulations in all respects. Tenant agrees that all trash and rubbish of Tenant shall be deposited only within receptacles provided by Landlord or those receptacles provided by Tenant and located in the areas designated by Landlord. If Tenant's permitted use includes the sale of and/or preparation of food: (a) Tenant shall at all times maintain a health department rating of "A" (or such other highest health department or similar rating as is available); and (b) in connection with Tenant's obligations under this Lease, Tenant shall be responsible for any and all health, safety and legal regulations and matters related to Tenant's grease trap(s) including, without limitation, contracting with a qualified service company for routine cleaning and maintenance of any trap(s) and/or grease lines which serve Tenant. Tenant shall provide Landlord with a copy of any contract required hereunder within ten (10) days after the Commencement Date, and shall provide a copy of any subsequent contracts within ten (10) days after their execution.

Tenant may not display or sell merchandise or place carts, portable signs, devices or any other objects outside the defined exterior walls or roof and no aerial or antenna shall be erected

on the roof or exterior walls of the Premises without first obtaining, in each instance, the written consent of Landlord which consent Landlord may give, withhold, or condition, in Landlord's sole discretion. Any aerial or antenna so installed without such written consent shall be subject to removal without notice at any time, at Tenant's expense. In addition, Tenant shall not solicit or distribute materials in any manner in the Common Area of the Shopping Center.

8.2 Prohibited Uses. During the term of this Lease no portion of the Premises may ever be used for any of the following uses whatsoever:

(i) An adult type bookstore or other establishment selling, renting, displaying or exhibiting pornographic or obscene materials (including without limitation: magazines, books, movies, videos, photographs or so called "sexual toys") or providing adult type entertainment or activities (including, without limitation, any displays of a variety involving, exhibiting or depicting sexual themes, nudity or lewd acts.

(ii) A massage parlor.

(iii) A skating rink.

(iv) A mortuary, crematorium or funeral home.

(v) A mobile home or trailer court, labor camp, junkyard or stockyard.

(vi) A landfill, garbage dump or for the dumping, disposing, incineration or reduction of garbage.

(vii) A telephone call center.

(viii) A gambling establishment, bingo parlor or betting parlor.

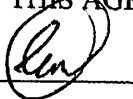
(ix) Veterinary hospital or animal raising or keeping facilities.

(x) Assembling, manufacturing, industrial, distilling, refining or smelting facility.

8.3 Open and Operating Covenant. Tenant covenants and agrees that it open and will continuously and uninterruptedly from and after its initial opening for business operate and conduct within the Premises the business which it is permitted to operate and conduct under the provisions of this Lease, except while the Premises are untenable by reason of fire or other casualty. Tenant further covenants to keep and maintain within and upon the Premises an adequate stock of merchandise and trade fixtures to service and supply the usual and ordinary demands and requirements of its customers. Tenant further agrees to have its window displays, exterior signs and exterior advertising displays adequately illuminated continuously during all hours on all days that Landlord in its sole and absolute discretion, determines to open the Shopping Center for business to the public, but not earlier than one (1) hour before Tenant's required opening or later than one (1) hour after Tenant's required closing on each day.

8.3.1 Liquidated Damages. IN THE EVENT TENANT FAILS TO OPEN FOR BUSINESS TO THE GENERAL PUBLIC ON OR BEFORE THE TENANCY DATE AS DEFINED IN ARTICLE I.J. OF THE FUNDAMENTAL LEASE TERMS (SUBJECT TO THE PROVISIONS OF SECTION 35.11 HEREOF), TENANT SHALL BE SUBJECT TO LIQUIDATED DAMAGES IN THE AMOUNT OF SIX THOUSAND AND 00/100 DOLLARS (\$6,000.00) PER MONTH FOR EACH MONTH (PRORATED ON A DAILY BASIS UNTIL TENANT OPENS FOR BUSINESS) TENANT FAILS TO OPEN FOR BUSINESS, DUE AND PAYABLE ON OR BEFORE THE FIRST (1<sup>ST</sup>) DAY OF EACH MONTH (THE "LIQUIDATED DAMAGES") UNTIL TENANT HAS OPENED FOR BUSINESS IN ACCORDANCE WITH THIS SECTION. THE PARTIES HERETO ACKNOWLEDGE THE DIFFICULTY OF ASCERTAINING LANDLORD'S ACTUAL DELAY DAMAGES FOR A DELAY IN TENANT OPENING FOR BUSINESS AND THEREFORE AGREE THAT THE ABOVE AMOUNTS ARE A GOOD FAITH ATTEMPT TO IDENTIFY AND QUANTIFY LANDLORD'S ACTUAL DAMAGES AND AS SUCH DO NOT CONSTITUTE A PENALTY. IN PLACING THEIR INITIALS BELOW, EACH PARTY SPECIFICALLY CONFIRMS THE ACCURACY OF THE STATEMENTS MADE ABOVE AND THE FACT THAT EACH PARTY WAS REPRESENTED BY COUNSEL WHO EXPLAINED THE CONSEQUENCES OF THIS LIQUIDATED DAMAGES PROVISION AT THE TIME THAT THIS AGREEMENT WAS MADE.

Tenant's Initials:



Landlord's Initials:



8.4 Landlord's Right to Terminate. Subject to force majeure as set forth in Section 35.11 below, if Tenant fails to open for business to the general public within ninety (90) days after the Tenancy Date, subject to extensions as provided in Section 35.11, Landlord shall have the right, but not the obligation, to terminate this Lease by notice to Tenant in accordance with this Article and the obligations of the parties shall cease as of the Effective Date of such notice of termination. If Landlord exercises its right of termination pursuant to this subsection, the obligation of Tenant to pay to Landlord the Liquidated Damages specified above shall continue until the Termination Date set forth below.

8.5 Cessation of Business. In the event Tenant ceases business operations within the Premises for a period in excess of sixty (60) consecutive days, Landlord shall have the right to terminate this Lease by notice to Tenant, which termination shall be effective thirty (30) days after the date of Landlord's notice of termination (the "Termination Date"). Prior to the Termination Date, Tenant shall continue to pay Rent and perform all of its other duties and obligations under this Lease. A cessation of business operations by reason of *force majeure* (as defined in Section 35.11), for purposes of alterations, reconstruction, repairs, restocking or refixturing, or a cessation of less than sixty (60) consecutive days, shall not be a cessation within the meaning of this Section. If this Lease terminates pursuant to this Section 8.5, Landlord shall pay to Tenant, on the Termination Date, an amount equal to the "Tenant's Book Value" (as defined below). Tenant's Book Value shall be an amount equal to the unamortized book value of Tenant's Work as defined in Exhibit "D" with respect to the Premises (other than personal

property, moveable trade fixtures, signs, equipment and soft construction costs, including architect's and engineer's fees), as shown on the books and records of Tenant as of the date which is thirty (30) days prior to the Termination Date. Tenant's books and records shall be prepared in accordance with Tenant's chain-wide accounting practices.

8.5 New Locations. Intentionally omitted.

## 9. UTILITIES.

9.1 Definitions: For purposes hereof, "Utilities" shall mean the services of electricity, natural gas (if permitted by Landlord), sewage (including removal and treatment), water (including treatment and delivery), telephone service and other services such as satellite data transmission, telecommunications cell sites or antennas, cable systems and security systems, or technological successors thereto. Landlord shall make available for the Premises only those Utilities facilities set forth as Landlord's Work in Exhibit "D" hereto and shall have no obligation whatsoever to make any other Utilities facilities or services available for the benefit of Tenant.

Commencing on the Commencement Date and continuing for the term of the Lease, as same may be amended, Tenant shall pay, as provided hereinafter, for any and all Utilities furnished to the Premises or otherwise for the benefit of Tenant except that Utilities in connection with the Common Area shall be paid by Tenant as a part of Tenant's pro rata share of Landlord's Operating Expenses as more fully described in Article 27 hereto. Landlord shall have the right, either in connection with Tenant's initial occupancy of the Premises, or from time to time throughout the Lease Term, beginning as of the Commencement Date to provide certain Utilities to the Premises, or to require Tenant to contract for Utility services with specific alternative service providers ("ASP"), provided, however, that the cost to Tenant of such Landlord-designated services shall not exceed the costs Tenant would have obtained directly from the local public utility company or, for Utilities not provided by a public utility company, the rate Tenant would be able to obtain on its own account. In either such event, Tenant shall use the Utilities or the Utility services designated by Landlord and shall not contract separately for the same without the prior written consent of Landlord which Landlord may grant or withhold in its sole and absolute discretion. Tenant shall install at its sole expense any separate meter required by Landlord or Tenant for any Utilities.

In the event Landlord provides a Utility as provided herein above, Landlord shall reasonably determine Tenant's share of the Utility so provided, and such determination shall be used to calculate a "Utilities Charge" which Tenant shall pay to Landlord as described hereafter. So long as Landlord is reasonable in its determination of Tenant's share of the Utility, Tenant agrees that Landlord's determination shall be binding upon Tenant. Tenant shall arrange, at Tenant's sole cost and expense, for the local utility company to provide all Utilities not otherwise provided or designated by Landlord as provided herein.

9.2 Payment of the Utilities Charge. For any Landlord-provided Utilities, Tenant shall pay the Utilities Charge described herein above, on the first day of each month, in advance, as Additional Rent. Such charge shall include all expenses for the repair, maintenance and replacement, as necessary, of all meters, pipes, conduits, equipment, components and facilities used to deliver such Utilities to the Premises. Landlord shall initially estimate the amount of the

Utilities Charge on the basis of a typical store layout comparable to Tenant's proposed use of the Premises and shall thereafter adjust such estimate from time to time as necessary, based on Landlord's experience and reasonably anticipated costs.

At the end of each calendar or partial calendar year during the Lease Term, Landlord shall compare the total of all monthly estimated Utilities Charges paid by Tenant during said year with the total expenses incurred by Landlord in supplying Utilities to the Premises during said year. If said total expenses which shall constitute Tenant's actual Utilities Charge, exceed Tenant's total estimated payments therefor, Tenant shall pay Landlord the deficiency within ten (10) days after notice from Landlord. If Tenant's total estimated payments exceed Tenant's actual Utilities Charge, Tenant shall offset such excess against Tenant's Utilities Charge(s) next due and shall be entitled to a refund thereof at the end of the Lease Term provided Tenant is not in monetary default.

9.3 Access to the Premises. Tenant shall reasonably cooperate with Landlord, the local public utility company, and any ASP at all times and shall allow Landlord (at no cost to Tenant), the local public utility company and any ASP access, as reasonably necessary, to the Shopping Center's electric lines, feeders, risers, wiring, supply lines, transformers, pipes, conduits, ducts, penetrations, components, appurtenances, systems, machinery, facilities, installations, or other equipment used in or in connection with the Shopping Center for the generation or supply of Utilities.

9.4 Landlord Not Responsible for Interruption of Service. Landlord shall in no way be liable or responsible for any loss, damage, or expense that Tenant may sustain or incur by reason of any change, failure, interference, disruption, or defect in the supply or character of the electric energy or other Utility furnished to the Premises, or if the quantity or character of electric energy or other Utility supplied by the utility service provider or any ASP is no longer available or suitable for Tenant's requirements, and no such change, failure, defect, unavailability, or unsuitability shall constitute an actual or constructive eviction, in whole or in part, or entitle Tenant to any abatement or diminution of rent, or relieve Tenant from any of its obligations under the Lease. Notwithstanding anything to the contrary contained in this Lease, in the event of any interruption in any utility service due to any cause within Landlord's reasonable control, which interruption renders the Premises wholly or partially untenantable for the reasonable operation of Tenant's business therein, all rent and other charges under this Lease shall abate during such period of untenability in proportion to the degree to which Tenant's use of the Premises is impaired.

Subject to Landlord's prior approval and Tenant's compliance with applicable codes, zoning ordinances and any other governmental requirements, Tenant may, at Tenant's expense, install separate meters on the Premises to monitor the consumption of Utilities.

9.5 Rights Reserved to Landlord. Landlord shall have the right during the Lease Term to install, relocate, maintain, and operate conduits, facilities, and structures comprising the air conditioning system and permitting the conveyance of Utilities in and through the space above the ceiling in the Premises. If Landlord desires to relocate any such conduits, facilities or structures, Tenant shall have the right to approve such relocation, which approval shall not be unreasonably withheld. Landlord further reserves the right to use up to one percent (1%) of the Floor Area of the Premises as Landlord may designate at any time to accommodate items serving

other tenants or resulting from the remodeling or expansion of the Shopping Center, including without limitation columns, shafts, ducts, and pipes, provided such portion is located adjacent to a wall other than the storefront.

## **10. REPAIR OF THE PREMISES.**

10.1 Tenant's Obligations. Tenant agrees at all times from and after delivery of the Premises, at its own cost and expense, to repair, maintain in good and tenantable condition and replace, as necessary, the Premises and every part thereof (except that portion of Premises to be maintained by Landlord under Section 10.2 below), including, without limitation, the following: all meters, pipes, conduits, equipment, components and facilities (whether or not within the Premises) that exclusively supply the Premises with Utilities, specifically excluding the maintenance, repair and replacement of the HVAC system (except as the appropriate utility company has assumed these duties), all Fixtures and other equipment installed in the Premises; all exterior and interior glass installed in the Premises; all signs, lock and closing devices; all interior window sashes, casements and frames; doors and door frames (except for the painting of the exterior surfaces thereof); floor coverings; and all such items of repair, maintenance, alteration, improvement or reconstruction as may be required at any time or from time to time by a governmental agency having jurisdiction thereof. All replacements made by Tenant in accordance with this Section 10.1 shall be of like, kind and quality to the items replaced and shall be subject to Landlord's approval. Upon surrender of the Premises, Tenant shall deliver the Premises to Landlord in good order, condition and state of repair, but shall not be responsible for damages resulting from ordinary wear and tear, insured casualty losses covered by Article 22 of this Agreement, or any items of repair covered by Section 10.2.

10.2 Landlord's Obligations. Subject to Section 10.1, Article 27, and reimbursement from Tenant for Tenant's Proportionate Share of the following items, Landlord shall repair, maintain in good and tenantable condition and replace, as necessary, those portions of the Premises and the Building, which shall include, but not be limited to: (i) the roof, exterior walls, (ii) skylights and windows which Landlord is obligated to repair, (iii) sidewalks, curbs, and parking/directional signs, (iv) sprinkler and other fire protection systems, (v) security alarm systems, (vi) other structural parts of the Premises and the Building (including the structural floor), (vii) planting and landscaping, (viii) exterior lighting, (ix) storm drainage, (x) maintenance, repair and replacement of HVAC systems for the Building, and (xi) maintenance, repair and replacement of all meters, pipes, conduits, equipment, components and facilities that supply the Premises on a nonexclusive basis and the Building on an exclusive or nonexclusive basis with Utilities (except as the appropriate utility company has assumed these duties), all collectively referred to as "Landlord's Maintenance Obligations". As used herein, the term "Landlord's Maintenance Obligations Costs" shall mean the total of: (i) those actual out-of-pocket expenses reasonably incurred by Landlord to provide Landlord's Maintenance Obligations in the manner required of Landlord in this Section 10.2 and (ii) an administrative fee payable to Landlord in an amount equal to twelve percent (12%) per annum of those costs defined in subsection (i) of this definition. In addition, Landlord shall have the option, but shall not be required, to make repairs necessitated by reason of the negligence of Tenant or anyone claiming under Tenant, or by reason of Improvements made by Tenant or anyone claiming under Tenant, or by reason of breaking and entering of the Premises. In the event that Landlord makes such repairs necessitated by the negligence of Tenant or anyone claiming under Tenant, Tenant

shall pay as Additional Rent Landlord's actual costs plus fifteen percent (15%) of such costs for overhead, within fifteen (15) days after presentation of a statement therefor.

Landlord may, at its sole option, bill Tenant for Tenant's Proportionate Share of Landlord's Maintenance Obligations Costs periodically in arrears from time to time, but not more than one (1) time per calendar month. Tenant shall pay as Additional Rent such periodic billing for Landlord's Maintenance Obligations Costs no more than thirty (30) days after presentation of a statement from Landlord therefor. All capital improvements or capital replacements in connection with Landlord's Maintenance Obligations with a useful life in excess of five (5) years, the cost for which exceeds Ten Thousand Dollars (\$10,000.00) shall be amortized on a reasonable basis, but not less than the useful life of such capital improvement or replacement, together with the interest on the unamortized balance of any amounts so expended at the rate of ten percent (10%) per annum.

It is understood and agreed that Landlord shall be under no obligation to repair, replace or maintain the Premises or the mechanical equipment exclusively serving the Premises at any time, except as this Lease expressly provides. Notwithstanding anything to the contrary contained in this Lease, Landlord shall not in any way be liable to Tenant for failure to make repairs as herein specifically required of it unless Tenant has previously notified Landlord, in writing, of the need for such repairs and Landlord has failed to commence and complete said repairs within a reasonable period of time following receipt of Tenant's written notification.

10.3 Tenant's Failure to Maintain. If Tenant refuses or neglects to repair, replace, or maintain the Premises, or any part thereof, in a manner reasonably satisfactory to Landlord, Landlord shall have the right but not the obligation, upon giving Tenant reasonable written notice of its election to do so, to make such repairs or perform such maintenance on behalf of and for the account of Tenant. In such event, Tenant shall pay as Additional Rent the cost of such work, plus fifteen percent (15%) of such costs to cover Landlord's overhead, promptly upon receipt of an invoice therefor. Notwithstanding the foregoing, Landlord will not be liable in any way for any damages sustained by any party if Landlord elects not to exercise its self-help rights described herein, and Tenant's obligation to indemnify Landlord pursuant to Section 22.3 hereof shall remain in effect whether or not Landlord exercises its rights hereunder. Landlord's self-help rights described herein shall not in any way limit any of Landlord's other remedies under the Lease for this breach by Tenant.

10.4 Right to Enter. Upon reasonable notice to Tenant, Tenant agrees to permit Landlord, or its authorized representatives, to enter the Premises at all reasonable times to inspect the same, to perform its duties under Section 10.2, and to perform any work therein (a) that may be necessary to comply with any laws, ordinances, rules or regulations of any public authority, the Insurance Service Office or any similar body, (b) that Landlord may deem necessary to prevent waste or deterioration in connection with the Premises if Tenant does not make, or cause to be made, such repairs or perform, or cause to be performed, such work promptly after receipt of written demand from Landlord, and (c) that Landlord may deem necessary in connection with the expansion, reduction, remodeling or renovation of any portion of the Shopping Center. Nothing herein contained shall imply any duty on the part of Landlord to do any such work which, under any provision of this Lease, Tenant may be required to do, nor shall Landlord's performance of any repairs on behalf of Tenant constitute a waiver of Tenant's default in failing to do the same. No exercise by Landlord of any rights herein reserved shall

entitle Tenant to any compensation, damages or abatement of rent from Landlord for any injury or inconvenience occasioned thereby. If Landlord makes or causes any such repairs to be made or performed, as provided for herein, Tenant shall pay the cost thereof to Landlord, as Additional Rent, promptly upon receipt of an invoice therefor, except for that work as provided in subparagraph (a) and (c) of this Section 10.4 which shall be at the sole cost and expense of Landlord. During any entry into the Premises, Landlord shall use reasonable and diligent efforts to minimize interference with Tenant's business operations.

10.5 Emergency Repairs. Anything in this Lease to the contrary notwithstanding, Landlord agrees that in the event of an emergency which necessitates prompt maintenance, repair or replacement of items which are otherwise required by this Lease to be maintained, repaired or replaced by Landlord, and Tenant is unable to contact Landlord and advise it of such emergency condition, Tenant may at its option proceed forthwith to make such repairs and pay the cost thereof. Landlord agrees to reimburse Tenant for the actual cost of such repairs within thirty (30) days following receipt of an invoice from Tenant, which invoice shall be accompanied by any actual invoices. Tenant agrees that such repairs shall be limited only to those repairs necessary to stop any immediate threat to any health, safety or property damage issues.

10.6 Modification Required by Law. If at any time during the term of this Lease or any extension thereof any governmental agency or other authority with jurisdiction over the Premises requires modifications or repairs of the Premises which are necessitated by reasons other than Tenant's peculiar use of the Premises, all such modifications or repairs shall be at Landlord's sole cost and expense. If Landlord does not make such modifications or repairs within a reasonable time after written notice from Tenant, then Tenant may make such modifications or repairs, subject to reimbursement by Landlord upon demand and receipt of such invoices and other documentation reasonably requested by Landlord for all costs or expenses incurred by Tenant, with interest upon the balance of any such repair costs at the Interest Rate. Notwithstanding the foregoing, Landlord reserves the right to contest Tenant's claim that Landlord failed to undertake and complete such repairs. If Landlord contests Tenant's claim, such dispute shall be determined by binding arbitration in accordance with the Rules of the American Arbitration Association. Tenant shall not have the right to perform any such repairs unless Landlord loses any such arbitration and fails to perform the required repair work within thirty (30) days following receipt of the decision of the arbitrator in any arbitration proceeding (as extended by any *force majeure*). Any such modifications or repairs of the Premises which are necessitated by reason of Tenant's peculiar use of the Premises shall be performed by Tenant at its sole cost and expense.

## 11. ACCESS BY LANDLORD.

11.1 Landlord shall have access to the Premises at all reasonable times upon twenty-four (24) hours written notice for the purpose of examining or making any repairs thereto which Landlord is required to make under this Lease or which are necessary for safety or maintenance purposes. In the event of an emergency, Landlord shall not be required to give Tenant twenty-four (24) hours written notice, but shall use reasonable efforts to notify Tenant and its security company prior to entry.

## 12. TENANT'S SIGNS.

12.1 In General. Subject to Landlord's prior approval and Tenant's compliance with applicable codes, zoning ordinances and any other governmental requirements, including, without limitation, Landlord's sign criteria as shown on Exhibit "F" attached hereto, Tenant, at its sole cost and expense, may install and operate its standard interior and exterior electric and other signs, in and on the Premises. Subject to Landlord's prior approval and the availability of signage capacity, Tenant, at its sole cost and expense, may also place on the exterior of the Premises any other sign which conforms to applicable legal requirements. Tenant's right to signage shall include a sign panel on a future tower sign to be located on or about Building E. The position of Tenant's sign panel shall be determined by Landlord in its sole discretion. Tenant shall be required to pay, at its sole cost and expense, for design, construction and installation of its sign panel and shall be required to maintain such sign panel for the term of this Lease, as extended. If this future tower sign is never constructed, the failure to construct such signage shall not be considered a condition precedent to the effectiveness of this Lease and Tenant shall not be entitled to any remedies in connection therewith. Tenant shall be required at Tenant's sole cost and expense, to utilize Landlord's contractors for any signage to be located on the Building E tower sign. Landlord's contractors are Graphics Solutions for design and Fabrication Arts for construction and installation, the contact information for both contractors being contained within Exhibit "F".

Notwithstanding the foregoing, Tenant shall have the right, for a period of thirty (30) days prior to the expiration of the term of the Lease, "Relocating" signs on the Premises, subject to compliance with local governmental authority and applicable code requirements and Landlord's review and written approval thereof.

Tenant may also utilize professionally made, first-class signage in its display windows as may be utilized by the majority of its other stores, subject to compliance with local governmental authority and applicable code requirements and Landlord's review and written approval thereof.

12.2 Removal of Signs. Tenant shall at all times have the right to remove all signs, fixtures, machinery, equipment, appurtenances or other property heretofore or hereafter furnished or installed by Tenant, provided it repairs any damage caused thereby, it being expressly understood and agreed by the parties that said property shall not become part of the Premises but shall at all times be and remain the property of Tenant and as such shall not be subject to any landlord's lien or other creditor's remedy otherwise available to Landlord.

12.3 Sign Design. It is expressly agreed between Landlord and Tenant that Tenant shall be solely responsible, at Tenant's sole cost and expense, for obtaining any and all permits and approvals required and/or necessary to enable Tenant to install Tenant's signage as specified in this Lease.

12.4 Signs of Others. Landlord shall have no right to (i) place or maintain any signs, other than those of Tenant, on the Premises, including the exterior walls and roof thereof.

**13. ALTERATIONS TO THE PREMISES, PERSONAL PROPERTY.**

13.1 Alterations. At Tenant's own expense, after giving Landlord notice in writing of its intentions to do so and without limiting Tenant's right to remove and/or replace Personal Property in accordance with Section 13.3, Tenant may, from time to time after completion of all work in accordance with Exhibit "D", make such permanent and nonstructural alterations, replacements, additions, changes, and/or improvements (collectively referred to in this Lease as "Improvements") to Tenant's Work previously completed in accordance with Exhibit "D" or to prior Improvements as Tenant may find necessary or convenient for its purposes, provided that the value of the Premises is not thereby diminished; provided, however, no mechanical, structural or utility Improvements or other Improvements costing in excess of Twenty-Five Thousand Dollars (\$25,000.00) may be made without obtaining the prior written approval of Landlord which approval shall not be unreasonably withheld or delayed. In addition, no Improvements shall be made to any storefront, mechanical, electrical or plumbing systems, the exterior walls or roof of the Premises, nor shall Tenant erect any mezzanine or increase the size of same, if one be initially constructed, without obtaining the prior written approval of Landlord. In no event shall Tenant make or cause to be made any penetration into or through the roof or floor of the Premises without obtaining the prior written approval of Landlord. Tenant agrees to reimburse Landlord for all reasonable costs and expenses (including, without limitation, any architect and/or engineer fees) incurred by Landlord in approving or disapproving Tenant's plans for Improvements. Tenant shall be liable for and shall indemnify and defend Landlord and other tenants at the Shopping Center from any claim, demand, lien, loss, damage or expense, including reasonable attorney fees and costs, arising from any Improvements permitted under this Article 13. Within thirty (30) days after completing its Improvements, Tenant shall certify to Landlord in writing Tenant's actual cost of constructing its Improvements.

13.2 Construction Requirements. All Improvements to be made to the Premises which require the approval of Landlord shall be made under the supervision of a competent architect or licensed structural engineer and made in accordance with plans and specifications prepared in conformity with the structural, mechanical, electrical, design and quality standards, requirements and/or criteria specified in Exhibit "D" and approved in writing by Landlord before commencement of the work. In the event that Tenant retains a contractor to construct its Improvements, Tenant shall comply with the provisions of Exhibit "D". All work with respect to any Improvements must be done in a good and workmanlike manner and diligently prosecuted to completion to the end that the Premises shall at all times be a complete unit except during the period of work. Upon completion of such work, Tenant shall have recorded in the office of the County Recorder where the Shopping Center is located a Notice of Completion, as required or permitted by law, and Tenant shall deliver to Landlord, within ten (10) days after completion of said work, a copy of the building permit with respect thereto. Upon the expiration or earlier termination of this Lease, such Improvements shall not be removed by Tenant but shall become a part of the Premises. Any such Improvements shall be performed and done strictly in accordance with the laws and ordinances relating thereto. In performing the work of any such Improvements, Tenant shall have the work performed in such a manner as not to obstruct access to the premises of any other tenant in the Shopping Center.

13.3 Personal Property. All of Tenant's trade fixtures, furniture, furnishings, signs and other personal property not permanently affixed to the Premises (collectively referred to as

"Personal Property" in this Lease) must be new when installed in, or attached to, the Premises by Tenant. Any such Personal Property shall remain the property of Tenant. Tenant shall have the right to remove any or all of its Personal Property which it may have stored or installed in the Premises, including, without limitation, counters, shelving, showcases, mirrors and other movable Personal Property. Tenant shall, at its expense, immediately repair any damage occasioned to the Premises by reason of the removal of any such Personal Property. Any Personal Property remaining at the Premises for ten (10) days following Tenant's vacating shall be declared abandoned.

13.4 Fixtures. Tenant's Improvements (as described in Section 13.1) and Tenant's Work (as described in Exhibit "D") are collectively referred to in this Lease as "Fixtures" and shall become the property of Landlord upon expiration or earlier termination of this Lease.

13.5 Landlord's Security Interest. Landlord hereby retains any and all rights to a security interest in Tenant's Fixtures.

13.6 Personal Property Taxes. Tenant shall pay before delinquency all taxes (including sales and use taxes), assessments, license fees and public charges levied, assessed or imposed upon its business operation as well as upon its merchandise, Fixtures and Personal Property. In the event any such items of property are assessed with property of Landlord, then, and in such event, such assessment shall be divided between Landlord and Tenant to the extent that Tenant shall pay only its equitable portion of such assessment.

#### 14. SURRENDER OF THE PREMISES.

14.1 Tenant will deliver and surrender possession of the Premises to Landlord upon the expiration of this Lease or its earlier termination, in condition and repair equal to the condition and repair thereof at the commencement of said term, loss by fire, ordinary wear and tear and decay, casualty, neglect or fault or default of Landlord, and taking by eminent domain excepted. Tenant shall, on or before the expiration of this Lease or earlier termination, remove all of Tenant's Personal Property, equipment, moveable signage, and moveable trade fixtures from the Premises, and all property not so removed shall be deemed abandoned by Tenant, and may be sold or otherwise disposed of at Tenant's expense; provided, however, Tenant shall not be obligated to remove its storefront.

#### 15. HOLDING OVER.

15.1 If Tenant continues its occupancy of the Premises after the expiration of the term of this Lease or any renewal or extension thereof (or any earlier termination provided or permitted by this Lease) either with or without the consent of Landlord, such tenancy shall be month-to-month only, and not year-to-year or based on any other interval of time. Such continued occupancy shall not defeat Landlord's right to possession of the Premises, and the month-to-month tenancy provided for herein may be canceled at the end of any calendar month upon not less than thirty (30) days prior written notice from Landlord to Tenant. Except for provisions relating to Lease Term and Base Rent which shall be at the rate of one hundred fifty percent (150%) of the Base Rent due during the last full month of the term of this Lease, all covenants, provisions, obligations and conditions of this Lease shall remain in full force and effect during such month-to-month tenancy.

**16. DEFAULT; REMEDIES UPON DEFAULT.**

16.1 Tenant Default. Any one or more of the following conditions shall constitute a default by Tenant (hereinafter referred to as an "Event of Default"):

16.1.1 Tenant shall at any time be in default of the payment of Rent or other charges due under this Lease, and Tenant shall fail to remedy such default within ten (10) days after receipt of written notice of such default from Landlord; or

16.1.2 Tenant shall at any time be in default of the performance of any of its obligations under this Lease other than payment of rent or other charges, and Tenant shall fail to remedy such default within thirty (30) days after receipt of written notice of such default from Landlord, provided, however, that Tenant shall not be deemed in default if such default cannot be cured within such thirty (30) day period and Tenant commences curing such default within such thirty (30) day period and thereafter diligently pursues such cure; or

16.1.3 Tenant shall be adjudged a bankrupt or make an assignment for the benefit of creditors; or

16.1.4 A receiver of any property of Tenant in or upon the Premises shall be appointed in any action, suit or proceeding by or against Tenant and not removed within ninety (90) days after appointment.

16.2 Landlord Remedies. Upon the occurrence of an Event of Default and the termination of the applicable notice period hereinabove provided without cure, Landlord shall have all the remedies set forth in this Article 16 and as provided under California law, including, without limitation, California Civil Code Sections 1951.2, 1951.4 (lessor may continue lease in effect after lessee's breach and abandonment and recover Rent as it becomes due, if lessee has the right to sublet or assign, subject only to reasonable limitations) and 1951.5. These remedies are not exclusive; they are cumulative and in addition to any and all remedies now or later allowed by law or in equity.

Upon the occurrence of an Event of Default and the termination of the applicable notice period herein above provided without cure, Landlord shall have the remedy described in California Civil Code Section 1951.4 (a lessor may continue lease in effect after lessee's breach and abandonment and recover Rent as it becomes due, if lessee has right to sublet or assign, subject only to reasonable limitations). Landlord can continue this Lease in full force and effect, and the Lease will continue in effect as long as Landlord does not terminate Tenant's right to possession by written notice thereof to Tenant, and Landlord shall have the right to enforce Tenant's obligations hereunder and to collect Rent and all other amounts hereunder when due. Upon the occurrence of an Event of Default and the termination of the applicable notice period hereinabove provided without cure, Landlord may enter the Premises and re-let them, or any part of them, to third parties for Tenant's account. In such event, Tenant shall be liable immediately to Landlord for all reasonable out-of-pocket costs Landlord incurs in re-letting the Premises, including, without limitation, brokers' commissions and like costs. Re-letting can be for a period shorter or longer than the remaining Term of this Lease, but, as to brokers' commissions, Tenant shall only be responsible for broker's commissions attributable to the remaining Term of this

Lease. No act by Landlord allowed by this Article shall terminate this Lease unless Landlord notifies Tenant in writing that Landlord elects to terminate this Lease. If Landlord elects to re-let the Premises, any rent or additional rent that Landlord receives from re-letting shall be applied to the payment of: first, any indebtedness or other costs and expenses hereunder owing from Tenant to Landlord other than Rent due from Tenant; second, all reasonable out-of-pocket costs, including for maintenance, incurred by Landlord in re-letting, and third, Rent due and unpaid under this Lease. After deducting the payments referred to above, any sum remaining from the rent Landlord receives from re-letting shall be held by Landlord (without interest thereon or liability therefor) and applied in payment of future Rent as Rent becomes due under this Lease. In no event shall Tenant be entitled to any excess rent received by Landlord. If, on the date Rent is due under the Lease, the rent received from the re-letting less Landlord's permitted costs, expenses as defined above, is less than the Rent due on that date, Tenant shall pay the difference to Landlord.

Upon the occurrence of an Event of a Default and the termination of the applicable notice period hereinabove provided without cure, Landlord may upon written notice to Tenant, terminate this Lease and Tenant's right to possession of the Premises at any time. Termination under the circumstances set forth in this Section will not occur unless and until Landlord provides written notice of termination to Tenant. Acts of maintenance, efforts to re-let the Premises, or the appointment of a receiver on Landlord's initiative to protect Landlord's interest under this Lease shall not constitute a termination of this Lease or of Tenant's right to possession. On termination, Landlord has the right, in addition to any and all other rights of Landlord hereunder, in equity, or at law, to recover from Tenant the following:

- i. The worth, at the time of the award, of the unpaid Rent that had been earned at the time of termination of this Lease;
- ii. The worth, at the time of the award, of the amount by which the unpaid Rent that would have been earned after the date of termination of this Lease until the time of award exceeds the amount of the loss of Rent that Tenant proves could have been reasonably avoided;
- iii. The worth, at the time of the award, of the amount by which the unpaid Rent for the balance of the Term after the time of award exceeds the amount of the loss of Rent that Tenant proves could have been reasonably avoided, and
- iv. Any other amount, and court costs, necessary to compensate Landlord for all detriment proximately caused by Tenant's default.

"The worth, at the time of the award," as used in (i) and (ii) above, is to be computed by allowing interest at the Interest Rate. "The worth at the time of the award," as referred to in (iii) above, is to be computed by discounting the amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award plus one percent (1%). Any amounts due from Tenant under the provisions of this Lease which are not paid when due shall bear interest at the Interest Rate.

16.3 Landlord Default. Subject to remedies for Landlord default, if any, set forth in other Articles of this Lease or any other remedies in law or in equity otherwise available which,

by virtue thereof, take precedence over this provision, if Landlord defaults in the performance of any of its obligations hereunder and fails to cure such default, or to commence and diligently pursue the completion thereof, within thirty (30) days of Landlord's receipt of written notice of such default, then Tenant may pay or discharge any such obligation. Should Tenant elect to pay or discharge any such obligation, Landlord shall, within thirty (30) calendar days from the date of Tenant's written demand, reimburse Tenant for the reasonable costs incurred by Tenant in connection therewith, including, but not limited to, reasonable attorneys' fees. Tenant shall supply such documentation regarding Tenant's costs as Landlord may reasonably request. Tenant's written demand shall specify and breakdown in reasonable detail the nature of all sums expended. Nothing herein contained shall be interpreted to mean that Tenant is excused from paying Rent due hereunder by reason of any default by Landlord. Tenant will not have the right to terminate this Lease for such default. In the event of such default, Tenant shall have all remedies available under law for breach of contract, including (without limitation) the right of specific performance; provided, however, that in no event shall Landlord be liable under any circumstance to Tenant for any loss of profits arising in connection with such default by Landlord. Notwithstanding the foregoing, in the event of a breach of Landlord's covenant of quiet enjoyment pursuant to Article 18 of this Lease, Tenant shall, within thirty (30) days after the discovery of such breach, deliver written notice of such breach to Landlord and to any lender or trustee under any fee mortgage against the Premises. If such breach is not cured by Landlord within thirty (30) days after Tenant has notified Landlord in writing of such breach, Tenant shall deliver a second notice of such breach to Landlord and to any lender or trustee under any fee mortgage. If such breach is not cured by Landlord within thirty (30) days after such second notice (excepting therefrom the event when Landlord may be in breach but has undertaken to cure the breach and thereafter diligently pursues the cure to completion), Tenant shall have the right to terminate this Lease by notice to Landlord.

In the event of a default on the part of Landlord hereunder, Tenant shall give notice to any mortgagee or trustee of Landlord which has notified Tenant of its address in the manner provided for notices in this Lease and said mortgagee or trustee will have the right to cure Landlord's defaults under this Article. The cure period will commence on notice to such mortgagee or trustee of the default and extend for a period ending twenty (20) days after the end of the time period for Landlord to cure a default.

16.4 Fixtures. Without limitation to Landlord's rights under Article 13, in the event of Tenant's default, all of Tenant's Fixtures shall remain on the Premises and, continuing during the length of said default, Landlord shall have the right to take the exclusive possession of same and to use the same free of rent or charge until all defaults have been cured.

## **17. NONWAIVER OF DEFAULT.**

17.1 No acquiescence by either party in any breach of covenant or default by the other party hereunder shall operate as a waiver of the acquiescing party's rights with respect to such breach or default or subsequently, to the same or any other breach or default.

## **18. QUIET ENJOYMENT.**

18.1 Landlord covenants and agrees that if Tenant shall perform all covenants and agreements herein stipulated to be performed on Tenant's part, then at all times during the term

of this Lease and any renewal or extension thereof Tenant shall have the peaceable and quiet enjoyment and possession of the Premises, without any manner of hindrance from Landlord.

Landlord hereby represents, warrants and covenants to and with Tenant that Landlord's execution of this Lease, compliance with the terms hereof or occupation of the Premises by Tenant will not conflict with, cause a breach of or constitute a default under the terms of any agreement or instrument to which Landlord is a party.

A breach of this Article by Landlord shall entitle Tenant to all available equitable relief as well as any and all remedies at law, and Landlord shall indemnify Tenant from and against all damages, expenses and costs arising out of or resulting therefrom.

#### **19. DAMAGE BY FIRE OR CASUALTY.**

19.1 If the Premises are destroyed or damaged by any cause and such destruction or damage can reasonably be repaired within two hundred seventy (270) days after the happening of such destruction or damage, then Tenant shall not be entitled to surrender possession of the Premises, nor shall Tenant's liability to pay Rent under this Lease cease, but in the event of such destruction or damage Landlord shall complete such repairs (exclusive of Tenant's furniture, fixtures, equipment, and signage, unless such signage was initially provided by Landlord or is covered by Landlord's insurance) within two hundred seventy (270) days after the occurrence of such destruction or damage. If Tenant is deprived of the occupancy of any portion of the Premises due to any such destruction or damage but can nevertheless in Tenant's reasonable opinion continue to engage in its regular business, the Rent and other charges under this Lease shall proportionately abate corresponding to the time during which, and to the area of the Premises of which, Tenant shall be deprived due to such destruction or damage or the making of such repairs; provided, however, no Rent shall be payable during any period that Tenant in its reasonable opinion is unable to and does not engage in its regular business at the Premises. If Landlord fails to complete repairs within the two hundred seventy (270) days provided herein (as extended by any *force majeure*), Tenant at its election may terminate this Lease and quit the Premises upon written notice to Landlord.

If the destruction or damage of the Premises cannot reasonably be repaired within two hundred seventy (270) days after the occurrence thereof, Landlord shall notify Tenant within thirty (30) days after the happening of such destruction or damage whether or not Landlord will repair or rebuild (exclusive of Tenant's furniture, fixtures, equipment, and signage, except as provided above). If Landlord elects not to repair or rebuild, this Lease shall be terminated. If Landlord elects to repair or rebuild, Landlord shall specify the time within which repairs or construction will be completed, and this Lease shall not terminate. In the event Landlord elects to repair or rebuild, Landlord shall restore the Premises to their former condition within the time specified in the notice and Tenant shall be entitled to an abatement of rent and other charges in the manner hereinabove set forth. If Landlord fails to complete restoration of the Premises within the specified time (as extended by any *force majeure*), then Tenant at its election may terminate this Lease and quit the Premises upon written notice to Landlord.

If this Lease is terminated for any reason pursuant to this Article, Landlord shall promptly refund to Tenant any rent paid in advance and any unearned charges.

Notwithstanding the foregoing, in the event of (i) damage or destruction to the Premises caused by a casualty that is not covered by insurance required to be maintained by Landlord hereunder and the cost to repair such damage exceeds \$250,000.00 or (ii) damage or destruction to the Premises during the last twelve (12) months of the Lease Term, then Landlord shall have no obligation to repair or rebuild and Landlord shall have the right to terminate this Lease by giving Tenant written notice thereof within thirty (30) days following the casualty; provided, however, Landlord's termination rights pursuant to subparagraph (ii) above shall not apply to the extent such damage or destruction occurs during the last twelve (12) months of the Lease Term and Tenant possesses and exercises its option to extend the Lease Term pursuant to Article 4 above within sixty (60) days following receipt of Landlord's termination notice.

## **20. WAIVER OF SUBROGATION.**

20.1 Landlord and Tenant hereby waive all rights of subrogation which either has or which may arise hereafter against the other for any damage to the Premises or any other real or personal property or any business caused by perils covered by fire and extended coverage, building, contents and business interruption insurance, or for which either party may be reimbursed as a result of insurance coverage affecting any loss suffered by it; provided, however, that the foregoing waivers do not invalidate any policy of insurance of the parties hereto now or hereafter issued, it being stipulated by the parties hereto that such waiver shall not apply in any case which would result in the invalidation of any such policy of insurance. Each party shall notify the other if such party's insurance would be so invalidated.

## **21. EMINENT DOMAIN.**

21.1 If the entire Premises are at any time after execution of this Lease taken by public or quasi-public use or condemned under eminent domain, then this Lease shall terminate and expire effective the date of such taking and any rent paid in advance and any unearned charges shall be refunded to Tenant by Landlord on such date.

Tenant shall have the right to terminate this Lease and to receive from Landlord an appropriate refund of rent paid in advance and unearned charges if, as a result of eminent domain proceedings or any other governmental or quasi-public action, any portion of the Premises or parking or access area serving the Premises is taken which would materially and detrimentally affect Tenant's use of the Premises. Should Tenant elect to remain in the Premises after any partial taking, then rent and other charges shall be reduced for the remainder of the term thereafter in proportion to the building area of the Premises taken, and reduced by an equitable amount for any non-building area taken and Landlord shall promptly repair and restore the Premises as nearly as possible to their prior condition. Tenant shall not be entitled to damages for the taking of its leasehold estate or the diminution of the value thereof, provided, if Tenant has made any leasehold improvements to the Premises or material alterations, structural changes or repairs thereto at its own expenses, regardless of when made, Tenant shall be entitled to claim an award for the unamortized balance of Tenant's cost thereof, and in the event the condemning authority does not make a separate award therefor Landlord shall assign a portion of its award to Tenant equal to a proportional amount attributable to Tenant's damages. In addition, Tenant shall be entitled to claim an award for loss of business, damage to merchandise and fixtures, removal and reinstallation costs and moving expenses.

## **22. INSURANCE; INDEMNIFICATION.**

### **22.1 Tenant's Insurance.**

22.1.1 General Liability. Tenant shall obtain and keep in force at Tenant's expenses for the term of this Lease commercial general liability insurance with a combined single limit of Three Million and No/100 Dollars (\$3,000,000.00) for each occurrence (including coverage under so-called "umbrella" or "excess liability" policies). Said insurance shall name Tenant as named insured and Landlord and such persons and affiliated entities and lenders of Landlord as Landlord may reasonably request as additional insured. The insurance required under this Article shall be issued by an insurance company authorized to do business in the state in which the Premises are located with a general policy holders' rating of at least A- and a financial rating of at least Class VII as rated in the most currently available "Best's Key Rating Guide"; and shall provide for at least ten (10) days' notice, by certified mail return receipt requested, to Landlord before cancellation, termination or nonrenewal of such insurance, and shall also insure Tenant's contractual liability under the indemnity provisions of this Lease and contain a cross-liability endorsement. All policies required under this Lease shall be written as primary coverage not contributing with or being in excess of any other coverage carried by Landlord.

22.1.2 Worker's Compensation. Statutory amount of workers' compensation insurance required by the State in which the Shopping Center is located for the benefit of Tenant's employees.

22.1.3 Plate Glass. Insurance covering full replacement cost of all plate glass on the Premises. Tenant shall have the option either to insure commercially or to self-insure the risk.

22.1.4 Equipment. Machinery insurance on all air conditioning equipment and systems exclusively serving the Premises. If said equipment and the damage it may cause are not covered by Tenant's "All Risk" insurance (as specified in subparagraph (e), below), then the insurance specified in this subparagraph shall be in an amount not less than One Hundred Thousand Dollars (\$100,000.00). If Tenant requires boilers or other pressure vessels to serve the Premises, they shall also be insured in the amount required by this subparagraph. Tenant may self-insure.

22.1.5 Tenant's Improvements. Insurance covering Tenant's (i) merchandise, (ii) "Fixtures" (as defined in Article 13), including the items specified as "Tenant's Work" in Exhibit "D", and (iii) "Personal Property" (as defined in Article 13) from time to time, in, on or upon the Premises, in an amount not less than full replacement value from time to time after the Effective Date, providing protection against any peril included within the classification "All Risk," including, without limitation, coverage for sprinkler and flood damage and theft. Any policy proceeds shall be used for the repair or replacement of the property damaged or destroyed unless this Lease shall cease and terminate under the provisions of Article 18.

22.1.6 Certificates. A certificate evidencing all such coverages shall be delivered to Landlord prior to Tenant entering upon the Premises and, thereafter, upon the expiration, renewal or the purchase of new coverage by Tenant.

22.2 Landlord's Insurance. Subject to reimbursement as a part of Landlord's Operating Costs as defined in Article 27, Landlord shall procure and maintain throughout the entire term of this Lease fire and extended coverage insurance in an amount not less than the full replacement value of the Premises, exclusive of excavation, footings and foundations and Tenant's furniture, fixtures, equipment, and signage, with a commercially reasonable deductible, insuring against loss or damage thereto by fire and other casualties covered by the standard form of fire and extended coverage insurance available in the State in which the Premises are located. Landlord shall also procure and maintain throughout the entire term of this Lease, public liability insurance coverage for casualties occurring on or about the Common Areas, having limits of liability of not less than One Million and No/100 Dollars (\$1,000,000.00) combined single limit and naming Tenant as an additional insured. Tenant shall pay Tenant's Proportionate Share of Landlord's cost of insurance upon receipt of documentation of cost incurred (i.e. premium invoice) prorated in the manner described in Section 27.3 hereof. A certificate evidencing such coverage shall be delivered to Tenant upon request.

22.3 Indemnification of Landlord. Tenant agrees to protect, defend, indemnify and hold Landlord, the Redevelopment Agency of The City of San Marcos, and the San Marcos Public Facilities Authority, and their individual directors, trustees, officers, staff, council persons, officers, agents, servants, employees, independent contractors or assignees, (collectively, "Landlord Parties"), and Landlord's interest in the Premises harmless from and against any and all losses, damages, claims, suits or actions, judgments and costs (including reasonable attorneys' fees) (collectively, "Losses") caused by (i) Tenant's failure to perform and observe its covenants hereunder, (ii) any act or omission of Tenant or its officers, agents, servants, employees, independent contractors, patrons, customers, licensees, subtenants, concessionaires or assignees (collectively, "Tenant Parties") causing loss or damage to the Premises or the Shopping Center, (iii) the occupation, use, possession, conduct or management of the Premises or the Shopping Center by Tenant or the Tenant Parties or (iv) any work or thing whatsoever done in or on the Premises or the Shopping Center by Tenant or the Tenant Parties; except to the extent that such Losses are caused by the negligence or willful misconduct of the Landlord or any of the Landlord Parties.

22.4 Indemnification of Tenant. Landlord agrees to protect, defend, indemnify and hold Tenant, the Tenant Parties and Tenant's interest in the Premises harmless from and against any and all Losses arising from (i) Landlord's failure to perform and observe its covenants hereunder, (ii) any act or omission of any of the Landlord Parties causing loss or damage to the Premises or the Shopping Center, (iii) the occupation, use, possession, conduct or management of the Shopping Center by Landlord or any of the Landlord Parties, or (iv) any work or thing whatsoever done in or on the Premises or the Shopping Center by Landlord or any of the Landlord Parties, except to the extent that such Losses are caused by the negligence or willful misconduct of Tenant or any of the Tenant Parties.

22.5 Survival. The provisions of this Article 22 shall survive for four (4) years following the expiration or sooner termination of this Lease with respect to any claims or liability occurring prior to such expiration or termination.

**23. SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT.**

23.1 At the option of Landlord or any successor-in-interest to all or part of Landlord's interest, this Lease shall be superior or subordinate to the interest of Landlord, any such successor-in-interest or to the lien of any mortgage upon the Premises or any property of which the Premises form a part, provided, however, that the subordination of this Lease shall be made upon the condition that in the event of the transfer of all or part of Landlord's interest, whether by sale, foreclosure, or other action taken under a mortgage, any such successor-in-interest shall agree that this Lease and the rights of Tenant hereunder shall not be disturbed but shall continue in full force and effect so long as Tenant shall not have committed an Event of Default hereunder. The word "mortgage," as used herein, includes a mortgage, deed of trust, bond, or other similar instrument and any modification, extension, renewal or replacement thereof. Subject to the foregoing, Tenant shall attorn to any such successor-in-interest and shall, upon the written request of Landlord, promptly execute a Subordination, Non-Disturbance and Attornment Agreement ("SNDA") in the form attached hereto as Exhibit "E", or substantially similar form reasonably acceptable to Tenant in confirmation of the foregoing and such attornment.

In addition to the foregoing, Landlord agrees to, within thirty (30) days of the Possession Date, deliver to Tenant, and Tenant agrees to thereafter promptly execute, a SNDA in the form attached hereto as Exhibit "E".

**24. TRANSFER OF INTEREST.**

24.1 Transfer by Landlord. Landlord may at any time transfer or encumber its interest in this Lease and underlying fee, but no transfer or sale of Landlord's interest hereunder shall be binding upon Tenant until Tenant has received a true, correct and complete copy of the original instrument assigning Landlord's interest in this Lease or a certified and conformed copy of any deed conveying Landlord's fee interest in the Premises. Any such instrument shall evidence the fact that the assignee or transferee thereunder has assumed all of Landlord's obligations under this Lease and acquired sufficient title to the Premises to enable it to perform such obligations.

**24.2 Transfer by Tenant.**

(a) **Definitions** As used in this Article 24, the following definitions shall apply:

**"Transfer"** means any voluntary, unconditional and present assignment, sublease, or other transfer of some or all of Tenant's interest, rights and duties in the Lease and/or the Premises, including Tenant's right to use, occupy and possess the Premises;

**"Encumbrance"** means any conditional, contingent or deferred assignment, or conveyance voluntarily made by Tenant of some or all of Tenant's interest, rights or duties in the Lease or the Premises, including Tenant's right to use, occupy or possess the Premises, in whole or in part, including, without limitation, any mortgage, deed of trust, pledge, hypothecation, lien, or other security arrangement;

**"Change of Control"** means the transfer by sale, assignment, operation of law, or otherwise of any shares, voting rights or ownership interest which will result in a change in persons exercising, or who may exercise, effective control of Tenant, unless such change results from a transaction which is excluded from the definition of "Transfer" set forth above, or from the trading of shares listed on a recognized public stock exchange. If Tenant is a private corporation whose stock becomes publicly held, the transfers of such stock from private to public ownership shall not be deemed a Change of Control;

**"Occupancy Transaction"** means any Transfer, Encumbrance or Change of Control, or other arrangement whereby the identity of the person or persons using, occupying or possessing the Premises changes or may change, whether such change be of an immediate, deferred, conditional, unconditional, exclusive, non-exclusive, permanent or temporary nature; and

**"Transferee"** means the proposed assignee, sublessee, mortgagee, beneficiary, pledgee or other recipient of Tenant's interests, rights or duties in this Lease or the Premises in the Occupancy Transaction.

24.3 Restrictions. Tenant shall not enter into, or consent to, an Occupancy Transaction, without first procuring Landlord's written consent, not to be unreasonably withheld, delayed or conditioned. The parties agree, however, that the manner of operation of the Premises and conduct of business thereon by Tenant will have an impact on the quality and reputation of the Shopping Center. Accordingly, the parties agree that in approving or disapproving of any proposed Occupancy Transaction, it shall not be unreasonable for Landlord to withhold its consent if any of the following situations exist or may exist:

(a) Use. The Transferee's contemplated use of the Premises following the proposed Occupancy Transaction is not the Permitted Use or change in use approved by Landlord pursuant to Section 8 above;

(b) Business Experience. In Landlord's reasonable business judgment, the Transferee or those to whom Transferee delegates management functions lacks sufficient business reputation or experience to operate a successful business of the type and quality permitted under this Lease;

(c) Amendment to Lease. The Transferee requests an amendment of the Lease other than to show the identity of Tenant;

(d) Breach of Agreements. The proposed Occupancy Transaction would involve a change from the Permitted Use that would breach any covenant of Landlord respecting radius, location, use or exclusivity in any other lease, financing agreement or other agreement relating to the Shopping Center, including the Operating Documents existing as of the Effective Date (or as agreed to by Tenant after the Effective Date); or such future covenants of Landlord as may be consistent with the terms and provisions of this Lease existing as of the date of Tenant's written request for such proposed Occupancy Transaction; or

(e) Financial Strength. The proposed Transferee of Tenant's obligations hereunder does not demonstrate to Landlord's reasonable satisfaction sufficient financial strength to meet the monetary obligations of Tenant hereunder, or, in lieu thereof, does not provide reasonable guarantees or security therefor.

24.4 Condition Precedent. Tenant shall not have the right or power to request Landlord's consent to, or to enter into, an Occupancy Transaction if there exists an uncured Event of Default, after expiration of any applicable notice and/or grace period, at the time of such request, and/or if Tenant is not in compliance with any of its obligations under this Lease.

24.5 Procedures.

(a) Request for Consent. Should Tenant desire to enter into an Occupancy Transaction, Tenant shall give notice thereof to Landlord by requesting in writing Landlord's consent to such Occupancy Transaction at least forty-five (45) business days before the proposed effective date of any such Occupancy Transaction and shall provide Landlord with the following:

(i) Description of Transaction. The full particulars of the proposed Occupancy Transaction including its nature, effective date, terms and conditions;

(ii) Description of Transferee. A description of the identity, net worth and previous business experience of the Transferee, including, without limitation, copies of Transferee's latest income statement, balance sheet and change-of-financial-position statements (with accompanying notes and disclosures of all material changes thereto) in audited form, if available, and certified as accurate by the Transferee;

(iii) Hazardous Materials. A description of the types and quantities of hazardous materials, if any, which the Transferee intends to bring onto the Premises;

(iv) Additional Information. Any further information relevant to the transaction which Landlord shall have reasonably requested within fifteen (15) days after receipt of Tenant's request for consent; and

(v) Tenant's Statement. A statement that Tenant intends to consummate the proposed Occupancy Transaction if Landlord consents thereto.

(b) Period for Review. Within thirty (30) days after receipt of Tenant's request for consent, along with all of the data requested by Landlord, Landlord shall respond as follows:

(i) Consent to the Occupancy Transaction;

(ii) Refuse to consent to the Occupancy Transaction; or

(iii) Terminate Tenant's tenancy as set forth below.

Landlord's failure to respond to Tenant within such thirty (30) day period shall be deemed Landlord's consent to the Occupancy Transaction.

(c) Termination of Tenant's Interest. Landlord shall have a period of thirty (30) days from receipt of Tenant's request for consent within which to exercise in writing its option to terminate this Lease upon the terms and conditions set forth in Section 8.4. Failure of Landlord to exercise such termination right within such thirty (30) day period of time shall terminate Landlord's termination rights granted hereunder with respect to such Transfer only, and Tenant shall be free to proceed with such Transfer. Notwithstanding the foregoing, if Tenant does not consummate such Transfer within six (6) months from the date the notice is given to Landlord, Landlord's termination right shall be reinstated and Tenant may not thereafter Transfer its interest in the Lease unless the provisions of this Section are complied with again in connection with such Transfer or any other proposed Transfer.

24.6 Documentation and Expenses. Each Occupancy Transaction to which Landlord has consented shall be evidenced by an instrument made in such written form as is reasonably satisfactory to Landlord and executed by Tenant and Transferee. By such instrument, Transferee shall assume and promise to perform all the terms, covenants and conditions of this Lease which are obligations of Tenant. Tenant shall remain fully liable to perform its duties under the Lease following the Occupancy Transaction, and Tenant shall pay all of Landlord's expenses incurred in reviewing Tenant's Occupancy Transaction request including, without limitation, Landlord's attorney's fees. Any consideration generated as a result of an Occupancy Transaction that is in excess of the consideration to be paid by Tenant under this Lease shall not be retained by Tenant, and shall be paid to Landlord.

24.7 Nullity. Any purported Occupancy Transaction consummated in violation of the provisions of this Article 24 shall be null and void and of no force or effect.

24.8 Non-Transfers. Notwithstanding anything to the contrary contained in this Lease, neither (i) an assignment of the Premises to a transferee which is the resulting entity of a merger or consolidation of Tenant with another entity, nor (ii) an assignment or subletting of all or a portion of the Premises to an affiliate of Tenant (i.e., an entity which is controlled by, controls, or is under common control with, Tenant), shall be deemed a Transfer under this Article 24, provided that Tenant notifies Landlord of any such assignment or sublease and promptly supplies Landlord with any documents or information reasonably requested by Landlord regarding such transfer or transferee as set forth in Section 24.5 above, and provided that such assignment or sublease is not a subterfuge by Tenant to avoid its obligations under this Lease. "Control," as used in this Section, shall mean the ownership, directly or indirectly, of at least fifty-one percent (51%) of the voting securities of, or possession of the right to vote, in the ordinary direction of its affairs, of at least fifty-one percent (51%) of the voting interest in, any person or entity.

## 25. REAL ESTATE TAXES.

25.1 Property Taxes. Tenant agrees to pay to Landlord, as Additional Rent, Tenant's Proportionate Share of all real estate taxes ("Taxes") allocated by Landlord on a prorata basis to the Land, Building, and/or Premises during the Lease Term. Such allocation of Taxes to the

Land shall be based upon the ratio between the net land area of the Land to the net land area of the Shopping Center. Tenant shall pay said Proportionate Share of Taxes in accordance with the requirements of Section 27.2 of this Lease. All Taxes for the first and last Lease Years shall be prorated by Landlord. Tenant acknowledges that the Shopping Center, Land, Building, and Premises, and Tenant's leasehold interest is subject to taxation, notwithstanding the ownership of the Shopping Center, Land, Building, and Premises by a public entity.

As used herein, "Taxes" shall mean any form of tax, assessment, lien, bond obligation, license fee, license tax, tax or excise on rent, or any other levy, charge or expense, together with any statutory interest thereon, imposed or required at any time by any federal, state, county or city authority having jurisdiction, or any political subdivision thereof, or any school, agricultural, lighting, drainage or other improvement or special assessment district thereof (hereinafter individually and collectively referred to as "Governmental Agencies"), on any interest of Landlord or Tenant or both (including any legal or equitable interest of Landlord or its mortgagee, if any) in the Shopping Center, Land, Building, and Premises, including, without limitation: (a) any impositions by Governmental Agencies (whether or not such impositions constitute tax receipts) or any other payments to Governmental Agencies (whether involuntarily imposed by any such Governmental Agencies or voluntarily agreed to by Landlord) in substitution, partially or totally, of any impositions now or previously included within the definition of real property taxes, it being acknowledged by Landlord and Tenant that Proposition 13 was adopted by the voters of the State of California in the June 1978 election ("Proposition 13") and that assessments, taxes, fees, levies and charges may be imposed by Governmental Agencies for such services as fire protection, street, sidewalk and road maintenance, refuse removal and for other governmental services formerly provided without charge to property owners or occupants, and in further recognition of the decrease of quality of governmental services and amenities as a result of Proposition 13, Taxes shall also include any governmental or private assessments or the Shopping Center's contribution towards a governmental private cost/sharing agreement for the purpose of augmenting or improving the quality of services and amenities normally provided by governmental agencies, and it is the intention of Landlord and Tenant that all such increased assessments, taxes, fees, levies and charges and all similar assessments, taxes, fees, levies and charges be included within the definition of Taxes; including without limitation, those calculated to increase tax increments to Governmental Agencies or to pay for such services as fire protection, street, sidewalk and road maintenance, refuse removal or other governmental services which may have been formerly provided without charge to property owners or occupants; (b) any impositions allocable to or measured by the area of the Shopping Center, Land, Building, or Premises or the realty underlying the Shopping Center, Land, Building, or Premises; (c) any impositions upon this Lease or any document to which Tenant is a party, creating or transferring an interest or an estate in the Shopping Center, Land, Building, or Premises; (d) any and all costs (including, without limitation, the fees of experts, tax consultants and attorneys) reasonably incurred by Landlord should Landlord reasonably elect to negotiate or contest the amount of said Taxes in formal or informal proceedings before the taxing Governmental Agency; provided, however, such costs shall not exceed the savings or other benefits received by Tenant as a result of any such negotiation or contest and (e) any transfer, transaction, sales, rental, gross receipts, license or similar taxes or charges measured by rent received by Landlord. Tenant shall also pay before delinquency all taxes (including sales and use taxes), assessments, license fees and public charges levied, assessed or imposed upon its business operation as well as upon its merchandise, furniture, fixtures, equipment and other Personal Property. In the event any such items of property are assessed with property of

Landlord, such assessment shall be equitably divided between Landlord and Tenant by Landlord. Tenant shall not be chargeable with nor be obligated to pay any franchise, estate, gift, rental, corporate, inheritance, or succession tax of Landlord or any income, value added, or excess profits tax of Landlord.

Landlord shall have the right to contest or seek a reduction in Taxes. In the event of any action to abate or reduce rents, any rebates, refunds or abatements of Taxes, less reasonable out-of-pocket costs to obtain the same, shall be refunded to Tenant on a pro-rata basis to the extent previously paid by Tenant within thirty (30) days of receipt by Landlord.

Tenant shall at all times be solely responsible for and shall pay before delinquency all municipal, county, state or federal taxes assessed or levied against any leasehold interest hereunder or any Personal Property of any kind owned, installed or used by Tenant. If at any time during the term of this Lease, a tax or excise on rents or other tax, however described, is levied or assessed against Landlord on account of or measured by, in whole or in part, the rent expressly reserved hereunder (excluding any income, corporate franchise, corporate, estate, inheritance, succession, capital stock, corporate loan, corporate bonus, transfer or profit tax of Landlord) as a substitute, in whole or in part, for taxes assessed or imposed on land and buildings, such tax or excise on rents or other tax shall be included as a part of the real property taxes covered hereby, but only to the extent of the amount thereof which is lawfully assessed or imposed as a direct result of Landlord's ownership of this Lease or of the rentals accruing under this Lease. If any real property tax or assessment levied against the land, buildings or improvements covered hereby or the rents reserved therefrom shall be evidenced by improvement or other bonds or in other form which may be paid in installments, Landlord shall, if permitted, elect such installment payment plan and only the amount paid in any Lease Year shall be included in the taxes for that Lease Year for purposes of this Article.

## **26. RIGHT OF PROTEST.**

26.1 Mechanics' Liens. Tenant may contest any mechanics' or other liens imposed against the Premises (provided Landlord agrees and acknowledges that Tenant shall have no responsibility with respect to liens arising from Landlord's Work or other construction, repair or maintenance required of Landlord under this Lease), provided Tenant believes in good faith that such liens are not proper, and further provided that Tenant furnishes Landlord reasonable security to ensure payment and to prevent any sale, foreclosure or forfeiture of the Premises by reason of such nonpayment. Tenant shall furnish to Landlord such security as Landlord may reasonably request pursuant to the foregoing sentence within thirty (30) days of receiving a written request therefor. Upon a final determination of the validity of such lien or claim, Tenant shall promptly pay any judgment or decree rendered against Tenant or Landlord, including without limitation all proper costs and charges, and shall cause such lien to be released of record, all without cost to Landlord.

26.2 Right to Cure. If Tenant shall be in default in paying any charge for which a mechanics' lien claim and suit to foreclose the lien have been filed, and shall not have given Landlord security to protect the Shopping Center and Landlord from liability for such claim of lien, Landlord may (but shall not be so required to) pay said claim and any costs, and the amount so paid, together with reasonable attorney fees incurred in connection therewith, shall be

immediately due and owing from Tenant to Landlord, and Tenant shall pay the same to Landlord with interest at the Interest Rate from the dates of Landlord's payment therefor.

26.3 Notice of Lien. Should any claim of lien be filed against the Premises or any action against the Premises or any action affecting the title to such Shopping Center be commenced, the party receiving notice of such lien or action shall forthwith give the other party written notice thereof.

26.4 Notice of Nonresponsibility. Landlord or its representatives shall have the right to go upon and inspect the Premises at all reasonable times and shall have the right to post and keep posted thereon notices of nonresponsibility or such other notices which Landlord may deem to be proper for the protection of Landlord's interest in the Premises. Tenant shall, before the commencement of any work which might result in any such lien, give to Landlord written notice of its intention to do so in sufficient time to enable posting of such notices.

## 27. COMMON AREAS.

27.1 Common Areas. Landlord will maintain in good order, condition (comparable to other first-class shopping centers in the trade area) and repair all parking areas, landscaping, sidewalks, driveways and other areas used in common by tenants of the Shopping Center (the "Common Areas"), and Landlord hereby grants to Tenant, its agents, employees and invitees, the nonexclusive right to use the Common Areas in common with other tenants of the Shopping Center. Commencing on the Commencement Date and continuing on the first day of each month during each Lease Year, Tenant shall pay Landlord, as Additional Rent, Tenant's Proportionate Share of Landlord's Operating Costs (as hereinafter defined) allocated by Landlord on a prorata basis to the Land, Building, and/or Premises during the Lease Term. The allocation of Landlord's Operating Costs to the Land shall be based upon the ratio between the net land area of the Land to the net land area of the Shopping Center.

Landlord shall keep, or cause to be kept, said Common Areas in a neat, clean and orderly condition, properly lighted and landscaped, and shall repair, maintain or replace all equipment and facilities thereof as Landlord shall deem necessary. Landlord may cause any or all of the services concerning the Common Areas to be provided (at reasonable and competitive rates) by an independent contractor(s) or by an affiliate(s) of Landlord.

Except as otherwise provided in this Lease, Landlord shall at all times have the right and privilege of determining the nature and extent of the Common Areas, whether the same shall be surface, underground or multiple-deck, and of making such changes therein and thereto from time to time which in its opinion are deemed to be desirable and for the best interest of all persons using said Common Areas, including the location and relocation of driveways, entrances, exits, automobile parking spaces, the direction and flow of traffic, installation of prohibited areas, landscaped areas, utilities and all other facilities thereof.

Landlord shall at all times after the Effective Date have the sole and exclusive control of the Common Areas, including, without limitation, the right to lease space within the Common Areas to tenants for the sale of merchandise and/or services and the right to permit advertising displays, educational displays and entertainment in the Common Areas. Landlord shall also have the right at any time and from time to time to exclude and restrain any person from use or

occupancy thereof, excepting, however, bona fide customers, patrons and service suppliers of Tenant and other tenants of Landlord who make use of said areas in accordance with the rules and regulations established by Landlord from time to time with respect thereto. The rights of Tenant with respect to the Common Areas shall at all times be subject to the rights of Landlord, the other tenants of Landlord and the other owners of the Shopping Center to use the same in common with Tenant. It shall be the duty of Tenant to keep all of the Common Areas free and clear of any obstructions created or permitted by Tenant or resulting from Tenant's operation and to permit the use of any of the Common Areas only for normal parking and ingress and egress by the said customers, patrons and service suppliers to and from the building occupied by Tenant.

The use and occupancy by Tenant of the Premises shall include the use, in common with all others to whom Landlord has granted or may hereafter grant rights to use the same, of the Common Areas located within the Shopping Center and of such other facilities as may be designated from time to time, subject, however, to rules and regulations for the use thereof as prescribed from time to time by Landlord. Tenant shall abide by the reasonable and non-discriminatory rules and regulations governing the Shopping Center which Landlord, in its sole discretion, may establish and/or amend from time to time for the proper and efficient operation and/or maintenance of the Common Areas or any portion thereof. Landlord shall use commercially reasonable efforts to uniformly enforce such rules and regulations. Such rules and regulations may specify, without limitation, when the Common Areas shall be open for use and when and where Tenant and its employees may park their vehicles in the Common Areas.

Employees of Tenant shall not park their automobiles in those automobile parking areas of the Common Areas which Landlord may from time to time designate for use by patrons of the Shopping Center. At all times Landlord shall have the right to designate, or change the designation of, the particular parking area to be used by any or all of such employees. Tenant and its employees shall park their cars only in those portions of the Common Areas, if any, designated for that purpose by Landlord.

Tenant acknowledges that if Landlord provides security officers for the Common Areas, Landlord does not represent, guarantee or assume responsibility that Tenant will be secure from any claim, demand, investigation, proceeding, action, suit, judgment, award, fine, lien, loss, damage, expense, liability, charge or cost of any kind or character (including attorney fees and court costs) relating to such security officers. Landlord shall have no obligation to hire, maintain or provide such services, which may be withdrawn or changed at any time with or without notice to Tenant or any other person and without liability to Landlord.

**27.2 Landlord's Operating Costs.** As used herein, the term "Landlord's Operating Costs" shall mean actual out-of-pocket expenses reasonably incurred by Landlord to maintain and operate the Common Areas in the manner required of Landlord hereunder and shall include, but not be limited to: (a) Landlord's obtaining all policies of insurance for the Common Areas, Land, Building and Premises and all reasonable deductibles associated therewith; (b) repairing, lighting, water, sprinkler, irrigation and other utility systems for the Common Areas; (c) cleaning, sweeping, striping, seal coating, parking lot maintenance, monument and/or tower sign maintenance and utility costs, maintenance of retaining walls, painting, repaving, disposing of refuse contained in trash receptacles located in the Common Areas, inspecting, planting and landscaping for the Common Areas and Shopping Center; (d) providing utilities to the Common Areas; (e) providing janitorial services for the Common Areas and security for the Shopping

Center, including but not limited to, the costs of uniforms, equipment, employment taxes, electronic intrusion and fire control devices for the parking lot, and telephonic alert system devices for the Common Areas; (f) complying with all present and future laws, regulations, ordinances and other governmental requirements including, but not limited to, improvements or changes required by any current or future laws, regulations or ordinances; (g) fees for permits, approvals, entitlements, exactions and licenses excluding fees for permits, approvals, entitlements, exactions and licenses for other tenants and occupants of the Shopping Center; (h) attorney's and accountant's fees and disbursements and court costs incurred by Landlord in connection with its operation and administration of the Common Areas other than any such fees disbursements or costs relating to compliance by other tenants of the Shopping Center with the rules and regulations of the Shopping Center or their respective leases; (i) replacing parking lot gutters, common area utility systems, sidewalks, landscaping, drainage, equipment, and any other similar Common Areas capital improvements, provided, that such permitted capital expenditures shall be amortized on a reasonable basis (but not less than the useful life of the improvements) together with interest on the unamortized balance of amounts so expended at the rate of ten percent (10%) per annum; (j) Taxes as defined in Article 25; and (k) any management fee paid by Landlord to a third party property management company (provided such fees do not exceed fifteen percent (15%) of the Landlord's Operating Costs). Notwithstanding the foregoing, the following shall, in all events, be excluded from Landlord's Operating Costs: depreciation, principal, interest and other charges on debt; administrative and overhead expenses, costs and fees, including, but not limited to, on-site wages, salaries and benefits (including the cost for any insurance coverages relating to management personnel), promotional and similar fees; maintenance performed on adjacent tracts not maintained by Landlord and/or not reserved to the benefit of the Shopping Center occupants; maintenance, repairs or replacements to the Common Areas necessitated by the negligent or wrongful act of Landlord or made to correct any construction defect or soil/subsurface condition; amounts paid to entities related to Landlord in excess of the cost of such services from any competitive source; amounts reimbursable from insurance proceeds or warranties; services, repairs and maintenance performed within an occupant's exclusive space which is not part of the Common Areas; or reserves for anticipated future expenses.

Tenant's Proportionate Share of Landlord's Operating Costs and Taxes for each calendar year and partial calendar year shall be paid in equal monthly installments on the first day of each calendar month, as Additional Rent. Landlord shall provide a budget based upon the Landlord's Operating Costs and Taxes for the preceding calendar year (the "Budget"), or Landlord may, at its sole option, bill such actual costs and expenses monthly in arrears from time to time but not more than one (1) time per calendar month. Within ninety (90) days after the end of each calendar year or portion thereof, Landlord shall furnish Tenant with a detailed written statement outlining the type and amount of expenses incurred by Landlord and Tenant's Proportionate Share of such costs and expenses for such period (the "Budget Reconciliation"). If the total amount paid by Tenant under this Article for any calendar year shall be less than the actual amount due from Tenant for such year as shown on the Budget Reconciliation, Tenant shall pay to Landlord the difference between the amount paid by Tenant and the actual amount due, such deficiency to be paid within thirty (30) days after the furnishing of each Budget Reconciliation. If the total amount paid by Tenant hereunder for any such calendar year shall exceed such actual amount due from Tenant for such calendar year, the amount of the overpayment shall be credited against the next installment of Additional Rent due hereunder. If Landlord shall fail to provide the Budget Reconciliation within the time provided for herein, Tenant shall have the right, after

not less than ten (10) days written notice to Landlord, to suspend additional rent payments pending Tenant's receipt of the Budget Reconciliation.

Landlord shall keep or cause to be kept the books and records applicable to such Landlord's Operating Costs and Taxes for a period of not less than two (2) years following the date of Tenant's receipt of any Budget Reconciliation, but, in the event of any dispute, such books and records shall be retained until the final determination of such dispute. Upon five (5) days' prior written notice given to Landlord within two (2) years after Tenant receives any Budget Reconciliation issued by Landlord as set forth above, Tenant may cause an audit to be made during Landlord's normal business hours at Landlord's headquarters of Landlord's records relating to Landlord's Operating Costs and Taxes for the period covered by any such Budget Reconciliation. Tenant shall promptly pay to Landlord any deficiency or Landlord shall promptly refund to Tenant any overpayment, including interest at the Interest Rate commencing from the due date of the Budget Reconciliation until such time that Tenant or Landlord receives payment from the other party. In the event that any audit discloses an overpayment of Landlord's Operating Costs and Taxes by Tenant of more than four percent (4%), then, in addition, Landlord shall pay the reasonable costs and expenses incurred by Tenant in conjunction with performance of such audit. In the event that any audit discloses an underpayment or an overpayment of Landlord's Operating Costs and Taxes by Tenant of less than four percent (4%), then Tenant shall pay the reasonable costs and expenses incurred by Landlord in conjunction with performance of such audit.

## **28. ALTERATIONS TO SHOPPING CENTER.**

28.1 Landlord may not amend or modify the Site Plan in any manner which would (i) impair the ingress to, or egress from, the Premises other than to a *de minimis* extent, (ii) impair or impede the circulation or access of pedestrians or traffic within the Shopping Center other than to a *de minimis* extent, (iii) violate any applicable governmental laws or regulations with regard to the Shopping Center or any portion thereof, or (iv) violate other provisions of this Lease. Except as set forth above, Landlord may amend or modify the Site Plan without the consent of Tenant.

28.2 Landlord shall have the right, upon sixty (60) days prior notice to Tenant ("Notice of Relocation"), to relocate Tenant to alternate premises of comparable area and frontage elsewhere in the Shopping Center ("Substitute Premises"); provided that Landlord shall reimburse Tenant a sum reasonably determined by Landlord to equal the cost to improve the Substitute Premises to which Tenant is relocated to a condition substantially equivalent to the then current condition of the Premises; and Tenant shall have all obligations with respect to the Substitute Premises as provided with respect to the Premises as defined in this Lease; provided, however, that Tenant's Base Rent and Tenant's Proportionate Share of those portions of Additional Rent charged on a per square foot basis shall be proportionately adjusted. Notwithstanding the foregoing, if the Premises have not been delivered to Tenant, or if less than two (2) years remain in the unexpired Term of this Lease or of any Option Term that has previously been exercised at the time of the Notice of Relocation, then Tenant may elect by delivery of written notice to Landlord, within thirty (30) days after receipt of the Notice of Relocation, to terminate this Lease rather than undergo such relocation and the effective date of such notice to terminate shall be that date originally specified as the effective date in the Notice of Relocation. Upon the effective date of termination, both Landlord and Tenant shall have no

further rights or obligations hereunder except those specified in Sections 14.1 and 29.9 hereof, those obligations which accrued prior to the date of termination or those obligations, which by their nature, survive the termination of the Lease. Tenant acknowledges that the above right to terminate constitutes Tenant's sole and exclusive remedy in the event Tenant elects to not accept the terms of a Notice of Relocation. Notwithstanding anything to the contrary contained herein, in the event that Tenant does not timely elect to terminate this Lease, then Tenant's right to terminate this Lease in the event Tenant elects to not accept the terms of a Notice of Relocation shall be deemed void and of no further force and effect and, further, shall be deemed Tenant's acceptance of the terms and conditions of the Notice of Relocation ("Tenant's Deemed Acceptance").

Landlord and Tenant shall document the description of the Substitute Premises, the changes in Base Rent, changes in Tenant's Proportionate Share of all Additional Rent charged on a per square foot basis or any other amendments to the Lease as a result of the relocation in an amendment to this Lease within thirty (30) days of Tenant's acceptance or Tenant's Deemed Acceptance of the Substitute Premises. Further, Landlord shall reimburse Tenant for Tenant's reasonable out-of-pocket expenses for moving Tenant's furniture, equipment, supplies, telephones and telephone equipment from the original Premises to the Substitute Premises and for reprinting, if necessary, Tenant's stationery in the same quality and quantity of Tenant's stationery supply on hand immediately prior to Tenant's relocation to the Substitute Premises within thirty (30) days of Tenant presenting Landlord with an invoice for Tenant's actual costs incurred therefor.

Tenant hereby waives any and all claims and causes of action resulting directly or indirectly from Landlord's exercise of any of its rights, as provided in this Section 28.2, including, by way of example but without limitation, claims for business interference, lost profits, damage to or loss of personal property, loss of benefit of the Lease or the Premises, or otherwise resulting from or related to any such change in the Premises, the Building, the Land or the Shopping Center or any other term or condition of relocation as provided in this Section 28.2 above.

## **29. HAZARDOUS SUBSTANCES.**

29.1 Use, Storage, Handling and Disposal of Hazardous Materials. Except as provided herein, during the term of this Lease and any extension thereof, Tenant and/or its sublessees, employees, agents, officers, guests and invitees ("Tenant Parties") shall not cause any Hazardous Materials (as such term is defined below) to be used, generated, stored, transported, handled or disposed of in or about the Premises at any time following the Effective Date (such activities are hereinafter referred to as "Environmental Activities"). This prohibition shall extend to the Tenant Parties and Tenant shall be responsible for assuring compliance by such persons with the foregoing prohibition. Notwithstanding the foregoing, and subject to Tenant's covenant to strictly comply with all "Hazardous Materials Laws" (as such term is defined below) and all other terms and conditions of this Article 29, Tenant and the Tenant Parties may bring upon, keep and use in or about the Premises: (a) any items typically sold in an office supply store; (b) general office supplies typically used in the ordinary course of business, such as copier toner, liquid paper, glue, ink and cleaning solvents, for use in the manner for which they were designed, in such amounts as may be normal for the business operations conducted by Tenant on the Premises; and (c) only those additional Hazardous Materials consented to by Landlord in writing,

which consent shall be in Landlord's sole discretion. In connection with seeking any such consent, Tenant shall deliver to Landlord a description of handling, storage, use and disposal procedures. Notwithstanding the foregoing, Tenant shall not install, operate or maintain any above- or below-grade tank, sump, pit, pond, lagoon or other storage or treatment vessel or device on the Premises except those devices which are required by health laws.

29.2 Compliance with Laws. Tenant, at its sole cost and expense, shall cause the Tenant Parties to comply, with all federal, state and local laws, ordinances and regulations and all rules, licenses, permits, orders, decrees and judgments relating to Environmental Activities (collectively referred to as "Hazardous Materials Laws") conducted by Tenant or any of the Tenant Parties on the Premises. Tenant's breach of any of its covenants or obligations under this Article 29 shall constitute a material default under this Lease. The obligations of Tenant under this Article 29 shall: (i) survive the expiration or earlier termination of this Lease without any limitation, (ii) constitute obligations that are independent and severable from Tenant's covenants and obligations to pay Rent under this Lease, and (iii) inure to the benefit of, and be enforceable by, Landlord, its assignees and successors-in-interest to the Premises.

29.3 Exculpation of Landlord. Other tenants of the Shopping Center may be using, handling or storing certain Hazardous Materials in connection with such tenant's use of their premises. The failure of another tenant to comply with applicable laws and procedures could result in a release of Hazardous Materials and contamination to improvements within the Shopping Center or the soil and groundwater thereunder. In the event of such release, the tenant responsible for the release, and not Landlord, shall be solely responsible for any claim, damage or expense incurred by Tenant by reason of such contamination.

29.4 Disclosure and Notification.

29.4.1 Disclosure Reports. Landlord may, from time to time, but not more often than annually, (each such date being hereafter referred to as a "Disclosure Date"), reasonably request that Tenant disclose to Landlord the names and amounts of all Hazardous Materials other than general supplies referred to in Section 29.1, which were used, generated, treated, handled, stored or disposed of on the Premises or which Tenant intends to use, generate, treat, handle, store or dispose of in, on or about the Premises, for the year prior to and after such Disclosure Date. The foregoing in no way shall limit the necessity for Tenant obtaining Landlord's consent pursuant to this Article 29.

29.4.2 Notification Requirement. Tenant shall immediately advise Landlord in writing of, and provide Landlord with a copy of: (i) any notices of violation or potential or alleged violation of any Hazardous Materials Laws which are received by Tenant from any governmental agency concerned with Tenant's or Tenant's Agent's Environmental Activities, (ii) any and all inquiry, investigation, enforcement, clean-up, removal or other governmental or regulatory actions instituted or threatened relating to Tenant or the Premises; (iii) all claims made or threatened by any third party against Tenant or the Premises relating to any Hazardous Materials, and (iv) any release of Hazardous Materials in, on or about the Premises or the Shopping Center of which Tenant is aware or reasonably believes may have occurred.

29.5 Inspection of Premises. In the event that Landlord reasonably believes that Tenant is in violation of any of Tenant's duties or obligations under this Article 29.1, Landlord

may require that Tenant retain a registered environmental consultant (the "Consultant") reasonably acceptable to Landlord to conduct an investigation of the Premises ("Environmental Assessment"): (i) for Hazardous Materials contamination in, about or beneath the Premises and (ii) to assess all Environmental Activities on the Premises for compliance with all applicable laws, ordinances and regulations and for the use of procedures intended to reasonably reduce the risk of a release of Hazardous Materials. The Environmental Assessment shall be performed in a manner reasonably calculated to discover the presence of Hazardous Materials contamination and shall be of a scope and intensity reflective of the general standards of professional environmental consultants who regularly provide environmental assessment services in connection with the transfer or releasing of real property. Additionally, the Environmental Assessment shall take into full consideration the past and present uses of the Premises by Tenant or any of the Tenant Parties and other factors unique to the Premises. The cost of the Environmental Assessment shall be paid by Landlord unless Landlord reasonably determines that Tenant violated a duty or obligation set forth in this Article 29, in which event the entire cost thereof shall be paid by Tenant as Additional Rent. Tenant shall comply, at its sole cost and expense, with all reasonable recommendations contained in the Environmental Assessment, including any recommendation with respect to the precautions which should be taken with respect to Environmental Activities on the Premises by Tenant or any of the Tenant Parties or any recommendations for additional testing and studies to detect the presence of Hazardous Materials. Tenant covenants to reasonably cooperate with the Consultant and to allow entry and reasonable access to all portions of the Premises for the purpose of Consultant's investigation.

29.6 Indemnification of Landlord. Tenant shall indemnify, defend (with counsel satisfactory to Landlord) and hold Landlord Parties (as defined above) and any successors to Landlord's interest in the Premises, harmless from and against any and all loss, cost, damage, expense (including reasonable attorneys' fees), claim, cause of action, judgment, penalty, fine or liability directly or indirectly relating to or arising from (i) any Environmental Activity on the Premises by Tenant or any of the Tenant Parties during the Term of this Lease, (ii) any remedial or clean-up work undertaken by or for Tenant in connection with its Environmental Activities or its compliance with Hazardous Materials Laws or (iii) the breach by Tenant of any of its obligations and covenants set forth in this Article 29. Notwithstanding the foregoing, Tenant shall not be required to indemnify Landlord Parties with respect to any Hazardous Materials which were not used, generated, stored, transported, handled or disposed of in or about the Premises by Tenant or Tenant's Agents, such as Hazardous Materials which may migrate onto or under the Premises from another source and Tenant shall not be required to indemnify the Landlord Parties with respect to any Losses resulting from the negligence or willful misconduct of Landlord, any of the Landlord Parties or any other present or future tenants of Landlord. Landlord shall have the right but not the obligation to join and participate in any legal proceedings or actions initiated in connection with Tenant's Environmental Activities. Landlord may also negotiate, defend, approve and appeal any action taken or issued by any applicable governmental authority with regard to contamination of the Premises by Hazardous Materials. Any costs or expenses incurred by Landlord for which Tenant is responsible under this Article 29 or for which Tenant has indemnified Landlord shall be reimbursed by Tenant on demand as Additional Rent.

29.7 Indemnification of Tenant. Landlord shall indemnify, defend (with counsel satisfactory to Tenant) and hold Tenant and the Tenant Parties harmless from and against any and all Losses directly or indirectly relating to or arising from (i) any Environmental Activity on

the Premises or in the Shopping Center by Landlord or any of the Landlord Parties, (ii) any remedial or clean-up work undertaken by or for Landlord or any of the Landlord Parties in connection with their Environmental Activities on the Premises or in the Shopping Center or their compliance with Hazardous Materials Laws, (iii) the breach by Landlord of any of its obligations and covenants set forth in this Article 29 or (iv) or any environmental conditions identified in the Letter Report, Phase I Environmental Site Assessment for the Property located at West San Marcos Boulevard and Grand Avenue, San Marcos, California dated July 16, 1999, Project Number 96E1409.4a prepared by Environmental Business Solutions, Inc., which report Tenant acknowledges having been provided a copy by Landlord. Notwithstanding the foregoing, Landlord shall not be required to indemnify the Tenant Parties with respect to any Losses resulting from the negligence or willful misconduct of Tenant or any of the Tenant Parties.

29.8 Remediation. If any Environmental Activities undertaken by Tenant or any of the Tenant Parties result in contamination of the Premises or any other portion of the Shopping Center or the soil or groundwater thereunder, subject to Landlord's prior written approval and any conditions imposed by Landlord, Tenant shall promptly take all actions, at its sole expense and without abatement of Rent, as are necessary to return the affected portion of the Shopping Center, the Premises and the soil and ground water to the condition existing prior to the introduction of the contaminating Hazardous Material by Tenant or Tenant Parties. Landlord's approval of such remedial work shall not be unreasonably withheld so long as such actions will not cause a material adverse effect on the Premises after expiration of the Term or any material adverse effect on the Shopping Center. Landlord shall also have the right to approve any and all contractors hired by Tenant to perform such remedial work. All such remedial work shall be performed in compliance with all applicable laws, ordinances and regulations and in such a manner as to minimize any interference with the use and enjoyment of the Shopping Center. Appearance of a Hazardous Material in or about the Premises shall not be deemed an occurrence of damage or destruction subject to the terms of this Lease respecting damage or destruction caused by act of God, force of nature, fire, flood, earthquake or other casualty.

29.9 Surrender of Premises. Prior to or after the expiration or earlier termination of the Lease Term, Landlord may have an Environmental Assessment of the Premises performed in accordance with this Article 29. Tenant shall perform, at its sole cost and expense, any clean-up or remedial work recommended by the Consultant which is necessary to remove, mitigate or remediate any Hazardous Materials contamination of the Premises in connection with Tenant's or any of the Tenant Parties' Environmental Activities. Prior to surrendering possession of the Premises, Tenant shall also remove any Personal Property, equipment, fixture and/or storage device or vessel on or about the Premises which is contaminated by or which contains Hazardous Materials caused by Tenant or any of the Tenant Parties.

29.10 Definition of Hazardous Materials. As used herein, "Hazardous Materials" shall mean asbestos, any petroleum fuel and any hazardous or toxic substances, material or waste which is or become regulated by any local governmental authority, the State of California or the United States Government, including, but not limited to, any material or substance defined as a "hazardous waste," "extremely hazardous waste," "restricted hazardous waste," "hazardous substance," "hazardous material" or "toxic pollutant" under the California Health and Safety Code and/or under the Comprehensive Environmental Response, Compensation and Liability Act, 42. U.S. C. §9601, et seq. The term "Hazardous Materials" will not include cleaning products, landscape fertilizers and other products in ordinary quantities that are customarily used

in the ordinary course of business of operating and maintaining commercial properties (but which nevertheless must be used in compliance with all applicable Hazardous Materials Laws).

29.11 Assignment and Subletting. If an assignee's or sublessee's ("Transferee") activities in or about the Premises involve the use, handling, storage or disposal of any Hazardous Materials other than those used by Tenant or other tenants or occupants of the Shopping Center and in quantities and processes similar to Tenant's uses in compliance with this Lease, the following provisions shall apply:

29.11.1 It shall be reasonable for Landlord to withhold its consent to such assignment or sublease in light of the risk of contamination posed by such activities.

29.11.2 Landlord may impose an additional condition to such assignment or sublease which requires Tenant to establish beyond a reasonable doubt that such Transferee's activities pose no significantly greater risk of contamination to the Premises than do Tenant's permitted activities, in view of the following considerations:

29.11.2.1 quantities, toxicity and other properties of the Hazardous Materials to be used by such Transferee,

29.11.2.2 the precautions against a release of Hazardous Materials such Transferee agrees to implement,

29.11.2.3 such Transferee's financial condition as it relates to its ability to fund a major clean-up of the Hazardous Materials involved and

29.11.2.4 such Transferee's policy and historical record respecting its willingness to respond to and remediate a release, if one has occurred, of Hazardous Materials to the satisfaction of the governmental regulatory agencies with jurisdiction over same.

### 30. ESTOPPEL CERTIFICATE.

30.1 Landlord and Tenant agree within thirty (30) days after request therefor by the other to execute in recordable form and deliver a statement, in writing, certifying (a) that this Lease is in full force and effect, (b) the Commencement Date of this Lease, (c) that Rent is paid currently, (d) the amount of Rent, if any, paid in advance, (e) that there are no uncured defaults by Landlord or stating those claimed by Tenant, and (f) such other information as may be reasonably requested and reasonably agreed to be provided; provided that, in fact, such facts are accurate and ascertainable.

### 31. PARKING.

31.1 Landlord covenants and agrees that the parking ratio of the Shopping Center shall at all times be at least equal to or greater than the minimum number of parking spaces required by law.

**32. ATTORNEY'S FEES.**

32.1 In the event of a default, or an alleged or asserted default, in the performance of any of the terms, covenants, agreements or conditions contained in this Lease, and either Landlord or Tenant places the enforcement or defense of such matter with an attorney, then the prevailing party shall be entitled to, and the other party shall pay, all of the prevailing party's costs and expenses, including reasonable attorneys' fees, in connection therewith, whether suit is actually filed or not.

**33. BROKERAGE.**

33.1 Landlord and Tenant hereby represent and warrant to each other that (i) other than those brokers and fees disclosed below, each has not dealt with any other brokers or agents and that there are no other side letters, contracts or agreements relating to, or entitling others to share or participate in, brokerage fees, commissions, finder's fees or other similar charges, (ii) other than those brokers and fees disclosed below, no other brokerage fees, commissions, finder's fees or other similar charges are owed to any persons, entities or other parties in connection with this Lease, and (iii) the following brokers and brokerage fees are the only brokers involved and brokerage fees due and payable in connection with this Lease in accordance with the terms and conditions of a separate written agreement (collectively, the "Broker's Fees"), which commission the Brokers are splitting equally:

Landlord's Broker(s): Flocke & Avoyer Commercial Real Estate  
Tenant's Broker(s): Retail Insite

33.2 Landlord agrees to pay such Broker's Fees on or before the Commencement Date, and further agrees to defend, indemnify and hold Tenant harmless from any loss, claim, liability or obligations with regard thereto. In the event that Landlord fails to pay the Broker's Fees on the Commencement Date, Tenant shall have the right, but not the obligation, to pay the Broker's Fees. In the event that Tenant pays all or any portion of the Broker's Fees, Landlord agrees that Tenant shall have the right to offset against fixed rent and other amounts payable under this Lease for the total amount of the Broker's Fees paid by Tenant, plus interest accruing thereon at the Interest Rate, until the Broker's Fees and interest are paid in full.

**34. NOTICES.**

34.1 Any notice or consent required to be given by or on behalf of either party to the other shall be in writing and given by mailing such notice or consent by either (i) one (1) business day after sending by an overnight courier service, or (ii) two (2) business days after sending by registered or certified mail, return receipt requested, addressed to the other party as indicated in Article I.K. of the Fundamental Lease Terms hereof, or at such other address as may be specified from time to time in writing by either party. Any notice or consent given hereunder by either party shall be deemed effective when mailed as aforesaid, but the time period in which to respond to any notice or consent shall commence to run on the date on which such notice or consent is actually received by the addressee. Refusal to accept delivery shall be deemed receipt thereof.

### 35. MISCELLANEOUS.

35.1 Severability of Provisions. If any term or provision of this Lease, or the application thereof to any person or circumstance, shall to any extent be determined to be invalid or unenforceable by a court of competent jurisdiction, then the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby.

35.2 Memorandum of Lease. Neither party may record this Lease. However, upon the request of either party hereto, the other party shall join in the execution of a memorandum or so-called "short form" of this Lease for the purposes of recordation ("Memorandum of Lease"). Said Memorandum of Lease shall describe the parties, the Premises, the term of this Lease and any special provisions hereof, and shall incorporate this Lease by reference. Any fees required to be paid in order to prepare or record such Memorandum of Lease shall be paid by the party which initiated its preparation. In the event of any conflict between the provisions of the Memorandum of Lease and the Lease, the Lease shall control.

35.3 Entire Agreement. This instrument shall merge all undertakings between the parties hereto with respect to the Premises and upon execution by both parties shall constitute the entire lease agreement, unless thereafter modified by both parties in writing. In the event Landlord shall execute this Lease prior to Tenant, Tenant shall have ten (10) days to accept the terms hereof and to execute this Lease, during which time Landlord's execution shall constitute an irrevocable offer.

35.4 Relationship of the Parties. Nothing contained in this Lease shall be deemed or construed by the parties hereto or by a third party to create the relationship of principal and agent or of partnership or of joint venture of any association whatsoever between Landlord and Tenant, it being expressly understood and agreed that neither the method or computation of rent nor any other provision contained herein, nor any act or acts of the parties hereto, shall be deemed to create any relationship between Landlord and Tenant other than the relationship of lessor and tenant.

35.5 Importance of Each Covenant. Each covenant and agreement on the part of one party hereto is understood and agreed to constitute an essential part of the consideration for each covenant and agreement on the part of the other party.

35.6 Headings. The headings of the Articles of this Lease are for convenience of reference only and do not form a part hereof, and they shall not be interpreted or construed to modify, limit, or amplify the intent of such Articles.

35.7 Parties in Interest. Subject to the provisions of this Lease relating to assignment, subleasing and other transfers of the parties' interests, this Lease shall inure to the benefit of and be binding upon the successors in interest and assigns of the parties hereto.

35.8 Counterparts. This Lease may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

35.9 Number and Gender. Words in the singular, plural, masculine, feminine and neuter as used herein shall have the meanings and be construed as required by the context in which they are used herein.

35.10 Governing Law. This Lease shall be construed and governed by the laws of the State in which the Premises are located. Should any provisions be illegal or not enforceable under the laws of the said State, it or they shall be considered severable, and the Lease and its conditions shall remain in force and be binding upon the parties as though the said provisions had never been included. Venue shall be in the appropriate court of the County of San Diego.

35.11 Force Majeure. Except as expressly provided herein, in the event that Landlord or Tenant shall be delayed, hindered in or prevented from the performance of any act required hereunder (excluding Tenant's obligations to pay Rent or Landlord's or Tenant's obligations to pay any other amounts due hereunder) by reason of strikes, lockouts, labor troubles, inability to procure materials, failure of power, unforeseen governmental delays, restrictive governmental laws or regulations, riots, insurrection, war, inclement weather, or other reason beyond their control (financial ability excepted), then performance of such act shall be extended for a period equivalent to the period of such delay. It shall be a condition of either Party's right to claim an extension of time under this Section that such Party notify the other Party in writing, within forty five (45) calendar days after the first occurrence of any such event, of the cause (specifying the nature thereof) and the period of time contemplated or necessary for performance.

35.12 Limitation on Liability. In consideration of the benefits accrued hereunder, Tenant covenants and agrees that, in the event of any actual or alleged failure, breach or default hereunder by Landlord, Tenant's sole and exclusive remedy shall be against Landlord's interest in the Shopping Center, and the obligations of Landlord under this Lease do not constitute personal obligations of individual partners, directors, trustees, officers, staff, council persons or shareholders of Landlord, the Redevelopment Agency of The City of San Marcos, or the San Marcos Public Facilities Authority, and Tenant shall not seek recourse against the individual partners, directors, trustees, officers, staff, council persons or shareholders of Landlord, The Redevelopment Agency of the City of San Marcos, the San Marcos Public Facilities Authority, or any of their personal assets for satisfaction of any liability in respect to this Lease.

35.13 Mutual Waiver of Right to Jury Trial.

LANDLORD AND TENANT DESIRE AND INTEND THAT ANY DISPUTES ARISING BETWEEN THEM WITH RESPECT TO OR IN CONNECTION WITH THIS LEASE BE SUBJECT TO EXPEDITIOUS RESOLUTION IN A COURT TRIAL WITHOUT A JURY. CONSEQUENTLY, LANDLORD AND TENANT EACH HEREBY WAIVES THE RIGHT TO TRIAL BY JURY OF ANY CAUSE OF ACTION, CLAIM, COUNTERCLAIM OR CROSS-COMPLAINT IN ANY ACTION, PROCEEDING OR OTHER HEARING BROUGHT EITHER BY LANDLORD AGAINST TENANT, OR BY TENANT AGAINST LANDLORD, ON ANY MATTER WHATEVER ARISING OUT OF, OR IN ANY WAY CONNECTED WITH, THIS LEASE, THE RELATIONSHIP OF LANDLORD AND TENANT, TENANT'S USE OR OCCUPANCY OF THE PREMISES, ANY CLAIM OF INJURY OR DAMAGE, AND THE ENFORCEMENT OF ANY REMEDY UNDER ANY

LAW, STATUTE AND REGULATION, EMERGENCY OR OTHERWISE, NOW OR  
HEREAFTER IN EFFECT.



Landlord's Initials



Tenant's Initials

**II. EXHIBITS.**

Attached hereto and made a part of this Lease is Exhibits "A" through "F".

**IN WITNESS WHEREOF**, the parties hereto have executed this Lease as of the date first  
above written.

**LANDLORD:**

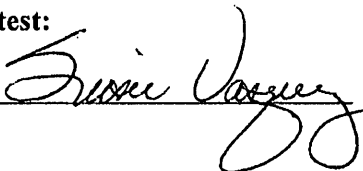
**THE CITY OF SAN MARCOS,**  
a chartered municipal corporation

By: 

Name: R. W. Gittings

Its: City Manager

Attest:



**TENANT:**

**JENNIFER CONVERTIBLES, INC.,**  
a Delaware corporation

By: 

Name: EDWARD B. SEAMAN

Its: EXECUTIVE VP

**EXHIBIT "A"**

**Legal Description of Shopping Center**

Parcel A of Parcel Map No. 19183 in the City of San Marcos, County of San Diego, State of California, recorded in the office of the County Recorder on March 20, 2003, of official records.

**EXHIBIT "A-1"**

**Legal Description of Land**

**[See attached]**

**EXHIBIT "A-1"**

JANUARY 8, 2004

J.N.: 991016.

PAGE 1 OF 4

EXHIBIT "A-1"  
LEGAL DESCRIPTION

A PORTION OF PARCEL 'A' OF PARCEL MAP NO. 19183 IN THE CITY OF SAN MARCOS, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, RECORDED IN THE OFFICE OF THE COUNTY RECORDER MARCH 20, 2003, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE MOST EASTERLY CORNER OF SAID PARCEL 'A', SAID CORNER BEING THE POINT OF BEGINNING OF THE SOUTHERLY RIGHT-OF-WAY LINE OF STATE ROUTE 78 PER DOCUMENT NO. 2000-034672, RECORDED IN THE OFFICE OF THE COUNTY RECORDER JUNE 30, 2000; THENCE, ALONG THE SOUTH LINE OF SAID PARCEL, SOUTH 05°03'54" WEST 12.20 FEET; THENCE CONTINUING ALONG SAID SOUTH LINE, SOUTH 64°03'48" WEST 115.83 FEET; THENCE SOUTH 15°02'27" EAST 11.61 FEET; THENCE SOUTH 60°53'26" WEST 151.50 FEET; THENCE SOUTH 59°04'54" WEST 80.56 FEET; THENCE SOUTH 58°16'59" WEST 45.26 FEET TO THE TRUE POINT OF BEGINNING; THENCE, CONTINUING ALONG SAID SOUTH LINE, SOUTH 58°16'59" WEST 236.04 FEET; THENCE SOUTH 49°41'13" WEST 61.45 FEET; THENCE, LEAVING SAID SOUTH LINE, NORTH 16°56'11" WEST 187.10 FEET; THENCE SOUTH 73°03'49" WEST 64.06 FEET; THENCE NORTH 69°57'28" WEST 99.45 FEET; THENCE NORTH 16°56'11" WEST 52.91 FEET; THENCE NORTH 20°02'36" EAST 21.73 FEET; THENCE SOUTH 69°57'28" EAST 218.03 FEET; THENCE NORTH 10°44'56" EAST 22.10 FEET; THENCE SOUTH 79°15'04" EAST 260.44 FEET TO THE TRUE POINT OF BEGINNING.

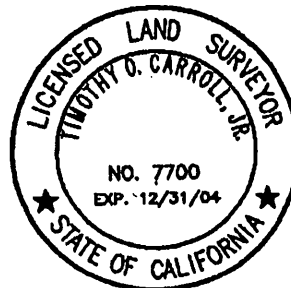
AREA = 40,984 S.F.

SHEET 2 OF 4 SHEETS

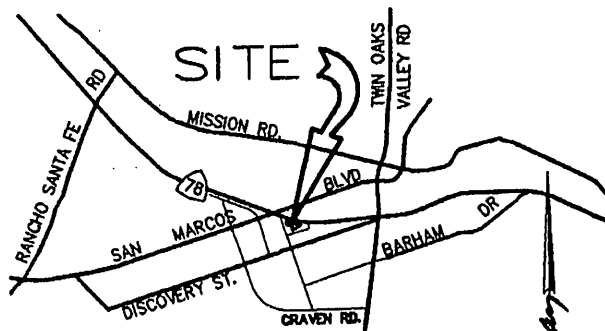
# EXHIBIT "A-1"

## LEASE BOUNDARY DATA

(No)	DELTA/BEARING	RADIUS	LENGTH
1	S05°03'54"W	—	12.20'
2	S64°03'48"W	—	115.83'
3	S15°02'27"E	—	11.61'
4	S60°53'26"W	—	151.50'
5	S59°04'54"W	—	80.56'
6	S58°16'59"W	—	45.26'
7	S58°16'59"W	—	236.04'
8	S49°41'13"W	—	61.45'
9	N16°56'11"W	—	187.10'
10	S73°03'49"W	—	64.06'
11	N69°57'28"W	—	99.45'
12	N16°56'11"W	—	52.91'
13	N20°02'36"E	—	21.73'
14	S69°57'28"E	—	218.03'
15	N10°44'56"E	—	22.10'
16	S79°15'04"E	—	260.44'



TIMOTHY O. CARROLL, JR. LS NO. 7700  
EXP. 12/31/04



SAN MARCOS

**VICINITY MAP**  
NO SCALE

### LEGEND:

LAND BOUNDARY	—————
EXISTING LOT LINE	-----
EXISTING EASEMENT LINE	- - - - -

ACRES

0.94

**O'Day**

CONSULTANTS

2710 Laker Avenue West  
Suite 100  
Coronado, California 92008  
760-931-7700  
Fax: 760-931-8680  
www.odayconsultants.com

Civil Engineering  
Planning  
Processing  
Surveying

REVISED BY:	DATE
DRAWN BY: T.G., G.M., C.G.	DATE 1-08-04
CHECKED BY: T.C.	DATE 1-08-04
APPROVED BY:	DATE

**CITY OF SAN MARCOS**

Creekside Marketplace  
Parcel D Land

SCALE:  
1"=100'

# EXHIBIT "A-1"

SCALE: 1" = 100'

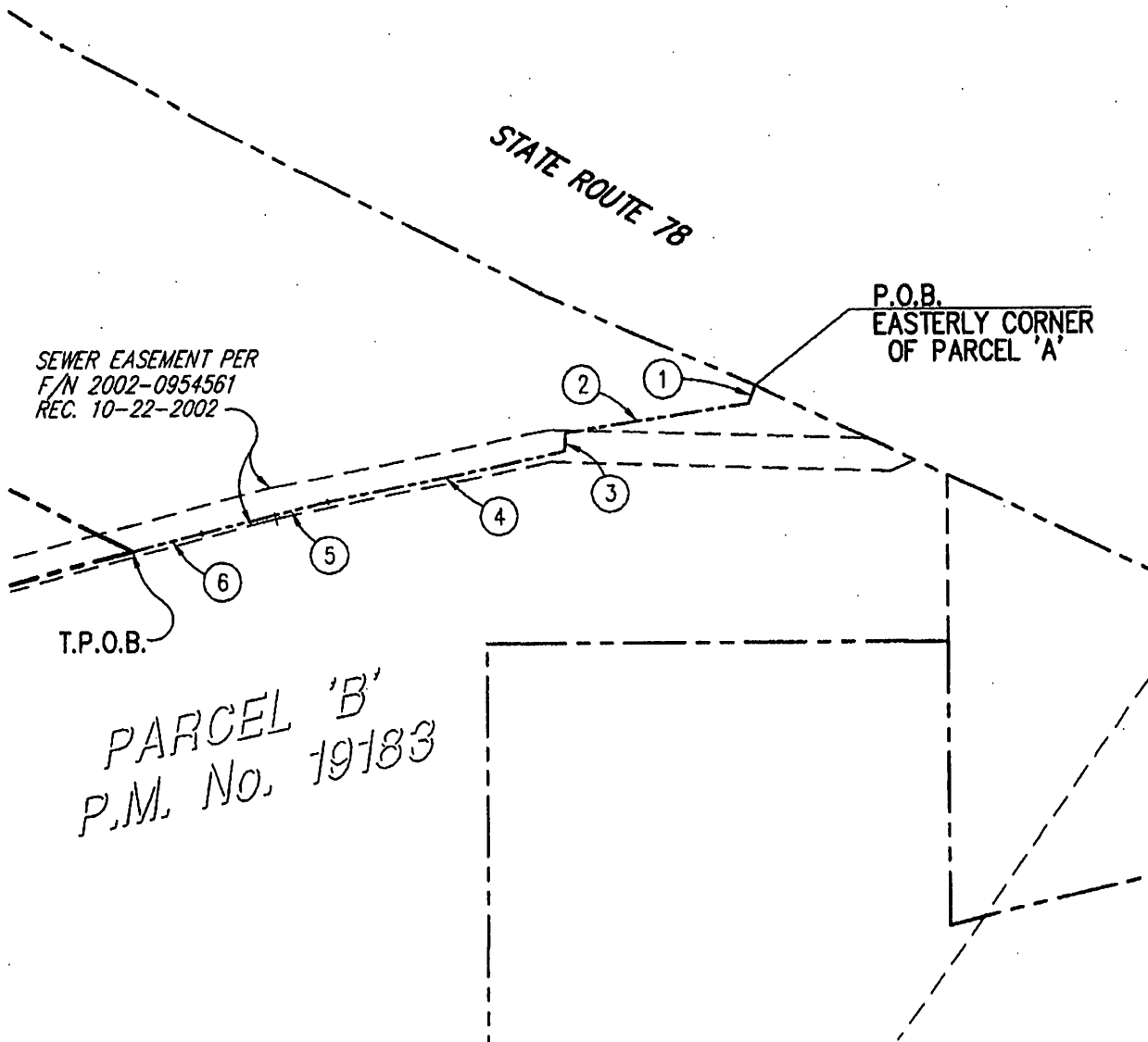
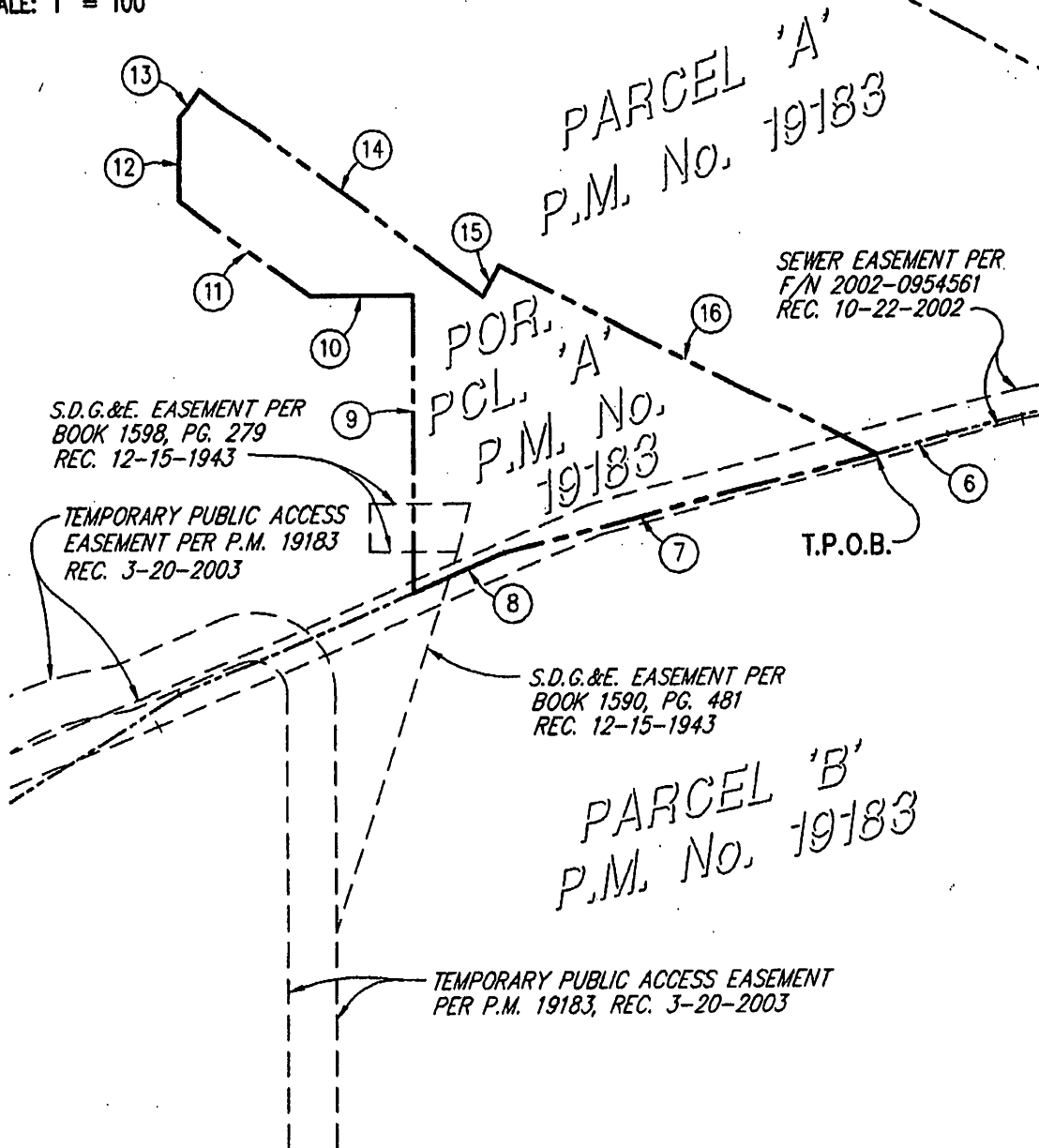


EXHIBIT "A-1"

STATE ROUTE 78

SCALE: 1" = 100'



**EXHIBIT "B"**

**Site Plan**

See Site Plan attached hereto and incorporated herein by reference. This Exhibit "B" indicates only (i) preliminary leasing concepts and (ii) layout, access, egress and design of the Shopping Center. It is subject to change and should not be relied upon as representing the identity, kind, size, design, location, use or opening date of any tenant, architectural or design features or space within the Shopping Center. Further, the space number used in this Lease to designate the Premises is assigned for administrative reference purposes only and may be unilaterally changed at any time by written notice from Landlord to Tenant. In the event of any change in the reference number, said change shall be deemed to be made everywhere in the Lease that reference is made to store number or space labeling or numbering.

**See Exhibit Folder for Exhibit B**

**EXHIBIT "B-1"**

**Floor Plan of Tenant's Premises**

[See attached.]



**SmithConsultingArchitects**  
12220 El Camino Real, Suite 200  
San Diego, CA 92130  
(858) 793 - 4777  
(858) 793 - 4787 Fax  
SCA #: 02179.S  
DATE: MAY 17, 2004

**EXHIBIT "C"**

**Conditions Precedent**

1. Landlord and Tenant acknowledge and agree that the obligations of Landlord and Tenant under this Lease are expressly subject to (i) Landlord receiving the required governmental approvals (the "Entitlements") to develop the Shopping Center as shown on the Site Plan attached as Exhibit "B" and (ii) Landlord's review and approval of Tenant's most recent financials available prior to the Effective Date. "Entitlements" include, without limitation, a final map, approval of Landlord's site development plan and environmental impact report, a general plan amendment to remove the Shopping Center from the California Village Design Overlay Area, approval by the San Marcos City Council, and any permits or approvals required by the Army Corps of Engineers and other fish and wildlife agencies, and all permits or approvals required by municipal, county, state and federal authorities to permit Landlord to construct the Premises, complete Landlord's Work and implement the provisions of this Lease. If Landlord does not approve Tenant's financial statements, meet all conditions described herein and obtain all approvals described above, this Lease may be terminated upon notice from Landlord to Tenant. In the event of any such termination, Landlord and Tenant shall have no further rights or obligations hereunder except those, if any, which accrued prior to the date of termination.

**EXHIBIT "D"****Provisions Relating To The Design  
And Construction Of Tenant's Premises****SECTION I - GENERAL REQUIREMENTS**

1. As soon as practicable after the final drawings and specifications have been approved by Landlord and by all applicable governmental agencies, Landlord will, at its own cost and expense, commence the erection of the Building covering the Premises, unless prevented or delayed by conditions over which Landlord has no control. It is expressly understood and agreed that the Building of which the Premises are a part may constitute a portion of a larger building. In the event that prior to commencement of construction of the Building of which the Premises are a part, Landlord elects not to proceed with such construction, Landlord may terminate this Lease upon notice to Tenant, and both parties shall be forthwith released.

2. When Landlord's architect (hereinafter "Project Architect") has completed drawings of the basic shell of the Building (or if such drawings have already been completed, then concurrently with the execution of this Lease), Landlord shall deliver a floor plan of the Premises ("Floor Plan") to Tenant showing thereon the columns and other structural work in the Premises.

3. Landlord will construct for Tenant an improved shell, all in conformity with and to the extent hereinafter set forth as "Landlord's Work". Tenant shall be responsible, at its own cost and expense, to complete the work hereinafter set forth as "Tenant's Work"; all Tenant's Work shall be completed to a good and workmanlike condition.

4. Tenant's plans shall be prepared with full knowledge of and in compliance with the Floor Plan, this Exhibit "D" and all City, County, State and Federal ordinances, rules and regulations relating thereto including, without limitation, the energy conservation requirements, if applicable, of the State in which the Shopping Center is located and the architectural and accessibility regulations issued by the United States Attorney General's office pursuant to Title III of the Americans with Disabilities Act of 1990 and the Minimum Guidelines and Requirements for Accessible Design issued by the Architectural and Transportation Barriers Compliance Board. All drawings for Tenant's Work, as described below, are to be prepared at Tenant's expense by an interior designer or space planner or, if required by governmental authorities, Tenant's architect who shall be licensed in the State in which the Shopping Center is located.

Tenant agrees to submit to Landlord, within twenty (20) days after the later of Tenant's receipt of the Floor Plan or the Effective Date of the Lease, fully dimensioned and detailed 3" scale preliminary drawings showing general store layout.

**EXHIBIT "D"**

Within forty-five (45) days after the later of Tenant's receipt of the Floor Plan or the Effective Date of the Lease, Tenant agrees to submit to Landlord two (2) sets of fully detailed and dimensioned one-quarter inch (1/4") scale construction drawings. These drawings shall indicate the specific requirements of Tenant's space showing clearly, without limitation, the interior partitions, trade fixture plans, lighting, electrical outlets, plumbing, signs, size and locations of equipment to be installed on the roof, if any, state energy compliance calculations, handicap access requirements, structural calculations, samples, etc., and all other items set forth under "Tenant's Work".

All drawings for Tenant's Work are subject to Landlord's and Project Architect's approval and in the event said drawings are not approved, for any reason whatsoever, within sixty (60) days after the later of Tenant's receipt of the Floor Plan or the Effective Date of the Lease, this Lease shall, at the option of Landlord, be null and void and of no further force or effect.

Tenant shall be responsible for submitting construction drawings to the proper building authority (or health authority as applicable) to obtain a building permit. Fees for plan checking, processing, permitting, and any other fees relating to Tenant's Work shall be paid by Tenant. At Landlord's option the Premises shall be constructed by Landlord or Tenant's contractor in accordance with said drawings and both parties agree to pursue the construction work of said building diligently to completion, complying with all governmental ordinances, rules and regulations. Upon completion of all Tenant's Work, Tenant shall file for record in the Office of the County Recorder where the Shopping Center is located a Notice of Completion, as permitted by law.

5. In the event Landlord agrees in writing to perform any of Tenant's Work, the following procedures and conditions apply:

a. The cost of all requirements shown on Tenant's construction drawings is to be paid for by Tenant. Landlord shall submit a bid proposal to Tenant after Landlord approval of Tenant's construction drawing and Landlord's agreement in writing to perform Tenant's Work. Tenant shall have the right to approve all costs to be borne by Tenant pursuant to the provisions of this paragraph 5. Tenant shall notify Landlord in writing within ten (10) days after Tenant's receipt of the bid proposal that Tenant approves or disapproves the bid provided, however, that if Tenant does not so notify Landlord within such ten (10) day period, Tenant shall be deemed to have approved such costs. The total amount of such costs to be paid by Tenant shall be delivered to Landlord prior to the commencement of construction of Tenant's Work.

b. Any additional charges, expenses, or costs arising by reason of any subsequent change, modification, or alteration in said approved general plans and specifications ("change to plan") made at the request of Tenant or required by governmental authorities, including without limitation architect's fees or consultant's fees, shall be at the sole cost and expense of Tenant, and Landlord shall have the right to demand payment for such change to plan prior to Landlord's performance thereof. No change to plan shall be made without the written consent of Landlord. Landlord shall bear no costs in connection with the plans or fees related to, or construction of, Tenant's Work.

**EXHIBIT "D"**

6. The parties agree to cooperate with each other and to respond with required approvals or disapprovals with reasonable diligence in order to complete Landlord's Work and any Tenant's Work. For purposes of this Lease, the term "Tenant Delay" shall mean any delay in substantial completion of the Premises caused or contributed to by any of the following reasons:

a. Tenant's failure to submit drawings or apply for any permits or approvals within the time periods specified in Paragraph 3, Section I of this Exhibit "D".

b. Tenant's request for changes in the plans and specifications or in the construction of the work; and/or

c. Tenant's failure to pay any costs required of Tenant pursuant to this Exhibit "D", within the time periods specified herein;

d. A breach by Tenant of the terms of this Exhibit "D" or the Lease; and/or

e. Any other acts or omissions of Tenant, or its contractors, agents or employees.

7. Tenant may not require an exterior design, finish or construction other than one that has been approved by Landlord; and Landlord shall be entitled to erect and construct such exteriors in keeping with the overall plans and design of the Shopping Center. Tenant shall not be permitted to maintain or place on the building or upon the Premises any awnings or other exterior appendage except with written consent of Landlord.

8. Landlord agrees to deliver to Tenant, and Tenant agrees to accept from Landlord, possession of the Premises forthwith upon substantial completion of the Premises. The term "substantial completion of the Premises" is defined as the date Landlord notifies Tenant ("Notice of Substantial Completion") that the Premises are substantially complete, (exclusive of "punch list" work) to the extent of Landlord's Work as specified in this Exhibit "D" to the point wherein Tenant's contractor may commence the construction of Tenant's Work as specified herein, it being understood and agreed that Landlord may be unable to install or complete all items of Landlord's Work in advance of Tenant's Work. In such instance each party shall cause its contractor to cooperate with the other's contractor to complete Landlord's Work and Tenant's Work in a timely and efficient manner. Certification by Project Architect of the substantial completion of the Premises in accordance with this Exhibit "D" shall be conclusive and binding upon the parties hereto. Tenant shall commence the construction of Tenant's Work as described in this Exhibit "D" promptly upon receipt of the Notice of Substantial Completion of the Premises and shall diligently prosecute such construction to completion and shall open the Premises for business concurrently with the date specified for commencement of Base Rent. Tenant agrees that upon receipt of Landlord's Notice of Substantial Completion, Tenant will accept the Premises in the condition which it may then be and waives any right or claim against Landlord for any cause, directly or indirectly, arising out of the condition of the Premises, appurtenances thereto, the improvements thereon and the equipment thereof; and Tenant shall thereafter save and hold harmless Landlord from liability as provided in Article 22 of this Lease. Landlord shall not be liable for any latent or patent defects therein; provided, however, that

#### EXHIBIT "D"

Landlord warrants the Building against latent defects for a period of one (1) year from completion.

9. In the event Tenant enters into possession of the Premises for the purpose of performing Tenant's Work prior to receipt of the Notice of Substantial Completion, such entry shall be deemed an acceptance by Tenant of substantial completion of the Premises, and in such event Tenant shall hold Landlord harmless and indemnify Landlord for any loss or damage to Tenant's property, fixtures, equipment and merchandise and for injury to any persons, unless same be caused by the gross negligence or willful misconduct of Landlord or its agents, and Tenant shall repair any damage done by Tenant or Tenant's agents, contractors, subcontractors, employees, vendors, or representatives to Landlord's Work.

10. During the construction of Landlord's Work, Landlord agrees at Landlord's expense to obtain and maintain public liability and worker's compensation insurance adequate to fully protect Tenant as well as Landlord from and against any and all liability for death of or injury to person or damage to property caused in or about or by reason of the construction of Landlord's Work. Tenant agrees at Tenant's expense to obtain or maintain public liability insurance as set forth in Article 22 and worker's compensation insurance adequate to fully protect Landlord as well as Tenant from and against any and all liability for death of or injury to person caused in or about or by reason of the construction of Tenant's Work.

11. Where final drawings are in conflict with this Exhibit "D", the provisions of Exhibit "D" shall prevail.

## **SECTION II - DESCRIPTION OF LANDLORD'S WORK**

The following is a description of the construction, and limitations of same, which will be provided by Landlord and herein referred to as "Landlord's Work":

### **A. BASIC SHELL**

1. **Frame:** The building shall be of steel or wood frame, reinforced concrete, or bearing wall construction designed in accordance with governing building codes.

2. **Floors:** All floors on the ground floor area shall be a minimum of four inch (4") concrete with smooth finish. Floor to be flat and on a single plane without visible depressions or raised areas.

3. **Roof:** The roof shall be built-up composition type, single ply, or other commercial roofing material as selected by the Project Architect.

4. **Exterior Doors/Frames:** Rear/side exterior exit door frame(s) will be metal construction. Exterior service doors will be metal with panic hardware as required by code.

5. **Exterior walls and roof** will be insulated with Fiberglass batt insulation in accordance with building code and state energy requirements.

## **EXHIBIT "D"**

6. Fire Service and Distribution: Landlord shall install, as Landlord's Work, the framework for the sprinkler system, which is a building-wide system, the balance of which system shall be Tenant's Work. Landlord will provide Tenant with a credit for the installation of such number of sprinkler drops or heads as would have been part of Landlord's Work had Landlord installed such equipment. Landlord and Tenant, in their reasonable commercial judgment, agree that such credit shall be Eight Hundred Seventy Five and 00/100 Dollars (\$875.00). Such credit shall be paid to Tenant at the same time and upon the same conditions as the Construction Allowance.

7. Storefront: A standard storefront shall be designed by Project Architect and installed by Landlord at its sole cost and expense. One double storefront door will be provided sized according to Landlord's specifications.

#### B. INTERIOR FINISHES

1. Ceilings: Landlord shall not be required to provide Tenant with any ceilings in the Premises. Landlord will provide Tenant with a credit for the normally required Landlord Work for such ceilings (exclusive of the restroom) and Landlord and Tenant, in their reasonable commercial judgment, agree that such credit shall be Two Thousand Eight Hundred Seventy Five and 00/100 Dollars (\$2,875.00). Such credit shall be paid to Tenant at the same time and upon the same conditions as the Construction Allowance.

2. Walls: Demising walls between suites shall be framed of wood stud, metal stud, or masonry, and shall be unpainted drywall, finish taped, sanded and ready to accept paint; they shall extend from floor to roof structure with drywall only on one side above the ceiling, drywall on the other side to extend six (6") above ceiling height. Any interior partitions shall not be a part of Landlord's Work.

3. Interior Doors/Frames: Interior door frames shall be hollow metal frame at the option of Landlord. Interior doors will be wood with lever hardware.

#### C. SANITARY FACILITIES

1. Toilet Room: One (1) standard lavatory, one (1) water closet, one (1) door with lever type hardware, one (1) insta hot, one (1) light fixture with fan, one (1) GFCI electrical outlet, and VCT flooring with topset base. Walls will be painted with a paint meeting the specifications of Landlord with a 48" high FRP wainscot, as required by code. If during the initial permitting process of Tenant, in the event that governmental authorities require the installation of a second bathroom based on number of employees or other permitting criteria, Landlord shall not be required to provide Tenant with the second restroom as part of Landlord's Work; provided, however, Landlord will provide Tenant with a credit for such restroom in a maximum amount of Seven Thousand and 00/100 Dollars (\$7,000.00). Such credit, once established, shall be paid to Tenant at the same time and upon the same conditions as the Construction Allowance. construct the second restroom in a location adjacent to the first restroom at Landlord's sole cost and expense. The completion of the second restroom shall not be a

condition to Landlord providing Tenant with the notice of substantial completion; provided, however, such restroom shall be completed by Landlord prior to the Tenancy Date.

#### D. UTILITIES

1. Water and Sewer: Landlord will furnish water and sewer service lines for one (1) toilet facility. Cost of any water or sewer service lines for a second restroom, if required, is already a component of the payment provided to Tenant under Section C, Sanitary Facilities, as set forth therein. Landlord will pay for the water meter serving the Premises. All installation required beyond these facilities shall not be a part of Landlord's Work. Cost of water used will be paid by Tenant pursuant to Section 9.2.

2. Electricity: Landlord shall furnish one (1) 200 amp subpanel within the Premises which shall include breakers appropriate for the scope of Landlord's Work and wiring stubbed to the subpanel and which shall be constructed to provide for separate metering. The meter shall not be a part of Landlord's Work. Landlord shall furnish seven (7) electrical convenience outlets, located as shown on Landlord's floor plans (including the electrical outlet shown in the toilet room, but exclusive of any electrical outlets for a second restroom, which cost, if required, is already a component of the payment provided to Tenant under Section C, Sanitary Facilities, set forth above).

3. Telephone: Landlord shall furnish one (1) telephone conduit (without wires) stubbed to Tenant's Premises.

4. Lighting: Landlord shall not be required to provide Tenant with any lighting in the Premises. Landlord will provide Tenant with a credit for the normally required Landlord Work for such lighting and Landlord and Tenant, in their reasonable commercial judgment, agree that such credit shall be Two Thousand and 00/100 Dollars (\$2,000.00). Such credit shall be paid to Tenant at the same time and upon the same conditions as the Construction Allowance.

5. Sprinkler Drops: See Section A, Paragraph 6, Fire Service and Distribution, above.

6. H.V.A.C.: Landlord will install a Landlord selected air conditioning unit, located on the roof complete with air distribution ductwork, air distribution outlets, fresh air supply, and thermostats as designed by the Landlord to suit the standard lease space requirements. The ducting providing to Tenant shall be hard ducting and shall be installed at thirteen (13) feet from the floor or higher. Air conditioning tonnage shall be based on approximately one (1) ton per four hundred (400) square feet, as dictated by state energy requirements and calculations, based on the standard Landlord improvements. One (1) ducted return vent shall be provided. Supply venting shall be supplied per code. Landlord will install a Landlord selected air conditioning unit, located on the roof complete with fresh air supply, and shall provide (but not install) the necessary thermostat as designed by the Landlord to suit the standard lease space requirements. Units will be set on the roof curbs with plenum and condensate line drops through the roof for electrical and thermostat wiring. All other work, including distribution and return air ducting shall be performed by Tenant as part of Tenant's Work. Supply venting shall be supplied per

~~code. Tenant shall utilize Landlord's roofing contractor for any penetrations required for any HVAC work, so as to not void Landlord's warranty or guaranty for same. Air conditioning tonnage shall be based on approximately one (1) ton per four hundred (400) square feet, as dictated by state energy requirements and calculations, based on the standard Landlord improvement. Tenant will be responsible for the initial start up of the units.~~

7. Gas. Landlord will install a one-inch (1") line stubbed to Tenant's Premises for gas service. Tenant will pay for the gas meter serving the Premises. All installation required beyond these facilities shall not be a part of Landlord's Work.

### SECTION III - DESCRIPTION OF TENANT'S WORK

The work to be done by Landlord in satisfying its obligations to construct Tenant's store under the Lease shall be limited to Landlord's Work as described in the foregoing paragraphs. All other items of work not therein provided to be performed by Landlord as part of Landlord's Work shall be provided by Tenant at Tenant's expense and are herein referred to as "Tenant's Work". Tenant acknowledges and agrees that if required by Landlord, Utility equipment and facilities included in Tenant's Work shall be procured from Utility providers specified by Landlord. Tenant's Work shall include, but not be limited to, the purchase and/or installation and/or performance of the following:

1. Electric Fixtures and Equipment: All electrical work for the Premises not specifically stated under Landlord's Work to be performed by Tenant including without limitation any additional convenience outlets or circuit breakers.

2. Utility Meters and Connections: The electrical or gas meter, connections and hookup fees for all utilities, assessments, front footage charges and any other fees or charges for Utilities serving the Premises shall be paid by Tenant. Tenant shall apply for and arrange for installation of all meters, except for the water meter. Notwithstanding the foregoing, should Tenant not have a separately designated water meter for its Premises and Tenant wants a submeter, Tenant shall install such meter at its sole cost and expense.

3. Telephones: All wiring from the main telephone room to the Premises and within the Premises. All conduits for Tenant's telephone system within the Premises. Tenant shall make all arrangements for telephone service.

4. Walls: All interior partitions and curtain walls within the Premises, except as provided by Landlord under Landlord's Work.

5. Coves and Ceilings: All special coves, ceilings, furring, etc.

6. Furniture and Fixtures: All store fixtures, cases, wood paneling, cornices, etc.

7. Show Window Background, Floors, Etc.: All show window floors, show window background, show window lighting fixtures, and show window doors.

### EXHIBIT "D"

8. Floor Coverings: All floor coverings and floor materials (including wall base) other than concrete (except as Landlord is required to provide in the toilet room as or as otherwise specified as Landlord's Work).

9. Ornamental Stairs: All ornamental or other stairs not required by governing building codes.

10. Alarm Systems, Etc.: All alarm systems or other protective devices.

11. Plumbing: All plumbing, either roughing in fixtures, or equipment required for Tenant's needs beyond Landlord's Work.

12. Special Ventilation: All ventilation systems, hoods, ducts, shafts, and chases, including show window's ventilation beyond Landlord's Work. Tenant's equipment shall conform to the project's roofing specifications and such work shall be paid for by Tenant, but shall be performed by the project's original roofing contractor.

13. Special Equipment: All special equipment such as conveyors, elevators, escalators, dumb waiters, etc., including installation and connection.

14. Interior Painting and wall coverings beyond Landlord's Work.

15. Tenant's exterior sign. All Tenant signs shall be designed, constructed, and located in accordance with the approved sign plan, and shall be subject to the approval of Landlord, and local governing agency, all as more specifically described in Exhibit "F" to the Lease.

16. Concrete Floors: Any special reinforcing, raised areas, insulated floor, or depressions.

17. Roof: Framing of all roof openings in accordance with structural calculations as required by code. All flashing, counterflashing and roof repairs caused by the installation of Tenant's equipment shall conform to the project's roofing specifications and such work shall be paid for by Tenant, but shall be performed by the project's original roofing contractor.

#### **SECTION IV - CONDITIONS RELATED TO PERFORMANCE OF TENANT'S WORK**

If Tenant's Work is performed by anyone other than Landlord's contractor, the following items shall apply; said items shall be incorporated as "Special Conditions" into the contract between Tenant and its contractor (with a copy of the contract to be furnished Landlord for Landlord's reasonable approval prior to the commencement by Tenant of Tenant's Work):

1. Prior to start of Tenant's Work, Tenant or Tenant's contractor shall provide Landlord with a construction schedule in "bar graph" form indicating the completion dates of all phases of Tenant's Work.

#### **EXHIBIT "D"**

2. Tenant or Tenant's contractor shall perform said work in a manner and at times which do not impede or delay Landlord's contractor in the completion of the Premises as provided in this Lease. Any delays in the completion of the Premises impacting the commencement of the Base Rent and any damage caused by Tenant or Tenant's contractor shall be at the sole cost and expense of Tenant.

3. Tenant or Tenant's contractor shall be responsible for the repair, replacement or cleanup of any damage done by him to other contractors' work which specifically includes Landlord's Work and accessways to the Tenant's Premises which may be currently used by others.

4. Tenant shall accept the Premises prior to Tenant's contractor starting any trenching operations. Any rework of subbase or compaction required after Tenant initial acceptance of the Premises shall be done by Tenant's contractor, which shall include the removal from the Shopping Center of any excess dirt or debris.

5. Tenant or Tenant's contractor shall contain his storage of materials and his operations within the Premises and such other space as such contractor may be assigned by Landlord or Landlord's contractor. Should he be assigned space outside of the Premises, he shall move to such other space as Landlord or Landlord's contractor shall direct from time to time to avoid interference or delays with other work.

6. All trash and surplus construction materials shall be stored within the Premises and shall be promptly removed from the Shopping Center at the sole cost of Tenant or Tenant's contractor. Once the Shopping Center is open and operating, no Common Area trash containers shall be used for construction debris.

7. Tenant or Tenant's contractor shall provide temporary utilities, portable toilet facilities and potable drinking water as required for his work within the Premises and shall pay to Landlord or Landlord's contractor the cost of any temporary utilities and facilities provided by Landlord or Landlord's contractor at Tenant or Tenant's contractor's request.

8. Tenant or Tenant's contractor shall notify Landlord or Landlord's Project Manager of any planned work to be done on weekends, holidays or other than normal job hours.

9. Tenant and Tenant's contractor are responsible for compliance with all applicable codes and regulations of duly constituted authorities having jurisdiction insofar as the performance of the work and completed improvements are concerned for all work performed by Tenant or Tenant's contractor and all applicable safety regulations established by the general contractor for the Shopping Center, and Tenant further agrees to save and hold Landlord harmless for said work as provided in Article 22 of the Lease. Prior to commencement of construction, Tenant shall submit to Landlord evidence of insurance as required in Article 22 of the Lease.

10. Tenant's contractor or subcontractors shall not post signs on any part of the Shopping Center or on the Premises.

#### EXHIBIT "D"

11. Notwithstanding the provisions herein, Tenant shall be responsible for and shall obtain and record a Notice of Completion promptly following completion of Tenant's Work.

12. Prior to the commencement of construction, Tenant shall obtain or cause its contractor to obtain payment and performance bonds covering the faithful performance of the contract for the construction of Tenant's Work and the payment of all obligations arising thereunder. Such bonds shall be for the mutual benefit of both Landlord and Tenant and shall be issued in the names of both Landlord and Tenant as obligees and beneficiaries. Prior to the date Tenant commences construction of Tenant's Work, Tenant shall submit evidence satisfactory to Landlord that such bonds have been issued.

**EXHIBIT "D"**

**ADDENDUM to EXHIBIT "D"****Construction Allowance**

Notwithstanding anything to the contrary contained in this Exhibit "D", Landlord agrees to contribute the sum of Twenty Thousand Six Hundred and 00/100 Dollars (\$20,600.00) ("Construction Allowance") toward the cost of Tenant's Work ("Costs"), except that said sum shall not in any event be applied toward costs of preparing the space plans, the working drawings; engineering and architectural fees; costs of governmental permits and plan check fees; testing and inspection costs; bonds.

If Tenant performs the Tenant Work, upon written request, Landlord shall pay Tenant the Construction Allowance within twenty (20) days after the latest date on which any contractor, subcontractor, materialman or laborer of Tenant may record a valid mechanics' lien against the Premises and/or Shopping Center with respect to Tenant's Work and after the Tenant has opened for business and delivered to Landlord the following:

1. An executed Tenant's Certificate certifying the then current status of the Lease and the dates relative to Tenant's obligations thereunder;
2. A copy of the "Certificate of Occupancy";
3. A copy of Tenant's recorded, valid "Notice of Completion," if applicable;
4. A complete list of the names, addresses, telephone numbers and contract amount for all contractors, subcontractors, vendors and/or suppliers providing materials and/or labor for Tenant's Work;
5. Copies of all invoices from Tenant's contractor, subcontractors, vendors and/or suppliers of labor and/or materials for Tenant's Work, which Tenant has paid;
6. Copies of all mechanics' lien releases or other lien releases on account of Tenant's Work, which are notarized, unconditional and in such form as Landlord shall have approved;
7. Copies of all building permits, indicating inspection and approval by the issuer of said permits; and
8. An architect's certification that the Premises have been constructed in accordance with Tenant's Plans and are one hundred percent (100%) complete in accordance with this Exhibit "D".

The cost of any additional work performed by Landlord for the benefit of Tenant shall be deducted from the Construction Allowance before said Construction Allowance is paid to Tenant.

**EXHIBIT "D"**

Should Tenant fail to open for business within the time limit set forth in Article 3.1 or otherwise be in default of its obligations under the Lease, then Landlord shall not be obligated to pay Tenant this Construction Allowance. In the event that the Lease is terminated as a result of Tenant's default pursuant to the provisions of Article 16 of the Lease, then, in addition to all other damages specified in Section 16.2 of the Lease, Landlord's damages shall include the unamortized cost of the Construction Allowance, (amortized on a straight-line basis over the initial Lease Term) with interest thereon at the Interest Rate, from the Commencement Date of the Lease through the date of payment to Landlord.

**EXHIBIT "D"**

**EXHIBIT "E"**

**Subordination, Non-Disturbance and  
Attornment Agreement**

THIS SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT ("Agreement") made as of the \_\_\_\_ day of \_\_\_\_\_, 2004, by and between \_\_\_\_\_, a \_\_\_\_\_ [corporation/partnership/limited partnership/limited liability company] ("Lender"), \_\_\_\_\_, a \_\_\_\_\_ ("Tenant"), and **The City of San Marcos**, a chartered municipal corporation ("Landlord").

**RECITALS**

- (a) Landlord holds the Landlord's interests in and Tenant holds the Tenant's interests in that certain Lease dated \_\_\_\_\_, 2004, between The City of San Marcos, a chartered municipal corporation, as Landlord, and \_\_\_\_\_, a \_\_\_\_\_, as Tenant, (the "Lease") regarding space in Creekside Market Place ("Premises"), located upon real estate in the City of San Marcos, San Diego County, State of California, more particularly described on the attached Exhibit "A";
- (b) Lender has made or has agreed to make a mortgage loan to the Landlord secured by a mortgage or deed of trust on the Premises which includes an assignment of Landlord's interest in the Lease (the "Mortgage");
- (c) Tenant and Lender desire to confirm their understanding with respect to the Lease and the Mortgage.

**NOW, THEREFORE**, in consideration of the mutual agreements contained in this Agreement, and other valuable consideration, the parties agree as follows:

- 1. Tenant's interests in the Lease, including, but not limited to, any option in favor of Tenant to extend or renew the Lease, are subordinate and subject to the Mortgage and to any consolidations, extensions, modifications or renewals thereof;
- 2. Lender agrees that the rights of Tenant under the Lease will remain in full force and effect, and Tenant's possession of the Premises under the Lease will remain undisturbed by Lender during the term of the Lease, and any renewal or extension thereof, in accordance with its terms so long as Tenant is not in default under the Lease beyond any applicable cure period;
- 3. After its receipt of notice from Lender of the completion of a foreclosure under the Mortgage or that Lender has received a conveyance of the Premises in lieu of foreclosure or otherwise obtained the right to possession of the Premises, Tenant will be considered to have attorned to and recognized Lender, its successors or assigns, or any purchaser at the foreclosure

sale, as its substitute Landlord under the Lease, and Tenant's possession of the Premises will not be disturbed as provided herein so long as Tenant is not in default under the Lease beyond any applicable cure period. This Agreement will be considered self-operative, and no separate agreements will be required to effectuate the attornment and recognition. The attornment and recognition of a substitute Landlord will be upon all of the terms set forth in the Lease;

4. If Lender or any other person or entity becomes the owner of the Premises ("New Owner") as a result of a foreclosure sale, a conveyance in lieu of foreclosure or otherwise, Tenant will have no claim against the New Owner resulting from, and the New Owner will not be liable for, any act, omission and/or breach of the Lease by any prior Landlord under the Lease occurring prior to (a) if the New Owner acquires the Premises through foreclosure, the date of expiration of all periods of redemption having occurred or the date said New Owner takes possession of the Premises, whichever shall occur first, or (b) if the New Owner acquires the Premises through a deed in lieu of foreclosure, the date of such acquisition. Further, New Owner shall not be bound by any prepayment of rent or amendment of the Lease made in violation of Paragraphs 5 and 6 below, or any security deposit other than any security deposit actually delivered to it;

5. Tenant shall not prepay any Base Rent or Additional Rent under the Lease for more than one (1) month in advance except with the written consent of Lender, unless such prepayment is required under the Lease;

6. Tenant shall not, without obtaining the prior written consent of Lender, enter into any agreement amending or modifying the Lease which would change the term of the Lease or the fixed rent specified therein;

7. Tenant shall provide Lender with copies of all written notices of any default by Landlord sent to Landlord pursuant to the Lease simultaneously with the transmission of such notices to the Landlord. Lender shall have the right to remedy any Landlord default under the Lease, or to cause any default of Landlord under the Lease to be remedied within 30 days after expiration of Landlord's cure period as set forth in the Lease. Tenant shall accept performance by Lender of any term, covenant, condition or agreement to be performed by Landlord under the Lease with the same force and effect as though performed by Landlord;

8. This Agreement may not be amended, modified or altered in any manner other than by a written agreement signed by all the parties hereto;

9. This Agreement will be binding upon and will inure to the benefit of the parties to this Agreement and their respective heirs, executors, administrators, personal representatives, successors and assigns, including any purchaser of the Premises at a foreclosure sale;

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10. All notices required or permitted to be given under this Agreement shall be in writing and sent to the following addresses:

If to Lender:

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If to Tenant:

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with a copy to:

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If to Landlord:

City of San Marcos  
1 Civic Center Drive  
San Marcos, CA 92069  
Attn: Paul Malone

with a copy to:

Investment Development Services, Inc.  
11828 Rancho Bernardo Road, Suite 201  
San Diego, CA 92128  
Attn: Mark Hoekstra

with a copy to:

Hilding Kipnis Lyon & Kelly  
11975 El Camino Real  
Suite 200  
San Diego, California 92130  
Attn: Michael E. Lyon, Esq.

Any party may change its address for such notices from time to time by serving written notice of the change upon the other parties as above provided; and

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11. This Agreement may be executed in multiple counterparts, all of which shall be deemed originals and with the same effect as if all parties had signed the same document. All such counterparts shall be construed together and shall constitute one instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

**LENDER:**

[\_\_\_\_\_]

Date: \_\_\_\_\_, 200\_\_

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

**TENANT:**

\_\_\_\_\_,  
a \_\_\_\_\_

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

Date: \_\_\_\_\_, 200\_\_

**LANDLORD:**

**THE CITY OF SAN MARCOS,**  
a chartered municipal corporation

Date: \_\_\_\_\_, 200\_\_

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

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

On this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_, before me, a notary public within and for said county, personally appeared \_\_\_\_\_ to me personally known, who, being by me duly sworn did say that s/he is the \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_ [corporation/partnership/limited partnership/limited liability company], named in the foregoing instrument, and that said instrument was signed by her/him and acknowledged said instrument to be the free act and deed of said [corporation/partnership/limited partnership/limited liability company].

My Commission Expires:

\_\_\_\_\_  
Notary Public

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

On this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_, before me, a notary public within and for said county, personally appeared \_\_\_\_\_ to me personally known, who, being by me duly sworn did say that s/he is the \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_ [corporation/partnership/limited partnership/limited liability company], named in the foregoing instrument, and that said instrument was signed by her/him and acknowledged said instrument to be the free act and deed of said [corporation/partnership/limited partnership/limited liability company].

My Commission Expires:

\_\_\_\_\_  
Notary Public

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

On this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, before me, a notary public within and for said county, personally appeared \_\_\_\_\_ to me personally known, who, being by me duly sworn did say that s/he is the \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_ [corporation/partnership/limited partnership/limited liability company], named in the foregoing instrument, and that said instrument was signed by her/him and acknowledged said instrument to be the free act and deed of said [corporation/partnership/limited partnership/limited liability company].

My Commission Expires:

\_\_\_\_\_  
Notary Public

**EXHIBIT "F"**

**Sign Criteria**

**See attached Comprehensive Sign Program dated April 15, 2004**

3/17/2004  
10:00 AM  
10:00 AM

3/17/2004  
10:00 AM  
10:00 AM

**EXTENSION AND MODIFICATION AGREEMENT**

**LANDLORD NAME**                      The City of San Marcos  
**AND ADDRESS:**                      1 Civic Center Drive  
                                         San Marcos, CA 92069

**TENANT NAME**                        JENNIFER CONVERTIBLES, INC.  
**AND ADDRESS:**                      417 Crossways Park Drive  
                                         Woodbury, NY 11797

**DATE OF LEASE:**                    September 30, 2004

**EXTENSION TERM:**                  Monthly, commencing December 1, 2009

**PREMISES:**                        Approximately 2,575 square feet in the  
                                         building known as Creekside Market Place,  
                                         Space 100, Building D, San Marcos, CA

**EFFECTIVE DATE:**                  December 1, 2009

**R E C I T A L**

Landlord and Tenant have agreed to extend and modify the Lease in the manner hereinafter set forth.

**NOW, THEREFORE**, for and in consideration of the covenants herein contained and other good and valuable consideration, the receipt and adequacy of which are confessed and acknowledged by each of the parties hereto, it is agreed as follows:

1. The Term of the Lease shall be extended commencing on the 1st day of December, 2009 on a month-to-month basis.

2. Either party shall have the right to terminate this Lease by giving the other party thirty (30) days' prior written notice.

3. During the Term, Tenant shall pay gross rent to the Landlord as follows:

<b>Period</b>	<b>Annual</b>	<b>Monthly</b>
12/01/2009 - onward	\$12,000	\$1,000

4. All notices to the Tenant shall be addressed to Jennifer Convertibles, Inc., 417 Crossways Park Drive, Woodbury,

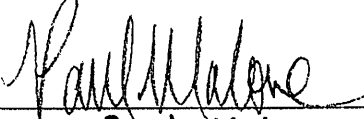
NY 11797, Attn: Edward B. Seidner, with a copy to The Law Office of Wincig & Wincig, 137 Fifth Avenue, New York, NY 10010, Attn: Owen Wincig, Esq.

5. Except as expressly modified in this Agreement, all the terms, covenants and conditions of said Lease shall remain in full force and effect, shall be binding on the parties hereto, and are hereby ratified and affirmed.

IN WITNESS WHEREOF, the parties hereto have set their hand and seal the day and year first below written and declare this Extension and Modification Agreement to be binding on them, their respective successors and permitted assigns.

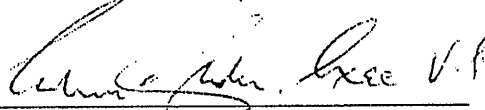
LANDLORD:

THE CITY OF SAN MARCOS

By:   
Name: Paul Malone  
Its: City Manager  
Date: 12/31/2009

TENANT:

JENNIFER CONVERTIBLES, INC.

By:   
Name: Edward B. Seidner  
Its: Executive Vice-President  
Date: December 17 2009

*Law Offices of*  
**WINCIG & WINCIG**

BERNARD WINCIG  
OWEN WINCIG

TAMARA KENWORTHY

UMAR A. SHEIKH  
OF COUNSEL  
ALSO ADMITTED IN N.J.

ANDREW KLINE  
WASHINGTON D.C. COUNSEL  
ADMITTED ONLY IN D.C. & MD.

*Ellen*  
137 Fifth Avenue, New York, N.Y. 10010

TELEPHONE: 212-575-8333

FACSIMILE: 212-575-8825

April 29, 2010

BY CERTIFIED MAIL, RRR

The City of San Marcos  
1 Civic Center Drive  
San Marcos, CA 92069  
Attn: Paul Malone

BY CERTIFIED MAIL, RRR

Mr. Mark Hoekstra  
Investment Development Services, Inc.  
11828 Rancho Bernardo Rd. - Suite 201  
San Diego, CA 92128

BY CERTIFIED MAIL, RRR

Mr. Michael E. Lyon, Esq.  
Hilding Kipnis Lyon & Kelly  
11975 El Camino Real - Suite 200  
San Diego, CA 92130

Re: Jennifer Convertibles, Inc.  
Premises: Creekside Market Place Shopping Center  
Space 100 Building D, San Marcos, CA  
Our File No.: 1402-2970

Dear Madam/Sir:

Please be advised Tenant above captioned hereby elects to exercise its right to terminate the above-referenced Lease on thirty (30) days prior written notice effective May 31, 2010, in accordance with Paragraph 2 of the Extension and Modification Agreement dated as of December 1, 2009. Kindly mark your records accordingly.

LAW OFFICES OF  
WINCIG & WINCIG

The City of San Marcos  
Investment Development Services, Inc.  
Hilding Kipnis Lyon & Kelly  
April 29, 2010  
Page 2

We thank you for all courtesies extended throughout our  
tenancy.

Very truly yours,

OWEN WINCIG

OW/lc

H:\JENNIFER\San Marcos, CA\042910-1402-2970-CSM ltr.doc

1 Gerald P. Kennedy (Bar No. 105887)  
2 PROCOPIO, CORY, HARGREAVES &  
3 SAVITCH LLP  
4 525 B Street, Suite 2200  
San Diego, California 92101  
Telephone: 619.238.1900  
Facsimile: 619.235.0398

5 Attorney for Claimants CITY OF SAN MARCOS

6  
7  
8 UNITED STATES BANKRUPTCY COURT  
9 FOR THE SOUTHERN DISTRICT OF NEW YORK

10 In re:

11 JENNIFER CONVERTIBLES, INC.,

12 Debtor

Case No.: 10-13799-alg

Chapter 7

**PROOF OF SERVICE**

13  
14 I am a resident of the State of California, over the age of eighteen years, and not a party to  
15 the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH  
16 LLP, 525 "B" Street, Suite 2200, San Diego, California 92101/1917. On August 6, 2010, I  
served the within documents:

17 **PROOF OF CLAIM**

18 ☐ **BY FACSIMILE** based upon court order or an agreement of the parties to accept service  
19 by facsimile, by transmitting via facsimile number (619) 235-0398/(760) 931-1155 the  
document(s) listed above to the fax number(s) set forth below on this date before 5:00  
p.m. No error was reported by the fax machine utilized.

20 ☐ **BY U.S. MAIL** by placing the document(s) listed above in a sealed envelope with  
21 postage thereon fully prepaid, in the United States mail at **San Diego/Carlsbad**,  
22 California addressed as set forth below. I am readily familiar with the firm's practice of  
collection and processing correspondence for mailing. Under that practice it would be  
23 deposited with the U.S. Postal Service on the same day with postage thereon fully  
prepaid in the ordinary course of business. I am aware that on motion of the party  
24 served, service is presumed invalid if postal cancellation date or postage meter date is  
more than one day after date of deposit for mailing an affidavit. (See Attached)

25 ☒ **BY OVERNIGHT DELIVERY** by placing the document(s) listed above in a sealed  
26 overnight envelope and depositing it for overnight delivery at **San Diego/Carlsbad**,  
27 California, addressed as set forth below. I am readily familiar with the practice of this  
firm for collection and processing of correspondence for processing by overnight mail.  
28 Pursuant to this practice, correspondence would be deposited in the overnight box  
located at **525 "B" Street, San Diego/in Carlsbad**, California the ordinary course of  
business on the date of this declaration.

1 **BMC Group, Inc., Claims Agent**  
2 **444 N. Nash Street**  
3 **El Segundo, CA 90245-2822**

4 ☐ **BY PERSONAL SERVICE** by personally delivering the document(s) listed above to  
5 the person(s) at the address(es) listed below: (1) For a party represented by an attorney,  
6 delivery was made to the attorney or at the attorney's office by leaving the documents in  
7 an envelope or package, which was clearly labeled to identify the attorney being served,  
8 with a receptionist or an individual in charge of the office, between the hours of nine in  
9 the morning and five in the evening; or (2) For a party, delivery was made to the party or  
10 by leaving the documents at the party's residence with some person not younger than 18  
11 years of age between the hours of eight in the morning and six in the evening.

12 ☐ **BY MESSENGER SERVICE** by providing the above listed document(s) addressed to  
13 the person(s) at the address(es) listed below to a professional messenger service for  
14 personal service. *[A declaration by the messenger service to be provided upon request  
15 and/or separately filed.]*


16 ☐ **BY ELECTRONIC SERVICE** based upon court order or an agreement of the parties to  
17 accept service by electronic transmission, by electronically mailing the document(s)  
18 listed above to the e-mail address(es) set forth below, or as stated on the attached service  
19 list and/or by electronically notifying the parties set forth below that the document(s)  
20 listed above can be located and downloaded from the hyperlink provided. No error was  
21 received, within a reasonable time after the transmission, nor any electronic message or  
22 other indication that the transmission was unsuccessful.

23 ☐ *(Federal)* **BY CM/ECF NOTICE OF ELECTRONIC FILING** by causing such  
24 document(s) listed above to be served through this Court's electronic transmission  
25 facilities via the Notice of Electronic Filing (NEF) and hyperlink, to the parties and/or  
26 counsel who are determined this date to be registered CM/ECF Users set forth in the  
27 service list obtained from this Court on the Electronic Mail Notice List.

28 ☐ *(State)* I declare under penalty of perjury under the laws of the State of California that  
the foregoing is true and correct.

☒ *(Federal)* I declare under penalty of perjury under the laws of the United States that the  
foregoing is true and correct.

Executed on August 6, 2010, at San Diego, California.

21   
22 Susan R. Strong

Gerald P. Kennedy  
Direct Dial: (619) 515-3239  
E-mail: gerald.kennedy@procopio.com

August 9, 2010

**VIA FEDEX**

BMC Group, Inc.  
Claims Agent  
444 N. Nash Street  
El Segundo, California 90245-2822

**Re: In re Jennifer Convertibles, Inc.; U.S.B.C. Case No. 10-13799-alg**

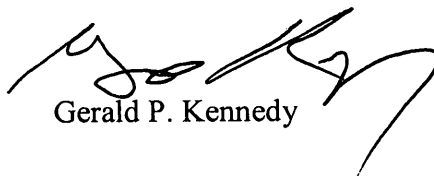
Dear Sir or Madam:

This office represents the City of San Marcos ("Claimant"), the landlord with respect to the lease of real property that had been occupied by Jennifer Convertibles, Inc. (the "Debtor") prior to the bankruptcy filing, located at 565 Grand Avenue, Suite D-100, San Marcos, California 92078 (the "San Marcos Store").

Enclosed please find an original Proof of Claim and original Proof of Service in the above-referenced matter, together with an additional copy of just the face page of the Proof of Claim and face page of the Proof of Service. If you find the documents to be in order, we request that you file same and provide us on behalf of the Claimant with a conformed copy of the face page for each document in the enclosed, self-addressed stamped envelope.

Should you have any questions concerning the enclosed, please do not hesitate to contact the undersigned at the telephone number referenced on this correspondence.

Very truly yours,

  
Gerald P. Kennedy

GPk:sps  
Enclosures  
cc: Clients