

SPECIAL ISSUES IN RETAIL LEASING

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SPECIAL ISSUES IN RETAIL LEASING

I. USE AND OPERATION.

A. Landlord's Position.

1. *Limit occupancy to a specific use.* Tenant is required to operate in the premises for the retail sale of a particular product or service, and for no other use or purpose.
2. *Prohibit any implied or express exclusive.* If Landlord is required to provide this right, limit to situations where Tenant is not in default, is using the premises for the specific exclusive use and carve-out waivers for existing tenants, de minimus uses and anchor tenants.
3. *Require store opening by a date certain.* Tenant must open by the defined Commencement Date or Rent Commencement Date.
4. *Require continuous operation.* Tenant must keep the premises fully stocked, staffed and fixtured and must operate at certain minimum time periods set forth in the lease.
5. *Specify trade name.* Do not allow modification without Landlord's prior consent.
6. *Prohibit use in a manner that would disturb surrounding tenants or violate any laws.*
7. *Obtain assurances that operations are "environmentally safe".* Tenant must indemnify and otherwise protect Landlord against any hazardous materials relating to Tenant's operations.

B. Tenant's Position.

1. *Broadest Possible Use or Uses.* Provide the maximum flexibility for changes in future use. “Any business being conducted by Tenant in its stores in the MSA where the Premises are located.” Ideal is “Any Lawful Use.” This is generally reserved for large, anchor tenants.
2. *Grant of express exclusive.* Tenant is to be the sole retailer selling its product or at its price point. Strict exclusives are more common in strip centers, while price point exclusives tend to be in regional malls.
3. *No Specified Opening Date.* Rent Commencement is NOT tied to store opening, but merely a covenant to pay. Some retailers have “No Opening” windows, such between November 1 and January 31.
4. *No continuous operation.* Some retailers will agree to open for at least one day; some will not agree to open at all. In a Forest Park Mall case, the judge refused to “police” what “fully fixtured,” “adequate inventory” and “trained personnel” meant.
5. *Trade name.* Retailer may agree to an initial trade name, but retain right to change name, especially if there is a merger or sale of “substantially all of Tenant’s stores in the MAS where the Premises are located.”
6. *Prohibit use in a manner that would disturb surrounding tenants or violate any laws.* This is generally not an issue for retailers, since they also want a first class shopping center.

7. *Obtain assurances that shopping center is “environmentally safe”.*
Tenants want representations and warranties from Landlord that the Premises do not contain any environmental problems or issues, and an indemnity to that effect.

C. See Sample Use and Operation Provision.

II. PERCENTAGE RENT.

A. Landlord’s Position.

1. *Define “natural break” and prorate for any partial calendar year.*
2. *Require payment on a monthly basis.* Tenant should be required to estimate percentage rent based upon sales during the preceding calendar year, or once breakpoint is reached.
3. *Establish a radius restriction.* Any sales within this area are deemed part of the sales at the premises and included in calculating Tenant’s percentage rent. Similar inclusion should be made for sales by related entities within restricted area.
4. *Broadly define “gross sales”.* Tenant must include sales of services as well as sales of merchandise. Care must be taken to include electronic sales generated from the premises as well as sales by sublessees and other parties operating in the premises.

B. Tenant's Position.

1. *There is a multitude of different ways to calculate percentage rent.*
 - a. Natural Breakpoint. Percentage rent rate (i.e. 5%) divided into the annual net rental (i.e. \$25,000) produces a “breakpoint” of \$500,000.
 - b. Unnatural Breakpoint. As many options as can be created. Examples include 5% to the breakpoint and 6% over; 6% to the breakpoint and 5% over; an arbitrary sales level with any given percentage over that point.
 - c. Recaptures from Percentage Rent.
 - i. Payment of Real Estate Taxes
 - ii. Payment of Insurance
 - iii. Payment of Common Area Maintenance
 - iv. Repayment of some of the cost of the tenant's store construction and build out.
 - v. May be 100% recapture of the item, some percentage only, or some percentage of the percentage rent that is payable. (100% of the payment of real estate taxes, but only out of 50% of the percentage rent that is otherwise due.)
2. *Payment on an annual basis.* Tenant will report sales monthly, but only pay estimate percentage rent annually within 60 days after the close of the fiscal year upon which sales are calculated. This avoids ups and downs of seasonal sales periods such as Back to School and Christmas.

3. *Avoid a radius restriction.* If the retailer's business judgment calls for a store "nearby," then there must be adequate sales potential to support the additional store(s).
4. *Accurately define "gross sales".* Permit exclusions for low margin items such as tobacco, 3rd party prescription sales, employee sales, and transfers of merchandise between tenant's stores. When departments are leased, include only the rent paid, not the actual sales generated.

C. See Sample Percentage Rent and Gross Sales Provisions.

III. CO-TENANCY REQUIREMENTS.

A. Landlord Position.

1. *Avoid.* Or agree to initial co-tenancy only.
2. *Allow substitutions and replacements.* Landlord can substitute other retailers for named co-tenants. To the extent named co-tenants have assignment/subletting rights, allow for this situation.
3. *Anticipate temporary closures.* Plan for co-tenancy failure during renovations, remodeling and repairs following damage.
4. *Limit remedies.* Do not have any remedies during curative time period and then allow for rent reduction or alternative percentage rent payment only. Require tenant to either terminate or reinstate original rent after agreed upon time frame.

B. Tenant's Position.

1. *Required.* Co-tenancy required as a condition of opening or paying minimum rent, and often includes both anchor tenants and a specified percentage of small shops or a minimum square footage of small shops.
2. *Allow substitutions and replacements, but only within a tight time frame.* Landlord can substitute other retailers for named co-tenants, but only to the extent that the substituted retailers are “comparable or similar” to the initial retailer. If not replaced within the time frame, need a right to either terminate the lease or shift to percentage of sales as the total, gross rent.
3. *Temporary closures.* Permitted, but only to the extent that the time frames in the above section are met.
4. *Broad remedies.* Percentage Rent and Termination Rights as described above.

IV. COMMON AREA MAINTENANCE/TENANT'S PROPORTIONATE SHARE.

A. Landlord's Position.

1. *Include everything.* In addition to costs of operating and maintaining the common areas, include accounting and legal fees, capital expenses, depreciation of equipment, reserves, management and administrative charges.
2. *Require contribution to a Promotion Fund.* Tenant should be required to participate in promotional activities at the Shopping Center or to join a merchant's association for similar purposes.

3. *Bill monthly.* Tenant should contribute its proportionate share based upon Landlord's estimate, which can be increased at any time upon prior notice. Provide for an annual reconciliation.
4. *Establish Tenant's rights to use common areas.* Incorporate rules and regulations. Permit Landlord to utilize the common areas for activities and work areas.
5. *Define Tenant's Proportionate Share.* Reduce the denominator by areas for which Landlord does not maintain common areas or has not yet built future phases in a project. Also exclude non-retail areas or areas that are not exclusively used by tenants.

B. Tenant's Position.

1. *Narrow Definition.* Permit only basic costs of operating and maintaining the common areas. These may include accounting and legal fees, but specifically limited to expenditures related to the common areas. Be sure to exclude capital expenditures and depreciation of equipment unless these produce an OVERALL reduction in common area costs. Avoid reserves, and limit costs to EITHER management or administrative charges, but NOT both. Provide for an annual reconciliation and an audit right for the tenant.
2. *Promotion Fund or Merchants' Association.* These are common and accepted in regional malls, but are mostly useless in strip center environments and should be prohibited.

3. *Bill No More Often than Quarterly.* Tenant should contribute its proportionate share based upon Landlord's reasonable estimate, and require the majority vote of retailers for increases above a set annual increase. Provide for an annual reconciliation and an audit right for the tenant.
 4. *Establish Tenant's rights to use common areas.* Incorporate rules and regulations. Permit Landlord to utilize the common areas for activities and work areas.
 5. *Define Tenant's Proportionate Share.* Be sure the denominator is RENTABLE space and not RENTED space, or your share of costs will increase with increased vacancy. TRY to have all anchor or major tenant's spaces included in the denominator.
- C. See Sample Common Area Definition, Provision, Tenant's Contribution Provision, Promotion Fund Provision, Rules and Regulations, Tenant's Proportionate Share Provision and Phasing Provision.

V. ASSIGNMENT AND SUBLETTING.

A. Landlord's Position.

1. *Permit only with Landlord's prior written consent.* Only exception should be internal transfers where assignee is equal to or exceeds original Tenant in financial strength.
2. *Require background information on assignee.* Since the experience and financial strength of the operation may impact percentage rent or other criteria important to Landlord, a thorough investigation must be made.

3. *Consider requiring new or additional guaranties.* In any event, do not release original Tenant or original guarantors from payment and performance under this lease.
4. *Consider recapture rights.* Landlord may prefer to simply take the space back rather than permit the assignment.
5. *Require delivery of profits.* Landlord shall receive increase in rent or other consideration.
6. *Limit Tenant's remedies for Landlord's failure to approve assignment.* This is relevant only where the state's law requires landlords to be reasonable in their approval rights.

B. Tenant's Position.

1. *Permit consent in specified situation.* No consent should be required in the event of a merger or sale of "substantially all of Tenant's stores in the MAS where the Premises are located." All other transfers should require "Landlord's reasonable consent."
2. *Require background information on assignee.* OK
3. *No new or additional guaranties.* If replacement tenant has new worth equal to or greater than tenant's at the time of the lease execution, permit release of departing tenant's liability.
4. *Prohibit recapture rights.* The tenant has built out the Premises and built traffic to the store. It must be able to recoup these costs via a sale of the lease.

5. *Prohibit delivery of profits.* Any sublease profits are being applied to the costs and goodwill described in the above section.

6. *Permit Tenant's remedies for Landlord's failure to approve assignment.* At the least, provide for implied consent to the assignment or sublease if no response is received from the Landlord within a specified time period (10 to 30 days).

C. See Sample Assignment and Subletting Provision.

VI. SIGNAGE.

A. Landlord's Position.

1. *Require conformity.* Landlord wants to maintain a consistent look throughout center. Therefore, it is important to attach specific sign criteria.

2. *Permit Landlord to modify criteria and require sign changes.* This is necessary to encourage renovations and remodeling within the center.

3. *Avoid providing rights on Pylon or Monument Signs.* These should be reserved for largest anchors only. If required, allow Landlord flexibility on location of signs and position and size of panels thereon.

B. Tenant's Position.

1. *Require conformity but permit Logotypes.* Tenants, especially regional and national retailers, have well known logos and script that must be permitted. Although the Landlord wants to maintain a consistent look throughout center, retailer identification is crucial to success.

2. *Permit Landlord to modify criteria and require sign changes, but ONLY if Landlord pays for replacement signage.* Allowing the Landlord unfettered rights to modify the sign criteria is equal to writing a blank check for unlimited signage.
3. *Obtain rights on Pylon or Monument Signs.* Depending upon the size of the shopping center, even moderate sized tenants should have an opportunity for at least one pylon or monument sign as most centers have multiple pylons.

SAMPLE PROVISIONS

1. Use and Operation – Landlord’s Position.

- (a) The Premises shall be occupied and used exclusively for the retail sale of _____ and for no other use or purpose whatsoever. Nothing contained in this Lease shall be deemed to give Tenant an express or implied exclusive use in the Shopping Center. Notwithstanding anything to the contrary contained in this Lease, Tenant shall open for business in the Premises on or before the Commencement Date set forth above, shall operate one hundred percent (100%) of the Premises during the Term, and shall keep the Premises fully stocked with merchandise and staffed with personnel to maximize Gross Sales at the Premises at all times. Tenant shall conduct its business in the Premises on all business days during the hours which from time to time may be reasonably determined by Landlord, but in no event less than eight (8) hours in a business day, six (6) days a week and sixty (60) hours a week. Tenant may close the Premises during reasonable periods for repairing, cleaning or decorating the Premises, with the prior written consent of Landlord. Tenant shall pay Landlord as liquidated damages, in addition to and not in lieu of Landlord’s other remedies, two hundred percent (200%) of the daily Fixed Rent for each day, or fraction thereof, that Tenant fails to keep open and operate in the Premises as required under this Lease.
- (b) Tenant agrees to conduct its business in the Premises under the following Trade Name:
_____.
- (c) Tenant agrees to conduct its labor relations and its relations with its employees, agents and contractors in such manner as to avoid all strikes, picketing and boycotts, of, on, or about the Premises and the Shopping Center. Tenant further agrees that if, during the period of initial construction of the Premises, any of its employees, agents or contractors strike, or if picket lines or boycotts or other visible activities objectionable to Landlord are established or conducted or carried out against Tenant or its employees, agents or contractors, or any of them, on or about the Premises or the Shopping Center, Landlord shall have the right to require Tenant and, when so required, Tenant shall immediately close the Premises to the public and remove all employees therefrom until the dispute giving rise to such strike, picket line, boycott, or objectionable activity has been settled to Landlord’s satisfaction.
- (d) Tenant shall use and occupy the Premises in accordance with all applicable federal, state and local laws, statutes, orders, ordinances, codes, rules and regulations (“Law” or “Laws”) and shall keep the Premises in a clean, careful, safe, and proper manner. Tenant shall not use, or allow the Premises to be used, for any purpose other than as specified in this Lease and shall not use or permit the Premises to be used for any unlawful, disreputable, or immoral purpose or in any way that will injure the reputation of the Shopping Center. Tenant shall not permit any activities in the Premises which may create or cause noise levels which are audible outside the Premises and disturbing to neighboring residences, other tenants or their customers or employees. Tenant shall not permit the Premises to be occupied in whole or in part by any other person or entity.

Tenant shall not cause or permit the use or occupancy of the Premises to be or remain a nuisance or disturbance, as determined by Landlord in its sole discretion, to neighboring residences, other tenants, occupants, or users of the Shopping Center. Tenant agrees to comply with the regulations, requirements and recommendations of any insurance underwriter, inspection bureau or similar agency, pertaining to the portion of the Premises installed by Tenant. Tenant shall permit Landlord to comply with the regulations, requirements and recommendations pertaining to the portion of the Premises installed by Landlord. Tenant shall give Landlord, upon Landlord's request, any information within its knowledge or possession regarding the environmental condition of the Premises for Landlord to determine if Landlord must comply with any Laws pertaining to the environmental condition of the Premises or the Shopping Center, and for Landlord to accurately complete any form or otherwise provide any information required under any such Laws. Tenant shall, upon written notice from Landlord, discontinue any use or operation of the Premises which is declared by any governmental authority to be a violation of Law. None of the agreements of Tenant contained in this subsection (d) or elsewhere in this Lease shall excuse Tenant from the performance of its obligations under Subsection (g) immediately below.

- (e) Tenant shall not at any time use or occupy the Premises in violation of the certificates of occupancy issued for the Shopping Center or the Premises, and in the event that any department of the state in which the Shopping Center is located or the city, town, village or county in which the Shopping Center is located shall at any time contend or declare that the Premises are used or occupied in violation of such certificate or certificates of occupancy, Tenant shall, upon five (5) days notice from Landlord or any such governmental agency, immediately discontinue such use of the Premises (and otherwise remedy such violation). The failure by Tenant to discontinue such use shall be considered a default under this Lease and Landlord shall have the right to exercise any and all rights and remedies provided herein or by Law. The statement in this Lease of the nature of the business to be conducted by Tenant in the Premises shall not be deemed or construed to constitute a representation or guaranty by Landlord that such business will continue to be lawful or permissible under any certificate of occupancy issued for the Shopping Center or the Premises, or otherwise permitted by Law.
- (f) Tenant shall not use any Shopping Center system in excess of its capacity or in any other manner which may damage such system or the Shopping Center. Machinery and mechanical equipment shall be placed and maintained by Tenant, at Tenant's expense, in locations and in settings sufficient in Landlord's reasonable judgment to absorb and prevent vibration, noise and annoyance.
- (g) As used herein, the term "Hazardous Material" means any hazardous or toxic substance, material or waste which is or becomes regulated by any local governmental authority, the state in which the Shopping Center is located or the United States Government, including, without limitation, any material or substance which is (i) defined or listed as a "hazardous waste", "extremely hazardous waste", "restricted hazardous waste", "hazardous substance" or "hazardous material" under any applicable Law, (ii) petroleum, or (iii) asbestos.

- (i) Tenant hereby agrees that all operations or activities upon, or any use or occupancy of the Premises, or any portion thereof, by Tenant, its assignees, subtenants, and their respective agents, servants, employees, representatives and contractors (collectively, "Tenant Affiliates"), throughout the term of this Lease, shall be in all respects in compliance with all Laws then governing or in any way relating to the generation, handling, manufacturing, treatment, storage, use, transportation, release, spillage, leakage, dumping, discharge or disposal of any Hazardous Material.
- (ii) Tenant agrees to indemnify, defend and hold Landlord and Landlord Affiliates (hereinafter defined in Section 14) harmless from any and all claims, actions, administrative proceedings (including informal proceedings), judgments, damages, punitive damages, penalties, fines, costs, liabilities, interest or losses, including reasonable attorneys' fees and expenses, consultant fees, and expert fees, together with all other costs and expenses of any kind or nature that arise during or after the Term of this Lease, directly or indirectly, from or in connection with the presence, suspected presence, release or suspected release of any Hazardous Material in or into the air, soil, surface water or groundwater at, on, about, under or within the Premises or the Shopping Center, or any portion of either thereof by Tenant or Tenant Affiliates, or from or in connection with the failure of Tenant or Tenant Affiliates to comply with any Laws or other requirements regarding protection of the environment, public health, or safety.
- (iii) In the event any investigation or monitoring of site conditions or any clean-up, containment, restoration, removal or other remedial work (collectively, the "Remedial Work") is required under any applicable Law, by any judicial order, or by any governmental entity as the result of operations or activities upon, or any use or occupancy of any portion of the Premises by Tenant or Tenant Affiliates, then, at Landlord's option, either Tenant shall perform or cause to be performed the Remedial Work in compliance with such Law or Landlord may cause the Remedial Work to be performed and Tenant shall reimburse Landlord within ten (10) days of demand therefor. All Remedial Work performed by Tenant shall be performed by one or more contractors, selected by Tenant and approved in advance in writing by Landlord, and under the supervision of a consulting engineer selected by Tenant and approved in advance in writing by Landlord. All costs and expenses of such Remedial Work shall be paid by Tenant, including, without limitation, the charges of such contractor(s), the consulting engineer, and Landlord's reasonable attorneys' fees and costs incurred in connection with monitoring or review of such Remedial Work. Nothing in this Subsection (g) (iii) shall affect any of Landlord's rights (or Tenant's obligations) pursuant to Subsection (g) (ii) above or elsewhere in the Lease.
- (h) Each of the covenants and agreements of Tenant set forth in this section shall survive the expiration or earlier termination of this Lease.

Use and Operation – Tenant’s Position.

The Demised Premises may be used for any lawful purpose.

During the initial term of this lease or during any renewal period hereunder, no portion of the Shopping Center (excluding the Demised Premises) shall be used:

- (a) For the purposes of, or which is permitted to be, the sale of

(“Prohibited Uses”);

(b) For any purpose which would permit more than (i) one thousand (1,000) square feet of space to be used for any Prohibited Uses, or (ii) five percent (5%) of such user’s floor area to be used for purposes of any Prohibited Uses, whichever is less; or

(c) For any purpose which, taken in the aggregate for the entire Shopping Center, would permit more than five thousand (5,000) square feet of space in the Shopping Center to be used for any of the Prohibited Uses.

In addition, during the initial term of this lease and during any renewal period hereunder:

(a) No portion of the Shopping Center located within three hundred linear feet (300’) of the demising walls of the Demised Premises shall be used as a restaurant, or for office purposes (such as medical or office uses), or for any use that requires parking in excess of five (5) spaces for each one thousand (1,000) square feet of leasable floor area, or for any use prohibited under subparagraphs (c) or (d) immediately below;

(b) No outlot (or any portion thereof) within the Shopping Center shall be used for purposes of any of the Restricted Uses (as hereinafter defined), if such outlot shall have the right to use any of the parking areas located within one hundred feet (100’) of the Demised Premises; and

(c) No portion of the Shopping Center shall be occupied or used, directly or indirectly, for a nightclub or other entertainment facility, bowling alley, arcade, amusement center, theater, movie theater, fitness center, health club, spa, game room, skating rink, billiard room, massage parlor, adult book store or any other purpose which includes the display or sale of pornographic or obscene materials or off-track betting facility, flea market, second hand store, pawn shop, blood bank, goodwill store, bar, liquor store or store selling alcoholic beverages for off premises consumption, tavern, pub, ballroom, dance hall, day care center, discotheque, beauty school, barber college, offices (other than a bank), place of instruction, reading room or any operation catering primarily to students or trainees rather than to customers or for any use prohibited under subparagraph (d) immediately below.

(d) If at any time during the term of this lease (and any renewals hereunder) Landlord (or any entity in which Landlord or any shareholder, partner, or member of Landlord owns or controls a beneficial interest, or any affiliate of Landlord) shall purchase, acquire, lease, or otherwise obtain the ownership or beneficial use of any property within a one (1) mile radius of the Shopping Center, the Prohibited Uses shall be deemed to be covenants running with such additional property and shall bind and burden such additional property and shall inure to the benefit of the Demised Premises and Tenant to the same extent that such additional property would have been subject to such restrictions if it were part of the "Shopping Center" as of the date of execution hereof.

2. Percentage Rent – Landlord’s Position.

- (a) In addition to Annual Fixed Rent, and as a material inducement for Landlord to lease the Premises to Tenant, Tenant agrees to pay Landlord Percentage Rent equal to _____% of Gross Sales in excess of \$_____.
- (b) Percentage Rent for each period from January 1 through and including the immediately following December 31 (a “Calendar Year”) during the Term shall equal the amount by which Tenant’s Gross Sales exceed the applicable Percentage Rent breakpoint set forth above which is in effect during that Calendar Year multiplied by the percentage rate set forth above. The breakpoint shall be increased on a Lease Year basis on the same date as increases in Fixed Rent. If the increase does not occur on a Calendar Year basis, the breakpoint for the Calendar Year in which there is an increase shall be the amount which results by multiplying one-twelfth (1/12th) of each breakpoint by the same number of months in which the corresponding Fixed Rent is in effect. The applicable breakpoint set forth above shall be prorated based on the number of days of any partial Calendar Year (including, without limitation, for any Calendar Year in which Tenant stops conducting business in the Premises solely as permitted hereunder, the number of days in such Calendar Year during which Tenant did conduct business).
- (c) Percentage Rent during the Term shall be payable on a monthly basis. Prior to the beginning of each Calendar Year, Landlord may send Tenant an estimate of annual Percentage Rent due for that Calendar Year based on ninety percent (90%) of the amount of Percentage Rent due from Tenant for the immediately preceding Calendar Year. The estimate shall be adjusted to equal twelve (12) times the average monthly Percentage Rent due if Tenant has not been in possession of the Premises for twelve (12) months. On or before the first of each month of each Calendar Year, Tenant shall pay Landlord one-twelfth (1/12) of the estimated annual Percentage Rent due for that Calendar Year. Tenant shall deliver to Landlord the monthly reports of Gross Sales required pursuant to Section 5(b) and, within thirty (30) days after the end of each Calendar Year, Tenant shall deliver to Landlord a complete and accurate statement, signed and certified by Tenant, showing in detail (i) Gross Sales for that Calendar Year; and (ii) the computation of Percentage Rent for that Calendar Year. If the statement reflects that Tenant owes Landlord Percentage Rent, Tenant shall pay the Percentage Rent (less any estimated Percentage Rent theretofore paid for the period in question) to Landlord at the time the statement is delivered to Landlord. If the statement reflects that the sum of monthly Percentage Rent payments previously made during that Calendar Year exceeds the Percentage Rent, the amount of the excess shall be credited against the next due monthly payments of Percentage Rent actually due for that Calendar Year or subsequent Calendar Years. If the excess occurs in the last Calendar Year of the Term, Landlord shall pay the amount of the excess to Tenant within thirty (30) days after receipt of the statement by Landlord.
- (d) If at any time during the Term, Tenant, its parent corporation or subsidiary corporation, its franchisor or franchisee, its Guarantor hereunder, or any person, firm, corporation or other entity having an interest in any of the aforementioned parties or any other person, firm or corporation who or which controls or is controlled by Tenant or any of the

aforementioned parties, shall directly or indirectly, either individually or as a partner, shareholder, agent, employee or otherwise, own, operate, maintain or have any significant affiliation, investment or interest in any business establishment similar to or in competition with that being operated at the Premises within the radius set forth in the Radius Restriction Sections of the Reference Pages from the perimeter of the Shopping Center, except those carried on as of the date of the execution of this Lease, then, the same shall constitute a default.

- (e) In addition to Landlord's other remedies, fifty percent (50%) of the Gross Sales from any such other business establishment or establishments within a _____ mile radius shall be included in the Gross Sales made on, in or from the Premises during each Calendar Year and Percentage Rent shall be computed upon the aggregate of the Annual Gross Sales made on, in or from the Premises and on, in or from any such other business establishment or establishments then located within the aforesaid area. Tenant shall be obligated to submit monthly sales statements and maintain records with respect to the sales and transactions of such other business establishment or establishments, and Landlord shall have the right to examine and audit the same just as though such sales and transactions had been made on, in or from the Premises. For purpose of this Section, any substantial increase in size or other substantial change in the type of business being carried on at any locations in existence as of the date of execution of this Lease, or change in location thereof to any other location within the area covered hereby, shall be deemed to remove the exemption created for such location from the operation of the provisions of this Section. As used herein, the term "radius" shall mean and refer to a geometric measurement and not the actual distance over available roadways. Tenant agrees not to operate its business so as to breach or violate any restrictive covenant contained in any other lease entered into by Tenant, nor violate any restrictive agreement contained in any contract entered into by Tenant, nor violate any restrictive agreement contained in any judgment or decree imposed upon Tenant.

3. Gross Sales Defined – Landlord’s Position.

- (a) Gross Sales shall be construed to include the entire amount of the actual sales price of all goods and services provided at, in, on, or from the Premises, including, without limitation, mail, telephone, electronic, video, computer or other technology-based system orders received or filled at the Premises, including gift and merchandise certificates, charges for services or rentals, all deposits not refunded to purchasers, orders taken at or from the Premises (although said orders may be filled elsewhere), and sales and receipts by any sublessee, concessionaire, licensee or other party in the Premises. Each installment or credit sale shall be treated as a sale for the full price in the month during which the installment or credit sale shall be made, irrespective of the time when Tenant shall receive payment (whether full or partial) from its customer. Layaway sales shall be included in Gross Sales to the extent of the down payment and any further payments during each calendar month. Gross Sales shall not include the following: (i) sums collected and paid by Tenant for any sales or excise tax imposed by any duly constituted governmental authority; (ii) the exchange of merchandise between stores of Tenant, if any, if the exchanges of merchandise are made solely for the convenient operation of the business of Tenant and not for the purpose of consummating a sale which has previously been made at, in, on, or from the Premises, and/or for the purpose of or having the effect of depriving Landlord of the benefit of a sale which otherwise would be made at, in, on, or from the Premises; (iii) the amount of returns to shippers or manufacturers; (iv) the amount of cash or credit refunds made upon any sale if the merchandise sold, or some part of the merchandise, is subsequently returned by the purchaser and accepted by Tenant; (v) sales of fixtures not in the ordinary course of Tenant’s business; or (vi) sums and credits received in settlement of claims for loss or damage to merchandise. No deductions shall be allowed for uncollected or uncollectible credit accounts and bank checks, or charges for bank credit cards.
- (b) All sales shall be recorded by means of cash registers or point of sale devices approved by Landlord. All cash registers and point of sale devices shall be equipped with sales totalizer counters for all sales categories, and a sequential transaction totalizer counter, which counters are locked in, constantly accumulating, and which cannot be reset. The registers shall also contain tapes upon which sales details and sequential transaction numbers are imprinted. Beginning and ending sales totalizer readings shall be made a matter of daily record. In the event of admission charges or rentals, Tenant shall issue serially numbered tickets for each admission or rental and shall keep an adequate record of the tickets, both issued and unissued. Landlord may require Tenant to provide Landlord by noon of the next business day a recapitulation of Gross Sales to be included on forms provided by Landlord. Failure to make available a proper receipt to each customer upon request shall constitute a breach of this Lease.

Tenant shall keep on the Premises, or at its principal office, true and complete records and accounts of all Gross Sales, including daily bank deposits, in, at, and from the Premises. The books and records shall include such sale records as would normally be examined by an accountant pursuant to generally accepted auditing standards in performing an audit of Tenant’s sales or the sales of its subtenants or concessionaires.

Tenant agrees to accurately record all sales in accordance with generally accepted accounting principles.

On or before the fifteenth (15th) day of each month, Tenant shall furnish to Landlord a true and accurate statement for each preceding month of all Gross Sales during the preceding month (showing the refunds and returns deducted in computing the amount of Gross Sales). The statement shall be certified by an authorized representative of Tenant to be correct. Tenant agrees to give Landlord access during business hours to Tenant's books and records. Tenant agrees that it shall keep and preserve for at least thirty-six (36) months after the end of each Calendar Year all sales slips, cash register or point of sale tape readings, sales books, bank books, duplicate deposit slips, and other evidence of Gross Sales for that year. Landlord shall have the right at any time and from time to time to audit all of the books of account, bank statements, documents, record returns, papers, and files of Tenant relating to Gross Sales, and Tenant on request of Landlord shall make all such matters available for examination at the Premises or at Tenant's principal office. If Landlord should have an audit made for any year and the Gross Sales shown by Tenant's statement for that year shall be found to be understated by more than three percent (3%) or contain any willful inaccuracies, then, in addition to immediately paying Landlord the full amount of the understated Percentage Rent, Tenant shall pay to Landlord the cost of the audit. If at any time Landlord shall audit the Gross Sales and the audit reveals an understatement of more than three percent (3%), the same shall constitute a default by Tenant. Landlord shall have the right to terminate this Lease upon notice to Tenant if there should be more than two (2) audits during the Term which reveal understatements of Gross Sales by Tenant of more than three percent (3%).

- (c) All statements of Gross Sales shall be delivered to Landlord's Address for Rent or to such other place as Landlord may from time to time direct by written notice to Tenant.
- (d) Computation of Percentage Rent shall be made separately for each calendar month and each Calendar Year of the Term, it being understood and agreed that the Gross Sales of any Calendar Year and the Percentage Rent due shall have no bearing on or connection with the Gross Sales of any other Calendar Year.
- (e) It is understood and agreed that Landlord shall not be construed or held to be a partner, co-venturer or associate of Tenant in the conduct of Tenant's business, nor shall Landlord be liable for any debts incurred by Tenant in the conduct of Tenant's business. It is understood and agreed that the relationship is and at all times shall remain that of Landlord and Tenant. Landlord and Tenant acknowledge and agree that neither shall be subject to any implied obligations to the other by reason that this Lease provides for the payment of Percentage Rent.

4. Common Areas Defined – Landlord’s Position.

- (a) Subject to the Rules and Regulations specified in this lease and the other applicable provisions of this Lease, Landlord grants to Tenant and Tenant’s employees, agents, customers, and invitees the nonexclusive right, during the Term, to use, subject to the rights of governmental authorities, easements, public highways and other restrictions of record, in common with others granted the use thereof, the Common Areas located within or benefiting the Shopping Center. “Common Areas” shall mean, as they may from time to time exist, those portions of the Shopping Center which are exclusive of gross leasable area and other areas which are set aside as the exclusive use areas of Landlord or its designees and shall include, without limitation, the parking areas, roadways, pedestrian sidewalks, roofs, loading docks, delivery areas, landscaped areas, and all other areas or improvements which may be provided by Landlord for the general use of tenants of the Building and the Shopping Center and their agents, employees, and customers whether within or without the Shopping Center. Landlord shall be responsible for the operation, management, and maintenance of the Common Areas. The manner in which the Common Areas shall be maintained and expenditures in connection therewith shall be at the sole discretion of Landlord. Landlord shall at all times have the right to utilize the Common Areas for promotions, exhibits, carnival type shows, rides, outdoor shows, displays, automobile and other product shows, the leasing of kiosks and food facilities, landscaping, decorative items, and any other use which, in Landlord’s sole judgment, tends to attract customers to, or benefit the customers or tenants of the Shopping Center. Landlord may temporarily close parts of the Common Areas for such periods of time as may be necessary for (i) temporary use as a work area in connection with the construction of buildings or other improvements within the Shopping Center or contiguous property; (ii) repairs or alterations in or to the Common Areas or to any utility-type facilities; (iii) preventing the public from obtaining prescriptive rights in or to the Common Areas; (iv) emergency or added safety reasons; or (v) doing and performing such other acts as in the use of good business judgment Landlord shall determine to be appropriate for the Shopping Center; provided, however, that Landlord shall use reasonable efforts not to unduly interfere with or disrupt Tenant’s business.
- (b) Tenant agrees to keep the Common Areas free and clear of any obstructions created or permitted by Tenant or resulting from Tenant’s operation and to use the Common Areas only for normal activities: parking, ingress and egress by Tenant and its employees, agents, representatives, licensees and invitees to and from the Premises and Shopping Center. If, in the opinion of Landlord, unauthorized persons are using the Common Areas by reason of the presence of Tenant in the Premises, Tenant, upon demand of Landlord, shall correct such situation by appropriate action and proceedings against all such unauthorized persons. Nothing herein shall affect the rights of Landlord at any time to remove any such unauthorized persons from said areas or to prevent the use of said areas by such unauthorized persons. Landlord shall have and reserves the right at any time to redesignate, modify, expand, reduce and change the Common Areas and to use and permit such uses thereof as do not materially and adversely affect Tenant’s use of the Premises.

- (c) Landlord shall be the sole determinant of the type and amount of security services to be provided to the Shopping Center, if any. In all events, Landlord shall not be liable to Tenant, and Tenant hereby waives any claim against Landlord, for (i) any unauthorized or criminal entry of third parties into the Premises or the Shopping Center, (ii) any damage to persons or property, or (iii) any loss of property in and about the Premises or the Shopping Center, by and from any unauthorized or criminal acts of third parties, regardless of any action, inaction, failure, breakdown, malfunction or insufficiency of the security services provided by Landlord.

- (d) Landlord shall acquire or obtain the use of additional land not presently part of the Common Areas, and shall elect to make the same available for parking and other purposes for which the Common Areas are utilized, then all of the costs and expenses referred to in the lease which are incurred in connection with the additional land shall be included in Common Area Cost.

Common Areas Defined – Tenant’s Position.

During the term of this lease and any extension thereof, Landlord shall comply with any and all laws, rules, regulations, ordinances, and orders with respect to the Shopping Center and common areas, and the operation, maintenance, and repair thereof, including without limitation applicable building codes, zoning ordinances, and environmental laws. Landlord shall not perform and shall not permit any other tenant or occupant of the Shopping Center to perform any acts or carry on any practices which would damage the Demised Premises or be a nuisance or menace to Tenant or which would interfere with the right of quiet enjoyment granted to Tenant or to other tenants and occupants of the Shopping Center.

Landlord shall notify Tenant in writing, at least ten (10) days prior to the commencement of any reconstruction, repairing or repaving of the common areas, and/or any restriction or closure of any access roads or entrances to the Shopping Center. Landlord shall schedule its reconstruction, repairs and repaving so as to minimize the length and scope of disruptions in the operation of the common areas of the Shopping Center. If any reconstruction, repairing, repaving, restriction, and/or closure impedes or interferes with normal access to the Demised Premises in a manner which interferes with Tenant’s business therein and such condition continues in excess of five (5) days after notice to Landlord from Tenant, then until such work no longer substantially impedes or interferes with normal access to the Demised Premises, the minimum rent and other charges shall abate during the period subsequent to such five-day period until such condition ceases and Tenant shall pay one percent (1%) of gross sales from the Demised Premises as rent during such period.

Should Tenant, at any time, utilize portions of the land described in **EXHIBIT “A”** for outdoor shows, entertainment or such other promotional uses which tend to attract the public, Tenant shall give Landlord notification of such intended use, a reasonable time in advance thereof, and, on written request of Landlord, supply Landlord with reasonable proof of adequate insurance or indemnification against damage to property, injuries to persons and loss of life sustained in connection therewith. In addition, Tenant shall be responsible for any physical damage to the improvements upon said land resulting from said use.

Tenant shall have the right to use the areas adjacent to its loading dock for the parking and storage of trucks, trailers and containers and for such other uses which do not impair the movement of traffic around the Shopping Center or impede fire lane access.

5. Common Area Charges – Landlord’s Position.

(a) Tenant agrees to pay to Landlord, as additional rent (“Additional Rent”) for the Premises, beginning on the Delivery Date and ending on the expiration of the Term, without deduction or setoff, the following amounts:

(i) Tenant’s Proportionate Share of the cost of operating and maintaining the Common Areas (the “Common Area Cost”), including, without limitation, the cost of the following: lighting, utilities, cleaning, snow and trash removal, line painting, security (if provided), management fees, maintenance, materials, labor costs, equipment (including, without limitation, the cost of service agreements on equipment), tools, general repairs, employee benefits and payroll taxes, accounting fees, legal fees, permits, license and inspection fees, sales, use and service taxes, and the repair or replacement of paving, curbs, stations, first-aid stations, comfort stations, stairways, truck ways, loading docks, package pick-up stations, sidewalks, ramps, roofs, the parking lot, driveways, any garage, landscaping, drainage facilities, and lighting facilities, including traffic lights, as may be necessary from time to time, and any other cost of operation of the improvements on the Common Areas. The Common Area Cost shall include the testing of any sprinkler alarm system or other fire prevention or suppression systems required by any governmental entity or insurance company in connection with the issuance of any permits or licenses or insurance policies, depreciation of equipment acquired for use in maintenance of the Common Areas, but shall not include the original cost of the equipment. Landlord has the right to include in Common Area Cost, and to establish as a reserve, such amounts (and for such periods of time) as Landlord deems reasonable for the maintenance, repair and restoration of the roof and paving of the Shopping Center. The amount of such reserve charged as a Common Area Cost for any Calendar Year shall not exceed five percent (5%) of the total Common Area Cost for said year, exclusive of Tax Cost and Insurance Cost for the same period.

6. Promotion Fund – Landlord’s Position.

Tenant shall pay Landlord, upon Landlord’s request, prior to the Delivery Date (and on each Lease Year anniversary date) the Annual Promotional Fund Cost of \$_____ per square foot, or such lesser amount indicated in such Landlord notice, as Tenant’s annual payment for Tenant’s share of costs (“Promotional Fund Costs”) of a promotional fund (“Promotional Fund”) to be used to pay costs and expenses incurred in connection with the formulation and execution of publicity programs for the promotion of the Shopping Center. Such programs, which at Landlord’s option shall be determined by Landlord or by an advertising agency or firm or volunteer committee of tenants, may include, without limitation, special events, shows, displays, advertisements, seasonal events, and promotional literature; provided, however, that Landlord or an outside advertising agency approved by Landlord shall have the right to review and approve the publicity programs, the items on the Promotional Fund budget for each year, and any amendments to the budget. A portion of the Promotional Fund may be applied to pay costs of administering the Promotional Fund.

7. Rules and Regulations – Landlord’s Position.

Tenant agrees that Landlord has the right, at any time and from time to time, to impose reasonable rules and regulations of general application governing the conduct of occupants of the Shopping Center and their use of the Common Areas. Tenant agrees to comply with the rules and regulations imposed by Landlord, including, without limitation, those rules and regulations in Exhibit “E”.

EXHIBIT “E”

RULES AND REGULATIONS

1. Landlord reserves the right to change from time to time the format of the signs or lettering on the sign and to require replacement of any signs previously approved pursuant to Section _____ to conform to Landlord’s new standard sign criteria established pursuant to any remodeling of the Shopping Center.
2. Tenant shall not, without the prior written consent of Landlord (i) paint, decorate or make any changes to the store front of the Premises; or (ii) install any exterior lighting, awning or protrusions, signs, advertising matter, decoration or painting visible from the exterior of the Premises or any coverings on exterior windows and doors, excepting only dignified displays of customary type in store windows. If Landlord objects in writing to any of the foregoing, Tenant shall immediately discontinue such use.
3. Tenant shall not (i) conduct or permit any fire, bankruptcy or auction sale (whether real or fictitious) unless directed by order of a court of competent jurisdiction, or conduct or permit any legitimate or fictitious “Going Out of Business” sale nor represent or advertise that it regularly or customarily sells merchandise as a “manufacturer’s outlet”, “distributor”, “wholesaler” or “warehouse”, but Tenant may represent and advertise that it conducts business at “offprice” or at “retail”; (ii) use, or permit to be used, the malls or sidewalks adjacent to the Premises, or any other area outside the Premises for solicitation or for the sale or display of any merchandise or for any other business, occupation or undertaking, or for outdoor public meetings, circus or other entertainment (except for promotional activities in cooperation with the management of the Shopping Center or an association of merchants within the Shopping Center); (iii) use or permit to be used any sound broadcasting or amplifying device which can be heard outside of the Premises or any flickering lights; (iv) operate or cause to be operated “elephant trains” or similar transportation devices; or (v) use or permit to be used any portion of the Premises for any unlawful purpose or otherwise contrary to Law, or use or permit the use of any portion of the Premises as regular living quarters, sleeping apartments or lodging rooms or for the conduct of any manufacturing business.
4. Tenant shall at all times keep the Premises at a temperature sufficiently high to prevent freezing of water pipes and fixtures. Tenant shall not, nor shall Tenant at any time, permit any occupant of the Premises to: (i) use, operate or maintain the Premises in such manner that any rates for any insurance carried by Landlord, or the occupant of any premises within the Shopping Center, shall thereby be increased; or (ii) commit waste,

perform any acts or carry any practices which may injure the Shopping Center or be a nuisance or menace to other tenants in the Shopping Center.

5. Tenant shall not obstruct any sidewalks, passages, exits, entrances, truck ways, loading docks, package pick-up stations, pedestrian sidewalk and ramps, first aid and comfort stations, or stairways of the Shopping Center. No tenant and no employee or invitee of any tenant shall go upon the roof of the Shopping Center without notifying Landlord prior thereto.
6. Landlord will furnish Tenant free of charge with two keys to each door lock in the Premises. Landlord may make a reasonable charge for any additional keys. Tenant, upon the termination of its tenancy, shall deliver to Landlord the keys to all doors of the Premises.
7. If Tenant requires telegraphic, telephonic, burglar alarm or similar services, it shall first obtain and comply with Landlord's instruction in their installation.
8. Tenant shall not place a load upon any floor which exceeds the designed load per square foot or the load permitted by Law. Landlord shall have the right to prescribe the weight, size and position of all equipment, materials, furniture or other property brought into the Premises. Heavy objects shall stand on such platforms as determined by Landlord to be necessary to properly distribute the weight. Business machines and mechanical equipment belonging to Tenant which cause noise or vibration that may be transmitted to the structure of Tenant's store or to any other space to such a degree as to be objectionable to Landlord or to any tenants shall be placed and maintained by Tenant, at Tenant's expense, on vibration eliminators or other similar devices. The persons employed to move equipment in or out of Tenant's store must be acceptable to Landlord. Landlord will not be responsible for loss of, or damage to, any equipment or other property from any cause, and all damage done to the Shopping Center by maintaining or moving such equipment or other property shall be repaired at the expense of Tenant.
9. The toilet rooms, toilets, urinals, wash bowls and other apparatus shall not be used for any purpose other than that for which they were constructed. No foreign substance of any kind whatsoever shall be thrown therein, and the expense of any breakage, stoppage or damage resulting from the violation of this rule shall be borne by the tenant who, or whose employees or invitees, shall be the cause of such breakage, stoppage or damage.
10. Tenant shall not install any radio or television antenna, loudspeaker or other device on the roof or exterior walls of Tenant's store. Tenant shall not interfere with radio or television broadcasting or reception from or in the Shopping Center or elsewhere.
11. Except as approved by Landlord, Tenant shall not damage partitions, woodwork or plaster or in any way deface the Premises. Tenant shall not cut or bore holes for wires. Tenant shall not affix any floor covering to the floor of the Premises in any manner except as approved by Landlord. Tenant shall repair any damage resulting from noncompliance with this rule.

12. Tenant shall not install, maintain or operate upon the Premises or in any Common Areas under the exclusive control of Tenant any vending machine or video game without Landlord's prior written consent.
13. Tenant shall comply with all Laws relating to solid waste management including, but not limited to, recycling. Unless otherwise prohibited by applicable Law, Tenant shall store all its trash and garbage in containers within its Premises and/or in the portion of the Common Areas designated by Landlord. Tenant shall not place in any trash box or receptacle any material which cannot be disposed of in the ordinary and customary manner of trash and garbage disposal. All garbage and refuse disposal shall be made in accordance with directions issued from time to time by Landlord.
14. No cooking shall be done or permitted by Tenant on the Premises without Landlord's prior written consent, except for brewing coffee and similar beverages and use of a single microwave oven by employees only, provided that such use is in accordance with all applicable Laws. In any event Tenant will not permit odors to emanate from the Premises.
15. Tenant shall not use in any space any hand trucks except those equipped with rubber tires and side guards or such other material-handling equipment as Landlord may approve. Tenant shall not bring any other vehicles of any kind into Tenant's store.
16. Employees of Landlord shall not perform any work or do anything outside of their regular duties unless under special instructions from Landlord.
17. All loading and unloading of goods shall be done only at such times, in the areas, and through the entrances, that may be designated for such purposes by Landlord. The delivery or shipping of merchandise, supplies and fixtures to and from the Premises shall be subject to such rules and regulations as in the judgment of Landlord are necessary for the proper operation of the Premises and the Shopping Center.
18. Tenant and Tenant's employees shall park their cars only in such portion of the parking area designated for those purposes by Landlord. Tenant shall furnish Landlord with state automobile license numbers assigned to Tenant's employees within five (5) days after taking possession of the Premises and shall thereafter notify Landlord of any changes within five (5) days after changes occur. In the event that Tenant or its employees fail to park their cars in designated parking areas as aforesaid, then Landlord, at its option, shall charge the Tenant Ten Dollars (\$10.00) per day or partial day per car parked in any area other than that designated.
19. Landlord may waive any one or more of these Rules and Regulations for the benefit of any particular tenant or tenants, but no such waiver by Landlord shall be construed as a waiver of such Rules and Regulations in favor of any other tenant or tenants, nor prevent Landlord from thereafter enforcing any such Rules and Regulations against any or all of the tenants of the Shopping Center.

20. These Rules and Regulations are in addition to, and shall not be construed to in any way modify or amend, in whole or in part, the terms, covenants, agreements and conditions of the Lease to which these Rules and Regulations are attached or any other lease of premises in the Shopping Center.
21. Tenant shall be responsible for the observance of all of the foregoing rules by Tenant's employees, agents, clients, customers, invitees and guests.
22. Tenant shall use, at Tenant's cost, such pest extermination contractor as Landlord may direct and at such intervals as Landlord may require.
23. Trailers, trucks or cars shall not be permitted to remain parked overnight in any area of the Shopping Center, whether loaded, unloaded or partially loaded. No parking shall be permitted of any trailer, truck or other vehicle in any area of the Shopping Center at any time for purposes of advertising or promotion without Landlord's prior written permission.

Tenant agrees to comply with all additional and supplemental rules and regulations upon notice of same from Landlord.

8. Tenant's Proportionate Share – Landlord's Position.

“Tenant's Proportionate Share” as used in this Lease shall mean a fraction, the numerator of which is the gross leasable area of the Premises and the denominator of which is the gross leasable area of the Shopping Center from time to time, as either may be remeasured from time to time by landlord to more accurately reflect the true gross leasable area. Notwithstanding the foregoing, in connection with the calculation of Tenant's Proportionate Share of Tax Cost, Insurance Cost and Common Area Cost (as such terms are hereinafter defined above), the denominator of such fraction shall be reduced by the gross leasable area of those portions of the Shopping Center for which Landlord is not obligated to incur such Tax Cost, Insurance Cost or Common Area Cost. The denominator in the above fraction shall increase or decrease with the further increase or decrease in the size of the Shopping Center. Gross leasable area of the Shopping Center means all ground floor area contained in the Shopping Center designated for tenants' or other occupants' exclusive occupancy.

9. Phasing – Landlord’s Position.

Tenant acknowledges that the Center may be developed in Phases as shown on Exhibit B, and that Phase III may be sold or developed by a party other than Landlord. If such is the case, Tenant agrees to the Lease being subject to a Reciprocal Easement Agreement (“REA”) provided the REA does not adversely affect Tenant’s ability to operate in the Premises as set forth in this Lease. Tenant acknowledges that Phases II and III might not be developed at the same time as Phase I which contains the Premises. Therefore, the Common Areas located in the Phase III area might not be completed and any square footage of buildings in said area will be subtracted from the formula for determining Tenant’s Proportionate Share of Common Area Maintenance Charges and Taxes until built.

10. Assignment and Subletting – Landlord’s Position.

- (a) Neither this Lease nor any interest in this Lease shall be sold, mortgaged, pledged, encumbered, assigned, transferred, or otherwise disposed of in any manner by Tenant, voluntarily or involuntarily, by operation of law, or otherwise, nor shall the Premises or any part of the Premises be sublet, used, or occupied for the conduct of any business by a third person, firm, or corporation or for any purpose other than authorized in this Lease. A sale or sales or transfer of fifty percent (50%) or more of the capital stock of Tenant (if Tenant is a limited liability company or a corporation) or of the interest in capital, profits, or losses of Tenant (if Tenant is a partnership) shall be deemed to be a prohibited assignment of this Lease within the meaning of this section. If Tenant desires to sublet the Premises, or any portion of the Premises, or assign this Lease, Tenant shall give written notice to Landlord at least ninety (90) days but not more than one hundred eighty (180) days prior to the proposed commencement date of the subletting or assignment. The notice shall set forth the following: (i) the name of the proposed subtenant or assignee, (ii) the current balance sheet and profit and loss statements for the proposed transferee or any other person to be liable for Tenant’s obligations under this Lease covering the prior three years (or for such shorter period as the proposed transferee or other person may have been in existence), all certified as true and correct by the proposed transferee, other person or an authorized officer thereof, (iii) a full description of the terms and conditions of the proposed Transfer, including copies of any and all documents and instruments, any purchase and sale agreements, sublease agreements, assignment agreements and all other writings concerning the proposed transfer, (iv) a description of the proposed use of the Premises by the proposed transferee, including any required or desired alterations or improvements to the Premises that may be undertaken by such transferee in order to facilitate its proposed use, (v) a business plan for the proposed transferee’s operations at the Premises, including a statement of projected income, expense, and cash flow for such operation for the two years following the proposed effective date of the Transfer, (vi) a list of personal, business and credit references of the proposed transferee, (vii) similar information for any guarantor or other person who will be liable in any manner for the payment of any amounts under the Lease, and (viii) any other information, documentation or evidence that may be reasonably requested by Landlord. Notwithstanding any permitted assignment or subletting, Tenant shall at all times remain directly and primarily liable for the payment of the rent and for compliance with all of its other obligations under this Lease. Upon the occurrence of a default under Section 20 of this Lease, which is not cured within any applicable grace period, if the Premises or any part of the Premises are then assigned or sublet, Landlord, in addition to any other remedies provided in this Lease or by law, may collect directly from the assignee or subtenant all rents due and becoming due to Tenant under the sublease and apply the rent against sums due Landlord from Tenant. The collection directly from an assignee or subtenant shall not be construed to constitute a novation or release of Tenant from the further performance of Tenant’s obligations. Any guaranty of Tenant’s performance executed as consideration for this Lease shall remain in full force and effect before and after any assignment or subletting. Landlord may require Tenant, and Tenant agrees, to execute a guaranty of this Lease before Landlord consents to any assignment or sublease. Landlord may proceed directly against Tenant without first exhausting any

remedies for default which Landlord may have against the assignee, subtenant or transferee of Tenant.

- (b) Landlord shall have the option, in its sole discretion, in the event of any proposed subletting or assignment, to terminate this Lease, or in the case of a proposed subletting of less than the entire Premises, to recapture the portion of the Premises to be sublet, as of the date the subletting or assignment is to be effective. The option shall be exercised by Landlord giving Tenant written notice within sixty (60) days following Landlord's receipt of Tenant's written notice as required above. If this Lease shall be terminated with respect to the entire Premises, the Term shall end on the date stated in Tenant's notice as the effective date of the sublease or assignment as if that date had been originally fixed in this Lease for the expiration of the Term. If Landlord recaptures only a portion of the Premises, the Annual Fixed Rent and Additional Rent during the unexpired Term shall abate, proportionately, based on the Annual Fixed Rent and Additional Rent due as of the date immediately prior to such recapture and Percentage Rent shall be calculated using the adjusted Annual Fixed Rent. Tenant shall, at Tenant's own cost and expense, discharge in full any outstanding commission obligation with respect to this Lease and any commissions which may be owing as a result of any proposed assignment or subletting, whether or not the Premises are rented by Landlord to the proposed Tenant or any other tenant.
- (c) Consent by Landlord to any assignment or subletting shall not include consent to a subsequent assignment or subletting of the Premises by Tenant or its assignee or sublessee or the consent to the assignment or transferring of any Lease renewal option rights (and such privileges shall be personal to the original Tenant under this Lease, shall not be assignable and shall terminate upon such assignment), unless Landlord specifically grants in writing such options, rights or privileges to the assignee or subtenant. Any sale, assignment, mortgage or other transfer of this Lease or subletting which does not comply with the provisions of this Section shall be void.
- (d) Notwithstanding Landlord's consent, if Tenant sells, sublets, assigns, or transfers this Lease and at any time receives periodic rent or other consideration which exceeds that which Tenant would at that time be obligated to pay Landlord, Tenant shall pay to Landlord one hundred percent (100%) of the gross increase in rent as the rent is received by Tenant and one hundred percent (100%) of any other consideration received by Tenant from the subtenant or the assignee. In no event may Tenant sublet all or any portion of the Premises at a square foot rental rate less than the greater of: (a) Landlord's prevailing rental rate for comparable space in the Shopping Center, as determined by Landlord, in its sole and absolute discretion; or (b) the current Annual Rent under this Lease, as of the date of Tenant's sublet request.
- (e) Should Landlord consent to an assignment or sublease of this Lease, Tenant, its proposed assignee or subtenant and Landlord shall execute an agreement prepared by or acceptable to Landlord under which the proposed assignee or subtenant agrees to be bound by the terms and conditions of this Lease. Tenant agrees to reimburse Landlord for attorney's fees and administrative expense involved with the review, processing or preparation of any documentation in connection with an assignment, subletting or other transfer of this

Lease or Tenant's interest in the Premises, whether or not Landlord's consent to such transfer is required or obtained.

- (f) If Tenant receives Landlord's consent or if Landlord does not terminate this Lease, the Annual Fixed Rent payable thereafter shall be no less than an amount equal to the highest annual combined Annual Fixed Rent and Percentage Rent payable by Tenant during any previous Lease Year since the Commencement Date.
- (g) Notwithstanding any other provision hereof, Tenant shall have no right to make (and Landlord shall have the absolute right in its sole discretion, to refuse consent to) any assignment of this Lease or sublease of any portion of the Premises. Without limiting the generality of the foregoing, Landlord shall have the absolute right, in its sole discretion, to refuse consent to any such assignment or sublease if, at the time of either Tenant's notice of the proposed assignment or sublease or the proposed commencement date thereof (i) there shall exist any uncured default of Tenant or matter which will become a default of Tenant with passage of time unless cured; (ii) the proposed assignee or sublessee is an entity (aa) with which Landlord is already in negotiation as evidenced by the issuance of a written proposal; (bb) which is already an occupant of the Shopping Center; (cc) which is incompatible with the character or occupancy of the Shopping Center; (dd) which would subject the Premises to a use which would (1) involve increased insurance, personnel or wear upon the Shopping Center, (2) violate any exclusive right or restriction granted to another tenant or other occupant of the Shopping Center, or contained in another lease or occupancy agreement of the Shopping Center, (3) require any addition to or modification of the Premises, the Building or the Shopping Center in order to comply with building code or other governmental requirements; (iii) the proposed transferee's financial condition is or may become insufficient to support all of the financial and other obligations of the Lease; (iv) the nature of the proposed transferee's proposed or likely use of the Premises would involve any increase risk of the use, release or mishandling of Hazardous Material; (v) the business reputation or character of the proposed transferee or the business reputation or character of any of its affiliates is not reasonably acceptable to Landlord; (vi) Landlord has not received assurances acceptable to Landlord in its sole discretion that all past due amounts owing from Tenant to Landlord (if any) will be paid and all other defaults on the part of Tenant (if any) will be cured prior to the effectiveness of the proposed Transfer; (vii) Landlord is not satisfied that the proposed transferee's assets, businesses or inventory would not be subject to seizure or forfeiture under any laws related to criminal or illegal activities; or (viii) the proposed transferee's business and occupancy of the Premises would not generate substantially the same percentage rent as Tenant has been generating, on an average basis, during the two years prior to the date of the proposed Transfer. Tenant expressly agrees that Landlord shall have the absolute right to refuse consent to any such assignment or sublease and that for the purposes of any statutory or other requirement of reasonableness on the part of Landlord such refusal shall be reasonable.
- (h) Anything contained in this Lease to the contrary notwithstanding, and without prejudice to Landlord's right to require a written assumption from each assignee, any person or entity to whom this Lease is assigned including, without limitation, assignees pursuant to

the provisions of the Bankruptcy Code, 11 U.S.C. Paragraph 101 et seq. (the “Bankruptcy Code”) shall automatically be deemed to have assumed all obligations of Tenant arising under this Lease. In the event this Lease is assigned to any person or entity pursuant to the provisions of the Bankruptcy Code, any and all monies or other consideration payable or otherwise to be delivered in connection with such assignment shall be paid or delivered to Landlord and shall remain the exclusive property of Landlord and not constitute the property of Tenant or Tenant’s estate within the meaning of the Bankruptcy Code. All such money or other consideration not paid or delivered to Landlord shall be held in trust for the benefit of Landlord and shall be promptly paid or delivered to Landlord.

- (i) Tenant’s sole remedy in the event that Landlord shall wrongfully withhold consent to or disapprove any sublease or assignment request shall be to obtain an order by a court of competent jurisdiction that Landlord grant such consent; in no event shall Landlord be liable for damages with respect to its withheld consent to any proposed transfer.

All of the other terms, covenants and conditions of this Lease shall continue in full force and effect and unamended.

Assignment and Subletting – Tenant’s Position.

Tenant may assign this lease or sublet the whole or any part of the Demised Premises, but if it does so, it shall remain liable and responsible under this lease; provided, however, that if such assignee (or its guarantor) has a net worth equal to or greater than TEN MILLION DOLLARS (\$10,000,000.00) (the “Minimum Net Worth”), Tenant shall be released from any further liability hereunder from and after the effective date of such assignment. If the assignee (or its guarantor) does not have the Minimum Net Worth as of the effective date of such assignment, then effective as of such date thereafter as such assignee (or its guarantor) obtains the Minimum Net Worth, Tenant shall be released from further liability hereunder. The sale, issuance, or transfer of stock in Tenant shall not be deemed to be an assignment of this lease.

11. Signage – Landlord’s Position.

Prior to opening for business, Tenant shall install an identification sign for the Premises at its cost and expense, which shall comply with Exhibit “F,” and “F-1”. Tenant shall not erect or install any other signs except as expressly permitted by Landlord. The signs shall comply with the requirements of applicable Law. All permits or licenses shall be obtained by Tenant. Tenant shall maintain the signs in good condition and repair and shall save Landlord harmless from injury to person or property arising from the erection and maintenance of the signs. Upon vacating the Premises, Tenant shall remove the signs and repair any damage caused by the removal.

EXHIBIT “F”

GENERAL RETAIL SIGN CRITERIA

1. All Tenant Identification Signage shall be subject to the approval of the Project Architect or Landlord. Two copies of detailed sign drawings shall be submitted for approval. Drawings to demonstrate placement of signage on complete building façade and pertinent storefront elevation. Submit plans to Landlord at _____.
2. Tenant shall be limited to Building Façade Signage only.
3. Tenant signage shall be limited to store name only.
4. Sign permits must be obtained by the Tenant.
5. Any damage caused by Tenant’s work by signage installation shall be repaired by the Landlord and charged to the Tenant.
6. Building Façade Signage Design Criteria.
 - (a) Signage will be composed of individually constructed illuminated letters mounted on a continuous wireway painted to match fascia and manufactured to Landlord’s specifications by _____ (Sign Company), which is located at _____.
 - (b) Logos and logo panels will be subject to Landlord approval.
 - (c) maximum length of signage shall be 70% of the width of Tenant’s demised premises.
 - (d) maximum height of sign area shall be 2’6”. No individual letter height may exceed 2’6”. Where 2 lines of letters are utilized, the overall height will still remain at 2’6”. There must be a minimum of 6” between the two lines of letters. Sign is to be centered on sign façade both vertically and horizontally.

- (e) On termination of lease, Tenant shall repair damage to building façade caused by his signage installation. Contractor selection, material and methods for repair must be approved in writing by the Landlord in advance of the work.

7. Landlord's Signage Specification.

PLASTIC FACED LETTERS MOUNTED ON WIREWAY WITH REMOTED TRANSFORMER.

LETTERS

Each letter shall be fabricated in channel block or log style having the body of the letter 5" deep. Letter channels and faces shall be formed in exact shape of letters.

Material used for reverse of letter shall be .090 aluminum sheet and shall be cleaned free of oil and grease. This channel will be primed with Matthews 3125-A wash primer or similar type. Two coats of white acrylic polyurethane will be applied. Finished surfaces to be smooth and free of lint and dust.

Letter faces shall be cut from 3/16" flat Rohm and Haas Plexiglas #2283. Lenses to be held to metal channel with trip cap retainer of white held in place with sheet metal screws painted to match trimcap. Each letter to have a 1/2" to 1" white outline on the face. The outline is to be 3M translucent high performance white vinyl.

ILLUMINATION

Each letter shall be illuminated within letter channel by double stroke red neon tubing.

Neon tubing shall be formed in the shape of the letter and shall be individually gas filled at 10 M.M. pressure or those pressures which will result in essentially uniform life for each section. Electrodes shall be type 8C as manufactured by _____.

Tube supports shall be adjustable type (not less than 3/8" diameter buttress threaded glass posts) in which tubing shall be firmly attached by means of pure annealed copper tie wires, without strain on tubing so supported. Supports shall be fastened to metal letter with stainless steel rivets.

WIREWAY

The wireway to be fabricated from .125 aluminum sheet and shall be cleaned free of oil and grease. The wireway to be coated with Matthews 3125-A wash primer or similar type. Two coats of acrylic, polyurethane comparable to Matthews acrylic polyurethane will be applied. Transformer lead wires only are to penetrate the brick wall area through 3/8" sealtight or 1/2" conduit with the appropriate connectors at each end. Transformers are to be enclosed in an appropriate metal enclosure and located inside the store area (not in canopy area).

NOTE: Balance of Tenant signage criteria to follow upon final approval of building façade and size as approved by the City of _____. In any event, Tenant's signage shall comply with the City of _____ sign ordinances.

Signage – Tenant’s Position.

The Demised Premises shall be referred to by only such designation as Tenant may indicate. Landlord expressly recognizes that the service marks and trademarks are the valid and exclusive property of Tenant and Landlord agrees that it shall not either during the term of this lease or thereafter, directly or indirectly, contest the validity of any of said marks or any of Tenant’s registrations pertaining thereto, in the United States or elsewhere, nor adopt or use any of said marks or any term, word, mark or designation which is in any aspect similar to any of the marks of Tenant. Landlord further agrees that it will not at any time permit any other tenant or occupant of the Shopping Center to use the words _____ on signage or as part of such tenant’s or occupant’s name or tradename, nor will Landlord do or cause to be done any act or thing, directly or indirectly, which contests or in any way impairs or tends to impair any part of Tenant’s right, title and interest in any of Tenant’s marks and Landlord shall not in any manner represent that it has any ownership interest in any of the aforesaid marks or registrations therefor. Landlord specifically acknowledges that any use thereof pursuant to this lease shall not create in Landlord any right, title or interest in any of the aforesaid marks.

Tenant shall have the right to install signs of such height and other dimensions as Tenant shall determine, bearing such legend or inscription as Tenant shall determine, upon any portion of the Demised Premises. Landlord warrants that local codes and ordinances will permit the exterior signage as shown in **EXHIBIT “C-2”**; provided, however, that if local codes and ordinances (including variances) will permit Tenant to erect greater signage than is shown on **EXHIBIT “C-2”**, Tenant shall have the right to install such greater signage. Tenant shall have the option to utilize the lighting standards in the parking lot for advertising purposes by attaching, or causing to be attached, signs advertising any and all products and services as Tenant shall elect and Tenant’s name.

Landlord acknowledges and agrees that as a material inducement for Tenant to enter into this lease that Tenant shall be provided the pylon signs to be constructed by Landlord in the locations shown on **EXHIBIT “B”** and in the position shown on **EXHIBIT “C-3”**. If for any reason Tenant is restricted from, or is denied, the use of the pylon sign(s) and the use of said sign cannot be restored within five (5) days after notice to Landlord from Tenant, then until such use is restored, the annual minimum rent and other charges shall abate during the period subsequent to such five-day period until such condition ceases, and Tenant shall pay one percent (1%) of gross sales from the Demised Premises as rent during such period. In the event the pylon is not restored within sixty (60) days after the date of Tenant’s notice, then Tenant may elect to terminate this lease upon sixty (60) days’ written notice to Landlord.

Landlord shall not permit any other signs, billboards or posters to be displayed on any portion of the Demised Premises, nor shall Landlord erect a pylon sign on any portion of the property described in **EXHIBIT “A”** without the consent of Tenant. Tenant shall also have the right to be located in the same position as shown on **EXHIBIT “C-3”** on any other pylons erected in the Shopping Center. In the event that Tenant elects to participate in a joint pylon sign for the entire Shopping Center, then such signage shall be placed at a location mutually acceptable to Landlord and Tenant. Tenant reserves the right to approve the overall composition, elevation and specifications of any pylon sign. Each user will bear the entire expense of the cost and installation of its individual sign panel on the pylon. Landlord shall be responsible for the

cost of installing the pylons and pylon sign boxes. Tenant's sign panel on the pylon shall be wired to the parking lot lighting system or the house panel.

Upon any assignment of this lease or subletting of the Demised Premises, the assignee and/or subtenant shall have the right, at its sole expense and in conformity with applicable laws and ordinances, to erect and thereafter to maintain and/or replace signs on the exterior walls of the Demised Premises and panels on any and all pylon signs for which Tenant has the right to install a panel hereunder, in accordance with such assignee's and/or subtenant's standard sign specifications.