

LEASING ISSUES FOR SMALL BUSINESSES

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Kevin graduated from the University of Houston College of Law, in May, 1981, where he served as the Executive Editor of the *Houston Law Review*. Before law school, he graduated from University of Texas at Austin in December, 1977, graduating with honors and majoring in Finance.

ACTIVITIES

Past Chair, Real Estate Forms Committee, State Bar of Texas.

Past Chair (1993-1996), Dallas Bar Association, Real Property Section.

Member, Various Planning Committees for the State Bar of Texas, University of Texas, and University of Houston.

Director, Advanced Real Estate Law Course (1994) (State Bar of Texas).

Speaker/Author: Numerous articles written for real estate related legal topics, including the Dallas Bar Association Real Property Section, State Bar of Texas, South Texas College of Law, University of Texas Law School, University of Houston Law Center, and Southern Methodist University School of Law.

Former Member: City of Allen, Texas Planning and Zoning Commission

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TABLE OF CONTENTS

I. PART ONE: THE REPRESENTATION..... 1

 1. Initial Meeting..... 1

 Assuming this is a new client referral and a new start up business, consider covering the following:. 1

 2. After the Initial Meeting. 1

 3. The LOI..... 1

 4. The Lease. 2

 5. Post-Lease Issues. 2

II. PART TWO: THE CLAUSES..... 2

 1. The Clauses..... 3

CLIENT ENGAGEMENT LETTER..... 13

CLIENT LETTER REGARDING LEASE ISSUES 15

SHOPPING CENTER LEASE 20

LEASING ISSUES FOR SMALL BUSINESSES

Purpose. The focus of this article is on key lease issues faced by small tenants in retail leases. This article is divided into two sections. The first part covers some fundamental issues in representing a small tenant. The second part will focus on specific lease clauses relevant to a small tenant using a landlord oriented form.

I. PART ONE: THE REPRESENTATION.

1. Initial Meeting.

Assuming this is a new client referral and a new start up business, consider covering the following:

a. **The Business.** Start with a discussion of the tenant's business plan. I do not have a checklist, but go over things like:

- (1) Do they have enough money for the start up? Have they discussed the business with a CPA and gone over forecasting/ budgeting?
- (2) Do they have a contractor for the finish out? Can they get everything built for the budget? Is the contractor reputable?
- (3) What is the timing on ordering inventory/ fixtures for the store?
- (4) Do they have quotes on insurance premiums?
- (5) Will they need a loan and have they already started that process?
- (6) Are they going to be raising money from investors?
- (7) Are there any special permits or licenses required by the City for this type of business?
- (8) Have they considered incorporating? Do they understand the difference between contractual liability [protected by corporate shield] and tort [personal claim]?

Make sure you go over what you see as issues. Other things will probably come to mind during the conversation. Try to determine what they do or do not need/want your legal help with.

b. **Fee.** Estimate your fee for them and explain why it is necessary. Consider giving them a fixed fee, say \$1,000 [4 hours to review lease and give a letter of comments] and \$500 to form a corporation, plus filing fees.

I try to explain my fee by seeing the value added to a transaction. For example, if I can point out that the Landlord's insurance does not cover the TI improvements and they need that coverage, that could save them \$40,000 later if there is a fire.

2. After the Initial Meeting.

After the first meeting, consider whether you will represent them. Look objectively for the little warning signs of trouble:

- a. Disrespect for you and your services [i.e., I don't really need a lawyer].
- b. No regard for your advice [just look at the lease].
- c. Negotiating fees, assuming you have carefully evaluated the matter and reasonably estimated your time. [Can you do this for a third of that, after all, "I'm going to be your client forever"].

Non-Representation Letter. Maybe you need to send them a non-representation letter, close the file and try to get even with the friend that referred these people to you.

Limited Representation Letter. Assuming that you will go forward with the representation, be sure to document your overall discussions. Then carefully limit the scope of your representation for malpractice protection. Think of the old law school exam where the professor listed more problems in a three page fact story than a Supreme Court Justice could cover in a year. For example:

- (1) If they are raising money, confirm that you discussed securities law and that you are not giving them advice in that regard.
- (2) Did you discuss the numerous governmental requirements such as employee withholdings, worker's comp insurance, sales tax, IRS filings, unemployment insurance, etc.? Be sure to document that you are not responsible for those things.
- (3) If they decide that incorporating is not worth the trouble, be sure to document your recommendation.
- (4) Finally, set out what you think you have been asked to do for the clients. Reconfirm your fee estimate and the time frame for the work.

3. The LOI.

Hopefully you will be involved before the Letter of Intent has been negotiated and signed.

- a. Do they understand the basic deal points?

- b. Does it accurately reflect the business deal they think they agreed to?
- c. Are there any significant business points that are not addressed? For example:
- (1) Have they seen the detail of the CAM charges for the Center?
 - (2) What about an exclusive in the Center? Are there any restrictions in the Center now?
 - (3) Do they expect signage on the pylon? If it is not available, can they have a “next use” right in the lease?
 - (4) What about a “no build” area? A Landlord needs the right to make changes to the Center over time, but can you protect visibility in the event a new building is built in the parking lot?
 - (5) Will they need to use the roof for any dish or antennae?
 - (6) Do they need reserved parking restrictions in front of the store?
 - (7) Should they ask for leasing restrictions in the Center? For example, no “long term users” such as restaurants or health clubs next door. Or, no sexually oriented businesses? Or, no sexual ads [such as movie rental stores].
 - (8) Is there any concern about the personal guaranty? Can you ask for a limitation of the amount [i.e., 20% of the unpaid rents] or for time [i.e., Tenant performs for the first two years then the guaranty goes away]?

Sometimes, you can smoke out a problem up front that the broker can clarify before you get started. Maybe you can see that the deal is not going to make. It would be better to see it now and stop with a small fee. Otherwise, you spend a lot of time on the Lease, then find a basic disagreement between the parties.

The other reason to discuss the LOI is because your letter discussing the Lease should incorporate the LOI and verify that the lease is in conformance with the LOI, except as noted.

4. The Lease.

a. I start by asking the client to read the Lease very carefully, several times. When they say it is a bunch of legal mumbo-jumbo, I say “no, it is just boring.” I want them to be prepared to discuss the Lease or intelligently review my comment letter.

I tell them to read it section by section. For example, Article 7 covers the common area. Read just that section several times, then move on to another section, say Article 22 on default. If a section just does not make sense, I want them to mark it and let me explain it to them.

b. Ask for the Lease in electronic form, if possible. Then you can mark changes to the Lease in **bold font** [or in redline] and add inserts like: NOTE: THIS MEANS THAT The problem with email is that it is very casual and I am not certain clients pay attention to it. If you use email on comments, be sure to keep a copy in the client file to verify your advice.

c. Check the LOI terms in the Lease. I like to quickly cover the LOI terms in the Lease and put a checkmark beside each one and note the section reference. Sometimes critical bargained for terms in the LOI are not included in the Lease form.

d. Prepare a comment letter to the clients. I have provided an example for our particular situation.

5. Post-Lease Issues.

Lawyers can add value for the client in many ways besides giving technical legal advice on a lease form.

a. Do they have a good idea on the process to get all permits, licenses, etc.? Landlords usually say that the construction process only takes 45 days, max. Typically, that’s right, but how long does it take to get a permit and get started? This can vary by city significantly.

b. Do they have a good contractor to get them through the finish out process? Should they consider using an independent supervisor/ architect?

c. Are they prepared to make advances to the Contractor during the finish-out process and handle retainage? Do they understand the construction risk of bad subcontractors, mechanic’s liens, bonds, etc.

d. Have they consulted with their insurance agent on the required insurance under the lease and are there other coverage that they need?

e. Be sure to advise the client to review the charges in the CAM reconciliation. Sometimes the management company sets up its charges “the way it always does it.” The tenant should confirm that the billing is in accordance with the Lease.

II. PART TWO: THE CLAUSES.

Assumptions. In order to be specific in the comments below, I have assumed that the attached lease has been proposed by the landlord. It is for a hair salon and contains typical terms for this type of lease. The lease clauses in this article were copied from the lease and set out in the Arial font. Suggested alternatives are shown in the Ameri Type Md font.

1. The Clauses.

a. **Tenant's permitted use.** From the landlord's perspective, the permitted use will be narrowly defined in order to control the future leasing rights in the Center. For example:

(r) Permitted use: Hair salon

Tenant acknowledges that the above specification of a "permitted use" means only that Landlord has no objection to the specified use and does not include any representation or warranty by Landlord as to whether or not such specified use complies with applicable laws and/or requires special governmental permits. In this regard, Tenant acknowledges that this Section 1.1(r) is subject to Sections 3.1 and 9.9 of this Lease.

- (1) Does the permitted use completely cover the business that this tenant intends to operate? After discussing the full range of services, suggest "the operation of a men's and women's hair salon, including the sale of incidental hair and beauty products and services such as manicures, chair massages, and shoe shines."
- (2) Is there a possible/ foreseeable growth or change in the tenant's business that can be added now?
- (3) To protect the tenant if the business fails, ask for a change of use to allow other specific uses, provided the proposed use does not violate a present exclusive granted to another tenant or otherwise prohibited by the lease [assuming there is a restrictive clause]. As an alternative, ask for "such other lawful use as permitted by Landlord in writing, which will not be unreasonably withheld."

b. **Exclusive use protection.** The landlord will resist this from a small tenant, but it can be critical to your client. Here is a standard exclusive rider that might be provided by a landlord:

1. The Restriction. Subject to the conditions and exceptions mentioned below, Landlord agrees that during the original term of this lease Landlord will not execute any lease for space within the Shopping Center with a tenant whose principal business activity is : _____.
2. Conditions. The restriction described above shall apply only as long as all of the following conditions exist:

- a. Tenant is occupying the Demised Premises doing business in the manner permitted by subsection 1.1(r) of this lease;
- b. Tenant has timely paid as due all rentals and other charges prescribed in this lease; and
- c. Tenant has not been in default with regard to any obligations prescribed in this lease.

Upon the failure of one or more of the above conditions, the restriction upon the Shopping Center shall automatically cease and shall thereafter be of no further force or effect.

3. Exceptions. The following exceptions apply to the restriction described above:

- a. The restriction shall not apply after the conclusion of the lease term described in subsection 1.1(l) of this lease, notwithstanding any renewal or extension of this lease which would result in Tenant's continued occupancy of the Demised Premises after the conclusion of the original term.
- b. The restriction shall not apply to any existing tenants in the Shopping Center, nor shall it apply to renewals or extensions of leases which pre-date the date of this lease, nor shall it apply to Landlord's consenting to assignments or sublettings relating to leases which pre-date the date of this lease.
- c. The restriction shall not apply to any land located outside the present boundaries of the Shopping Center.
- d. If a court of competent jurisdiction or governmental agency should determine the restriction to be illegal or unenforceable, or if Landlord and Tenant should agree that the restriction is illegal or unenforceable, the restriction shall thereafter be of no further force or effect; moreover, Landlord and Tenant further agree that in such event the remainder of this lease will continue in full force and effect.
- e. If Landlord gives written notice to Tenant that a prospective tenant in violation of the restriction has requested that Landlord negotiate with it for space in the Shopping Center, then the restriction shall automatically cease and shall thereafter be of no further force or effect unless Tenant, within ten (10) days after delivery of

Landlord's notice, agrees in writing to indemnify Landlord and hold Landlord harmless from all liability, legal actions (including, without limitation, court costs and attorneys' fees), expense and loss incurred by Landlord and related in any way to Landlord's attempts to comply with the restriction.

- f. The restriction shall not apply to any land not owned by Landlord, even if within the Shopping Center; and in this regard, Tenant is hereby advised to obtain a written confirmation as to what land is owned by Landlord, and not to rely on any verbal representations by the Agent or any other party.

(1) First ask if the exclusive is a real need. Many tenants perceive that another similar user will be a death-knoll. Understand exactly what the Tenant's underlying business issue is before you ask the landlord for an exclusive.

(2) Assuming the landlord is unwilling to grant an out-right, all-encompassing, never be allowed in the Center exclusive, consider:

(i) An exclusive for tenant's primary line of business, i.e., women's sports clothes, excluding shoes.

(ii) An exclusive for the primary use, such as sale of chicken menu items if the tenant is a "Chick'n R' Us" restaurant, i.e. allow other restaurants to sell chicken items but not more than 25% of the menu listings can be chicken.

(iii) An exclusive in a limited area of the Center, i.e., within 500 feet of tenant's door or not in the building where tenant is located.

(3) If you are fortunate enough to get an exclusive concession and the proposed form above is offered, be sure to try and mitigate the Conditions and Exceptions.

(4) Here's a sample exclusive clause from a franchise agreement requirement:

Except for the existing "Pietro's" restaurant, Landlord agrees that,

during the term of the Lease, no other party, except Tenant, shall have the right to sell pizza and Italian food for on and off premises consumption (the "Exclusive Right") within Shopping Center. During the term of the Lease, no part of the Shopping Center may be leased, sold, used or occupied for the Exclusive Right other than (a) the Leased Premises; or (b) any portion of the Shopping Center leased and/or occupied by another Tenant or Shopping Center user of Landlord whose existing lease or right of possession was executed or entered into prior to the date of this Lease and expressly permitted such use.

c. **Restrictions on uses, Part I.** Many leases have very restrictive clauses on what a tenant may not do. For example:

9.4 Tenant shall not conduct within the Demised Premises any fire, auction, bankruptcy, "going-out-of-business", "lost-our-lease" or similar sale; nor shall Tenant operate within the Demised Premises a "wholesale" or "factory outlet" store, a cooperative store, a "second hand" store, a "surplus store or a store commonly referred to as a "discount house". The purpose for this restriction is the maintenance of a first-class shopping center image, not price regulation; therefore, Landlord agrees that items may be sold, and on occasion be advertised as being sold, at discounted prices as long as Tenant complies with all applicable laws and maintains an image consistent with a first-class shopping center.

But what about the landlord? Is there any protection to a tenant as to what will not be allowed in the Center? Sales at a family buffet restaurant, card shop, or religious book store will be hurt if an adult book store, or used video outlet [with the adults only section], or liquor store opens next door. Short of a prohibition, consider asking for a limitation on location in the Center. Here is an example of a leasing prohibition clause:

Landlord agrees that no part of the Shopping Center shall be leased, sold or used for: (a) a restaurant (other than the Leased Premises) or a bar; (b) a health club, gymnasium, or other similar

type of user (excepting, however, a weight loss clinic and a diet center); (c) a car dealership, rental or leased car business or any other like business which shall store or shuttle automobiles; or (d) a theater, bingo parlor or other place of gambling (whether legal or illegal) or any sexually-oriented business.

d. **Restrictions on uses, Part II.** If your client is moving to this Center based on a perception that the strong retail mix will be an asset for his business or the Center's clientele will justify the rental, ask the Landlord to restrict leasing to the potentially detrimental user. For example, a moderately upscale family Italian restaurant might have trouble with a Vet Clinic next door. Or a jewelry store might not want a package beer store or discount cigarette shop on one side.

e. **Parking, Part I.** Some tenants are very sensitive to readily available fast -in/out parking. Landlords are hesitant to grant any reserved parking rights and even more unwilling to accept any responsibility to enforce the restrictions.

Consider asking for the right to paint the curb and place "parking for *** only" signs in front of specific spaces. Be willing to accept a prohibition for any actual enforcement rights, such as towing or placing stickers on wind shields. Here is another example of a parking protection clause:

Landlord agrees that it will not reduce the number of parking spaces available to Tenant's customers located immediately in front of the Leased Premises, as set forth on Exhibit *.

f. **Parking, Part II.** Some tenants require easy parking access and will ask for an express covenant that no part of the parking lot [as designated on an Exhibit] will be used for any other purpose [i.e., no temporary sales/ carnivals] or buildings [i.e., a "no-build" area].

g. **Parking, Part III.** Some businesses are "parking hogs." Theaters and health clubs usually attract customers that stay for a long time, preventing your tenant's customers from getting in and out. Consider restricting such users from the immediate area of your location.

h. **Non-Disturbance.** Typically, the landlord will not want to bother with a Non-Disturbance Agreement from its lender, unless its loan documents require it. And, a small tenant probably does not need to worry about a foreclosing lender kicking it out after a foreclosure. But if the tenant is expending a lot of money as part of the finish-out or otherwise making a substantial investment in the location, insist on a NDA as a condition of the lease or require the landlord to use its "best efforts" to

obtain one. Don't bother drafting one, the lender will use its form. Also, be prepared to pay all lender costs for the NDA.

i. **Permits/Inspections/Licenses.** Landlord leases do not have any contingency protections for a tenant's ability to obtain permits to open or an opportunity to inspect the premises. Make sure the tenant has investigated the permit/licensing process before signing the lease. Here is an example of a building permit approval clause:

Tenant agrees to deliver to Landlord, within ten (10) days after the date of this Lease, a copy of Tenant's final plans and specifications (the "Plans") for Tenant's improvements at the Leased Premises. Landlord shall have a period of ten (10) days after receipt of the Plans within which to approve or disapprove them by giving Tenant written notice thereof. In the event Landlord disapproves the Plans, then Tenant shall have the right to terminate this Lease by giving written notice of termination.

The following conditions precedent to the effectiveness of the Lease must be satisfied or waived by Tenant, in writing, on or before midnight on the 60th day after the date of the Lease (the "Permit Period"). In the event that any of the conditions precedent described in this Section shall not have been satisfied or otherwise waived by Tenant prior to expiration of the Permit Period, Tenant shall have the right to terminate this Lease by giving Landlord written notice of termination on or before the last day of the Permit Period, whereupon this Lease shall terminate and the parties shall be relieved of their respective rights and obligations set forth in the Lease. Should Tenant fail to timely terminate this Lease in accordance with the provisions of this Section, the conditions precedent described in this Section shall be deemed waived by Tenant. Tenant agrees to undertake satisfaction of the conditions precedent in good faith and with due diligence. Landlord agrees to cooperate with Tenant to the extent reasonably necessary and without cost to Landlord.

(a) Tenant shall have obtained all of the necessary construction and building permits for the purpose of constructing the improvements and installations as provided in the approved Plans, including, but not limited to, the sign

permits necessary for installation of its signs; and

- (b) Tenant shall have approved the cost of all connection, installation, impact, environmental or other similar fees imposed by any applicable governmental agency or quasi-governmental agency having jurisdiction in lawfully imposing such fees. The aforesaid shall not include ordinary filing fees statutorily imposed in order to obtain building permits or deposits to utility companies for service; and
- (c) Tenant shall have satisfied itself that the Demised Premises are satisfactory to its operational needs.

j. **Franchises.** If your client is a franchise, ask very early if the franchisor has a lease approval requirement and, if so, make sure the landlord is willing to accept them.

k. **Substitution of space.** Landlords have a legitimate need to have the ability to relocate a small tenant in order to accommodate blocking up a larger space for a tenant. Almost every lease form contains a right for the landlord to relocate the tenant's space with a clause like:

3.3 At Landlord's request, Tenant agrees to relocate to other space located in the Shopping Center, provided such other space is of equal or larger size than the Demised Premises. Landlord must: give Tenant at least thirty (30) days written notice, (b) pay all reasonable out-of-pocket expenses of any such relocation, but not including lost sales. In the event of such relocation, this Lease shall continue in full force and effect without any change in the terms or other conditions, but with the new location substituted for the old location set forth in Section 1.1.

Many times, landlords will delete this clause as it is very expensive to actually relocate a tenant. If your client is concerned about being moved, ask if there is an area of the Center that is unacceptable, and amend the clause to exclude that area. Here are few clarifications to consider:

3.3 At Landlord's request, Tenant agrees to relocate to other space located in the Shopping Center, but not in the part of the Shopping Center shown on Exhibit * and labeled "Excluded Relocation Area", provided such other space is of equal or larger size than the Demised Premises and Landlord remodels the space to the same finish-out as

Tenant's Premises, including all of Tenant's finish-out. Landlord must: give Tenant at least 120 days written notice, (b) pay all reasonable out-of-pocket expenses of any such relocation, but not including lost sales, unless Tenant's business is closed for more than XX business days, in which event Landlord will also pay lost profits and expenses. In the event of such relocation, this Lease shall continue in full force and effect without any change in the terms or other conditions, but with the new location substituted for the old location set forth in Section 1.1.

1. **Operating expenses.**

- (1) Most tenants [and every attorney] go crazy over the laundry list of permitted expenses in the typical landlord common area pass-through clause.

In addition to the Minimum Guaranteed Rental payable under this Lease, during the Lease Term, Tenant shall pay to Landlord as additional rental Tenant's proportionate share of all costs incurred by Landlord, in its discretion, related to the ownership, operation, management, repair, maintenance, security, equipping, guarding and insuring the Shopping Center, including the Common Area, buildings and other improvements included in the Shopping Center, and in providing facilities and services for the common use of Tenant and any other tenants of the Shopping Center (collectively the "**Common Area Maintenance Expenses**"), including, without limitation, the following items: the costs of all utilities used for buildings and improvements which are not billed separately to a tenant of the Shopping Center; costs of maintaining and repairing the buildings and other improvements in the Shopping Center other than the Building's Structure (as defined below); wages, salaries and compensation of employees¹, including taxes, insurance and employee benefits; consulting,

¹ Limit this to employees that are assigned to work on the property, not office personnel.

accounting, legal, janitorial, maintenance, security and other services; management fees and costs (charged by Landlord, any affiliate of Landlord or any other entity managing the Shopping Center, determined at a rate consistent with prevailing market rates for comparable services and buildings)²; costs of glass cleaning, parking lot and sidewalk cleaning and removal of trash and debris; costs of repair, maintenance and replacement of landscaping, signage and directories located on-site and off-site, sprinkler systems, lighting, utility lines and underground storm and sanitary sewers, parking areas, parking garages, driveways, curbs, sidewalks and walkways, loading areas and facilities for traffic and pedestrian control, security gates, alarm systems, custodial facilities, stairs, stairways, elevators, escalators, ramps and interior corridors and hallways, advertising, seasonal decorations and an allowance in an amount equal to 15% of the Common Area Maintenance Expenses for Landlord's overhead and administrative costs³; alterations, additions and improvements made by Landlord for purposes of reducing Common Area Maintenance Expenses or complying with applicable laws⁴; depreciation of personal property and equipment; and any other costs or expenses that under generally accepted accounting principles would be regarded as management, maintenance, repairs and operating expenses. In addition, although the roofs of the buildings in the Shopping Center are not literally part of the Common Area, Landlord

² Either exclude management or get the maximum number here.

³ Some will argue that both a management fee and an administrative fee are duplicative, but to the landlord, it is real money in their pocket and most will not agree to change.

⁴ Expenses to comply with all laws could be a major problem later. If the landlord has to make changes to handicap ramps or upgrade fire protection systems, most tenants would feel that those are not really within the scope of operating expenses and should not be passed back through.

and Tenant agree that roof maintenance, repair and replacement shall be included as part of Common Area Maintenance Expenses to the extent not specifically allocated to Tenant under this Lease nor to another tenant pursuant to its lease. With regard to capital expenditures (a) the original investment in capital improvements, i.e., upon the initial construction of the Shopping Center, shall not be included and (b) improvements and replacements, to the extent not capitalized on Landlord's records, shall be included and (c) improvements and replacements, to the extent capitalized on Landlord's records, shall be included only to the extent of a reasonable depreciation or amortization taking into consideration the probable life expectancy of such improvement or replacement, as applicable (including interest accruals commensurate with Landlord's interest costs)⁵. The proportionate share to be paid by Tenant of the cost of operation and maintenance of the Common Area shall be computed on the ratio that the total floor area (all of which is deemed "leasable") of the Demised Premises bears to the total leasable floor area of all buildings within the Shopping Center (excluding, however, areas owned or maintained and expenses paid for by a party or parties other than Landlord). If this Lease should commence on a date other than the first day of a calendar year or terminate on a date other than the last day of the calendar year, Tenant's reimbursement obligations under this Section 7.4 shall be prorated based upon Landlord's expenses for the entire calendar year. Tenant shall make such payments to Landlord on demand, at intervals not more frequent than monthly. Landlord may at its option make monthly or other

⁵ It is unlikely that you'll be successful in removing this "capital expense" pass-through, although most landlords will tell you that they never add this kind of expense to a tenant's statement. I point this out so your client will understand this upside exposure.

periodic charges based upon the estimated annual cost of operation and maintenance of the Common Area, payable in advance but subject to adjustment after the end of the year on the basis of the actual cost for such year.

- (2) Before you attack the list, take a look at the opening part of the list. As long as it starts off with the "any and all expenses" language, merely striking out some items probably won't exclude them from the landlord's ability to pass them back to the tenant.
- (3) The footnotes provide some specific comments about the most troubling sections.
- (4) Some attorneys are very concerned about the possibility of a landlord double collecting expenses. Personally, I've never seen and can't imagine any landlord intentionally collecting an expense from one specific tenant under a lease and adding it into the common pool also. Here is a typical exclusion:

Common Area Maintenance Costs shall not include the leasing commissions or tenant finish-out costs for any other tenant, legal expenses related to the making or enforcement of other leases, or any other expenses which are properly chargeable to another party or recovered from another party.

- (5) The attached lease does not have an audit right for the tenant's benefit. Landlord's usually don't object to a right to audit. Here is a sample clause:

For a period of one year after the end of each calendar year during this Lease, Tenant shall have the right to audit Landlord's books with respect to CAM charges incurred during the applicable calendar year, upon thirty (30) days prior written notice to Landlord. Such audit shall be made at Landlord's offices.

During such inspection, Landlord shall make such books and records and any reasonably appropriate supporting documentation available for Tenant's review.

In the event that Tenant's audit and inspection shall reveal an error in the calculation of CAM, and Landlord does not dispute the results of such audit and inspection by giving Tenant written notice of Landlord's dispute within ten (10) days after Landlord's receipt of the results thereof, then adjustment shall be made by appropriate payment or refund within fifteen (15) days after such audit and inspection results are delivered to Landlord. Tenant agrees to deliver to Landlord, within thirty (30) days after conclusion of each such audit and inspection, a true and complete copy of the results thereof. In the event that any such undisputed audit and inspection reveals an error in favor of Landlord which is more than 5% of the Landlord's total annual CAM charge for the applicable calendar year, Landlord agrees to credit to Tenant's obligation to pay rent under the Lease, upon written notice with supporting documentation, the reasonable cost of the applicable audit and inspection. If Landlord timely disputes the results of any audit and inspection, Landlord and Tenant shall mutually designate a disinterested certified public accountant (herein the "CPA") located in [City, State], to conduct an audit of the CAM charges for the applicable calendar year, and the results of such audit shall be binding upon Landlord and Tenant and any underpayment or overpayment shall be made within fifteen (15) days after both parties have

received a copy of the results of such audit. The cost of the CPA shall be paid one-half by Landlord and one-half by Tenant.

- (6) A recent New York case involved a landlord trying to collect 10 years worth of CAM adjustments. I've never seen that many years attempted, but it seems like landlords get better accountants after they sell a Center, and they suddenly find a lot of charges for the previous years. Tenants are asking for limitations on landlord readjustment periods in order to minimize huge unexpected expenses.

m. **Gross sales.** A typical gross sales clause is:

"Gross sales" means the sales price, whether for cash or otherwise (including the full purchase price of purchases in whole or in part by means of gift certificates, advertising certificates or trade-ins), of all sales of merchandise and services, and other receipts whatsoever including valet charges and live venues, of all business conducted in or from the Demised Premises, including, by way of illustration (but in no way limited to), mail or telephone orders received or filled at the Demised Premises, "layaways" and other deposits (offset by such sums refunded to purchasers), orders taken (although such orders may be filled elsewhere), sales to employees, sales through vending machines, electronic games or other devices, and sales by any sublessee, concessionaire or licensee or otherwise (as well as licensee fees, franchise fees and similar fees) in or from the Demised Premises. Each sale upon installment or credit shall be treated as a sale for the full price in the month during which the sale was made, irrespective of the time when Tenant receives payment from its customer. No deduction shall be allowed for uncollected or uncollectible credit accounts.

It is very important for the tenant to understand the definition of gross sales and have an accounting system in place to track the numbers. The items in this definition are usually not objectionable, unless the tenant has a high amount of employee discount sales or huge dollar sales with little or no profit [mainly lottery tickets]. I know of one landlord that sued to collect rents based

on lottery sales, even though all of the funds went back to the State.

n. **Landlord's Lien.**

- (1) Article 23 of the attached lease contains a typical landlord security interest. From the landlord's point of view, it is critical to have the UCC security interest in order to (i) secure the payment obligation and (ii) more importantly have a way to dispose of left over property after the tenant moves out, if necessary.
- (2) If financing is critical for the business, consider the following clause:

Landlord agrees that Tenant may grant a security interest in all or part of Tenant's personal property ("*Tenant's Property*") located within the Premises (including Tenant's trade fixtures). Landlord agrees that any lien that it may have against Tenant's Property (whether by statute or under the terms of the Lease or otherwise) will be subject and subordinate to the security interest of Tenant's lender. Landlord agrees to execute a subordination document reasonably acceptable to Landlord and which comply with the provisions of this Section, if requested by Tenant's lenders, within fifteen (15) days after Landlord's receipt of such documents. This Section and any such subordination documents are expressly subject to the following conditions: (a) Landlord may continue to exercise all rights under the Lease, (b) any damage to the Premises caused by the removal of any personal property must be repaired by the removing party, and (c) all of Tenant's Property must be removed from the Premises on or before fifteen (15) days after the earlier of expiration or earlier termination of the term of the Lease, or such property will be deemed abandoned and the Landlord may dispose of it as allowed by law and without any restrictions under this Section or the Lease.

- (3) Occasionally, a tenant needs to have the landlord agree that under no circumstances will

it claim any lien or rights in some property of the tenant, such as medical records for a veterinarian or property files for a real estate broker. Most landlords will agree to make those types of documents available for the tenant to pick up without the payment of funds.

o. **Obligation to operate.** Most landlord leases have a covenant to operate, especially if the tenant is committed to paying percentage rents.

9.1 Tenant shall commence business operations in the Demised Premises on or immediately after the Commencement Date and shall operate its business in an efficient, high class and reputable manner so as to produce the maximum amount of sales from the Demised Premises. Tenant shall not at any time leave the Demised Premises vacant, but shall in good faith continuously through the Lease Term conduct and carry on within the entire Demised Premises the type of business for which the Demised Premises is leased.

Nobody likes to think about a worst case scenario, especially a tenant about to start a new business venture. Consider tying this to an overall occupancy in the Center formula or the anchor store being open.

p. **Assignment/ Sublease.** Often overlooked or under negotiated, the right to assign the lease is the most important link in the tenant's exit strategy for the business. Consider the following and the annotated footnotes:

19.1 Tenant shall not assign or in any manner transfer this Lease or interest therein, or sublet the Demised Premises or any part thereof, or grant any license, concession or other right of occupancy of any portion of the Demised Premises without the prior written consent of Landlord⁶. Landlord agrees that it will not withhold consent in a wholly unreasonable and arbitrary manner (as further explained in Section 28.4 of this Lease); however, in determining whether or not to grant its consent, Landlord shall be entitled to take into consideration factors such as Landlord's desired tenant mix⁷, the

reputation and net worth of the proposed transferee⁸, and the then current market conditions (including market rentals)⁹. In addition, Landlord shall also be entitled to charge Tenant a reasonable fee for processing Tenant's request.

As an overall protection for the tenant, try to add a provision that in the event landlord declines a proposed transferee under any of the foregoing, then tenant may give notice and terminate the lease.

q. **HVAC maintenance.** The tenant's duty to maintain and replace is also a frequently over looked section in negotiations. Here is the standard clause:

10.2 Tenant shall keep the Demised Premises in good, clean and habitable condition and shall at its sole cost and expense keep the premises free of insects, rodents, vermin and other pests and make all needed repairs and replacements, including replacement of cracked or broken glass, except for repairs and replacements required to be made by Landlord under the provisions of Section 10.1, Article XVII and Article XVIII. Without limiting the coverage of the previous sentence, it is understood that Tenant's responsibilities therein include the **repair and replacement of all lighting, heating, air conditioning, plumbing and other electrical, mechanical and electromotive installation, equipment and fixtures** and also include all utility repairs in ducts, conduits, pipes and wiring, and any sewer stoppage located in, under and above the Demised Premises, regardless of when or how the defect or other cause for repair or replacement occurred or became apparent.

ladies dress shop, a use permitted under the lease, why should the landlord now be allowed to decide it doesn't want to allow a transfer to continue the same business?

⁸ Reputation seems reasonable, but if the current tenant/guarantor remain liable on the lease, why should the new tenant's net worth matter? At a minimum, clarify that the net worth requirement is the same as the current tenant.

⁹ This is also a concern if rental rates go up, the landlord can insist on conditioning its consent to an increase in rents. Define the market rates as the amount net of leasing commissions and market tenant improvement quotes.

⁶ The best solution is to add, "which consent will not be unreasonably withheld" and delete the next sentence.

⁷ This is ambiguous. If the tenant's business is currently a

Landlords are often willing to amend this section to allow a pro rata cost of the replacement of the HVAC system, especially if the unit is existing when the lease commences. Sometimes the limitation will only apply if the unit is replaced during the last two years of the lease. A final position is to allow the tenant to option to terminate the lease if the HVAC system needs to be replaced in the last year.

r. **Legal Fees.** This lease does not have a clause allowing the prevailing party to recover legal fees. Consider the following:

In the event of any legal action or proceeding brought by either party against the other arising out of this Lease, the prevailing party shall be entitled to recover reasonable attorney's fees and costs incurred in such action and such amount be included in any judgment rendered in such proceeding.

s. **Landlord's general representations.** Landlord's typically don't make any representations in a lease and will try very hard to shift all risks to the tenant. However, the following clause is helpful and not very objectionable:

Landlord represents and warrants to Tenant that: (a) to Landlord's actual knowledge, the Shopping Center complies with all applicable laws, rules and regulations; (b) it is the owner of the real property and improvements in the Shopping Center; (c) it has the full right and authority to enter into the Lease without any subsequent action and the execution of the Lease, and the performance of Landlord's obligations therein, do not violate any agreement binding on Landlord; (d) that as of the date of the Lease, there are no restrictions (including pre-existing lease exclusives) except those disclosed in writing to Tenant prior to the date of the Lease that would prevent Tenant from operating within the Leased Premises.

This clause attempts to smoke out several potential problems: are there any building code problems, any title restrictions from adjacent properties, and any current tenant exclusives?

t. **Visibility.** If visibility is of a particular concern to your client, then consider this clause:

Landlord agrees that Landlord shall not engage in or permit any action that would materially

obstruct the visibility of the Leased Premises or Tenant's signs from *** [describe viewpoint]

u. **Tenant improvement costs.** In older Centers, tenants sometimes find that a condition of getting a building permit may require outside improvements to the Center, such as a handicap ramp, curb cuts, etc. Make sure the tenant is aware of this and add a covenant that the landlord is responsible for all upgrades to the exterior of the Leased Premises, and not the tenant.

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CLIENT ENGAGEMENT LETTER

June *, 200*

Mr. and Mrs. John Smith
455 Main Street
Dallas, Texas 75205

Re: Lease for Skillman Plaza Center

Dear John and Jenny:

I would like to express my appreciation for your request that I represent you in connection with the Lease for the referenced Center. I am confident that I will be able to provide quality services in an efficient manner.

I want to confirm that I am representing both of you in this matter. While I would not anticipate a problem ever arising, I want to advise you that I cannot withhold information shared by one of you from the other. Also, in the event a dispute ever arises between the two of you, I cannot continue representing either of you.

The Rules governing lawyers require that I prepare this engagement letter to explain my fees and representation. My current hourly rate is \$300. My rate is subject to change. If it does, I will advise you of the increase before it is effective. The hourly rate is a starting point for my fee. Time is occasionally adjusted before a statement is sent, based on my evaluation of the time spent in relation to the benefit received.

I will bill you on a regular basis. The statement will contain a brief description of the services and expenses. Other expenses, such as copying and telephone charges, are usually billed after being totaled in each category. My copy rates are \$.20 per page. I do not charge for facsimile service, unless the call is long distance.

If you have any questions about a statement, please call me promptly so that we can discuss any concern you may have and respond appropriately.

At your election, you may discharge me from this representation at any time, and I am free to withdraw at any time and without cause, subject to reasonable notice under the circumstances and to approval by the court where your matter may be pending. I will be entitled to receive compensation from you for all of my services rendered and all disbursements made, up to the time of my discharge, withdrawal, or the time the court allows me to withdraw.

Based on our conversation at the first meeting, I want to confirm that I am not providing any tax advice in connection with this new business. Also, you have advised me that you are not receiving any new money from investors as part of this new venture. There is another limitation to my representation in this matter.

While we have generally discussed your new business venture, I have not undertaken a general representation of your business. There will be many legal requirements to operate a hair salon business, such as hiring/ firing employees, providing subleases for work areas, liability to customers for injuries, etc. The scope of my engagement at this time is strictly limited to a review of the Lease and advice on what is generally accepted in such leases in this area.

I also want to confirm that I have estimated that my time to review the letter of intent and lease and prepare a letter for your review will take about four hours and my fee will be \$1,000. In the event I need more time than that, I will call you in advance of incurring the time. If you need me to assist in negotiations or additional drafting, that will be billed at my hourly rate.

If you have any questions, please do not hesitate to call.

Very truly yours,

Kevin M. Kerr

NOTICE

The State of Texas has passed a law in 1991 requiring that all attorneys notify their clients about the existence of the State of Texas's attorney grievance process. The notification requires that I advise you as follows: "The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar Office of General Counsel will provide you with information about how to file a complaint. For more information, please call 1-800-932-1900. This is a toll-free telephone call."

CLIENT LETTER REGARDING LEASE ISSUES

June *, 200*

Mr. and Mrs. John Smith
455 Main Street
Dallas, Texas 75205

Re: Lease for Skillman Plaza Center

Dear John and Jenny:

The purpose of this letter is to provide you with my thoughts and advice on the proposed form Shopping Center Lease. I have compared the Lease with the Letter of Intent dated June *, 200* that you gave me. I have also reviewed your hand written comments in the margins and I have tried to respond to them in this letter.

First, I would advise you that this is a Landlord oriented form. I generally don't recommend that you try to substantially re-write the Lease. I usually find that the Landlord will not allow such changes and my legal fee will climb quickly. I suggest that you use this letter as a starting point to discuss issues with your lease broker, Fred Harrison. It is possible that with his relationship with the Landlord's representatives, he can assist in many of these concerns. You can also discuss these issues with the Landlord's representative without me, to see where they stand on things.

My goal is not to tell you whether you should or should not accept something. Instead, I want to make sure you understand the Lease and the risks involved. The paragraph numbers below relate to the sections of the Lease.

1(c) We will change the tenant designation to the new corporation, "Hair by Jenny, Inc."

1(f) You will both be personal guarantors. As we discussed, the Landlord has the right to look to you personally for all obligations under this Lease. However, by doing business as a corporation, you can limit your personal exposure to third parties. You can ask that the Guaranty be limited to a specific amount. Another way to limit your exposure is to ask that if the tenant performs under the Lease for the first two years, then the Guaranty should terminate.

1(j) The square footage is important in this clause. While it says "approximately" it will be the amount used for your rent and charges. I suggest that you have the space measured to verify the amount. Also, ask for an agreement that in the event the Landlord determines the space is actually bigger, then the rental cannot increase by more than a fixed amount. I have seen situations where the space was significantly bigger and the tenant was asked to pay a lot more rent. Also, there is no representation by the Landlord as to the total leasable square footage in the Center.

This also ties to Section 6.2. Notice that the definition of "proportionate share" is the total leasable floor area of all buildings in the Center at the time of the charge. This means that if a building is removed later, then your percentage of charges will go up.

1(k) This is the rent commencement date clause. You have no "free rent" in this lease. Your obligation to pay rent starts from the date you open or 90 days from the date of the Lease. This means that you are at risk if there are construction delays. You should consider adding a penalty clause to the construction contract so that the job is finished on time. You can also ask for an extension of this time, if the City or Landlord delays in approving plans or permits.

1(l) Notice that the Lease Term is unknown at this time. After you open, you should ask the Landlord to verify in writing when the Lease Term ends. That date is critical because your renewal notice deadline is keyed to this date.

1(n) There are numerous references to percentage rent in the Lease. I do not recommend trying to strike them all out.

1(r) I suggest that you try to broaden the Permitted Use, if possible. At a minimum, you should include a general statement that you can sell ancillary hair care products and provide ancillary services, such as nails and massages. Are there any other types of services/ products that you anticipate in your business? This is important because later on, the Landlord might lease a space to a nail salon and grant it an “exclusive right to paint nails.” Without permission in this Lease, the Landlord could prohibit nail care in your space.

Ideally, I would like to see a very general statement of retail and services. That would help you if you ever need to sublease the space to another user.

3.1 This is a very important clause. It says that you have inspected the space and you are not relying on the Landlord’s representations about its condition. You should assume that the Landlord is absolved of all liability if a problem [such as black mold] is later discovered. I have seen some Landlord’s add a statement that “to Landlord’s knowledge” there are no such problems. Be sure to have an inspection completed before you sign the Lease.

Also, this Section confirms that the Landlord is not responsible for any finish out work. If you feel that any party has promised that the Landlord will do anything, it needs to be included in the Lease to be enforceable.

3.2 This is not applicable as the space is vacant.

3.3 This is called a “relocation clause.” Most Landlords are willing to delete this as it is rarely used. However, if the Landlord ever has two small unusable spaces beside you, it might want to move you to another location to make a better leasing space here. While the Landlord has to pay your expenses, it is never as much as the aggravation of moving.

4.5 There is a late fee if any payment is not received by the tenth day of the month.

Article 5. Even though the Lease does not require that you pay percentage rents, most Landlords want to see your sales reports. They use this information in setting rents for other tenants and they will use it against you when the lease renewal comes up. Since you are not paying percentage rents, most Landlords would relax this to a quarterly or semi-annual report. It might also let you drop it out, if you ask.

Article 6. This section covers your obligation to reimburse the Landlord for the real property taxes and insurance that it carries on the Center. You should review these numbers before you sign the Lease. These are called “pass-throughs” as the Landlord can pass-through any future increases to the tenants as part of your rental. However, you are liable for all taxes associated with your personal property and fixtures in the store. Be sure to have your financial planner estimate those for you. Don’t worry about Section 6.3, since you are in the middle of a building, your space will never be taxed as a separate parcel. Section 6.4 looks onerous, but it simply means if the Landlord learns the insurance bill is going to go up in the near future, it can adjust the estimated payment early.

Article 7 is very important. This is another part of the Lease where the Landlord can pass-through

expenses to you.

7.1 This form Lease is very broad and I doubt some of the items listed are actually included in the Center. You should cover the areas with the Landlord to make sure there are no surprises later. Notice that the roof is part of the common area for maintenance cost recovery. Also, the Landlord reserves the right to change the common area.

I suggest you add a restriction here stating the Landlord cannot substantially block your visibility and cannot remove the immediate row of parking from in front of your space.

7.2 Ask to see a copy of the Landlord's rules for the common area. This section also deals with restrictions on your use of the common area.

7.3 The Landlord has reserved the right to decide how the Center will be managed. It is committing to use standards of similar Centers in the area. The disclosure about security is very important. We are a litigious society and people tend to file lawsuits against the Landlord and Tenant if they are robbed in the parking lot or their car is vandalized. You need to make sure that you have adequate insurance for all contingencies in a Center.

7.4 This Section details your obligation to pay for the operating costs of the Center. While a lot of costs are listed, note that it starts off saying "all costs." This Lease also says that roof costs, including replacement, are part of the common area costs. Finally there are two "non-expense" costs. The management fee is paid to the property manager [typically a percentage of rental collected] and the 15% of expense administration fee for the Landlord's overhead. Notice that capital expenses are only to be charged back on a depreciation basis.

This Lease does not have an audit provision for the Landlord's charges. I suggest that you ask for a similar right to audit as Section 5.3. While a Landlord should have the right to set its rent and expenses separately, you should have a right to know your maximum exposure for increases. Consider asking for a cap on increases in any year, say 5%.

Article 8. Most Landlords will delete this upon request.

Articles 9 and 10. I will not cover these sections in much detail, because they are fairly easy to read. They are important sections because they have a lot of restrictions on your business, but I don't think you will find them to be objectionable.

Section 9.9 is particularly important. The Landlord is not in the business of cutting hair. It does not know if the space can be used for that purpose or if you need any special licensing permits. It is your responsibility to confirm that you can do business at this location.

I would also point out Section 10.3. You need to make sure that you are performing proper maintenance on the HVAC system.

Article 11. If you need to make improvements to the space later, you need to contact the Landlord first and get permission. Notice that you are liable for injuries and damages so you should have insurance in place and make sure the contractor indemnifies you from these claims, with insurance. Section 11.3 requires all work to be "bonded." Most small jobs should not require a bond and Landlords will usually limit this to remodeling contracts over a set amount.

13.2 Of course, you will want to have a sign for your store. There are extensive sign ordinance

requirements and you need to make sure the sign company gets the proper approvals of the sign, both from the Landlord and the City. Be sure to get a firm quote on the sign cost as they can be expensive. Also, ask about your right to be on the pylon sign in the Center and include it as part of your Lease. If the space is not available on the pylon now, then include a provision that gives you the first option when a tenant moves out.

14.1 You should confirm that all utilities are in the space now. This section says that Landlord only has to bring utilities to the building- not the space. This can be a substantial expense if the lines are far away.

Article 15. Be sure to send this section to your insurance agent. You will need to provide the Landlord with a certificate verifying these coverages as minimums. You may want to carry additional insurance.

Article 16. This section attempts to absolve the Landlord from a broad range of injuries and events. This is not an absolute limitation and the Landlord is responsible for its negligence and failure to make repairs after notice. There is also a tenant indemnity to the Landlord for tenant's negligence. Again, you need to make sure your insurance covers these claims. Also, this is the reason you incorporated the business.

Article 17. This is a difficult section to understand and it rarely occurs. Basically, if the damage is major or the lender keeps the insurance money to apply to the loan, the Landlord may terminate the Lease. Otherwise, the Landlord must rebuild. However, the Landlord only has to return the space to its condition at the beginning of the Lease, i.e., white box. You have to have insurance on your finish-out needs.

Section 17.4 can sometimes be amended. It says that while rent will be adjusted to a fair amount during the reconstruction phase, you have to pay the other CAM, tax and insurance charges. Some Landlords will say all charges are adjusted to a fair amount.

Article 18. This is another clause that rarely comes into use. Eminent domain means the City condemns part of the land for public use. Part of the land might be taken for road widening. If a significant taking of the building or common area is made, then either party may terminate the Lease.

Article 19. You may only transfer the Lease [i.e., sell the business] with the Landlord's consent. But under this Lease, the Landlord agrees to act reasonably. Notice however, that as part of the consent, the Landlord may consider several factors, such as current market rents. Also, if you assign the Lease, you are not released from liability under the guaranty, unless the Landlords signs a release.

Article 20. This section requires an understanding of Texas law. If a deed of trust is filed before the lease is signed, then if the lien is foreclosed, your rights under the lease are terminated. Lenders need to be "first" on the property so the subordination is important to them. However, lenders should consent to your lease and agree that if the lien is foreclosed, then the lease will remain so long as you are not in default. I would suggest that you change Section 20.1 to only allow a subordination if the lender agrees to allow you to stay. Notice it says that Landlord only has to use its best efforts.

Article 21. Most Landlords will delete this section since you are not paying percentage rents. However, it is probably not objectionable, unless you open another business within a three-mile radius of the Center. If so, ask to limit the distance.

Article 22. This Lease requires notice and opportunity to cure any defaults before the Landlord can enforce its rights under the Lease. As you can see in this long section, after a default occurs, the Landlord can change the locks, evict you, sue you, sublease the space and charge you the short fall of rents, and all other rights under the laws of the State of Texas.

Article 23. This section grants a security interest in your personal property and allows the Landlord to

sell it under the law for secured sales, and use the proceeds to pay any amounts due under the Lease. Since you are not using a loan, this section isn't a problem.

28.2 This section prohibits you from using a Landlord default to withhold your rent payment. You must pay rent regardless of the Landlord's default.

28.17 This section should be deleted or the Lease should not be effective until the Landlord approves everything.

28.20 I've never seen a Landlord exercise this buy-out right, but I would ask to have it deleted. Otherwise, you have to decide if the buy-out would reasonably compensate you for the loss of the business.

Exhibit B. You need to discuss this with your contractor and Landlord. Your contractor should also indemnify you from these claims listed in A.4. The finish-out part is where most tenants have troubles: cost overruns, unexpected delays, additional work, etc. Notice that you can't apply for your permit until all of these conditions are satisfied. Also, look carefully at part C: the Landlord does not reimburse you for finish-out expenses until 30 days after all of these conditions are satisfied.

Exhibit C. The renewal right is limited only to you and not an assignee of the Lease. The right to renew the Lease will affect your ability to sell the property. Since the renewal is at market rents, the Landlord will probably agree to strike this limitation. I like to adjust the definition of market rents to be the quoted price, adjusted for the finish-out and commission obligation for the new space. In other words, bring the current quote to an as-is type lease.

Exhibit D. This is a full recourse guaranty of all lease obligations.

I hope this summary is helpful in your negotiations with the Landlord. If you have any questions, please do not hesitate to call.

Very truly yours,

Kevin M. Kerr

SHOPPING CENTER LEASE

ARTICLE I : DEFINITIONS AND CERTAIN BASIC PROVISIONS.

The following lists sets out certain defined terms and certain financial and other information pertaining to this Lease:

- (a) Landlord: Skillman Plaza Partners, Ltd.
- (b) Landlord's address: 210 Central Expressway, Suite 210, Dallas, TX 75231
- (c) Tenant: John and Jenny Smith
- (d) Tenant's address: 455 Main Street, Dallas, Texas 75205
- (e) Tenant's trade name: Hair by Jenny
- (f) Tenant's guarantor: N/A
- (g) Agent: Retail Partners, Inc.
- (h) Cooperating Agent: None
- (i) Shopping Center: Skillman Plaza Center, 909 Skillman, Dallas, Texas 75205

Landlord's property located in the City, County and State listed above, which property is described or shown on Exhibit "A" attached to this Lease. With regard to Exhibit "A", the parties agree that the exhibit is attached solely for the purpose of locating the Shopping Center and the Demised Premises within the Shopping Center and that no representation, warranty, or covenant is to be implied by any other information shown on the exhibit (i.e., any information as to buildings, tenants, prospective tenants, etc., is subject to change at any time).

(j) Demised Premises: Suite no. 405 in the Shopping Center, containing approximately 2,000 Square Feet in area (measured by calculating lengths and widths to the center of interior walls and the exterior of outside walls), being known as and being described or shown on Exhibit "A" attached to this Lease.

(k) Commencement Date: the earlier of:

(a) the date upon which Tenant opens for business at the Demised Premises, or

(b) whichever the following alternatives may be appropriate (place an "X" or other mark designating a choice in the appropriate box):

December _____, 200*

90 days after the final execution of this Lease by both Landlord and Tenant.

_____ days after the Demised Premises are deemed "ready for occupancy" (as defined in Exhibit A attached to this Lease), it being Landlord's estimate that the Demised Premises will be "ready for occupancy" on or before *, 200*

(l) Lease Term: Commencing on the Effective Date and continuing for five (5) years after the Commencement Date; provided that if the Effective Date is a date other than the first day of a calendar month, the Lease Term shall be extended for said number of years and months in addition to the remainder of the calendar month in which the Commencement Date occurs.

- (m) Minimum guaranteed rental: \$3,000 per month
- (n) Percentage rental rate: N/A
- (o) Common area maintenance charge: A minimum of \$800 per month, payable in advance.

(p) Prepaid rental: \$3,800 being an estimate of the minimum guaranteed rental, common area maintenance charge and Tenant's obligation for taxes, other real estate charges and insurance, and (if applicable) merchants' association dues or promotional fund for the first full month of the Lease Term, such prepaid rental being due and payable upon execution of this Lease.

(q) Security deposit: \$2,500 such security deposit being due and payable upon execution of this Lease.

(r) Permitted use: Hair salon

Tenant acknowledges that the above specification of a "permitted use" means only that Landlord has no objection to the specified use and does not include any representation or warranty by Landlord as to whether or not such specified use complies with applicable laws and/or requires special governmental permits. In this regard, Tenant acknowledges that this Section 1.1(r) is subject to Sections 3.1 and 9.9 of this Lease.

ARTICLE II: GRANTING CLAUSE.

Landlord leases the Demised Premises to Tenant upon the terms and conditions set forth in this Lease.

ARTICLE III: DELIVERY OF PREMISES.

3.1 Except as otherwise provided herein, the Demised Premises are being leased "AS IS", with Tenant accepting all defects, if any; and Landlord makes NO WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, WITH RESPECT TO THE DEMISED PREMISES. Without limitation, Landlord makes no warranty as to the habitability, fitness or suitability of the Demised Premises for a particular purpose nor as to the absence of any toxic or otherwise hazardous substances. This Section is subject to any contrary requirements under applicable law; however, in this regard Tenant acknowledges that it has been given the opportunity to inspect the Demised Premises and to have qualified experts inspect the Demised Premises prior to the execution of this Lease and has relied exclusively on such inspections. Tenant agrees that Landlord shall not be obligated to perform any construction, remodeling work, or other improvements in connection with Tenant's commencement and/or operation of business in the Demised Premises, except as outlined in Exhibit "B" and any work performed or directed by Tenant shall be at the sole cost and expense of Tenant.

3.2 If any present occupant of the Demised Premises holds over and Landlord cannot acquire possession of the Demised Premises prior to the Commencement Date, Landlord will not be deemed to be in default under this Lease. In such event, Tenant agrees to accept possession of the Demised Premises at such time as Landlord is able to tender the same. Landlord will waive the payment of rentals and other charges covering any period prior to tender of possession of the Demised Premises to Tenant.

3.3 At Landlord's request, Tenant agrees to relocate to other space located in the Shopping Center, provided such other space is of equal or larger size than the Demised Premises. Landlord must: give Tenant at least thirty (30) days written notice, (b) pay all reasonable out-of-pocket expenses of any such relocation, but not including lost sales. In the event of such relocation, this Lease shall continue in full force and effect without any change in the terms or other conditions, but with the new location substituted for the old location set forth in Section 1.1.

ARTICLE IV: RENT

4.1 No payment or receipt of a lesser amount than any rentals due will be deemed to be other than on account of the amount due and not an accord and satisfaction. Landlord may accept such payment without prejudice to Landlord's right to recover the balance due, or pursue any other remedies available to Landlord.

4.2 Rentals will accrue from the Commencement Date, and will be payable at Landlord's Address.

4.3 Tenant must pay to Landlord the minimum guaranteed rental in monthly installments in the amount(s) specified in Section 1.1. The first installment is payable on or before the Commencement Date, and subsequent installments are due and payable on or before the first day of each succeeding month during the Lease Term. If the Commencement Date is not the first day of a month, Tenant will pay a prorated sum as minimum guaranteed rental for the balance of such month.

4.4 **If Percentage Rental is applicable:**

(a) In addition to the minimum guaranteed rental, Tenant agrees to pay for each year, Percentage Rental determined by (1) multiplying the total gross sales made in or from the Demised Premises during the year by the

Percentage Rental Rate and then (2) subtracting the minimum guaranteed rental paid for such year. The Percentage Rental is payable in monthly installments as follows: on or before the 10th day of each month, Tenant must pay to Landlord, a sum equal to the product of the Percentage Rental Rate multiplied by the gross sales made during the previous month, less the minimum guaranteed rental paid for the such month. If the total of the monthly payments for any year is not equal to the annual percentage rental for such year, then either Tenant will pay any deficiency or Landlord will refund any overpayment, within sixty days after the end of such year. In no event shall the rent to be paid by Tenant and retained by Landlord for any calendar year be less than the annual minimum guaranteed rental specified in this Lease together with all applicable charges.

(b) Percentage Rental is also due for any fractional part of a month and must be prorated to account for the partial month. Upon termination of this Lease, Tenant shall make a payment of percentage rental for the final month or partial calendar month of the term of this Lease determined in accordance with Section 4.4 above.

(c) "Gross sales" means the sales price, whether for cash or otherwise (including the full purchase price of purchases in whole or in part by means of gift certificates, advertising certificates or trade-ins), of all sales of merchandise and services, and other receipts whatsoever including valet charges and live venues, of all business conducted in or from the Demised Premises, including, by way of illustration (but in no way limited to), mail or telephone orders received or filled at the Demised Premises, "layaways" and other deposits (offset by such sums refunded to purchasers), orders taken (although such orders may be filled elsewhere), sales to employees, sales through vending machines, electronic games or other devices, and sales by any sublessee, concessionaire or licensee or otherwise (as well as licensee fees, franchise fees and similar fees) in or from the Demised Premises. Each sale upon installment or credit shall be treated as a sale for the full price in the month during which the sale was made, irrespective of the time when Tenant receives payment from its customer. No deduction shall be allowed for uncollected or uncollectible credit accounts.

Gross sales shall not include, however, any sums collected and paid out for any sales or excise tax imposed by and duly constituted governmental authority, nor shall it include the exchange of merchandise between the stores of Tenant, if any, where such exchanges are made solely for the convenient operation of the business of Tenant and not for the purpose of consummating a sale which has theretofore been made in or from the Demised Premises and/or for the purpose of depriving Landlord to the benefit of a sale which otherwise would be made in or from the demised Premises, nor the amount of returns to shippers or manufacturers, nor the amount of any cash or credit refund made upon any sale when the merchandise sold, or some part thereof is thereafter returned by purchaser and accepted by tenant, nor sales of Tenant's fixtures.

4.5 If **any payment** under this Lease is not received within 10 days after its due date, or if any check which is returned for insufficient funds, then in addition to the past due amount, Tenant must pay to Landlord one of the following (the choice to be at the sole option of Landlord unless one of the choices is improper under applicable law, in which event the other alternative will automatically be deemed to have been selected): (a) a late charge in an amount equal to ten percent (10%) of the rental then due, in order to compensate Landlord for its administrative and other overhead expenses; or (b) interest on the rental then due at the maximum contractual rate which could legally be charged in the event of a loan of such rental to Tenant (but in no event to exceed 1½% per month), such interest to accrue continuously on any unpaid balance due to Landlord during the period commencing with the due date of such payment and terminating with the date on which Tenant makes full payment of all amounts owing to Landlord at the time of said payment. Such late charges are payable as additional rental, are not a deduction from gross sales, and are payable immediately on demand. Tenant must also pay an additional fee of \$50.00 to compensate Landlord for its expenses in connection with a dishonored check.

4.6 If Tenant fails in two consecutive months or in two non-consecutive months within any six month period to make rental payments within ten days after due, Landlord may require Tenant to pay the minimum guaranteed rentals quarterly in advance instead of monthly and that all future rental payments are to be made on or before the due date in good funds. Landlord's acceptance of a non-certified check will not be construed as a subsequent waiver of said rights.

ARTICLE 5: SALES REPORTS, RECORDS AND FINANCIAL STATEMENTS

5.1 On or before the 10th day of each calendar month during the Lease Term, Tenant must deliver to Landlord a certified statement of gross sales during the preceding calendar month. In addition, within sixty (60) days after the expiration of each calendar year and within sixty (60) days after the termination of this Lease, Tenant must deliver to Landlord a statement of gross sales during the preceding calendar year (or partial calendar year), certified to be correct by an independent Certified Public Accountant. All such statements must be in such form as the Landlord may require; and, if requested by Landlord, Tenant shall also provide to Landlord copies of sales reports submitted by Tenant to the Comptroller of the State of Texas. Tenant acknowledges Landlord's concern for prompt, accurate sales records, inasmuch as those records not only form a basis for percentage rentals but also enable Landlord to monitor the success of the Shopping Center. Tenant also acknowledges that its failure to submit statements of gross sales will result in additional (although not readily ascertainable) expense to Landlord. Tenant therefore agrees that if it does not deliver to Landlord a

statement of gross sales within ten (10) days of a written demand, then the minimum guaranteed rental for the particular month during which the statement was due and for each month thereafter (until the statement is delivered) shall automatically be increased two hundred dollars (\$200.00), with the increase not to be considered as a deduction from percentage rental. In addition, if Tenant fails to deliver statements of gross sales after notice from Landlord, then Landlord does not need to send additional notices, until all defaults are cured. The rights of Landlord under this Section are cumulative with the rights prescribed elsewhere in this Lease or at law.

5.2 Tenant must keep in or make available at the Demised Premises a permanent, accurate set of records of all sales of merchandise and revenue derived from business conducted in the Demised Premises, and all supporting records such as tax reports and banking records. All such records must be retained and preserved for at least twenty-four (24) months after the end of the calendar year to which they relate, and are subject to inspection and audit by Landlord and its agents at all reasonable times.

5.3 In the event that Landlord is not satisfied with the statements of gross sales, Landlord may make an audit of all records pertaining to sales made in or from the Demised Premises. If Tenant's statements are found to be incorrect to an extent of more than two percent (2%) over the figures submitted by Tenant, or if Tenant has failed to deliver statements, Tenant shall pay for such audit. In addition, Tenant must promptly pay to Landlord any deficiency that is established by such audit.

5.4 If the Lease Term is in excess of one year, and if the gross sales for the first Lease year are insufficient for Tenant to pay percentage rental for that year, then in addition to the statements and reports prescribed above, Tenant shall, within ten (10) days after a request from Landlord at anytime thereafter, deliver to Landlord such financial statements as are reasonably required by Landlord to verify the net worth of Tenant and any guarantor of Tenant's obligations under this Lease. This obligation will continue from time to time and during each subsequent year in which Tenant's sales are insufficient for Tenant to pay percentage rental for the immediately preceding year.

5.5 Landlord shall use good faith efforts to keep confidential all sales reports, records and financial statements supplied by Tenant; however, Landlord shall have the right to reveal such information to mortgagees, prospective purchasers and mortgagees (and agents in such regard) and to Landlord's own managerial and administrative staff.

ARTICLE 6: TENANT'S RESPONSIBILITY FOR TAXES, OTHER REAL ESTATE CHARGES AND INSURANCE EXPENSES

6.1 Tenant is liable for all taxes levied against Tenant's personal property and trade fixtures in the Demised Premises. If any such taxes are levied against Landlord or Landlord's property and if Landlord elects to pay the same or if the assessed value of the Landlord's property is increased by inclusion of personal property and trade fixtures placed by Tenant in the Demised Premises and Landlord elects to pay the taxes based on such increase, Tenant must pay to Landlord upon demand that part of such taxes for which Tenant is primarily liable hereunder.

6.2 Tenant is also be liable for "Tenant's proportionate share" (as defined below) of all "real estate charges" (as defined below) and "insurance expenses" (as defined below) related to the Shopping Center or Landlord's ownership of the Shopping Center. Tenant's obligations under this Section will be prorated during any partial year (i.e., the first year and the last year of the Lease Term).

"Tenant's proportionate share" is the fraction the numerator of which is the total floor area in the Demised Premises and the denominator of which is the total leasable floor area of all buildings in the Shopping Center at the time when the respective charge was incurred, excluding, however, areas for which any such real estate charges or insurance expenses, or both, are paid by a party or parties other than Landlord.

"Real estate charges" includes ad valorem taxes, general and special assessments, parking surcharges, any tax or excise on rents, any tax or charge for governmental services (such as street maintenance or fire protection) and any tax or charge which replaces any of such above-described "real estate charges"; provided, however, that "real estate charges" shall not be deemed to include any franchise, estate, inheritance or general income tax.

"Insurance expenses" includes all premiums and other expenses incurred by Landlord for liability insurance and fire and extended coverage property insurance (plus whatever endorsements or special coverages that Landlord, in Landlord's sole discretion, may consider appropriate).

6.3 Landlord and Tenant will attempt to obtain separate assessments for Tenant's obligations pursuant to this Lease for such of the real estate charges as are readily susceptible of separate assessment. To the extent of a separate assessment, Tenant agrees to pay such assessment before it becomes delinquent and to keep the Demised Premises free from any lien or attachment. This covenant will survive the termination of the Lease. With regard to the calendar year

during which the Lease Term expires, Landlord at its option either may bill Tenant when the charges become payable or may charge the Tenant an estimate of Tenant's pro rata share of whichever charges Landlord has paid (based upon information available for the current year plus, if current year information is not adequate in itself, information relating to the immediately preceding year).

6.4 If Landlord believes that at some time within the immediately succeeding twelve (12) month period Tenant will owe Landlord any amounts pursuant to one or more of the preceding sections of this Article, Landlord may direct that Tenant prepay monthly a prorata portion of the prospective future payment. Tenant agrees that such amounts are due and payable monthly on the same day that minimum guaranteed rental is due.

ARTICLE 7: COMMON AREA

7.1 "Common Area" means that part of the Shopping Center intended for the common use of all tenants, including among other facilities (as such may be applicable to the Shopping Center), parking areas, private streets and alleys, landscaping, curbs, loading area, sidewalks, malls and promenades (enclosed or otherwise), lighting facilities, drinking fountains, meeting rooms, public toilets, and the like but excluding space in buildings (now or hereafter existing) designated for rental, streets and alleys maintained by a public authority, areas within the Shopping Center which may from time to time not be owned or controlled by Landlord, or areas leased to a single purpose user (such as a bank or a fast-food restaurant) where access is restricted. In addition, although the roof(s) of the building(s) in the Shopping Center are not literally part of the Common Area, they will be deemed to be so included for purposes of Landlord's ability to prescribe rules and regulations regarding same and their inclusion for purposes of common area maintenance reimbursements. Landlord reserves the right to change from time to time the dimensions and location of the Common Area, as well as the dimensions, identity and type of any buildings in the Shopping Center. For example, and without limiting the generality of the immediately preceding sentence, Landlord may from time to time substitute for any parking area or other areas reasonably accessible to the tenants of the Shopping Center, which areas may be elevated, surface or underground.

7.2 Tenant and its employees and customers, and when duly authorized pursuant to the provisions of this Lease, its subtenants, licensees and concessionaires, shall have the nonexclusive right to use the Common Area (excluding roofs of buildings in the Shopping Center), such use to be in common with Landlord, other Tenants in the Shopping Center and other persons permitted by the Landlord to use the same, and subject to such reasonable rules and regulations governing uses as Landlord from time to time prescribes. For example, and without limiting the generality of Landlord's ability to establish rules and regulations governing all aspects of the Common Areas, Tenant agrees as follows:

(a) Tenant and Tenant's employees must park their cars in Landlord's designated parking areas. Tenant must furnish Landlord with license numbers assigned to Tenant's and Tenant's employees cars, within five (5) days after taking possession of the Demised Premises and must thereafter notify Landlord of any changes within five (5) days after such changes occur. If Tenant or its employees fail to park their cars in the designated parking areas, then Landlord may charge Tenant Ten Dollars (\$10.00) per day per car parked in any area other than those designated, as and for liquidated damages and Tenant agrees to pay such charges upon demand. Tenant authorizes Landlord to cause any car which is not parked in the designated parking areas to be towed from the Shopping Center and Tenant agrees to reimburse Landlord for the cost thereof upon demand, and otherwise indemnify and hold Landlord harmless with respect thereto.

(b) Tenant may not solicit business within the Common Area nor take any action that would interfere with the rights of other persons to use the Common Area.

(c) Landlord may temporarily close any part of the Common Area as necessary to make repairs, alterations or to prevent the public from obtaining prescriptive rights.

(d) Use of the roof(s) is reserved to Landlord. Landlord may allow Tenant access to the roof, subject to such compensation and restrictions, as determined by Landlord in its sole discretion.

7.3 Landlord is responsible for the operation, management and maintenance of the Common Area. The manner of maintenance is in Landlord's sole discretion. Landlord agrees that the Common Areas will generally be in keeping with similar shopping centers within the immediate area for a similar tenant mix. Without limiting the generality of the immediately preceding sentence, Tenant acknowledges that LANDLORD MAKES NO REPRESENTATION OR WARRANTY REGARDING WHETHER OR NOT LANDLORD WILL PROVIDE SECURITY SERVICES OR, IF SO, WHAT FORM OF SECURITY SERVICES WILL BE PROVIDED.

7.4 Tenant agrees to pay to Landlord Tenant's proportionate share of all costs for the operation and maintenance of the Common Area, including:

(a) lighting, painting, cleaning, policing, inspecting, repairing and replacing, (and, if there is a enclosed

mall or promenade in the Shopping Center, heating and cooling) security (if and to the extent Landlord provides security), advertising, seasonal decorations, a reasonable portion of whatever management fee Landlord pays to the manager of the Shopping Center, an allowance in the amount of 15% of the total Common Area costs for Landlord's overhead and administrative costs, plus the cost of any insurance for which Landlord is not reimbursed pursuant to Section 6.2.

(b) although the roof(s) are not literally part of the Common Area, Landlord and Tenant agree that roof maintenance, repair and replacement will be included as a common area maintenance item to the extent not specifically allocated to Tenant under this Lease nor to another tenant pursuant to its lease. With regard to capital expenditures (i) the original investment in capital improvements, i.e., upon the initial construction of the Shopping Center, shall not be included and (ii) improvements and replacements, to the extent not capitalized on Landlord's records, shall be included and (iii) improvements and replacements, to the extent capitalized on Landlord's records, shall be included only to the extent of a reasonable depreciation or amortization taking into consideration the probably life expectancy of such improvement or replacement, as applicable (including interest accruals commensurate with Landlord's interest costs). The proportionate share to be paid by Tenant of the cost of operation and maintenance of the Common Area shall be computed on the ratio that the total floor area (all of which is deemed "leasable") of the Demised Premises bears to the total leasable floor area of all buildings within the Shopping Center (excluding, however, areas owned or maintained and expenses paid for by a party or parties other than Landlord); provided that in no event shall such share be less than the amount specified in Section 1.1(o) above. If this Lease should commence on a date other than the first day of a calendar year or terminate on a date other than the last day of the calendar year, Tenant's reimbursement obligations under this Section 7.4 shall be prorated based upon Landlord's expenses for the entire calendar year. Tenant shall make such payments to Landlord on demand, at intervals not more frequent than monthly. Landlord may at its option make monthly or other periodic charges based upon the estimated annual cost of operation and maintenance of the Common Area, payable in advance but subject to adjustment after the end of the year on the basis of the actual cost for such year. In the event that any payment due from Tenant to Landlord is not received within ten (10) days after its due date for any reason whatsoever, or if any such payment is by check which is returned for insufficient funds, then, in addition to the amount then due, Tenant shall pay to Landlord one of the following (the choice to be at the sole option of Landlord unless one of the choices is improper under applicable law, in such event the other alternative will automatically be deemed to have been selected): (a) interest on the amount then due at the maximum contractual rate which could legally be charged in the event of a loan of such amount to Tenant (but in no event to exceed 1½ % per month), such interest to accrue continuously on any unpaid balance until paid; or (b) a late charge in an amount equal to ten percent (10%) of the amount then due, in order to compensate Landlord for its administrative and other overhead expenses. If any payment is made by check, which is returned for insufficient funds, Tenant shall immediately make the required payment to Landlord in good funds; moreover, Tenant shall also pay Landlord an additional fee of \$50.00 to compensate Landlord for its expense and effort in connection with the dishonored check.

ARTICLE VIII: MERCHANTS' ASSOCIATION OR PROMOTIONAL FUND

8.1 In the event the Landlord shall organize a merchants' association composed of the tenants in the Shopping Center, Tenant agrees that it will join and maintain membership in such association, will pay such dues and assessments as may be fixed and determined from time to time by the association and will comply with such other bylaws, rules and regulations as may be adopted from time to time by the association.

8.2 In the event that Landlord shall establish a promotional fund to pay for advertising and other marketing activities of the Shopping Center (as may be directed by Landlord from time to time), Tenant shall pay whatever sums Landlord shall reasonably designate as Tenant's proportionate contribution to the promotional fund.

ARTICLE IX: USE AND CARE OF DEMISED PREMISES

9.1 Tenant shall commence business operations in the Demised Premises on or immediately after the Commencement Date and shall operate its business in an efficient, high class and reputable manner so as to produce the maximum amount of sales from the Demised Premises. Tenant shall not at any time leave the Demised Premises vacant, but shall in good faith continuously through the Lease Term conduct and carry on within the entire Demised Premises the type of business for which the Demised Premises is leased. Tenant shall, except during reasonable periods for repairing, cleaning and decorating, keep the Demised Premises open to the public for business with adequate personnel in attendance on all days (including, if designated by Landlord, Sundays and holidays) and during all hours (including, if designated by Landlord, evenings) established by Landlord from time to time as store hours for the Shopping Center, and during any other hours when the Shopping Center (including, if designated by Landlord, extended hours during the shopping season prior to Christmas and whenever else that the majority of the retail tenants in the Shopping Center open for business during extended days or hours, or both), except to the extent Tenant may be prohibited from being open for business by applicable law, ordinance or governmental regulation.

9.2 The Demised Premises may be used only for the purpose or purposes specified in Section 1.1(r) above, and only under the trade name specified in Section 1.1(e) (or, if Section 1.1(e) is not filled in, any trade name approved in

advance by Landlord), and for no other purpose and under no other trade name, it being understood and acknowledged that Landlord has entered into this Lease in large part because it believes that such use and trade name will benefit the Shopping Center as a whole. Landlord agrees, however, that it will not withhold consent in a wholly unreasonable and arbitrary manner (as further explained in Section 28.4 of this Lease). Notwithstanding anything contained herein to the contrary, Tenant shall not sell condoms on the Demised Premises or place signage in the windows of the Demised Premises advertising the sale of discount cigarettes.

9.3 Tenant shall not, without Landlord's prior written consent, keep anything within the premises or use the premises for any purpose which increases the insurance premium cost or invalidates any insurance policy on the Demised Premises or other parts of the Shopping Center. All property kept, stored or maintained within the premises by Tenant shall be at Tenant's sole risk. Tenant shall indemnify Landlord and hold Landlord harmless from and against any and all liability, liens, claims, demands, damages, expenses, fees, costs, fines, penalties, suits, proceedings, actions and causes of action (including without limitation all attorneys' fees and expenses) arising out of or relating to, directly or indirectly, any violation or alleged violation by Tenant of any government authority pertaining to health or the environment relating to the Demised Premises and the Shopping Center ("Environmental Laws"), now existing or hereafter arising, except for violations of Environmental Law caused by Landlord. This indemnification shall survive the expiration or termination of this Lease.

9.4 Tenant shall not conduct within the Demised Premises any fire, auction, bankruptcy, "going-out-of-business", "lost-our-lease" or similar sale; nor shall Tenant operate within the Demised Premises a "wholesale" or "factory outlet" store, a cooperative store, a "second hand" store, a "surplus store" or a store commonly referred to as a "discount house". The purpose for this restriction is the maintenance of a first-class shopping center image, not price regulation; therefore, Landlord agrees that items may be sold, and on occasion be advertised as being sold, at discounted prices as long as Tenant complies with all applicable laws and maintains an image consistent with a first-class shopping center.

9.5 Tenant shall not permit any objectionable noises or odors to emanate from the premises; nor place or permit any radio, television, loudspeaker or amplifier on the roof or outside the Demised Premises or where the same can be seen or heard from outside the building; nor place any antenna, equipment, awning or other projection on the exterior of the Demised Premises; nor take any other action which would constitute a nuisance or would disturb or endanger other tenants of the Shopping Center or unreasonably interfere with their use of their respective premises; nor permit any unlawful or immoral practice to be carried on or committed on the Demised Premises; nor do anything which would tend to injure the reputation of the Shopping Center.

9.6 Tenant shall take good care of the Demised Premises; shall keep the Demised Premises secure (i.e., Tenant acknowledges that it is not relying on any representation or warranty by Landlord in this regard), and keep the same free from waste at all times. Tenant shall not overload the floors in the Demised Premises, nor deface or injure the Demised Premises. Tenant shall keep the Demised Premises and sidewalks, service-ways and loading areas adjacent to the premises neat, clean and free from dirt, rubbish, ice or snow at all times. Tenant shall store all trash and garbage within the Demised Premises, or in a trash dumpster or similar container approved by Landlord as to type, location and screening; and Tenant shall arrange for the regular pick-up of such trash and garbage at Tenant's expense (unless Landlord finds it necessary to furnish such a service, in which event Tenant shall be charged an equitable portion of the total charges to all tenants using the service). Receiving and delivery of goods and merchandise and removal of garbage and trash shall be made only in the manner and areas prescribed by Landlord. Tenant shall not operate an incinerator or burn trash or garbage within the Shopping Center. Tenant shall collapse all corrugated boxes or large containers to minimize the volume of space taken up in the dumpster, or Tenant shall be assessed an additional charge for such activity.

9.7 Tenant shall maintain all display windows in a neat, attractive condition, and shall keep all display windows, exterior signs and exterior lighting under any canopy in front of the Demised Premises lighted from dusk until 11:00 p.m. every day, including Sundays and holidays (or any other hours established by Landlord for the Shopping Center).

9.8 Tenant shall include the address and identity of its business activities in the Demised Premises in all advertisements made by Tenant in which the address and identity of any similar local business activity of Tenant is mentioned.

9.9 Tenant shall procure at its sole expense any permits and licenses required for the transaction of business in the Demised Premises and otherwise comply with all applicable laws, ordinances and governmental regulations. In addition, if the nature of Tenant's business makes it advisable for Tenant to take any extra precautions (for example, in the case of a business which is affected by so-called "dramshop" laws, Tenant's compliance with all "dramshop" educational programs and procedures), Tenant shall take all such extra precautions. At Landlord's request, Tenant shall deliver to Landlord copies of all such permits and licenses and proof of Tenant's compliance with all such laws, ordinances,

governmental regulations and extra precautions.

9.10 Tenant shall be responsible for compliance with the Americans with Disabilities Act of 1990, as amended from time to time, and related state and municipal laws and regulations, in all matters regarding both the configuration of the Demised Premises (the interior as well as all public and/or employee door entrances) and Tenant's business operations at the Demised Premises.

ARTICLE X: MAINTENANCE AND REPAIR OF PREMISES

10.1 Landlord shall keep the foundation, the exterior walls (except plate glass; windows, doors, door closure devices and other exterior openings; window and door frames, molding, locks and hardware, special store fronts; lighting, heating, air conditioning, plumbing and other electrical, mechanical and electromotive installation equipment and fixtures; signs, placards, decorations or other advertising media of any type; and interior painting or other treatment of exterior walls) and roof (subject to the second sentence in Section 7.4 above) of the Demised Premises in good repair. Landlord, however, shall not be required to make any repairs occasioned by the act or negligence of Tenant, its agents, employees, subtenants, licensees, customers and concessionaires (including, but not limited to, roof leaks resulting from Tenant's installation of air conditioning equipment or any other roof penetration or placement); and the provisions of the previous sentence are expressly recognized to be subject to the provisions of Article XVI and Article XVIII of this Lease. In the event that the Demised Premises should become in need of repairs required to be made by Landlord hereunder, Tenant shall give immediate written notice thereof to Landlord; and Landlord shall not be responsible in any way for failure to make any such repairs until a reasonable time shall have elapsed after receipt by Landlord of such written notice.

10.2 Tenant shall keep the Demised Premises in good, clean and habitable condition and shall at its sole cost and expense keep the premises free of insects, rodents, vermin and other pests and make all needed repairs and replacements, including replacement of cracked or broken glass, except for repairs and replacements required to be made by Landlord under the provisions of Section 10.1, Article XVII and Article XVIII. Without limiting the coverage of the previous sentence, it is understood that Tenant's responsibilities therein include the repair and replacement of all lighting, heating, air conditioning, plumbing and other electrical, mechanical and electromotive installation, equipment and fixtures and also include all utility repairs in ducts, conduits, pipes and wiring, and any sewer stoppage located in, under and above the Demised Premises, regardless of when or how the defect or other cause for repair or replacement occurred or became apparent. If any repairs required to be made by Tenant hereunder are not made within ten (10) days after written notice delivered to Tenant by Landlord, Landlord may at its option make such repairs without liability to Tenant for any loss or damage which may result to its stock or business by reason of such repairs and Tenant shall pay Landlord upon demand, as additional rental hereunder, the cost of such repairs plus interest at the maximum contractual rate which could legally be charged in the event of a loan of such payment to Tenant (but in no event to exceed 1½ % per month), such interest to accrue continuously from the date of payment by Landlord until repayment by Tenant. At the expiration of this Lease, Tenant shall surrender the Demised Premises in good condition, excepting reasonable wear and tear and losses required to be restored by Landlord in Section 10.1, Article XVII and Article XVIII of this Lease.

10.3 Tenant shall be responsible for preventative maintenance on the heating, ventilation and air conditioning equipment (HVAC) for the Demised Premises. Without limiting the generality of the immediately preceding sentence: (a) Tenant shall replace all filters in the HVAC system at least once every six weeks; and (b) Tenant shall have the entire heating, ventilation and air conditioning equipment inspected by a qualified or licensed HVAC contractor at least once a year. The inspection specified in item (b) immediately above shall be completed between March 1st and May 31st of each year. Tenant shall provide Landlord with a copy of the invoice or report from the inspecting company, giving evidence that the system has been inspected. If Landlord has not received from Tenant by June 15th of each year a copy of the inspection report, then Landlord shall have the right to have the heating, ventilation and air conditioning equipment inspected by a company to be selected by Landlord. Landlord shall bill Tenant for the cost of this inspection, which shall be paid within ten (10) days of receipt of Landlord's invoice.

10.4 Tenant shall be responsible for pest control within the Demised Premises. Tenants whose primary business involves the sale of any type of food, beverages, plants, animals or any other type of merchandise which attracts pests, such business to be at Landlord's sole discretion, are required to have inspections each month. Tenant shall provide written evidence of such pest control inspection each month to Landlord by the tenth (10) day of each month. If Tenant fails to provide such evidence, Landlord shall bill Tenant for the cost of this inspection, which shall be paid within ten (10) days of receipt of Landlord's invoice.

ARTICLE XI: ALTERATIONS

11.1 Tenant shall not make any alterations, additions or improvements to the Demised Premises without prior written consent of Landlord, except for the installation of unattached, movable trade fixtures, which may be installed without drilling, cutting or otherwise defacing the Demised Premises. Without limiting the generality of the immediately

preceding sentence, any installation or replacement of Tenant's heating or air conditioning equipment must be effected strictly in accordance with Landlord's instructions. All alterations, additions, improvements and fixtures (including, without limitation, all floor coverings and all heating and air conditioning equipment but excluding Tenant's unattached, readily movable furniture and office equipment) which may be made or installed by either party upon the Demised Premises shall remain upon and be surrounded with the premise and become the property of Landlord at the termination of this Lease, unless Landlord requests their removal, in which event the Tenant shall remove the same and restore the premises to their original condition at Tenant's expense.

11.2 All construction work done by Tenant within the Demised Premises shall be performed in a good and workmanlike manner, in compliance with all governmental requirements, and in such a manner as to cause a minimum of interference with other construction in progress and with the transaction of business in the Shopping Center. Tenant agrees to indemnify Landlord and hold Landlord harmless against any loss, liability or damage resulting from such work, and Tenant shall, if requested by Landlord, furnish bond or other security satisfactory to Landlord against any such loss, liability or damage.

11.3 In the event Tenant uses a general contractor to perform construction work within the Demised Premises, Tenant shall, prior to the commencement of such work, require said general contractor to execute and deliver to Landlord a waiver and release of any and all claims against Landlord and liens against the Shopping Center to which such contractor might at any time be entitled and to execute and record a Bond to Pay Claims (the "Bond") in accordance with Chapter 53, Subchapter 1 of the Texas Property Code, as such may be amended, superseded or replaced from time to time, and shall deliver a copy of the recorded bond to Landlord. The delivery of waiver and release of lien and the Bond within the time period set forth above shall be a condition precedent to Tenant's ability to enter on and begin its construction work at the Demised Premises and if applicable, to any reimbursement from Landlord for its construction work.

11.4 In the event that Landlord elects to remodel all or any portion of the Shopping Center, Tenant will cooperate with such remodeling, including Tenant's tolerating inconveniences (and even the temporary removal of Tenant's signs in order to facilitate such remodeling, as it may relate to the exterior of the Demised Premises).

ARTICLE XII: LANDLORD'S RIGHT OF ACCESS

12.1 Landlord shall have the right to enter upon the Demised Premises at any time for the purpose of inspecting the same, or of making repairs to the Demised Premises, or of making repairs, alterations or additions to adjacent premises, or of showing the Demised Premises to prospective purchasers, tenants or lenders.

12.2 Tenant will permit Landlord to place and maintain "For Rent" or "For Lease" signs on the Demised Premises during the last ninety days of the Lease Term, it being understood that such signs shall in no way affect Tenant's obligations pursuant to Section 9.4, Section 13.1 or any other provision of this Lease.

12.3 Use of the roof above the Demised Premises is reserved to Landlord.

ARTICLE XIII: SIGNS; STORE FRONTS

13.1 Tenant shall not, without Landlord's prior written consent, (a) make any changes to the store front, or (b) install any exterior lighting, decorations, paintings, awnings, canopies or the like, or (c) erect or install any signs, window or door lettering, placards, decorations or advertising media of any type which can be viewed from the exterior of the Demised Premises, excepting only dignified displays of customary type for its display windows. All signs, lettering, placards, decorations and advertising media (including, without limitation, the sign required by Section 13.2 below) shall conform in all respects to the sign criteria established by Landlord for the Shopping Center from time to time in the exercise of its sole discretion, and shall be subject to Landlord's requirements as to construction, method of attachment, size, shape, height, lighting, color and general appearance and in compliance with any applicable sign ordinance, rules or regulations for the municipality in which the Shopping Center is located. All signs shall be kept in good condition and in proper operating order at all times.

13.2 Subject to the restrictions of Section 13.1 above, Tenant agrees to install and maintain a first-class sign on or prior to the Commencement Date and to maintain such sign during the term of this Lease.

ARTICLE XIV: UTILITIES

14.1 Landlord agrees to cause to be provided to the Shopping Center the necessary mains, conduits and other facilities necessary to supply water, gas (if deemed appropriate by Landlord), electricity, telephone service and sewerage service to the building in which the Demised Premises are located.

14.2 Tenant shall promptly pay all charges for electricity, water, gas, telephone service, sewerage service and other utilities furnished to the Demised Premises. Landlord may, if it so elects, furnish one or more utility services to Tenant, and in such event Tenant shall purchase the use of such services as are tendered by Landlord, and shall pay on demand as additional rental the rates established therefore by Landlord which shall not exceed the rates which would be charged for the same services directly by the local utility companies. Landlord may at any time discontinue furnishing any such service without obligation to Tenant other than to connect the Demised Premises to the public utility, if any, furnishing such service.

14.3 Landlord shall not be liable for any interruption whatsoever in utility services not furnished by Landlord, nor for interruptions in utility services furnished by Landlord which are due to fire, accident, strike, acts of God or other causes beyond the control of Landlord or in order to make alterations, repairs or improvements.

14.4 If a sub-meter is installed in the Demised Premises to measure the flow of water, electricity, or gas thereto, Tenant at the request of Landlord shall be responsible to read said meter and provide all meter information to Landlord.

ARTICLE XV: INSURANCE COVERAGES

15.1 Landlord shall procure and maintain throughout the Lease Term a policy or policies of insurance, at its sole cost and expenses (but subject to Tenant paying its proportionate share pursuant to Article VI above), causing the Shopping Center to be insured under fire and extended coverage and liability insurance (plus whatever endorsements or special coverages Landlord, in its sole discretion, may consider appropriate), to the extent necessary to comply with Landlord's obligations pursuant to other provisions of this Lease.

15.2 Tenant shall procure and maintain throughout the Lease Term a policy or policies of insurance, at its sole cost and expense, causing Tenant's fixtures and contents to be insured under standard fire and extended coverage insurance and, with regard to liability insurance, insuring both Landlord and Tenant against all claims, demands or actions arising out of or in connection with Tenant's use or occupancy of the Demised Premises, or by the condition of the Demised Premises. The limits of Tenant's liability policy or policies shall be in an amount not less than \$1,000,000 per occurrence (and no offset for occurrences on property other than the Demised Premises), and shall be written by insurance companies satisfactory to Landlord, which are licensed to do business in the state in which the Shopping Center is located with a general policyholder's rating of not less than B+ and a financial rating of not less than Class VIII, as rated in the most current edition of Best's Key Rating Guide. Tenant shall obtain a written obligation on the part of each insurance company to notify Landlord at least thirty (30) days prior to cancellation of such insurance. Such policies or duly executed certificates of insurance shall be promptly delivered to Landlord and renewals thereof as required shall be delivered to Landlord at least thirty (30) days prior to the expiration of the respective policy terms. If Tenant should fail to comply with the foregoing requirement relating to insurance, Landlord may obtain such insurance and Tenant shall pay to Landlord on demand as additional rental hereunder the premium cost thereof plus interest at the maximum contractual rate (but in no event to exceed 1½% per month) from the date of payment by Landlord until repaid by Tenant.

15.3 Tenant covenants and agrees to maintain insurance on all alterations, additions, partitions and improvements erected by, or on behalf of, Tenant in, on or about the demised premises in an amount not less than 90% (or such greater percentage as may be necessary to comply with the provisions of any co-insurance clause of the policy) of the "replacement cost" thereof as such term is defined in the State of Texas Insurance code or laws. Such insurance shall insure against the perils and be in form, including stipulated endorsements, as provided in section 15.2 hereof. Such insurance shall be for the sole benefit of Tenant and under its sole control. All such policies shall be procured by Tenant from responsible insurance companies satisfactory to Landlord. Certified copies of policies of such insurance, together with receipt evidencing payment of premiums therefor shall be delivered to Landlord prior to the commencement date of this Lease. Not less than thirty (30) days prior to the expiration date of any such policies, certified copies of renewals thereof (bearing notations evidencing the payment of renewal premiums) shall be delivered to Landlord. Such policies shall further provide that not less than thirty (30) days written notice shall be given to Landlord before such policy may be canceled or changed to reduce insurance provided thereby.

ARTICLE XVI: WAIVER OF LIABILITY; MUTUAL WAIVER OF SUBROGATION

16.1 Landlord and Landlord's agents and employees shall not be liable to Tenant, nor to Tenant's employees, agents, visitors, nor to any other person whomsoever, for any injury to person or damage to property caused by the Demised Premises or other portions of the Shopping Center becoming out of repair or by defect or failure of any structural element of the Demised Premises or of any equipment, pipes or wiring, or broken glass, or by the backing up of drains, or by gas, water, steam, electricity or oil leaking, escaping or flowing in the Demised Premises (except where due to Landlord's willful failure to make repairs required to be made hereunder, after the expiration of a written notice to Landlord of the need for such repairs), nor shall Landlord be liable to Tenant, nor to Tenant's employees, agents or visitors, nor to

any other person whomsoever, for any loss or damage that may be occasioned by or through the acts or omissions of other tenants in the Shopping Center or of any other persons whomsoever, excepting only duly authorized employees and agents of Landlord. Landlord shall not be held responsible in any way on account of any construction, repair or reconstruction (including widening) of any private or public roadways, walkways or utility lines.

16.2 Landlord shall not be liable to Tenant or to Tenant's employees, agents, or visitors, or to any other person whomsoever for any injury to person or damage to property on or about the Demised Premises or the Common Area caused by the negligence or misconduct of Tenant, its employees, customers, subtenants, licensees or concessionaires, or of any other person entering the Shopping Center under express or implied invitation of Tenant (with the exception of customers in the Common Area), or arising out of the use of the premises by Tenant and the conduct of its business therein, or arising out of any breach or default by Tenant in the performance of its obligations under this Lease; and Tenant hereby agrees to indemnify Landlord and hold Landlord harmless from any loss, expense or claims arising out of such damage or injury.

16.3 Landlord and Tenant each hereby release the other from any and all liability or responsibility to the other, or to any other party claiming through or under them by way of subrogation or otherwise, for any loss or damaged to property caused by a casualty which is insurable under the standard fire and extended coverage insurance; provided, however, that this mutual waiver shall be applicable only with respect to a loss or damage occurring during the time when property insurance policies, which are readily available in the marketplace, contain a clause or endorsement to the effect that any such release shall not adversely affect or impair the policy or the right of the insured party to receive proceeds under the policy; provided, further, that this release shall not be applicable to the portion of any damage which is not reimbursed by the damaged party's insurer because of the "deductible" in the damaged party's insurance coverage. The release specified in the Section 16.3 is cumulative with any releases or exculpations, which may be contained in other provisions of this Lease.

ARTICLE XVII: DAMAGES BY CASUALTY

17.1 Tenant shall give immediate written notice to the Landlord of any damage caused to the Demised Premises by fire or other casualty.

17.2 In the event that the Demised Premises shall be damaged or destroyed by fire or other casualty insurable under standard fire and extended coverage insurance and Landlord does not elect to terminate this Lease as hereinafter provided, Landlord shall proceed with reasonable diligence and at its sole cost and expense to rebuild and repair the Demised Premises. In the event (a) the building in which the Demised Premises are located shall be destroyed or substantially damaged by a casualty not covered by Landlord's insurance or (b) such building shall be destroyed or rendered untenable to an extent in excess of fifty percent (50%) of the first floor area by a casualty covered by Landlord's insurance, or (c) the holder of a mortgage, deed of trust or other lien on the Demised Premises at the time of the casualty elects, pursuant to such mortgage, deed of trust or other lien, to require the use of all or part of Landlord's insurance proceeds in satisfaction of all or part of the indebtedness secured by the mortgage, deed of trust or other lien, then Landlord may elect either to terminate this Lease or to proceed to rebuild and repair the Demised Premises. Landlord shall give written notice to Tenant of such election within sixty (60) days after the occurrence of such casualty and, if Landlord elects to rebuild and repair, shall proceed to do so with reasonable diligence and at its sole cost and expense.

17.3 Landlord's obligation to rebuild and repair under this Article XVII shall in any event be limited to restoring one of the following (as may be applicable): (a) if this Lease does not include an attached exhibit describing Landlord's initial construction responsibility ("Landlord's Work"), restoring the Demised Premises to substantially the condition in which they existed prior to such casualty, exclusive of any alterations, additions, improvements, fixtures and equipment installed by Tenant; or (b) if this Lease does include any attached exhibit securing Landlord's Work, Landlord shall restore Landlord's Work, as described in the applicable exhibit attached to this Lease, to substantially the same condition in which the same existed prior to the casualty. Tenant agrees that promptly after completion of such work by Landlord, Tenant will proceed with reasonable diligence and at Tenant's sole cost and expense to restore, repair and replace all alterations, additions, improvements, fixtures, signs and equipment installed by Tenant, or, if any exhibit describing Tenant's Work is attached hereto, all items of Tenant's Work as described in such exhibit, as the case may be.

17.4 Tenant agrees that during any period of reconstruction or repair of the Demised Premises, it will continue the operation of its business within the Demised Premises to the extent practicable. During the period from the occurrence of the casualty until Landlord's repairs are completed, the minimum guaranteed rental shall be reduced to such extent as may be fair and reasonable under the circumstances; however, there shall be no abatement of the percentage rental and other charges provided for herein.

ARTICLE XVIII: EMINENT DOMAIN

18.1 If more than thirty percent (30%) of the floor area of the Demised Premises should be taken for any public or quasi-public use under any governmental law, ordinance or regulation or by right of eminent domain or by private purchase in lieu thereof; this Lease shall terminate and the rental shall be abated during the unexpired portion of this Lease, effective on the date physical possession is taken by the condemning authority.

18.2 If less than thirty percent (30%) of the floor area of the Demised Premises should be taken as aforesaid, this Lease shall not terminate; however, the minimum guaranteed rental (but not percentage rental) payable hereunder during the unexpired portion of this Lease shall be reduced in proportion to the area taken, effective on the date physical possession is taken by the condemning authority. Following such partial taking, Landlord shall make all necessary repairs or alterations to the remaining premises or, if an exhibit describing Landlord's Work is attached to this Lease, all necessary repairs within the scope of Landlord's Work as described in such exhibit, as the case may be, required to make the remaining portions of the Demised Premises an architectural whole.

18.3 If any part of the Common Area should be taken as aforesaid, this Lease shall not terminate, nor shall the rental payable hereunder be reduced, except that either Landlord or Tenant may terminate this Lease if the area of the Common Area remaining following such taking plus any additional parking area provided by Landlord in reasonable proximity to the Shopping Center shall be less than seventy percent (70%) of the area of the Common Area immediately prior to the taking. Any election to terminate this Lease in accordance with this provision shall be evidenced by written notice of termination delivered to the other party within thirty (30) days after the date on which physical possession is taken by condemning authority.

18.4 All compensation awarded for any taking (or proceeds of private sale in lieu thereof) of the Demised Premises or Common Area shall be the property of the Landlord, and Tenant hereby assigns its interest in any such award to Landlord; provided, however, Landlord shall have no interest in any award made to Tenant for Tenant's moving and relocation expenses or for the loss of Tenant's fixtures and other tangible personal property if a separate award for such items is made to Tenant as long as such separate award does not reduce the amount of the award that would otherwise be awarded to Landlord.

ARTICLE XIX: ASSIGNMENT AND SUBLETTING

19.1 Tenant shall not assign or in any manner transfer this Lease or interest therein, or sublet the Demised Premises or any part thereof, or grant any license, concession or other right of occupancy of any portion of the Demised Premises without the prior written consent of Landlord. Landlord agrees that it will not withhold consent in a wholly unreasonable and arbitrary manner (as further explained in Section 28.4 of this Lease); however, in determining whether or not to grant its consent, Landlord shall be entitled to take into consideration factors such as Landlord's desired tenant mix, the reputation and net worth of the proposed transferee, and the then current market conditions (including market rentals). In addition, Landlord shall also be entitled to charge Tenant a reasonable fee for processing Tenant's request. Consent by Landlord to one or more assignments or sublettings shall not operate as a waiver of Landlord's rights as to any subsequent assignments and sublettings.

19.2 If Tenant is a corporation, partnership or other entity and if at any time during the term of this Lease the person or persons who own a majority of either the outstanding voting rights or the outstanding interests of Tenant at the time of the execution of this Lease cease to own a majority of such voting rights or ownership interests (except as a result of transfers by devise or descent), the loss of a majority of such voting rights or ownership interests shall be deemed an assignment of this Lease by Tenant and, therefore, subject in all respects to the provisions of Section 19.1 above. The previous sentence shall not apply, however, if at the time of the execution of this Lease, Tenant is a corporation and the outstanding voting shares of capital stock of Tenant are listed on a recognized security or over-the-counter market.

19.3 Any assignee or sublessee of an interest in and to this Lease shall be deemed, by acceptance of such assignment or sublease or by taking actual or constructive possession of the Demised Premises, to have assumed all of the obligations set forth in or arising under this Lease. Such assumption shall be effective as of the earlier of the date of such assignment or sublease or the date on which the assignee or sublessee obtains possession of the Demised Premises.

19.4 Notwithstanding any assignment or subletting, Tenant and any guarantor of Tenant's obligations under this Lease shall at all times remain fully responsible and liable for the payment of the rental herein specified and for compliance with all of its other obligations under this Lease (even if future assignments and sublettings occur subsequent to the assignment or subletting by Tenant, and regardless of whether or not Tenant's approval has been obtained for such future assignments and sublettings). Moreover, in the event that the rental due and payable by a sublessee (or a combination of the rental payable under such sublease plus any bonus or other consideration therefore or incident thereto)

exceed the rental payable under this Lease, or if with respect to a permitted assignment, permitted license or other transfer by Tenant permitted by Landlord, the consideration payable to Tenant by the assignee, licensee or other transferee exceeds the rental payable under this Lease, then Tenant shall be bound and obligated to pay Landlord all such excess rental and other excess consideration within ten (10) days following receipt thereof by Tenant from such sublessee, assignee, licensee or other transferee, as the case may be. Finally in any event of assignment or subletting it is understood and agreed that all rentals paid to Tenant by an assignee or sublessee shall be received by Tenant in trust for Landlord, to be forwarded immediately to Landlord without offset or reduction of any kind and upon election by Landlord such rentals shall be paid directly to Landlord as specified in Article IV of this Lease (to be applied as a credit and offset to Tenant's rental obligation).

19.5 Tenant shall not mortgage, pledge or otherwise encumber its interests in this Lease or in the Demised Premises.

19.6 In the event of the transfer and assignment by Landlord of its interest in this Lease and the building containing the Demised Premises to a person expressly assuming Landlord's obligations under this Lease, Landlord shall thereby be released from any further obligations hereunder, and Tenant agrees to look solely to such successor in interest of the Landlord for performance of such obligations. Any security given by Tenant to secure performance of Tenant's obligations hereunder may be assigned and transferred by Landlord to such successor in interest and Landlord shall thereby be discharged of any further obligation relating thereto.

ARTICLE XX: SUBORDINATION; ATTORNMENT; ESTOPPEL

20.1 Tenant accepts this Lease subject and subordinate to any mortgage, deed of trust, or other lien presently existing or hereafter placed upon the Shopping Center or any portion of the Shopping Center which includes the Demised Premises, and to any renewals and extensions thereof. Tenant agrees that any mortgagee shall have the right at any time to subordinate its mortgage, deed of trust or other lien to this Lease; provided, however, notwithstanding that this Lease may be (or made to be) superior to a mortgage, deed of trust or other lien, the mortgagee shall not be liable for prepaid rentals, security deposits and claims accruing during Landlord's ownership; further provided that the provisions of a mortgage, deed of trust or other lien relative to the rights of the mortgagee with respect to proceeds arising from an eminent domain taking (including a voluntary conveyance by Landlord) and provisions relative to proceeds arising from insurance payable by reason of damage to or destruction of the Demised Premises shall be prior and superior to any contrary provisions contained in this instrument with respect to the payment or usage thereof. Landlord is hereby irrevocably vested with full power and authority to subordinate this Lease to any mortgage, deed of trust or other lien hereafter placed upon the Demised Premises or the Shopping Center as a whole, and Tenant agrees upon demand to execute such further instruments subordinating this Lease as Landlord may request; provided, however, that upon Tenant's written request and notice to Landlord, Landlord shall use good faith efforts to obtain from any such mortgagee a written agreement that after a foreclosure (or a deed in lieu of foreclosure) the rights of Tenant shall remain in full force and effect during the Lease Term so long as Tenant shall continue to recognize and perform all of the covenants and conditions of this Lease.

20.2 At any time when the holder of an outstanding mortgage, deed of trust or other lien covering Landlord's interest in the Demised Premises has given Tenant written notice of its interest in this Lease, Tenant may not exercise any remedies for default by Landlord hereunder unless and until the holder of the indebtedness secured by such mortgage, deed of trust or other lien shall be received written notice of such default and a reasonable time (not less than 30 days) shall thereafter have elapsed without the default having been cured.

20.3 Tenant agrees that it will from time to time upon request by Landlord execute and deliver to Landlord a written statement addressed to Landlord (or to a party designated by Landlord), which statement shall identify Tenant and this Lease, shall certify that this Lease is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as so modified), shall confirm that Landlord is not in default as to any obligations of Landlord under this Lease (or if Landlord is in default, specifying any default), shall confirm Tenant's agreements contained above in this Article XX and shall contain such other information or confirmations as Landlord may reasonably require. Landlord is hereby irrevocably appointed and authorized as the agent and attorney-in-fact of Tenant to execute and deliver any such written statement on Tenant's behalf if Tenant fails to do so within seven (7) days after delivery of a written request from Landlord to Tenant.

ARTICLE XXI : DIRECTION OF TENANT'S ENERGIES

21.1 Tenant acknowledges that Tenant's monetary contribution to Landlord (in the form of rentals) and Tenant's general contribution to commerce within the Shopping Center (also important in Landlord's determination to execute this Lease with Tenant) will be substantially reduced if during the term of this Lease, either Tenant or any person, firm or corporation, directly or indirectly controlling, controlled by or under common control with Tenant shall directly or indirectly

operate, manage, conduct or have any interest in any establishment within commercial proximity of the Shopping Center. Accordingly, Tenant agrees that if during the term of this Lease, either Tenant or any person, firm or corporation, directly or indirectly controlling, controlled by or under common control with Tenant (and also, in the event Tenant is a corporation, if any officer or director thereof or shareholder owning more than ten percent (10%) of the outstanding stock thereof, or parent, subsidiary or related or affiliated corporation) either directly or indirectly commences operation of any store selling or otherwise sells or offers for sale any merchandise or services of the type to be sold by Tenant in the Demised Premises as provided in Section 1.1(r) hereof or similar or related items, or in any manner competes with the business provided herein to be conducted by Tenant at the Demised Premises, within a straight-line radius of three (3) miles of the Shopping Center, which Tenant acknowledges is a reasonable area for this provision, then in such event, the rental payable by Tenant hereunder shall be adjusted as follows:

(a) thereafter, the minimum guaranteed rental shall be 125% of the amount stipulated in Section 1.1(m) and Section 4.1 of this Lease, and

(b) thereafter, the percentage rental shall be computed as if twenty-five percent (increased to fifty-percent, if the other store is within a two-mile radius, and seventy-five percent, the other store is within a one-mile radius), of all amounts which would be "gross sales" (as defined in Section 4.5 of this Lease) if the merchandise had been sold, services rendered or business conducted at or from the Demised Premises (in lieu of at or from such other store) were, in fact, "gross sales" (as so defined) and the provisions of Article V will likewise apply to the other store.

The above adjustment in rental reflects the estimate of the parties as to the damages which Landlord would be likely to incur by reason of the diversion of business and customer traffic from the Demised Premises and Shopping Center to such other store within such radius, as a proximate result of the establishment of such other store. This provision shall not apply to any existing store presently being operated by Tenant as of the date hereof, provided there is no change in size, merchandise mix or trade name of such commercial establishment. Finally, Tenant agrees that Landlord may waive, for any reason whatsoever, all rights granted to Landlord pursuant to this Section 21.1 and may sever this Section from the remainder of this Lease (thereby keeping the remainder of this Lease unmodified and in full force and effect).

ARTICLE XXII: DEFAULT BY TENANT AND REMEDIES

22.1 The following events shall be deemed to be events of default by Tenant under this Lease:

(a) Tenant shall fail to pay any installment of rental or other obligation under this Lease involving the payment of money and such failure shall continue for a period of ten (10) days after written notice thereof to Tenant provided, however, that for each calendar year during which Landlord has already given Tenant one written notice of the failure to pay an installment of rental, no further notice shall be required (i.e., the event of default will automatically occur on the tenth day after the date upon which rental was due).

(b) Tenant shall fail to comply with any term, provision or covenant of this Lease, other than as described in subsection (a) above, and shall not cure such failure within fifteen (15) days after written notice thereof of Tenant, or shall cure that particular failure but shall fail to comply with the same provision of the Lease within three months after Landlord's written notice.

(c) Tenant or any guarantor of Tenant's obligations under this Lease shall become insolvent, or shall make a transfer in fraud of creditors, or shall make an assignment for the benefit of creditors.

(d) Tenant or any guarantor of Tenant's obligations under this Lease shall file a petition under any section or chapter of the federal Bankruptcy Code, as amended, or under any similar law or statute of the United States or any state thereof; or Tenant or any guarantor of Tenant's obligations under this Lease shall be judged bankrupt or insolvent in proceedings filed against Tenant or any guarantor of Tenant's obligations under this Lease thereunder.

(e) A receiver or Trustee shall be appointed for the Demised Premises or for all or substantially all of the assets of Tenant or any guarantor of Tenant's obligations under this Lease.

(f) Tenant shall desert or vacate or shall commence to desert or vacate the Demised Premises or any substantial portion of the Demised Premises or at any time prior to the last month of the Lease Term shall remove or attempt to remove, without prior written consent of Landlord, all or a substantial amount of Tenant's goods, wares, equipment, fixtures, furniture, or other personal property.

(g) Tenant shall do or permit to be done anything that creates a lien upon the Demised Premises or upon all or any part of the shopping center.

22.2 Upon the occurrence of any such events of default, Landlord shall have the option to pursue any one or

more of the following remedies.

(a) Without any further notice or demand whatsoever, Tenant shall be obligated to reimburse Landlord for the damages suffered by Landlord as a result of the event of default, plus interest on such amount as the maximum contractual rate which could legally be charged in the event of a loan of such amount to Tenant (but in no event to exceed 1½% per month); and Landlord may pursue a monetary recovery from Tenant. In this regard, and without limiting the generality of the immediately preceding sentence, it is agreed that if Tenant fails to install a sign on the front of the Demised Premises within fifteen (15) days after Commencement Date of this Lease, or if Tenant fails to open for business as required in this Lease or, having opened for business, subsequently deserts or vacates the Demised Premises or otherwise ceases to conduct business in the Demised Premises as required in this Lease, then the Landlord at its option may seek monetary recovery for the loss of Tenant's anticipated contribution to commence within the Shopping Center; moreover, Landlord and Tenant further agree that in as much as the exact amount of damages would be difficult to determine, liquidated damages will be due monthly (i) in an amount equal to fifteen percent (15%) of the minimum guaranteed rental payable for that month (i.e., Tenant will pay minimum guaranteed rental equal to one hundred fifteen percent (115%) of the amount specified in Section 1.1(m) of this Lease) if Tenant opens for business but fails to install a sign and (ii) in an amount equal to twenty-five percent (25%) of the monthly guaranteed rental payable for the month if Tenant fails to open for business as required in this Lease or, having opened for business, subsequently deserts or vacates the Demised Premises or otherwise ceases to conduct business in the Demised Premises as required by this Lease (including, but not limited to, failing to comply with the requirements of Section 9.1 of this Lease).

(b) Without any further notice or demand whatsoever, Landlord may take one or more of the actions permissible at law to insure performance by Tenant of Tenant's covenants and obligations under this Lease. In this regard, and without limiting the generality of the immediately preceding sentence, it is agreed that if Tenant fails to open for business as required in this Lease or, having opened for business, deserts or vacates the Demised Premises, Landlord may enter upon and take possession of such premises in order to protect them from deterioration and continue to demand from Tenant the monthly rentals and other charges provided in this Lease, without any obligation to relet; however, if Landlord does, at its sole discretion, elect to relet the Demised Premises, such action by Landlord shall not be deemed as an acceptance of Tenant's surrender of the Demised Premises unless Landlord expressly notified Tenant of such acceptance in writing pursuant to this subsection (b), Tenant hereby acknowledging that Landlord shall otherwise be reletting as Tenant's agent and Tenant furthermore hereby agreeing to pay to Landlord on demand any deficiency that may arise between the monthly rentals and other charges provided in this Lease and that actually collected by Landlord. It is further agreed in this regard that in the event of any default described in subsection (b) of Section 22.1 of this Lease, Landlord shall have the right to enter upon the Demised Premises by force if necessary without being liable for prosecution or any claim of damages therefor, and do whatever Tenant is obligated to do under the terms of this Lease; and Tenant agrees to reimburse Landlord on demand for any expense which Landlord may incur in thus effecting compliance with Tenant's obligations under this Lease, and Tenant further agrees that Landlord shall not be liable for any damages resulting to the Tenant from such action.

(c) Landlord may terminate this Lease by written notice to Tenant, in which event Tenant shall immediately surrender the Demised Premises to Landlord, and if Tenant fails to do so, Landlord may, without prejudice to any other remedy which Landlord may have for possession or arrearages in rentals (including any late charge or interest which may have accrued pursuant to Article IV or any other provision of this Lease), enter upon and take possession of the Demised Premises and expel or remove Tenant and any other person who may be occupying said premises or any part thereof, by force if necessary, without being liable for prosecution or any claim for damages therefor. Tenant hereby waives any statutory requirement of prior written notice for filing eviction or damage suits for nonpayment of rentals. In addition, Tenant agrees to pay Landlord on demand the amount of all loss and damage which Landlord may suffer by reason of any termination effected pursuant to this subsection (c), said loss and damage to be determined by either of the following alternative measures of damages:

(i) Until Landlord is able, through reasonable efforts, the nature of which efforts shall be at the sole discretion of Landlord, to relet the Demised Premises, Tenant shall pay to Landlord on or before the first day of each calendar month, the monthly rentals and other charges provided in this Lease. After the Demised Premises have been relet by Landlord, Tenant shall pay to Landlord on the 20th day of each calendar month the difference between the monthly rentals and other charges provided in this Lease for such calendar month and that actually collected by Landlord for such month. If it is necessary for Landlord to bring suit in order to collect any deficiency, Landlord shall have a right to allow such deficiencies to accumulate and bring an action on several or all of the accrued deficiencies at one time. Any such suit shall not prejudice in any way the right of Landlord to bring a similar action for any subsequent deficiency or deficiencies. Any amount collected by Landlord from subsequent tenants for any calendar month, in excess of the monthly rentals and other charges provided in this Lease, shall be credited to Tenant in reduction of Tenant's liability for any calendar month in which the amount collected by Landlord will be less than the monthly rentals and other charges provided in this Lease; but Tenant shall have no right to such excess other than the above-described credit.

(ii) When Landlord desires, Landlord may demand a final settlement. Upon demand for a final settlement, Landlord shall have a right to, and Tenant hereby agrees to pay, the difference between the total of all monthly rentals and other charges provided in this Lease for the remainder of the term and the reasonable rental value of the Demised Premises for such period, such difference to be discounted to present value at a rate equal to the rate of interest which is allowed by law in the State of Texas when the parties to a contract have not agreed on any particular rate of interest (or, in the absence of such law, at the rate of six percent per annum).

If Landlord elects to exercise the remedy prescribed in Section 22.2(b) above, this election shall in no way prejudice Landlord's rights at any time thereafter to cancel said election in favor of the remedy prescribed in subsection 22.2(c) above, provided that at the time of such cancellation Tenant is still in default. Similarly, if Landlord elects to compute damages in the manner prescribed by subsection 22.2(c)(i) above, this election shall in no way prejudice Landlord's right at any time thereafter to demand a final settlement in accordance with subsection 22.2(c)(ii) above. Pursuit of any of the above remedies shall not preclude pursuit of any other remedies prescribed in other sections of this Lease and any other remedies provided by law. Forbearance by Landlord to enforce one or more of the remedies herein provided upon an event of default shall not be deemed or construed to constitute a waiver of such default.

22.3 It is expressly agreed that in determining [the monthly rentals and other charges provided in this Lease], as that term is used throughout subsections 22.2(c)(i) and 22.2(c)(ii) above, there shall be added to the minimum guaranteed rental (as specified in Sections 1.1(m) and Article IV of this Lease) a sum equal to the charges for maintenance of the Common Area (as specified in Sections 1.1(o) and 7.4 of this Lease) the payments for taxes, charges and insurance (as specified in Article VI of this Lease) plus 1/24th of the total of all percentage rentals required to be paid by Tenant (pursuant to Section 4.4 of this Lease) because of gross sales during the two full calendar years immediately preceding the date Landlord initiated action pursuant to said subsections (or, if two full calendar years have not then elapsed, to the corresponding fraction of all percentage rentals required to be paid because of gross sales during the period commencing with the Commencement Date of this Lease and concluding with the date on which Landlord initiated such action).

22.4 It is further agreed that, in addition to payments required pursuant to subsections 22.2(b) and 22.2(c) above, Tenant shall compensate Landlord for all expenses incurred by Landlord in repossession (including, among other expenses any increase in insurance premiums caused by the vacancy of the Demised Premises), all expenses incurred by Landlord in reletting (including, among other expenses, repairs, remodeling, replacements, advertisements and brokerage fees), all concessions granted to a new tenant upon reletting (including, among other concessions, renewal options), all losses incurred by Landlord as a direct or indirect result of Tenant's default (including, among other losses, any adverse reaction by Landlord's mortgagee or by other tenants or potential tenants of the Shopping Center) and a reasonable allowance for Landlord's administrative efforts, salaries and overhead attributable directly or indirectly to Tenant's default and Landlord's pursuing the rights and remedies provided herein and under applicable law.

22.5 Landlord may restrain or enjoin any breach or threatened breach of any covenant, duty or obligation of Tenant herein contained without the necessity of proving the inadequacy of any legal remedy or irreparable harm. The remedies of Landlord hereunder shall be deemed cumulative and not exclusive of each other.

22.6 If on account of any breach or default by Tenant in its obligations hereunder, Landlord shall employ an attorney to present, enforce or defend any of Landlord's rights or remedies hereunder, Tenant agrees to pay any reasonable attorney's fees incurred by Landlord in such connection.

22.7 In the event of a default under subsection 22.1(a) above or in the event that any one or more provisions of this Article XXII authorizes Landlord to enter the Demised Premises, Landlord is entitled and is hereby authorized, without any notice to Tenant, to enter upon the Demised Premises by use of a duplicate key, a master key, a locksmith's entry procedures or any other means not involving personal confrontation, and to alter or change the door locks on all entry doors of the Demised Premises, thereby permanently excluding Tenant. In such event Landlord shall not be obligated to place any written notice on the Demised Premises explaining Landlord's action; moreover, if a reason for Landlord's action is the failure of Tenant to pay any one or more rentals when due pursuant to this Lease, Landlord shall not be required to provide the new key (if any) to Tenant until and unless all rental defaults of Tenant have been fully cured.

22.8 Tenant acknowledges its obligation to deposit with Landlord the sum stated in Section 1.1(q) above, to be held by Landlord without interest as security for the performance by Tenant of Tenant's covenants and obligations under this Lease. Tenant agrees that such deposit may be commingled with Landlord's other funds and is not an advance payment of rental or a measure of Landlord's damages in case of default by Tenant. Upon the occurrence of any event of default by Tenant, Landlord may, from time to time, without prejudice to any other remedy provided herein or provided by law, use such funds to the extent necessary to make good any arrears of rentals and any other damages, injury, expenses or liability caused to Landlord by such event of default, and Tenant shall pay to Landlord on demand the amount so applied in order to restore the security deposit to its original amount. If Tenant is not then in default thereunder, any remaining balance of such deposit shall be returned by Landlord to Tenant upon termination of this Lease (subject to the

provisions of Section 19.6 above).

22.9 In the event of any default described in subsection (d) of Section 22.1 of this Lease, any assumption and assignment must conform with the requirements of the Bankruptcy Code which provides, in part, that the Landlord must be provided with adequate assurances (i) of the source of rent and other consideration due under this Lease, (ii) that the financial condition and operating performance of any proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of Tenant and its guarantors, if any, as of the date of execution of this Lease; (iii) that any percentage rent due under this Lease will not decline substantially; (iv) that any assumption or assignment is subject to all of the provisions of this Lease (including, but not limited to, restrictions as to use) and will not breach any such provision contained in any other lease, financing agreement or other agreement relating to the Shopping Center; and (v) that any assumption or assignment will not disrupt any tenant mix or balance in the Shopping Center.

(a) In order to provide Landlord with assurances contemplated by the Bankruptcy Code, Tenant must fulfill the following obligations, in addition to any other reasonable obligations that Landlord may require, before any assumption of this Lease is effective; (i) all defaults under subsection (a) of Section 22.1 of this Lease other than under subsection (d) of Section 22.1 must be cured within fifteen (15) days after the date of assumption; (iii) all actual monetary losses incurred by Landlord (including, but not limited to, reasonable attorneys fees) must be paid to Landlord within ten (10) days after the date of assumption; and (iv) Landlord must receive within ten (10) days after the date of assumption a security deposit in the amount of six (6) months minimum guaranteed rent (using the minimum guaranteed rent in effect for the first full month immediately following the assumption) and an advance prepayment of minimum guaranteed rent in the amount of three (3) months minimum guaranteed rent (using the minimum guaranteed rent in effect for the first full month immediately following the assumption), both sums to be held by Landlord in accordance with Section 22.8 above deemed to be rent under this Lease for the purposes of the Bankruptcy Code as amended and from time to time in effect.

(b) In the event this Lease is assumed in accordance with the requirements of the Bankruptcy Code and this Lease, and is subsequently assigned, then, in addition to any other reasonable obligations that Landlord may require and in order to provide Landlord with the assurances contemplated by the Bankruptcy Code, Landlord shall be provided with (i) a financial statement of the proposed assignee prepared in accordance with generally accepted accounting principles consistently applied, though on a cash basis, which reveal a net worth in an amount sufficient, in Landlord's reasonable judgment, to assure the future performance by the proposed assignee of Tenant's obligations under this Lease; or (ii) a written guaranty by one or more guarantors with financial ability sufficient to assure the future performance of Tenant's obligations under this Lease, such guaranty to be in form and content satisfactory to Landlord and to cover the performance of all Tenant's obligations under this Lease.

22.10 No agreement to accept a surrender of the Demised Premises and no act or omission by Landlord or Landlord's agent during the term shall constitute an acceptance of surrender of the Demised Premises unless made in writing and signed by Landlord. No reentry or taking possession of the Demised Premises by Landlord shall constitute an election by Landlord to terminate this Lease unless a written notice of such intention is given to Tenant. No provision of this Lease shall be construed as an obligation upon Landlord to mitigate Landlord's damages under this Lease.

ARTICLE XXIII: LANDLORD'S CONTRACTUAL SECURITY INTEREST

23.1 In addition to the statutory Landlord's lien, Landlord shall have at all times a valid security interest to secure payment of all rentals and other sums of money becoming due hereunder from Tenant, and to secure payment of any damages or loss which Landlord may suffer by reason of the breach by Tenant of any covenant, agreement or condition contained herein, upon all goods, wares, equipment, fixtures, furniture, improvements and other personal property of tenant presently, or which may hereafter be situated on the Demised Premises, and all proceeds therefrom and such property shall not be removed without the consent of Landlord until all arrearages in rent as well as any and all other sums of money then due to Landlord or to become due to Landlord hereunder shall first have been paid and discharged and all the covenants, agreements and conditions hereof have been fully complied with and performed by Tenant. Upon the occurrence of an event of default by Tenant, Landlord may, in addition to any other remedies provided herein, enter upon the Demised Premises and take possession of any and all goods, wares, equipment, fixtures, furniture, improvements and other personal property of Tenant situated on the premises, without liability for trespass or conversion, and sell the same at public or private sale, with or without having such property at the sale, after giving Tenant reasonable notice of the time and place of any public sale or of the time at which any private sale is to be made, at which sale the Landlord or its assigns may purchase unless otherwise prohibited by law. Unless otherwise provided by law, and without intending to exclude any other manner of giving Tenant reasonable notice, the requirement of reasonable notice shall be met if such notice is given in the manner prescribed in this Lease at least five days before the time of sale. Any sale made pursuant to the provisions of this paragraph shall be deemed to have been a public sale conducted in a commercially reasonable manner if held in the above-described premises or where the property is located after the time, place and method of sale and a general description of the types of property to be sold have been advertised in a daily newspaper published in the county in which the property is located, for five consecutive days before the date of the sale. The proceeds from any such

disposition, less any and all expenses connected with the taking of possession, holding and selling of the property (including reasonable attorney's fees and legal expenses), shall be applied as a credit against the indebtedness secured by the security interest granted in this paragraph. Any surplus shall be paid to Tenant or as otherwise required by law; the Tenant shall pay any deficiencies forthwith. Upon request by Landlord, Tenant agrees to execute and deliver to Landlord a financing statement in form sufficient to perfect the security interest of Landlord in the aforementioned property and proceeds thereof under the provision of the Uniform Commercial Code (or corresponding state statute or statutes) in force in the state in which the property is located, as well as any other state the laws of which may at any time consider to be applicable; moreover Landlord is hereby irrevocably vested with a power of attorney from Tenant to execute any and all such financing statements of behalf of Tenant.

23.2 Notwithstanding Section 23.1, Landlord agrees that it will subordinate its security interest and landlord's lien to the security interest of Tenant's supplier or institutional financial source for as long as the rental account of Tenant under this Lease is current (or is brought current), provided that Landlord approves the transaction as being reasonably necessary for Tenant's operations at the Demised Premises, and further provided that the subordination must be limited to a specified transaction and specified items of the fixtures, equipment or inventory involved in the transaction.

ARTICLE XXIV: HOLDING OVER

24.1 In the event Tenant remains in possession of the Demised Premises after the expiration of this Lease and without the execution of a new lease, it shall be deemed to be occupying said premises as a tenant from month-to-month at a rental equal to the rental (including any percentage rental) herein provided plus fifty percent (50%) of such amount and otherwise subject to all the conditions, provisions and obligations of this Lease insofar as the same are applicable to a month-to-month tenancy.

ARTICLE XXV: NOTICES

25.1 Wherever any notice is required or permitted hereunder, such notice shall be in writing. Any notice or document required or permitted to be delivered hereunder shall be deemed to be delivered when actually received by the designated addressee or, if earlier and regardless of whether actually received or not, when deposited in the United State mail, postage prepaid, certified mail, return receipt requested, addressed to the parties hereto at the respective addresses set out in Section 1.1 above or by facsimile with confirmatory receipt at the numbers set forth herein, (or at Landlord's option, to Tenant at the Demised Premises), or at such other addresses as they have theretofore specified by written notice.

25.2 If and when included within the term "Landlord" as used in this instrument there are more than one person, firm or corporation, all shall jointly arrange among themselves for their joint execution of such notice specifying some individual at some specific address for the receipt of notices and payments to the Landlord; if and when included within the term "Tenant" as used in this instrument there are more than one person, firm or corporation, all shall jointly arrange among themselves for their joint execution of such a notice specifying some individual at some specific address for the receipt of notices and payment to Tenant. All parties included within the terms "Landlord" and "Tenant" respectively, shall be bound by notices and payments given in accordance with the provisions of this Article to the same effect as if each had received such notice or payment. In addition, Tenant agrees that notices to Tenant may be given by Landlord's attorney, property manager or other agent.

ARTICLE XXVI: COMMISSIONS; TITLE ADVICE

26.1 Landlord shall pay to Real Estate Partners, Inc., as Agent, a commission for negotiating this Lease per separate agreement.

26.2 Tenant hereby acknowledges that at the time of the execution of this Lease, it has advised Tenant by this writing that Tenant should have an abstract covering the real estate upon which the Shopping Center and the Demised Premises are located examined by attorney of Tenant's own selection, or at Tenant's option, that Tenant should obtain a leasehold owner's policy of title insurance.

26.3 Tenant also acknowledges that Agent has advised Tenant that because Agent has no expertise with respect to toxic or otherwise hazardous substances. Tenant should, prior to executing this Lease, have qualified experts conduct proper inspections of the Demised Premises in order to determine whether or not toxic or otherwise hazardous substances exist in, under or around the Demised Premises.

ARTICLE XXVII: REGULATIONS

27.1 Landlord and Tenant acknowledge that there are in effect federal, state, county and municipal laws, orders,

rules, directives and regulation (collectively referred to hereinafter as the “Regulations”) and that additional Regulations may hereafter be enacted or go into effect, relating to or affecting the Demised Premises or the Shopping Center, and concerning the impact on the environment of construction, land use, maintenance and operation of structures, and conduct of business. Subject to the express rights granted to Tenant under the terms of this Lease, Tenant will not cause, or permit to be caused, any act or practice, by negligence, omission, or otherwise, that would adversely affect the environment, or do anything to permit anything to be done that would violate any of said laws, regulations or guidelines. Moreover, Tenant shall have no claim against Landlord by reason of any changes Landlord may make in the Shopping Center or the Demised Premises pursuant to said Regulations or any charges imposed upon Tenant, Tenant’s customers or other invitees pursuant to same.

27.2 If, by reason of any Regulations, the payment to, or collection by, Landlord of any rental or other charge (collectively referred to hereinafter as “Lease Payments”) payable by Tenant to Landlord pursuant to the provisions of this Lease is in excess of the amount (the “Maximum Charge”) permitted thereof by the Regulations, then Tenant, during the period (the “Freeze Period”) when the Regulations shall be in force and effect shall not be required to pay, nor shall Landlord be permitted to collect, any sum in excess of the Maximum Charge. Upon the earlier of (i) the expiration of the Freeze Period, or (ii) the issuance of a final order or judgment of a court of competent jurisdiction declaring the Regulations to be invalid or not applicable to the provisions of this Lease, Tenant, to the extent not then proscribed by law, and commencing with the first day of the month immediately following, shall pay to Landlord as additional rental, in equal monthly installments during the balance of the Lease Term, a sum equal to the cumulative difference between the Maximum Charges and the Lease Payments during the Freeze Period. If any provision of this section, or the application thereof, shall to any extent be declared to be invalid and unenforceable, the same shall not be deemed to affect any of the other provisions of this section or of this Lease, all of which shall be deemed valid and enforceable to the fullest extent permitted by law.

ARTICLE XXVIII: MISCELLANEOUS

28.1 Nothing in this Lease shall be deemed or construed by the parties hereto, nor by any third party, as creating the relationship of principal and agent or of partnership or of joint venture between the parties hereto, it being understood and agreed that neither the method of computation of rentals, nor any other provision contained herein, nor any acts of the parties hereto, shall be deemed to create any relationship between the parties hereto other than the relationship of Landlord and Tenant.

28.2 Tenant shall not for any reason withhold or reduce Tenant’s required payments of rentals and other charges provided in this Lease, it being agreed that the obligations of Landlord under this Lease are independent of Tenant’s obligations except as may be otherwise expressly provided. The immediately preceding sentence shall not be deemed to deny Tenant the ability of pursuing all rights granted it under this Lease or at law; however, as contemplated in Texas Rule of Civil Procedure 174(b), as amended from time to time, at the direction of Landlord, Tenant’s claims in this regard shall be litigated in proceedings different from any litigation involving rental claims or other claims by Landlord against Tenant (i.e., each party may proceed to a separate judgment without consideration, counterclaim or offset as to the claims asserted by the other party).

28.3 The liability of Landlord to Tenant for any default by Landlord under the terms of this Lease shall be limited to the proceeds of sale on execution of the interest of Landlord in the Demised Premises; and Landlord shall not be personally liable for any deficiency, except that Landlord shall, subject to the provisions of Section 19.6 hereof, remain personally liable to account to Tenant for any security deposit under this Lease. This clause shall not be deemed to limit or deny any remedies that Tenant may have in the Event of Default by Landlord hereunder, which do not involve the personal liability of Landlord.

28.4 In all circumstances under this Lease where the prior consent of one party (the “consenting party”), whether it be Landlord or Tenant, is required before the other party (the “requesting party”) is authorized to take any particular action, such consent shall not be withheld in a wholly unreasonable and arbitrary manner; however, the requesting party agrees that its exclusive remedy if it believes that consent has been withheld improperly (including, but not limited to, consent required from Landlord pursuant to Section 9.2 or Section 19.1) shall be to institute litigation either for a declaratory judgment or for a mandatory injunction requiring that such consent be given (with the requesting party hereby waiving any claim for damages, attorneys fees or any other remedy unless the consenting party refuses to comply with a court order or judgment requiring it to grant its consent).

28.5 One or more waivers of any covenant, term or condition of this Lease by either party shall not be construed as a waiver of a subsequent breach of the same covenant term or condition. The consent or approval by either party to or of any act by the other party requiring such consent or approval shall not be deemed to waive or render unnecessary consent to or approval of any subsequent similar act.

28.6 Whenever a period of time is prescribed for action to be taken by Landlord, Landlord shall not be liable or responsible for, and there shall be excluded from the computation of any such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, governmental laws, regulations or restrictions or any other causes of any kind whatsoever which are beyond the reasonable control of the Landlord.

28.7 In the event that the designation of a percentage rental rate in Section 1.1(n) of this Lease includes a breakpoint of gross sales (e.g., "5% of gross sales of \$1,000,000"), then: (a) subsection (ii) in the first sentence of Section 4.4 of this Lease shall be deemed to have been deleted and all other formula references in Section 4.4 adjusted accordingly; (b) the breakpoint shall be divided by twelve for purposes of computing monthly percentage rental installments in the second sentence of Section 4.4; and (c) during all periods when minimum guaranteed rentals are reduced (e.g. pursuant to Section 17.4 or Section 18.2) the breakpoint shall be reduced accordingly.

28.8 If any provisions of this Lease should be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions of this Lease shall not be affected thereby.

28.9 If this Lease is in fact a sublease, Tenant accepts this Lease subject to all of the terms and conditions of the underlying lease by which Landlord holds the Shopping Center as lessee. Tenant covenants that it will do not act or thing which would constitute a violation by Landlord of his obligation under such underlying lease; provided, however, that Tenant's agreement in this regard is premised on Landlord's assurance to the effect that the terms of this Lease do not violate such underlying lease.

28.10 The laws of the State of Texas shall govern the interpretation, validity, performance and enforcement of this Lease. Venue for any action under this Lease shall be the county in which rentals are due pursuant to Section 4.2 and Section 1.1 of this Lease.

28.11 The captions used herein are for convenience only and do not limit or amplify the provisions hereof.

28.12 Whenever herein the singular number is used, the same shall include the plural, and words of any gender include each other gender.

28.13 The terms, provisions and covenants contained in this Lease shall apply to, inure to the benefit of and be binding upon the parties hereto and their respective heirs, successors in interest and legal representatives except as otherwise herein expressly provided.

28.14 Tenant shall provide the items described in this Section 28.14 to Landlord for Landlord's written approval prior to the Lease being in full force and effect (but Landlord and Tenant agree that such items are for the benefit of Landlord, and Landlord may waive the right to receive any or all of such items, and Tenant shall have no right to terminate the Lease as a result thereof). Prior to commencement of any work in or to the Demised Premises, Tenant shall first obtain Landlord's written approval of Tenant's plans and written specifications covering the proposed work, Tenant's proposed contractor(s), and Tenant's contract(s) covering the proposed work.

(a) Should there be construction work performed in the Demised Premises, upon completion thereof, Tenant shall provide Landlord satisfactory evidence that all bills have been paid to all contractors, subcontractors and vendors who performed services or provided materials in or on the Demised Premises. Additionally, Tenant shall furnish final notarized lien waivers acceptable to Landlord, which lien waivers shall include but not be limited to the total contract amount of material and/or labor used in or on the Demised Premises.

(b) In connection with the installation of any equipment on or penetrations through the roof of the Demised Premises, Tenant at its sole cost and expense must provide to Landlord a letter satisfactory to Landlord from a structural engineer of Landlord's selection stating that said engineer has approved the location at which the equipment is to be installed and/or the location of any proposed roof penetrations. Additionally, the letter must clarify: (i) that the installation of all equipment and/or penetrations was located and completed in accordance with said engineer's instructions which may have included the requirement of some additional structural bracing; (ii) that all work was performed in a good and workmanlike manner; and (iii) that said work was completed in accordance with the specifications set forth in the attached Exhibit.

(c) Tenant agrees that should Tenant install any equipment on the roof of the Demised Premises, then the associated roof work as described below shall be performed under the direction of a professional roofing contractor hereinafter referred to as "the consultant"; and not a mechanical contractor. Said work shall include but not be limited to creating penetrations through the roof, flashing such penetrations, installing and flashing curbs or other approved materials upon which all equipment is to be set, and filling, pitchpockets and/or pitchpans. Tenant must obtain a letter satisfactory to Landlord from the consultant, certifying that said consultant reviewed and approved the Tenant's roofing contractor's

shop drawings prior to the commencement of any work, with such shop drawings having reflected the scope of work to be performed and the type, description, and weight of all materials to be utilized. Additionally, the consultant's letter shall certify: (i) that the work in progress was inspected to the extent deemed necessary by the consultant; (ii) that the consultant inspected the completed work; and (iii) that the roofing contractor performed all of said work in a good and workmanlike manner acceptable to said consultant and in accordance with industry standards and that such work included to the extent applicable, but was not limited to the following: (aa) the roofing contractor performed the roof flashing work on all penetrations (including but not limited to soil stacks, vent stacks, conduit, piping, etc.); (ab) said roofing contractor filled all pitchpans to the extent pitchpans were installed and filled all pitchpockets after all electrical lines or conduit had been installed through the roof; (ac) said roofing contractor installed rain caps over all uncovered vents; and (iv) said roofing contractor removed all debris from the work area on the roof. Notwithstanding anything stated above, if Landlord's roof is still under warranty, then Tenant must use the roofing contractor of the Landlord's designation; and in connection therewith, it is Tenant's obligation to ascertain Landlord's roof warranty status prior to any work being initiated on the roof. If the roof is not under warranty, Tenant shall nevertheless, prior to the commencement of any work on the roof, obtain Landlord's written approval of the proposed roofing contractor Tenant intends to use. The cost of all consultant's inspections and certifications letters as well as all work required by the consultant shall be paid by the Tenant.

(d) Tenant shall provide Landlord with a true copy of Tenant's Certificate of Occupancy issued by the governmental authority in whose jurisdiction the Demised Premises are located.

(e) Tenant shall provide Landlord with a Certificate of Insurance evidencing the insurance coverages set forth in Article 15.2 herein.

(f) Tenant shall provide Landlord with a Tenant Certification Letter, if requested by Landlord, stating that the Lease is in full force and effect, confirming the commencement and expiration dates of the Lease, rentals to be paid, status of Security Deposit, acknowledgment by Tenant that all construction work, if any, has been completed to Tenant's satisfaction, Tenant has accepted the Demised Premises, and Tenant asserts no claim or default against Landlord and that Landlord is not in default under any of the terms and conditions of Lease.

(g) In connection with work to be performed in or at the Demised Premises, Tenant shall cause its contractor(s) to indemnify Landlord and its Management Agent against any claim, demand, suit, loss or liability arising out of such work to be performed, as set forth on Exhibit "_____" attached hereto.

(h) Tenant shall provide Landlord with Landlord's Financing Statements in accordance with Article 23.1 herein.

(i) To the extent that the Tenant is a corporation, then Tenant must provide to Landlord a corporate resolution in form and substance acceptable to Landlord authorizing Tenant to enter into this Lease and authorizing the officer executing the Lease to do so on behalf of the Tenant.

28.15 This Lease contains the entire agreement between the parties, and no brochure, rendering, information or correspondence shall be deemed to be part of this agreement unless specifically incorporated herein by reference. In addition no agreement shall be effective to change, modify or terminate this Lease in whole or in part unless such is in writing and duly signed by the party against whom enforcement of such change, modification or termination is sought.

28.16 LANDLORD AND TENANT HEREBY ACKNOWLEDGE THAT THEY ARE NOT RELYING UPON ANY BROCHURE, RENDERING, INFORMATION, REPRESENTATION OR PROMISE OF THE OTHER, OR OF THE AGENT OR COOPERATING AGENT, EXCEPT AS MAY BE EXPRESSLY SET FORTH (PLACE AN "X" OR OTHER MARK DESIGNATING A CHOICE IN THE APPROPRIATE BOX):

IN THIS LEASE;

IN _____ AS WELL AS IN THIS LEASE.

NOTE: IF NO "X" (OR OTHER MARK DESIGNATING A CHOICE) IS PLACED IN EITHER BOX IN THIS SECTION 28.15, THEN THE FIRST BOX WILL BE DEEMED TO HAVE BEEN MARKED.

28.16 This Lease consists of twenty-eight articles and Exhibits "A" through "D". With the exception of Article VII, in the event any provision of an exhibit or other attached page shall be inconsistent with a provision in the body of the Lease, the provision as set forth in the exhibit shall be deemed to control.

28.17 This Lease is expressly contingent upon Landlord's approval of Tenant's and (where applicable) any guarantor's signed financial statements, which shall include a balance sheet dated no earlier than ninety (90) days from

the date of this Lease, and income statements covering the current partial year’s business operations. Upon Landlord’s request, Tenant agrees to provide to Landlord in a timely manner any additional information, financial or otherwise, concerning Tenant’s business operations at the Demised Premises. This Lease will be contingent upon Landlord’s approval of all financial or other information requested by Landlord.

28.18 Should pollution liability insurance become available, Landlord has the right to require the Tenant to carry such insurance with limits and coverage acceptable to Landlord.

28.19 Tenant shall have no further renewal options unless expressly granted by Landlord in writing, in accordance with Exhibit “C” attached hereto.

28.20 Landlord reserves the right to buy out Tenant’s Lease at any time during the Lease Term, for an amount not greater than the combined total of all future payments of minimum guaranteed rental that Tenant is obligated to make under the remaining Lease Term. If Landlord exercises its option to buy out Tenant’s Lease, Landlord agrees to pay all reasonable costs associated with Tenant’s move.

EXECUTED as of the latest date accompanying a signature by Landlord or Tenant below.

LANDLORD:

TENANT:

SKILLMAN PLAZA, LTD.
a Texas limited partnership

John Smith

By: GP SKILLMAN PLAZA, INC.
a Texas corporation
as General Partner

Jenny Smith

By: _____
Name:
Title:

Date:

Taxpayer ID No. :

Phone:214-
Fax: 214-*

Phone: 972-
Fax: 972-*

AGENT:
RETAIL PARTNERS, INC.

COOPERATING AGENT:
None

By:

