

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2014-CA-_____

THE SPEAQUESS GROUP, LLC
d/b/a JAMBA JUICE

DEFENDANT/APPELLANT

FAYETTE CIRCUIT COURT
CIVIL ACTION NO.: 14-XX-17

VS.

ON APPEAL FROM THE FAYETTE DISTRICT COURT
CASE NO. 14-C-04015
THE HONORABLE JULIE M. GOODMAN, JUDGE

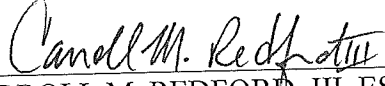
FAYETTE MALL SPE, LLC

PLAINTIFF/APPELLEE

MOTION FOR DISCRETIONARY REVIEW

CERTIFICATE OF SERVICE

The Undersigned does hereby certify that copies of this Motion was served upon the following named individuals by U.S. mail on this the 16th day of September, 2014: Judge James D. Ishmael, Jr., Robert F. Stephens Courthouse, 120 N. Limestone, Ste 551, Lexington, KY 40507; Judge Julie M. Goodman, 150 N. Limestone, Room 531, Lexington, Kentucky 40507; Vincent Riggs, Clerk, Fayette Circuit Court, 103 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, Kentucky 40507; Matthew A. Stinnett, Esq. and Lauren Nichols, Esq. of Bingham Greenebaum Doll, LLP, 300 West Vine Street, Suite 1100, Lexington, Kentucky 40507; and Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.


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APPENDIX

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4. Lease January 2012

Comes The Speaquess Group, LLC d/b/a Jamba Juice ("Jamba Juice"), by counsel, and hereby respectfully moves this Court pursuant to CR 76.20(3) for discretionary review of the Opinion and Order entered by the Fayette Circuit Court on or about August 20, 2014 ("Opinion and Order"), a copy of which is attached as **Appendix #1** hereto, states as follows:

- (a) The name of the Movant is The Speaquess Group, LLC d/b/a Jamba Juice and it is the Tenant. Movant is represented by Carroll M. Redford, III, and Susan Y.W. Chun, Miller Griffin & Marks, P.S.C., 271 West Short Street, Suite 600, Lexington, Kentucky 40507. The name of the Respondent is Fayette Mall SPE, LLC ("Fayette Mall") and it is the Landlord. Respondent is represented by Matthew A. Stinnett, Esq. and Adam C. Reeves, Esq. of Bingham Greenebaum Doll, LLP, 300 West Vine Street, Suite 1100, Lexington, Kentucky 40507, telephone number (859) 288-4656 or (859) 231-8500.
- (b) The date of entry of the judgment sought to be reviewed is the Opinion and Order the Fayette Circuit Court entered August 20, 2014. See **Appendix #1**. Final disposition of the case by the Circuit Court was by Order Denying Motion for Reconsideration entered on September 9, 2014. See, **Appendix# 2**. The case arises from the Forcible Detainer of the Fayette District Court, 4th Division, entered May 28, 2014. See, **Appendix #3**.
- (c) A supersedeas bond is not applicable in this case, and one has not been executed. However, Movant continues to pay the requisite rent to the Fayette Circuit Court Clerk as required by KRS 383.255(2) and consistent with the terms of the Fayette Circuit Court Orders entered September 9, 2014 and September 11, 2014.

(d)(i) Statement of material facts:

This case arises out of a forcible detainer action in the Fayette District Court. The Fayette District Court, however, lacked subject matter jurisdiction to proceed on the matters as presented by the Landlord because this was not a forcible detainer claim based on non-payment of rent; it was based on the technical, non-material breach of the lease by Tenant for more than three occasions during twelve months of paying the rent late. Regardless of the jurisdictional defect to the case, the Landlord failed to present any evidence that the rent for any month other than May 2014 was paid late.

1. Existing Lease and Licensing Agreement.

On or about January 24, 2012, Fayette Mall and Jamba Juice entered into a five (5) year lease for Jamba Juice's rental of certain commercial space designated as space #C-311, and located in a shopping center known as Fayette Mall ("Shopping Center") located at the intersection of Nicholasville Road and Reynolds Road in the City of Lexington, Fayette County, Kentucky ("Existing Lease"). A copy of the Lease is attached hereto as **Appendix #4**.

The term of the Existing Lease was for five (5) years commencing on May 1, 2012 ("Term"). (Existing Lease at Art. I, Sec. 1.1(b)).

The Existing Lease requires Jamba Juice to pay Fayette Mall the Minimum Annual Rent without previous demand and without any setoff or deduction, in equal monthly installments, in advance, on the first day of each and every calendar month throughout the term. (Existing Lease at Art. II, Sec. 2.1). The Existing Lease does not require or mandate any specific method or means of payment of the Minimum Annual Rent.

The Existing Lease defines default by Jamba Juice as the following:

- a. Jamba Juice fails to pay the Minimum Annual Rent and such failure continues for more than five (5) days after written notice from Fayette Mall to Jamba Juice; or
 - b. Jamba Juice fails to observe and perform any of the other terms, covenants and/or conditions of the Existing Lease and such failure continues for more than ten (10) days after written notice from Fayette Mall to Jamba Juice; or
 - c. Jamba Juice fails to pay when due the Minimum Annual Rent three (3) or more times in any period of twelve (12) consecutive months; or
 - d. The leased premises are abandoned, or Jamba Juice fails to take possession of the leased premises and initially open for business as required.
- (Existing Lease at Art. XI, Sec. 11.1).

The Existing Lease expressly states:

Notice given by certified or registered mail shall be deemed to have been given at the time return receipt is signed for, provided, however, that if delivery is refused or the notice is unclaimed, notice shall be deemed received five (5) days after the same shall have been deposited in the mail.

(Existing Lease at Art. XII, Sec. 12.15, emphasis added).

After commencement of the Term, and for approximately 16 months, Fayette Mall had no problems with Jamba Juice's tenancy. Because the Existing Lease did not specify the form or manner of the monthly rental payment, Jamba Juice paid the Minimum Annual Rent by either commercial (i.e., business) check or by credit card, with no protest or objection whatsoever by Fayette Mall. However, without providing any prior notice to Jamba Juice, in January 2014, Fayette Mall deemed rent payment by credit card unacceptable, and rejected Jamba Juice's tender of payment of the rent due for the months of January, all late fees, as well as the advance payment of the full amount of the February rent that was not yet due. Fayette Mall rejected this tender of payment of the January and February rent by credit card despite its subsequent acceptance of payment by credit card for the rent due on its associated storage space.

2. Case No. 14-C-1866.

Fayette Mall filed a forcible detainer action against Jamba Juice on February 26, 2014 for the alleged non-payment of January and February 2014 rent (Fayette District Court Case No. 14-C-1866). The case was assigned to Hon. Julie M. Goodman. At the hearing on March 19, 2014, the Court heard that Fayette Mall had accepted rent payment via credit card on the storage space, and the District Court dismissed that action on its merits. The District Court ruled that so long as Jamba Juice made prompt payment of all the amounts due through March, 2014, "then she is up to date through March." (3/19/14

CD at 10:24:44)¹. Thereafter, Jamba Juice promptly paid all the amounts due, including the rent due for the month of March, 2014, and Fayette Mall accepted that payment.

3. This Case (Case No. 14-C-04015).

On May 19, 2014, Fayette Mall filed a second forcible detainer action 14-C-4015 against Jamba Juice in the Fayette District Court (“District Court”), again drawing Judge Goodman. The Forcible Detainer Complaint filed in Case No. 14-C-04015 (“Forcible Detainer Complaint”) alleged that the “Lease ... provides that the tenant is in default if it fails to pay rent when due three or more times within a period of twelve consecutive months.” The Forcible Detainer Complaint also erroneously alleged that Jamba Juice breached the lease by failing to pay rent “when due for the months of January, February, March, April and May of 2014”. The Forcible Detainer Complaint further erroneously alleged that “Fayette Mall gave Jamba Juice notice of this default and of its intent to terminate the lease and evict Jamba Juice from the premises on May 14, 2014.” Fayette Mall claimed, therefore, “Defendant unlawfully and forcibly detain the premises,” and demanded possession of same. Noticeably absent was any claim of unpaid or past due rent.

On May 28, 2014, a hearing was held² before Judge Goodman during which Myron Worley, the General Manager of CBL (“Mr. Worley”), testified on behalf of Fayette Mall, and Emmy Marquess (“Ms. Marquess”), a member of Jamba Juice and appearing *pro se*, testified on behalf of Jamba Juice (“May 28 Hearing”).

At the commencement of the May 28 Hearing, Fayette Mall’s lawyer informed the District Court that “the default under this lease is based upon the failure to timely pay

¹ A copy of the March 19, 2014 hearing video is included on the CD enclosed in the Appendix.

² A copy of the May 28, 2014, hearing video is included on the CD enclosed in the Appendix.

rent three times within the last twelve months.” The District Court made clear to the parties that if the action was for breach of contract and not non-payment of rent, then the Circuit Court Civil Division was the appropriate forum to decide the dispute, and the action was not one for forcible detainer.

During the May 28 Hearing, the only testimony received from any fact witness was that Jamba Juice was late, at most, as to the May 2014 payment because May was the focus of the limited testimony presented by the Landlord. In fact, even though there was no discussion of any other month’s payment, at most, Jamba Juice could only have been late at that point only *twice* (for April and May) since Fayette District Court Case No. 14-C-1866 was dismissed with prejudice on March 19, 2014.

The record is also clear that the rent had been tendered for May 2014, but that it was “rejected” or not accepted (though still held) by Fayette Mall because it was not in the “correct” form. Jamba Juice tendered payment for the May 2014 payment by commercial check, but thereafter Jamba Juice was informed that it had to pay by cashier’s check instead. Therefore, in order to have enough funds to obtain the cashier’s check as well as not double pay, Jamba Juice put a stop payment on the business check tendered.

Fayette Mall admitted that it had received a check from Jamba Juice to cure the amounts due on May 22, 2014. Fayette Mall also admitted that it started to process the check through its automated system despite it having already filed the forcible detainer action against Jamba Juice. Fayette Mall further admitted that the check was still physically in the possession of Fayette Mall and held by its bank “remotely” even at the time of the hearing. However, after hearing that Jamba Juice stopped payment on the

May commercial check, the District Court cut Ms. Marquess off from explaining the situation and granted the forcible detainer “because she stopped payment.” The District Court cited as its reason for granting the forcible detainer the provision in the Existing Lease that deemed Jamba Juice in default if it failed to pay when due the Minimum Annual Rent three (3) or more times in any period of twelve (12) consecutive months.

The case was presented by Fayette Mall not as one for non-payment of rent, but one based upon the technical contractual breach of monthly rent being late three times during the last twelve months. Yet, the proof in the record was extremely limited and focused only on May 2014. Thus, the petition failed as a matter of law. Jamba Juice also presented proof that any claims of late delivery were a creation of the Landlord by randomly and arbitrarily changing the acceptable form of rent payment when the written lease is silent on any such required form of rent payment.

Furthermore, because the basis of the action was for late payment and not non-payment of rent, the District Court did not have jurisdiction over the dispute. The action was for breach of the Lease terms, and not for forcible detainer. The Fayette District Court should have dismissed the forcible detainer petition.

(d)(ii) Questions of law presented

- 1) Whether the Circuit Court erred in failing to apply the correct legal standard of review of the trial court’s finding of fact.
- 2) Whether the Circuit Court erred in relying on evidence adduced in a previous dismissed forcible detainer case to find that the tenant was guilty of forcibly detaining the property in the instant case.

- 3) Whether the Circuit Court erred in failing to conclude that the District Court was the improper forum for this action as it did not have subject matter jurisdiction over this dispute for a technical breach of the lease agreement.

(d)(iii) The specific reason or reasons why the judgment should be reviewed.

1. This Case Should be Used to Reaffirm the Correct Standard of Review of Forcible Detainer Cases.

The issue was preserved for review by it being presented by Movant in its Motion to Alter, Amend filed with the Fayette Circuit Court.

The Opinion and Order should be reviewed because not only did the lower courts err in result, but the Circuit Court failed to properly follow the standard of review of a trial court's findings of fact after a bench trial in a forcible detainer case. This Court should use this case to reaffirm and provide modern guidance on the applicable standard of review of forcible detainer cases, as well as to correct the lower courts' mistakes.

The standard of the review of a court's findings of fact made by a court after a bench trial is whether they are clearly erroneous. CR 52.01³.

Forcible detainer actions are designed and intended to be summary proceedings. Baker v. Ryan, 967 S.W.2d 591, 593 (Ky. App. 1997). "Notice periods are short, pleadings are restricted, triable issues are limited, discovery is generally unavailable, and the judgment is promptly operative." Id. "In general, the only issues are possession by the plaintiff and detainer by the defendant." Id.

³ Findings of fact are clearly erroneous if they are not supported by substantial evidence. Moore v. Asente, 110 S.W.3d 336 (Ky.2003). Substantial evidence is evidence of a probative value that a reasonable person would accept as adequate to support a conclusion. Id. "Appellate courts must be careful to avoid the sort of unfettered review of the record and of the trial court's rulings that indicates a de novo review." Miller v. Eldridge, 146 S.W.3d 909, 917 (Ky. 2004).

District Court dockets are filled with forcible detainer cases. Yet, given the nature of forcible detainer actions, there is not a great deal of modern case law addressing them. There is a complete lack of case law addressing forcible detainer of commercial leases. This case would provide the Court with an opportunity to provide more guidance on the rights of commercial tenants and landlords as to the correct standard of review and method of trying a case.

Jamba Juice respectfully submits that the Circuit Court failed to apply the correct standard of review of the trial court's finding of fact in this case. The Circuit Court found that the District Court's ruling that Jamba Juice had violated the "three strikes" provision was supported by the evidence. The Circuit Court found that "it is undisputed that Jamba Juice failed to pay its rent in January, February, March, April or May of 2014 in a timely fashion" (Opinion and Order at p. 1). The Circuit Court so opined despite the dearth of factual evidence from the record on appeal in **this** case regarding the months Jamba Juice was allegedly late in payment of the rent, and instead, relied upon the evidence adduced in a **previous** case adjudicated by the District Court, which evidence is not part of the record on appeal.

The only evidence adduced during the May Hearing was that Jamba Juice was allegedly late, at most, for the May payment. Such does not support the eviction order even if the District Court had subject matter jurisdiction. In fact, the primary evidence presented by the Landlord was the actual receipt and holding of the May rent payment by the Landlord and its rejection or nonacceptance of the rent payment, even though they remained holding the check and did not return the check. This testimony, by itself, would justify the dismissal of the eviction proceedings in most circumstances.

At the hearing, Fayette Mall did not provide any evidence about late payment for any month other than May, 2014. While Fayette Mall's *lawyer*, - and not any fact witness - claimed that Fayette Mall had sent a letter to Jamba Juice on May 14, 2014 for late payment, and Fayette Mall's *lawyer* claimed that this case (Case No. 14-C-04015) was based on the "three strikes" provision, Fayette Mall did not provide any factual evidence *in this case* to support this claim. Thus, there is no evidence in the record of **this case** that Jamba Juice had defaulted on the Existing Lease three times within the last twelve months, and the Circuit Court did not apply the correct standard of review of the trial court's findings of fact in this case.

2. The Circuit Court Impermissibly Relied Upon Evidence Adduced During Another Case In Ruling.

The issue was preserved for review by it being presented by Movant in its Petition filed with the Fayette Circuit Court. The Court should also take this case to clarify that a trial court cannot rely on evidence adduced in a previous trial that was dismissed with prejudice when ruling in the instant case.

a. Res Judicata or Collateral Estoppel Barred the District Court from Relitigating the Late Payment of Rent in January, February, and March.

Here, despite the fact that Case No. 14-C-1866 was dismissed on March 19, 2014 with prejudice, which dismissal acted as res judicata or collateral to bar any relitigation of the issues addressed therein, the Circuit Court found that the District Court did not act improperly in considering allegations in another proceeding that Jamba Juice had been late in payment of rent for the months of January, February, and March, 2014 as basis for finding that Fayette Mall was entitled to evict in May 2014 based upon the "three strikes" provision of the Existing Lease. The rule in this district is "that a dismissal with

prejudice constitutes an adjudication of the merits of the controversy as fully and completely as if the order had been entered after trial of the suit.” Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 362 (6th Cir. 1967).

The doctrine of res judicata prevents the relitigation of the same issues in a subsequent appeal and includes every matter belonging to the subject of the litigation which could have been, as well as those which were, introduced in support of the contention of the parties on the first appeal.

Miller v. Administrative Office of Courts, 361 S.W.3d 867, 871 (Ky. 2011).

Alternatively, the doctrine of collateral estoppel, applies to this case.

Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. Cream Top Creamery at 362.

[C]ollateral estoppel, bars subsequent relitigation of a fact or issue where that fact or issue was necessarily adjudicated in a prior cause of action and the same fact or issue is presented in a subsequent suit.

Cobbins v. Tennessee Dept. of Transp., 566 F.3d 582, 589 (6th Cir. 2009).

The doctrine of collateral estoppel not only bars litigation issues actually litigated, but also issues that could have been litigated in support of that previous cause of action so long as the same controversy is involved.

Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical. The key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts. If the two suits concern the same controversy, then **the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action.** Yeoman v. Commonwealth, Health Policy Bd., 983 S.W.2d 459, 465 (Ky. 1998) (emphasis added).

Here, the Circuit Court erred in ruling that the District Court could consider allegations of rent issues in January, February, and March of 2014 presented in another

case as a basis for the eviction brought in May in this case. Case No. 14-C-1866 specifically dealt with whether Fayette Mall was entitled to a forcible detainer for the alleged non-payment of those three months rent, and the District Court found that it was not. Either *res judicata* or collateral estoppel bar Fayette Mall from using the alleged “fact” that Jamba Juice was late in payment for the months of January, February, or March as grounds for the May eviction because, not only was late-payment of rent an issue that could have been litigated by Fayette Mall in support of the March forcible detainer action, but the District Court *actually* decided in that case that Jamba Juice was *not* late in payment of rent for those months. The District *specifically* found in Case No. 14-C-1866 that so long as Jamba Juice brought its account up to date after the March hearing, it was “up to date” in its rent payments and not late in payment for the months of January, February, and March, 2014. The District Court also concluded as a matter of law that because Fayette Mall had accepted partial payment of the rent due, Jamba Juice was not in default of the Lease. That decision collaterally estopped Fayette Mall from arguing in this case that Jamba Juice was late in payment of rent for those months.

b. The Trial Court was prohibited from taking judicial notice of the evidence from Case No. 14-C-1866.

None of the testimony from Case No. 14-C-1866 was introduced – let alone mentioned – in this case, and is not part of the record. A fundamental rule of the law in this Commonwealth is that evidence that is not a part of the record will not be considered on appeal. Wells v. Wells, 406 S.W.2d 157, 158 (Ky. 1966). Even though a court may take judicial notice of certain undisputed facts, it may not take judicial notice of mere evidence introduced in a previous case. S.R. v. J.N., 307 S.W.3d 631, 637 (Ky. App. 2010). According to this Court:

The rule in this Commonwealth is that courts cannot adopt by judicial notice the *evidence* introduced in one case for the purpose of proving a similar proposition in another case.

Id. (emphasis in original). The Kentucky Rules of Evidence provide in relevant part:

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned....

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. See, KRE 201.

Courts may take judicial notice of a finding of fact contained in an order. S.R. v. J.N., 307 S.W.3d 631, 637 (Ky. App. 2010). Collateral estoppel also provides authority to do so in such a case. See supra, Argument 2a. However, a court may not take judicial notice of evidence heard in the earlier case for two reasons:

First, KRE 201(e) requires a court to give the parties notice of its intention to take judicial notice of any matter and an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.

Second, ... Evidence introduced in an adversary proceeding—and not stipulated to by the parties or reduced to a finding by the court—is by its nature subject to dispute. Unless the circuit court ruled on the truth or falsity of that evidence in the prior proceedings, thereby making it a judicially noticeable finding of fact, then that evidence cannot be judicially noticed.

S.R. v. J.N., at 637. More recently, the Kentucky Supreme Court held:

Under KRE 201, therefore, it may be appropriate to notice court records for the occurrence and timing of matters reflected in them—the holding of a hearing, say, or the filing of a pleading—but it will generally not be appropriate to notice the truth of allegations or findings made in another matter, since such allegations or findings generally will not pass the “indisputability” test.

Rogers v. Commonwealth, 366 S.W.3d 446, 451 (Ky. 2012) (emphasis added).

Here, the District Court impermissibly took judicial notice of the evidence adduced in Case No. 14-C-1866. Not only did the District Court in this case fail to give the parties notice of its intention to take judicial notice of the evidence heard in the Case No. 14-C-1866 and an opportunity to be heard as to the propriety of doing so, but it took notice of evidence that was *not* stipulated, and in fact, found by the District Court to be incorrect. The District Court specifically found in Case No. 14-C-1866 that so long as Jamba Juice made prompt payment of all the amounts due through March, 2014, "then she is up to date through March." (3/19/14 CD at 10:24:44). Because the District Court previously ruled that so long as Jamba Juice made prompt payment of the amount due, "it was up to date," that ruling established that Jamba Juice was not late in payment for the months of January, February, and March, and the District Court could only take judicial notice of that finding of fact. Therefore, the Circuit Court clearly erred in allowing those alleged late payments of rent for the months of January, February, and March to be considered as basis for the "three strikes" provision.

Repeat offenders crop up frequently in forcible detainer cases. It is necessary for this Court to provide clear guidance to the trial courts in this Commonwealth on whether they can consider evidence from a previous case when that case was dismissed with prejudice. This Court should take discretionary review to clarify this law in the forcible detainer venue.

3. The Circuit Court Failed to Reverse the District Court Based Upon Its Lack of Subject Matter Jurisdiction Over this Dispute.

The issue of lack of subject matter jurisdiction of the Fayette District Court was preserved for review by it being presented by the Fayette District Court Judge during the

May 28, 2014, hearing, as well as by Movant in its Petition and its Motion to Alter, Amend and its Reply filed with the Fayette Circuit Court.

Forcible detainers are creatures of statute. The relevant statute defines only four specific situations as comprising a forcible detainer:

(a) The refusal of a tenant to give possession to his landlord after the expiration of his term; or of a tenant at will or by sufferance to give possession to the landlord after the determination of his will;

(b) The refusal of a tenant of a person who has made a forcible entry to give possession, on demand, to the person upon whose possession the forcible entry was made;

(c) The refusal of a person who has made a forcible entry upon the possession of one who acquired it by a forcible entry to give possession, on demand, to him upon whose possession the first forcible entry was made;

(d) The refusal of a person who has made a forcible entry upon the possession of a tenant for a term to deliver possession to the landlord, upon demand, after the term expires; and, if the term expires whilst a writ of forcible entry sued out by the tenant is pending, the landlord may, at his cost and for his benefit, prosecute it in the name of the tenant.

KRS 383.200(3).

If a situation does not fall within one of these three enumerated situations, no forcible detainer will lie, and the District Court does not have jurisdiction over the dispute. Emmons v. Madden, 781 S.W.2d 529, 531 (Ky. App. 1989).

In Emmons, the buyer of land brought a forcible detainer action against his vendor for her failure to vacate the land after the transaction was completed. The court agreed with the buyer/defendant that it did not have subject matter over the dispute because the situation did not fit into one of the enumerated categories set forth in KRS 383.200(3). The Court found that the action was one for the seller's breach of the contract of sale, and not one for eviction by a landlord. Therefore, the Court reversed the

lower courts' ruling that the buyer was entitled to a forcible detainer, declaring, "[t]his dispute was beyond the limited jurisdiction of the district court and it should have dismissed the action. Id. at 531. .

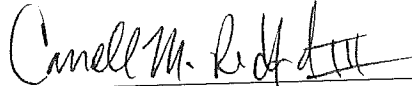
Here, as in Emmons, the lower courts failed to recognize that the District Court did not have subject matter jurisdiction over this dispute because it involved a claim for breach of contract rather than a claim for non-payment of rent. It informed the parties that if the dispute concerned a breach of the lease the proper forum was in the Circuit Court, but it still proceeded to adjudicate the dispute. No one disputed that Jamba Juice had tendered rent for the months at issue, and the only basis for this action was Jamba Juice's alleged untimely tender of that rent. Therefore, this Court should take discretionary review of this matter to correct the lower court's error and to clarify the issues that are properly the subject matter of forcible detainer actions.

(e) The Movant currently does not have a petition for rehearing or motion for reconsideration pending in the Court of Appeals. (Fayette Circuit Court)

(f) No other party to the proceeding has a petition for rehearing or motion for reconsideration pending in the Court of Appeals. (Fayette Circuit Court)

CONCLUSION

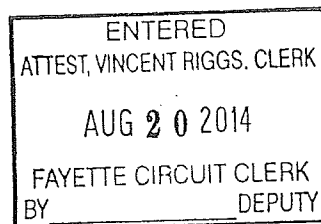
For the reasons set forth above, Jamba Juice respectfully requests that this Court grant its Motion for Discretionary Review to reverse the decisions of the Fayette Circuit Court and Fayette District and to confirm the Fayette District Court lacked subject matter jurisdiction over the breach of contract case and for all claims against Jamba Juice to be dismissed with prejudice.


ATTORNEYS FOR MOVANT

APPENDIX

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COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
DIV. 3
CASE NO. 14-XX-17



THE SPEAQUESS GROUP, LLC
d/b/a JAMBA JUICE

TENANT/APPELLANT

vs.

ON APPEAL FROM THE
FAYETTE DISTRICT COURT
CASE NO. 14-C-04015
THE HONORABLE JULIE M. GOODMAN, JUDGE

FAYETTE MALL SPE, LLC

LANDLORD/APPELLEE

OPINION AND ORDER

This matter is before the Court on appeal from the Fayette District Court, Case No. 14-C-04015. Having reviewed the record and the briefs of the parties, having heard the arguments of counsel at a hearing on August 7, 2014, and the Court being sufficiently advised, this Court HEREBY AFFIRMS the District Court's ruling granting Fayette Mall SPE, LLC's ("Fayette Mall") petition for forcible detainer against The Speaquess Group, LLC d/b/a Jamba Juice ("Jamba Juice"). Pursuant to KRS 383.255, the rent deposited with the Circuit Court Clerk shall be distributed to Fayette Mall.

As set forth in further detail during the hearing, this Court reviewed the district court's findings of fact to determine if such were clearly erroneous and its conclusions of law *de novo*. It is undisputed that Jamba Juice failed to pay its rent in January, February, March, April or May of 2014 in a timely fashion, which constitutes a default under the lease agreement. Specifically, the lease agreement contains a provision that provides the tenant shall be in default if it fails to pay monthly rent when and as due three or more times during the course of twelve consecutive months. The issues before the Court are (1) whether the District Court had sufficient evidence before it at the May 2014 Forcible Detainer hearing and therefore could utilize the January,

February or March late payments in finding Jamba Juice's default; (2) whether there was sufficient evidence before the District Court during its May 2014 Forcible Detainer hearing to find that Jamba Juice failed to pay its rent timely three or more times during the course of twelve consecutive months; and (3) whether Jamba Juice was denied due process during the May 28, 2014 hearing.

At the March 19, 2014 hearing, the District Court adjudicated the issue of whether Jamba Juice defaulted under a provision of the lease agreement for nonpayment of rent, not whether Jamba Juice was timely in paying its rent. Jamba Juice argues that Fayette Mall should be precluded from using at the May 2014 Forcible Detainer hearing the fact that it was untimely in paying January, February and March's rent in this action, which proof was elicited at the March Forcible Detainer hearing (that was dismissed). This Court finds that the District Court may make use of "facts" from the March Forcible Detainer hearing in its May 2014 Forcible Detainer hearing. Thus, this Court finds that the District Court did not err when it permitted Fayette Mall to utilize January, February and March's late payment of rent when determining whether Jamba Juice defaulted under the lease agreement and that it had substantial evidence of same before it at the May 2014 Forcible Detainer hearing.

The District Court heard evidence during the March 19, 2014 hearing that Jamba Juice had not paid rent on January, February or March. And at the May hearing, Jamba Juice failed to pay its rent on time in April and May. Thus, this Court concludes that at the May 28, 2014 hearing, the District Court had sufficient evidence to find that the tenant was not timely in paying rent for the months of January, February, March April and May.

Finally, this Court does not agree that Jamba Juice was denied due process at the May 28, 2014 hearing. Jamba Juice was afforded its full day in court.

Based on the review of the record and the arguments presented during this appeal, this Court finds that the District Court had a sufficient factual and legal basis to grant Fayette Mall's petition for forcible detainer.

/s/ JAMES D. ISHMAEL, JR.
A TRUE COPY
ATTEST: VINCENT RIGGS, CLERK
FAYETTE CIRCUIT COURT
BY J. Guerrero DEPUTY

JAMES D. ISHMAEL, JR.
JUDGE, FAYETTE CIRCUIT COURT

HAVE SEEN AND CONSISTENT WITH
THE COURT'S RULING FROM THE
BENCH ON AUGUST 7, 2014:

Lauren Nichols
Matthew A. Stinnett
Lauren R. Nichols
BINGHAM GREENEBAUM DOLL LLP
Lexington, Kentucky 40507
COUNSEL FOR LANDLORD/APPELLEE

Trip Redford (with permission by UN)
Carroll M. Redford, III
Susan Y.W. Chun
Elliott C. Miller
Miller, Griffin & Marks, PSC
271 West Short Street, Suite 600
Lexington, KY 40507
COUNSEL FOR TENANT/APPELLANT

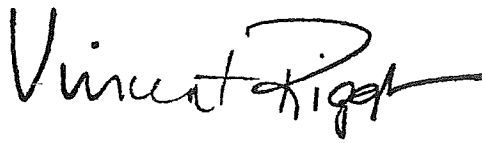
CERTIFICATE OF SERVICE

I certify that the foregoing document was sent via U.S. 1st Class Mail on this the 20th day of August, 2014 to the following:

Matthew A. Stinnett
Lauren R. Nichols
BINGHAM GREENEBAUM DOLL LLP
300 West Vine Street, Suite 1100
Lexington, Kentucky 40507
COUNSEL FOR LANDLORD/APPELLEE

Carroll M. Redford, III
Susan Y.W. Chun
Elliott C. Miller
Miller, Griffin & Marks, PSC
271 West Short Street, Suite 600
Lexington, KY 40507
COUNSEL FOR TENANT/APPELLANT

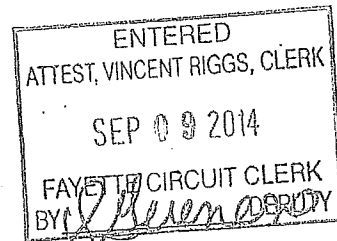
Fayette District Court
Civil Division and Forcible Detainers
150 N. Limestone Room D101
Lexington, Kentucky 40507



Clerk, Fayette Circuit Court

By: S. Guerrero

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
3rd DIVISION
CASE NO. 14-XX-17



THE SPEAQUESS GROUP, LLC
d/b/a JAMBA JUICE

TENANT/APPELLANT

v.

ORDER

FAYETTE MALL SPE, LLC

LANDLORD/APPELLEE

*** **

This matter having come before the Court on August 22, 2014, on Appellant/Tenant's Motion for Reconsideration and/or Motion to Alter, Amend or Vacate and Motion to Suspend Effectiveness and to Stay Enforcement; and the Court having heard the arguments of counsel, having reviewed the record and being otherwise sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED that Appellant/Tenant's Motion is SUSTAINED in part and DENIED in part as follows:

With respect to Tenant/Appellant's Motion for Reconsideration and/or Motion to Alter, Amend or Vacate, the motions are OVERRULED.

With respect to Tenant/Appellant's Motion to Suspend Effectiveness and to Stay Enforcement, the motion is SUSTAINED. The Court finds that if Tenant/Appellant timely files a Petition for Discretionary Review before the Kentucky Court of Appeals under KRS 383.255 ("Appeal"), it must tender the monthly sums owed to Appellant/Landlord under the lease agreement between the parties in the amount of \$7,284.53¹ ("Rent") to the Fayette Court Clerk by or on the first day of each month during the pendency of the Appeal to maintain the stay of the District Court's May 28, 2014 Forcible Detainer Judgment. If, however, Tenant/Appellant

¹ This amount represents the rent owed for the space within the Fayette Mall rented as #C-311.

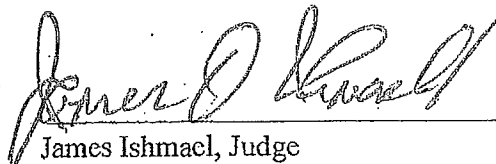
does not tender the Rent in full by or on the first day of each month, Landlord/Appellee may move for immediate recourse before this Court to remove Tenant/Appellant from the premises. During the pendency of any Appeal, Landlord/Appellee is not required to provide any notice(s) otherwise required under the lease agreement, nor is Tenant/Appellant provided any grace period or opportunity to cure as otherwise granted under the lease agreement.

The Court FURTHER ORDERS that the Fayette Court Clerk is to immediately release all sums currently escrowed by Tenant/Appellant to Landlord/Appellee. Each month during the pendency of any Appeal, Fayette Court Clerk is to release the escrowed Rent in its entirety by the tenth day of the month to Landlord/Appellee. To effectuate a release of the escrowed funds, The Fayette Court Clerk shall mail via first class mail a check payable to "Fayette Mall SPE, LLC" to the following address:

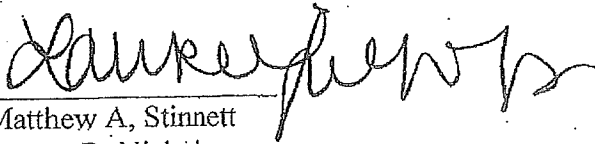
Fayette Mall
Attn: Myron Worley, General Manager
3401 Nicholasville Road, Suite 303
Lexington, Kentucky 40503-3693

Finally, pursuant to the parties' agreement, the Court SO ORDERS that the Fayette Circuit Court shall retain jurisdiction during the pendency of any Appeal to address any issues arising over the stay and/or the timely payment of monthly rent to the Fayette Court Clerk by the Tenant/Appellant.

Dated: 7/5/14


James Ishmael, Judge
Fayette Circuit Court, 3rd Division

Tendered By:



Matthew A. Stinnett

Lauren R. Nichols

Attorneys for Landlord/Appellee

Have Seen and Agreed AS NOTED OR/
and consistent with the Courts
Ruling from the Bench on ~~September~~ ^{AUGUST 22 + 29, 2014}



Carroll M. Redford III

attorneys for Tenant/Appellant

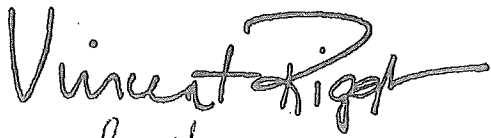
CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served by mailing same first class mail, postage prepaid, to counsel listed below:

Matthew A. Stinnett, Esq.
Lauren R. Nichols
Bingham Greenebaum Doll, LLP
300 West Vine Street, Suite 1100
Lexington, Kentucky 40507;

Carroll M. Redford, III
Miller, Griffin & Marks, PSC
271 West Short Street, Suite 600
Lexington, Kentucky 40507

on this the 9th day of September, 2014.


By: S. Guerrero
Clerk

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AOC-217 Doc. Code: JPF or
Rev. 3-12 JDF
Page 1 of 1
Commonwealth of Kentucky
Court of Justice www.courts.ky.gov
KRS 383.240



**FORCIBLE DETAINER
JUDGMENT**

Case No. 14-C-04015

Court _____ District _____

County Fayette

Division District

FAYETTE MALL SPE LLC

PLAINTIFF

v.

THE SPEAQUESS GROUP LLC DBA JAMBA JUICE

DEFENDANT(S)

This cause coming on for hearing and all parties being properly before the Court. The Court, having heard evidence and argument, and the Court being otherwise sufficiently advised. IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

That the Defendant(s) are guilty of forcible detainer as charged and that the Plaintiff have restitution of the premises located in Fayette county at:

FAYETTE MALL SHOPPING CENTER

3401 NICHOLASVILLE ROAD #C-311

LEXINGTON KY 40503

Defendant(s) are ordered to vacate said property within 7 (seven) days of the entry of this Judgment.

The Court further awards to the Plaintiff costs of this action.

If a Forcible Detainer Settlement Agreement (AOC-218) has been executed and Filed of record by the parties, said terms are hereby incorporated herein and all parties shall comply with same.

EITHER PARTY MAY FILE AN APPEAL WITHIN 7 (SEVEN) DAYS OF THE ENTRY OF THIS JUDGMENT.

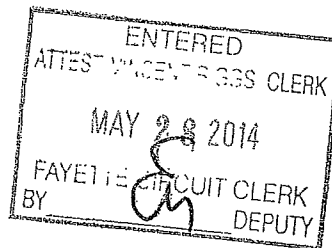
MAY 28 2014

Date: _____, 2 _____

Judi Muth Goodman

Judge

Distribution: File ☒
Plaintiff ☒
Defendant ☒



FAYETTE MALL

SHOPPING CENTER LEASE

SHOPPING CENTER
LANDLORD
TENANT

FAYETTE MALL - LEXINGTON, KENTUCKY
FAYETTE MALL SPE, LLC, a Delaware limited liability company
THE SPEAQUESS GROUP, LLC, a Ky limited liability company,
d/b/a J&MBA JUICE

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PAYETTE MALL

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EXHIBIT A - SHOPPING CENTER PREMISES

EXHIBIT B - CONSTRUCTION

GUARANTY OF LEASE

FAYETTE MALL

8/11/2011; 12/29/11

SHOPPING CENTER LEASE

THIS LEASE made and entered into as of the 24 day of JAN, 2012, by and between FAYETTE MALL SPE, LLC, a Delaware limited liability company ("Landlord"), and THE SPEAQUESS GROUP, LLC, a limited liability company, d/b/a JAMBA JUICE ("Tenant").

ARTICLE I
REFERENCE PROVISIONS, SHOPPING CENTER, LEASED PREMISES AND TERM

Section 1.1 Reference Provisions.

- (a) **LEASED PREMISES**—cross hatched and/or designated as space #C-311 on EXHIBIT A annexed hereto and made a part hereof and containing approximately 605 square feet. The Leased Premises are in a building in a Shopping Center known as Fayette Mall located at the intersection of Nicholasville Road and Reynolds Road in or near the Town or City of Lexington, County of Fayette, State of Kentucky;
- (b) **TERM**—shall be for a period of Five (5) years commencing as provided in Section 1.2. As used in this Section 1.1, the term "year" shall mean each successive twelve (12) calendar month period commencing on the first day of a calendar month. If the Term commences on a day other than the first day of a calendar month, then the period commencing with the first day of the Term and ending on the last day of the calendar month in which the Term commenced shall be added to the first year of the Term.
- (c) **MINIMUM ANNUAL RENT**—Sixty-Seven Thousand, Nine Hundred, Eleven and 25/100 Dollars (\$67,911.25) per year for the first year of the Lease Term, with annual increases of three percent (3%) per year over the amount payable for the previous year through the balance of the Lease Term, prorated for a partial year if applicable.
- (d) **PERCENTAGE RENT AND BASE**—an amount equal to eight percent (8%) of Gross Sales in excess of a base of Eight Hundred Forty-Eight Thousand Eight Hundred Ninety-One and 00/100 Dollars (\$848,891.00) per year for the first year of the Lease Term, which base amount shall be subject to annual increases of three percent (3%) per year over the base amount for the previous year through the balance of the Lease Term; as specified in Section 2.2.
- (e) **USE**—For the primary retail sale of juices, blended drinks to include, but not limited to, smoothies and incidental thereto, for the retail sale of coffee, tea, tea-based drinks and other beverages, soups, baked goods, pizza, flatbreads, sandwiches, wraps, salads, snacks; health products to include, but not be limited to, health foods, health-oriented books and nutritional products; juice-related equipment and supplies, promotional items to include, but not be limited to, apparel, headwear, books, drinkware and activity items and as a further incidental use, for the display retail sale of other items as reasonably related to the sale of juices; and for no other purpose. In no event shall Tenant offer alcohol or any items in violation of any restrictions or prohibitions affecting the Shopping Center.
- (f) (i) **INTENTIONALLY DELETED.**
(ii) **INTENTIONALLY DELETED.**
(iii) **GENERAL PROMOTION FUND**—None.
- (g) **SECURITY DEPOSIT**—None.
- (h) **NOTICE ADDRESS—**

TENANT The Speaquess Group, LLC 407 Hart Road Lexington, Kentucky 40502	LANDLORD CBL & Associates Management, Inc. CBL Center, Suite 500 2030 Hamilton Place Boulevard Chattanooga, Tennessee 37421-6000
---	---
- (i) **Anchor Stores** shall mean the spaces designated Buildings A, B, C, D, and E on Exhibit A attached hereto and any future spaces of 20,000 square feet or more of floor area.
- (j) **Department Stores** shall mean a retail store occupying not less than 25,000 square feet.
- (k) **The Triggering Number** means Five (5) Department Stores.
- (l) **Store Hours** shall mean Monday through Saturday continuously between the hours of 10:00 A.M. and 9:00 P.M. and Sundays continuously between the hours of 12:00 NOON and 6:00 P.M.
- (m) **OPERATING COSTS**—Tenant's Operating Costs Charge is Eighteen and 64/100 Dollars (\$18.64) per square foot of the Leased Premises for the 2012 calendar year increased by five percent (5%) each calendar year thereafter over the amount payable for the previous calendar year (prorated for a partial

FAYETTE MALL

calendar year, if applicable). Notwithstanding the foregoing, if at any time during the Term of this Lease, Landlord causes a refurbishing and/or renovation of all or part of the Shopping Center, then effective on the first day of the first full calendar month following the completion of said refurbishing and/or renovation Tenant's Operating Costs Charge shall be increased by an amount (the "Refurbishing Charge") in accordance with the schedule at the end of this paragraph for the calendar year in which said increase becomes effective (prorated for a partial calendar year, if applicable, for the calendar year in which said increase becomes effective and the full amount (increased by the aforementioned percent increase) would be added at the beginning of the next full calendar year) and said increased Operating Costs Charge shall increase each calendar year thereafter as set forth herein:

Schedule:

Refurbishing and/or renovation cost

More than	equal to or less than	Refurbishing Charge
Four Million Dollars	Eight Million Dollars	One Dollar per square foot of the Leased Premises for the calendar year in which the Refurbishing Charge is activated
Eight Million Dollars	Unlimited	Two Dollars per square foot of the Leased Premises for the calendar year in which the Refurbishing Charge is activated

Examples:

Assumptions: Tenant's Operating Costs Charge for the calendar year in which the Term commences equals \$12 per square foot; the annual increase equals ten percent (10%); and a Five Million Dollar renovation is completed on October 31st of such calendar year. Result: from January 1st through October 31st Tenant's Operating Costs Charge would be an annual amount equal to \$12 per square foot. On November 1st that Operating Costs Charge would become \$12 per square foot plus 1/6th of \$1 per square foot prorated through December 31st (\$17 per square foot because two months left in the calendar year in which the Term commences). On January 1st of the immediately succeeding calendar year the Operating Costs Charge would become \$14.20 per square foot through December 31st of such calendar year (\$13.20 per square foot plus \$1.10 per square foot), subject to increase for further renovations. If no renovations completed during such calendar year then on January 1st of the next succeeding calendar year, Tenant's Operating Costs Charge would equal \$15.73 per square foot of the Leased Premises.

FAVETTE MALL

Section 1.2 Shopping Center; Leased Premises, and Term. Landlord hereby leases to Tenant and Tenant rents from Landlord those certain premises ("Leased Premises") now existing or hereafter to be erected in the Shopping Center described in Section 1.1(a) and shown on EXHIBIT A hereto. The Term (as described in Section 1.1(b)) shall commence on the earlier of (1) the date which is Ninety (90) days following Landlord's tender of possession of the Leased Premises, or (2) the date on which Tenant opens for business in the Leased Premises. Providing such entry does not interfere with Landlord's general construction of the Shopping Center and/or Landlord's work to be done, if any, in preparing the Leased Premises for Tenant's occupancy, Tenant, its agents, employees, and contractors, shall have the right to enter the Leased Premises prior to the tender of possession for the purposes of taking measurements and obtaining other information required in connection with Tenant's prospective occupancy thereof. Any access by Tenant to the Leased Premises prior to the commencement of the Term shall be upon all of the terms, covenants and conditions of this Lease except for the payment of rent and other charges. Tenant shall pay all utility charges relating to the Leased Premises which accrue after Landlord's tender of possession.

Tender of possession shall be deemed to have occurred when Landlord has completed Landlord's work, if any, required by Exhibit B annexed hereto and made a part hereof.

The Leased Premises shall extend to the exterior faces of exterior walls or to the building line where there is no wall, or the center line of those walls separating said premises from other leased premises in the Shopping Center, together with the appurtenances specifically granted in this Lease, but reserving and excepting to Landlord or its designee the right to install, maintain, use, repair and replace pipes, ductwork, conduits, utility lines and wires through hung ceiling space, column space, and partitions, in or beneath the floor slab or above or below the Leased Premises or other parts of the Shopping Center, except that Landlord shall not unreasonably interfere with or interrupt the business operations of Tenant within the Leased Premises, and except where necessary as determined by Landlord's architect, no pipes, conduits, utility lines, or wires installed by Landlord shall be exposed in the sales area of the Leased Premises.

Tenant agrees to complete Tenant's work and open the Leased Premises for business to the public not later than the commencement date of the Term. In the event Tenant fails to take possession and open for business to the public fully fixtured, stocked, and staffed on the commencement date of the Term, then and in such event Landlord shall have, in addition to all remedies in this Lease provided, the right to collect in addition to the Minimum Annual Rent and other sums payable under this Lease a further item of additional rent at a rate equal to twice the Minimum Annual Rent per day for each and every day that Tenant shall fail to be open for business, which further additional rent shall be deemed to be in lieu of any Percentage Rent that may have been earned during such period.

Section 1.3 Acceptance of Leased Premises. As often as may be requested by Landlord, Tenant shall promptly and without cost to Landlord execute, acknowledge, and deliver to Landlord and/or Landlord's mortgagee a written acceptance or estoppel certificate with respect to the Leased Premises in form and substance acceptable to Landlord.

Section 1.4 Quiet Enjoyment. Tenant, upon paying the rents herein reserved and performing and observing all of the other terms, covenants, and conditions of this Lease on Tenant's part to be performed and observed, shall peaceably and quietly have, hold, and enjoy the Leased Premises during the Term, subject, nevertheless, to the terms of this Lease and to any mortgages, ground or underlying leases, agreements, and encumbrances to which this Lease is subordinate.

Section 1.5 Parties to Have No Liability if Shopping Center Not Constructed. If for any reason construction of the Shopping Center is not commenced within three (3) years after the date on which this Lease shall be completely executed, or if for any reason construction of the Shopping Center is not completed within two (2) years from the date commenced, this Lease shall thereupon cease and terminate and the parties shall be released and discharged from any and all liability hereunder.

ARTICLE II RENT AND OTHER CHARGES

Section 2.1 Minimum Annual Rent. Upon commencement of the Term, Tenant shall pay to Landlord without previous demand therefor and without any setoff or deduction whatsoever, the Minimum Annual Rent provided in Section 1.1(c), payable in equal monthly installments, in advance, on the first day of each and every calendar month throughout the Term, except that the first installment of Minimum Annual Rent shall be paid upon the execution of this Lease and, if the Term commences on a date other than the first day of a month, Tenant shall pay Landlord on the first day of the Term, a pro-rata portion of such Minimum Annual Rent, calculated based upon the number of calendar days in the month in which Tenant's obligation to pay Minimum Annual Rent commences.

If at any time during the Term of this Lease, the Shopping Center shall have more than the Triggering Number of Department Stores, then for the first such Department Store in excess of the Triggering Number commencing upon the date such additional Department Store opens for business, Tenant shall pay as additional rent the Additional Department Store Charge. For each additional Department Store after the first additional Department Store, in lieu of the Additional Department Store Charge, Tenant shall pay as additional rent, the Subsequent Additional Department Store Charge commencing upon the date each such additional Department Store opens for business. Additional Department Store Charge means an annual amount equal to fifteen percent (15%) of Tenant's Minimum Annual Rent (and increases to Minimum Annual Rent, if any, as they occur) as defined in Section 1.1(c); Subsequent Additional Department Store Charge means an annual amount equal to one hundred fifteen percent

Version #2 - 12/19/11
J:\Fayette Mall\2011\Fayette universal inline fixed lease version 2 Watermark.doc
T. Furrer P. L. C.

FAYETTE MALL

~~(11%) of the then in effect Additional Department Store Charge (and increases thereto, if any, as they occur) or the Subsequent Additional Department Store Charge (and increases thereto, if any, as they occur), as the case may be. Tenant shall pay said Additional Department Store Charge or the Subsequent Additional Department Store Charge, as the case may be, without setoff or deduction in advance equal monthly installments on the first day of each and every calendar month throughout the remainder of the Term. Notwithstanding the foregoing, Tenant does not rely on, and Landlord does not make any express or implied representation, promise or condition that any specific type, quality or number of Anchor Stores or Department Stores shall occupy any space in the Shopping Center during all or any part of the term of the Lease or renewals or extensions thereof, if any.~~

~~The Minimum Annual Rent, and all future incremental increases thereto, shall be increased at the commencement of the fourth (4th) and seventh (7th) years of the Term by an amount equal to the highest annual Percentage Rent due and payable by Tenant during any of the prior three (3) years of the Term, and the Percentage Rent base shall be adjusted accordingly.~~

Section 2.2 Percentage Rent. (a) Tenant shall pay to Landlord, in addition to the aforesaid Minimum Annual Rent, the Percentage Rent provided in Section 1.1(d).

(b) The term "Gross Sales" means the selling price of all merchandise sold or delivered in, at, on, or from any part of the Leased Premises (including, without limitation, sales by means of any mechanical or vending device) and the charges for all services of any sort sold or performed in, at, or from any part of the Leased Premises and shall include sales and charges for cash or credit, regardless of collections in the case of the latter, but shall exclude (1) returns and refunds in fact made by Tenant upon transactions included within Gross Sales, not exceeding the selling price of merchandise returned by the purchaser and accepted by Tenant, (2) exchange of merchandise between stores of Tenant where such exchanges are made solely for the convenient operation of Tenant's business and not for the purpose of consummating a sale which has been made at, in, on, or from the Leased Premises, (3) the amount of any city, county, state, or federal sales, luxury, or excise tax on such sales which is both added to the selling price (or absorbed therein) and paid to the taxing authority by Tenant (but not by any vendor of Tenant). A sale shall be deemed to be made in the Leased Premises if an order therefor is secured or received in the Leased Premises, whether or not such order is filled in the Leased Premises or elsewhere or if, pursuant to mail, telegraph, telephone, Internet, electronic commerce, or other similar means, orders are received or filled at or from the Leased Premises. All moneys or other things of value not herein specifically excluded from Gross Sales shall be deemed included therein. Nothing herein contained shall be construed as a consent to occupancy by a concessionaire, or to the use of any mechanical or other vending device in violation of the provisions of this Lease.

(c) Tenant shall prepare and keep at the Leased Premises for a period of not less than three (3) years, adequate books and records (conforming to generally accepted accounting practices, consistently applied) showing Gross Sales for each month throughout the Term. Tenant agrees that all Gross Sales shall be registered at the time each sale is made in a manner reasonably satisfactory to Landlord and in accordance with good business practices.

(d) On or before the tenth (10th) day of each month during the Term, Tenant shall furnish Landlord at the Shopping Center's manager's office a statement of Gross Sales for the preceding calendar month. On or before the thirtieth (30th) day following each year (as defined in Section 1.1(b)) Tenant shall submit a statement to Landlord at the Shopping Center's manager's office, satisfactory to Landlord in form and substance, certified as correct by a Certified Public Accountant or, at Landlord's election, Tenant's chief financial officer, showing the amount of Gross Sales for such year together with an itemization of all claimed deductions therefrom. Tenant shall require its licensees, if any are permitted hereunder, to furnish similar statements. Landlord will hold such information in confidence, except that Landlord may reveal such reported sales to any mortgagee or prospective mortgagee, encumbrancer, or purchaser of the Shopping Center, or a prospective purchaser of Landlord's interest therein.

(e) If the event that Gross Sales for any year exceed the Percentage Rent base set forth in Section 1.1(d) hereof, then Tenant shall pay Landlord the Percentage Rent payment computed upon such Gross Sales on or before the 30th day of each month for the preceding month for the remainder of the year commencing with the month the Percentage Rent base is exceeded. Acceptance of such Percentage Rent by Landlord shall not constitute a waiver of Landlord's right to additional Percentage Rent justified by the audit hereinafter described. In the event that two (2) Percentage Rent bases are stated for any particular year, the Percentage Rent base for such year shall be determined as follows: Multiply each Percentage Rent base by a fraction, the numerator of which shall be the number of days during such year applicable to such Percentage Rent base, and the denominator of which shall be three hundred sixty-five (365). The sum of the products as hereinbefore determined shall be the Percentage Rent base for such year.

(f) Intentionally deleted.

(g) For any partial year during the Term, Percentage Rent payable by Tenant for any such partial year shall be calculated upon an adjusted Percentage Rent base arrived at by multiplying the Percentage Rent base set forth in Section 1.1(d) hereof by a fraction, the numerator of which shall be the number of days transpired to the end of such partial year and the denominator of which shall be three hundred sixty-five (365). If the Term commences on a day other than the first day of a calendar month, then the Gross Sales for such partial calendar month shall be added to the Gross Sales for the first year of the Term and the Percentage Rent base shall be proportionately increased based on the number of days in such partial calendar month.

(h) Landlord or its duly authorized representatives may, during regular business hours, inspect the records of Gross Sales made by Tenant, provided such inspection is commenced within three (3) years after Landlord's
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receipt of a certified annual statement of Gross Sales hereinabove required and is limited to the period covered by such statement. Tenant and each licensee shall produce said records on request of Landlord. If Landlord's audit shall disclose a deficiency in Gross Sales for such period of less than two percent (2%), Tenant shall promptly pay to Landlord the amount of such Percentage Rent due on such deficiency, if any. If such audit by Landlord shall disclose a deficiency in Gross Sales of two percent (2%) or more, then Tenant shall promptly pay Landlord Percentage Rent due on such deficiency, if any, together with interest (as hereinafter defined) and the cost of such audit. If Tenant fails to file a certified annual statement of Gross Sales as herein required, Tenant shall pay all Percentage Rent due, if any, together with interest and the cost of such audit. In addition to the foregoing, if any two (2) out of three (3) consecutive annual Gross Sales statements furnished by Tenant understate the amount of Gross Sales by more than two percent (2%), after notice by Landlord to Tenant of such understatement, then in such event Landlord may, at its option, terminate this Lease.

Section 2.3 Taxes. Tenant shall pay promptly when due or make reimbursement to Landlord for all taxes imposed upon Tenant's rent, Lease, and business operation, including, without limitation, all sales taxes, value added taxes, documentary taxes, stamp taxes, and other taxes assessed upon the consideration to be received by Landlord for this Lease, upon all personal property of Tenant, and shall also pay to Landlord, as additional rent, Tenant's share of real estate taxes as specified in this Section 2.3. Tenant's share of real estate taxes shall be computed by multiplying the total amount of such taxes assessed against the Shopping Center, less only amounts contributed towards such taxes by the tenants, occupants or owners of Anchor Stores (other than Landlord and/or its affiliates), by a fraction, the numerator of which shall be the number of square feet of floor area in the Leased Premises, and the denominator of which shall be the "Leased Shops Floor Area", as hereinafter defined (said fraction sometimes hereinafter referred to as "Tenant's Proportionate Share"). Leased Shops Floor Area shall mean the greater of (a) the actual leased floor area of Shops, as hereinafter defined, included in the Shopping Center as of July 1 in each year, or (b) eighty percent (80%) of the total leasable floor area of Shops included in the Shopping Center as of July 1 in each year. Shops shall mean any existing or future in-line individual space within the Shopping Center which is designed for the exclusive use and occupancy of rent paying tenants, excluding Anchor Stores, and shall in no event include common areas, areas occupied by retail merchandising units, storage areas, mezzanine areas and areas, if any, used as a community room, or for management and promotion offices. Notwithstanding the foregoing, if the Shopping Center opens subsequent to July 1, the actual leased floor area and the total leasable floor area of Shops for such year of opening shall be determined as of December 31st of such year. Tenant acknowledges and stipulates that Landlord has made no representation or agreement of any kind as to the total dollar amount of such taxes, actual or estimated, or Tenant's dollar share thereof.

The term "real estate taxes" shall mean all taxes and assessments (special or otherwise) levied or assessed directly or indirectly against the Shopping Center (land, buildings and/or improvements as the same may be enlarged or reduced from time to time), personal property used in connection with the common areas and other taxes arising out of the use and/or occupancy of the Leased Premises imposed by federal, state, or local governmental authority or any other taxing authority having jurisdiction over the Shopping Center, including expenses incurred by Landlord in reviewing and/or in contesting the validity of, in seeking a reduction in, or in seeking to prevent an increase in any such tax(es) or assessment(s) including but not limited to tax consultants and/or tax advisors, but shall exclude franchise, capital stock, income, estate or inheritance taxes personal in nature in the State of Tennessee the term "real estate taxes" shall also mean any taxes based upon the value of the Shopping Center, including, without limitation, the value of the Shopping Center as part of the "net worth" or value of the Landlord's assets as a component of any franchise tax; if the Shopping Center is located in the State of Michigan the term "real estate taxes" shall also mean the Michigan Business Tax.

Landlord shall estimate the taxes referred to in this Section 2.3, and Tenant shall pay one-twelfth (1/12) thereof monthly in advance, together with the payment of Minimum Annual Rent. After the end of each calendar year Landlord shall furnish Tenant a statement in reasonable detail of the actual real estate taxes, prepared in accordance with sound accounting practices by Landlord's accounting department, and there shall be an adjustment between Landlord and Tenant, with payment to or repayment by Landlord, as the case may require, to the end that Landlord shall receive the entire amount of Tenant's annual share for such period.

In no event shall Tenant's share of real estate taxes due hereunder be reduced by, nor shall Tenant be entitled to share or participate in any tax refund, rebate, and/or abatement related to any government incentive for the development of, redevelopment of, improvement of any kind to, or expansion of the Shopping Center and the financial benefits of such tax reduction, refund, rebate, and/or abatement shall belong solely to Landlord and/or its designees.

Section 2.4 Common Areas and Operating Costs. All common areas and other common facilities (hereinafter collectively called "common areas") made available by Landlord in or about the Shopping Center shall be: subject to the exclusive control and management of Landlord, expressly reserving to Landlord, without limitation, the right to erect and install within the malls and/or the parking areas, kiosks, planters, pools, sculpture, freestanding buildings, additional stories to buildings, or otherwise. Common areas (as initially constructed or as the same may be enlarged or reduced at any time thereafter) shall mean all areas, space, facilities, equipment, signs, and special services from time to time made available by Landlord for the common and joint use and benefit of Landlord and its designees, the Tenant and other tenants and occupants of the Shopping Center, and their respective employees, agents, subcontractors, concessionaires, licensees, customers, and invitees, which may include (but shall not be deemed a representation as to their availability), the sidewalks, parking areas, access roads, driveways, landscaped areas, truck service ways, tunnels, loading docks, pedestrian malls (enclosed or open), courts, stairs, ramps, elevators, escalators, comfort and first aid stations, public restrooms, community hall or auditorium, and

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parcel pickup stations. Landlord hereby expressly reserves the right from time to time to, construct; maintain; and operate lighting and other facilities, equipment, and signs on all of the common areas; to police the same; to change the area, level, location, and arrangement of the parking areas and other facilities forming a part of the common areas; to construct, operate; maintain, repair, and replace retention ponds and mitigation areas which serve the Shopping Center; to build multi-story parking facilities; to restrict parking by tenants and other occupants of the Shopping Center and their employees, agents, subtenants, concessionaires, and licensees; to enforce parking charges (by operation of meters or otherwise); to close temporarily all or any portion of the common areas for the purpose of making repairs or changes thereto and to discourage non-customer parking; to establish; modify, and enforce reasonable rules and regulations with respect to the common areas and the use to be made thereof; to grant rights to hold events in the common areas such as automobile displays and carnivals; and to grant individual tenants the right to conduct sales in the common areas. Landlord shall operate, manage, equip, light, and maintain the common areas in such manner as Landlord may from time to time determine, and Landlord shall have the right and exclusive authority to employ and discharge all personnel, including independent contractors, with respect thereto. Tenant is hereby given a non-exclusive license to use, during the Term, the common areas of the Shopping Center as they may now or at any time during the Term exist, provided, however, that if the size, location; or arrangement of such common areas or the type of facilities at any time, forming a part thereof is changed or diminished, Landlord shall not be subject to any liability therefor, nor shall Tenant be entitled to any compensation or diminution or abatement of rent therefor, nor shall such change or diminution of such areas be deemed a constructive or actual eviction. Landlord reserves the right to grant to third persons the non-exclusive right to cross over and use in common with Landlord and all tenants of the Shopping Center the common areas as designated from time to time by Landlord. In order to establish that the Shopping Center and any portion thereof is and will continue to remain private property and to prevent a dedication thereof or the accrual of any rights to any person or the public therein, Landlord hereby reserves the unrestricted right to close all or any portion of the Shopping Center owned, leased, or controlled by Landlord to the general public for one (1) day in each calendar year, and in connection therewith, to seal off all entrances to the Shopping Center, or any portion thereof. Tenant hereby acknowledges, consents, and agrees that any and/or all services, facilities, and access by the public to the Leased Premises and/or to the Shopping Center may be suspended in whole or in part during such temporary times as any of the anchor stores in the Shopping Center are not open for business, on legal holidays, or such other days as may be declared by local, state, or federal authorities as days of observance, and/or during any periods of actual or threatened civil commotion, insurrection, or other circumstances beyond Landlord's control.

In consideration of Landlord's managing, repairing, operating, advertising, promoting, and maintaining the Shopping Center, Tenant hereby agrees to pay Landlord as additional rent the annual Operating Costs Charge set forth in Section 1.1(m) each year during the Term, which Operating Costs Charge shall automatically increase as set forth in Section 1.1(n). Tenant shall pay the annual Operating Costs Charge monthly in twelve (12) equal installments each year, in advance, together with the payment of Minimum Annual Rent. Landlord and Tenant acknowledge and agree that the Operating Costs Charge has been freely negotiated and agreed upon between the parties and is not subject to dispute, review, challenge or audit at law or in equity. Furthermore, in the event this Lease is a renewal lease and/or a lease for premises being relocated from elsewhere within the Shopping Center (whether the previous lease is between Landlord or a predecessor-in-interest of Landlord and/or Tenant and Tenant's parent, subsidiary or affiliate), in consideration of Landlord agreeing to enter into this Lease, Tenant on behalf of itself, its parent, its subsidiaries and its affiliates (collectively the "Tenant Group") hereby waives any and all legal rights, rights of recovery and equitable remedies against Landlord and/or Landlord's predecessor-in-interest for amounts paid from the beginning of time through the end of time relating to any and all charges for common area expenses (regardless of the terminology used to describe such expenses) and for marketing fund/merchants' association, media fund, general promotion fund, marketing, association, promotion fund, advertising fund and merchants association fees and dues (regardless of the terminology used to describe such marketing, advertising and/or promotion related charges) under the terms of such previous lease and hereby waives any and all rights and remedies it has and/or they have and/or may have to inspect and/or audit Landlord's records and contracts relating to same. In addition to any other remedy at law or in equity, in the event Tenant Group or any member thereof commences an action in contradiction of or in violation of the terms hereof, then (i) this provision may be pleaded in bar of any such action, (ii) Landlord shall be entitled to injunctive relief; and (iii) Tenant shall indemnify and hold harmless Landlord and its employees and its agents against all costs and expenses, including attorneys' fees, incurred in defending against the action and that result from any such actions.

Landlord shall have the right to allocate any portion of the Operating Costs Charge to a promotion fund(s) as Landlord deems appropriate in its sole discretion. As part of the promotion of the Shopping Center, there may be advertising campaigns, the quality and scope of which shall be determined by Landlord. Such campaigns may include but not be limited to, newspaper, electronic, billboards, direct mail, tabloids, and various other types of media. In connection with such advertising, Landlord may from time-to-time request from Tenant information regarding merchandise and/or promotional details so that Landlord can produce such advertising for the Shopping Center. Landlord's request will specify the format to be used and the merchandise and/or services to be featured in such advertising. Tenant will submit such requested promotional information for promotional purposes to Landlord's representative, who is requesting the information within thirty (30) days after receipt of Landlord's request therefor. Landlord and its representatives shall not be responsible for the contents of any advertising information supplied by Tenant. Tenant shall indemnify and hold Landlord and its representatives harmless against any and all claims, demands, or actions arising out of the use of such advertising supplied by Tenant. If Tenant fails to furnish the information and/or merchandise as set forth herein, then in that event, Landlord is hereby authorized, but not obligated, to include Tenant's trade name and logo, if available, in such advertising.

Section 2.5 Utilities Charges. (a) Tenant shall pay promptly, as and when the same become due and payable, all water rents, rates and charges, all sewer rents and all charges for electricity, gas, heat, steam, hot air and/or Version #2 - 12/09/11
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chilled water, air conditioning, ventilating, lighting systems, and other utilities supplied to the Leased Premises. If any such utilities are not separately metered or assessed or are only partially separately metered or assessed and are used in common with other tenants in the Shopping Center, Tenant will pay to Landlord a proportionate share of such charges, in addition to Tenant's payments of the separately metered charges. Landlord may install re-registering meters and collect any and all charges aforesaid from Tenant, making returns to the proper public utility company or governmental unit, provided that Tenant shall not be charged more than the rates it would be charged for the same services if furnished directly to the Leased Premises by the Local Utility Company, as hereinafter defined.

(b) Landlord shall have the absolute right at any time and from time to time to select and change utility providers serving the Shopping Center (each such utility provider designated by Landlord is hereafter referred to as a "Designated Service Provider"), and Tenant shall accept such utility service (including, without limitation, any heating, ventilating, air conditioning, and/or lighting systems serving the Leased Premises and/or any other Shopping Center areas) from Landlord's Designated Service Provider to the exclusion of all other suppliers. In addition to the foregoing, at the option of Landlord, any utility or related services which Landlord may at any time elect to provide to the Leased Premises may be furnished by Landlord or any agent employed or independent contractor selected by Landlord, and Tenant shall accept the same therefrom to the exclusion of all other suppliers.

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(c) Notwithstanding anything else contained in this Lease to the contrary, Landlord shall have the right, at any time and from time to time, to cause one or more utilities (including, without limitation, any heating, ventilating, air conditioning, and/or lighting systems serving the Leased Premises and/or any other Shopping Center areas) to be furnished by means of an on-site or off-site energy system and/or to provide some other alternative energy system (whether so-called "total energy" or otherwise) in lieu of the direct furnishing of the same to Tenant and other occupants of the Shopping Center from the Local Utility Company or the Designated Service Provider, and Tenant agrees in any such case, to accept any such utility from Landlord in lieu of the Local Utility Company or the Designated Service Provider and to pay Landlord and/or other designee as Landlord shall determine all costs and charges therefor, provided that the same shall not result in any additional cost or expense to Tenant over and above that which it would pay if it purchased same directly from the Local Utility Company, as hereinafter defined; and provided further that same is in compliance with all laws, regulations, ordinances and other governmental requirements.

(d) Landlord shall not be liable for any loss, damage, or expense that Tenant may sustain or incur by reason of any change, failure, interference, disruption, or defect in the supply or character of any utility services furnished to the Leased Premises, or if the quantity or character of utility services is no longer available or suitable for Tenant's requirements, and no such change, failure, defect, unavailability or unsuitability shall constitute an actual or constructive eviction, in whole or in part, or entitle Tenant to any abatement or diminution of Minimum Annual Rent or other charges, or relieve Tenant from any of its obligations under this Lease.

ARTICLE III
CONSTRUCTION OF LEASED PREMISES

The Leased Premises shall be constructed by Landlord and/or Tenant in accordance with the provisions of Exhibit B annexed hereto and made a part hereof.

Tenant is responsible, at its sole cost and expense, for obtaining any and all required governmental approval of the plans and specifications, including but not limited to building permit fees and any other fees, taxes, costs, and expenses attributable to the Leased Premises and for assuring that the plans and specifications comply with all governmental rules, regulations, codes, and ordinances, including but not limited to, those required by the City, County and State in which the Shopping Center is located, state and local health departments, and state and local fire marshals. Tenant hereby agrees to remodel the Leased Premises and storefront in keeping with Tenant's most current prototype store and Landlord's design criteria subject to the requirements of Exhibit B of the Lease, with all work to be completed on or before the commencement date of the Term.

ARTICLE IV
USE OF LEASED PREMISES

Section 4.1 Use of Leased Premises. Tenant agrees to use the Leased Premises only for the permitted use set forth in Section 1.1(c) and for no other purpose.

Tenant covenants that the Leased Premises during the Term of this Lease shall be used only and exclusively for lawful and moral purposes, Tenant's business shall be conducted in a lawful manner, and no part of the Leased Premises or improvements thereon shall be used in any manner whatsoever for any purpose in violation of the laws, ordinances, regulations, or orders of the United States, including without limitation the Americans with Disabilities Act, all amendments thereto and all regulations promulgated thereunder (collectively, the "ADA"), or of the state, county, and/or city where the Leased Premises are located. Tenant shall comply with all such laws, ordinances, regulations, or orders now in effect or hereafter enacted or passed during the Term of this Lease insofar as the Leased Premises and any signs of the Tenant are concerned, including, but not limited to zoning ordinances, the ADA, building codes, and fire codes; and shall make at Tenant's own cost and expense all additions and alterations to the Leased Premises ordered or required by such laws or authorities, whether in order to meet the special needs of Tenant, or by reason of the occupancy of Tenant, or otherwise; provided, however, Tenant shall not

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be required to make structural alterations to the Leased Premises or the building in which the Leased Premises are located unless made necessary by reason of the nature of Tenant's business, work performed in the Leased Premises, or the manner of operation thereof.

Tenant shall not make, store, use, treat, or dispose of any "hazardous substance," "contaminant," or "pollutant" (as those terms are defined under any federal, state, and local law or regulation, or common law, pertaining to health, safety, or environmental protection, as from time to time amended, referred to herein in the aggregate as "hazardous substance laws") on or about the Leased Premises; except, to the extent that Tenant's manufacturing, storage, use, treatment, or disposal is permitted by or excepted from such hazardous substance laws. In cases of such permits or exceptions, Tenant shall provide Landlord,

- a) current copies of all such permits and restrictions on such permits; and,
- b) current documents required as a condition of such permits or exceptions as mandated by hazardous substance laws.

These permits, documents, or exceptions shall be furnished to Landlord prior to execution and acceptance of the Lease. Tenant shall also furnish Landlord a monthly certification that such permits, documents, or exceptions are still current, that Tenant shall immediately notify Landlord of any change, revocation, or enforcement action concerning such permits, documents, or exceptions.

~~Section 4.2 Joint Opening of Shopping Center. In order to effect a joint opening of the Shopping Center, Tenant, upon written request from Landlord, shall delay the opening of its store for a period not to exceed thirty (30) days from the date it would otherwise have opened the store for business, and in such event and notwithstanding Section 1.1 hereof, the Term shall commence on the date of the joint opening of the Shopping Center.~~

Section 4.3 Continuous Operation by Tenant. Tenant agrees that a shopping center is an interdependent enterprise, that the Shopping Center's success is dependent on the continued operation of Tenant's business, and that maintenance of the character and quality of the Shopping Center is enhanced by the continued occupancy of the Leased Premises and the regular conduct of Tenant's business therein. Accordingly, Tenant agrees to open the Leased Premises for business on the commencement date provided in Section 1.2 hereof and operate one hundred percent (100%) of the Leased Premises during the entire Term under the name set forth in this Lease or such other name as Landlord may approve in writing, with due diligence and efficiency and so as to produce all of the Gross Sales which may be produced by such manner of operation. Tenant shall carry at all times in the Leased Premises a stock of merchandise of such size, character, and quality as shall be reasonably designed to produce maximum Gross Sales. Tenant shall continuously conduct its business in the Leased Premises at least during the Store Hours and such additional hours as any Anchor Store in the Shopping Center is open for business, or at Landlord's election, such other or additional hours as may be determined by Landlord. If Tenant fails to perform its obligations under this Section, (b) Landlord shall be entitled to injunctive relief requiring Tenant to occupy the Leased Premises and operate as hereinabove provided, and/or (b) recognizing that the actual damages Landlord will incur by reason of Tenant's failure to comply with this Section are likely to be uncertain and not easily proven, Tenant and Landlord hereby agree that Landlord may elect to receive from Tenant as liquidated damages and not as a penalty, and Tenant hereby agrees to pay to Landlord promptly upon receipt of notice thereof, in addition to the Minimum Annual Rent and other sums due under this Lease, in each month or any part thereof during the remainder of the Term during which Tenant does not comply with this Section, additional sums equal to (i) twice the Minimum Annual Rent per month, and additionally (ii) one-sixth (1/6) of the highest annual Percentage Rent payable, if any, by Tenant at any time during the Term, the parties further agreeing that the amount of liquidated damages hereunder has been arrived at by Landlord and Tenant in good faith in an effort to establish agreed upon liquidated damages which Landlord will suffer in the event Tenant fails to comply with this Section, and/or (c) at Landlord's election after giving ten (10) days' written notice, Landlord shall be entitled to immediate possession of the Leased Premises for the purpose of commencing reletting efforts. Landlord's rights and remedies under this Section are in addition to and are without prejudice to Landlord's rights and other remedies set forth in Section 11.2 hereof. A vacation of premises or cessation of operations by any other tenant(s) in the Shopping Center shall not in any way release Tenant from Tenant's obligations under this Lease, such obligations being independent covenants of this Lease.

Section 4.4 Additional Covenants of Tenant. Tenant's use of the Leased Premises and the common areas shall be subject at all times during the Term to reasonable rules and regulations adopted by Landlord not in conflict with any of the express provisions hereof governing the use of the parking areas, malls, walks, driveways, passageways, signs, exteriors of buildings, lighting, and other matters affecting other tenants in and the general management and appearance of the Shopping Center. Tenant agrees to comply with all such rules and regulations upon notice to Tenant from Landlord. In the event Tenant fails to comply with such rules and regulations or any of the other covenants set forth in this Section after twenty-four (24) hours' notice from Landlord of this non-compliance (which notice may be oral or in writing), then Tenant shall pay to Landlord as additional rent the sum of one hundred dollars (\$100.00) for each violation, acceptance of such additional rent to be without prejudice to any other rights or remedies available to Landlord. Each day on which a violation occurs or continues shall be a separate violation. Tenant expressly agrees as follows:

(a) All deliveries to or from the Leased Premises shall be done only at such times, in the areas, and through the entrances designated for such purpose by Landlord.

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(b) All garbage and refuse shall be kept inside the Leased Premises in the kind of container specified by Landlord, and shall be placed outside of the Leased Premises prepared for collection in the manner and at the times and places specified by Landlord. If Landlord shall provide or designate a service for picking up refuse and garbage, Tenant shall use same at Tenant's cost. Tenant shall pay the cost of removal of any of Tenant's refuse and garbage, and maintain all common loading areas in a clean manner satisfactory to the Landlord. If any part of the Tenant's business shall consist of the preparation and/or sale of food, including without limitation the operation of a restaurant, snack shop, or food market, Tenant shall provide refrigerated garbage containers at Tenant's expense for the disposal of its food scraps and refuse. Tenant shall use any trash compactor Landlord provides for the general use of Tenant or tenants in a designated area of the Shopping Center. Notwithstanding the foregoing provisions, in the event Tenant is or becomes a generator of medical waste, Tenant shall be solely responsible for complying with all federal, state and local laws, whether existing now or established in the future, relating in any way to the storage, containment, treatment, transfer, transportation and disposal of medical waste (including the use of licensed medical waste management companies) and shall indemnify and hold Landlord harmless for Tenant's noncompliance or violations thereof. For purposes hereof, "medical waste" shall mean any solid, semisolid or liquid waste which is generated in the diagnosis, treatment (e.g., provisions of medical services), immunization or performance of a service to the body of human beings or animals, in research pertaining thereto or in the production or testing of biologicals. "Generator" shall mean any person or entity whose act or process produces medical waste as hereinbefore defined.

(c) No radio or television aerial or other device shall be erected on the roof or exterior walls of the Leased Premises or the building in which the Leased Premises are located without first obtaining in each instance Landlord's consent in writing. Any aerial or device installed without such written consent shall be subject to removal at Tenant's expense without notice at any time.

(d) No loud speakers, televisions, phonographs, radios, tape players, or other devices shall be used in a manner so as to be heard or seen outside of the Leased Premises without the prior written consent of Landlord, nor shall Tenant solicit business or distribute advertising or promotional material in the common areas. No electronic or communication devices shall be used in the Leased Premises or in connection therewith which interrupt or interfere with the use and enjoyment of electronic or communication devices of other occupants of the Shopping Center or of the neighborhood in which the Shopping Center is located.

(e) Tenant's heating and air conditioning system for the Leased Premises shall be designed to maintain a slight positive air pressure so as to prevent the drawing of heated or cooled air from any enclosed mall and Tenant shall keep the Leased Premises heated or air conditioned, as the case may be, at least to the same minimum temperature in the case of heat and to the same maximum temperature in the case of air conditioning, as the Landlord is endeavoring to maintain in the enclosed mall area. Notwithstanding the foregoing provision, in the event Tenant is an odor-producing tenant (e.g., a hair salon, nail salon, food preparation establishment, pet store, shoe repair shop, fragrance or bath and body store, etc.), Tenant may be required by Landlord to maintain a slight negative air pressure (relative to adjacent areas) in all or part of the Leased Premises in order to prevent the emission of such odors into adjacent spaces outside of the Leased Premises or the common areas.

(f) The plumbing facilities shall not be used for any other purpose than that for which they are constructed; no foreign substance of any kind shall be thrown therein, and the expense of any breakage, stoppage, or damage resulting from a violation of this provision shall be borne by Tenant. All grease traps, if any, shall be installed and maintained in accordance with applicable law and in accordance with Landlord's requirements.

(g) Subject to Landlord's approval of all service providers, Tenant at its expense shall contract for termite and pest extermination services covering the Leased Premises, to be rendered as needed but at least annually.

(h) Tenant shall not burn any trash or garbage of any kind in the Leased Premises, the Shopping Center, or within three (3) miles of Shopping Center.

(i) Tenant shall keep any display windows or signs in or on the Leased Premises well-lighted during such hours and days that any enclosed mall in the Shopping Center is lighted by Landlord or if no enclosed mall exists, then during such hours and days as specified by Landlord.

(j) Tenant shall keep and maintain the Leased Premises (including, without limitation, exterior and interior portions of all windows, doors and all other glass) in a neat and clean condition.

(k) Tenant at its expense shall participate in any reasonable window cleaning program that may be established by Landlord for all or substantially all other stores in the Shopping Center.

(l) Tenant shall take no action which would violate Landlord's labor contracts, if any, affecting the Shopping Center, nor create any work stoppage, picketing, labor disruption or dispute, or any interference with the business of Landlord or any other tenant or occupant in the Shopping Center or with the rights and privileges of any customer or other person(s) lawfully in and upon said Shopping Center, nor shall Tenant cause any impairment or reduction of the good will of the Shopping Center. Tenant, General Contractor and sub-contractor shall execute a labor disharmony letter setting forth the aforesaid covenants prior to commencement of construction in the Leased Premises.

(m) Tenant shall pay before delinquency all license or permit fees and charges of a similar nature for the conduct of any business in the Leased Premises.

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(n) Tenant shall use the Shopping Center name and logo, as such may be changed from time to time, in referring to the location of the Leased Premises in all newspaper, radio, television, or other advertising.

(o) Tenant shall store and/or stock in the Leased Premises only such merchandise as Tenant is permitted to offer for sale in the Leased Premises pursuant to this Lease. Tenant shall not violate applicable federal and state laws prohibiting the sale or display of products which infringe on the trademarks or copyrights of others.

(p) Tenant shall not conduct or permit any fire, bankruptcy, auction, or "going out of business" sale (whether real or fictitious) or any other sale that conveys to the public that business operations are to be discontinued at the Leased Premises, or utilize any unethical method of business operation. Tenant shall not use the Leased Premises as a clearance, outlet or wholesale center.

(q) Tenant shall not perform any act or carry on any practice which may damage, mar, or deface the Leased Premises or any other part of the Shopping Center.

(r) Tenant shall not use any forklift truck, tow truck, or any other powered machine for handling freight in the Shopping Center except in such manner and in those areas in the Shopping Center as may be approved by Landlord in writing. All such equipment shall have rubber wheels only.

(s) Tenant shall not place a load on any floor in the interior delivery system, if any, or in the Leased Premises, or in any area of the Shopping Center, exceeding the floor load which such floor was designed to carry, nor shall Tenant install, operate, or maintain therein any heavy item or equipment except in such manner as to achieve a proper distribution of weight.

(t) Tenant shall not install, operate, or maintain in the Leased Premises or in any other area of the Shopping Center any electrical equipment which does not bear Underwriter's Laboratory approval, or which would overload the electrical system or any part thereof beyond its capacity for proper and safe operation as determined by Landlord.

(u) Tenant shall not suffer, allow, or permit any vibration, noise, light, noxious odor, or other effect to emanate from the Leased Premises, or from any machine or other installation therein, or otherwise suffer, allow, or permit the same to constitute a nuisance or otherwise interfere with the safety, comfort, and convenience of Landlord or any of the other occupants of the Shopping Center or their customers, agents, invitees, or any others lawfully in or upon the Shopping Center. Upon notice by Landlord to Tenant that any of the aforesaid is occurring, Tenant agrees to forthwith remove or control the same.

(v) Tenant shall not use or occupy the Leased Premises in any manner or for any purpose which would injure the reputation or impair the present or future value of the Leased Premises, the Shopping Center, and/or the neighborhood in which the Shopping Center is located.

(w) Tenant shall not store, display, sell, or distribute any alcoholic beverages or any dangerous materials (including without limitation fireworks) unless specifically permitted in this Lease.

(x) Tenant shall not use or occupy the Leased Premises or do or permit anything to be done therein in any manner which shall prevent Landlord and/or Tenant from obtaining at standard rates any insurance required or desired, or which would invalidate or increase the cost to Landlord of any existing insurance, or which might cause structural injury to any building, or which would constitute a public or private nuisance, or which would violate any present or future laws, including the ADA, regulations, ordinances, or requirements (ordinary or extraordinary, foreseen or unforeseen) of the federal, state, or municipal governments, or of any department, subdivisions, bureaus, or offices thereof, or of any other governmental public or quasi-public authorities now existing or hereafter created having jurisdiction over the Leased Premises or the Shopping Center of which they form a part.

(y) Tenant shall not operate on the Leased Premises or in any part of the Shopping Center any coin or token operated vending machine or similar device (including, without limitation, pay telephones, pay lockers, pay toilets, scales, amusement devices, and machines for the sale of beverages, foods, candy, cigarettes, or other merchandise and/or commodities), except for the sole and exclusive use of Tenant's employees.

(z) Tenant shall not allow any third party to make use of any portion of the Leased Premises in any manner including but not limited to the display of advertising material for which Tenant is compensated.

Section 4.5 Signs, Awnings and Canopies. Landlord may erect and maintain such suitable signs as it in its sole discretion may deem appropriate in the Shopping Center. Tenant may erect and maintain only such signs as Landlord may approve. Tenant shall submit to Landlord detailed drawings of its sign for review and approval by Landlord prior to erecting said sign on the Leased Premises;

Tenant shall keep insured and maintain such sign in good condition, repair, and operating order at all times. If any damage is done to Tenant's sign, Tenant shall commence to repair same within five (5) days or Landlord may at its option repair same at Tenant's expense;

Tenant shall not place or permit to be placed or maintained on any door, exterior wall, or window of the Leased Premises any sign, awning, canopy, advertising matter, or other thing of any kind, and shall not place or

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time equal to the original Lease Term not to exceed ten (10) years). Following Landlord's request, said unamortized costs of leasehold improvements shall be certified to Landlord by Tenant's chief financial officer. Landlord's reimbursement to Tenant of the aforementioned unamortized costs of leasehold improvements shall occur within thirty (30) days after the date Tenant vacates the Leased Premises and Landlord shall deduct from said reimbursement any sums then due Landlord.

ARTICLE V
INSURANCE REQUIRED OF TENANT

Section 5.1 Insurance Required of Tenant. (a) Tenant shall obtain and provide, on or before the earlier of the commencement of the Term or Tenant's entering the Leased Premises for any purpose, and keep in force at all times thereafter, the following insurance coverages with respect to the Leased Premises:

(i) Commercial General Liability Insurance, with contractual liability endorsement, relating to the Leased Premises and its appurtenances on an occurrence basis with a combined single limit of not less than One Million Dollars (\$1,000,000.00) per occurrence and Two Million Dollars (\$2,000,000.00) in the aggregate for bodily injury, death and property damage.

(ii) All Risk (except for those items specifically excluded) Coverage, and Flood (if required by Landlord, any mortgagee or governmental authority) Insurance and such other coverages as Landlord may reasonably effect to require in an amount adequate to cover the replacement cost of all personal property, decorations, trade fixtures, furnishings, equipment, and all contents therein.

(iii) Boiler and Machinery (Mechanicals) Insurance covering all pressure vessels; boilers; heating, ventilating, and air conditioning equipment; or similar equipment, if any, in, on, adjoining, above, or beneath the Leased Premises which serve the Leased Premises, in a minimum amount of One Million Dollars (\$1,000,000.00); provided, however, Tenant shall not be required to maintain separate coverage if the risks contemplated herein are adequately covered by Tenant's other insurance required pursuant to this Section.

(iv) Business Interruption Insurance covering those risks referred to in (ii) above in an amount equal to all Minimum Annual Rent and other sums payable under this Lease for a period of twelve (12) months commencing with the date of loss.

(v) As required by the law of the State where the Leased Premises are located, Worker's Compensation Insurance covering all persons employed, directly or indirectly, in connection with any finish work performed by Tenant or any repair or alteration authorized by this Lease or consented to by Landlord, and all employees and agents of Tenant with respect to whom death or bodily injury claims could be asserted against Landlord or Tenant, with Employer's Liability Insurance with limits of not less than One Million Dollars (\$1,000,000.00) per accident or disease. Tenant's Worker's Compensation Insurance shall include a waiver of subrogation rights as to all claims against Landlord and the parties designated by Landlord as Additional Insureds.

(vi) Plate Glass Insurance.

(vii) In the event Tenant or its employees or its licensees provide medical, dental, optometric, or other products or services for which Professional Liability or Medical Malpractice Insurance coverage is available, Professional Liability/Medical Malpractice coverage on an occurrence form, if available, with a limit of liability of not less than One Million Dollars (\$1,000,000). All professionals working within the practice including, but not limited to, doctors, nurses, physician assistants, dentists, and assistants must be insured by the policy. If an occurrence policy is not available, a claims made policy is acceptable with a retroactive date no later than the date the practice became a tenant of Landlord. Further, coverage must be maintained for a minimum of two (2) years after the practice is no longer a tenant of Landlord.

(viii) Such other insurance as may be carried on the Leased Premises and Tenant's operation thereof, as may be determined by Landlord.

(b) Before undertaking any alterations, additions, improvements, or construction, Tenant shall obtain at its expense a commercial general liability insurance policy insuring Tenant and Landlord against any liability which may arise on account of such proposed alterations, additions, improvements, or construction on an occurrence basis with the minimum limits set forth in this Section 5.1.

(c) All of the aforesaid insurance shall be written by one or more Best Rated A/VII or better insurance companies licensed in the state where the Shopping Center is located and in form satisfactory to Landlord and shall be written in the name of Tenant with Landlord (and any designee(s) of Landlord) named as Additional Insured, except the Worker's Compensation Insurance required by subparagraph (a)(v) above for which Tenant shall not be required to name Landlord and its designees as Additional Insureds; all such insurance may be carried under a blanket policy covering the Leased Premises and any other of Tenant's stores; all such insurance shall contain endorsements that such insurance may not be cancelled or amended with respect to Landlord (or its designees) except upon thirty (30) days' prior written notice to Landlord (and any such designees) by the insurance company; Tenant shall be solely responsible for payment of premiums and that Landlord (or its designees) shall not be required to pay any premium for such insurance; in the event of payment of any loss covered by such policy, Landlord (or its designees) shall be paid first as their interests may appear by the insurance company for Landlord's

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maintain any decoration, lettering, or advertising matter on the glass of any window or door of the Leased Premises without first obtaining Landlord's written consent. Tenant further agrees to maintain any such signs, awnings, canopies, decorations, lettering, advertising matter, or other things as may be approved by Landlord in good condition, operating order, and repair at all times. All signs of Tenant visible from the common areas of the Shopping Center shall be in good taste and shall conform to the standards of design, motif, and decor from time to time established by Landlord for the Shopping Center. No flashing signs shall be permitted. No credit card signs or advertisements, nor any hand lettered signs shall be visible from the common areas. Tenant shall install professionally lettered name signs on its service door.

Section 4.6 Retail Restriction Limit. The parties acknowledge that the realization of the benefits of a percentage rent lease are dependent upon Tenant's maximizing its Gross Sales, and that self-competition is inconsistent with the generation of maximum Gross Sales. The parties further acknowledge that the Minimum Annual Rent was negotiated together with and giving consideration to the Percentage Rent rate and Base and that self-competition by Tenant will deprive Landlord of a bargained-for consideration. Further, the parties acknowledge that the Shopping Center is an interdependent and synergistic environment and that self-competition by Tenant is inconsistent with such environment. Accordingly, Tenant covenants and agrees that during the Term and any extension or renewals thereof Tenant will not, directly or indirectly, engage in any business similar to or in competition with that for which the Leased Premises are let, within a radius of three (3) ~~two~~ (2) miles of the Shopping Center, measured from the perimeter of the Shopping Center, without Landlord's prior written consent. The covenant of this preceding sentence shall be inapplicable to any business of Tenant existing as of the date hereof, provided the nature, character, and/or size of such business remains the same and is continuously operated at the same location. If Tenant shall breach the covenant contained in this Section 4.6, then in addition to the rights and remedies provided in Article XI of this Lease, Landlord may, at its option, either (i) terminate this Lease upon thirty (30) days' written notice to Tenant, or (ii) enjoin the operation of the violative store of Tenant, or (iii) include all Gross Sales generated by any violative store of Tenant in calculating the Percentage Rent due under this Lease.

Section 4.7 Relocation. At any time during the Term of the Lease if Landlord desires to relocate Tenant, then, subject to Tenant's right to terminate pursuant to the next paragraph, Landlord shall have the right, upon giving no less than sixty (60) days prior written notice to Tenant ("Notice of Relocation"), to relocate the Leased Premises to a space containing approximately the same square footage as the Leased Premises (not more than ten percent (10%) variation) anywhere in the Shopping Center (the "Relocation Premises"). Tenant's term for such Relocation Premises shall be for the balance of the Term of the Lease at the same per square foot charges (subject to increase in accordance with the terms of this Lease), including but not limited to the Minimum Annual Rent and Percentage Rent, and otherwise on the same terms of this Lease. In the event of such relocation, Landlord shall promptly reimburse Tenant for the direct and actual reasonable costs and expenses incurred by Tenant related to the moving and relocation of Tenant as evidenced by invoices and paid receipts provided such costs and expenses do not exceed the lesser of (i) Two and 50/100 Dollars (\$2.50) per square foot of the Leased Premises and (ii) Five Thousand Dollars (\$5,000.00) (not including any installation or construction) and Landlord shall perform at Landlord's sole cost and expense the build-out of the Relocation Premises to at least the equivalent quality and condition of the existing Leased Premises (in Landlord's commercially reasonable judgment) immediately prior to such relocation, including all furniture, fixtures, trade fixtures, leasehold improvements and equipment. Landlord shall be permitted to reuse furniture, fixtures, trade fixtures, leasehold improvements and equipment from the Leased Premises in the Relocation Premises. The date Tenant relocates or should have relocated to the Relocation Premises shall be the Relocation Date. Such relocation shall take place in a manner so that Tenant may operate in the original Leased Premises until the Relocation Premises are nearly prepared for the operation of Tenant's business taking into account Landlord's right to use furniture, fixtures, trade fixtures, leasehold improvements and equipment from the Leased Premises in the Relocation Premises. Notwithstanding the foregoing, in the event Landlord relocates Tenant, Landlord shall have the right to (but not the obligation) and Tenant agrees to extend the Term of the Lease for a period that causes the Lease Term to expire on the fifth (5th) anniversary of the Relocation Date (any period of time after the last year of the initial Lease Term (as described in Section 1.1(b)) hereinafter the "Relocation Extension Term") unless there are more than five (5) years remaining in the Lease Term upon the date Tenant opens for business (or should have opened) in the Relocation Premises. In the event the Term is so extended Tenant's Minimum Annual Rent per year after the last year of the initial Lease Term shall be the Minimum Annual Rent per square foot of the Leased Premises during the last year of the initial Lease Term plus the amount of Percentage Rent payable during the last year of the initial Lease Term on a per square foot basis (hereinafter the "Extended Rent"). Such Extended Rent shall commence at the beginning of the Relocation Extension Term and continue through the balance of the Relocation Extension Term. Upon relocation, this Lease shall continue to remain in full force and effect and the Relocation Premises shall become the Leased Premises for all purposes set forth in this Lease. In the event of a relocation Landlord shall provide Tenant with a letter reflecting the aforementioned changes.

Within twenty (20) days of the date of the Notice of Relocation, Tenant shall notify Landlord in writing either that: (a) Tenant agrees to relocate to the Relocation Premises in accordance with the terms in the Notice of Relocation or (b) Tenant elects to terminate the Lease with such termination to be effective on the date Landlord intended the Leased Premises to be returned to Landlord as indicated in the Notice of Relocation. Failure by Tenant to respond to the Notice of Relocation within the aforesaid twenty (20) day period will be deemed to mean that Tenant agrees to relocate in accordance with the aforesaid terms and conditions. In the event Tenant elects to terminate the Lease, Landlord shall have the right within ten (10) days thereafter to withdraw its notice requiring Tenant to relocate, in which event Tenant's right to terminate the Lease shall be null and void and Tenant shall remain in the Leased Premises and this Lease shall continue in full force and effect. If Landlord shall not so withdraw its notice, and Tenant's rejection of the Relocation Premises terminates this Lease, then the Landlord shall reimburse Tenant for the unamortized cost of Tenant's actual investment in the Leased Premises' leasehold improvements (calculated as of the date of such termination and amortized on a straight line basis over a period of

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loss. The minimum limits of the commercial general liability policy of insurance shall in no way limit or diminish Tenant's liability hereunder. Tenant shall deliver to Landlord at least fifteen (15) days prior to the time such insurance is first required to be carried by Tenant, and thereafter at least fifteen (15) days prior to the expiration of such policy, either a stamped certified true duplicate original or a certificate of insurance on all policies procured by Tenant in compliance with its obligations hereunder, together with evidence satisfactory to Landlord of the payment of the premiums therefor. If Tenant fails to obtain and provide any or all of the aforesaid insurance, then Landlord may, but shall not be required to, purchase such insurance on behalf of Tenant and add the cost of such insurance as additional rent payable with the next installment of Minimum Annual Rent.

(d) The minimum limits of the commercial general liability policy of insurance shall be subject to increase at any time, and from time to time, after the commencement of the third (3rd) full year of the Term if same shall become necessary for adequate protection. Within thirty (30) days after demand therefor by Landlord, Tenant shall furnish Landlord with evidence of Tenant's compliance with such demand.

(e) Tenant agrees to notify Landlord in writing not less than thirty (30) days prior to the date Tenant opens for business in the Leased Premises of the actual cost of all permanent leasehold improvements and betterments installed or to be installed by Tenant in the Leased Premises (whether same have been paid for entirely or partially by Tenant), but exclusive of Tenant's personal property, movable trade fixtures and contents, in order that Landlord can insure said improvements and betterments from and after the date Tenant opens for business in the Leased Premises on an All Risk (except for those items specifically excluded) basis, and such other risks as Landlord may elect to insure. Similar notification shall be given to Landlord not less than thirty (30) days prior to the commencement of any proposed alterations, additions, or improvements to the Leased Premises by Tenant (if same are permitted under the terms of this Lease) subsequent to the initial construction of the Leased Premises. If, on account of the failure of Tenant to comply with the foregoing provisions, Landlord is adjudged a co-insurer by its insurance carrier, then any loss or damage Landlord shall sustain by reason thereof shall be borne by Tenant and shall be immediately paid by Tenant upon receipt of a bill therefor together with evidence of such loss.

Section 5.2 Fire Insurance Rate and Requirements. (a) Tenant agrees, at its own cost and expense, to comply with all of the rules and regulations of the Fire Insurance Rating Organization having jurisdiction and any similar body. If, at any time and from time to time, as a result of or in connection with any failure by Tenant to comply with the foregoing sentence or any act of omission or commission by Tenant, its employees, agents, contractors, or licensees, or as a result of or in connection with the use to which the Leased Premises are put (notwithstanding that such use may be for the purposes hereinbefore permitted or that such use may have been consented to by Landlord), the hazard insurance rate(s) applicable to the Leased Premises, or the building in which same are located, or to any other premises in said building, or to any adjacent property owned or controlled by Landlord, or an affiliate of Landlord, and/or to the contents in any or all of the aforesaid properties (including rent insurance relating thereto) shall be higher than that which would be applicable for the least hazardous type of occupancy legally permitted therein, Tenant agrees that it will pay to Landlord, on demand, as additional rent, such portion of the premiums for all hazard insurance policies in force with respect to the aforesaid properties (including rent insurance relating thereto) and the contents of any occupant thereof as shall be attributable to such higher rates. If Tenant installs any electrical equipment that overloads the lines in the Leased Premises or the building in which the Leased Premises are located, Tenant shall, at its own cost and expense, promptly make whatever changes are necessary to remedy such condition and to comply with all requirements of the Landlord and the Fire Insurance Rating Organization and any similar body and any governmental authority having jurisdiction thereof. For the purpose of this paragraph, any finding or schedule of the Fire Insurance Rating Organization having jurisdiction thereof shall be deemed to be conclusive.

(b) In the event that this Lease so permits and Tenant engages in the preparation of food or packaged foods or engages in the use, sale, or storage of inflammable or combustible material, Tenant shall install chemical extinguishing devices (such as ansul) approved by the Fire Insurance Rating Organization and shall keep such devices under service as required by such organization.

(c) If gas is used in the Leased Premises, it shall only be permitted to be used for cooking equipment and in no event for heating the Leased Premises, and Tenant shall install at its expense gas cut-off devices (manual and automatic).

Section 5.3 Waiver of Subrogation. Landlord shall not be liable for any damage by fire or other peril includable in the coverage afforded by an All Risk (except for those items specifically excluded) Insurance policy, (whether or not such coverage is in effect), no matter how caused, it being understood that the Tenant will look solely to its insurer for reimbursement. Tenant shall not be liable for any damage by fire or other peril includable in the coverage afforded by an All Risk (except for those items specifically excluded) Insurance policy (whether or not such coverage is in effect), no matter how caused, it being understood that Landlord will look solely to its insurer for reimbursement.

ARTICLE VI REPAIRS AND MAINTENANCE

Section 6.1 Repairs by Landlord. Within a reasonable period after receipt of written notice from Tenant, Landlord shall make necessary structural repairs to the exterior walls (excluding the exterior of and the frames surrounding all windows, doors, plate glass, store fronts, and signs); necessary repairs to the roof, foundations, load bearing items, plumbing, pipes, and conduits located outside the Leased Premises and/or in the common areas; and necessary repairs to sidewalks, malls, parking areas, and curbs. Landlord shall not be required to make any repairs

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where same were made necessary by any act or omission or negligence of Tenant, any subtenant, or concessionaire, or their respective employees, agents, invitees, licensees, visitors, or contractors, or by fire or other casualty or condemnation, except as provided in Article VIII.

Section 6.2 Repairs and Maintenance by Tenant. Tenant shall make and pay for all repairs to the Leased Premises and all equipment and systems serving the Leased Premises exclusively and shall replace all things which are necessary to keep the same in a good state of repair and operating order, such as (but not limited to) all fixtures, furnishings, lighting, and store signs of Tenant. Tenant shall also maintain, replace, and keep in good repair and operating order all components exclusively serving the Leased Premises, whether located within or without the Leased Premises, including but not limited to air conditioning, ventilating, plumbing, sprinklering, heating, and electrical installations, ceilings, inside walls, carpeting, and floor surfaces. Tenant shall at all times keep the Leased Premises and all exterior entrances, exterior walls, glass and show mouldings, partitions, doors, floor surfaces, fixtures, equipment, and appurtenances thereof in good order, condition, and repair, and in a reasonably satisfactory condition of cleanliness, including reasonable periodic painting of the Leased Premises, and Tenant shall make such other necessary repairs in and to the Leased Premises not specified in Section 6.1 hereof as being the responsibility of Landlord, and as required by Section 5.3 hereof. Tenant shall at its expense replace all broken or damaged glass or substitutes therefor, as the case may be. The provisions of this Section 6.2 shall not limit Landlord's obligation to restore or repair under Article VIII hereof in the event of fire or other casualty.

If (i) Tenant does not repair properly as required hereunder and to the reasonable satisfaction of Landlord, or (ii) Landlord, in the exercise of its sole discretion, determines that emergency repairs are necessary, or (iii) repairs or replacements to the Shopping Center and/or common areas are made necessary by any act or omission or negligence of Tenant, its agents, employees, subtenants, assignees, concessionaires, contractors, invitees, licensees, or visitors, then in any of such events Landlord may make such repairs without liability to Tenant for any loss or damage that may accrue to Tenant's merchandise, fixtures, or other property, or to Tenant's business by reason thereof, and upon completion thereof, Tenant shall pay Landlord's costs for making such repairs plus twenty percent (20%) for overhead, upon presentation of a bill therefor, as additional rent. Said bill shall include interest from the date such repairs were billed by the contractor(s) making such repairs.

Section 6.3 Inspection. Landlord or its representatives shall have the right to enter the Leased Premises during any business day (and in emergency at all times) during the Term.

Section 6.4 Obstructions. Tenant agrees to keep its loading facilities, if any, and the sidewalks and mall areas immediately adjoining the Leased Premises free from Tenant's trash, litter, or obstructions, and, in addition, if the Leased Premises open onto an outside area, to keep said outside sidewalk area immediately adjoining the Leased Premises free from ice and snow.

ARTICLE VII ADDITIONS AND ALTERATIONS

Section 7.1 By Landlord. Landlord reserves the right from time to time to make changes, alterations, repairs, additions, and eliminations in and to the buildings and structures and the common areas in the Shopping Center, to build additional stories on the building in which Leased Premises are contained, to install seating, kiosks, and planting areas, temporary or permanent free-standing units and vending devices in such areas, including public areas, common areas, and malls, and as it deems feasible, to erect any new or additional buildings or kiosks in any part of the Shopping Center, to enclose any and all malls, make such changes in the roadways and parking facilities including multi-level, double-decked, elevated, or subterranean parking facilities as it deems feasible, and use the air rights over any building or structures, install a sprinkler system in the Shopping Center, which may or may not include the Leased Premises, and relocate the various buildings, parking areas, and other common areas; enlarge or reduce the Shopping Center at the sole option of Landlord by addition(s) to the Shopping Center of land and/or buildings or by the diminution thereof; randomly extend all or some storefronts beyond their present positions; vary, alter, remodel, renovate, relocate, revise, eliminate, and/or modify the following: the mall floor and/or ceilings; the entrance and exit door locations to the enclosed mall, mall skylights, the color scheme throughout the Shopping Center; canopies, and columns in the mall and common areas and on the exterior of the Shopping Center, the exterior and interior facade of the Shopping Center, the Shopping Center logo and name, exterior identification and roadways in the Shopping Center, as Landlord or its managing agent, architect, engineers, designers, or planners may deem feasible, reasonable, and/or desirable, which in Landlord's sole, uncontrolled, and exclusive discretion it may deem necessary and/or desirable to all of which and to any resulting inconvenience Tenant hereby consents, and none of which shall entitle Tenant to any abatement of rent or constitute an eviction. Such alterations, renovations and additions constructed by Landlord shall comply with applicable laws, including but not limited to building codes, zoning ordinances and the ADA. Tenant shall cooperate with Landlord in Landlord's efforts to comply therewith, which shall include the obligation to make required modifications to the Leased Premises at Tenant's expense. If new common area floor tiles are installed by Landlord in conjunction with any such renovation or remodeling, Tenant shall, at its sole cost and expense, replace all entryway floor tiles within the Leased Premises (if any) with the same type of matching floor tiles.

~~In the event Landlord renovates, remodels, and/or encloses courts and malls, Tenant agrees at Tenant's expense to refurbish and/or remodel the storefront and the interior finishes of the Leased Premises so as to provide a mall storefront and an interior decor and fixture package that shall conform to the improvements made by Landlord (such new storefront and interior finishes to be subject to Landlord's approval). All of Tenant's refurbishing and/or remodeling to be accomplished pursuant to this paragraph shall be performed in a timely manner so as to be completed prior to or simultaneous with the grand opening of Landlord's improvements to the Shopping Center. All~~

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such refurbishing and/or remodeling shall be done in accordance with plans to be provided by Tenant, subject to Landlord's prior written approval.

Section 7.2 By Tenant. Tenant may from time to time (if Tenant shall not then be in default), at its own expense, alter, renovate, or improve the Leased Premises provided the same be performed in a good and workmanlike manner, in accordance with accepted building practices and applicable laws including, but not limited to, building codes, zoning ordinances and the ADA; and so as not to weaken or impair the strength or lessen the value of the building in which the Leased Premises are located. Tenant shall be entitled to all salvage resulting therefrom. No changes, alterations, or improvements affecting the exterior of the Leased Premises or the structure of the building shall be made by Tenant. Prior to commencement of all such work, Tenant shall obtain Landlord's prior written approval of the plans and specifications therefor and shall cause Landlord's requirements for bonding, insurance, and other contractor requirements to be satisfied. Any work done by Tenant under the provisions of this Section 7.2 shall not interfere with the use by the other tenants of their premises in the Shopping Center. Tenant shall pay or reimburse Landlord for the cost of all modifications to the common areas necessitated by Tenant's construction or alterations to the Leased Premises.

Section 8.1 Damage or Destruction. (a) If all or any part of the Leased Premises shall be damaged or destroyed by fire or other hazard insured under an All Risk (except for those items specifically excluded) insurance policy to the Lessee Premises, Landlord shall, except as otherwise provided herein, repair and/or rebuild with reasonable diligence, but Landlord's obligation hereunder shall be limited to the performance of work, if any, in accordance with Exhibit B hereof, and Landlord shall not be obligated to commence and/or rebuilding until insurance proceeds are released to Landlord. Landlord's obligation hereunder is limited to the proceeds received and retained by Landlord under its insurance policy, which are allocable to Premises. Should Tenant have notified Landlord in writing of the permanent leasehold improvements and items installed by Tenant in the completed Leased Premises (whom same have been paid for entirely or in part by Tenant) and should such notice accurately state the full insurable value of such permanent leasehold improvements and betterments, then and in those events, and subject to the first and second sentences of this Section, Landlord shall repair and/or rebuild the Leased Premises to a condition comparable to that existing prior to damage or destruction. Nothing hereinabove contained shall impose upon Landlord any liability or duty to repair, rebuild, or replace any property belonging to Tenant. If there should be a substantial loss with the operation of Tenant's business in the Leased Premises as a result of such damage or destruction, Tenant shall temporarily close its business to the public, provided Tenant did not cause such damage or destruction. The Minimum Annual Rent and other sums payable hereunder shall abate, but only to the extent of the amount actually received by Landlord on account of Landlord (or its designee(s)) under any policy of rent and/or interruption insurance. The Percentage Rent base (Gross Sales figure) shall be proportionately reduced for the period of time Tenant's business is closed.

Unless this Lease is terminated as hereinafter provided, Tenant shall repair, redecorate, and refixtue the Leased Premises and restock the contents thereof in a manner and to at least a condition equal to that existing prior to its destruction or casualty; and the proceeds of all insurance carried by Tenant on its personal property, decorations, trade fixtures, furnishings, equipment, and contents in the Leased Premises shall be held in trust by Tenant for such purposes. Tenant agrees to exercise reasonable diligence to reopen for business in the Leased Premises as soon as practicable unless this Lease is terminated as hereinafter provided.

(b) Notwithstanding anything else to the contrary contained in this Section 8.1 or elsewhere in this Lease, Landlord, at its option, may terminate this Lease on thirty (30) days' notice to Tenant given within one hundred eighty (180) days after the occurrence of any of the following:

(i) The Leased Premises and/or building in which the Leased Premises are located shall be damaged or destroyed as a result of an occurrence which is not covered by Landlord's insurance; or

(ii) The Leased Premises and/or building in which the Leased Premises are located shall be damaged or destroyed and the cost to repair the same shall amount to more than twenty-five percent (25%) of the cost of replacement thereof or

(iii) The Leased Premises shall be damaged or destroyed to the extent of twenty-five percent (25%) or more of the cost of replacement during the last three (3) years of the Term or any extended term; or

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(iv) Any or all of the buildings or common areas of the Shopping Center are damaged (whether or not the Leased Premises are damaged) to such an extent that, in the sole judgment of Landlord, the Shopping Center cannot be operated as an economically viable unit.

(c) Except to the extent specifically provided for in this Lease, none of the Minimum Annual Rent and other sums payable by Tenant, nor any of Tenant's other obligations under any provisions of this Lease, shall be affected by any damage to or destruction of the Leased Premises by any cause whatsoever.

(d) The term "cost of replacement" as used in this section shall be determined by the company or companies selected by Landlord insuring Landlord against the casualty in question, or if there shall be no insurance, then as the parties hereto shall agree, or in absence of any insurance company determination or an agreement, as shall be determined by arbitration according to the rules and practices of the American Arbitration Association in Chattanooga, Tennessee.

(e) Tenant shall give to Landlord and to all mortgagees of record prompt written notice of any damage to or destruction of any portion of the Leased Premises resulting from fire or other hazard.

Section 8.2 Condemnation. If the entire Leased Premises shall be appropriated or taken under the power of eminent domain by any public or quasi-public authority, or conveyance shall be made in lieu thereof, this Lease shall terminate and expire as of the date of such taking, and the parties shall thereupon be released from all liability hereunder which accrues after the date of such taking.

Anything in this Lease to the contrary notwithstanding, in the event more than fifteen percent (15%) of the Leased Premises or more than twenty-five percent (25%) of the then existing paved parking spaces of the Shopping Center shall be appropriated or taken, or conveyance made in lieu thereof, either party shall have the right to cancel and terminate this Lease as of the date of such taking upon giving notice to the other of such election within thirty (30) days after such taking. In the event of such cancellation, the parties shall thereupon be released from any further liability under this Lease (except for obligations existing on the effective date of such termination); provided, however, that if more than twenty-five percent (25%) of the then existing paved parking spaces shall be appropriated or taken and fifteen percent (15%) or less of the Leased Premises shall be appropriated or taken, and Tenant shall have given notice to Landlord of cancellation, Landlord may at its option nullify and vacate Tenant's cancellation by giving Tenant notice within thirty (30) days prior to the effective date of taking that it will provide substitute parking on or adjacent to the Shopping Center sufficient to cause the paved parking spaces after such substitution to be reduced by not more than twenty-five percent (25%) of the number of spaces prior to such taking, in which event the Lease shall remain in full force and effect.

If a portion of the Leased Premises is taken, or conveyance made in lieu thereof, and if this Lease shall not be terminated as provided in the preceding paragraph, then the Minimum Annual Rent and the Percentage Rent base (Gross Sales figure) shall be ratably apportioned according to the space so taken, and Landlord shall, at its own expense, restore the remaining portion of the Leased Premises to a complete architectural unit, but such work shall not exceed the scope of the work required to be done by Landlord, if any, pursuant to Exhibit B hereto. The cost of Landlord's obligation hereunder shall be limited to that portion of the net proceeds of the condemnation award actually received and retained by Landlord which are allocable to the Leased Premises.

If more than fifteen percent (15%) of the leasable floor space within the Shopping Center shall be so taken, regardless of whether or not the Leased Premises shall have been partially taken, then Landlord shall have the right to terminate this Lease on thirty (30) days' written notice.

All compensation awarded or paid upon such a total or partial taking of the Leased Premises shall belong to and be the property of Landlord without any participation by Tenant.

It is mutually agreed that (i) any reduction in the parking area, number of parking spaces in the Shopping Center, and/or restriction on the number of motor vehicles that may enter the Shopping Center by action or order of any governmental authority, quasi-governmental authority, and/or by any court having jurisdiction which does not in fact constitute a physical taking of property shall not constitute such a taking or condemnation under this Lease that would entitle Tenant to terminate the Lease, (ii) any such environmental condemnation and/or compliance by Landlord with any order, rule or regulation of any such authority, with any such judicial decree, and/or any such existing or future law shall not constitute a default under this Lease by Landlord so as to entitle Tenant to terminate the Lease and the Lease shall remain in full force and effect, and (iii) as between Landlord and Tenant, Landlord may but shall not be obligated to comply with any such order, rule, regulation, judicial decree or law, it being understood by the parties that Landlord may elect to refuse to comply in order to test such order, rule, regulation, judicial decree, or law.

ARTICLE IX
GENERAL PROMOTION FUND

Section 9.1 Amounts.

Section 9.1.1 Initial Amounts. Tenant covenants and agrees to pay the amounts set forth in this Lease for the General Promotion Fund. Such amounts shall be paid as follows:

(n) INTENTIONALLY DELETED.

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(b) INTENTIONALLY DELETED.

(c) ~~General Promotion Fund.~~

(i) ~~Initial Charge.~~ Tenant shall pay to Landlord a charge in the amount set forth in Section 4.4(f) of this Lease for the General Promotion Fund within ten (10) days after Tenant's receipt of Landlord's bill therefor.

(ii) ~~Expansion/Refurbishing Charge.~~ Subsequent payments by Tenant for the General Promotion Fund are contingent upon the events set forth in subsection 9.5(e) below. Such subsequent payments shall be in an amount equal to One and 00/100 Dollars (\$1.00) per square foot of the Leased Premises. Tenant shall pay to Landlord such subsequent payment within ten (10) days after Tenant's receipt of Landlord's bill therefor. This charge will be payable for each Expansion/Refurbishing of the Shopping Center during the Term of this Lease.

Section 9.1.2 INTENTIONALLY DELETED.

Section 9.1.3 INTENTIONALLY DELETED.

Section 9.1.4 INTENTIONALLY DELETED.

Section 9.2 INTENTIONALLY DELETED.

Section 9.3 INTENTIONALLY DELETED.

Section 9.4 INTENTIONALLY DELETED.

Section 9.5 General Promotion Fund. The General Promotion Fund shall be used for the additional promotion of the Shopping Center and its tenants.

(a) ~~Initial Opening of the Shopping Center.~~ If the Shopping Center will have an initial grand opening celebration (the "Initial Opening") at the time or within ninety (90) days before Tenant opens or is required to open for business in the Leased Premises,

(i) ~~Tenant's charge for the General Promotion Fund will be used for promotion, advertising, and other activities and purposes in connection with the Initial Opening;~~

(ii) ~~Tenant shall advertise its business in the Leased Premises at Tenant's expense in such media as Landlord determines in conjunction with the Initial Opening;~~

(b) ~~For Lease Term Commencing More than Ninety (90) Days after the Initial Opening of the Shopping Center.~~ If Tenant's Lease Term shall commence more than ninety (90) days after the Initial Opening of the Shopping Center, Tenant's contribution to the General Promotion Fund will be used in the ongoing promotion of the Shopping Center including promotion connected with Tenant's grand opening of the Leased Premises.

(c) ~~Expansion/Refurbishing of the Shopping Center.~~ If at any time during the Term of this Lease Landlord causes an expansion of the Shopping Center which increases the area of the Shopping Center by ten percent (10%) or more or causes a major refurbishing of all or part of the Shopping Center (the "Expansion/Refurbishing"), then Tenant shall pay to Landlord the Expansion/Refurbishing Charge as set forth in Section 9.1.1(c)(ii) above. Monies collected therefor will be used for the promotion of the celebration of the Expansion/Refurbishing (the "Celebration"), which promotion will include, but not be limited to, special events, shows, displays, promotional literature, and other events and/or items furthering the Celebration.

ARTICLE X
FINANCING

Section 10.1 Financing. If any lending institution and/or any bonding authority with which Landlord or any such bonding authority has negotiated or may negotiate interim or long term financing for the Shopping Center or part thereof does not approve the credit rating of Tenant, or if such lending institution or bonding authority shall require change(s) in this Lease as a condition of its approval of this Lease for such financing; and if within fifteen (15) days after notice from Landlord (i) Tenant fails or refuses to supply or execute guarantees which are stated by Landlord as necessary to secure the approval of Tenant's credit by any such lending institution or bonding authority, or (ii) if Tenant fails or refuses to execute with Landlord the amendment or amendments to this Lease accomplishing such financing, or (iii) if for any reason, such financing in an amount satisfactory to Landlord cannot be obtained, Landlord shall have the right to cancel this Lease at any time prior to the commencement of the Term. In the event of cancellation by Landlord hereunder, this Lease shall be and become null and void and both parties shall automatically be released as of the date of Landlord's cancellation notice from any and all liability or obligation under this Lease, except that Landlord shall return the security, if any, made by Tenant. Notwithstanding anything

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contained herein to the contrary, Tenant shall not be required to agree, and Landlord shall not have any right of cancellation for Tenant's refusal to agree, to any modification of the provisions of this Lease relating to the amount of Minimum Annual Rent and Percentage Rent reserved, the size and/or location of the Leased Premises, the duration and/or commencement date of the Term, or reducing the improvements to be made by Landlord to the Leased Premises prior to the tender of possession.

Section 10.2 Subordination. Landlord and Tenant agree that this Lease is and shall be subject and subordinate at all times to all ground and underlying leases and to all mortgages (in any amounts and all advances thereon which may now or hereafter affect such leases or the real property of which the Leased Premises form a part), and to all renewals, modifications, consolidations, participations, replacements, and extensions thereof. The term "mortgage(s)" as used herein shall be deemed to include trust indenture(s), deed(s) of trust, and security deed(s). Tenant agrees to attorn to any underlying ground lessor or mortgagee, its affiliates, successors and assigns or any purchaser of the Shopping Center in a foreclosure proceeding or by a deed in lieu of foreclosure (a "Mortgagee Party") who shall succeed to Landlord's interest in this Lease upon request of such ground lessor or Mortgagee Party. Upon request of Landlord, Tenant shall promptly execute and acknowledge, without charge therefor, an agreement acknowledging such subordination and agreeing to attorn to any underlying ground lessor or Mortgagee Party who shall succeed to Landlord's interest in this Lease. Upon request of such ground lessor succeeding to Landlord's interest in this Lease or Mortgagee Party, Tenant shall execute such agreement in confirmation of such attornment as such successor-in-interest shall reasonably request.

If any Mortgagee Party requires that this Lease be prior rather than subordinate to any such mortgage, Tenant shall, promptly upon request therefor by Landlord or such Mortgagee Party, and without charge therefor, execute a document effecting and/or acknowledging such priority, which document shall contain, at the option of such Mortgagee Party, an attornment obligation to the Mortgagee Party as Landlord in the event of foreclosure or to any party acquiring title through such mortgage in such event.

Upon request of any Mortgagee Party of record, Tenant shall give prompt written notice in the manner provided in Section 12.13 of any default of Landlord hereunder, and Tenant shall allow such Mortgagee Party a reasonable length of time (in any event, not less than sixty (60) days from the date of such notice) in which to cure any such default. Any such notice shall be sent to the Mortgage Loan Department of any such Mortgagee Party at its home office address.

ARTICLE XI DEFAULT BY TENANT

Section 11.1 Default. Tenant shall be in default hereunder if (1) Tenant fails to pay without any setoff or deduction whatsoever when due Minimum Annual Rent and any other sums due under this Lease and such failure shall continue for more than five (5) days after written notice from Landlord to Tenant; or (2) Tenant fails to observe and perform any of the other terms, covenants and/or conditions of this Lease and such failure shall continue for more than ten (10) days after written notice from Landlord to Tenant; or (3) Tenant fails to pay when due the Minimum Annual Rent and any other sums payable under this Lease three (3) or more times in any period of twelve (12) consecutive months; or (4) the Leased Premises shall be abandoned, deserted, vacated, or if Tenant fails to take possession of the Leased Premises and initially open for business to the public as required hereunder. If the nature of a default under (2) above is such that it cannot reasonably be cured within the aforesaid time period, and work thereon shall be commenced within said period and diligently prosecuted to completion, then Landlord's rights under Section 11.2 shall be inapplicable. The Leased Premises and all trade fixtures, equipment, and inventory therein shall be conclusively deemed abandoned by Tenant upon (a) fifteen (15) consecutive days' absence from the Leased Premises by Tenant or its agents (unless such absence results from fire or other casualty) together with the failure to pay Minimum Annual Rent, or (b) removal of all or a substantial portion of Tenant's trade fixtures, equipment, or inventory from the Leased Premises together with a failure to pay Minimum Annual Rent. In such event and in addition to Landlord's remedies set forth in Section 11.2, Landlord may enter the Leased Premises and may remove all such remaining trade fixtures, equipment, and inventory at Tenant's expense. All such property shall, at Landlord's option, become the property of Landlord, or said property may be placed in storage at Tenant's cost and expense, or sold or otherwise disposed of, in which event the proceeds of such sale or other disposition shall belong to Landlord.

If at any time during the Term there shall be filed by or against Tenant or any successor tenant then in possession or any guarantor of either under this Lease, in any court pursuant to any statute either of the United States or of any state, a petition (i) in bankruptcy, (ii) alleging insolvency, (iii) for reorganization, (iv) for the appointment of a receiver, or (v) for an arrangement under the Bankruptcy Acts, or if a similar type of proceeding shall be filed, Landlord may terminate Tenant's rights under this Lease by notice in writing to Tenant, and thereupon Tenant shall immediately quit and surrender the Leased Premises to Landlord, but Tenant shall continue liable for the payment of rent and all other sums due hereunder.

Section 11.2 Landlord's Rights on Default. In the event of any default by Tenant, Landlord may (1) apply the Security Deposit, if any, specified in Section 1.1(g) toward the satisfaction and cure of such a default, and/or (2) cure Tenant's default at Tenant's cost and expense, and/or (3) without terminating this Lease re-enter the Leased Premises and remove all persons and all or any property therefrom, by any suitable action or proceeding at law, or by force or otherwise, without being liable for any prosecution therefor or damages therefrom, and repossess and enjoy the Leased Premises, with all additions, alterations, and improvements, and Landlord may at its option, repair, alter, remodel, and/or change the character of the Leased Premises as it may deem fit, and/or (4) at any time, reject the Leased Premises or any part or parts thereof, as the agent of Tenant or in Landlord's own right, and/or (5).

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terminate this Lease upon not less than three (3) days' written notice to Tenant. The exercise by Landlord of any right granted in this Section shall not relieve Tenant from the obligation to make all rental payments, and to fulfill all other covenants required by this Lease, at the time and in the manner provided herein, and, if Landlord so desires, all current and future rent and other monetary obligations due hereunder shall become immediately due and payable. Tenant throughout the remaining Term hereof shall pay Landlord, no later than the last day of each month during the Term, the then current excess, if any, of the sum of the unpaid rentals and costs to Landlord resulting from such default by Tenant over the proceeds, if any, received by Landlord from such reletting, if any, but Landlord shall have no liability to account to Tenant for any excess. Landlord shall not be required to relet the Leased Premises nor exercise any other right granted to Landlord hereunder, nor shall Landlord be under any obligation to minimize Tenant's loss as a result of Tenant's default. If Landlord attempts to relet the Leased Premises, Landlord shall be the sole judge as to whether or not a proposed tenant is suitable and acceptable. If Landlord relets the Leased Premises (no inference being made that Landlord is required to do so), then any proceeds from such reletting shall be applied in the following order of priority: (a) to the payment of all expenses Landlord may have incurred in connection with reentering, ejecting, removing, dispossessing, reletting, altering, repairing, redecorating, subdividing or otherwise preparing the Leased Premises for said reletting, including court costs, attorney's and brokerage fees; (b) to the payment of any past-due indebtedness or obligations due hereunder from Tenant to Landlord, including the cost of debt collection; and (c) the residue, if any, to the payment of the on-going obligations of Tenant to Landlord pursuant to the terms and conditions of this Lease, and Tenant hereby waives all claims to any excess. All of the foregoing shall bear interest from the date incurred until the date of payment.

In the event of a breach by Tenant of any of the covenants or provisions hereof, Landlord shall have, in addition to any other remedies which it may have, the right to invoke any remedy allowed at law or in equity to enforce Landlord's rights or any of them, as if re-entry and other remedies were not herein provided for. With respect to any litigation arising out of this Lease, Tenant hereby expressly waives the right to a trial by jury and the right to file any counterclaim or crossclaim against Landlord. Tenant agrees that no demand for rent and no re-entry for condition broken and no notice to quit possession or other notices proscribed by statute shall be necessary to enable Landlord to recover such possession, but that all right to any such demand and any such re-entry and any notice to quit possession or other statutory notices or prerequisites are hereby expressly waived by Tenant.

In the event Tenant is a corporation, partnership, or limited liability company, Tenant agrees prior to commencement of the Term to appoint an agent for service of process having an address in the state in which the Leased Premises are located and to continuously maintain such appointment during the Term. In the absence of such appointment, Tenant hereby appoints the Secretary of State of the state in which the Leased Premises are located as its agent for service of process.

Section 11.3 *Non-Waiver Provisions.* The failure of Landlord to insist upon a strict performance of any of the terms, conditions, and covenants herein shall not be deemed to be a waiver of any rights or remedies that Landlord may have and shall not be deemed a waiver of any subsequent breach or default in the terms, conditions, and covenants herein contained except as may be expressly waived in writing.

The maintenance of any action or proceeding to recover possession of the Leased Premises, or any installment or installments of rent or any other moneys that may be due or become due from Tenant to Landlord, shall not preclude Landlord from thereafter instituting and maintaining subsequent actions or proceedings for the recovery of possession of the Leased Premises or of any other moneys that may be due or become due from Tenant. Any entry or re-entry by Landlord shall not be deemed to absolve or discharge Tenant from liability hereunder.

Section 11.4 *Force Majeure.* If Landlord or Tenant is delayed or prevented from performing any of their obligations under this Lease by reason of strike or labor troubles or any cause whatsoever beyond either party's control, the period of such delay or such prevention shall be deemed added to the time herein provided for the performance of any such obligation by Landlord or Tenant, except for the payment of rent and all other monetary obligations payable by Tenant in accordance herewith.

Section 11.5 *Enforcement Expenses.* If at any time Tenant shall be in default hereunder, and if Landlord shall deem it necessary to engage attorneys to enforce Landlord's rights hereunder, the determination of such necessity to be in the sole discretion of Landlord, Tenant will reimburse Landlord for court costs, reasonable attorney's fees (in both the trial court and appellate courts) and all other reasonable expenses.

ARTICLE XII OTHER PROVISIONS

Section 12.1 *Definition and Liability of Landlord.* The term "Landlord" as used in this Lease means only the owner or mortgagee in possession for the time being of the building in which the Leased Premises are located or the owner of a leasehold interest in said building and/or the land thereunder so that in the event of sale of said building or leasehold interest or an assignment of this Lease, or a demise of said building and/or land, Landlord shall be and hereby is entirely freed and relieved of all obligations of Landlord subsequently accruing.

It is specifically understood and agreed that there shall be no personal liability of Landlord (nor Landlord's agent, if any) in respect to any of the covenants, conditions, or provisions of this Lease. In the event of a breach or default by Landlord of any of its obligations under this Lease, Tenant shall look solely to the equity of the Landlord in the Shopping Center for the satisfaction of Tenant's remedies.

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In addition hereto, it is specifically understood and agreed that Landlord's rights, privileges, duties, and obligations may be administered by Landlord's designee, including, but not limited to, Landlord's agent, and that such designee shall have the full authority of Landlord hereunder to perform all of Landlord's functions hereunder including, but not limited to, the execution of this Lease and any other related documentation.

Section 12.2 Relationship of the Parties: Nothing contained in this Lease shall be deemed or construed as creating the relationship of principal and agent or of partnership or joint venture between the parties hereto, it being understood and agreed that neither the method of computing rent nor any other provision contained herein nor any acts of the parties hereto shall be deemed to create any relationship between the parties other than that of Landlord and Tenant. If the named Landlord in this Lease is represented by an agent or managing agent, then Tenant agrees that the word "Landlord" shall be deemed to refer solely to such agent's principal.

Section 12.3 Security Deposit. Tenant has deposited or shall deposit with Landlord as security for the performance by Tenant of the terms of this Lease the sum set forth in Section 1.1(c) hereof. Landlord may use, apply on Tenant's behalf, or retain (without liability for interest) during the Term the whole or any part of the security so deposited to the extent required for the payment of any rent or other sum as to which Tenant may be in default hereunder or for any sum which Landlord may expend by reason of Tenant's default in respect of any of the terms of this Lease, including but not limited to any deficiency or damage incurred in relating the Leased Premises. The covenants in this Section 12.3 are personal covenants between Landlord and Tenant and not covenants running with the land, and in no event will Landlord's mortgagee(s) or any purchaser at a foreclosure sale or a sale in lieu of foreclosure be liable to Tenant for the return of the security deposit. After each application from Tenant's security deposit, Tenant shall upon demand replenish said deposit to the amount set forth in Section 1.1(c).

Provided Tenant shall comply with all the terms of this Lease, such security shall be returned to Tenant upon the later to occur of (i) termination of this Lease and after surrender of possession of the Leased Premises to Landlord and (ii) the complete satisfaction of all of Tenant's monetary obligations and other covenants in the Lease. In the event of a sale of the Shopping Center or assignment of this Lease by Landlord to any person other than a mortgagee, Landlord shall have the right to transfer the security to its vendee or assignee, subject to Tenant's aforesaid rights upon termination, and thereupon Landlord shall be released from any liability with respect to the return of such security to Tenant, such vendee or assignee to be solely responsible to Tenant therefor.

Tenant shall not assign or encumber its interest in the security deposit, and neither Landlord nor its successors and assigns shall be bound by any attempted assignment or encumbrance.

Section 12.4 Indemnity. Tenant agrees to defend, indemnify and save Landlord and any ground and underlying lessor(s) of the Leased Premises harmless from and against any and all claims and demands (except such as result from the negligence of Landlord, or any such ground or underlying lessor(s) or their respective agents, contractors, servants, or employees, subject to Section 5.3) for, or in connection with, any accident, injury, damage, fine, penalty or resulting costs whatsoever caused to any person or property arising, directly or indirectly, out of the business conducted in or the use and/or occupancy of the Leased Premises or occurring in, on, or about the Leased Premises of any part thereof, or arising directly or indirectly, from any violation of law, the ADA, act or omission of Tenant or any concessionaire or sub-tenant or their respective licensees, servants, agents, employees, or contractors, and from and against any and all costs, expenses, attorneys' fees and liabilities incurred in connection with any such claims and/or proceedings brought thereon. The commercial general liability and property damage coverage maintained by Tenant pursuant to this Lease shall specifically insure the contractual obligations of Tenant as set forth in this Section and/or as provided in this Lease.

Tenant further agrees to defend, indemnify, and hold Landlord, any ground and underlying lessor(s) and any mortgagee harmless from all loss, damage, expense, fees, claims, costs, fines, penalties, and liabilities including, but not limited to clean up costs, remedial and monitoring costs, damages to the environment, attorneys' fees and costs of litigation, arising out of the Tenant's installation of any hazardous substances or violation of any hazardous substance law (as defined in Section 4.1 hereof). In the event insurance coverage is available, or becomes available, for the losses or liabilities described in this paragraph, Tenant shall furnish such coverage for the protection of both Tenant and Landlord (and any designees of Landlord).

The covenants of this Section 12.4 shall survive the termination or expiration of this Lease.

Section 12.5 Damage to Property or Persons: Landlord shall not be liable for any loss of or damage to property of Tenant or of others located in the Leased Premises or the Shopping Center, by theft or otherwise, nor for any loss or damage whatsoever to any property which Tenant could remove at the end of the Term as provided in Section 12.7 hereof. Landlord shall not be liable for any injury or damage to persons or property or to the interior of the Leased Premises resulting from fire, explosion, falling plaster, steam, gas, electricity, water, rain, snow, or leaks from any part of the Leased Premises or from the pipes, appliances, or plumbing works or from the roof, street, or subsurface or from any other place or by dampness or by any other cause of whatsoever nature. Landlord shall not be liable for any such injury or damage caused by other tenants or any person(s) either in the Leased Premises or elsewhere in the Shopping Center, or by occupants of property adjacent to the Shopping Center, or by the public, or by operations in the construction of any private, public, or quasi-public work. Landlord shall not be liable for any latent defect in construction except for a period of one (1) year from the date the general contractor constructing the Shopping Center substantially completes construction of the shell of the Leased Premises. The parties agree that any liability of Landlord under the preceding sentence shall be limited to cost of repair only. Landlord shall not be responsible for damage or loss of property of Tenant kept or stored on the Leased Premises, no matter how caused.

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Notwithstanding anything contained herein to the contrary, Landlord shall be liable for its negligence, except as set forth in Section 5.3 hereof.

Section 12.6 Assignment, Subletting, or Licensing.

Section 12.6.1 Transfer, Assignment, Sublease, or License. Tenant shall not, voluntarily, involuntarily, or by operation of law, sell, mortgage, pledge, or in any manner transfer or assign this Lease in whole or in part, or sublet or license the whole or any part of the Leased Premises, or permit any other persons or entity to occupy same without the consent of Landlord, references elsewhere herein to assignees, subtenants, licensees, or other persons or entities notwithstanding. In the event that Tenant requests permission to either assign this Lease, or to sublet or license the whole or any part of the Leased Premises, or this Lease is deemed to be assigned pursuant to Section 12.6.2 of this Lease, then Landlord may, in its sole and absolute discretion, elect to consent or withhold consent. If Landlord's consent is obtained (no inference being intended herein that Landlord is in any way obligated to grant such consent), then, in addition to such other conditions as Landlord shall have then imposed, if any, such assignment or subletting or licensing shall be subject to and conditioned upon the following:

(a) at the time of any such proposed assignment or subletting or licensing, Tenant shall not be in default under any of the terms, conditions, or covenants of this Lease; and,

(b) the proposed assignee or sublessee or licensee shall occupy the Leased Premises and conduct its business in accordance with the terms, conditions, and covenants of this Lease, including the use specified in Section 1.1(c) hereof; and,

(c) that if the Minimum Annual Rent or any additional rent or charges required to be paid by any such proposed assignee or sublessee or licensee exceeds the Minimum Annual Rent and/or items of additional rent reserved hereunder, then Tenant shall pay to Landlord monthly the entire amount of such excess, which shall be deemed additional rent; and,

(d) Tenant and its proposed assignee or sublessee or licensee shall execute, acknowledge, and deliver to Landlord a fully executed counterpart of a written assignment of lease or sublease or license, as the case may be, duly consented to by any Guarantor of this Lease by the terms of which,

(i) in case of an assignment, Tenant will assign to such proposed assignee Tenant's entire interest in this Lease, together with all prepaid rents hereunder, and the proposed assignee will accept said assignment and assume and agree to perform, directly for the benefit of Landlord, all of the terms, conditions, and covenants of this Lease on Tenant's part to be performed hereunder; or,

(ii) in case of a subletting or licensing, the sublease or license will in all respects be subject and subordinate to all of the terms, conditions, and covenants of this Lease, it being understood that Landlord shall have the right to prohibit such sublease or license if in the opinion of Landlord or its counsel such sublease or license would result in income to Landlord, which is not "rents from real property" as defined in Section 856(d) of the INTERNAL REVENUE CODE OF 1986, as amended, and the proposed sublessee or licensee will agree to be bound by and to perform all of the terms, conditions, and covenants of this Lease on Tenant's part to be performed hereunder; except the payment of Minimum Annual Rent and all items of additional rent reserved hereunder, which Tenant shall continue to pay to Landlord; and,

(e) notwithstanding any assignment or subletting or licensing under the terms of this Article, both Tenant and any Guarantor of this Lease will acknowledge that, notwithstanding such assignment or sublease or license and the consent of Landlord thereto, both Tenant and any Guarantor of this Lease will not be released or discharged from any liability whatsoever under this Lease and will continue to remain liable thereon with the same force and effect as though no assignment or sublease had been made; and,

(f) Tenant shall pay to Landlord or Landlord's designee Landlord's administrative costs, overhead, and fees of counsel in connection with each such assignment, sublease, or license, but not less than the minimum sum of One Thousand Dollars (\$1,000.00); and,

(g) in no event and under no circumstances shall any sublessee whether permitted pursuant to the terms and conditions of this Lease or occupying (or having occupied) the Leased Premises in violation of the Lease terms be considered a third party beneficiary to this Lease, and any such sublessee shall have no rights against Landlord.

The acceptance of rent from any other entity shall not be deemed to be a waiver of any of the provisions of this Lease or to be a consent to the assignment of this Lease or the subletting or licensing of the Leased Premises.

Section 12.6.2 Transfer of Stock or Interest of Tenant or Guarantor. If at any time during the term of this Lease, any part or all its outstanding voting stock, if Tenant is a corporation, or any interest in the partnership, if Tenant is a partnership, or any membership interest, if Tenant is a limited liability company shall be transferred by sale, assignment, bequest, inheritance, operation of law, or other dispositions so as to result in a change in the present effective voting control of Tenant by the person or persons owning a majority of said outstanding voting stock or a majority interest in the partnership or limited liability company, as the case may be, on the date of this Lease, then such event shall constitute an assignment for the purposes of this Lease.

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In the event there is a Guarantor of this Lease, then if at any time during the Term of this Lease,

(a) any part or all of such Guarantor's outstanding voting stock, if such Guarantor is a corporation, or any interest in the partnership, if such Guarantor is a partnership, or any membership interest, if Tenant is a limited liability company shall be transferred by sale, assignment, bequest, inheritance, operation of law, or other dispositions so as to result in a change in the present effective voting control of such Guarantor by the person or persons owning a majority of said outstanding voting stock or a majority interest in the partnership or limited liability company, as the case may be, on the date of this Lease; or,

(b) such Guarantor is dissolved,

Tenant shall so notify Landlord. Such notice shall be effective in accordance with this Section 12.6.2 only if said notice shall include or state all of the following: (1) that said notice is given pursuant to Section 12.15 of this Lease; (2) the occurrences giving rise to such notice, stated with particularity as to the effective dates, parties involved or affected; and the shares or interests affected; (3) in the event of a transfer of shares or a partner's or member's interest, a recent financial statement (certified by an independent Certified Public Accountant) of the transferee(s); and (4) that Landlord shall have thirty (30) days from receipt of such notice to terminate this Lease as described herein.

Landlord shall have the right, at its option, to terminate this Lease by notice to Tenant given within thirty (30) days after Landlord's receipt of such notice from Tenant. In the event Landlord receives other notice of such transfer or of the dissolution of such Guarantor, then Landlord shall have the right, at its option, within ninety (90) days after receipt of such other notice, to terminate this Lease or to declare a default pursuant to Article XI of this Lease.

The foregoing provisions shall not apply to that portion of the outstanding voting stock which is listed on a National Securities Exchange as defined in the Securities Exchange Act of 1934, as amended. For the purposes of this Section 12.6.2, stock ownership shall be determined in accordance with the principles set forth in Section 544 of the Internal Revenue Code of 1954, as the same existed on August 16, 1954, and the term "voting stock" shall refer to the shares of stock regularly entitled to vote for the election of directors of the corporation.

Section 12.6.3 Assignment to Parent, Subsidiary, Affiliated Corporation of Tenant. Notwithstanding anything in this Article XII to the contrary, Tenant shall have the unrestricted right to assign this Lease to its parent corporation or to any subsidiary or affiliated corporation or to a corporation which directly or indirectly owns at least fifty percent (50%) interest in Tenant or in which Tenant owns at least fifty percent (50%), provided that Tenant shall deliver to Landlord within ten (10) days after the date of such assignment, an executed copy of the assignment wherein such parent corporation, subsidiary, affiliated corporation, or the corporation which directly or indirectly owns fifty percent (50%) interest in Tenant or in which Tenant owns at least a fifty percent (50%) interest, assumes for the benefit of Landlord all of the obligations of Tenant under this Lease and further provided that any such assignment shall not relieve Tenant from liability for the payment of rent or other sums provided or from the obligation to keep and be bound by the terms, conditions, and covenants of this Lease. In the event such parent, subsidiary, or affiliated corporation or the corporation which directly or indirectly owns at least fifty percent (50%) interest in Tenant or in which Tenant owns at least a fifty percent (50%) interest shall at any time after the date of such assignment no longer be a parent, subsidiary, or affiliated corporation or the corporation which directly or indirectly owns at least a fifty percent (50%) interest in Tenant or in which Tenant owns at least a fifty percent (50%) interest, then such an event shall constitute an assignment for the purposes hereof and shall be subject to the provisions of Section 12.6.1.

Section 12.6.4 Assignment in Instances of Merger, Consolidation, Acquisition. Notwithstanding anything contained in this Article XII to the contrary, and provided Tenant directly owns at least ten (10) other stores operating under the same trade name as the trade name Tenant is operating under pursuant to the terms of this Lease, Tenant shall have the right to assign this Lease to any corporation into which Tenant may merge or to any corporation arising out of consolidation of Tenant with another corporation or to a corporation or other entity acquiring all or substantially all the assets of Tenant or all of the issued and outstanding voting stock of Tenant. Such right to assign this Lease shall be expressly conditioned upon Tenant's delivering to Landlord, within ten (10) days after the date of such assignment, evidence that the corporation or such acquiring corporation or other corporation arising out of a consolidation of Tenant with another corporation or such acquiring corporation or other entity, as the case may be, has a net worth and financial condition equal to or greater than the net worth and financial condition of Tenant and the Guarantor, if any, as of the date of this Lease or as of the date of such assignment, whichever is greater, in a form reasonably acceptable to Landlord wherein the corporation or such acquiring merge or the corporation arising out of a consolidation of Tenant with another corporation or such acquiring corporation or other entity, as the case may be, assumes for the benefit of Landlord all of the terms, conditions, and covenants set forth in this Lease to be observed and performed by Tenant and agrees to be bound by the terms, conditions, and covenants of this Lease. Any such assignment shall not relieve Tenant from liability for the payment of rent or other sums herein provided or from the obligation to keep and be bound by the terms, conditions, and covenants of this Lease.

Section 12.7 Surrender of Premises and Holding Over. At the expiration of the tenancy hereby created, Tenant shall surrender the Leased Premises in good condition, reasonable wear and tear excepted, and damage by unavoidable casualty excepted to the extent that the same is covered by Landlord's All Risk (except for those items specifically excluded) Coverage, and Tenant shall surrender all keys for the Leased Premises to Landlord at the

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Section 12.8 Lien of Landlord for Rent, Taxes and Other Sums. Landlord shall have, and Tenant hereby grants, a security interest in any furnishings, equipment, fixtures, inventory, accounts receivable, chattel paper, documents, instruments, and goods which are or are to become fixtures, together with all items now or hereafter affixed thereto, wherever located, whether now owned or existing or hereafter acquired or arising, and all cash and non-cash proceeds of the foregoing, including but not limited to insurance proceeds. The security interest is granted for the purpose of securing the payment of rent; other charges, assessments, penalties, and damages herein covenanted to be paid by Tenant, and for the purpose of securing the performance of all other obligations of Tenant hereunder. Upon Tenant's default or breach of any covenants of this Lease, Landlord shall have all remedies available under the law of the State where the Leased Premises are located, including but not limited to the right to take possession of the above mentioned property and dispose of it by sale in a commercially reasonable manner. Tenant hereby agrees to execute and deliver from time to time Financing Statements at Landlord's request or for permitted or required by the Uniform Commercial Code Landlord may execute and record Financing Statements for the purpose of serving notice to third parties of the security interest herein granted. Tenant shall, upon demand, reimburse Landlord for all filing and recording fees and taxes incurred in connection with filing and recording such Financing Statements. In addition, Tenant agrees to pay Landlord's administrative charge, but not less than the minimum sum of Three Hundred Fifty Dollars (\$350.00), for the review and/or processing of any Subordination of Landlord's Lien agreements.

Section 12.9. Liens. Tenant shall discharge or bond over any lien filed against the Shopping Center or any part thereof, work done or materials furnished with respect to the Leased Premises within ten (10) days after such lien is filed and Tenant shall obtain execution of lien waivers prior to commencement of construction in the Leased Lien. If Tenant fails to keep this covenant, in addition to any other remedies available to Landlord under this Lease or otherwise, Landlord may at its option discharge such lien, in which event Tenant agrees to pay Landlord a sum equal to the amount of the lien thus discharged plus Landlord's internal administrative costs, attorneys' fees, expenses, and damages thereby caused.

Section 12.10 Landlord's Right of Cancellation. If Tenant shall fail to pay Percentage Rent in an amount equal to at least twenty five percent (25%) of the Minimum Annual Rent payable pursuant to Section 11.6) in at least one (1) of any year after the fourth (4th) year of the Lease Term (including any extension or renewal thereof), then Landlord may, at its option, elect to terminate this Lease by notice to Tenant given within six (6) months after the end of each year and this Lease shall terminate and be null and void one hundred twenty (120) days after delivery of such notice. Tenant may render such notice of termination inoperative if Tenant shall, within thirty (30) days after receipt of such notice, agree in writing to increase the Minimum Annual Rent payable for the then current year of the Lease Term and each year thereafter by an amount equal to twenty five percent (25%) of the Minimum Annual Rent payable for each current year of the Lease Term and each year thereafter:

Section 12.11 Interest. Whenever this Lease refers to "Interest," same shall be computed at a rate equal to the Prime Rate (as hereinafter defined) plus two (2) percentage points. If, however, payment of interest at such rate should be unlawful, that is, violative of usury statutes or otherwise, then "Interest" shall, as against such party, be computed at the maximum legal rate payable by such party.

"Prime Rate" shall mean the Prime Rate as published in *The Wall Street Journal* from time to time (or the average Prime Rate if more than one is published), any change in such Prime Rate to effect a change in the rate

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charged hereunder on the date of each such change. If *The Wall Street Journal* ceases to be published or ceases to publish a Prime Rate, then Landlord shall designate another publication.

Section 12.12 Late Payments. Should Tenant fail to pay when due any installment of Minimum Annual Rent, Percentage Rent, or any other sum payable to Landlord under the terms of this Lease, then interest shall accrue from and after the date on which any such sum shall be due and payable, and such interest together with a Late Charge of Two Hundred Dollars (\$200.00) to cover the extra expense involved in handling such delinquency shall be paid by Tenant to Landlord at the time of payment of the delinquent sum.

Section 12.13 Consents. With respect to any provision of this Lease which either provides or is held to provide that Landlord shall not unreasonably withhold or unreasonably delay any consent or approval, Tenant shall not be entitled to make any claim for, and Tenant hereby expressly waives, any claim for damages, it being understood and agreed that Tenant's sole remedy therefor shall be an action for specific performance.

Section 12.14 Waiver of Right of Redemption. Tenant hereby expressly waives any and all rights of redemption conferred by statute or otherwise.

Section 12.15 Notices. Whenever notice shall be given by either party to the other, notice shall be in writing addressed to the address of the party being notified at the address set forth in this Lease or to such other address as a party may from time to time designate by notice to the other party. Notice may be given by hand delivery, express service, electronic means, or by postage paid certified or registered mail with return receipt requested. Notice given by hand delivery, express service, or electronic means shall be deemed to have been given upon receipt by the party being notified. Notice given by certified or registered mail shall be deemed to have been given at the time return receipt is signed for, provided, however, that if delivery is refused or the notice is unclaimed, notice shall be deemed received five (5) days after the same shall have been deposited in the mail.

Section 12.16 No Broker. Tenant and Landlord warrant and represent that no broker was involved on either's behalf in negotiating or consummating this Lease, and agree to indemnify and hold the other harmless from and against any and all claims for brokerage commissions arising out of any communications or negotiations had by either with any broker regarding the Leased Premises or any other premises in the Shopping Center and/or the consummation of this Lease.

Section 12.17 Short Form Lease. Tenant agrees not to record this Lease without the express written consent of Landlord and further agrees to execute, acknowledge, and deliver at any time after the date of this Lease, at the request of Landlord, a "short form lease" suitable for recording.

Section 12.18 Entire and Binding Agreement. This Shopping Center Lease contains all of the agreements between the parties hereto, and it may not be modified in any manner other than by agreement in writing signed by all the parties hereto or their successors in interest. The terms, covenants, and conditions contained herein shall inure to the benefit of, and be binding upon, Landlord and Tenant and their respective successors and assigns, except as may be otherwise expressly provided in this Lease. Tenant acknowledges that neither Landlord nor any broker has made any representations to, or agreements with, Tenant which are not contained in this Lease. The parties hereto specifically agree that this Lease has been negotiated as an arm's-length transaction, that each party had the benefit of being or the opportunity to be represented by legal counsel, that this document as executed by the parties evidences the agreement between the parties, and that no weight of construction shall be given to one party or another as the drafter of this Lease.

Section 12.19 Provisions Severable. If any term or provision of this Lease or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each term and provision of this Lease shall be valid and be enforced to the fullest extent permitted by law.

Section 12.20 Captions, Underlining, Line-Outs. The captions contained herein are for convenience and reference only and shall not be deemed as part of this Lease or construed as in any manner limiting or amplifying the terms and provisions of this Lease to which they relate. The underlining of certain portions of this Lease shall not mean that such portions are to be given any greater or lesser force or effect than the non-underlined portions. Any portion of this Lease which has been lined out was the agreement of the parties to eliminate and the language of any such lined-out provisions shall be given no force and effect whatsoever.

Section 12.21 Rule Against Perpetuities. If the Term of this Lease shall not have commenced within five (5) years from the date appearing on Page 1 of this Lease, then this Lease shall thereupon become null and void and have no further force and effect whatsoever in law or equity.

Section 12.22 Warranty and Authority. Tenant hereby represents and warrants to Landlord that (a) there are no proceedings pending nor to Tenant's knowledge threatened before any court or administrative agency that would materially adversely affect the financial condition of Tenant or the ability of Tenant to enter into this Lease or the validity or enforceability of this Lease; (b) there is no provision of any existing mortgage, indenture, contract or agreement binding on Tenant which would conflict with or in any way prevent the execution, delivery or performance of the terms of this Lease by Tenant; (c) any financial statements of Tenant provided to Landlord in connection with this Lease are true, complete and correct in all material respects, fairly present the financial condition of Tenant as of the date and for the period referred to therein and have been prepared in accordance with

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generally accepted accounting principles consistently applied; (d) there has been no material adverse change in the financial condition of Tenant since the date of such financial statements and to the knowledge of Tenant, no such material adverse changes are pending or threatened; and (e) Tenant is not, and shall not become, a person or entity with whom Landlord is restricted from doing business with under regulations of the Office of Foreign Asset Control ("OFAC") of the Department of the Treasury (including, but not limited to, those named on OFAC's Specially Designated and Blocked Persons list) or under any statute, executive order (including, but not limited to, the September 24, 2001, Executive Order Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism), or other governmental action and is not and shall not engage in any dealings or transaction or be otherwise associated with such persons or entities. Tenant acknowledges that Landlord is executing this Lease in reliance upon the foregoing representations and warranties and that such representations and warranties are a material element of the consideration inducing Landlord to enter into and execute this Lease. If this Lease is executed by more than one party (whether any such party is an individual or a corporation, partnership, limited partnership, joint venture, sole proprietorship or any other firm, person or entity), the parties executing this Lease shall be jointly and severally liable hereunder. If Tenant is a corporation, partnership, limited liability company or other entity, the persons executing this Lease on behalf of Tenant represent and warrant to Landlord that they have the authority to enter into this Lease on behalf of Tenant, to bind Tenant and that this Lease has been authorized and approved by the Board of Directors or other governing body of Tenant.

Section 12.23 Irrevocable Offer: In consideration of Landlord's administrative expense in considering this Lease and the terms of Tenant's proposed tenancy hereunder, Landlord's reservation of the Leased Premises pending such consideration and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Tenant's submission to Landlord of this Lease, duly executed by Tenant, shall constitute Tenant's irrevocable offer to continue for thirty (30) days from and after receipt by Landlord of the said Lease duly executed by Tenant or until Landlord shall deliver to Tenant written notice of rejection of Tenant's offer, whichever shall first occur. If within said thirty (30) day period Landlord shall neither return the Lease duly executed by Landlord nor so advise Tenant of Landlord's rejection of Tenant's offer, then after said thirty (30) day period Tenant shall be free to revoke its offer, provided, however, Tenant's offer shall continue until (a) revoked by Tenant in writing or (b) accepted or rejected by Landlord.

Section 12.24 Disputed Charges and Landlord's Records. Notwithstanding anything to the contrary contained in the Lease, Tenant shall notify Landlord in writing within one year after making a payment or receipt of any notice of payments due under this Lease if Tenant disputes the amount of such payment or the fact that such payment is due from Tenant. If Tenant fails to deliver this notice such failure will constitute a waiver of Tenant's right to dispute such billing or the amount thereof and such shall be deemed by Tenant an account stated. Delivery of notice hereunder will not release Tenant of its responsibility to make such payment in a timely fashion, nor mitigate Landlord's rights under this Lease in connection with Tenant's failure to do so. Upon receipt of notice of a disputed charge and the payment of such charge, Landlord agrees to cooperate as reasonably necessary to demonstrate to Tenant the propriety of the billing, however, Tenant hereby waives any and all legal and equitable rights it has or may have to inspect and/or audit Landlord's records and contracts relating to Tenant's charges under the terms of this Lease, Tenant acknowledging and agreeing that any such inspections or audits impose an unreasonable burden and expense upon Landlord and Landlord's administrative staff.

Section 12.25, Landlord's Right to Terminate. If at any time during the Term of this Lease Landlord initiates any or all of the following: i) remerchandises and/or redevelops the Shopping Center, ii) relocates any occupants of the Shopping Center containing 15,000 square feet or more of floor area, iii) adds any occupants containing 15,000 square feet or more of floor area to the Shopping Center, then Landlord shall have the right to terminate Tenant's Lease by giving advance written notice to Tenant. In such event, the effective date of termination (hereinafter referred to in this section as "Termination Date") shall be sixty (60) days from the date Landlord sends said notice unless the parties shall agree in writing to a different date of termination. In the event Landlord terminates this Lease as set forth herein, Landlord shall reimburse Tenant for the unamortized cost of Tenant's actual investment in the Leased Premises' leasehold improvements (calculated as of the date of such termination and amortized on a straight line basis over the initial Term of the Lease (not to exceed a period of ten (10) years)), less any amounts contributed by Landlord for construction of the Leased Premises, if applicable. Following Landlord's request, said unamortized costs of leasehold improvements shall be certified to Landlord by Tenant's chief financial officer. Landlord's reimbursement to Tenant of the aforementioned unamortized costs of leasehold improvements shall occur within thirty (30) days after the Termination Date and Landlord shall deduct from said reimbursement any sums then due Landlord. Upon the Termination Date, Tenant shall surrender the Leased Premises to Landlord in accordance with the terms of Section 12.7 of this Lease and Landlord and Tenant shall be released from any and all further liability hereunder except for obligations and liabilities that survive the expiration or earlier termination of this Lease. Notwithstanding the foregoing, Tenant agrees to pay to Landlord all rent and other sums due under the Lease including any year end adjustments which shall accrue through the Termination Date.

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Rider to Lease. A Rider to lease numbered consecutively herewith and attached hereto is hereby made a part hereof. Any conflict or inconsistency between the terms of the main body of the Lease and the terms of the Rider shall be resolved in favor of the terms of the Rider.

IN WITNESS WHEREOF, Landlord and Tenant have duly executed this Lease as of the day and year first above written, each acknowledging receipt of an executed copy hereof.

LANDLORD:

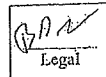
FAYETTE MALL SPE, LLC, a Delaware limited liability company, Federal Identification Number 62-1542285, by CBL & Associates Management, Inc., a Delaware corporation, Federal Identification Number 62-1542279, Managing Agent

WITNESS:

Carman L/S

By: Victoria S. Berghel
Print Name: Victoria S. Berghel
Its: Senior Vice President and General Counsel

DATE: January 24, 2012



TENANT:

THE SPEAQUESS GROUP, LLC, a Kentucky limited liability company, d/b/a JAMBA JUICE, Federal Identification Number 80-0724236

WITNESS:

Daniel P. Marquess

By: Ed Marquess
Print Name: Ed Marquess
Its: partner

DATE: January 11, 2012

RIDER TO LEASE

A. Section 2.5 of the Lease is supplemented as follows:

Environmental Charge. At Landlord's election Landlord or its designee may collect from Tenant as additional rent under this Lease an "Environmental Charge" which may contain, without limitation, the following items which Landlord may supply to the Leased Premises.

(a) **Electricity.** (i) If Landlord elects as an element of said Environmental Charge to supply electricity, then Tenant shall use electricity supplied by Landlord as Tenant's sole source of energy. Such electricity shall be supplied to Tenant in accordance with Exhibit B to this Lease, for Tenant's reasonable use in connection with such lighting, heating and air conditioning systems and such other electrical appliances and equipment (Tenant's Electrical Installations) as may be installed in the Leased Premises with Landlord's permission. The "Electrical Charge" as hereinafter defined shall as a component of the Environmental Charge be deemed additional rent under this Lease and may be determined by one of the following methods, depending on the location of the Shopping Center and applicable utility laws and regulations:

1) Tenant agrees that Landlord's engineer shall make, at any time and from time to time, a survey and an estimate of the energy which will be used by Tenant's Electrical Installations. The energy estimate shall be based upon data obtained from Tenant's plans and specifications as verified by a survey of Tenant's premises following completion of Tenant's construction work, and shall take into consideration the Tenant's hours of usage of connected electrical loads consisting primarily of lighting and air conditioning equipment and other miscellaneous electric equipment as may be installed and controlled by Tenant. Landlord's engineer shall use the aforesaid survey estimate to establish as a component of the Environmental Charge the Tenant's monthly "Electrical Charge" which shall be one-twelfth (1/12) of the Tenant's annual charge for electrical energy (the "Electrical Charge"). In connection with such survey Tenant shall supply Landlord upon request with the information necessary to estimate Tenant's connected load. Tenant shall be notified of the survey findings which shall be conclusive and binding upon the parties. Tenant shall pay to Landlord monthly in advance together with the payment of Minimum Annual Rent as a portion of the Environmental Charge a sum equal to Tenant's monthly Electrical Charge which shall be based upon the aforesaid survey.

Notwithstanding anything contained herein to the contrary, Landlord shall upon Landlord's volition or at Tenant's written request and expense, install a test meter if permitted by law to measure electrical energy consumed by Tenant in the Leased Premises no more than once annually. If the test meter discloses that the consumption of the electrical energy in the Leased Premises for such period is different from the amount Landlord's engineer estimated to be consumed therein, then, Tenant's annual total Electrical Charge for the next annual period shall be adjusted to reflect the electrical energy consumed in Leased Premises. Landlord shall submit a statement to Tenant after the test meter results have been obtained setting forth (1) the manner of calculation of Tenant's Electrical Charge; and (2) the adjustment, if any, in the Electrical Charge.

or

2) Tenant agrees that Landlord may at Tenant's expense furnish and install a test meter that shall be read monthly or at some other regular interval by Landlord and Tenant shall pay monthly or at some other regular interval, as the case may be, as its Electrical Charge (the "Electrical Charge") for the electrical energy consumed in the Leased Premises.

The Electrical Charge shall include a proportionate cost of the central electrical distribution system but only that portion from the electric master meter to the Leased Premises, including the cost of the electric meter Tenant would have paid had electricity not been supplied by Landlord, but shall exclude the cost of the conduit provided by Landlord in accordance with Exhibit B hereof. Also, the Electrical Charge shall include a reasonable allowance for Landlord's survey, if applicable, billing and administrative expenses, and Landlord's costs of repair and maintenance of Landlord's electrical supply system. The Electrical Charge may be revised by Landlord from time to time to reflect an increase or decrease in the following: taxes, costs of repair and maintenance of Landlord's electrical supply system, rates charged to similar consumers by the Local Utility Company or the Designated Service Provider, as the case may be, Tenant's connected load, any adjustment required as a result of actual operating experience, and seasonal requirements. Regardless of whether the Electrical Charge is determined by method 1 or 2 above, the rate segment of the Electrical Charge shall not exceed the rate (including taxes) which Tenant as the operator of a separately metered and billable facility would otherwise pay for continuous comparable service to the applicable municipality, governmental authority or utility company located in and serving retail facilities of a size and with the same requirements as Tenant's in the geographic location of the Shopping Center ("Local Utility Company") if such electrical energy were not supplied by Landlord and had Tenant purchased such electricity directly from the Local Utility Company. In addition Tenant acknowledges that underground utility lines must be drawn from outside the property line to the building of which the Leased Premises is a part, and therefore, in addition to the Electrical Charge, Tenant shall pay a user surcharge on the cost of this electrical utility construction to be paid by the Landlord, beginning with the first electrical charge billing. Said surcharge is to reimburse the Landlord for on-site electrical costs including primary feeders, transformers, switchgear and associated equipment. This surcharge shall include interest on this unpaid balance to be adjusted quarterly, upon the aforementioned costs to be incurred by Landlord. The aforesaid costs that Tenant shall pay, shall be that which Tenant would have paid had Tenant purchased such electricity directly from the Local Utility Company and such had not been supplied by

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Landlord.

(ii) The amount charged to Tenant as a component of the Environmental Charge which is attributable to the electricity consumed in the Leased Premises shall be as hereinbefore described. In no event shall payment of the Electrical Charge component of the Environmental Charge abate, nor shall Tenant have any right of offset or counterclaim against the payment of such Electrical Charge component of the Environmental Charge.

(b) Water. (i) If Landlord elects as an element of said Environmental Charge to supply water ("Water Service"), then Tenant shall use Water Service supplied by Landlord as Tenant's sole source of Water Service. The "Water Charge" as hereinafter defined shall as a component of the Environmental Charge be deemed additional rent under this Lease and may be determined by one of the following methods, depending on the location of the Shopping Center and applicable utility laws and regulations:

1) Tenant agrees that Landlord's engineer shall make, at any time and from time to time, a survey and an estimate of the water (including taxes and sewer charges) which will be used by Tenant in the Leased Premises. The water estimate shall be based upon data obtained from Tenant's plans and specifications as verified by a survey of Tenant's premises following completion of Tenant's construction work, and shall take into consideration the Tenant's usage of water in the Leased Premises. Landlord's engineer shall use the aforesaid survey estimate to establish as a component of the Environmental Charge the Tenant's monthly Water Charge which shall be one-twelfth (1/12) of the Tenant's annual charge for water service (the "Water Charge"). In connection with such survey, Tenant shall supply Landlord upon request with the information necessary to estimate Tenant's water consumption; Tenant shall be notified of the survey findings which shall be conclusive and binding upon the parties. Tenant shall pay to Landlord monthly in advance, together with the payment of Minimum Annual Rent as a portion of the Environmental Charge, a sum equal to Tenant's monthly Water Charge which shall be based upon the aforesaid survey.

Notwithstanding anything contained herein to the contrary, Landlord shall upon Landlord's volition or at Tenant's written request and expense, install a test meter if permitted by law to measure water consumed by Tenant in the Leased Premises no more than once annually. If the test meter discloses that the consumption of water in the Leased Premises for such period is different from the amount Landlord's engineer estimated to be consumed therein, then, Tenant's annual total Water Charge for the next annual period shall be adjusted to reflect the water consumed in the Leased Premises. Landlord shall submit a statement to Tenant after the test meter results have been obtained setting forth (1) the manner of calculation of Tenant's Water Charge; and (2) the adjustment, if any, in the Water Charge.

or

2) Tenant agrees that Landlord may at Tenant's expense furnish and install a test meter that shall be read monthly or at some other regular interval by Landlord and Tenant shall pay monthly or at some other regular interval, as the case may be, as its Water Charge (the "Water Charge") for Tenant's water usage.

or

3) An alternative method of calculating the Water Charge applied uniformly to all similarly situated Shops, as defined in Section 2.3, receiving such service.

There shall be included in the Water Charge a reasonable allowance for Landlord's survey, if applicable, the cost of a water meter Tenant would have paid had water not been supplied by Landlord, billing and administrative expenses, and Landlord's cost of repair and maintenance of Landlord's water supply system. The Water Charge may be revised by Landlord from time to time to reflect an increase or decrease in the following: taxes; costs of repair and maintenance of Landlord's water supply system; rates charged to similar consumers by the Local Utility Company or the Designated Service Provider, as the case may be; Tenant's consumption; any increase required as a result of actual operating experience, and seasonal requirements. The portion of Tenant's Environmental Charge attributable to the annual Water Charge component shall not exceed the total charges (including taxes) which Tenant as the operator of a separately metered and billable facility would otherwise pay if such water service were not supplied by Landlord and had Tenant purchased such water directly from the Local Utility Company.

(ii) The amount charged to Tenant as a component of the Environmental Charge which is attributable to the water consumed on the Leased Premises shall be as hereinbefore described. In no event shall payment of the Water Charge component of the Environmental Charge abate, nor shall Tenant have any right of offset or counterclaim against the payment of such Water Charge component of the Environmental Charge.

(c) Heating and Air-Conditioning. If Landlord elects, as an element of said Environmental Charge, to supply heating, ventilating and air conditioning ("HVAC Service") in the form of chilled water or treated air (at Landlord's option), then Tenant shall use HVAC Service furnished by Landlord as Tenant's sole source of HVAC Service. The "HVAC Charge" as hereinafter defined shall as a component of the Environmental Charge be deemed additional rent under this Lease.

Since Tenant's Mechanical Installations are not presently ascertainable, Tenant agrees that Landlord's engineer shall make a survey and an estimate of the charges (including taxes) which Tenant as the operator of a store-

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separately equipped with curb-mounted, air-cooled rooftop type HVAC equipment with economizer, electric resistance type heaters would otherwise incur. The estimate shall include an additional component for the cost of the installation of such an "assumed" rooftop type HVAC equipment, as well as an estimate of on-going maintenance and repair. There shall be added to and included in the HVAC estimate a reasonable allowance for Landlord's survey, billing and administrative expenses.

In connection with such survey Tenant shall furnish Landlord upon request with the information necessary to estimate Tenant's heating and air conditioning load. Tenant shall be notified of the survey findings which shall be conclusive and binding upon the parties. Tenant shall pay to Landlord monthly in advance together with the payment of Minimum Annual Rent, as a portion of the Environmental Charge, a sum equal to the amortization of the HVAC Service ("HVAC Charge") over a ten-year period, including interest at prime plus 2%, as of Tenant's opening date.

(d) **Telephone Service and Charges.** If telephone service is desired, Tenant shall be responsible for the obtaining and installation of such service, equipment and fixtures in accordance with the provisions of this Lease, all local laws, rules, regulations, and ordinances. If the local serving utility shall directly serve the Leased Premises with telephone service, Tenant shall, at its expense, pay all charges for such service directly to the serving utility. If Landlord, who shall have the option to do so, shall elect to supply telephone service, Tenant shall purchase such service from Landlord and shall pay to Landlord a Telephone Service Charge that would be similar to that paid if Tenant were obtaining telephone service directly from the serving utility. At its option, Landlord may elect to provide monthly statements of Tenant's Telephone Service Charge or may elect to establish an annual Telephone Service Charge in which event Tenant shall pay to Landlord on or before the first day of each month, one twelfth (1/12) of such annual Telephone Service Charge.

(e) If Landlord hereafter determines that it is not feasible in Landlord's sole judgment to supply or to continue supplying as elements of the Environmental Charge electricity, water service, HVAC, or telephone service or if it shall hereafter become unlawful for Landlord to supply electricity, water service, or telephone service, then Landlord may discontinue providing any or all of such services. In such event Tenant shall purchase water and/or electricity and/or telephone service as the case may be directly from another utility provider of Tenant's choice, and Tenant shall at Tenant's sole cost and expense cause the Leased Premises to be separately metered and billable, and Tenant shall pay any other expenses charged directly or indirectly to Landlord as a result of Tenant's use of another provider.

(f) Tenant agrees that Landlord shall not be liable to Tenant for disruption or diminution of any utility service nor for any shortages or curtailments of the use of any utility services, and in no event shall such disruption, shortages or curtailments constitute an eviction, actual or constructive, or entitle Tenant to damages nor to any abatement of Minimum Annual Rent or other charges due under this Lease.

(g) In the event Tenant fails to pay any sum due under this Rider or Section, as the case may be, Landlord may, in addition to all other remedies, cease supplying the utility service(s) to which such nonpayment relates while such nonpayment exists.

(h) If Landlord is required to pay a deposit to any Designated Service Provider or to the Local Utility Company, as the case may be, servicing the Shopping Center, Tenant herewith agrees to pay its share of said deposit by paying to Landlord a utility deposit in an amount equal to two months' Electrical Charge of Water Charge or Telephone Service Charge, as the case may be, payable within ten (10) days after receipt of the bill therefor.

B. Section 2.3 of the Lease is hereby supplemented with the following:

The term "real estate taxes" shall also mean any license fees, charge or taxes, or occupation license fees, charges, or taxes imposed upon the Landlord and/or the Shopping Center as the result of this Lease or as the result of Tenant's operations at the Shopping Center by the state, county, or local governmental authority or any agency or division or subdivision thereof.

C. ~~Intentionally deleted, IN THE EVENT (AND ONLY IN SUCH EVENT) THE LEASED PREMISES ARE LOCATED IN ANY OF SPACES #A110 THROUGH #A136 AND FOOD COURT SPACES #1 THROUGH #56, Section 6.2 of the Lease is hereby modified so that the first sentence of Section 6.2 is deleted and replaced in its entirety with the following:~~

~~Tenant shall make and pay for all repairs to the Leased Premises and all equipment and systems serving the Leased Premises exclusively including those within any portion of the Air Rights referred to in Rider B, Section 12.26 and shall replace all things which are necessary to keep the same in a good state of repair and operating order, such as (but not limited to) all fixtures, furnishings, lighting, and store signs of Tenant."~~

D. ~~Intentionally deleted, IN THE EVENT (AND ONLY IN SUCH EVENT) THE LEASED PREMISES ARE LOCATED IN ANY OF SPACES #A110 THROUGH #A136 AND FOOD COURT SPACES #1 THROUGH #56, Section 12.4 of the Lease is hereby deleted and replaced in its entirety with the following:~~

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Section 12.4 - Indemnity. Tenant agrees to defend, indemnify and save Landlord and any ground and underlying lessor(s) of the Leased Premises harmless from and against any and all claims and demands (except such as result from the negligence of Landlord, or any such ground or underlying lessor(s) or their respective agents, contractors, servants, or employees, subject to Section 5.3) for, or in connection with, any accident, injury, damage, liens, fine, penalty or resulting costs, whatsoever caused to the improvements situated within the Air Rights and/or to any person or property arising, directly or indirectly, out of the business conducted in or the use and/or occupancy of the Leased Premises and/or the Air Rights referred to in Rider B - Section 12.26 or occurring in, on, or about the Leased Premises or any part thereof and/or the Air Rights referred to in Rider B - Section 12.26, or arising directly or indirectly from any violation of law, the ADT, act of omission of Tenant or any concessionaire or sub-tenant or their respective licensees, servants, agents, employees, or contractors, and from and against any and all costs, expenses, attorneys' fees and liabilities incurred in connection with any such claims and/or proceedings brought thereon. The comprehensive general liability and property damage coverage maintained by Tenant pursuant to this Lease shall specifically insure the contractual obligations of Tenant as set forth in this Section and/or as provided in this Lease.

Tenant further agrees to defend, indemnify and hold Landlord, any ground and underlying lessor(s) and any concessionaire harmless from all loss, damage, expense, fees, claims, costs, fines, penalties, and liabilities including, but not limited to, clean-up costs, remedial and monitoring costs, damages to the environment, attorneys' fees and costs of litigation, arising out of the Tenant's installation of any hazardous substances or violation of any hazardous substance law (as defined in Section 4.1 hereof). In the event insurance coverage is available, or becomes available, for the losses or liabilities described in this paragraph, Tenant shall furnish such coverage for the protection of both Tenant and Landlord (and any designees of Landlord).

Tenant recognizes that in completing its construction of the Leased Premises that it will be necessary to enter upon and make use of certain portions of the Air Rights referred to in Rider B - Section 12.26 and the improvements to be constructed therein. Tenant hereby agrees to indemnify Landlord against and to hold Landlord harmless from any and all claims, actions, liens, demands, expenses and judgments for loss, damage or injury to property or persons which may result by reason of Tenant's entry into and construction within the Air Rights or improvements constructed therein.

The covenants of this Section 12.4 shall survive the termination or expiration of this Lease.

E. Intentionally deleted, IN THE EVENT (AND ONLY IN SUCH EVENT) THE LEASED PREMISES ARE LOCATED IN ANY OF SPACES #A14 THROUGH #A136 AND FOOD COURT SPACES #1 THROUGH #50, the following is added as Section 12.26 of the Lease:

Section 12.26. Air Rights Lease. This Leased Premises does not include such portion of the Leased Premises, if any, located within the Air Rights lease by Landlord to Adcor Realty Corporation (predecessor to J.C. Penney Company, Inc.) by Indenture of Lease, dated December 28, 1970 (hereinafter referred to as the "Adcor Lease"), said Air Rights being that portion of the Shopping Center as sketched on Exhibit 1 which lies above an elevation of 1,038.50 feet, United States Geodetic Survey, being also the elevation which is fifteen feet (15') above the finished floor level of the enclosed mall.

The demise and lease of the Leased Premises includes the easements and rights granted to and reserved by Landlord subject, however, to the easements and rights granted to Adcor Realty Corporation, all of which easements and rights were granted and reserved pursuant to Subsection 6(b) of the Adcor Lease captioned "Construction and Air Rights Easements," the pertinent portions of which have been reproduced and are incorporated below as subparagraph (1) to this Rider E - Section 12.26 and made a part hereof to the extent that the same shall be applicable to the Leased Premises and the construction and use thereof by Tenant.

The exterior walls, the roof of the Leased Premises consisting of the second floor slab of the store to be constructed pursuant to the Adcor Lease and the land beneath said Leased Premises and the aforementioned Air Rights above said Leased Premises are not demised hereunder, and the use thereof, together with the right to place, maintain, repair and replace utility lines, pipes, tunneling and the like in, under, over, upon or through the Leased Premises as may be reasonably necessary or advisable for the servicing of the Leased Premises or other portions of the Shopping Center of which the Leased Premises are a part, are expressly reserved unto the Landlord, provided that such utility lines, pipes, tunneling and the like shall be located so as not to unreasonably effect the tenability of the Leased Premises and that repairs or maintenance thereof shall be done in a manner so as to inconvenience Tenant and Tenant's use of the Leased Premises as little as, under the circumstances, is reasonably possible.

(1) Set forth below are pertinent portions of that certain Indenture of Lease, dated December 28, 1970 between Landlord and Adcor Realty Corporation as assigned to J.C. Penney Company, Inc. (Adcor Lease), the terms of which materially effect the rights and obligations of Landlord and Tenant herein with respect to the construction, use, occupancy and repair of the Leased Premises:

As used in the Adcor Lease and in this Rider E - Section 12.26, the following terms have the meanings hereinafter specified:

"Landlord" shall mean Lexington Joint Venture, a partnership;

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"Tenant" shall mean J.C. Penney Company, Inc., a Delaware corporation, its successors and assigns (successor to Adco Realty Corporation);

"Landlord Parcel" shall mean the Developer Parcel, including the Leased Premises, as more fully described on Exhibit A to this Lease;

"Developer Parcel" shall mean the parcel(s) within the Shopping Center as the parcels may be changed from time to time by addition thereto or subtraction therefrom, in which, at any time in question, Landlord has an ownership or a possessory interest;

"demised land" shall mean the portion of the Developer Parcel designated "Lease Parcel" and the Air Rights as described in Addendum No. 2 of this Lease, all as shown on Exhibit A hereto;

"Tenant store" shall mean the retail department store constructed upon the demised land by Adco Realty Corporation, presently occupied by J.C. Penney Company, Inc.

Section 6(b) of the Adco Lease provides, in part, as follows:

(b) Construction and Air Rights Easements.

(i) Landlord hereby grants to Tenant and Tenant hereby grants to Landlord the non-exclusive right, privilege and easement in, to, over, under and across the Landlord Parcel and the demised land, respectively, to construct, install, use, maintain, repair and replace such underground utility lines (hereinafter called "Utilities"), footings, foundations, supports and other similar appurtenances to the building improvements of the respective grantees (hereinafter called "Building Supports") as may reasonably be required for the construction, maintenance and operation of the Tenant store, as respects Tenant, and of the buildings and improvements to be erected on the Landlord Parcel, as respects Landlord, subject to the right of prior approval (which approval shall not be unreasonably withheld) of the plans showing the location of the Utilities and Building Supports by the grantor of the easements therefor.

(ii) Landlord hereby grants to Tenant and Tenant hereby grants to Landlord the right, privilege and easement over the Landlord Parcel and demised land, respectively, to construct, install, use, maintain, repair and replace such roof and building overhangs, entrance arches, awnings, signs, lighting and other similar appurtenances to the building improvements of the respective grantees (hereinafter called "Building Projections") as may reasonably be required for the construction, maintenance and operation of the Tenant store, as respects Tenant, and of the buildings and improvements to be erected on the Landlord Parcel, as respects Landlord, subject to the right of prior approval (which approval shall not be unreasonably withheld) of the plans showing the location of the Building Projections by the grantor of the easements therefor and further subject to the restriction that any such Building Projections shall not exceed one and one-half feet (1 1/2'), except for the Building Projection to be located at the northwest corner of the Air Rights adjoining the cross-mall and consisting of a masonry pilaster, which Building Projection shall not exceed three and one-half feet (3 1/2').

(iii) Tenant hereby grants to Landlord and all those claiming through or under Landlord the right, privilege and easement to construct, install, use, maintain, repair and replace HVAC equipment on the roof of the Tenant store and necessary duct shaft and pipe chases through that portion of the Tenant store located within the Air Rights for the purpose of serving the buildings and improvements constructed during the term of this lease on that portion of the Landlord Parcel which is beneath that portion of the second floor of the Tenant store constructed within the Air Rights; provided, however, that Tenant shall have the right of prior approval of the plans showing the location of such HVAC equipment, duct shafts and pipe chases, which approval shall not be unreasonably withheld. The Landlord hereby expressly agrees to repair, at its sole expense, any damage to the Tenant store caused by the Landlord in installing such HVAC equipment on the roof of the Tenant store, and the Landlord hereby expressly agrees to maintain and repair or cause to be maintained and repaired such HVAC equipment and to indemnify and hold the Tenant harmless from all claims, liability, cost and expense, whether in connection with personal injury, property damage or otherwise, which result or arise out of the installation or maintenance and repair of such HVAC equipment.

(iv) Tenant hereby grants to Landlord the right, privilege and easement to attach the enclosed mall to the easterly and northerly walls of the Tenant store, and each party hereto hereby grants to the other the right, privilege and easement to attach to and use as a common wall, in common with the grantor, any perimeter walls which either party may erect on their respective premises; provided, however, that in each instance (a) such attachment shall not unreasonably contribute to any structural loading on the building improvements constructed by the grantor, (b) the matter of flashing shall be mutually satisfactory to the parties with the object of minimizing the possibility of future leaks along the line of attachment and (c) the grantor shall have the right of prior approval of the plans covering such attachment, which approval shall not be unreasonably withheld. Tenant hereby grants to Landlord and all those claiming through or under Landlord the further right, privilege and easement within that portion of the Air Rights which is beneath the under side of the second floor framing of the Tenant store for the purpose of enabling Landlord

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to construct, install, use, maintain, repair and replace the store front framing, together with finish materials and signs thereon, interior mall finishes and necessary framing for same, ceilings, light fixtures, sprinkler systems and HVAC ventilators, ducts, and piping and other equipment appurtenant to the foregoing, including the right to attach the foregoing to the under side of the second floor framing of the Tenant store, for the construction, maintenance and operation of buildings and improvements constructed during the term of this Lease on that portion of the Landlord Parcel which is beneath that portion of the Tenant store constructed within the Air Rights. Any such attachment shall be without any obligation by the grantee to pay the grantor any amount for the grantee so to attach; and the grantee hereby expressly agrees to repair or cause to be repaired, at its sole expense, any damage to the building improvements of the grantor caused by the grantee in making such attachment, and Landlord and Tenant, as the case may be, in its capacity as grantee hereby expressly agrees to maintain and repair such attachment and to indemnify and hold the grantor harmless from all claims, liability, cost and expense, whether in connection with personal injury, property damage or otherwise, which result or arise out of the making or maintenance and repair of such attachment.

(v) Landlord hereby grants to Tenant the right, privilege and easement to construct, install, use, maintain, repair and replace foundations and columns within those portions of the Landlord Parcel shown cross-hatched and highlighted on Exhibit A hereto for the purpose of supporting that portion of the Tenant store constructed within the Air Rights, and the Tenant hereby expressly agrees to repair, at its sole expense, any damage to the buildings and improvements of the Landlord caused by the Tenant in constructing, installing, using, maintaining, repairing and replacing such foundations and columns, and the Tenant further agrees to maintain and repair such foundations and columns and to indemnify and hold Landlord harmless from all claims, liability, cost and expense, whether in connection with personal injury, property damage or otherwise, which result or arise out of the construction, installation, use, maintenance, repair and replacement of such foundations and columns.

(vi) Each of the construction and Air Rights easements granted pursuant to this Subsection 6(b) shall survive the total or partial destruction of the subject matter of the easement and/or the servient tenement of the easement grant; provided, however, nothing contained in this Subsection 6(b) shall obligate Landlord or Tenant to rebuild or restore any improvements constructed by Landlord or Tenant other than as required by Section 13.

(vii) Each of the parties hereto hereby grants to the other party and to all others claiming through or under it the right to enter upon the premises of the other party for the purpose of making such repairs to the improvements of the other party heretofore referred to in connection with the construction and Air Rights easements granted pursuant to this Subsection 6(b) to the extent necessary for the purpose of preserving the building improvements of the party making such repairs, and the other party agrees to reimburse it for the reasonable cost of such repairs; provided, however, that neither party or any others claiming through or under it shall exercise the foregoing right to enter and make repairs upon the premises of the other unless such other party fails to make such repairs within a reasonable period after receipt of notice specifying the nature of the required repairs.

(viii) Each party hereto further agrees, upon receipt of request from the other party, to execute such additional instruments as may be necessary or desirable to evidence the easements granted pursuant to this Subsection 6(b).

F. ~~Intentionally deleted, IN THE EVENT (AND ONLY IN SUCH EVENT) THE LEASED PREMISES ARE LOCATED IN ANY OF SPACES #A10 THROUGH #A16 AND FOOD COURT SPACES #1 THROUGH #56; Exhibit B - Section 12 of the Lease is hereby supplemented by the addition of the following:~~

~~"Tenant recognizes that in completing any construction of the Leased Premises that it will be necessary to enter upon and make use of certain portions of the Air Rights referred to in Rider E - Section 12.26 hereof and the improvements to be constructed thereon. Tenant hereby agrees to indemnify Landlord against and to hold Landlord harmless from any and all claims, losses, costs or damages which may result by reason of Tenant's entry into and construction within the Air Rights or improvements constructed therein."~~

G. The following is hereby added as Section 12.27 of the Lease:

Section 12.27. Contingency. Landlord and Tenant agree that this Lease is expressly conditioned upon Landlord's obtaining legal possession of Space #C-311 (hereinafter "Required Space") as part of the Leased Premises. In the event Landlord is unable to obtain legal possession of the Required Space and tender possession of the Leased Premises to Tenant in a reasonable period of time, in Landlord's sole and absolute discretion, Landlord shall have the right to terminate this Lease by giving written notice thereof to Tenant and this Lease shall be null and void *ab initio*. In the event Landlord is unable to obtain legal possession of the Required Space and tender possession of the Leased Premises to Tenant within three (3) years from the date of this Lease, then Tenant shall have the right to terminate this Lease by giving written notice thereof to Landlord and this Lease shall become null and void *ab initio*. Once Landlord has tendered possession of the Leased Premises to Tenant, Tenant shall no longer have the right to cancel and terminate this Lease pursuant to this Section.

The Speaquest Group, LLC
d/b/a Jamba Juice
Space C-311 - 605 sq. ft.

EXHIBIT "A"

**EXHIBIT B
CONSTRUCTION**

Section 1.1 Condition of Premises. (a) Tenant acknowledges that it has examined and inspected the Leased Premises, is familiar with the physical condition thereof, and finds same suitable for Tenant's purposes. Tenant further acknowledges (i) that Landlord has not made and does not hereby make any representations regarding the physical condition of the Leased Premises or the Shopping Center, and (ii) that there are no warranties, either express or implied, regarding the condition of the Leased Premises and/or the Shopping Center. Landlord shall have no responsibility for (a) the removal, modifications, or upgrading of any existing construction or equipment to accommodate Tenant's occupancy of the Leased Premises, (b) the undertaking of any additional improvements or alterations, or (c) the installation of any equipment. Accordingly, Tenant hereby accepts the Leased Premises in their "AS IS" condition.

(b) For the purpose of construing Landlord's obligations under Sections 8.1 and 8.2 of the Lease, Landlord's work referred to in said Sections shall be deemed to refer to the Leased Premises in the condition existing at the time of tender of possession, together with any additional items of Landlord's work specifically enumerated in this Exhibit.

Section 1.2 Tenant's Plans and Specifications. (a) In the event Tenant plans to improve, renovate or alter the Leased Premises, Tenant shall, within fifteen (15) days following the execution of this Lease or earlier if required to meet the commencement date of the Lease, prepare at Tenant's sole cost and present to Landlord complete plans and specifications for work to be done to alter the Leased Premises in accordance with Landlord's design, criteria and Tenant's requirements. Failure by Tenant to submit its plans and specifications as herein required shall constitute an event of default under this Lease.

(b) With regard to Tenant's plans and specifications Landlord may either: (i) evidence its approval by endorsement to that effect by signature or initials on one (1) set of said plans and specifications and the return of such signed or initialed set to Tenant (whereupon such approved preliminary plans and specifications shall then constitute the final plans and specifications), or (ii) refuse such approval if Landlord shall determine that the same: (A) do not conform to the Landlord's design criteria and the standards of design, motif and decor established or adopted by Landlord and/or other tenants in the Shopping Center; and/or (B) would subject Landlord to any additional cost, expense or liability or the Leased Premises to any violation, fine, or penalty; and/or (C) would in any way adversely affect the reputation, character and/or nature of the Shopping Center; and/or (D) would provide for or require any installation or work which is or might be unlawful or create an unsound or dangerous condition or adversely affect the structural soundness of the Leased Premises and/or the building of which the Leased Premises are a part; and/or (E) interfere with or abridge the use and enjoyment of any adjoining space in the building in which the Leased Premises are located. If Landlord refuses approval, Landlord shall advise Tenant of those revisions or corrections which Landlord requires, and Tenant shall within ten (10) days thereafter submit revised plans and specifications to Landlord for its approval in accordance with this Section. In the event Tenant does not comply with the foregoing requirements, then Landlord may place Tenant in default.

(c) Tenant shall at Tenant's cost and expense obtain all necessary permits and approvals from any governmental authority or agency having jurisdiction which are required for the performance of the work shown on the approved plans and specifications and Tenant's occupancy of the Leased Premises. Tenant shall obtain all necessary permits, approvals, meters and hook-ups from the appropriate utility companies, and Tenant shall pay all fees, charges and deposits required in connection therewith.

(d) Tenant's plans and specifications shall be prepared and sealed by an architect or engineer duly licensed in the state in which the Shopping Center is located. If the drawings for Tenant's work are not prepared in accordance with the foregoing, Landlord shall have the right to cause the project architect to redraft, sign and seal Tenant's plans at Tenant's cost and expense.

(e) No construction work shall be commenced by Tenant until Tenant receives prior written approval of the final plans and specifications from Landlord. Approval of Tenant's plans and specifications by Landlord or Landlord's architect does not relieve Tenant of the responsibility to comply with the requirements of applicable codes and regulations. All changes after final approval are subject to Landlord's prior written approval. After approval by Landlord of Tenant's plans and specifications, Tenant shall pay for any additional architectural or construction costs incurred by Landlord in reviewing and/or making requested changes, substitutions or eliminations in such approved plans and specifications requested by Tenant. Tenant shall pay for any architectural costs incurred by Landlord in connection with any subsequent remodeling, alteration, repair or rebuilding of the Leased Premises. Landlord's plan reviewers are not authorized to obligate Landlord beyond the Lease requirements.

(f) Nothing contained in this Lease or this Exhibit shall be deemed or construed in any way as constituting the consent or request of Landlord, express or implied, by inference or otherwise, to any General Contractor, subcontractor, laborer, mechanic or materialman, for the performance of any labor or the furnishing of any materials for any specific improvement, alteration or repair of the Leased Premises or any part thereof nor as giving Tenant a right, power or authority, as otherwise provided in this Lease or this Exhibit to contract for or permit the rendering of any services or the furnishing of any materials that would give rise to the filing of any mechanics' or materialmen's liens or claims of liens against the Leased Premises, Tenant's interest therein, or the Shopping Center.

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Section 1.3 Sign Criteria:

(a) Signs are to be furnished and installed by Tenant and approved by Landlord's architect. Tenant's sign contractor or architect must submit a colored rendering of Tenant's sign prior to approval. Tenant's sign shall be located within the limits of Tenant's storefront and shall not project more than 8" beyond the storefront if the Shopping Center is a mall, and not more than 12" beyond the storefront if the Shopping Center is a strip center. Sign is limited to Tenant's trade name only ("d/b/a"). The following sign requirements will be reviewed in conjunction with the Shopping Center's design criteria:

(b) Sign Size:

- | | | | |
|------|--------------------------------|----------------|------------------|
| (i) | Malls: | | |
| (A) | Up to 30' storefront: | Capitals - 18" | Lower case - 12" |
| (B) | 30'-1" and greater storefront: | Capitals - 24" | Lower case - 18" |
| (ii) | Strip Centers: | | |
| (A) | Up to 30' storefront: | Capitals - 24" | Lower case - 18" |
| (B) | 30'-1" and greater storefront: | Capitals - 30" | Lower case - 24" |

(c) The length of Tenant's sign shall be limited to 70% of Tenant's storefront.

(d) All conduit, wiring for and connection to sign shall be furnished by Tenant.

(e) No flashing signs or exposed neon tubing permitted.

(f) In a mall no outdoor signs permitted without Landlord's prior written approval.

(g) All signs shall be composed of individually lighted, separate letters; provided, however, in a strip center an internally illuminated aluminum box, finished on all exposed faces, with sign letters individually cut into the face panel, and with Plexiglas letters may be permitted by Landlord.

(h) In a strip center, under-canopy sign design shall be as designated by Landlord.

(i) No exterior signs shall be permitted without Landlord's prior written approval.

(j) For spaces fronting on an enclosed mall, Tenant shall furnish and install in a convenient location above the sign panel specified above one (1) 110-volt electrical outlet for use with seasonal promotions.

Section 1.4 Construction by Tenant. (a) Tenant shall perform at Tenant's sole cost and expense all construction and demolition work required to complete the Leased Premises in accordance with the Tenant's plans and specifications as approved by Landlord and the Shopping Center's tenant construction requirements. Tenant is responsible for all removals, modifications, and upgrades to any existing construction or equipment to accommodate Tenant's work and occupancy of the Leased Premises. No construction shall be commenced by Tenant prior to Tenant's compliance with the requirements of this Exhibit and Landlord's written authorization and consent to the commencement of work in the Leased Premises. All construction work shall comply with applicable building, fire and underwriter's codes and shall be performed in a workmanlike manner. If Tenant elects or the Landlord does not permit the reuse of existing improvements and equipment, the Tenant shall remove such improvements and repair the remaining construction to its original condition, or as may be required by the Landlord.

(b) (i) Anything in this Exhibit to the contrary notwithstanding, all roof penetrations and roof restoration as well as the installation of all structural supports shall be performed at Tenant's expense by the roofing contractor who performed the roofing work upon the initial construction of the Shopping Center or by such roofing contractor as Landlord may designate. In addition, any tenant producing grease exhaust will install a Landlord approved grease protection system on the Shopping Center roof. Upon completion of said roofing work the roofing contractor shall furnish a letter addressed to Landlord stating that the work done in accordance with Tenant's approved plans and specifications has not affected the roof bond or guaranty for the Shopping Center roof.

(ii) Anything in this Exhibit to the contrary notwithstanding, all upper level tenants whose use includes the preparation and/or sale of food must install a waterproof membrane under its entire floor and above the concrete slab, and any penetrations of such membrane shall be sealed tight.

(iii) Anything in this Exhibit to the contrary notwithstanding, all entryway floor tiles to the Leased Premises must match the existing common area floor tiles immediately adjacent to the Leased Premises.

FAYETTE MALL

(c) Tenant's General Contractor (the "General Contractor") shall be subject to Landlord's prior written approval, which approval may be withheld in Landlord's sole discretion. Tenant and Tenant's General Contractor shall comply with the requirements set forth in this subsection (c). Tenant and Tenant's General Contractor shall enter into a construction contract in the form of the current edition of Document A101 or A107 of The American Institute of Architects in which the General Contractor agrees to perform Tenant's work required hereunder. Said contract shall be subject to Landlord's prior written approval. Said contract shall provide, among other things, as follows:

(i) That notwithstanding anything contained in the Contract Documents to the contrary, the General Contractor will perform the work and furnish the materials required therefor on the sole credit of Tenant; that no lien for labor or materials will be filed or claimed by the General Contractor against the Shopping Center premises of which the Leased Premises are a part or against the Leased Premises; that the General Contractor will discharge any such lien filed or claims by any person or entity that furnishes labor or materials to the Leased Premises; and that the General Contractor will indemnify and save Landlord harmless from any and all costs and expenses, including reasonable attorney's fees, suffered or incurred as a result of any such lien that may be filed or claimed in connection with or arising out of the work;

(ii) That the General Contractor shall furnish the following satisfactory in form and substance to Landlord prior to commencement of the work: (A) a payment bond and a performance bond in the amount of the contract issued by a bonding company acceptable to Landlord licensed in the state where the Shopping Center is located wherein Landlord is named a co-obligee, or a guaranty of such construction in the form and executed by such persons as Landlord may require; (B) a lien waiver executed by the General Contractor, lien waivers executed by all subcontractors, and lien waivers executed by all materialmen who will furnish materials in excess of Two Thousand Dollars (\$2,000.00) in the aggregate; and (C) a letter executed by the General Contractor which provides in substance that the General Contractor will not permit its worker and subcontractors to create any disharmony or interfere with any worker, general contractors or subcontractors working in the Shopping Center, that either Landlord or Tenant shall have the right to suspend work under said contract on twenty-four (24) hours notice until any such condition ceases; and that either Landlord or Tenant shall have the right to terminate said contract without liability if any such condition continues for thirty (30) days;

(iii) That the General Contractor shall furnish Tenant and Landlord with certificates of insurance setting forth the following coverages: (A) worker's compensation insurance with limits of not less than Five Hundred Thousand Dollars (\$500,000.00); (B) bodily injury, including death, with limits of \$500,000.00 per person and \$2,000,000.00 per occurrence and \$4,000,000.00 aggregate; (C) property damage, with limits of \$2,000,000.00 per occurrence and \$4,000,000.00 aggregate; (D) motor vehicle liability and property damage in the amounts set forth in (B) and (C); and (E) Builder's Risk Insurance in the full amount of the Replacement Cost on an Agreed Amount Basis;

(iv) That the General Contractor shall be responsible from the time of its execution of the agreement or from the time of the beginning of the first work, whichever shall be earlier, for all injury or damage of any kind resulting from the work to persons or property. In addition to the liability imposed upon the General Contractor on account of personal injury (including death) or property damage suffered through the General Contractor's negligence, which liability is not impaired or otherwise affected hereby, the General Contractor shall assume the obligation to save Landlord harmless and to indemnify Landlord from every expense, liability, or payment arising out of or through injury (including death) to any person or persons or damage to property of any person at any place in which work is located arising out of or suffered through any act or omission of the General Contractor or any Subcontractor, or any one either (A) directly or indirectly employed by or (B) under the supervision of any of them in the prosecution of the work; and

(v) That the General Contractor shall at all times keep the Leased Premises and adjacent areas free from accumulation of waste materials or rubbish caused by its operations. The General Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the work and shall take all necessary precautions for the safety of, and shall provide all necessary protection to prevent damage, injury or loss to (A) all employees on the work and other persons who may be affected thereby, including without limitation licensees and invitees of the Shopping Center and other tenants in the Shopping Center; (B) all the work and other materials and equipment to be incorporated therein; and (C) other property at the site or adjacent thereto. Such precautions shall include, but shall not be limited to, the furnishing of guard rails, barricades and the securing of the Leased Premises. Landlord shall have the right, but not the obligation, to erect construction barricades on behalf of Tenant at Tenant's sole cost and expense, and the cost of such barricades shall be negotiated between the Shopping Center manager and the General Contractor.

FAYETTE MALL

GUARANTY OF LEASE

In consideration of the foregoing Lease between FAYETTE MALL, SPE, LLC, a Delaware limited liability company as Landlord, and THE SPEAQUESS GROUP, LLC, a KY limited liability company, d/b/a JAMBA JUICE, as Tenant and in consideration of other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, and to induce Landlord to enter into said Lease, the undersigned, MARY SPEAKER, jointly and severally and JOHN SPEAKER, jointly and severally, if there be more than one (collectively, "Guarantor"), covenants and agrees as follows:

1. Guarantor hereby irrevocably, unconditionally and absolutely guarantees to Landlord the prompt and full payment of rent and all other sums due to Landlord under said Lease and the prompt and complete performance of all covenants contained in said Lease on the Tenant's (and any successors and assigns of Tenant, hereinafter collectively "Tenant") part to be performed. Guarantor hereby agrees that if pursuant to any order of a bankruptcy court Landlord is required to refund, disgorge or repay any amounts paid to Landlord due to, inter alia, the legal theory of preference, an amount equal to such funds refunded, disgorged or repaid shall be included in Guarantor's obligations to Landlord and Guarantor shall be responsible for the payment of any such amount to Landlord. Guarantor agrees to indemnify and hold Landlord harmless from any loss, costs or damages arising out of Tenant's failure to pay the aforesaid rent and other sums and/or the Tenant's failure to perform any of the aforesaid covenants.
2. Guarantor waives diligence, demand for payment or performance, extension of time of payment or performance, notice of acceptance of this Guaranty, notice of nonpayment, nonperformance and indulgences, and notices of every kind and consents to any and all forbearances and extensions of the time of payment and performance, and to any and all modifications in the terms, covenants and conditions of said Lease hereafter made or granted and to all extensions and assignments thereof. Guarantor waives all right of subrogation whatsoever with respect to any collateral securing the aforesaid obligations.
3. Guarantor agrees that its obligations hereunder are primary and agrees that this Guaranty may be enforced by Landlord without first resorting to or exhausting any other remedy, security or collateral; provided, however, that nothing herein contained shall prevent Landlord from suing on the aforesaid obligations with or without making the Guarantor a party to the suit or exercising any other rights under said Lease, and if such suit or any other remedy is availed of only the net proceeds therefrom, after deduction of all charges and expenses of every kind and nature whatsoever, shall be applied in reduction of the amount due on the aforesaid obligations. No action brought under this Guaranty and no recovery in pursuance thereof shall be a bar or defense to any further action which may be brought under this Guaranty by reason of any further default(s) hereunder or in the performance and observance of the terms, covenants and conditions of said Lease. Guarantor agrees that a release or settlement with one or more of the persons or entities comprising Guarantor or Tenant shall not release any other Guarantor, and all such remaining Guarantors shall remain jointly and severally liable as though they were the only persons or entities executing this Guaranty. Guarantor hereby submits to personal jurisdiction in the state where the Leased Premises are located for the enforcement of this Guaranty, and waives any and all personal rights under the laws of any state to object to jurisdiction within the state where the Leased Premises are located for the purposes of litigation to enforce this Guaranty. In the event such litigation is commenced, Guarantor agrees that service of process may be made and personal jurisdiction over Guarantor obtained by serving a copy of the summons and complaint upon the Secretary of State of the state where the Leased Premises are located, who is hereby appointed Guarantor's agent for service of process. With respect to any litigation arising out of said Lease and/or this Guaranty of Lease, Guarantor hereby expressly waives the right to a trial by jury and the right to file any counterclaim or crossclaim against Landlord.
4. Guarantor agrees that the Guarantor's obligation to make payment in accordance with the terms of this Guaranty shall not be impaired, modified, changed, released or limited in any manner whatsoever by any impairment, modification, change, release or limitation of the liability of Tenant or its estate in bankruptcy (including without limitation any rejection of the Lease by Tenant or by any Trustee or Receiver in bankruptcy) resulting from the operation of any present or future provision of the National Bankruptcy Act, other similar statute, or from the decision of any court. The liability of Guarantor shall not be affected by any repossession of the Leased Premises by Landlord.
5. Guarantor agrees that in the event this Guaranty is placed in the hands of an attorney for enforcement, Guarantor shall reimburse Landlord for all expenses incurred, including expenses and reasonable attorney's fees incurred through the trial courts and all appeals.
6. Guarantor agrees that this Guaranty shall inure to the benefit of and may be enforced by Landlord, its successors and assigns and any mortgage(s) of the Leased Premises, and shall be binding and enforceable against the Guarantor and the Guarantor's legal representatives, successors and assigns.

FAYETTE MALL

IN WITNESS WHEREOF, the Guarantor has executed this Guaranty this 18 day of January, 20 12.

ADDRESS:

207 Crooked Tree Court
Naperville, Illinois 60563

GUARANTOR:

Mary Speaker
MARY SPEAKER, jointly and severally
Social Security Number 391-54-6957

WITNESS:

Monica J. Johnson

DATE: 1-18-2011

ADDRESS:

207 Crooked Tree Court
Naperville, Illinois 60563

GUARANTOR:

John Speaker
JOHN SPEAKER, jointly and severally
Social Security Number 391-58-4869

WITNESS:

Jennifer Anderson

DATE: 1-19-2011



NOTARY COMMISSION
EXPIRES 11/15/15
NOTARY ID 466035