

# EXHIBIT “D”

SHOPPING CENTER LEASE AGREEMENT

Between

**FLAGLER & 82ND, LTD.,**

a Florida limited partnership

Landlord

and

**PETsMART, INC.,**

a Delaware corporation,

Tenant

Dated:

5/16/03, 2003

PETsMART Store No.:

348

Shopping Center:

Flagler Park Plaza

Location:

NWC Flagler Street & NW 82<sup>nd</sup> Ave.  
Miami, FL

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**EXHIBITS:**

Exhibit A Site Plan

Exhibit B Legal Description

Exhibit C Commencement Date Certificate

Exhibit D Construction Requirements and Delivery Conditions

Exhibit D-1 The Premises Elevations

Exhibit D-2 Tenant’s Utility Requirements

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### SHOPPING CENTER LEASE AGREEMENT

THIS SHOPPING CENTER LEASE AGREEMENT (the "Lease") is made as of the 16<sup>th</sup> day of May, 2003, by and between FLAGLER & 82ND, LTD., a Florida limited partnership/(hereinafter called "Landlord"), and PETSMART, INC., a Delaware corporation (hereinafter called "Tenant").

In consideration of the mutual promises, covenants and agreements herein contained, Landlord and Tenant hereby promise, covenant and agree with each other as follows:

#### FUNDAMENTAL LEASE PROVISIONS

Certain fundamental terms of the Lease are set forth below for convenience of reference and are hereafter referred to as the "Fundamental Lease Provisions." Other provisions of the Lease shall prevail over the Fundamental Lease Provisions in the event of any inconsistency.

- A. Shopping Center Name and Location:  
 Flagler Park Plaza  
 NWC Flagler St & NW 82<sup>nd</sup> Ave.  
 City: Miami State: FL  
 County: Miami-Dade
  
- B. Approximate Dimensions and Gross Floor Area of Premises:
 

Width:	110 feet
Depth:	182 feet
Gross Floor Area:	20,020 square feet
Minimum Interior Clearance:	18 feet
  
- C. Term and Critical Dates:
  - (i) Initial Term: Ten (10) Lease Years, zero (0) months
  - (ii) Renewal Options: Three (3) options of five (5) Lease Years each
  - (iii) Construction Start Date: Within ten (10) days after lease execution (Exhibit D, Section 1.1)
  - (iv) Delivery Date: June 1, 2003
  - (v) Storefront Completion Date: August 1, 2003 (Exhibit D, Section 2.1(b))

D. Base Rent:

(i) Subject to adjustment as provided in subsection (iv) below and Section 3.2 of this Lease, the initial Base Rent and the duration of the period during which such initial Base Rent is payable shall be as provided in the first row of the chart set forth in subsection (ii) below. The Base Rent for and duration of the Renewal Periods shall be as set forth in subsection (iii) below.

(ii) Initial Term:

Rental Period	Maximum Annual Base Rent		Maximum Monthly Base Rent
	/Sq. Ft.	Total	Total
Lease Years 1 – 5	\$13.75	\$275,275.00	\$22,939.58
Lease Years 6 – 10	\$14.75	\$295,295.00	\$24,607.92

(iii) Renewal Periods:

Rental Period	Annual Base Rent		Monthly Base Rent
	/Sq. Ft.	Total	Total
Lease Years 11 – 15	\$16.00	\$320,320.00	\$26,693.33
Lease Years 16 – 20	\$17.25	\$345,345.00	\$28,778.75
Lease Years 21 - 25	\$18.50	\$370,370.00	\$30,864.17

(iv) The Base Rent during the entire term is subject to adjustment as provided in Section 3.3 in the event that the Gross Floor Area of the Premises is less than that set forth in Section B above.

E. Estimated First Lease Year Additional Charges (dollars per square foot of Gross Floor Area per year):

Taxes: \$1.22 CAM: \$2.76 Insurance: \$0.88 Total: \$4.86

F. Intentionally Deleted

G. Real Estate Broker:

Florida Shopping Center Group

H. Landlord's Address for Payments and Notices and Telephone and Taxpayer ID Numbers:

Flagler & 82nd, Ltd.  
19501 Biscayne Boulevard, Ste. 400  
Aventura, FL 33180  
Attn: Jacquelyn Soffer  
Tele. No.: (305) 937-6200  
Taxpayer ID No.: \_\_\_\_\_

I. Landlord's Automatic Clearing House (ACH) Instructions for Payments (to be provided by Landlord prior to Rent Commencement Date:

Bank Name: \_\_\_\_\_  
Bank Address (City/State): \_\_\_\_\_  
ABA/Transit Routing Number: \_\_\_\_\_  
Account Number: \_\_\_\_\_  
Name on Account: \_\_\_\_\_  
Instructions to Bank (optional): \_\_\_\_\_

J. Tenant's Address for Notices and Telephone and Taxpayer ID Numbers:

PETSMART, Inc.  
19601 N. 27<sup>th</sup> Avenue  
Phoenix, AZ 85027  
Attn: Vice President, Real Estate  
Tele. No.: (623) 580-6100  
Taxpayer ID No.: 94-3024325

K. Construction Allowance: Four Hundred Fifty Thousand Dollars (\$450,000.00)

1. PREMISES AND COMMON AREA

1.1 Lease of Premises. Landlord hereby leases exclusively to Tenant, and Tenant hereby leases from Landlord, subject to and with the benefit of the terms, covenants, conditions and provisions of this Lease, the following (which are referred to throughout this Lease as the "Premises"): that portion of an existing building identified as Unit 61-A which is outlined and cross-hatched on Exhibit A, together with any and all rights and privileges granted herein or now or hereafter belonging or appurtenant to the Premises; the Premises is part of a larger existing building which is to be modified by Landlord in accordance with the requirements set forth in Exhibit D, and any other improvements at any time attached to or incorporated into the Premises, whether by Landlord or Tenant, as hereinafter provided. Tenant's rights hereunder include the right to use and occupy the Premises and one-half of the existing loading dock and receiving area (the "Shared Loading Dock"), located as shown on Exhibit A, including specifically one recessed truck well that is a part thereof and which will be available for Tenant's exclusive use. The Shared Loading Dock will be shared by Tenant exclusively with only the tenant occupying the



space currently identified as "Linens N Things" on Exhibit A. The Premises are located within the "Retail Area" of the Shopping Center (as defined below) and constitute a portion of that certain real property (the "Land") described in Exhibit B (provided, however, that the inclusion of the description of the Land in Exhibit B shall not be a restriction of Landlord's ability to increase, decrease, or otherwise modify the size or configuration of the Land from time to time, subject to the restrictions and limitations set forth in this Lease). Any buildings and improvements on or to be built on the Land and as such may be changed from time to time, subject to the restrictions and limitations set forth in this Lease, are collectively called "Improvements", and the Land and the Improvements are collectively called the "Shopping Center". Subject to Tenant's leasehold interest under this Lease, Landlord shall hold title to all Improvements, whether constructed or installed by Landlord or Tenant, which are incorporated into and constitute a permanent part of the Premises, except for Tenant's Trade Fixtures, which shall be subject to Section 26.1 below. "Retail Area" is defined as that portion or portions of the Shopping Center designated on Exhibit A and which is to be devoted to the establishment and operation of in-line retail stores.

**1.2 Rights to Use Common Area.** Landlord hereby grants to Tenant the non-exclusive right to use, in common with Landlord, other tenants and occupants of the Shopping Center, and all others to whom Landlord has heretofore granted rights or to whom Landlord may hereafter grant rights (provided, Landlord shall not voluntarily grant any right to use such areas to any non-occupant of the Shopping Center), all portions of the Shopping Center intended for common use (the "Common Area"). For purposes of this Lease, "Common Area" shall be defined as all portions of the Shopping Center provided for common use within the Shopping Center, as the same may be modified from time to time by Landlord, as permitted under and subject to the restrictions in this Lease, including, but not limited to, parking areas, roads, streets, drives, truck and delivery passages, customer loading zones, landscaped and planted areas, parking lot lighting, exterior ramps, entrances to and exits from the Shopping Center, sidewalks, the pylon or monument structure referred to in Section 3.2 of Exhibit D, retaining walls, package pick up stations, drinking fountains, public restrooms and comfort stations, lounges, first aid stations, directory equipment, information facilities, public meeting rooms, auditoriums, maintenance rooms, mall office rooms, lighting facilities, bus stops, taxi stands, storm and sanitary sewer systems, utility lines, and water filtration and treatment facilities, including without limitation, disposal plants and lift stations and retention ponds or basins, whether located within or outside of the Shopping Center (provided, however, that if such disposal plants and lift stations and retention ponds or basins serve other users in addition to the Shopping Center, then the costs in connection with the maintenance of such disposal plants and lift stations and retention ponds or basins shall be prorated among the users based upon their respective usages for the purposes of determining Landlord's portion of the costs includable in Common Area Costs pursuant to Section 6.5 of this Lease), and all easements or other rights under any instrument creating covenants, conditions, easements, restrictions or other rights with respect to any portion of the Shopping Center. The Common Area shall not include any actual or planned building areas whether or not depicted on Exhibit A which are leased or intended for lease to or for the exclusive use of Landlord or any tenant or group of tenants in the Shopping Center.

The Shopping Center is subject to easements and other rights and restrictions set forth in the Public Records of Dade-Miami County, Florida. Landlord hereby represents and warrants

that any existing restrictions on use, including but not limited to easements, mortgages, and development order have been duly recorded and will be binding upon and enforceable against the Shopping Center and all owners, tenants or other occupants, Mortgagees and other parties holding any interest in any portion thereof, as applicable. Landlord hereby warrants that no provisions of such recorded instruments are materially inconsistent with the rights of Tenant under this Lease or will materially adversely affect Tenant's ability to conduct business at the Premises as permitted herein. Landlord shall not amend, waive the benefit of or terminate, or permit any amendment, waiver or termination of, any such instrument in any manner which is materially inconsistent with the rights of Tenant under this Lease or materially adversely affects Tenant's ability to conduct business at the Premises as permitted herein. Landlord shall perform all applicable obligations under such documents at no expense to Tenant, except if and as herein elsewhere expressly provided, and shall at its own sole expense use all reasonable and diligent efforts to enforce the provisions of such recorded instruments in accordance with its terms against all other parties subject thereto.

## 2. TERM

**2.1 Commencement and Duration of Term.** The words "Term" and "Lease Term" as used herein shall, except as otherwise expressly provided, mean the Initial Term and, provided Tenant has exercised its option to renew the Lease in accordance with the terms of this Lease, each Renewal Period for which the option has been duly exercised, until this Lease expires or is terminated as herein provided. The Initial Term of this Lease shall be for the period set forth in Section C(i) of the Fundamental Lease Provisions. Subject to Section 26.2, and the Commencement Co-Tenancy Requirement set forth in Paragraph 3 of Exhibit I, the Initial Term shall commence on the date (hereinbefore and hereinafter called the "Commencement Date") which is two hundred ten (210) days (the "Construction Period") after the later of (i) the Delivery Date (as hereinafter defined) or (ii) the date Tenant has obtained all governmental approvals and permits necessary for the commencement and completion of Tenant's Work (as hereinafter defined), provided Tenant has made timely application therefor and has diligently pursued the issuance of such permits. In the event that Tenant elects to open for business in the Premises prior to the expiration of the Construction Period, then, although the Commencement Date shall not occur as a result of Tenant's election to open for business, Tenant shall nevertheless commence to pay to Landlord as of the date Tenant opens for business (such date being referred to herein as "Tenant's Opening Date"), Tenant's proportionate share of all Common Area Costs, Insurance and Real Property Taxes due to Landlord under this Lease. The term "Lease Year" as used herein shall mean a period of twelve (12) successive months, except that, if the Commencement Date is a day other than the first day of a calendar month, the first Lease Year of the Initial Term shall also include the initial fractional month, together with the next succeeding twelve (12) calendar months, and the first Lease Year of the Term shall expire, unless otherwise provided herein, at the close of business on the last day of the calendar month in which occurs the first anniversary of the Commencement Date. Provided, however, if the last Lease Year of the Initial Term would otherwise expire on a date which is after September 30 and prior to the next following January 31, then at Tenant's election made in writing to Landlord at least ninety (90) days prior to the expiration of the Initial Term, the duration of the last Lease Year in the Initial Term shall be extended to and shall expire at the close of business on January 31 next following the date the Initial Term would have otherwise expired.

**2.2 Delivery Conditions.** Landlord shall be deemed to have delivered the Premises to Tenant only when all of the conditions set forth in Section 2.1 of Exhibit D have been fulfilled and Landlord has delivered written notice thereof to Tenant as provided in Section 2.2 of Exhibit D (all of which conditions are referred to herein as "Delivery Conditions"). The date on which all Delivery Conditions have been fulfilled is referred to herein as the "Delivery Date". Certain additional obligations of Landlord related to delivery are set forth in Sections 1 and 2 of Exhibit D.

**2.3 Co-Tenancy.** Certain obligations of Landlord and related provisions pertaining to co-tenancy at the Shopping Center are set forth in Exhibit I.

**2.4 Certificate of Commencement.** Within ten (10) days after the written request of either party after the Commencement Date has been determined, Landlord and Tenant shall execute, acknowledge and deliver to each other duplicate originals of a Certificate in the form provided in Exhibit C setting forth the Delivery Date and the Commencement Date, subject to the terms and conditions of Article 2 hereof.

**2.5 Renewal Periods.** Provided (a) Tenant is not at the time of exercise in default of any material obligation under the Lease beyond any and all applicable cure periods, (b) Tenant or a permitted subtenant of the entire Premises has continuously operated the Premises for the 12-month period prior to the expiration of the then applicable term (other than closures due to casualty, condemnations, remodeling or as otherwise permitted hereunder), and (c) the Lease shall have been renewed for the immediately preceding Renewal Period (as hereafter defined), if applicable, Tenant shall have the number of successive options to extend the Term of this Lease for the periods of time which are set forth in Section C(ii) of the Fundamental Lease Provisions, each such extension period being hereinafter called a "Renewal Period". Each of such options shall be deemed exercised automatically and without further act or deed by Landlord or Tenant unless Tenant shall deliver written notice to Landlord not less than one hundred eighty (180) days prior to the expiration of the then unexpired Term or Renewal Period, as the case may be, that Tenant is electing not to exercise any further renewal option. If Tenant fails to give such notice, time being of the essence, this Lease shall terminate as of the then applicable expiration date, and neither Landlord nor Tenant shall have any further obligation or liability hereunder arising or continuing from and after such expiration date, subject, however, to the provisions of Section 26.6 and any other provision hereof which expressly survives termination of this Lease. The terms and conditions of this Lease shall remain unchanged during all Renewal Periods, except (a) that the Base Rent payable during each Renewal Period shall be as specified in Section 3; and (b) there shall be no privilege to renew beyond the expiration of the third Renewal Period.

### 3. RENT

**3.1 Base Rent.** Commencing on the Commencement Date and continuing throughout the Initial Term of this Lease and all Renewal Periods, and subject to the Rent Credit (as defined below), Tenant shall pay to Landlord Base Rent for the Premises in the amounts set forth in Section D of the Fundamental Lease Provisions, subject to adjustment as hereinafter set forth; provided, however, that if the duration of the first Lease Year exceeds twelve (12) calendar months, the Annual Base Rent payable for the first Lease Year shall equal the initial Monthly Base Rent as set forth in the right-hand column of such chart multiplied by the actual number of

calendar months in such first Lease Year. If the Term commences or terminates on a day other than the first day of a calendar month, the Base Rent and other charges for such fractional month shall be prorated based on the actual number of days in the fractional month. The proration of Base Rent for such fractional month, and any other prorations of payments due under any provision of this Lease, shall be based on the actual number of days in each calendar month. With respect to the terms set forth in subsection D(ii) and D(iii) of the Fundamental Lease Provisions, in the event of conflict between the Annual Base Rent and Monthly Base Rent, Annual Base Rent shall control and in the event of conflict between "/Sq. Ft." and "Total", "/Sq. Ft." shall control.

**3.2 CPI Adjustments.** The initial Base Rent and the duration of the period during which such initial Base Rent is payable shall be as provided in the first row of the chart set forth in subsection D(ii) of the Fundamental Lease Provisions. For each subsequent rental period during the Initial Term as set forth in the left hand column of subsection D(ii) of the Fundamental Lease Provisions, the Annual Base Rent shall equal the Annual Base Rent for the previous rental period increased by a percentage amount equal to seven (7) times the percentage change during such previous rental period in the "U.S. Department of Labor Consumer Price Index for All Urban Consumers, U.S. City Average (1982-84 = 100)" (the "CPI"); provided, however, that in no event shall the Base Rent for any rental period be reduced below the Base Rent for the previous rental period or exceed the applicable Maximum Base Rent for such rental period set forth in such chart. In making such calculation, the parties shall use the CPI most recently published as of each January 1. In the event that the CPI applicable to a rental period is not available as of the date when the first installment of Base Rent is due following the beginning of such period, such installments shall be based on the latest available CPI and shall be further adjusted both retroactively and prospectively after the applicable CPI becomes available. At the time of making any change in the amount of Base Rent payable under this Lease, Landlord shall provide to Tenant a copy of the applicable CPI's and a breakdown of Landlord's method of calculating such payment, which calculation shall be final and binding on both parties unless contested by Tenant within sixty (60) days. Any adjustment in the Base Rent pursuant to this Section 3.2 shall become effective as of the first day of such new rental period. In the event that the CPI ceases to be published, Landlord shall select another comparable index published by a department or agency of the United States Government to be substituted for the prior index, with any appropriate adjustment required because of the predecessor index. This procedure shall continue until such time as no such index is so published, at which time Landlord and Tenant shall mutually select another comparable index to use in place thereof. For each rental period during the Renewal Periods the Annual Base Rent shall be in the amount set forth in the appropriate line of subparagraph D(ii) of the Fundamental Lease Provisions.

**3.3 Floor Area Adjustment.** The Base Rent is also subject to adjustment based on the actual Gross Floor Area of the Premises, as defined in Section 1.4 of Exhibit D, provided that in no event shall the Gross Floor Area of the Premises exceed the number set forth in Section B of the Fundamental Lease Provisions plus one hundred square feet. If the Gross Floor Area of the Premises is less than the area set forth in Section B of the Fundamental Lease Provisions, the Base Rent for the Initial Term and the Maximum Base Rent for all Renewal Periods shall be reduced proportionately.

**3.4 Time and Place of Payments.** Tenant shall pay the Base Rent to Landlord at the address of Landlord as set forth in Section H of the Fundamental Lease Provisions or such other address as Landlord may designate in writing, in equal monthly installments, in advance, without prior demand and without deduction or set-off except as permitted under this Lease, on or before the first (1st) day of each calendar month. At Tenant's election, Tenant's payment of Base Rent may be through an automatic clearing house (ACH) or by wire transfer as set forth in Section I of the Fundamental Lease Provisions. Tenant may rely upon and proceed in accordance with any notice of change of ownership of Landlord's interest given in accordance with this Lease without duty of inquiry and even if Tenant has knowledge or notice contrary thereto.

**3.5 Rent Credit.** One Hundred Fifty Thousand Dollars (\$150,000.00) of the Construction Allowance payable by Landlord to Tenant, as provided in Paragraph 1.7(a) of Exhibit D, will be paid to Tenant in the form of a rent credit ("Rent Credit"). The Rent Credit shall be available to Tenant from and after the Commencement Date (or Tenant's Opening Date, if earlier), to be applied to the initial and any subsequent monthly installments of Base Rent and other amounts due under the Lease after the Commencement Date (or Tenant's Opening Date, if earlier) until such Rent Credit amount has been fully applied and credited or otherwise paid to Tenant.

#### 4. USE AND OCCUPANCY

The Premises may be used (i) for the operation of "Tenant's Primary Business" as defined in Section 2 of Exhibit G; or (ii) for any lawful retail purpose except those uses prohibited in Exhibit G, and any uses prohibited under then existing exclusives granted by Landlord to future tenants in the Shopping Center which occupy at least 15,000 square feet of Gross Floor Area (provided Tenant has been advised of such future exclusives in writing within thirty (30) days after the granting thereof) and which are in effect at the time of any change in use to a permitted use other than Tenant's Primary Business; and (iii) for office and storage uses incidental to any permitted use. Landlord represents and warrants that all necessary zoning, variances, permits or other public and private approvals or consents (collectively referred to as "Necessary Approvals") to allow the use of the Premises for any part of Tenant's Primary Business including, specifically but not in limitation, veterinary clinics and hospitals, boarding, animal training and obedience adoption classes, pet adoption and grooming services, as well as retail purposes generally, have been obtained and/or are currently in full force and effect. Landlord shall not seek to modify, or voluntarily agree to modify, any of the Necessary Approvals in any way that would restrict or prohibit Tenant's use of the Premises and Common Areas as permitted hereunder. Tenant shall be responsible to obtain and maintain any and all operational permits and authorizations specifically required for the operation of Tenant's business in the Premises, certificates of use, transaction privilege tax license and any professional licenses required specifically for its proposed pet grooming and veterinary services and retail sales. Tenant shall have the right to remain open for business at all hours permitted by law in the jurisdiction where the Premises are located and the Common Areas shall be open and operating for ingress, egress and parking during all of Tenant's business hours (provided that Tenant shall give Landlord at least seven (7) days notice if Tenant determines to operate during hours which are later than the normal Common Area operating hours set forth in Section 6.1 and subject to the requirement of Section 6.1 relative to the payment for extended lighting of the Common Areas). Tenant shall be

required to open, fully stocked, for at least one (1) day within one hundred eighty (180) days after the Commencement Date (the "Required Opening Date"). Landlord's sole and exclusive remedy for breach of this covenant shall be to increase the Base Rent upon not less than thirty (30) days prior written notice by twenty-five percent (25%) effective as of the Required Opening Date and continuing until the date when Tenant opens for business as hereinabove provided. After opening for business as required herein, Tenant shall not be obligated to remain open for business or to operate for any period or during specified hours at the Premises. In the event Tenant ceases to operate the Premises for a period in excess of sixty (60) consecutive days, or a total of more than ninety (90) days in any consecutive twelve (12) month period (exclusive of such periods during which Tenant is, in good faith, undertaking repairs to or remodeling of the Premises, or is closed due to a casualty, condemnation, untenability of the Premises due to Landlord's negligence or willful malfeasance, or any other reason expressly permitted by this Lease), Landlord shall have the right, but not the obligation, to terminate this Lease on ninety (90) days notice to Tenant (unless Tenant shall re-open or commence making preparations to re-open during such ninety (90) day period and actually opens within 120 days after such notice) and the parties shall be relieved from further obligation under this Lease. In the event Tenant reopens and again ceases operations, the preceding provisions shall again apply.

## 5. REMAINDER OF THE IMPROVEMENTS

**5.1 Buildings.** All Improvements constructed within the Shopping Center shall conform to a generally consistent and harmonious style of architectural design and the exterior of the Premises shall be substantially similar to the building elevation design and specifications shown on Exhibit D-1. No buildings, kiosks and other Improvements and permanent barriers shall be constructed within Tenant's Protected Area (as defined below).

**5.2 Parking and Drive Areas.** On the Delivery Date, the number, location and configuration of parking spaces in the Common Area and the location and dimensions of all vehicular and pedestrian access ways shall be as shown on Exhibit A. Thereafter, the layout, striping and location of all parking areas and pedestrian and vehicular access ways and other Improvements and landscaping within that portion of the Common Area identified on Exhibit A as "Tenant's Protected Area" shall not be changed without Tenant's consent. Except during temporary periods when other truck access ways are closed for repairs or improvements, commercial delivery trucks shall be restricted from passing in front of the Premises. The Common Area shall at all times (other than at such times as the parking areas may be temporarily closed for repairs, maintenance, resurfacing, or as may be reasonably required to prevent other parties from acquiring prescriptive rights in or to the Common Areas) contain no less than four and one-half (4.5) parking spaces per one thousand (1,000) square feet of Gross Floor Area for the entire Shopping Center.

**5.3 Height Restrictions.** No future improvement or structure in that portion of the Shopping Center located between (and including) the improvements currently leased to or occupied by McFrugals and Linens 'N Things as shown on Exhibit A (the "Restricted Area") shall contain more than one (1) structural story or exceed the greater of (A) its existing height or (B) thirty five (35) feet in height above finished floor level in height.

**5.4 Underground Utilities.** Except as otherwise required by utility providers, all portions of water, gas, electricity, sewerage and other utility lines within the Shopping Center and not within the exterior walls of any structure or enclosed area shall be installed wholly underground, except hydrants, standpipes, meters, control valves and other similar items which are customarily located above ground or are required to be located above ground by law or the providing utility. The foregoing requirements shall not apply to existing utility installations.

**5.5 Interference with Operation.** In doing any construction work, making any repairs or doing any maintenance in the Shopping Center after Tenant takes possession of the Premises, Landlord shall use its reasonable commercial efforts to prevent any interference with the operation of the business of Tenant or any permitted subtenant or licensee of Tenant. Without limiting the foregoing, Landlord shall not perform or allow any construction work, other than routine maintenance or emergency repairs on or within the Common Area if such work would have a material adverse impact on pedestrian or vehicular access to the Premises, on the roof or exterior of the Premises, or within the Premises (if Landlord has the right or obligation to do so under any provision of this Lease) during the period of November 15 through January 1, except with Tenant's prior consent or if required by law or in the event of an emergency. In the event Landlord does perform or allow any construction work to occur which is prohibited by this Section 5.5, and as a result thereof Tenant is unable to operate its regular business in the Premises for more than one (1) day, Tenant shall have the right, in addition to any other remedies available to Tenant under Section 20, and without notice or cure period, to abate Base Rent and other charges for the period such prohibited construction work is conducted; provided however that in the event such construction is due to Landlord making repairs or alterations which Tenant is required to perform under this Lease and has failed to do, then Base Rent and such other charges shall in no matter abate.

## **6. COMMON AREA**

**6.1 Manner and Period of Operation.** Landlord shall maintain, operate, repair and replace, or cause to be maintained, operated, repaired and replaced, the Common Area and all exterior portions of the Shopping Center according to the highest reasonable standard for retail shopping centers of similar age and character in the metropolitan area where the Premises are located and in compliance with all applicable laws, codes, ordinances, regulations, building and health codes, including but not limited to: keeping the Common Area properly drained, reasonably free of water, ice, snow, mud, sand, rubbish and other obstructions and in a neat, clean, orderly and sanitary condition; maintaining adequate trash receptacles for Common Area refuse (but not for trash or other refuse of any tenant or occupant within the Shopping Center) and periodically collecting and removing all such Common Area refuse; maintaining signs, markers, painted lines and other means and methods of pedestrian and vehicular traffic control; exterior painting of Improvements (including the Premises) as and when reasonably required as determined by Landlord, and on a uniform basis throughout the Shopping Center; repairing and replacing paving, curbing and sidewalks; maintaining reasonable security throughout all areas of the Shopping Center; maintaining all planting and landscaped areas and all storm sewerage and drainage utilities and other utilities; and keeping pylon or monument signage, the Common Area and other areas as are necessary for safety, security and normal operation of Tenant's Business open and operating during and for a minimum period of sixty (60) minutes before and after

regular Shopping Center operating hours (i.e., 10:00 a.m. to 9:00 p.m. Monday through Saturday and noon to 6:00 p.m. on Sunday) and for such longer periods as Tenant may request and suitably lighted throughout all non-daylight hours during such period of operation. In the event that Landlord extends the hours of lighting signage or operating the Common Area beyond 10:00 p.m. Monday through Saturday or 7:00 p.m. Sunday, only those tenants or other occupants requesting such extension shall pay for the additional cost thereof in the proportion that the Gross Floor Area of each such requesting party's premises bears to the total Gross Floor Area of all requesting parties' premises in the Shopping Center.

**6.2 Certain Restrictions on Use of Common Area.** Except as otherwise expressly provided herein, the parking spaces in the Common Area shall be used only for the parking of private automobiles or similar vehicles of customers, agents, contractors, invitees, licensees, subtenants and employees of Tenant or any other tenants or occupants of the Shopping Center while such persons are present at the Shopping Center, and for no other purpose, and none of such parking spaces located in Tenant's Protected Area shall be reserved. No portion of Tenant's Protected Area shall be used for inventory storage, do-it-yourself or demonstration areas, park and ride or car pooling arrangements, sidewalk sales, merchandise displays, deliveries, truck parking (except delivery trucks making deliveries to the Premises), cart storage area or similar uses, except as otherwise specifically permitted herein. Notwithstanding the preceding, Tenant may use the sidewalk in front of the Premises for occasional sidewalk sales, to be held no more than four (4) times per year, on seven (7) days prior notice to Landlord, and strictly in compliance with all governmental requirements and Landlord's reasonable rules and regulations. Employees of Tenant and other tenants and occupants of the Shopping Center shall not park their automobiles or other vehicles in Tenant's Protected Area except in the area(s) designated as "Employee Parking" on Exhibit A, (if and provided such areas are designated on Exhibit A), or such other areas as Landlord and Tenant may mutually and reasonably designate from time to time, which shall be no closer than three hundred (300) feet from the Premises, and Landlord shall use diligent efforts to prevent any violation of this provision. Landlord reserves the right to close any or all portions of the Common Areas to such extent and for such time as may, in the sole discretion of Landlord's counsel, be legally necessary to prevent a dedication thereof or the accrual of any rights to any person or to the public therein; and to close temporarily, if necessary, any part of the Common Areas in order to discourage non-customer parking.

**6.3 Free Access.** Landlord shall not exact any charge or permit others to exact any charge for use of the Common Area by customers, agents, contractors, invitees, licensees, subtenants or employees of Tenant or any other tenant or occupant in the Shopping Center, except for reasonable charges for valet parking service (provided any valet parking area shall not be located in Tenant's Protected Area). Landlord shall not restrict access to the Common Area or Premises for customers' pets. Provided, however, Tenant shall not permit any boarded pets (during the period of boarding) to leave Tenant's store or otherwise enter the Common Areas except for walking of boarded animals under leash in an area extending not farther than 100 feet from the Premises. Tenant shall provide daily janitorial service in that portion of the Common Area located within 150 feet of the Premises in order to clean up pet droppings and prevent the accumulation of stains and odors.



**6.4 Interference with Others.** In making any replacement, change, restoration, alteration, improvement or repair of or to the Premises, Tenant and its contractors, agents, employees and suppliers may use, to the extent available, the portion of the Common Area behind or adjacent to the Premises or such other areas as are reasonably designated by Landlord for the parking of trucks and delivery vehicles, storage of materials and other matters incidental to such work; provided, however, that no such use shall unreasonably or materially interfere with the operation of the Shopping Center and shall not interfere with the business of any tenant of the Shopping Center; and provided further that Tenant shall use the area to the rear of the Premises to the extent reasonably possible therefor but in no event shall Tenant block or obstruct the adjoining tenant's access to or from the Shared Loading Dock. Without limiting the foregoing, Tenant may use only the Premises for the storage of pallets, equipment, inventory or any other items necessary for the conduct of Tenant's Primary Business at the Premises. In making any permitted or required replacement, change, restoration, alteration, improvement or repair of or to any portion of the Shopping Center, Landlord and any other tenant or occupant in the Shopping Center and their or Landlord's contractors, agents, employees and suppliers may use such portions of the Common Area as are not directly in front of the Premises or within Tenant's Protected Area, or block Tenant's access to or from the shared Loading Dock, for or in connection with the parking of trucks and delivery vehicles, storage of materials, and other matters incidental to such work, provided that such use shall not unreasonably or materially interfere with access to the front or rear of the Premises or materially or unreasonably with the operation of any portion of the Shopping Center or of the business of Tenant.

**6.5 Tenant's Proportionate Share.** From and after the Commencement Date (or Tenant's Opening Date, if earlier), Tenant shall pay to Landlord Tenant's proportionate share of the reasonable expenses actually incurred by Landlord for maintaining, operating and repairing the Common Area ("Common Area Costs"), subject to the limitations provided herein. The term "Tenant's proportionate share" shall mean the ratio of the Gross Floor Area of the Premises (but in no event more than the number of square feet set forth in Tenant's Plans) to the total Gross Floor Area of all Improvements within the Shopping Center; provided, however, that in no event shall the Gross Floor Area of the Shopping Center be less than Two Hundred Seventy-Five Thousand (275,000.00) square feet for the purpose of such calculation. Subject to the foregoing, if the total Gross Floor Area of the Shopping Center changes, Tenant's proportionate share shall be adjusted proportionately. The total Gross Floor Area of the Shopping Center shall be determined in the manner and subject to the terms and provisions of Section 1.4 of Exhibit D for the purpose of such calculation.

**6.6 Common Area Costs.**

**6.6.1 Common Area Costs** shall include all sums incurred in a manner deemed by Landlord to be reasonable and appropriate in connection with the operation, maintenance and repair of the Common Area, and shall include, subject to the limitations set forth herein, the costs and expenses of (the following subparagraphs are for definition only and are not to be construed so as to impose any obligations on Landlord):

(a) snow, ice, garbage and trash removal; maintenance and repair of all parking lot surfaces, service areas and courts, including cleaning, sweeping, painting, striping

and repaving; maintenance and repair of sidewalks, curbs, guardrails, bumpers, fences, screens, flagpoles, bicycle racks, Shopping Center identification signs, directional signs, traffic signals, and other traffic markers and signs;

(b) maintenance and repair of the (i) storm and sanitary drainage systems, including disposal plants and lift stations and retention ponds or basin; (ii) irrigation systems; (iii) electrical, gas, water and telephone systems; (iv) lighting systems (including bulbs, poles and fixtures); (v) emergency water and sprinkler systems; (vi) other utility systems, including any utility charges in connection with any of the foregoing systems and further including the installation, maintenance and operation of any computerized system for any of the foregoing;

(c) planting, replanting and replacing of flowers, shrubbery, plants, trees and other landscaping;

(d) maintenance, repair and acquisition cost (rental fees and/or purchase price or in lieu of purchase price, the annual depreciation allocable thereto) of all security devices, machinery and equipment used in the operation and maintenance of the Common Area, and all personal property taxes and other charges incurred in connection with such security devices, machinery and equipment;

(e) the cost of installation and operation of music program services and loudspeaker systems for the Common Area;

(f) on-site personnel, including, without limitation, security and maintenance people of the Shopping Center (including, without limitation, the payroll taxes and employee benefits of such personnel); and

(g) an administrative fee ("Administrative Fee") not to exceed eight percent (8%) of the Common Area Costs, which shall exclude, for purpose of calculating the amount of the Administrative Fee, (a) the costs of utility service for the Common Areas, (b) any amounts paid or reimbursed to Tenant pursuant to Section 6.9, and (c) the Administrative Fee.

6.6.2 Notwithstanding the foregoing provisions, Common Area Costs shall not include:

(a) depreciation (other than straight-line depreciation as provided below);

(b) costs of repairing and replacing to the extent that proceeds of insurance or condemnation awards are received therefor; and

(c) costs of a capital nature, including without limitation capital expenditures to improve or increase the value of any portion of the Shopping Center; but nothing

therein shall be deemed to prohibit inclusion in Common Area Costs of all costs and expenses related to repair (but not replacement) of the roof and the parking areas of the Shopping Center.

In addition, for purposes of this and all other provisions of this Lease, the Common Area Costs shall not be deemed to include Insurance Costs, Real Property Taxes or any other amount payable by Tenant which is not a part of the Common Area Costs as defined in this Section. The Common Area Costs shall also exclude any item which is not customarily considered to be a normal expense of maintenance, operation or repair, including without limitation the following: marketing or advertising costs for the Shopping Center; leasing commissions; brokerage fees; the cost of electricity or other utilities that serve tenants' spaces; executive or managerial salaries; consulting fees; fees paid to architects, engineers, attorneys or other professionals; market study fees; initial paving, initial striping or initial landscaping costs; costs of sculptures, paintings or other artwork in the Common Areas; costs of structural repairs or replacements; costs of repairs or replacements which are capital in nature or are required to be depreciated under generally accepted accounting principles and any other depreciation or amortization expense, other than the costs of major roof repairs and the costs of major repaving or resurfacing (but not replacement) of the Common Areas which for purposes of calculating Tenant's share of Common Area Costs shall occur no more often than every eight (8) years and the cost of which shall be amortized on a straight line basis over an eight (8) year period (provided, however, this provision shall not apply to any partial or minor repaving or resurfacing of the Common Areas, the cost of which is less than \$5,000.00); the costs of performing any of Landlord's repair and maintenance responsibilities under Section 7.1; penalties incurred because the Landlord fails to pay taxes or any other obligation on time; points, fees and interest charges; principal payments or other payments of any kind related to the Landlord's financing or refinancing of the Shopping Center or any portion thereof; rental or other payments under any ground lease; any amounts paid by Landlord resulting from a default under a lease or other agreement; the cost of containing, removing or otherwise remediating any contamination of the Land or other portions of the Shopping Center or other environmental liability; home or branch office expenses; any field personnel employment costs in excess of the reasonable allocable share thereof for work performed at the Shopping Center and reasonably necessary to accomplish the tasks required by this Section 6.6; any general overhead costs; any other administrative, management or supervisory fees or expenses (other than the Administrative Fee referenced above); costs resulting from any sale or transfer of the Shopping Center or any interest therein by Landlord; expenses resulting from defective construction or other work, including the use of defective or inferior materials, or the negligence of or other improper performance or non-performance of Landlord; any cost of work which is to be performed at the expense of Landlord under any other provision of this Lease; any excessive amount the Landlord pays a contractor or vendor because of a special relationship; or any other unsubstantiated or unreasonable cost.

**6.7 Estimated Payments and Annual Adjustments.** Prior to the beginning of each calendar year during the Term of the Lease, Landlord shall provide to Tenant an estimate of the Common Area Costs for such year together with a breakdown of such calculation in reasonable detail and in a form consistent with prior years to allow comparison. Such estimated Common Area Costs shall not exceed the previous year's actual Common Area Costs by more than five percent (5%). The estimated annual Common Area Costs through the end of the first full calendar year during the Lease Term shall be as set forth in Section E of the Fundamental Lease

Provisions. From and after the Rent Commencement Date, on a monthly basis during the Term of this Lease, Tenant shall pay Landlord one-twelfth (1/12) of Tenant's proportionate share of such estimated Common Area Costs, in advance, at the same time and in the same place as the Base Rent. Within one hundred eighty (180) days after (i) the end of each calendar year during the Term hereof, and (ii) the expiration of the Term of this Lease, Landlord shall submit to Tenant a final, annual reconciliation statement ("Adjustment Bill") for the actual amount of Common Area Costs required to be paid by Tenant for the calendar year (or portion thereof) just ended. Tenant's failure to object to the Adjustment Bill rendered by Landlord within a period of ninety (90) days after receipt thereof shall constitute acquiescence with respect thereto and shall render such Adjustment Bill an account stated between Landlord and Tenant (subject, however, to Tenant's audit rights set forth in Section 6.8). If Tenant's proportionate share of the actual Common Area Costs (as defined herein) with respect to such accounting period exceeds the aggregate amount(s) previously paid by Tenant with respect thereto, Tenant shall pay to Landlord the deficiency within sixty (60) days following receipt of the Adjustment Bill from Landlord. Provided, however, notwithstanding anything to the contrary contained herein, commencing with the second full calendar year after the Commencement Date, Tenant's proportionate share of Common Area Costs for any calendar year (excluding the cost of utilities) shall not exceed 105% of Tenant's proportionate share of Common Area Costs from the prior calendar year (based on final Common Area Costs, excluding the cost of utilities). However, if the aggregate amount(s) previously paid by Tenant with respect thereto exceeds Tenant's proportionate share of the actual Common Area Costs (as defined herein) for such period, then Landlord shall pay Tenant a refund of such net surplus within sixty (60) days following the date of the Adjustment Bill. The Adjustment Bill and other billings shall set forth in reasonable detail the total Common Area Costs (broken down by cost categories) during such period. Within thirty (30) days after receipt of Tenant's request therefor, Landlord shall provide to Tenant the method of calculating Tenant's proportionate share. Landlord hereby waives all right to collect or retain Tenant's proportionate share of any Common Area Costs (including any Administrative Fee thereon) for which an Adjustment Bill has not been submitted to Tenant within two (2) years after the end of the calendar year during which such Common Area Costs were incurred.

**6.8 Audit Rights.** Landlord's books and records relating to the Common Area Costs for the Shopping Center shall be subject to the examination of Tenant, or by a reputable independent accounting or auditing firm representing Tenant (provided and so long as such firm provides its service on a non-contingent fee basis), for a period of two (2) years following the date Landlord has provided Tenant with the Adjustment Bill for a particular Lease Year. Such examination shall be at the sole expense of Tenant (except as provided below) at the Notice Address of Landlord and shall be conducted during normal business hours (but not during the calendar months of February, March or April) upon ten (10) days' advance notice to Landlord. Any underpayments or overpayments by Tenant as determined by such audit shall be promptly adjusted and paid between Landlord and Tenant. If such overpayments actually exceed three percent (3%) of Tenant's proportionate share of the Common Area Costs for the period, Landlord shall pay for the cost of the audit within thirty (30) days following receipt of Tenant's invoice therefor. All information pertaining to the Common Area Costs for the Shopping Center which Tenant, its agents or auditors review during the course of such examination shall be held in strict confidence by Tenant, its agents or auditors.

**6.9 Self-Help Rights.** Should Landlord or Landlord's independent contractor fail to operate and maintain Tenant's Protected Area in accordance with the requirements of this Lease, Tenant may give Landlord thirty (30) days written notice thereof, setting forth with particularity its objections or claimed deficiencies, and if such objections and/or deficiencies are not corrected to Tenant's reasonable satisfaction within said thirty (30) day period, or in the event that such correction requires more than thirty (30) days and is not commenced promptly and performed diligently or continues beyond the time reasonably needed to correct the objection or deficiency, then Tenant, in addition to any other right or remedy, shall have the right thereafter to correct any or all such objections or deficiencies, or cause such deficiencies to be corrected by an independent, qualified contractor. Upon demand by Tenant, Landlord shall pay Tenant an amount equal to all costs, fees and expenses paid or incurred by Tenant for such operation, maintenance and repairs plus eight percent (8%) thereof as an administrative fee together with accrued interest on the unpaid balance thereof at the Interest Rate from the date paid or incurred by Tenant until recovered in full. If Landlord fails to pay to Tenant such total amount within thirty (30) days after receiving a written demand therefor and reasonable evidence of the amount thereof, Tenant may elect to deduct such amount from the next payments due to Landlord hereunder until recovered in full; provided, however, Tenant may not deduct more than fifty percent (50%) from any single monthly installment of Base Rent, but may deduct one hundred percent (100%) of any monthly amounts then being billed and payable to Landlord for Common Area Costs, and such monthly deductions from successive monthly installments of Base Rent and Common Area Costs may continue until all amounts due to Tenant hereunder are fully recovered, provided, however, that Tenant shall be entitled to offset against larger percentages of successive installments of Base Rent if the fifty percent (50%) offset is insufficient to reimburse Tenant in full within six (6) months after the due date, taking into account the then remaining number of installments of Base Rent.

## **7. MAINTENANCE OF REMAINDER OF SHOPPING CENTER**

**7.1 Landlord's Obligations.** Landlord shall at its own sole cost and expense and not as a part of Common Area Costs except as otherwise provided herein or in Article 6: repair all damage to the Premises or Common Area caused by subsidence or other structural or latent defects; maintain in good condition and repair and replace, if reasonably necessary, the roofing, canopy, gutters, downspouts, exterior painting, wiring, plumbing, pipes, conduits and equipment which serve the Premises but are not located within the interior thereof and all structural portions of the Premises [which shall include without limitation the foundations; exterior walls (but not exterior doors); columns; store front (excluding plate glass); floor slab; roof structure and all elements supporting the floor or roof]; and make all repairs and changes to the Premises or Common Area required by reason of the negligence of the Landlord, its employees, agents, contractors or other tenants or occupants of the Shopping Center, fire or other casualty, vandalism or any breach by Landlord of any provision of this Lease. The foregoing provision shall not prejudice Landlord's right to include the cost of maintaining the roof over the Premises and the Shopping Center in Common Area Costs as provided in Section 6.6. Landlord shall make or cause all repairs and replacements to be made promptly and without unreasonable interference with the operation of the Shopping Center or the business of Tenant or any subtenant or licensee of Tenant. All maintenance, repairs and replacements performed by or for Landlord shall utilize good quality workmanship and materials conforming to the original specifications.

**7.2 Intentionally Deleted.**

**7.3 Tenant's Obligations.** Tenant will be responsible for maintenance and repair of all parts of the HVAC system. Tenant shall keep and maintain, in good order, condition and repair the Premises and every part of thereof (except for such portions as are Landlord's obligation pursuant to Section 7.1 hereof), including but not limited to the area enclosed by the unfinished interior surfaces of the walls, floors and ceilings of the Premises, including building systems, doors, and Tenant's portion of the Shared Loading Dock, but excluding any structural elements and any portion of any mechanical, plumbing, electrical or other system which does not exclusively serve the Premises. The provisions of this Section are subject to Section 6.6 and Section 22.

**7.4 Glass.** Tenant shall replace any and all glass damaged or broken in the Premises, except that Landlord shall replace same if damaged or broken by fire or other casualty covered by the insurance to be carried by Landlord hereunder or by reason of any breach or default by Landlord of its obligations hereunder or the negligence or intentional acts of Landlord, its employees, agents or contractors.

**7.5 Self-Help Rights.** All repairs to be performed by Landlord shall be commenced and completed as soon as reasonably possible. If Landlord has not performed any such repairs to the Premises within thirty (30) days after written notice of the necessity therefor has been given by Tenant, or if such repairs require longer than thirty (30) days and are not commenced promptly and performed diligently or continue beyond the time reasonably necessary therefor, Tenant may at any time thereafter, but shall have no obligation to, make such repairs at the expense of Landlord. Landlord further agrees that Tenant may, without notice, make emergency repairs to the Premises costing not in excess of ten thousand dollars (\$10,000.00) at Landlord's expense. For purposes hereof, the term "emergency" shall mean and refer to an unexpected situation or occurrence of a sudden and urgent nature that requires immediate action in order to avoid serious risk to person or property. Tenant shall give Landlord notice as soon as reasonably practical before or after commencing any emergency repair. Upon demand by Tenant, Landlord shall pay Tenant an amount equal to all costs, fees and expenses paid or incurred by Tenant for any repairs made by Tenant pursuant to this Section plus (except in the case of emergency repairs made by Tenant without notice) eight percent (8%) thereof as an administrative fee together with interest on such total amount at the Interest Rate from the date paid or incurred by Tenant until repaid in full. If Landlord fails to pay to Tenant such total amount within thirty (30) days after receiving a written demand therefor, together with copies of invoices and other reasonable evidence of such amount, Tenant may deduct the same from the next payments due to Landlord hereunder until recovered in full. If, during the making of any repairs or alterations herein required or authorized to be made by Landlord, Tenant is deprived of the uninterrupted use of any portion of the Premises for more than one (1) day, the Base Rent and other charges payable by Tenant hereunder shall be equitably abated.

**8. INSURANCE**

**8.1 Casualty Insurance.** Throughout the Term of this Lease or during any period of occupancy prior to the start of the Term or holding over thereafter, Landlord shall maintain or cause to be maintained at all times special form property insurance coverage in an amount equal

to not less than eighty percent (80%) of the full replacement value of all Improvements in the Shopping Center, including the Premises and any Improvements to the Premises made by Landlord or Tenant, provided that any insurance policy covering less than full replacement cost shall contain a waiver of co-insurance.

**8.2 Landlord's Liability Insurance.** Throughout the Term of this Lease or during any period of occupancy prior to the start of the Term or holding over thereafter, Landlord shall maintain commercial general liability insurance in respect of the Common Area, including contractual liability coverage, (i) in the minimum amounts of one million dollars (\$1,000,000.00) per occurrence, with an annual aggregate limit of two million dollars (\$2,000,000.00) for personal or bodily injury and damage to property, and (ii) in addition, Landlord shall maintain an umbrella policy in the minimum coverage amount of two million dollars (\$2,000,000.00) per occurrence, with an annual aggregate limit of two million dollars (\$2,000,000.00). Provided, however, reimbursable "Insurance Costs" (as defined in Section 8.4 below) shall not include the cost of any commercial general liability insurance coverage with per occurrence limits in excess of two million dollars (\$2,000,000.00) and/or annual aggregate limits in excess of five million dollars (\$5,000,000.00).

**8.3 Deductibles and Other Coverages.** Any deductible amounts actually paid by Landlord and not otherwise recovered by Landlord shall be includable within the gross amount of Insurance Costs as defined in Section 8.4, but, for purposes of calculating Tenant's obligation under Section 8.4 below, such deductible amount shall in no event exceed \$10,000. The minimum limits of insurance set forth herein shall in no way limit or diminish the liability of Landlord or Tenant hereunder and shall be subject to increase at any time, and from time to time, after the commencement of the fifth (5th) Lease Year of the Term hereof if Landlord, in the exercise of its reasonable judgment, shall deem same necessary for adequate protection (but in no event greater than is reasonably required in similar shopping centers in the metropolitan area where the Shopping Center is located).

**8.4 Reimbursement of Insurance Costs.** The costs to Landlord of all insurance required by this Article are hereinabove and hereinafter called the "Insurance Costs." Upon request, Landlord shall provide to Tenant a detailed breakdown of the various types and amounts of insurance which it maintains pursuant to this Section 8 and the respective costs thereof. Landlord shall maintain records of such Insurance Costs, and Tenant shall have the same rights of audit as are provided in Section 6 with respect to Common Area Costs. From and after the Commencement Date (or Tenant's Opening Date, if earlier), Tenant shall pay to Landlord Tenant's proportionate share (as defined in Section 6.5) of such Insurance Costs within thirty (30) days following receipt of a statement from Landlord showing the total amount thereof and a receipted invoice or other reasonable evidence of Landlord's payment thereof; provided, however, that any tenant or other occupant of the Shopping Center which is considered by the insurance carrier to entail a greater than normal risk for retail tenants shall pay any additional insurance premiums resulting therefrom, and Tenant shall not be responsible for any portion of such increase; and further provided that "Insurance Costs" shall in all events exclude insurance premiums incurred by Landlord if and to the extent that (i) the premiums are attributable to insurance coverages that are not authorized hereunder, and/or (ii) the amount of such premium

exceeds the rates readily available to Landlord for the type and amount of insurance involved, given the size, age, type of construction and tenant profile or mix of the Shopping Center.

**8.5 Tenant's Insurance Obligations.** Tenant covenants and agrees to provide on or before commencement of the Term and to keep in force during the entire Term of this Lease: (1) commercial general liability insurance for the mutual benefit of Landlord and Tenant relating to the Premises and its appurtenances in an amount of not less than One Million (\$1,000,000.00) Dollars covering bodily injury, property damage, personal injury and advertising injury arising out of or relating, directly or indirectly, to Tenant's business operations (and the operation of any permitted subtenant, concessionaire or licensee), conduct, assumed liabilities or use or occupancy of the Premises or any other part of the Shopping Center, which insurance shall name Landlord as an additional insured; (2) fire and extended coverage, vandalism, malicious mischief and special extended coverage in an amount adequate to cover the cost of replacement of all leasehold or building improvements in the Premises which were originally constructed or provided by or on behalf of Tenant; and (3) Workmen's Compensation insurance in the amounts required by applicable state law. Tenant agrees to deliver to Landlord at least fifteen (15) days prior to the time such insurance is first required to be carried by Tenant, and thereafter at least fifteen (15) days prior to the expiration of any such policy, a certificate of all policies procured by Tenant in compliance with its obligations hereunder. The minimum limits of the comprehensive general liability policy of insurance shall in no way limit or diminish Tenant's liability under this section and shall be subject to increase at any time, and from time to time, after the commencement of the fifth (5th) year of the Term hereof if Landlord, in the exercise of its reasonable judgment, shall deem same necessary for adequate protection (but in no event greater than is reasonably required in similar shopping centers in the metropolitan area where the Shopping Center is located). Within thirty (30) days after demand therefor by Landlord, Tenant shall furnish Landlord with evidence that such demand has been complied with.

**8.6 General.** Each party shall promptly deliver to the other certificates evidencing (or, promptly upon request, copies of) all insurance policies required under this Lease and shall thereafter deliver to the other party certificates evidencing renewal of such policies at least fifteen (15) days prior to the expiration of any existing policy. Tenant's insurance policies required under this Lease shall name Landlord as an additional insured and contain a provision that the same cannot be canceled without ten (10) days prior notice to Landlord for non-payment of premiums and thirty (30) days prior notice to Landlord for any other reason and shall be written by companies licensed to write insurance in the jurisdiction where the Shopping Center is located, provided such companies have a Best's financial category minimum rating of Class "A/VII" or better in the most recent edition of Best's Insurance Report or as otherwise approved by Landlord and Tenant in the event such rating system shall be modified or discontinued. Each of Tenant and Landlord shall have the right to provide any insurance required to be carried by it hereunder under blanket policies, so long as the minimum amounts of coverage required herein are expressly reserved for the Shopping Center and the Premises, as applicable. Nothing herein shall prevent either party from maintaining additional amounts or types of insurance coverage at its own sole cost and expense.

**8.7 Waiver of Subrogation.** Landlord hereby releases Tenant from any liability for damage or destruction to the Premises or any other portion of the Shopping Center, including any



improvements, alterations or changes thereto, whether or not caused by acts or omissions of Tenant, its employees, agents or contractors, and Landlord hereby waives any and all claims and right of recovery against Tenant, its employees, agents and/or contractors, for damage, loss or injury caused by or resulting from fire and/or other perils, to the extent that any such claims for damages, losses or injuries are or would be covered by any special form property insurance policies which Landlord does or is required to maintain hereunder, without regard to deductible amounts. Tenant hereby releases Landlord from any liability for damage or destruction to the Premises, including any improvements or alterations thereto made by Tenant, and/or Tenant's trade fixtures or other personal property, whether or not caused by acts or omissions of Landlord, its employees, agents or contractors, and Tenant hereby waives any and all claims and right of recovery against Landlord, its employees, agents and/or contractors, for damage, loss or injury caused by or resulting from fire and/or other perils, to the extent that any such claim for damages, losses or injuries are or would be covered by any special form property insurance policies which Tenant does or is required to maintain hereunder without regard to deductible amounts. Landlord and Tenant shall each look to their respective insurance coverage for recovery of any insured property damage. Each of Landlord and Tenant shall cause any special form property insurance policies which it maintains to contain a provision whereby the insurer waives any (i) rights of subrogation and (ii) rights of recovery against the other party. Both Landlord and Tenant agree to immediately give each insurance company which has issued to it policies of special form property insurance written notice of the terms of said mutual waivers and to cause said insurance policies to be properly endorsed, if necessary, to prevent the invalidation thereof by reason of said waivers and shall furnish to the other party a certificate of insurance or other written evidence of such endorsement or that such endorsement is not required.

## 9. INDEMNITY.

Subject to Sections 8.7 and 18.2, Tenant covenants and agrees to indemnify and hold Landlord harmless from and against any and all losses, claims, demands, damages (but not consequential damages), liabilities or expenses (including reasonable attorneys' fees) resulting from the negligence of Tenant or its officers, agents, contractors, subcontractors, assignees, subtenants, licensees, or their respective employees in the use, occupation, repair or alteration of the Premises. The foregoing shall not apply to any loss, claim, damage, liability or expense arising out of or resulting from any negligent, willful or otherwise wrongful act or omission of Landlord or its agents, contractors, subcontractors or employees. Subject to Sections 8.7 and 18.2, Landlord covenants and agrees to indemnify and hold Tenant harmless from and against any and all losses, claims, demands, damages (but not consequential damages), liabilities or expenses (including reasonable attorneys' fees) resulting from the negligence of Landlord or its officers, agents, contractors, subcontractors or their respective employees in the use, occupancy, operation or maintenance of the Common Area. The foregoing shall not apply to any loss, claim, damage, liability or expense arising out of or resulting from any negligent, willful or otherwise wrongful act or omission of Tenant or its agents, contractors, subcontractors, employees, subtenants or licensees.

## 10. REQUIREMENTS OF LAW AND FIRE INSURANCE

In the use of the Premises and the operation of Tenant's business at the Premises, Tenant shall comply with all applicable laws, orders, statutes, ordinances, rules and regulations of federal, state, county and municipal authorities having jurisdiction and with any order relating to Tenant's business and Tenant's use of the Premises which is made pursuant to law by any public officer having due authority. Tenant shall also comply with all regulations of any board of fire underwriters having jurisdiction which impose any obligation, order or duty in respect of Tenant's use of the Premises, provided that Tenant shall have no obligation to make any structural changes to the Premises unless the same is the result of Tenant's specific use thereof as opposed to general retail use. Tenant shall have the right, upon giving notice to Landlord, to contest any obligation imposed upon Tenant pursuant to the provisions of this Article and to defer compliance during the pendency of such contest, provided that the failure of Tenant so to comply will not subject Landlord to prosecution or criminal or civil penalty and provided further that, prior to commencing any protest, Tenant shall post any bond or provide such other assurance as may be required or permitted by law to avoid imposition of any penalty or damages or to pay any such penalty or damages at Tenant's sole expense. Landlord shall, at Tenant's expense, cooperate with Tenant in such contest and shall execute any documents reasonably required in furtherance of such purpose. This Article is not intended to impose on Tenant any obligation to make or pay for changes or alterations to the Premises or the Premises or any other obligation which under this Lease is an obligation of Landlord, and Landlord shall be responsible to comply at its own expense with all requirements of law or any board of fire underwriters which apply to the Shopping Center generally or require any modification of the Shopping Center or the Premises; provided, however, that Tenant shall be responsible for changes or alterations to the Premises required by law which result from Tenant's specific use of the Premises or manner of operating the Premises, and not from retail use or operation generally.

## 11. ALTERATIONS OF THE PREMISES

**11.1 Alterations by Tenant.** Subject to the provisions of this Section 11.1, Tenant may from time to time at its own cost and expense make such interior alterations, additions, restorations, changes, replacements or installations which are non-structural, non-utility and non-storefront in nature (hereinafter called "Alterations") in, of or to the Premises as Tenant deems necessary or desirable. Any structural Alterations or Alterations which change or alter the exterior appearance of the Premises shall require prior written consent of Landlord, which consent shall not be unreasonably withheld and shall be deemed granted unless, within twenty (20) days, Landlord disapproves such request in writing specifying the reason or all of the reasons therefor. Actions necessary to affix or integrate permitted interior Alterations to or with structural elements shall not be deemed structural changes so long as no portion of the structure must be redesigned or reconstructed or is weakened as a result of such Alteration or the removal thereof and the cost to Landlord of structural maintenance, repair and applicable insurance does not increase as a result thereof. Landlord, at Tenant's cost and expenses, shall cooperate with Tenant in the obtaining of any required building permit or governmental approval thereof and shall execute any documents reasonably required in furtherance of such purpose. Tenant shall pay all costs and expenses in connection with any and all work performed on the Premises (including Alterations), shall discharge any mechanic's lien filed against the Premises in connection

therewith in accordance with the requirements of Section 26.11 and shall indemnify and hold Landlord harmless from and against any claims, damages, costs and expenses arising out of such work. At Landlord's request, Tenant shall remove any such work (including Alterations) at the expiration or earlier termination of this Lease and restore the Premises to the condition existing prior to such installation, normal wear and tear and damage due to casualty excepted. Tenant shall require its contractor and subcontractors to furnish Landlord certificates of insurance evidencing coverages with the limits as specified and referenced in this Lease.

Landlord hereby grants to Tenant the right to install a satellite antenna on the roof over the Premises. Such satellite antenna shall be in a location directly over the Premises or in such other location acceptable to Landlord, shall be of a size and frequency reasonably acceptable to Landlord and otherwise in accordance with plans and specifications prepared by Tenant and approved by Landlord and in accordance with all applicable building codes. The approval by Landlord of the size or frequency of such satellite or of the plans and specifications shall not constitute the assumption of any liability on the part of Landlord for their compliance or conformity with applicable building codes and the requirements of this Lease or for their accuracy. Tenant shall be solely responsible for such plans and specifications. Landlord shall have no liability in connection with any interruption of services provided by such satellite or any obligation to maintain or repair such satellite. In no event shall such satellite, or its use thereof, interfere with utility lines or risers then located in or servicing the Shopping Center or otherwise substantially interfere with other communication equipment then located within the Shopping Center. Tenant shall maintain said satellite antenna in a good state of repair and shall protect, defend, indemnify, save and hold harmless Landlord against and from any and all claims, losses, costs, damages and expenses, including reasonable attorney's fees, resulting from, or in connection with, the erection, maintenance, existence or removal of such satellite antenna; and shall repair any damage which may have been caused by the erection, maintenance, existence or removal of such satellite antenna. Tenant's obligation to observe or perform this covenant shall survive the expiration or termination of this Lease. The provisions of this paragraph are intended solely for the benefit of Landlord and Tenant and no third party shall have any rights accruing in connection therewith. Tenant shall not authorize the use of the satellite by any third party who does not occupy or use any portion of the Premises, or sell, lease or assign the rights lease hereby granted to any such third party, and any such grant of authorization, or attempted sale, lease or assignment shall be a default under this Lease. Upon termination or earlier expiration of this Lease or Tenant vacating the Premises, Tenant shall remove such satellite antenna and repair all damage caused by such removal. In no event may Tenant's installation or maintenance of such satellite breach or invalidate the warranty on Landlord's roof or any portion thereof.

**11.2 Alterations by Landlord.** Following the Delivery Date, Landlord may not alter the interior or exterior of the Premises or make any changes or alterations to the Shared Loading Dock which materially or adversely affect Tenant's use or access to the Shared Loading Dock without Tenant's consent, unless required to comply with any law or order of any governmental authority having jurisdiction thereover.

## 12. LANDLORD ACCESS TO DEMISED PREMISES.

Tenant shall permit Landlord to enter upon the Premises at all reasonable times during customary business hours of Tenant upon reasonable written notice given no less than two (2) days in advance, to make any necessary inspections of or repairs, changes, replacements and restorations to the Premises or to exhibit the Premises to prospective purchasers and Mortgagees of the Shopping Center and, during the one hundred eighty (180) day period preceding the then applicable date of expiration of the Term, to exhibit the Premises to prospective tenants. Landlord may, without prior notice in case of an emergency, enter the Premises to remedy such emergency, in which event Landlord shall give Tenant prompt written notice thereafter of the reason for and time of entry and of all actions taken by Landlord and to the extent any amounts are incurred in remedying such emergency, the cost thereof. In the event of any entry pursuant to this Article, Landlord shall use commercially reasonable and diligent efforts to minimize any interference with the conduct of Tenant's business; if any entry or work performed by Landlord in the Premises results in Tenant's inability to operate its regular business in the Premises for more than one (1) day, Base Rent and all charges hereunder shall abate until Tenant is able to resume its regular business in the Premises.

## 13. UTILITIES

As of the earlier of the Delivery Date or the date Tenant enters and takes exclusive possession of the Premises for the commencement of fixturing and stocking and at all times thereafter for the duration of the Initial Term and each Renewal Period, Landlord shall make available to Tenant within the Premises at the locations in adequate supply in accordance with and as shown on the schedule of Tenant's utility requirements attached hereto as Exhibit D-2, and Tenant agrees to pay for all utility services rendered or furnished to the Premises including heat, gas, water, electricity, sprinkler charges assessed by any governmental authority, fire line charges, sewer rental, sewage treatment facilities charges and the like, together with all taxes levied or other charges on such utilities and governmental charges based on utility consumption only or generally imposed by the municipality or utility service to end users. Said utility services may be provided directly to the Premises by the local utility company or, at Landlord's option, the services may be provided by the local utility company directly to Landlord who then distributes to the Premises. If any such utilities are not separately metered or assessed or are only partly separately metered or assessed and are used in common with other tenants of the Shopping Center, Tenant will pay to Landlord an apportionment of such charges for utilities used in common based on the gross area leased to each tenant using such common facilities, in addition to Tenant's payments of the separately metered charges. If Landlord shall supply any such services, Tenant will purchase same from Landlord at charges not in excess of the charges for the services in question made by any utility corporation or governmental agency supplying such utilities in the area. Any such charges for services supplied by Landlord, or charges for utilities which may be rebilled by the Landlord, shall be due and payable within thirty (30) days after billings therefor are rendered to Tenant. In no event shall Landlord be liable for the quality, quantity, failure or interruption of such service to the Premises or any loss or damage resulting therefrom unless due to the negligence of Landlord or its agents, employees or contractors; subject, however, to the provisions of Section 8.7 of this Lease. Landlord shall pay in full any fee such as connection, tap or meter installation fees or similar charge, however denominated (but

not any security deposit required by the public utility for service to the Premises or fees charged by the utility for reading the meter), which is not part of the regular service rate for existing utility customers. All utility service for the Premises shall be in the name of Tenant, and Tenant shall arrange with and pay directly to such public utility companies the consumption charges for all utilities which it uses in the Premises. If Landlord furnishes any utility service to the Premises and Tenant, in its reasonable business judgment, deems Landlord's calculation of the Tenant's usage of such utility service to be excessive and so notifies Landlord, then Tenant shall have the right, promptly after giving such notice and if permitted by the public utility furnishing such utility to Landlord, to install a check meter reasonably approved by Landlord to meter the actual usage of the utility service furnished to the Premises for a period of ninety (90) days. The results of such check meter shall be binding upon the parties and, if different from the usage actually billed by Landlord, the usage as determined by such check meter shall be applied retroactively in direct proportion to such difference to the date Tenant first notified Landlord that such usage was excessive and the billing from Landlord for such utility service shall be adjusted based upon such usage from such date.

#### 14. REAL PROPERTY TAXES

**14.1 Definition.** For purposes hereof, the term "Real Property Taxes" shall mean and include all real property taxes and assessments, impositions and charges of every kind and nature whatsoever, extraordinary as well as ordinary, general and special, foreseen and unforeseen, and each and every installment thereof (including any interest on amounts which may be paid in installments but not any penalties which arise from Landlord's late payment of such Real Property Taxes), which any governmental or other authority having jurisdiction over the Shopping Center levies, assesses, or imposes upon against the land, buildings and all other improvements within the Shopping Center, together with any and all reasonable costs and expenses incurred by Landlord in negotiating, appealing or contesting such taxes and assessments, but excluding (i) any current or future assessments under local improvement districts, community facilities districts or similar arrangements undertaken by or with the consent of Landlord for the purpose of financing improvements to the Shopping Center; (ii) any correction of or supplement to any tax or assessment for any period prior to the Commencement Date; (iii) relative to any Shopping Center located in California, any increase in Real Property Taxes caused by the elimination of any limit on such increases as a result of any transfer of the Shopping Center or any portion thereof or interest therein by Landlord; and (iv) any tax on the net income of Landlord or in the nature of an income tax. Should any governmental taxing authority acting under any present or future law, ordinance or regulation, levy, assess or impose a tax, excise and/or assessment (other than an income or franchise tax) upon or against the rentals payable by Tenant to Landlord, either by way of substitution for or in addition to any existing tax on land and buildings or otherwise, or any other substitute tax, the proceeds of which are used to fund the same governmental functions as were funded by ad valorem taxes, the same shall be considered Real Property Taxes under this Lease and Tenant shall be responsible for and shall pay Tenant's proportionate share thereof, on or before the date that any fine, penalty or interest would be added thereto for nonpayment. Substitute taxes as referred to above in the paragraph shall include a governmental surtax on parking spaces.

**14.2 Tenant's Obligation to Pay.** From and after the Commencement Date (or Tenant's Opening Date, if earlier), Tenant shall pay to Landlord its proportionate share of all Real Property Taxes within the later of (i) thirty (30) days following receipt by Tenant of a statement from Landlord showing the total amount thereof; or (ii) twenty (20) days prior to the earliest due date of such Real Property Taxes to permit Landlord to obtain the maximum discount permitted by law, and receipt by Tenant of a paid invoice or other reasonable evidence of Landlord's payment of the Real Property Taxes for the prior fiscal period. Any Real Property Tax relating to a fiscal period a part of which is not included within the Term of this Lease shall be prorated so that Tenant shall pay only that portion thereof which relates to the tax period included within the Term of this Lease. Tenant's proportionate share shall be computed in the same manner as to Tenant's proportionate share of Common Area Costs.

**14.3 Tenant's Obligation to Pay Additional Taxes.** Tenant shall pay the following when due: all taxes assessed against Tenant's personal property; all license fees, occupational taxes, impact fees and other governmental charges assessed by reason of Tenant's use or occupancy of the Premises, including, without limitation, any rental or occupancy taxes and any other taxes arising out of the operation of Tenant's business or occupancy of the Premises

**14.4 Landlord's Obligation to Minimize.** Landlord shall have the right but not the obligation to contest Real Property Taxes by appropriate means when reasonable to do so. If any general or special assessment, whether ordinary or extraordinary, is assessed in whole or in part against the Shopping Center which may be payable over a term of years, Landlord shall include only such portion of any such tax or assessment which falls due within each year of this Lease in determining Tenant's proportionate share, whether or not Landlord elects to make such payment over a term of years. Provided Tenant pays its proportionate share of such Real Property Taxes at or before such early payment due date, Landlord shall include all discounts or credits for early payment of real estate taxes when determining Tenant's proportionate share, whether or not Landlord takes advantage of such discounts or credits for early payment.

**14.5 Intentionally Deleted.**

**14.6 Copies of Bills and Notices.** Landlord shall promptly provide Tenant a copy of any Real Property Tax bill accompanied by a statement as to Tenant's proportionate share thereof and a computation as to how said amount was determined.

## **15. SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT**

**15.1 Conditions of Subordination.** This Lease shall be and become subject and subordinate to the lien of any present or future mortgage, deed of trust or other encumbrance or ground lease (hereinafter collectively "Mortgage") of the Premises or all or any portion of or interest in the Shopping Center and any renewals, modifications, replacements or extensions thereof, provided however that in connection with any future mortgage, such subordination shall be conditioned upon Tenant receiving a non-disturbance and attornment agreement executed by the holder thereof (hereinafter the "Mortgagee") and applicable to any and all advances to be made under such mortgages, and all renewals, modifications, extensions, consolidations and replacements thereof. Tenant covenants and agrees to execute and deliver, upon demand, such further instrument or instruments subordinating this Lease on the foregoing basis to the lien of

any such Mortgage or Mortgages as shall be desired by the Landlord and any Mortgagees or proposed Mortgagees, provided Tenant receives from such Mortgagee(s) or ground lessor an agreement, in writing, wherein such Mortgagee or ground lessor, as applicable, agrees that in the event of the termination of the applicable Mortgage or in the event of a foreclosure or deed in lieu of foreclosure, or any similar action taken pursuant to said Mortgage, this Lease and the right of Tenant under this Lease will not be terminated or disturbed except in accordance with the provisions of this Lease. Tenant shall, in the event of the sale or assignment of Landlord's interest in the Shopping Center, or in the event of any proceedings brought for the foreclosure of, or in the event of the exercise of the power of sale under any Mortgage covering the Shopping Center, attorn to and recognize such purchaser or Mortgagee as Landlord under this Lease.

If any Mortgagee shall have given prior written notice to Tenant that it is a holder of a Mortgage as described in the first paragraph of this Article and such notice includes the address to which notices to such Mortgagee are to be sent, then Tenant agrees to give to such Mortgagee notice simultaneously with any notice given to Landlord to correct any default of Landlord as hereinabove provided and agrees that the Mortgagee shall have the right, within sixty (60) days after receipt of said notice, to correct or remedy such default before Tenant may exercise any right of termination under this Lease by reason of such default.

**15.2 Form of Subordination.** Upon request of the holder of a Mortgage which has agreed to execute and deliver to Tenant a non-disturbance and attornment agreement as provided in this Article 15, Tenant shall execute, acknowledge and deliver to such Mortgagee an agreement ("SNDA") in the form attached hereto as Exhibit F. The exact language set forth in the form of SNDA attached hereto as Exhibit F may be modified so long as it does not change the intention of the parties and is approved by each party in its sole discretion. In no event shall any of Tenant's inventory, trade fixtures, furniture or furnishings, books or records, accounts or other property or assets be or become subject or subordinate to any Mortgage or other lien of any kind in favor of Landlord or granted by Landlord to any Mortgagee or other person. Upon request of Tenant or Tenant's lender, Landlord shall execute, acknowledge and deliver certificates, waivers, subordinations or other appropriate agreements confirming the foregoing.

**15.3 Further Agreements.** If the holder of any existing Mortgage requires that this Lease have priority over such Mortgage, Tenant shall, upon request of such Mortgagee, execute, acknowledge and deliver to such Mortgagee an agreement acknowledging such priority, in form reasonably approved by Tenant.

## **16. ASSIGNMENT AND SUBLETTING**

**16.1** Except as otherwise provided herein, Tenant covenants and agrees not to assign this Lease or to sublet the whole or any part of the Premises, or to permit any other persons to occupy same without the written consent of the Landlord first had, which consent shall not be unreasonably withheld or delayed. Any assignment or subletting, even with the consent of Landlord, shall not relieve Tenant from liability for payment of rent or other sums herein provided or for the obligation to keep and be bound by the terms, conditions and covenants of this Lease as such exist as of the date of the assignment or sublease. The acceptance of rent from any other person shall not be deemed to be a waiver of any of the

provisions of this Lease or to be a consent to the assignment of this Lease or subletting of the Premises. Notwithstanding the foregoing provisions, such assignment or subletting shall not divide the Premises into more than two spaces nor shall either of such divided space contain less than 8,000 square feet of floor area. Except in connection with a subletting or assignment permitted under Sections 16.4, 16.5 and/or 16.6 below, Landlord shall have the right to recapture the Premises (but in the event of a partial subletting, not more than that portion of the Premises which is being sublet) by written notice to Tenant given within thirty (30) days after receipt of Tenant's notice of Tenant's intention to assign or sublet and all information reasonably requested by Landlord in connection with such proposed action. Tenant may vitiate Landlord's recapture right by notifying Landlord that Tenant withdraws its intent to assign or sublet. Such withdrawal notice must be given within fifteen (15) days of Landlord's recapture notice. Landlord's recapture notice shall specify a lease termination date no earlier than sixty (60) days nor later than ninety (90) days after such notice. In the event of recapture of the Premises by Landlord as above provided, Landlord shall reimburse Tenant the difference between the unamortized value over the initial Lease Term of the leasehold improvements and equipment installed by Tenant in the Premises over and above Landlord's payment of the Tenant Construction Allowance, not to exceed Fifty Dollars (\$50.00) per square foot calculated on the Gross Floor Area of the Premises. Upon such lease termination date, Tenant shall vacate the Premises and Landlord and Tenant shall be relieved of obligations hereunder, except for those accruing through such termination date.

16.2 Any consent by Landlord to an assignment or sublease by Tenant, shall apply only to the specific transaction thereby authorized and shall not relieve Tenant from the requirement of obtaining prior written consent of Landlord to any further assignment or sublease.

16.3 An assignment for the benefit of creditors or by operation of law shall not be effective to transfer any rights to assignee without the written consent of the Landlord first having been obtained.

16.4 Notwithstanding anything contained in this Article 16 to the contrary, Tenant shall have the right to assign this Lease or to sublet the Premises to any entity that satisfies the definitional requirements of a "Comparable Replacement Tenant" set forth in Paragraph 4 of Exhibit I, provided Tenant shall deliver to Landlord, within thirty (30) days after the date of such assignment or subletting, an executed copy of the assignment or sublease wherein such assignee or subtenant assumes for the benefit of Landlord all of the terms, conditions and covenants set forth in this Lease to be observed and performed by Tenant (other than, in the case of a sublease, the payment of rent due hereunder) and agrees to be bound by the terms, conditions and covenants of this Lease.

16.5 Notwithstanding anything contained in this Article 16 to the contrary, Tenant shall have the right to assign this Lease or to sublet the Premises to its parent corporation or to any subsidiary or affiliated entity provided that Tenant shall deliver to Landlord, within thirty (30) days after the date of such assignment or subletting, an executed copy of the assignment or sublease wherein such parent corporation, subsidiary or affiliated entity assumes for the benefit of Landlord all of the obligations of Tenant under this Lease (other than, in the case of a sublease, the payment of rent due hereunder), and agrees to be bound by the terms, conditions



and covenants of this Lease and further provided that any such assignment or subletting shall not relieve Tenant from liability for the payment of rent or other sums herein provided or from the obligation to keep and be bound by the terms, conditions and covenants of this Lease. In the event such parent, subsidiary or affiliated corporation or other entity making the assignment or sublease shall at any time after the date of such assignment or sublease no longer be a parent, subsidiary or affiliated corporation of the entity making the assignment or sublease, then such event shall constitute an assignment for the purposes hereof and shall be subject to the provisions of this Article 16.

16.6 Notwithstanding anything contained in this Article 16 to the contrary, Tenant shall have the right to assign this Lease or to sublet the Premises to any corporation into which Tenant may merge or to any corporation arising out of a consolidation of Tenant with another corporation or to a corporation or other entity acquiring; (i) all or substantially all the assets of Tenant; or (ii) all of the issued and outstanding voting stock of Tenant (any of the preceding, and "Acquiring Entity"); or (iii) all or substantially all of Tenant's stores in the Miami-Dade metropolitan area. Such right to assign this Lease or to sublet the Premises to an Acquiring Entity shall be expressly conditioned upon Tenant delivering to Landlord, within thirty (30) days after the date of such assignment or subletting, an executed copy of the assignment or sublease in a form reasonably acceptable to Landlord wherein the corporation into which Tenant may merge the corporation arising out of a consolidation of Tenant with another corporation or such acquiring corporation or other entity, as the case may be, assumes for the benefit of Landlord all of the terms, conditions and covenants set forth in this Lease to be observed and performed by Tenant and agrees to be bound by the terms, conditions and covenants of this Lease. Any such assignment or subletting shall not relieve Tenant from liability for the payment of rent or other sums herein provided or from the obligation to keep and be bound by the terms, conditions and covenants of this Lease.

16.7 Nothing contained in this Article 16 shall be deemed to limit or restrict Tenant's right to have one or more departments operate within the Premises by means of sublease, license or concession agreements.

## 17. TITLE

17.1 **Landlord's Title Warranty.** Landlord represents and warrants that it is the owner of fee simple title to the Shopping Center, including the Land and all Improvements (except to the extent owned by tenants), equipment, fixtures and all other personal property appertaining thereto, and including the Premises, free and clear of all tenancies, occupancies, restrictions, covenants, easements, liens, encumbrances and any other exceptions which are inconsistent with and/or which adversely affect any rights of Tenant under this Lease. Landlord represents and warrants that no easements are located under Tenant's Building. Landlord agrees that it will not enter into or exercise any power to amend any existing title exception or permit any amendment to occur therein pursuant to any power of amendment reserved therein or otherwise which is inconsistent with or adversely affects any rights of Tenant under this Lease.

17.2 Intentionally deleted.

**17.3 Covenant of Quiet Enjoyment.** If Tenant pays the Base Rent and additional rent and performs all of the covenants and agreements to be performed on Tenant's part within any applicable notice and cure period, Landlord covenants and agrees that Tenant shall have complete and quiet enjoyment of and may peaceably enjoy the Premises and all appurtenances belonging thereto, including the use of the Common Areas, throughout the Initial Term and all Renewal Periods or until this Lease is earlier terminated as provided herein, subject, however, to the express terms, covenants and conditions contained in this Lease. Landlord represents and warrants that Tenant will not be prevented or restricted in any material way from conducting any part of its Primary Business in or from the Premises or in exercising any of the rights herein granted with respect to the Common Area because of any restriction, covenant, lease, encumbrance or agreement entered into by any person having or having had an interest in the Premises or any portion of the Shopping Center. If Tenant is so prevented or restricted because of any court order or other judicial determination arising out of any such restriction, covenant, lease encumbrance or agreement, the Base Rent and other charges to be paid by Tenant hereunder shall be equitably abated during the period of such prevention or restriction according to the nature and degree thereof and, if said period shall continue for ninety (90) days or more after notice from Tenant or Landlord, Tenant may cancel this Lease by notice in writing to Landlord at any time thereafter during said period, and in the event of such termination Tenant shall have no further obligation or liability hereunder. From and after the execution and delivery hereof, Landlord shall defend, indemnify and save harmless Tenant against all actions, claims, costs (including reasonable attorneys' fees) and losses arising out of the existence of any such lease, encumbrance, restriction, covenant or agreement or allegation of the existence thereof.

**17.4 Access.** Landlord represents and warrants that the Premises do and will throughout the Initial Term of the Lease and all Renewal Periods have adequate vehicular and pedestrian access to and from adjacent public streets and alleys. If at any time access to the Premises, including access by semi-trailer trucks or other delivery or pickup vehicles to or from the loading area of the Premises, is prevented or materially impeded for any reason beyond Tenant's reasonable control and, as a result thereof, Tenant is restricted in or is reasonably unable to continue the operation of its retail business in the Premises, the Base Rent and other charges to be paid by Tenant hereunder shall be equitably abated according to the nature and degree of the restriction on said operation until such access is again permitted; and if such condition continues for a period of sixty (60) days after notice, Tenant may cancel this Lease by notice in writing to Landlord and the holder of any first Mortgage at any time thereafter while said condition continues, and in the event of such termination Tenant shall have no further obligation or liability hereunder. Landlord shall not pile snow or other materials in such a manner as to interfere with access to or use of any portion of the Premises, including the loading area.

**17.5 Sale or Transfer of the Shopping Center.** Landlord shall have the right to sell or transfer all or any portion of the Shopping Center without the consent of Tenant but shall give or cause the transferee to give Tenant prompt written notice of any such sale or transfer, including the identity of the transferee and any change in the address for giving notices or paying rent hereunder. If Landlord intends to sell or transfer less than the entire Shopping Center, Landlord shall, in addition to the foregoing, before entering into such transaction, subject the portion of the Shopping Center to be transferred to a declaration, indenture or other instrument in form and substance reasonably satisfactory to Tenant which (i) runs with the land and is binding and

enforceable by, against and upon such portions of the Shopping Center to be transferred, and all tenants or occupants thereof and other persons acquiring any interest therein at any time, (ii) preserves all of the rights of Tenant under this Lease with respect to the portion of the Shopping Center to be transferred, including any portion thereof which is not owned by Landlord and the exclusives and prohibited uses set forth herein (iii) cannot be terminated or amended during the Term of this Lease in any manner which is inconsistent with the rights of Tenant hereunder. Notwithstanding the foregoing, "Landlord", so far as covenants or obligations on the part of Landlord are concerned, shall be limited to mean and include the owner of the Land only for the time of such ownership. If the Land is transferred, the seller automatically shall be entirely released of all covenants and obligations under this Lease which accrue from and after the date of such transfer, provided the transferee has assumed and agreed to carry out all covenants and obligations of Landlord hereunder. The covenants and obligations contained in this Lease to be performed on the part of Landlord shall be binding upon Landlord, its successors and assigns, only during their respective successive periods of ownership. The covenants and undertakings herein made and entered into by Landlord are solely for the purpose of binding Landlord to the extent specifically of Landlord's interest in the Land and the Shopping Center and the income therefrom. No personal liability is assumed by or shall at any time arise or be asserted or enforced against Landlord, or against any general or limited partner of Landlord, or any of their respective agents, employees, officers, partners, successors or assigns, on account of this Lease or on account of the covenants herein contained, either express or implied, all such liability, if any, being expressly waived and released by Tenant and by any persons claiming by, through or under Tenant, and that recourse hereunder, if any, by Tenant, its successors or assigns, shall be limited specifically and exclusively to Landlord's interest in the Land and the Shopping Center and the income therefrom. The limitation of this Section shall not apply to or limit any injunctive or other equitable, declaratory or other forms of relief to which Tenant may be entitled (notwithstanding that such actions are *in personam* in nature) or any other remedy or action against Landlord provided such action does not involve the personal liability of Landlord for monetary damages from property other than Landlord's interest in the Shopping Center and/or the Land.

## 18. ENVIRONMENTAL RESPONSIBILITY

**18.1 Tenant's Responsibilities.** Tenant shall not store, handle, use, sell, generate or release, or specify, use or dispose of, or permit its architect, contractors, subcontractors or any parties performing any work on behalf of Tenant to specify, use or dispose of, directly or indirectly, on the Premises, Common Areas, Shopping Center, any hazardous or toxic substances, materials or wastes regulated under any federal, state or local statute, ordinance, rule, regulation or other law now or hereafter in effect pertaining to environmental protection, contamination, remediation or worker safety, including, without limitation, any substance, which now or hereafter is defined or designated as a "hazardous waste" or "hazardous substance" (i) by the United States Department of Transportation or by the Environmental Protection Agency; or (ii) under or pursuant to the (a) Federal Water Pollution Control Act, as amended; (b) Resource Conservation and Recovery Act, as amended; (c) the Comprehensive Environmental Response, Compensation and Liability Act, as amended; (d) the Superfund Amendments and Reauthorization Act; or (e) any other federal, state or local laws relating in any way to the protection of the environment. Upon Landlord's request, Tenant shall deliver to Landlord a

certificate from its architect, contractor, subcontractor or other performing party stating that no such materials have been specified or used in such work. Notwithstanding the foregoing provisions, any such contractors retained by Tenant for hazardous waste removal purposes shall certify only that all residues of hazardous, toxic, explosive, carcinogenic or otherwise environmentally impacting materials which such contractor used in their work on the Premises have been removed to meet all applicable federal, state and local environmental laws and standards; provided, however, such removal shall meet the most stringent promulgated application of said environmental laws and standards, even if such application is scheduled to take effect only in the future. Upon reasonable advance notice to Tenant, Landlord may conduct an environmental audit of the Premises at Landlord's cost and expense. While conducting such environmental audit or procedure, Landlord shall use reasonable efforts not to materially adversely interfere with Tenant's use of the Premises. Notwithstanding the foregoing provisions, Tenant may keep on the Premises only such retail products containing hazardous materials as are reasonable and customary for the sale to Tenant's customers, in accordance with all federal, state and local laws, but shall not keep said substances in such quantities and/or for such duration as would require permits or other regulatory authorizations to be obtained and shall in all events indemnify and hold Landlord harmless in connection with the release, use or presence of same in the Premises and the Shopping Center. If any hazardous waste or hazardous substance is detected and the same have been introduced, placed or brought upon the Premises or the Shopping Center by Tenant, Tenant's officers, agents, contractors, subcontractors, subtenants, assignees, or licensees, or their respective employees, or if Tenant violates the covenants contained herein is discovered, the fees and expenses of such audit shall be paid by Tenant on demand of Landlord. Tenant shall immediately notify Landlord and provide copies upon receipt of all written complaints, claims, citations, demands, inquiries, reports or notices relating to the condition of the Premises or compliance with environmental laws.

**18.2 Landlord's Responsibilities.** Landlord represents, warrants and agrees that to the best of Landlord's knowledge, as of the date hereof and the Delivery Date, the Premises, Common Areas and all other portions of the Shopping Center are and will be free from asbestos and other hazardous or toxic materials, wastes or other substances which violate, are required to be removed or remediated by or give rise to any liability under any Federal, state, local or other statute, rule, regulation or other law governing or protecting the environment. If at any time any removal or remediation of any environmental contaminant is sought or ordered or any liability or penalty is sought or imposed by any person with respect to the Premises, the Common Area or any other portion of the Shopping Center or by any authority having jurisdiction thereof on account of the presence of any hazardous or toxic substance or waste or other environmental contaminant at or any migration thereof from the Shopping Center, whether based on alleged violation of applicable environmental standards, actual damage to persons or property resulting therefrom, or otherwise and provided the same has not been caused by Tenant's breach of its obligations under the Lease, Landlord shall defend, indemnify and hold harmless Tenant therefrom and against all claims, demands, losses, costs, expenses and liabilities on account of such contamination, unless and to the extent caused by any breach of Tenant's obligations hereunder. This indemnification shall survive and continue after the expiration or termination of this Lease.

## **19. TENANT'S DEFAULT**

**19.1 Default; Notice and Grace.** If Tenant defaults in the performance of any of its obligations under this Lease, Landlord may give written notice to Tenant specifying the nature of such default. If Tenant does not correct or cure such default within ten (10) days after receipt of such notice as to a default in payment of Base Rent or other sums due hereunder, or within thirty (30) days after receipt of such notice in all other cases if such default is non-monetary (or if such default is of a nature which cannot be reasonably cured within such thirty (30) day period, then within such longer period as is reasonably required to cure such default provided Tenant commences such cure within said thirty (30) day period and thereafter pursues with reasonable diligence the completion thereof), then Landlord shall have the rights and remedies provided herein, at law or in equity.

**19.2 Landlord's Remedies.** If Tenant fails to cure any default within the applicable grace period, then Landlord shall have the right, only upon order of a court of competent jurisdiction after due notice and hearing, to re-enter the Premises and dispossess Tenant and any other occupants thereof, remove their effects not previously removed by them and hold the Premises free of this Lease. After such a dispossession or removal, (1) the Base Rent and other charges hereunder shall be paid up to the date thereof, (2) Landlord may relet the Premises or any part or parts thereof either in the name of Landlord or otherwise, for a term or terms which may, at the option of Landlord, be less than or exceed the period which would otherwise have constituted the balance of the Term of this Lease, and (3) Tenant shall pay to Landlord any deficiency between the sum of the Base Rent and other charges due pursuant to the terms of this Lease plus the reasonable costs of reletting the Premises and the amount of rents and other charges collected on account of the new lease or leases of the Premises for each month of the period which would otherwise have constituted the balance of the Term of this Lease (not including any Renewal Periods, the commencement of which shall not have occurred prior to such dispossession or removal). Such deficiency shall be paid by Tenant in monthly installments on the dates specified in this Lease for payment of Base Rent without demand, and any suit brought to collect the amount of the deficiency for any month shall not prejudice in any way the rights of Landlord to collect the deficiency for any subsequent month by a similar proceeding. In the alternative, following any such dispossession or removal, Landlord may claim as damages an amount which is equal to the difference (discounted at a discount rate of ten percent (10%) to the net present value) between the balance of Base-Rent payable over the remainder of the Term of this Lease and the fair market rental value of the Premises over the same period. Notwithstanding any other provision hereof to the contrary, Landlord shall use reasonable and diligent efforts to mitigate its damages in the event of any breach or default by Tenant but Landlord shall have no obligations to give preference to the reletting of the Premises over the leasing of any other space in the Shopping Center. Except as herein expressly provided, Landlord's remedies provided for hereunder shall not be deemed exclusive of any other remedies available at law or in equity, and all such remedies shall be cumulative.

## **20. LANDLORD'S DEFAULT**

**20.1 Default; Notice and Grace.** If Landlord defaults in the performance of any of its obligations under this Lease or breaches any of the use restrictions and/or Tenant's exclusive

rights set forth in this Lease. Tenant may give written notice to Landlord specifying the nature of such breach or default. If such breach or default continues for a period of more than thirty (30) days after written notice from Tenant specifying such breach or default (or, as to any breach or default which requires more than thirty (30) days to remedy, if such cure is not commenced promptly and pursued diligently or continues beyond the period reasonably required to cure the same using due diligence), Tenant may at its option exercise any of its rights and remedies at any time thereafter.

**20.2 Tenant's Remedies.** If Landlord fails to cure any breach or default within the applicable grace period, Tenant's remedies shall include, without limitation, the rights to: (1) declare the Term ended and vacate the Premises and be relieved from all further obligations under this Lease if such breach or default has a material adverse effect upon Tenant's ability to use or occupy the Premises and the Common Areas in the manner provided herein, and Tenant has no other adequate remedy under this Lease; and/or (2) incur any expense necessary to perform the obligation of Landlord specified in such notice; and/or (3) sue for injunctive relief; and/or (4) sue for specific performance; and/or (5) sue for damages; and/or (6) set off any amount expended or damages incurred by Tenant as a result of such default against the next payments of Base Rent or other charges coming due under this Lease until recovered in full; and/or (7) avail itself of any other remedy provided herein or available at law or in equity. Upon demand by Tenant, Landlord shall pay Tenant an amount equal to the cost of any expense incurred pursuant to clause (2) above plus eight percent (8%) of the expense for administration and interest thereon at the Interest Rate from the date paid or incurred until reimbursed in full. Tenant's remedies provided for herein shall not be deemed to be exclusive of any other remedies available at law or in equity, and all of Tenant's remedies shall be cumulative.

**20.3 Mortgagee Protection.** Notwithstanding the foregoing, prior to exercising any right of termination resulting from the breach or default of Landlord, Tenant will give any Mortgagee which has complied with the requirements of Article 15 written notification of Landlord's default expressly stating Tenant's intent to terminate this Lease as a result thereof and shall afford such Mortgagee a reasonable period to cure said default on behalf of Landlord, not to exceed thirty (30) days, which may run concurrently with any notice or grace period given to Landlord.

**20.4 Limitation of Landlord's Liability.** Anything in this Lease to the contrary notwithstanding, Tenant agrees that Tenant shall look solely to the interest and estate of Landlord in the Shopping Center for the collection of any judgment requiring the payment of money by Landlord in the event of any default by Landlord under this Lease, subject, however, to the prior rights of any Mortgagee which has complied with Article 15 of this Lease, and no other assets of the Landlord shall be subject to levy, execution or other judicial process for the satisfaction of Tenant's claim. The foregoing exculpation shall not be applicable in the event of fraud or misappropriation of payments made by Tenant to Landlord on account of Insurance Costs, Real Property Taxes or Common Area Costs. Further, the foregoing shall not be deemed to limit Tenant's rights to obtain injunctive relief or specific performance or to avail itself of any other right or remedy which may be available to Tenant by law or in equity, or under the terms of this Lease.

## 21. PROHIBITED USES AND EXCLUSIVE RIGHTS

Certain provisions pertaining to exclusive rights of Tenant and other occupants of the Shopping Center and prohibited uses within the Shopping Center are set forth in Exhibit G. Landlord hereby represents and warrants that Exhibit G sets forth any and all existing exclusive rights and prohibited uses which currently affect any portion of the Shopping Center, including without limitation under any existing lease, declaration of covenants or restrictions or other agreement or document of any kind affecting any portion of the Shopping Center, whether or not of record or otherwise disclosed to Tenant.

## 22. DAMAGE OR DESTRUCTION

**22.1 Insured Losses.** Landlord shall promptly and diligently repair or reconstruct the Premises (to the condition existing on the Delivery Date and including specifically Tenant's storefront) in the event it is damaged or destroyed by fire or other insured casualty, and all proceeds from Landlord's insurance carried in accordance with this Lease (to the extent required to repair or reconstruct the Premises) shall be applied by Landlord for said repair or reconstruction. Landlord shall not be responsible for repairing, replacing or reconstructing (i) any Improvements or Alternations made by Tenant in the Premises or (ii) Tenant's goods and merchandise, trade fixtures, furniture, signs, decorations, furnishings, wall covering, floor covering, draperies, equipment and other personal property on or in the Premises at the time of such fire or other insured casualty. Provided, however, that if during the last year of the Term of this Lease the Premises are damaged as a result of fire or other casualty to an extent in excess of fifty percent (50%) of the then replacement cost (excluding foundation), Landlord or Tenant may, within thirty (30) days following the date such damage occurs, terminate this Lease by written notice to the other party. If Tenant has an unexercised option to extend the Term of this Lease, and, within thirty (30) days following receipt of notice of the destruction, has satisfied the conditions precedent to exercise such right and does, in fact, exercise such option, this Lease shall not terminate, and Landlord shall promptly thereafter commence the necessary repair or reconstruction of the Premises.

**22.2 Uninsured Losses.** The provisions of Section 22.1 to the contrary notwithstanding, if the Premises are damaged or destroyed to an extent of more than fifty percent (50%) of its then replacement cost (excluding foundation) as a result of a casualty against which Landlord does not and is not required hereby to maintain insurance, Landlord or Tenant may, within thirty (30) days following the date of such destruction, terminate this Lease upon written notice to the other party.

**22.3 Effect of Termination.** If this Lease is terminated pursuant to Sections 22.1, 22.2 or 22.5, Tenant shall surrender possession of the Premises within sixty (60) days after notice of termination is duly given, and all obligations of either party hereunder, including any obligation of Tenant to pay rent or other charges, shall terminate as of the date of such destruction, except for the obligation to maintain insurance until, and any indemnity obligation arising from events or circumstances occurring prior to, such surrender of possession. Landlord shall promptly refund to Tenant any unearned rent paid, or Tenant shall promptly pay to Landlord any rent then accrued.

**22.4 Abatement and Tolling.** Following the date of any damage or destruction and during any period of repair or reconstruction, all Base Rent and other charges payable under this Lease shall abate from the date of such damage until the date which is the earlier of (i) ninety (90) days after the date on which the Common Area and the Premises are substantially restored or (ii) the date on which Tenant reopens at the Premises; provided, however, that, if Tenant continues the operation of its business following such damage or destruction or reopens prior to the completion of all of Landlord's Work, such Base Rent and other charges shall be equitably abated during the period of repair or reconstruction based on the nature and degree of the interference with Tenant's business resulting therefrom. In the event the Base Rent and other charges shall completely abate for any period pursuant to the terms of this Lease, the Term of this Lease shall toll for the period of such abatement, in which event the monthly installments of Base Rent, following the end of the period of such abatement, shall recommence and thereafter continue at the same rental rate that was in effect at the time of such abatement, the remaining scheduled increases of Base Rent shall be postponed for the period of such abatement to reflect such tolling, the expiration date of the then applicable Term of this Lease (whether the Initial Term or any Renewal Period) and the commencement and expiration dates of any subsequent Renewal Periods shall be extended for the period of such abatement.

**22.5 Change in Use.** If any portion of the Shopping Center is damaged or destroyed to such an extent that Landlord, in its sole reasonable discretion, elects to discontinue operation of the Shopping Center, Landlord may cancel this Lease (provided it also cancels the leases of all other tenants in the Shopping Center) by giving Tenant notice of its election and this Lease shall terminate and shall become null and void ninety (90) days after said notice.

## **23. EMINENT DOMAIN**

### **23.1 Condemnation. If:**

(1) The whole of the Premises shall be taken by any public or quasi-public authority under the power of eminent domain, condemnation or expropriation or in the event of a conveyance in lieu thereof, then this Lease shall terminate on the date when Tenant is required to yield possession thereof; or

(2) If any part of the Premises (but less than the whole of the Premises) or Tenant's Protected Area shall be so taken or conveyed and such partial taking or conveyance shall render the balance of the Premises unsuitable for Tenant's regular business, as determined by Tenant, then this Lease and/or Tenant's rights therein (as to Tenant's Protected Area) shall terminate only as to the part taken or conveyed as of the date Tenant is required to yield possession thereof, or at Tenant's election, Tenant shall have the right to terminate this entire Lease as of the date Tenant is required to yield possession of the part taken or conveyed;

(3) More than twenty-five (25%) percent of the Premises shall be so taken or conveyed, then Landlord and Tenant shall each have the right to terminate this Lease by written notice given to the other within sixty (60) days of the date Tenant is required to surrender possession of the part so taken or conveyed; or



(4) Any part of the Premises or the Shopping Center is so taken or conveyed, and the Lease is not terminated as set forth above, then: (a) this Lease shall continue in full force and effect, except that the Base Rent shall be reduced in the same proportion that the Gross Floor Area of the Premises so taken or conveyed bears to the original Gross Floor Area demised, such reductions commencing as of the date that Tenant is required to surrender possession of the part taken or conveyed; and (b) Landlord shall upon receipt of the award in condemnation or the consideration for a conveyance made in lieu of condemnation, and provided Tenant chooses not to terminate this Lease, restore and reconstruct the Shopping Center, including the Premises, as nearly as possible to the same condition and usefulness as existed prior to such event, using such portion of the proceeds of such condemnation as may be required for such purpose, provided, however, Landlord shall have the right to terminate this Lease if Tenant is not, as of the date of the taking, operating in the Premises and does not covenant, by written notice to Landlord delivered within thirty (30) days after the taking, to re-open for business for at least one (1) day within ninety (90) days after the Premises and the Shopping Center are restored as required by this Section; or

(5) More than thirty (30%) percent of (a) the Gross Floor Area of the building of which the Premises are a part, or (b) the Gross Floor Area of the Shopping Center, or (c) the Common Areas, shall be taken or conveyed as aforesaid, notwithstanding the fact that neither the Premises nor the building of which the Premises are a part is so taken or conveyed and notwithstanding anything to the contrary set forth above, either party shall have the right, at its option, to be exercised by notice in writing delivered to the other, to terminate this Lease effective, at the option of Landlord, either upon the date title vests in the condemning authority, or upon the date Landlord is required to deliver possession of the part taken or conveyed.

23.2 As used in the Article, the amount received by Landlord as compensation for any such taking or consideration for any such conveyance shall mean the award received by Landlord from such condemning authority.

23.3 As used in this Article, "Premises" and "portion of Premises" shall not include fixtures, floor covering, furniture, equipment, decorations, signs and contents of Tenant, but this shall not limit Tenant's obligation above.

23.4 Whenever there is a dispute as to the percentage of any condemnation, or conveyance in lieu of condemnation, as it affects the provisions of this Article, the determination of Landlord's Architect shall be conclusive and binding upon the parties hereto.

23.5 In the event of a taking under the power of eminent domain of the Premises, Common Areas, or any other portion of the Shopping Center, whether whole or partial, all compensation awarded for such taking of the fee and leasehold estate, or consideration paid for a conveyance in lieu of condemnation, as damages or otherwise, shall belong to and be the property of Landlord, except that Tenant shall be entitled to recover from the condemning authority, but not from Landlord, such amounts as may be separately awarded to Tenant for removal expenses, business dislocation damages, loss of business (excluding the residual value of this Lease), such lost profits as Tenant may be able to separately and specifically establish and moving expenses, provided no such claim shall diminish or adversely affect Landlord's award.

Tenant hereby assigns to Landlord all right, title and interest of Tenant in and to any award made for leasehold damages and/or diminution in the value of Tenant's leasehold estate.

## **24. NOTICES**

Any notices, consents, approvals, elections, submissions, requests or demands required or permitted to be given under this Lease or pursuant to any law or governmental regulation by Landlord to Tenant or by Tenant to Landlord shall be in writing (whether or not expressly so provided) and shall be deemed received and effective three (3) business days after being sent by certified mail, return receipt requested, postage prepaid, or one (1) business day after being sent by overnight express mail or nationally recognized courier service (e.g., Federal Express) to Landlord or Tenant, at the respective addresses set forth in Sections H and J of the Fundamental Lease Provisions or such other addresses as either party may designate by notice to the other from time to time. In lieu of overnight express mail, and in any event during any period of courier strike or other interference with overnight delivery, any notice may be given by personal delivery with a receipt signed by the person served or by any person authorized by law to serve process in the jurisdiction where such service is accomplished and shall be effective when received or when receipt or delivery is refused.

## **25. CERTAIN REPRESENTATIONS AND WARRANTIES**

### **25.1 Certain Landlord Warranties. Landlord represents and warrants that:**

(a) Landlord is a limited partnership, Landlord has been duly formed, is validly existing and has full power and authority to execute and deliver this Lease and perform its obligations hereunder for the Initial Term and all Renewal Periods; any resolution or other action necessary to authorize this Lease has been duly taken by Landlord and the person or persons executing this Lease for Landlord have been duly authorized to do so; and

(b) The execution and delivery of this Lease and the performance by Landlord of its obligations hereunder are not and shall not be prohibited by or cause a breach of, and the provisions hereof do not conflict with, any other agreement, mortgage, contract or other instrument or document to which Landlord is a party or by which it or any of its property is bound.

### **25.2 Certain Tenant Warranties. Tenant represents and warrants that:**

(a) Tenant is a corporation and has been duly formed, is validly existing and has full power and authority to execute and deliver this Lease and perform its obligations hereunder for the Initial Term and all Renewal Periods; any resolution or other action necessary to authorize this Lease has been duly taken by Tenant and the person or persons executing this Lease for Tenant have been duly authorized to do so; and

(b) The execution and delivery of this Lease and the performance by Tenant of its obligations hereunder are not and shall not be prohibited by or cause a breach of, and the provisions hereof do not conflict with, any other agreement, mortgage, contract or other instrument or document to which Tenant is a party or by which it or any of its property is bound.

## 26. GENERAL

**26.1 Tenant's Trade Fixtures.** All trade fixtures, furniture, equipment and other personally furnished or installed by Tenant or its subtenants or licensees in the Premises (including fixtures leased to Tenant, its subtenants or licensees by third parties), regardless of the manner or mode of attachment, including but not limited to fish tanks, bird and pet cages, displays and display cases, counters, shelves, racks, appliances, fans, veterinarian and grooming equipment and fixtures, compactors, scales, registers and general store fixtures and equipment (all of which are referred to herein as Tenant's "Trade Fixtures"), shall be and remain the property of Tenant or its subtenants or licensees and may be removed by Tenant or its subtenants or licensees at any time during the Term of this Lease (including any Renewal Periods) or any holdover period permitted under Section 26.6. Any of Tenant's Trade Fixtures remaining on the Premises after the expiration of such period shall be deemed abandoned by Tenant or its subtenants or licensees and shall become the property of Landlord without payment therefor or shall be removed by Tenant at Landlord's request. Tenant agrees to repair any damage done to the Premises or pay the Landlord's reasonable cost of repairing any damage done to the Premises resulting from the removal of such Trade Fixtures, reasonable wear and tear excepted.

**26.2 Unavoidable Delays.** If either party shall be prevented or delayed from punctually performing any obligations or satisfying any condition under this Lease by any strike, lockout, labor dispute, unavailability of services, labor or materials, acts of God, unusually inclement weather, unusual governmental restriction, regulation or control, enemy or hostile governmental action, civil commotion, insurrection, sabotage, fire or other casualty, or any condition caused by the other party, then the time to perform such obligation to satisfy such condition shall be extended on a day-for-day basis for the period of the delay caused by such event; provided, however, that the party claiming the benefit of this Section 26.2 shall, as a condition thereto, give notice to the other party in writing within ten (10) days of the incident specifying with particularity the nature thereof, the reason therefor, the date and time such incident occurred and a reasonable estimate of the period that such incident will delay the fulfillment of obligations contained herein. Failure to give such notice within the specified time shall render such delay invalid in extending the time for performing the obligations hereunder. This Section 26.2 shall not apply to the inability to pay any sum of money due hereunder or the failure to perform any other obligation due to the lack of money or inability to raise capital or borrow for any purpose.

**26.3 Interest Rate; Usury.** As used herein, the term "Interest Rate" shall mean interest at the rate of (i) two percent (2%) per annum over the prime rate of interest announced from time to time by Citibank, N.A. (or if such bank ceases to exist or to regularly announce a prime rate, by the largest bank headquartered in New York, New York which does then announce a prime rate) or (ii) the maximum rate allowed by law, whichever is less. If any charge or payment provided for herein which is in the nature of interest shall exceed the highest rate of interest allowed by law, such excess shall be deemed to constitute and shall be credited as a prepayment of principal, and any amount received which is in excess of the sum of principal and permitted interest shall be repaid in full upon demand.

**26.4 Memorandum or Short Form of Lease.** At the request of either Landlord or Tenant, each of Landlord and Tenant shall execute, acknowledge and deliver to the other upon

execution hereof duplicate originals of a Memorandum of Lease in the form attached hereto as Exhibit H containing the information required by law for notice to third parties, which Memorandum of Lease shall be recorded at the sole cost and expense of the requesting party.

**26.5 Estoppel Certificates.** Upon the reasonable request of the other party at any time or from time to time, each of Landlord and Tenant agree to execute, acknowledge and deliver to the other within twenty (20) days after request a written instrument in a form reasonably satisfactory to both parties duly executed and acknowledged (a) certifying that this Lease has not been modified except as set forth in such certificate and is in full force and effect as modified, (b) specifying the dates to which the Base Rent and other charges hereunder have been paid, (c) stating whether or not, to the knowledge of the party executing such instrument, the other party thereto is in default and, if so, stating the nature of such default, (d) stating the Commencement Date, (e) stating which options to renew the Term have been exercised, if any, and (f) affirming such other factually accurate matters pertaining to the provisions or subject matter of this Lease as may be requested by the other party. Each party shall pay the reasonable expenses incurred by the other party in providing the second and any subsequent such certificate requested during any twelve (12) month period. Such instrument shall not have the effect of waiving, estopping any party from asserting or otherwise depriving any party of the benefit of any provision of this Lease which provides a right to contest any payment, to receive a refund of any overpayment, to adjust the amount of any past or future payment or to receive copies of or to audit or review any books or records of the other party.

**26.6 End of Term; Holding Over.** Upon expiration or termination of this Lease, Tenant shall peaceably and quietly quit and surrender the Premises (including all Alterations), broom-clean, in good order and condition, reasonable wear and tear excepted and, in the case of termination of this Lease pursuant to Section 22 or 23, the damage that gave rise to such termination excepted also. Should Tenant remain in possession of the Premises after the end of the Lease Term, such holding over shall not be deemed to extend the Term of or constitute an election to renew this Lease, but Tenant's occupancy thereafter shall continue to be subject to all of the terms and conditions herein contained, and Tenant shall continue to pay rent at a rate equal to 150% of the Monthly Base Rent in effect immediately preceding the end of the Lease Term until such time as Tenant shall surrender the Premises to Landlord. Such holding over period may be terminated by Landlord at any time upon sixty (60) days prior written notice and Tenant shall pay all costs and expenses reasonably expended by Landlord in obtaining possession of the Premises after such holdover, including but not limited to all attorneys fees and expenses and court costs. Notwithstanding the preceding, Tenant shall not pay 150% of the Monthly Base Rent in effect immediately preceding the end of the Lease Term for such period (but shall pay 100% of the Monthly Base Rent and additional rent for such period) provided Landlord and Tenant are in good faith negotiating a new lease for the Premises; provided, however, that the foregoing shall not obligate Landlord or Tenant to negotiate in good faith or otherwise for a new lease for the Premises.

**26.7 Choice of Law.** This Lease and the rights and obligations of the parties hereto shall be interpreted and construed in accordance with and governed by the laws of the jurisdiction where the Premises are located.

**26.8 Intentionally Deleted.**

**26.9 Attorneys' Fees.** In any legal proceeding arising under this Lease, including appeal, the party prevailing will receive from the other all costs, expenses and reasonable attorneys' fees as fixed by the court.

**26.10 Jury Waiver.** Landlord and Tenant hereby waive trial by jury in any court action, proceeding or counterclaim, including any claim of injury or damage and any provisional remedy. This waiver will expressly survive the expiration or earlier termination of the Term.

**26.11 Mechanics' Liens.** Nothing contained in this Lease shall be construed as a consent on the part of Landlord to subject the estate of Landlord to liability under the Mechanic's Lien Law of the State of Florida, for work done by or on behalf of Tenant, it being expressly understood that Landlord's estate shall not be subject to such liability. Tenant shall strictly comply with The Mechanic's Lien Law of the State of Florida as set forth in F.S.713, or any successor statute. In the event that a mechanics' claim of lien is filed against the property in connection with any work performed by or on behalf of Tenant, Tenant shall satisfy or bond such claim within twenty (20) days from the date of filing. In the event that Tenant fails to satisfy or bond within said twenty (20) day period, Landlord may, but shall not be obligated to, do so and thereafter charge Tenant, as additional rent, all costs incurred by Landlord in connection with satisfaction of such claim, including attorneys' fees and interest at the highest rate allowed by law. Further, Tenant agrees to indemnify, defend and save Landlord harmless from and against any damages or lost incurred by Landlord as a result of any such mechanics' claim of lien including but not limited to attorney fees and costs. If so requested by Landlord (as provided in Section 26.4), Tenant shall execute a short form or memorandum of this Lease, which may, in Landlord's discretion be recorded in the Public Records for the purpose of protecting Landlord's estate from mechanics' claims of lien, as provided in Florida Statutes Section 713.10.

**26.12 Real Estate Commissions.** Both Landlord and Tenant represent that they have dealt with no broker other than as set forth in Section G of the Fundamental Lease Provisions in connection with the negotiation, execution and delivery of this Lease. Landlord agrees to pay a reasonable commission to said broker, subject to the terms of any separate agreement between Landlord and said broker. If any person other than said broker shall assert a claim to a finder's fee, brokerage commission or other compensation on account of alleged employment as finder or broker or performance of services as a finder or broker in connection with this transaction, the party against whom the finder or broker is claiming shall indemnify and hold the other party harmless from and against any such claim and all costs, expenses and liabilities incurred in connection with such claim or any action or proceeding brought thereon, including but not limited to reasonable attorneys' fees and court costs in defending such claim.

**26.13 Partnerships.** Nothing contained in this Lease shall be construed to make Landlord and Tenant partners or joint venturers or to render either party liable for any debts or the obligations of the other.

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

**26.15 Time of the Essence.** Subject only to the specified notice and cure periods set forth herein, time is of the essence in this Lease and each and every provision hereof in which any date or time period is specified.

**26.16 No Offer.** The submission of this Lease for examination does not constitute an offer to enter into a Lease, and this Lease shall become effective only upon execution and delivery hereof by Landlord and Tenant.

**26.17 Successors and Assigns; Third Party Beneficiaries.** The covenants and agreements contained in this Lease shall bind and inure to the benefit of (i) Landlord and its permitted successors and assigns and (ii) Tenant and its permitted successors and assigns. There are no third party beneficiaries to this Lease or any provision hereof.

**26.18 Entire Agreement; Waiver.** This Lease contains the entire agreement between the parties and cannot be changed, modified or amended unless such change, modification or amendment is in writing and executed by the party against which the enforcement of the change, modification or amendment is sought. Any waiver of any right, remedy or other term or provision hereof must be in writing, must expressly identify the provision waived and must be executed by the party or parties against whom such waiver is to be enforced. Without limiting the foregoing, the failure of either party to seek redress for violation of or to insist upon the strict performance of any term, covenant or condition contained in this Lease shall not constitute a waiver of such provision on any subsequent occasion.

**26.19 Construction of Lease; Severability.** The captions preceding the Articles, Sections and Sections of this Lease are intended only for convenience of reference and in no way define, limit or describe the scope of this Lease or the intent of any provision hereof. Whenever the singular is used, the same shall include the plural and vice versa and words of any gender shall include the other gender. It is hereby mutually acknowledged and agreed that the provisions of this Lease have been fully negotiated between parties of comparable bargaining power with the assistance of counsel and shall be applied according to the normal meaning and tenor thereof without regard to the general rule that contractual provisions are to be construed narrowly against the party which drafted the same or any similar rule of construction. In the event that any provision of this Lease is held to be unenforceable by a court of competent jurisdiction, the balance shall remain in full force and effect, and such unenforceable provision shall be construed or reformed by such court in order to give the maximum permissible effect to the intention of the parties as expressed therein.

**26.20 Counterparts.** This Lease may be executed and delivered in any number of duplicate counterparts, and each counterpart so delivered which bears the signature or a facsimile thereof of a party hereto shall be binding as to such party, and all counterparts shall together constitute one original and the same instrument.

**26.21 Exhibits.** Exhibits A through J, as identified in the Table of Contents of this Lease, are attached to and incorporated into this Lease with the same force and effect as if fully set forth herein.