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U.S. BANKRUPTCY COURT  
ALBUQUERQUE, N.M.

IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

IN RE: §  
§  
FURR'S SUPERMARKETS, INC., § Case No. 11-01-10779-SA  
a Delaware Corporation, §  
§  
Debtor. §

**LIMITED OBJECTION BY ADRIAN BACA TO MOTION TO  
REJECT CERTAIN UNEXPIRED REAL ESTATE LEASES, SUBLEASES,  
AND EQUIPMENT LEASES & TO COMPEL REJECTION OF  
CERTAIN EXECUTORY CONTRACTS**

Comes now Adrian Baca ("*Baca*") a Lessor, Licensor and party-in-interest in the above Chapter 11 case through his attorneys of record Krafzur Gordon Mott P.C., and files his *Objection to Motion to Reject Certain Unexpired Real Estate Leases, Subleases, & Equipment Leases and To Compel Rejection of Certain Executory Contracts* (the "*Objection*"), and in support thereof, would respectfully show the Court as follows:

**I. Factual & Procedural Background**

1. *La Feria* is the lessor under a *Supermarket Lease* dated January 11, 1999 (the "*Lease*") for non-residential real property from which the Debtor operated Store #954 located at 319 S. Main, in Anthony, Texas (the "*Anthony Store*"). A copy of the *Lease* is attached to this *Objection* as Exhibit "A" and incorporated herein for all purposes. As of the date of this *Objection*, Furr's had listed the *Lease* as one it would reject under Category 4 of the *Notice of Proposed Cure Amounts, Objection Deadline and Final Hearing* (i.e., properties for which a *Rejection Notice* will be issued). The *Anthony Store* was closed by Furr's on August 16, 2001.

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2. As part and parcel of the *Lease* transaction, Baca and Furr's executed the following:
- A. *Trademark Licensing Agreement* dated January 11, 1999 (the "*Licensing Agreement*") for the "*La Feria*" word mark and logo. A copy of the *Licensing Agreement* is attached as Exhibit "B" and incorporated herein for all purposes. The *Licensing Agreement* recites in relevant part:

- A. *Licensor [Baca] owns certain common law and Federal trademarks and/or applications therefor identified in Exhibit A to this Agreement (the "Trademarks").*
- B. *Licensee [Furr's] desires to use the Trademarks in the operation of supermarkets in the States of Texas and New Mexico using the La Feria name...*
- C. *Licensor is willing to grant to Licensee the exclusive right to use the Trademarks in the operation of the Supermarkets subject to the terms and conditions of this Agreement, and Licensee is willing to accept and assume such rights and obligations.*

The *Licensing Agreement* specifically provides at **Article V Trademark Ownership** that -

*Licensee acknowledges Licensor's exclusive right, title, and interest in and to all Trademarks, including all United States or foreign patents, trademarks and copyrights or applications therefor, all trade secrets, and any and all other proprietary rights related to the Trademarks, whether now existing or hereafter arising. Licensee shall not at any time knowingly do or cause to be done, or fail to do or cause to be done, any act or thing, directly or indirectly, contesting or in any way impairing Licensor's right, title, or interest in any Trademark. Every use of any Trademark by Licensee shall inure to the benefit of Licensor. Further, Licensee acknowledges and agrees that all improvements, new applications, alterations and enhancements to the Trademarks shall be the property of Licensor. Licensor shall indemnify Licensee and hold Licensee harmless from and against any infringement or alleged infringement action or proceeding brought against Licensee by a Third Party on account of Licensee's lawful use of the Trademark.*

Thus, the ownership of the *La Feria* trademark by Baca is undisputed. With regards to the duration of the *Licensing Agreement*, **Article VI Term & Termination** provides -

***Section 6.1. Term.** The term of this Agreement shall be for a period concurrent with the term (including all renewal terms) of that certain lease agreement of even date herewith (the "Lease Agreement") between Licensee and La Feria Park N Shop, Inc. relating to the store at 319 S. Main Street, Anthony, Texas (the "Anthony Location") [emphasis added]; provided, however, that Licensor shall have the right and option to terminate this Agreement upon written notice to Licensee if, during the term hereof, Licensee ceases to operate a Supermarket at the Anthony Location or defaults under the terms of such Lease Agreement such that the lessor terminates same, or Licensee or the lessor under such Lease Agreement otherwise terminates the Lease Agreement.*

B. *Non-Competition Agreement* dated January 11, 1999 (the "*Non-Compete Agreement*"). A copy of the *Non-Compete Agreement* is attached as Exhibit "C", and incorporated herein for all purposes. The *Non-Compete Agreement* provides in relevant part at Paragraph 2 -

*(a) **Agreement Not to Compete.** Each of the Selling Parties agrees that, after the date of this Agreement and for a period of three (3) years after the termination of Baca's employment by Buyer as an employee or consultant (the "Covenant Period"), he, or it (as the case may be), shall not, directly or indirectly, in any manner or capacity (e.g., as an advisor, principal, agent, partner, officer, director, stockholder, employee, member of any association or otherwise) engage in the Business within the geographic area described in Section 2(b) below except on behalf of Buyer as Buyer's employee or consultant. Notwithstanding anything herein to the contrary, this Agreement shall terminate and shall not bind or be enforceable against the Selling Parties if, during the Covenant Period, Buyer ceases to operate a supermarket at the Location or defaults under the terms of, or otherwise terminates, that certain lease agreement of even date herewith between Seller and Buyer relating to the Location [emphasis added].*

3. As of the date of the filing of this *Objection*, the Debtor has not filed a motion to reject either the Licensing or Non-Compete agreements.
4. As of the date of this *Limited Objection*, the Debtor was in postpetition default to Baca in the amount of approximately \$30,867.52, comprised of the following charges:

Charge	Amount	Comments
Postpetition CAM Charges	\$ 2,249.12	April through August 16, 2001 @ \$535.84 per month. Prorated for August.
Postpetition Property Taxes	\$12,568.50	February 9 through August 16, 2001.
Trademark Licensing Fees	\$16,050.00	Use of <i>La Feria</i> trademark at Furr's Stores #936, 944, 953, and 954.
<b>Total</b>	<b>\$30,867.62</b>	

5. Additionally, there are prepetition property taxes and rent due in the amount of approximately \$43,062.76. Because the *Lease* is to be rejected, and because the Chapter 11 Estate of the Debtor is insolvent (possibly even administratively), there is no probability that Mr. Baca will ever recoup these claims.

## **II. Applicable Authority**

6. Section 365(d) of the Bankruptcy Code provides in relevant part:
- (c) *Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.*
- (b) *(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee -*
- (A) *cures, or provides adequate assurance that the trustee will promptly cure, such default;*

- (B) *compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and*
- (C) *provides adequate assurance of future performance under such contract or lease.*
- (2) *In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.*
- (10) *The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.*

### **III. Relief Requested**

6. On August 20, 2001, Baca received the Debtor's *Motion to Reject Certain Unexpired Real Estate Leases, Subleases, and Equipment Leases* (the "*Motion to Reject*"). The *Motion to Reject* provides that the Debtor will reject the *Lease for Store #954* and surrender the property no later than August 31, 2001. Upon rejection, Baca intends to recommence supermarket operations at the *Anthony Store* under his *La Feria* banner.
7. However, the rejection of a lease for a recently operating supermarket creates issues which

need to be addressed immediately by the Debtor to avoid further economic loss to Baca and damage to the *Anthony Store*.

8. It is Baca's position that waiting until August 31, 2001 to take possession of the *Anthony Store* will cause him further economic harm. Every day that the supermarket property remains closed and in the control of Furr's causes not only loss of business to Baca, but also loss of goodwill to the *La Feria* mark. To permit the property to remain "dark" for any period of time adds greater injury to Baca. For example:

- When Baca sold his business to Furr's in January, 1999, Baca permitted Furr's to use his licenses and permits so that there would be no interruption of business and loss to Furr's. Though it would be difficult to require Furr's to allow another party to use its licenses and permits because of its status as a Debtor-in-Possession, Furr's should mitigate the harm it causes to Baca by surrendering the property to Baca immediately so that he can begin the licensing and permitting process, stocking inventory, and training employees.
- The *Anthony Store* is part of a "shopping center" and the *La Feria* supermarket served as the anchor tenant. Baca is at risk of losing two prospective tenants if the property remains vacant or closed for any period of time.
- A second shopping center owned by Baca adjacent to the *Anthony Store* is also suffering decreased business as customers are not frequenting the *Anthony Store* area. Customers are now being forced to drive miles further to an alternate supermarket location.

- Furr's bankruptcy and the closure of the *Anthony Store* has damaged the *La Feria* trademark as it is now associated with the failure of a business as opposed to the successful operation of a supermarket
9. Based on the foregoing, Baca would request that the Court compel the immediate surrender of the *Anthony Store* before August 31, 2001.
  10. Moreover, the *Licensing Agreement* cannot exist and operate independently of the store *Lease*. Baca further requests that upon rejection of the *Lease*, the Court also find that the *Trademark Licensing Agreement* has been rejected. Though §365 permits the Debtor until confirmation of a plan of reorganization for rejection or assumption of personal property contracts, the Debtor has made it clear that it has no prospect of reorganizing. Thus, the *Licensing Agreement* will never be assumed.
  11. Similarly, the *Non-Compete Agreement* cannot operate without the existence of the *Furr's* supermarket operations. Baca would further request that upon rejection of the *Lease* the Court also find that the *Non-Compete Agreement* has been rejected. Though §365 permits the Debtor until confirmation of a plan of reorganization for rejection or assumption of personal property contracts, the Debtor has made it clear that it has no prospect of reorganizing. Thus, the *Non-Compete Agreement* will also never be assumed.

**IV. Additional Relief Requested - Offer to Purchase  
Certain Equipment at Anthony Store**

12. To prevent additional harm to the *Anthony Store*, Baca is prepared to make an offer for the purchase of a significant portion of the equipment located in the *Anthony Store*. Baca has made several written and telephonic inquiries to Furr's officers to purchase the property

from the Estate but no response has been received. Baca feels it is imperative that he be given an opportunity to purchase certain equipment because it will i). minimize the downtime of the *Anthony Store* for reopening and thus mitigate his damages, and ii). since a portion of the equipment is attached to the building (i.e., refrigeration lines and compressors), its removal by Furr's will damage the building. Considering the Estate's insolvent nature, any subsequent claim for damages to the *Anthony Store* would be worthless.

13. Alternatively, if equipment is to be removed, Baca requests the right to be present to monitor removal to ensure the building is not damaged.
14. Similarly, Baca would request an opportunity to purchase any signage on the *Anthony Store* reflecting his *La Feria* trademark before it is removed and/or destroyed by Furr's or its agents, assigns, or successors, including the "electronic attraction board" located in front of the store. Considering that this signage has no value to any other third-party because the trademark contained on it is owned by Baca, it is in the Estate's best interests to recognize value from Baca's offer. Further, Furr's used the *La Feria* trademark at other store locations. Baca would request a similar opportunity to purchase the signage from those store locations.

WHEREFORE, PREMISES CONSIDERED, *Adrian Baca*, respectfully prays that the Court enter an order finding and compelling the Debtor to immediately:

- a). Reject the *Supermarket Lease* for the real property and improvements known as Furr's Store #954 located at 319 S. Main Street, Anthony, Texas and immediately surrender possession of the property to Adrian Baca;

- b). Reject all terms of the *Trademark Licensing Agreement*;
- c). Reject all terms of the *Non-Competition Agreement*;
- c). Be provided an opportunity to bid for the purchase of the equipment at Store #954, as well as any interior or exterior, passive or electronic signage containing the "La Feria" trademark;
- d). In the event the equipment located at the *Anthony Store* is removed by the Debtor, its agents, assigns or successors, allowing Adrian Baca to be present to monitor the removal of such equipment.

Respectfully submitted,

**KRAFSUR GORDON MOTT P.C.**

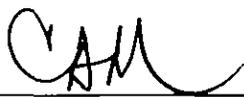
Attorneys for *Adrian Baca* and  
*La Feria Park N Shop, Inc.*

P.O. Box 1322

El Paso, Texas 79947-1322

(915) 545-1133

(915) 545-4433 (fax)

By:   
CARLOS A. MIRANDA  
Texas State Bar No. 14199582

**CERTIFICATE OF SERVICE**

This is to certify that on the 20<sup>th</sup> day of August, 2001, a true and correct copy of the foregoing *Objection* was mailed via first-class mail, facsimile & email to the parties listed below.



CARLOS A. MIRANDA

United States Trustee (first-class mail only):

Office of the U.S. Trustee  
P.O. Box 608  
Albuquerque, NM 87103

Debtor:

David Thuma, Esq.  
Jacobitz, Thuma & Walker, P.C.  
500 Marquette NW, Ste. 650  
Albuquerque, NM 87102

Richard Levin, Esq.  
Skadden, Arps, Slate, Meagher & Flom, L.L.P.  
300 South Grand Ave., Ste. 3400  
Los Angeles, California 90071-3144

SUPERMARKET LEASE

THIS SUPERMARKET LEASE (this "Lease"), dated this 11th day of January, 1999, is entered into by and between LA FERIA PARK N SHOP, INC., a Texas corporation, having an address at 500 Wild Willow, El Paso, Texas 79922 ("Lessor"), and FURR'S SUPERMARKETS, INC., a Delaware corporation having an address at P.O. Box 10267, Albuquerque, New Mexico 87184 ("Lessee").

WITNESSETH:

THAT Lessor hereby demises and leases to Lessee, and Lessee hereby hires and takes from Lessor, the real property situated, lying and being bounded and described in Exhibit "A" (the "Land"), and the Building (as defined in Article 1), together with all sidewalks in front of or adjoining the Building, (collectively the "Premises") and easements, rights, privileges and appurtenances thereto, including, without limitation, a non-exclusive easement in the Common Area for parking, access and ingress and egress over and on the Parking Facilities and curb cuts associated therewith.

TO HAVE AND TO HOLD the Premises unto Lessee, its permitted successors and assigns, for a term of twenty (20) years commencing on January 11, 1999 (the "Term Commencement Date"), and expiring on January 31, 2019, unless this Lease shall be extended or sooner terminate as hereinafter provided.

AND, Lessor and Lessee covenant and agree as follows:

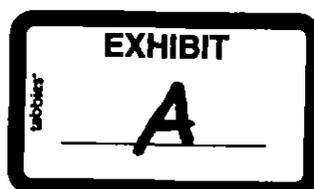
ARTICLE 1

CERTAIN DEFINITIONS

As used herein:

(a) "Affiliate" means, as to a party, any person or entity which controls, or is controlled by, or is under common control with, such party.

(b) "Basic Rent" means for the first five (5) Lease Years of the Lease, the amount of \$315,000.00 for each Lease Year (\$26,250.00 per month), as prorated in Section 2.2, net to the Lessor. The Basic Rent shall be adjusted after the end of every sixty (60) months (i.e., the first day of months 61, 121, 181, and thereafter on the first day of each renewal term under Article 23 hereof, (such sixty (60) month period being herein referred to as the "Adjustment Period") so that the Basic Rent for the new Adjustment Period will be increased by the increase in the Consumer Price Index as set forth in Subsection (i) or (ii) below.



(i) **CPI Adjustment.** The increase in the Basic Rent shall be calculated by multiplying the annual Basic Rent for the then expiring Adjustment Period by a fraction, the numerator of which is the index number for the first month of the new Adjustment Period hereunder in the column for "Food at Home" (unadjusted) in the table entitled "Consumer Price Index for all Urban Consumers" (index base: 1982-84 + 100), "U.S. City Average" published monthly by the Bureau of Labor Statistics of the U.S. Department of Labor in the *Monthly Labor Review* (said table herein referred to as the "CPI-U"), and the denominator of which is the CPI-U for the first full month of the then expiring Adjustment Period. If this number so calculated is greater than the Basic Rent amount for the same Adjustment Period, the adjusted rental as so calculated shall be the Basic Rent of the Premises effective as of the first day of such Adjustment Period. If the amount so calculated is less than the Basic Rent then in effect, the Basic Rent then in effect shall continue until the beginning of the next Adjustment Period. On the first day of the calendar month immediately following receipt of notice of such adjustment, Lessee shall commence payment of the new monthly Basic Rent specified in the notice, and shall also pay to Lessor, with respect to the month(s) already expired, the excess of the required monthly rentals specified in the notice over the monthly amounts actually paid by Lessee.

For example purposes only, assume the index number for the CPI-U on month 61 is 176.3 and the index number for the CPI-U for the first month of the Lease was 163.6. The CPI increase is calculated as follows:  $176.3 \div 163.6 = 1.08$  multiplied by \$315,000.00 = \$339,452.93.

(ii) **Changes in Index.** If the "CPI-U" is discontinued, the "Consumer Price Index for Urban Wage Earners and Clerical Workers" ("CPI-W") for "Food at Home," unadjusted (index base: 1982-83 = 100), "U.S. City Average," published monthly in the *Monthly Labor Review* by the Bureau of Labor Statistics of the United States Department of Labor shall be used for calculating the CPI adjustment increase stated above. If the "CPI-W" is discontinued, comparable statistics on the purchasing power of the consumer dollar published by the Bureau of Labor Statistics of the United States Department of Labor shall be used for making such computation. If the Bureau of Labor Statistics shall no longer maintain statistics on the purchasing power of the consumer dollar, comparable statistics published by a responsible financial periodical or recognized authority selected by the Lessor shall be used for making such computation. If the base year "(1982-84 = 100)" or other base year used in computing the CPI-U (or CPI-W, if applicable) is changed, the figures used in making the adjustment discussed above shall be changed accordingly for all future calculations, so that all increases in the "CPI-U" (or CPI-W, if applicable) are taken into account notwithstanding any such change in the base year.

(c) "**Building**" means the structures, improvements and fixtures now or hereafter erected or situated on the Land, the foundations and footings thereof and the appurtenances thereto, but excluding therefrom all trade fixtures, equipment, machinery, inventory, and articles of personal property title to which is vested in Lessee or a person other than Lessor.

(d) "Center" means the Shopping Center located in Anthony, Texas, more particularly described on Exhibit B.

(e) "Changes or Alterations" has the meaning specified in Section 10.1.

(f) "Condemnation Proceeds" means the award or awards for a Taking or a Constructive Total Taking, with the interest thereon, less the reasonable cost of the determination of the amount thereof.

(g) "Common Area" has the same meaning as defined in Section 14.1.

(h) "Constructive Total Taking" means a Taking of such scope that the untaken portion of the Premises or Parking Facilities is insufficient to permit the restoration of the existing Premises or Parking Facilities so as to constitute a complete, rentable building with parking facilities adequate therefor, capable of producing a proportionately fair and reasonable net annual income to Lessee after (a) the payment of (i) all Operating Expenses thereof (excluding depreciation or amortization of capital expenses), and (ii) the Basic Rent, as reduced to the extent provided in Article 9, and (b) performance of all covenants and agreements herein provided to be performed by Lessee.

(i) "Depository" means a bank or trust company designated by Lessor and Lessee in the State which has a capital and surplus account excess of \$100,000,000.

(j) "Deposited Sums" means all sums of the character referred to in Section 4.6 and Section 9.3.

(k) "Event of Default" has the meaning set forth in Article 17.

(l) "Existing Building" shall mean the existing building, other than the Premises located in the Center shown on Exhibit "B", including the sidewalks and covered area in front of or adjoining said building.

(m) "Expiration" means the expiration of the Term.

(n) "Expiration Date" means the date on which Expiration occurs.

(o) "Full Replacement Value" means the actual replacement cost of the Building (excluding foundation and excavation costs) without physical depreciation.

(p) "Impositions" means, subject to the qualifications set forth in Section 3.2, all real estate taxes, personal property taxes, assessments, water and sewer rates and charges, vault charges, license and permit fees and other governmental levies and charges general and special, ordinary and extraordinary, foreseen as well as unforeseen, of any kind or nature which are assessed, levied, confirmed, imposed or become a lien upon the Center, Premises or Common Area, as applicable, or which become payable, during the Term.

(q) "Lease Year" means each of the following: (i) the period beginning on the Term Commencement Date and ending on December 31 of the calendar year in which the Term

Commencement Date occurs, (ii) except for the Lease Year referred to in clause (iii) below, each successive calendar year thereafter beginning on January 1 in which occurs any part of the Term (and, in the case of a termination in accordance with Article 17, in which any part of the Term would have occurred but for such termination), and (iii) in the case of the calendar year in which the Expiration Date occurs, the period beginning January 1 of such year and ending on the Expiration Date.

(r) "Legal Requirements" means all laws and ordinances and the orders, rules, regulations, and requirements of all federal, state, and municipal governments and appropriate departments, commissions, boards and officers thereof, and the orders, rules, and regulations of the Board of Fire Underwriters which has jurisdiction (or any other body hereafter constituted exercising similar functions), which are applicable to the Premises and the Common Areas of the Center or to the use or manner of use thereof, including, without limitation, those pertaining to air and water quality, Hazardous Materials, waste disposal, air emissions, and other environmental, health, safety, and zoning matters, as well as all such laws regarding handicapped accessibility.

(s) "Lessee's Share" means the fraction, the numerator of which is the total leasable square footage of the Premises ( 40,774 square feet) and the denominator of which is the total amount of leaseable square footage in the Center ( 53,078 square feet ); provided, however, Lessee's Share shall not increase beyond 77 % by reason of any decrease in the amount of leasable square footage in the Center. Lessor and Lessee each acknowledge that the square footage shown for the Premises, Common Area and Center are approximations and are not based upon a calculation by a surveyor. Each party to this Lease consents to the calculation of leaseable square footage shown in this Subsection (s) and Subsection (t) below.

(t) "Lessor's Share" means 100% minus Lessee's Share (currently calculated as 23%).

(u) "Mortgage" means any mortgage, indenture of mortgage, or deed of trust now or hereafter placed upon the fee title to the Premises or the Center.

(v) "Notice" means any notice, demand, request, consent, approval, or other communication required or permitted to be given by Lessor or Lessee hereunder.

(w) "Operating Expenses" shall mean all costs and expenses incurred by Lessee or Lessor as the case may be (herein called "CAM Maintenance Party") with respect to the maintenance and operation of the Common Areas, including but not limited to: utilities (other than the utilities separately provided for in Section 14.6); maintenance, repair and replacement of all portions of the Common Areas, including without limitation, signs within the Common Area used by Lessee, painting, cleaning and graffiti removal, paving parking areas, roads and alleys, landscaping, line painting, utility lines, light poles, electrical systems (including electrical wiring to light poles); amounts paid to contractors and subcontractors for work or services performed in connection with the foregoing; security services, if any; trash collection, sweeping, and such other items as Lessor and Lessee from time to time reasonably agree to include as Operating Expenses. Operating Expenses do not include debt service under mortgages; leasing commissions; the cost of renovating space for other tenants of the Center; or items, other than paving or resurfacing costs, which are treated as capital expenditures for Federal Income Tax purposes. Paving and resurfacing costs included in Operating Expenses which are treated as capital expenditures for Federal Income Tax

purposes, shall be amortized on a straight line basis over a period equal to the lesser of the useful life thereof for Federal Income Tax purposes or ten (10) years.

(x) "Parking Facility" means those portions of the common area depicted for parking on Exhibit B.

(y) "Prime Rate" means the rate of interest announced by The Chase Manhattan Bank, N.A. from time to time as the prime rate" to be in effect at its principal office in New York, New York.

(z) "State" means the State in which the Land is situated.

(aa) "Taking" means a taking of all or any portion of the fee title to the Premises and Lessee's leasehold estate therein or any part of the Common Area, which would materially interfere with Lessee's use of the Premises as a Supermarket Facility, in condemnation proceedings by deed in lieu of condemnation, or by any right of eminent domain.

(bb) "Term" means the initial term of this Lease as set forth in the recital paragraphs and each successive renewal term effected pursuant to Article 23.

(cc) "Total Taking" means a Taking of all of the fee title to the Premises and Lessee's leasehold estate therein.

(dd) "Work" has the meaning set forth in Section 11.2.

## ARTICLE 2

### RENT

2.1. Lessee shall pay the Basic Rent and all additional rent and other charges due under this Lease to Lessor during the Term, without notice or demand therefor, in lawful money of the United States of America, or by check, at the address of Lessor specified above or at such place as Lessor may from time to time designate.

2.2. The Basic Rent shall be paid to Lessor in equal monthly installments in advance on the first day of each month. Basic Rent for the first month of the first Lease Year and the first month of every Lease Year when in Article 1(b) an adjustment in Basic Rent is made, shall be prorated and adjusted based upon the actual number of days in such month. Also, in the event that the Expiration Date does not coincide with the end of a month, Basic Rent for such month likewise shall be prorated and adjusted.

2.3. This Lease with respect to the Premises is and shall be deemed and construed to be a triple "net lease" and Lessee shall pay to Lessor the Basic Rent and all additional rent and other charges due under this Lease from Lessee, free of all charges, assessments, impositions, or deductions of any kind and without abatement, deduction, or set-off except as otherwise expressly provided in this Lease, and under no circumstances or conditions shall Lessor be expected or

required to make any payment of any kind with respect to the Premises or be under any other obligation or liability hereunder, with respect to the Premises. Except as otherwise expressly provided in Sections 8.2, 9.1 and 9.5, Lessee shall have no right to terminate this Lease, and the obligations of Lessee under this Lease shall not be affected for any reason, including, without limitation, the damage to or destruction of all or any part of the Premises by any cause, the prohibition, limitation or restriction of Lessee's use of the Premises, the interference with such use by any individual or entity, notwithstanding any present or future law to the contrary, it being the intention of Lessor and Lessee that the Basic Rent, and the other additional rent payable to or on behalf of Lessor shall continue to be payable in all events and the obligations of Lessee hereunder shall be unaffected.

#### 2.4 Operating Expenses.

(a) As soon as practical after the beginning of each Lease Year during the term hereof, the CAM Maintenance Party shall furnish the other party (the "Non-CAM Maintenance Party") a written statement estimating the Non-CAM Maintenance Party's share of the Operating Expenses, based upon the Lessor's Share or Lessee's Share of Operating Expenses, as applicable, (herein collectively the "Estimate"). The Non-CAM Maintenance Party shall pay the CAM Maintenance Party monthly one-twelfth (1/12) of the Estimate. In addition, for each Lease Year following the initial Lease Year in which the Term Commencement Date occurs, the Non-CAM Maintenance Party shall pay by the tenth (10th) day of the first month following receipt of the Estimate an amount equal to the number of months elapsed in the Lease Year prior to receipt of the Estimate statement times one-twelfth (1/12) of the Estimate, so as to bring said monthly payments current for the year. As soon as practical after the end of each Lease Year during the term hereof, the CAM Maintenance Party shall furnish the Non-CAM Maintenance Party a written statement showing total Operating Expenses by line item and Lessor's Share or Lessee's Share, as applicable, of the total Operating Expenses actually due for the Lease Year ended (the "Actual Expenses"). If the Actual Expenses exceed the Estimate, then the Non-CAM Maintenance Party shall pay within ten (10) days of receipt of said statement, the difference between the Actual Expenses and the Estimate. If the Estimate exceeds the Actual Expenses, then the CAM Maintenance Party shall refund the difference within ten (10) days of the date that such statement is furnished. The provisions of this Section shall apply for any partial Lease Year during which this Lease is effective, subject to a pro rata adjustment based upon the number of calendar months or portions thereof that this Lease is in effect. Upon reasonable notice to the CAM Maintenance Party, the Non-CAM Maintenance Party shall have the right to review all bills, charges and receipts relating to such expenses at CAM's Maintenance Party's business office during regular business hours.

(b) The CAM Maintenance Party shall not be in breach of its obligation to maintain the Common Area unless the CAM Maintenance Party has received written notice from the Non-CAM Maintenance Party specifying the requested maintenance. If the CAM Maintenance Party fails to commence the requested maintenance within thirty (30) days after receipt of notice from the Non-CAM Maintenance Party, the Non-CAM Maintenance Party shall give the CAM Maintenance Party a second maintenance notice allowing the CAM Maintenance Party five (5) additional days to commence performance of its maintenance obligations. In the event the CAM Maintenance Party does not commence performance of its maintenance obligations within the five (5) day period allowed in the second maintenance notice, the Non-CAM Maintenance Party shall have the right to perform such maintenance obligations on behalf of the CAM Maintenance Party

and to send the CAM Maintenance Party an invoice for the reasonable charges incurred in performing such maintenance.

(c) If Lessor is the Non-CAM Maintenance Party or if Lessor is the CAM Maintenance Party and Lessee performs maintenance obligations on behalf of Lessor following the procedure set out in Subsection 2.4(b) and Lessor does not pay the invoice for maintenance of the Common Area within thirty (30) days after receipt of an appropriate invoice from Lessee, accompanied by supporting documentation, Lessee may offset the amount owed under the invoice against the Basic Rent due under this Lease. Notwithstanding the foregoing, Lessee's offset shall not exceed twenty percent (20%) of the Basic Rent owing in any one month, with the balance so owing to Lessee, if any, to be subject to offset in subsequent months until Lessee is reimbursed in full plus applicable late charges and interest.

(d) If the Lessee is the Non-CAM Maintenance Party, Lessee's Share of the Operating Expenses shall be additional rent under this Lease and Lessor shall be entitled to exercise its remedies under Article 17 in the event of nonpayment. If Lessee is the CAM Maintenance Party and Lessee does not pay an invoice for maintenance of the Common Area performed by Lessor, following the procedure set out in Subsection 2.4(b), within thirty (30) days after receipt of an appropriate invoice from Lessor, accompanied by supporting documentation, Lessee's obligation to pay such invoice shall be additional rent under this Lease and Lessor shall be entitled to exercise its remedies under Article 17 in the event of nonpayment.

(e) If Lessor and Lessee dispute the validity of Lessor's Share of the Operating Expenses, the reasonableness of the charges to be reimbursed or the extent of the Common Area maintenance obligations, the dispute shall be determined by arbitration in the manner provided in Article 24.

2.5. Late Charges. Lessor and Lessee each agree to pay a late charge of four percent (4%) for each payment due under this Lease that remains unpaid for more than ten (10) days after written notice of delinquency to cover the administrative costs of processing such late payment. In addition to said late charge, any rental or other amount due from Lessee or Lessor under this Lease which is more than thirty (30) days delinquent shall bear interest from the date such rental or other amount was due at the lesser of the rate of the Prime Rate plus two (2) percentage points or the then maximum nonusurious rate under applicable law, (the lesser of said amounts being herein referred to as the "Maximum Rate.") In the event the late charge is ever deemed to be "interest" the amount of interest on past due amounts shall be automatically reduced so that the combination of said late charge and the interest on past due amounts, if any, does not exceed the Maximum Rate. Any amount collected which exceeds the Maximum Rate will be deemed credited to other amounts owed by Lessee or Lessor as the case may be under this Lease, and any remaining excess after such credit shall be refunded to the obligee. It is the intent of both Lessor and Lessee to at all times comply with the applicable law regarding the maximum nonusurious amount or rate of interest which may be contracted for, charged, taken, reserved or received by Lessor or Lessee, as the case may be.

## ARTICLE 3

### PAYMENT OF IMPOSITIONS, ETC.

3.1. Upon request by either party, Lessor and Lessee shall cooperate to have a separate Property Identification Number for tax purposes ("PID Number") assigned to the Premises and a separate PID Number for the Common Area. In the event Lessor and Lessee are successful in obtaining a separate PID Number for the entire Premises and a separate PID Number for the Common Area, Lessee shall be responsible for payment of 100% of the Impositions against the Premises and Lessee shall pay Lessee's Share of the Impositions upon the Common Area. In the event Lessor and Lessee are successful in obtaining a separate PID Number for the Building only, or if the Impositions attributable to the Building can be reasonably determined without obtaining a separate PID Number for the Building, Lessee shall be responsible for payment of 100% of the Impositions assessed against the Building and for Lessee's Share of the Impositions against the underlying land within the Center and the improvements located in the Common Area. In the event Lessor and Lessee are unable to obtain a separate PID Number for the Building (or determine the Impositions attributable to the Building) or for the Premises and the Common Area, Lessee shall pay Lessee's Share of Impositions upon the Center. Lessee shall pay all Impositions for which it is 100% responsible directly to the applicable taxing authorities thirty (30) days prior to the accrual of interest and penalties. Lessee shall pay Lessee's Share of Impositions to Lessor within thirty (30) days of Lessor's billing to Lessee therefore; provided, however, Lessee shall not be required to make such payments for Impositions to Lessor more than thirty (30) days prior to the date the Impositions are payable to the applicable taxing authorities without penalties or interest. The intent of Lessor and Lessee is that Lessee shall be responsible for payment of : (i) 100% of the Impositions relating to the Building and Land underlying the Building, and (ii) Lessee's Share of all Impositions relating to the Common Area.

3.2. Nothing contained in this Lease shall require Lessee to pay any franchise, corporate, estate, inheritance, succession, capital levy, stamp, or transfer tax or any other tax, assessment, charge, or levy upon the Basic Rent or any additional rent payable by Lessee under this Lease. No tax, assessment, charge, or levy of the character hereinabove in this Section described shall be deemed included within the term "Imposition"; provided, however, that if at any time under the laws of the State or any political subdivision thereof a tax or excise on rents is levied or assessed against Lessor or the Basic Rent, as a substitution in whole or in part for taxes assessed or imposed by the State or any political subdivision thereof on land and buildings within the Premises or the Common Area or Center, where applicable, the same shall be deemed included within the term "Imposition", and Lessee shall (but only to the extent that such substitution so far as ascertainable relieves Lessee from the payment of an Imposition as provided in Section 3.1) pay and discharge such tax or excise on rents in accordance with Section 3.1. If Lessor and Lessee dispute whether or to what extent a tax is being substituted for taxes assessed or imposed on land and buildings or the Land and the Building, the dispute shall be determined by arbitration in the manner provided in Article 24.

3.3. If Lessee or Lessor (the "Requesting Party") so requests by Notice to the party responsible for payment of Impositions to the taxing authority, the party paying such taxes shall furnish to the Requesting Party within thirty (30) days after the date when any Imposition is payable, official receipts from the appropriate taxing authority, or other evidence reasonably satisfactory to the requesting party, evidencing the payment thereof.

3.4. Either party shall have the right to contest the amount or validity, in whole or in part, of any Imposition by appropriate proceedings. Lessee shall continue to make the payment required pursuant to Section 3.1 during the time of such protest. Upon the termination of such proceedings, the responsible party shall pay any amount of such Imposition or part thereof as finally determined in such proceedings, together with all costs, fees, interest, penalties, and other liabilities in connection therewith. Neither party shall unreasonably withhold its consent to joining in any such proceedings or permitting the same to be brought in its name if required by law. Unless otherwise agreed, the party who does not initiate the protest shall not be subjected to any liability for the payment of any costs or expenses in connection with any such proceedings.

3.5. Any certificate, advice, or bill showing nonpayment of any Imposition received from the appropriate official designated by law to make or issue the same or to receive payment of any Imposition shall be evidence that such Imposition is due and unpaid at the time of the making or issuance of such certificate, advice or bill.

#### ARTICLE 4

#### INSURANCE

4.1. At all times Lessee shall keep the Building insured for the mutual benefit of Lessor and Lessee against:

(a) loss or damage by fire, and such other risks as may be included in the standard form of extended coverage insurance from time to time available, in amounts sufficient to prevent Lessor or Lessee from becoming co-insurers within the terms of the applicable policies, and, in any event, in an amount not less than 100% of the then Full Replacement Value (which shall include without limitation at least six (6) months loss of rental insurance);

(b) loss or damage from leakage of sprinkler systems now or hereafter installed in the Building, in such amount as Lessor may reasonably require; and

(c) such other hazards and in such amounts as Lessor may reasonably require, provided that such insurance is then customarily maintained in buildings of similar construction, use and class in the area in which the Premises are located.

4.2. Lessee shall also maintain insurance for the mutual benefit of Lessor and Lessee against claims for bodily injury or property damage, under a policy of comprehensive general public liability insurance, with such limits as may reasonably be required by Lessor from time to time, but not more than \$5,000,000 combined single limit.

4.3. During the Term, Lessee shall maintain insurance on the Common Area, as reasonably agreed between Lessor and Lessee, for bodily injury and property damage, under a policy of comprehensive general public liability insurance (which may be included as part of Lessee's insurance policy under Section 4.2 above). Lessor shall be named as an additional insured under such insurance. As soon as practicable after the beginning of each Lease Year during the Term, Lessee shall furnish Lessor with a written statement estimating Lessor's Share of the insurance

expenses for the Common Area (herein collectively called the "Insurance Estimate"). Lessee shall invoice Lessor for Lessor's Share of the Insurance Estimate on a periodic basis such that Lessor shall reimburse Lessee for such insurance costs at the approximate times during each Lease Year that Lessee is required to make such payments to Lessee's insurance carrier. For example, if Lessee is billed by its insurance carrier on a quarterly basis, then in such event, Lessor shall reimburse Lessee on a quarterly basis, corresponding with the time that the insurance premiums are due from Lessee to its insurance carrier. In addition, should there be deductibles on any insurance loss relating to the Common Area, upon receipt of an invoice from Lessee, Lessor shall be responsible for Lessor's Share of all such deductibles, provided, however, in no event shall the deductible for purposes of calculating Lessor's Share be greater than \$10,000. Lessor shall pay Lessee for Lessor's Share of such Insurance Estimate and deductibles within ten (10) days after receipt of an invoice therefor.

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4.4. Upon the execution of this Lease, the original policies procured by Lessee pursuant to Section 4.1 (or certificates therefor, at Lessee's option) shall be delivered to the holder of the Mortgage, or, if there is none, to Lessor, and a certificate of insurance shall be delivered to either of the foregoing which did not receive the original policy. The original policies procured pursuant to Sections 4.1, 4.2 and 4.3 (or certificates therefor, at Lessee's option) shall be delivered to Lessor. At least thirty (30) days prior to the expiration date of any policy, the original renewal policy for such insurance shall be delivered by Lessee to the holder of the expiring original policy (or certificates thereof shall be delivered as aforesaid), together with satisfactory evidence of payment of the premium thereon. All policies referred to in Sections 4.1, 4.2 and 4.3 shall contain agreements by the insurers that such policies shall not be canceled except upon thirty (30) days' prior written notice to each named insured, loss payee and mortgagee.

4.5. All policies of insurance required herein shall name Lessor and Lessee as the insureds as their respective interests may appear. All policies referred to in Section 4.1 shall also provide for any loss to be payable to the holder of the Mortgage and/or Lessor, as their interest may appear. In the event Lessee is not obligated to rebuild, and Lessee elects not to rebuild, the loss, if any, under the policies referred to in Section 4.1 shall be adjusted with the insurance companies by Lessor and Mortgagee; otherwise, Lessee shall be entitled to adjust the loss under the policies referred to in Section 4.1.

4.6. The loss under all policies referred to in Section 4.1 shall be payable (a) in the case of any casualty resulting in a loss payment not exceeding 35% of the Full Replacement Value, to Lessee, or (b) in the case of any casualty resulting in a loss payment in excess of 35% of the Full Replacement Value, to the Depository in the event Lessee rebuilds. Any proceeds received by Lessee under any insurance policy referred to in Section 4.1 shall be held by Lessee in trust for application to the cost of restoring, repairing, replacing, or rebuilding the Building. Any loss payment paid to the Depository shall be disbursed by it in accordance with Article 11.

4.7. Nothing in this Article shall prevent Lessee from taking out insurance of the kind and in the amounts and with companies provided for under Section 4.1, 4.2 and 4.3 under a blanket insurance policy or policies which cover other properties owned or operated by Lessee or any Affiliate of Lessee as well as the Premises; provided, however, that any such policy of insurance provided for under Section 4.1 (a) shall specify therein, or Lessee shall furnish Lessor and the holder of the Mortgage with a written statement from the insurers under such policies specifying the amount of the total insurance allocated to the Building, which amount shall be not less than the amount

required by Section 4.1 to be carried, and (b) shall not contain any clause which would result in the insured thereunder being required to carry insurance with respect to the property covered thereby in an amount equal to a minimum specific percentage of the Full Replacement Value of such property in order to prevent the insured therein named from becoming a co-insurer of any loss with the insurer under such policy.

4.8. All insurance provided for under Section 4.1, 4.2 and 4.3 may contain loss deductible clauses in such maximum amounts as Lessor shall approve by Notice to Lessee, which approval shall not be unreasonably withheld.

4.9. All policies required of Lessee hereunder shall: (i) be issued by a reputable insurance company qualified to do business in the state where the Premises are located which has an A.M. Best Rating Company rating of not less than "A" according to the most recent rating thereof; (ii) state that such insurance is primary over any insurance carried by Lessor; and (iii) contain an endorsement in favor of Lessor, waiving such insurance company's right of subrogation against Lessor. A duly executed certificate of insurance shall be delivered to Lessor prior to the Term Commencement Date. All renewals shall be delivered to Lessor at least thirty (30) days prior to the expiration of the respective policy terms. Lessee will also reimburse Lessor for any increased premiums or additional insurance which Lessor reasonably deems necessary as a result of Lessee's use or occupancy of the Premises or any vacancy or abandonment thereof by Lessee.

4.10. Lessor and Lessee and all parties claiming under them mutually release and discharge each other and their respective officers, directors, partners, employees and agents from all claims and liabilities arising from or caused by any casualty, hazard or claim to the extent they could be covered by the insurance required to be carried hereunder and waive any right of subrogation which might otherwise exist in or accrue to any person on account thereof; provided that such release shall not operate in any case where the effect is to invalidate such insurance coverage. The failure of a party to insure its property shall not void this waiver. This release shall apply even if the loss or damage shall be caused by the fault or negligence of a party hereto or for any person for which such party is responsible.

**4.11. ALL PROPERTY OF LESSEE KEPT IN THE PREMISES SHALL BE SO KEPT AT LESSEE'S RISK ONLY.**

## ARTICLE 5

### LESSOR'S RIGHT TO PERFORM LESSEE'S COVENANTS - ADDITIONAL RENT

5.1. If Lessee shall at any time fail to (a) pay any Imposition in accordance with Article 3, (b) take out, pay for, maintain, or deliver any of the insurance policies provided for in Article 4, (c) cause any lien of the character referred to in Article 12 to be discharged as therein provided, or (d) perform any other act on its part to be performed under this Lease, and if (i) Lessee has not disputed the existence of such Event of Default as provided in Section 17.1(b) and (ii) such Event of Default continues for a period of fifteen (15) days (ten (10) days in the case of the failure to pay for any of the insurance policies provided for in Article 4) after Lessor gives Lessee a Notice specifying such Event of Default, or, in the case of an Event of Default which cannot with due

diligence be remedied by Lessee within fifteen (15) days (or ten (10) days, as the case may be), if Lessee shall fail to proceed as promptly as may be reasonably possible after the service of such Notice and with due diligence to commence to remedy the same or shall thereafter fail to prosecute the remedying of the same with due diligence, then Lessor may, but shall not be obligated so to do, and without further Notice or demand upon Lessee and without waiving or releasing Lessee from any obligations of Lessee in this Lease contained, and without being deemed to have elected a remedy for such default, (w) pay any Imposition payable by Lessee pursuant to Article 3, (x) take out, pay for, and maintain any of the insurance policies provided for in Article 4, (y) discharge any lien of the character referred to in Article 12 as therein provided, and (z) perform any other act on Lessee's part to be performed under this Lease.

5.2. All sums paid by Lessor pursuant to Section 5.1 and all necessary incidental costs and expenses paid or incurred by Lessor in connection with the performance of any act by Lessor pursuant to said Section, together with interest thereon from the date of making of such expenditure by Lessor at the Maximum Rate, shall be payable by Lessee to Lessor within ten (10) days after demand therefor by Notice accompanied by evidence reasonably establishing that the expenditure has been made, or at the option of Lessor may be added to the Basic Rent then due or thereafter becoming due under this Lease.

5.3. All sums which may become payable to Lessor by Lessee as in this Article 5 provided and all other charges and expenses of whatsoever nature which Lessee is required to pay pursuant to this Lease other than Basic Rent, shall be deemed additional rent hereunder and payable, unless otherwise expressly provided, as provided in Section 5.2, and Lessor shall have (in addition to any other right or remedy of Lessor) the same rights and remedies in the event of the nonpayment of any such sums by Lessee as in the case of default by Lessee in the payment of the Basic Rent.

## ARTICLE 6

### COVENANTS AGAINST WASTE AND TO REPAIR AND MAINTAIN THE PREMISES

6.1. Lessee shall not cause or permit any waste, damage, or injury to the Premises.

6.2. Lessee shall keep the Premises and the adjoining sidewalks and curbs clean and in good condition free of accumulations of dirt, rubbish and ice, and shall make all repairs (including structural repairs) and replacements necessary to maintain the Premises and the Building and all components thereof including, without limitation, the roof, roof membrane, heating, ventilation and air conditioning system (HVAC), in good condition and repair and in a condition appropriate for buildings or similar construction, use, and class in the area of the Premises; and in any event, shall make all repairs necessary to avoid any structural damage or injury to the Building.

6.3. Lessee shall not remove or permit the removal of any of the permanent fixtures equipment such as the HVAC system, fire suppression systems, or other property constituting a part of the Premises (other than obsolescent fixtures) unless other fixtures or property at least equal in value and utility shall be promptly substituted therefor.

6.4. Lessee agrees to supply and maintain at its own expense any fire extinguishers, or other fire prevention equipment required by law, rules, orders, ordinances, and regulations of any city, county, or state in which the Premises are located and/or required by any insurance carrier, underwriters association, bureau, or any other similar body having jurisdiction involving the Premises.

## ARTICLE 7

### COMPLIANCE WITH ORDERS, ORDINANCES, ETC.

7.1. Lessee shall promptly comply with (a) all Legal Requirements, and (b) the requirements of all policies of public liability, fire, and all other policies of insurance at any time in force with respect to the Premises as required under Section 4.1, 4.2 and 4.3; and (c) all reasonable rules and regulations promulgated by Lessor and applicable to all tenants of the Center, for the care, operation or cleanliness of the Center.

7.2. Without limitation on the foregoing, Lessee shall not cause or permit any Hazardous Material to be brought upon, kept or used in or about the Premises or the Center by Lessee, its agents, employees, contractors or invitees except in the ordinary course of Lessee's operation of a Supermarket Facility on the Premises, provided that such Hazardous Material will be used, kept and stored in a manner that complies with all laws regulating any such Hazardous Material so brought upon or used or kept in or about the Premises or the Center.

7.3. As used herein, the term "Hazardous Material" means any pollutant, toxic substance, regulated substance, hazardous waste, hazardous material, hazardous substance, oil, hydrocarbon, asbestos or similar item as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, as amended, the Safe Drinking Water Act, as amended, the Federal Water Pollution Control Act, as amended, the Texas Water Code, as amended, the Texas Solid Waste Disposal Act, as amended, or any other federal, state or local environmental or health and safety related, constitutional provisions, law, regulation, ordinance, rule, or bylaw, whether existing as of the date hereof, previously enforced or subsequently enacted (collectively the "Environmental Laws").

7.4. Lessee shall promptly advise Lessor in writing of (a) any governmental or regulatory actions instituted or threatened under any Environmental Law affecting the Lessee or the Premises, (b) all claims made or threatened by any third party against Lessee or the Premises or the Center relating to damage, contribution, cost recovery, compensation, loss or injury resulting from any Hazardous Materials, (c) the discovery of any occurrence or condition on any real property adjoining or in the vicinity of the Premises that could cause the Premises or the Center to be classified in a manner which may support a claim under any Environmental Law, and (d) the discovery of any occurrence or condition on the Premises or the Center or any real property adjoining or in the vicinity of the Premises or the Center which could subject Lessee, the Premises or the Center to any restrictions in ownership, occupancy, transferability or use of the Premises under any Environmental Law. Lessor may elect to join and participate in any settlements, remedial actions, legal proceedings or other actions initiated in connection with any claims under any Environmental Law and to have

its reasonable attorney's fees paid by Lessee. At its sole cost and expense, Lessee agrees when applicable or upon request of Lessor to promptly and completely cure and remedy every violation of an Environmental Law caused by Lessee, its agents, employees, contractors or invitees, and shall indemnify and hold Lessor harmless against such violations of Environmental Law caused by Lessee, its agents, employees, contractors or invitees. For purposes of this Section, Lessee's indemnity shall not extend to matters involving asbestos or asbestos containing materials present within the Premises on the Term Commencement Date.

7.5. Lessee shall have the right to contest by appropriate legal proceedings, in the name of Lessee or Lessor or both, without cost or expense to Lessor, the validity or application of any Legal Requirement, and if, by the terms of such Legal Requirement, compliance therewith pending the prosecution of any such proceeding may be legally held in abeyance without the incurrence of a lien, charge, or liability of any kind against the Premises or Lessee's leasehold interest therein and without subjecting Lessee or Lessor to any criminal liability of whatsoever nature for failure so to comply therewith, Lessee may postpone compliance therewith until the final determination of any proceedings, provided that all such proceedings shall be prosecuted with due diligence and dispatch, and if any lien, charge or civil liability is incurred by reason of noncompliance, Lessee may nevertheless make the contest and delay compliance as aforesaid, provided that Lessee furnishes to Lessor security, reasonably satisfactory to Lessor, against all loss or injury by reason of such noncompliance or delay and prosecutes the contest with due diligence. Lessor shall execute and deliver any papers which may be necessary or proper to permit Lessee to contest the validity or application of any such Legal Requirement.

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7.6. Notwithstanding any other provisions in Article 7 to the contrary, Lessee shall have no responsibility, liability or obligation with respect to any Hazardous Materials present on, in or under the Premises, Common Area or Center on the Term Commencement Date or any attorneys fees incurred by Lessor with respect thereto. Lessor shall indemnify Lessee and hold Lessee harmless from and against any and all violations of Environmental Laws caused by Lessor, its agents, employees, contractors or invitees. For purposes of this Section, Lessor's indemnity shall not extend to matters involving asbestos or asbestos containing materials present within the Premises.

ARTICLE 8

DAMAGE AND DESTRUCTION

8.1. In case of damage to or destruction of the Premises during the first ten (10) Lease Years of the Term, by fire or any other cause, similar or dissimilar, insured or uninsured, Lessee shall restore, repair, replace, and rebuild the Premises as nearly as may be reasonably possible to the condition, quality, and class the Premises were in immediately prior to such damage or destruction, or with such changes or alterations as Lessee may make in accordance with Article 10.

8.2. In case of damage to or destruction of the Premises which would cost more than fifty percent (50%) of the Full Replacement Value of the Premises to repair, during any time after the first ten (10) Lease Years of the Term, by fire or any other insured cause, Lessee shall restore, repair, replace or rebuild the Premises as nearly as may be reasonably possible to the condition, quality and

class the Premises were in immediately prior to such damage or destruction, or with such changes or alterations as Lessee may make in accordance with Article 10, unless within thirty (30) days of such damage or destruction, Lessee elects by written Notice to Lessor to terminate this Lease. If Tenant so elects to terminate this Lease, all insurance proceeds shall be disbursed to Lessor and/or the holder of any Mortgage.

8.3. In case of damage or destruction which would cost fifty percent (50%) or less of the Full Replacement Value of the Premises to repair, during any time after the first ten (10) Lease Years of the Term, by fire, or any other cause, similar or dissimilar, insured or uninsured, Lessee shall restore, repair, replace, or rebuild the Premises as nearly as may be reasonably possible to the condition, quality, and class the Premises were in immediately prior to such damage or destruction, or with such changes or alterations as Lessee may make in accordance with Article 10. In the event of any dispute regarding whether the cost of repair is greater or less than fifty percent (50%) of the Full Replacement Value of the Premises, the issue shall be resolved by arbitration in accordance with Article 24.

8.4. The Basic Rent payable hereunder shall not be abated in the event of a casualty, unless the Lease is terminated pursuant to this Article 8 in which case Basic Rent shall cease as of the date of the casualty.

8.5. Whenever under the foregoing obligations of this Article 8, Lessee has the obligation to rebuild and/or repair all or any portion of the Premises and to continue the Lease in full force and effect, such restoration must be commenced within ninety (90) days after Lessee's obligation to do so becomes fixed by reason of the foregoing provisions and Lessee must prosecute such reconstruction, rebuilding and/or repairs diligently, to the end that the Premises will be restored to substantially the same condition as before the occurrence of such damage. In the event Lessee is required to restore or rebuild the Premises, or elects to do so hereunder, Lessee shall diligently pursue completion of such restoration until completion. If the Lease is terminated due to a casualty, and in accordance with the provisions of this Article 8, Lessee will have no further rights hereunder other than the removal of Lessee's Trade Fixtures and other personal property, and Lessee will have no further interest in the proceeds of said insurance.

8.6. Whenever, under the foregoing provisions of this Article 8, Lessee has the obligation to rebuild, repair or reconstruct all or any portion of the Premises herein, prior to commencing any rebuilding, repair or reconstruction, Lessee shall submit the plans, drawings and related documents for the restoration (the "Reconstruction Plans") to Lessor, and the provisions of Article 10 hereof shall apply to such rebuilding, repair and/or reconstruction, provided, however, that the criteria used by Lessor in approving such Reconstruction Plans shall be primarily limited to (i) whether the Reconstruction Plans comply with applicable laws and land use regulations and the permitted encumbrances (but such approval shall not relieve Lessee of its responsibility hereunder), and (ii) whether such Reconstruction Plans will restore the Premises to substantially the same condition as before the occurrence of such damage. Lessee may make reasonable modifications approved by Lessor which do not increase the cost of restoration and for which Lessee agrees to pay. Lessee's submittal of the Reconstruction Plans to Lessor shall constitute commencement of restoration or reconstruction for purposes of Section 8.5. Lessor shall not unreasonably delay or withhold approval under this Section.

8.7. Whenever, under the foregoing provisions of this Article 8, Lessee has the obligation or option to rebuild, repair or reconstruct all or any portion of the Premises, all insurance proceeds shall be made available to Lessee for use in connection with Lessee's rebuilding, repairing or reconstruction.

ARTICLE 9  
CONDEMNATION

9.1. If there is a Total Taking or a Constructive Total Taking, this Lease shall terminate on the date of the Total Taking or the Constructive Total Taking, and the Basic Rent and additional rent payable by Lessee hereunder shall be apportioned and paid as of such date and shall be paid as of such date. If Lessor disputes Lessee's determination that a Constructive Total Taking has occurred, the dispute will be determined by arbitration in the manner provided in Article 24. If Lessee determines that a Constructive Total Taking has not occurred, this Lease shall continue in full force and effect subject to the other provisions of this Article.

9.2. If there is a Total Taking or a Constructive Total Taking, the Condemnation Proceeds shall be paid to Lessor. Lessee hereby irrevocably assigns to Lessor any award or payment to which Lessee may be or become entitled by reason of any Taking; provided, however, that Lessee may submit a claim to the condemning authority for damage to or loss of its leasehold estate in the Premises, so long as such award is stated separately from and does not in any way reduce the award or payment to Lessor.

9.3. If there is a Taking less than a Constructive Total Taking this Lease shall not terminate or be affected in any way, except as provided in Section 9.5, and the Condemnation Proceeds shall be paid as follows:

(a) First, Lessee shall be entitled to receive such portion of the Condemnation Proceeds as is reasonably necessary for restoration of the Premises and such portion of the Condemnation Proceeds shall be payable, (i) if such portion of the Condemnation Proceeds amounts to less than 35% of the Full Replacement Value immediately preceding such Taking, in trust to Lessee for application by Lessee to the cost of restoring, repairing, replacing or rebuilding the Premises; or (ii) if such portion of the Condemnation Proceeds exceeds 35% of the Full Replacement Value immediately preceding such Taking, to a Depository. The portion of the Condemnation Proceeds so paid to the Depository shall be disbursed by it in accordance with Article 11.

(b) Second, Lessor shall be entitled to receive the balance.

9.4. If there is a Taking less than a Constructive Total Taking, subject to reimbursement as provided in Article 11, and whether or not the Condemnation Proceeds are sufficient for the purpose, Lessee shall proceed with due diligence to restore, repair, replace or rebuild the remaining part of the Premises to substantially their former condition, or with such Changes or Alterations as Lessee may make in accordance with Article 10.

9.5. If there is a Taking of the character referred to in Section 9.3, this Lease shall terminate as to the portion of the Premises so taken, and from and after the date of such Taking a just proportion of the Basic Rent, according to the extent and nature of such Taking, shall abate on a fair and equitable basis for the remainder of the Term. If Lessor and Lessee dispute the amount of the abatement of Basic Rent, the dispute shall be determined by arbitration as provided in Article 24. Until the amount of the abatement of the Basic Rent is determined, Lessee shall pay to Lessor the Basic Rent reduced by the amount or the abatement of the Basic Rent as reasonably established by the Lessor. When the amount of the abatement is agreed upon or determined, Lessor shall refund to Lessee the amount or the Basic Rent paid from the date of the Taking which is in excess of the amount to which the Basic Rent has been reduced by such abatement, together with interest thereon at a rate equal to the Prime Rate plus two percent for the period from the date paid until the date of reimbursement to Lessee. In the event that an arbitrator determines that the amount or the abatement is less than the amount previously established by the Lessor, Lessee shall pay to Lessor the difference between the amounts of the abatement as established by the lessor and such arbitrator, together with interest thereon at a rate equal to the Prime Rate plus two percent for the period from the date upon which the payment was due until the date of actual payment by the Lessee. A Taking of a portion of the Common Area up to seventy-five (75) feet in width adjacent to Highway 80 ( the "Protected Area") shall be deemed not to constitute a Taking or Constructive Total Taking which allows Lessee to terminate the Lease. A Taking of the Protected Area shall not entitle Lessee to an abatement and all damages therefrom shall be reserved to Lessor.

9.6. If the order or decree in any condemnation or similar proceeding does not separately state either the amount to be awarded to Lessor and Lessee under Section 9.2 or 9.3 or the amount or compensation or the restoration of the Premises under Section 9.3 and if Lessor and Lessee cannot agree thereon within thirty (30) days after the final award or awards are fixed and determined, the dispute shall be determined by arbitration in the manner provided in Article 24.

9.7. Lessee and the holder of the Mortgage shall have the right to participate in any condemnation proceeding for the purpose of protecting their rights hereunder.

## ARTICLE 10

### CHANGES AND ALTERATIONS

10.1. Lessee shall have the right, at any time and from time to time, to make such changes and alterations, structural or otherwise, to the Premises as Lessee deems necessary or desirable. Such changes, and alterations (collectively, "Changes or Alterations") shall be made in all cases subject to the following conditions:

(a) No Changes or Alterations shall be undertaken until Lessee has obtained and paid for, so far as the same may be required from time to time, all municipal and other governmental permits and authorization of the various municipal departments and governmental subdivisions having jurisdiction. Lessor shall join in the application for such permits or authorizations whenever such action is necessary.

(b) Any structural Changes or Alterations, or any Changes or Alterations undertaken as a single project and involving an estimated cost aggregating more than 35% of the

then full insurable value of the Building, shall be conducted under the supervision of an architect or engineer licensed as such in the State, who may be an employee of Lessee, selected by Lessee subject to Lessor's reasonably granted approval. No such work shall be undertaken until preliminary plans and outline specifications and budget estimates therefor, prepared and approved in writing by such architect or engineer, stating that the same comply with this Article, have been submitted to and approved (in Lessor's reasonable discretion) by Lessor.

(c) All Changes or Alterations shall be of such a character that, when completed, the value of the Premises shall not be less than the value of the Building and the parking facilities immediately before any such Changes or Alterations.

(d) All work done in connection with any Changes or Alterations shall be done in a good and workmanlike manner and in compliance with all Legal Requirements. The cost of such work shall be paid in cash or its equivalent, so that the Premises shall at all times be free of liens for labor and materials supplied or claimed to have been supplied. Lessee shall make such Changes or Alterations with reasonable dispatch, delays due to strikes, lockouts, acts of God, inability to obtain labor or materials, governmental restrictions, enemy action, civil commotion, fire, unavoidable casualties, or similar causes beyond the control of Lessee with the exercise of due diligence excepted.

(e) Lessee shall maintain at all times when any work is in progress in connection with any Changes or Alterations (i) worker's compensation insurance covering all persons employed in connection therewith and with respect to whom death or bodily injury claims could be asserted against Lessor, Lessee or the Premises, and (ii) general liability insurance as required to be carried pursuant to Section 4.2(b) for the mutual benefit of Lessor and Lessee with limits of not less than \$5,000,000.

10.2. In performing any work or repairs to, or restoration, replacement or rebuilding of, the Premises required to be performed by Lessee hereunder, Lessee shall observe and perform, insofar as the nature of such repairs, restoration, replacement or rebuilding the conditions relating to Changes or Alterations set forth in Section 10.1.

## ARTICLE 11

### DISBURSEMENT OF DEPOSITED SUMS

11.1. All Deposited Sums paid to or deposited with a Depositary shall be disbursed in the manner hereinafter provided.

11.2. From time to time as any Changes or Alterations undertaken as a single project progress, or as the restoration, repair, replacement or rebuilding of the Premises or any portion thereof damaged or destroyed by fire or any other cause, or not taken in a proceeding of the character described in Section 9.3 progresses (collectively, the "Work"), the Deposited Sums shall be disbursed in proportion to the percentage of completion thereof and in such manner and subject to such requirements as the Lessor, or Lessor's Lender, shall reasonably impose in order to insure that the Work shall be (a) completed in a good and workmanlike manner, (b) paid or in full, and (c)

completed free of any lien against the Premises. At any time after the completion of the Work, the balance of the Deposited Sums shall be disbursed to Lessee.

11.3. If this Lease is terminated pursuant to Section 17.1 prior to the disbursement of the Deposited Sums or any part thereof, Lessor may notify the Depositary thereof and thereupon the Depositary shall have no further right or obligation to disburse any of the Deposited Sums to Lessee, and Lessee shall have no further right to the Deposited Sums.

11.4. The Depositary shall have the right to deduct from the Deposited Sums its reasonable charges for acting as Depositary hereunder.

## ARTICLE 12

### MECHANICS' LIENS

Lessee shall not suffer or permit any mechanic's liens to be filed against the Premises or Lessee's leasehold estate hereunder, by reason of work, labor, services, or materials supplied or claimed to have been supplied to Lessee or anyone holding any interest in the Premises or any part thereof through or under Lessee. If a mechanic's lien is ever filed against the Premises, Lessee shall, within thirty (30) days after notice of the filing thereof, cause the same to be discharged of record by payment, deposit, bond, order of a court of competent jurisdiction, or otherwise. If Lessee fails to cause such lien to be discharged within such period, then Lessor may discharge it either by paying the amount claimed to be due, by procuring its discharge by deposit, or by bonding proceedings, and in any such event, Lessor shall be entitled, if Lessor so elects, to compel the prosecution of an action for the foreclosure of the lien by the lienor, and to pay the amount of the judgment in favor of the lienor with interest, costs and allowance. Nothing in this Lease contained shall be deemed or construed in any way as constituting the consent or request of Lessor, express or implied by inference or otherwise, to any contractor, subcontractor, laborer or materialman for the performance of any labor or the furnishing of any materials for any specific improvement, alteration to, or repair of the Premises or any part thereof, or as giving Lessee a right, power, or authority 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 mechanic's lien against the premises.

## ARTICLE 13

### ACCEPTANCE; USE; SURRENDER OF THE PREMISES; INSPECTION OF THE PREMISES; CONTINUED OPERATION

13.1. Lessee may use the Premises for the operation of a Supermarket Facility and for any other purpose permitted by applicable Legal Requirements. Lessee may engage in other enterprises and own and operate supermarkets in other locations, whether or not in competition with the supermarket on the Premises. Lessee's acceptance of occupancy from Lessor shall constitute acknowledgment by Lessee that Lessee has inspected the Premises and the Center of which the Premises are a part and that same are suitable for Lessee's intended use thereof as stated in this

Paragraph. Lessee recognizes and agrees that Lessor is making no representations or warranties, expressed or implied, as to the present or future suitability of the Premises or the Center for any particular use. Additionally, and without limitation on the foregoing, **LESSEE ACKNOWLEDGES THAT IT ACCEPTS THE CONDITION OF THE PREMISES AND CENTER "AS IS" WITH ALL FAULTS AND THAT LESSOR HAS NOT MADE ANY REPRESENTATION OR WARRANTY AS TO THE CONDITION THEREOF, EXCEPT AS EXPRESSLY SET FORTH IN THIS LEASE.** Without limitation on the foregoing, Lessee specifically acknowledges that Lessor makes no representation or warranty that the Center, the Premises or any component (including without limitation equipment or building systems) are Year 2000 compliant.

13.2. Lessor shall have the exclusive right to operate a Supermarket Facility within the Center. As used herein, "Supermarket Facility" is defined as a retail or wholesale establishment whose gross proceeds from sales consist of ten percent (10%) or more of food, food products, beer, wine and other grocery items. Lessor shall not lease the Center for purposes of: a bowling alley, movie theater, restaurant with a square footage in excess of 7,500 square feet or a establishment with the primary purpose of serving alcoholic beverages which is not related to a restaurant. Lessee and Lessor each agree that it shall not use or permit the Premises or other portions of the Center to be used for an adult book store, adult motion picture theater, topless or nude live entertainment club, or similar adult entertainment establishment. Additionally, Lessee acknowledges receipt from Lessor of a listing of all exclusive uses, if any, granted to other Lessees in the Center. Lessee agrees that its intended use will not violate any such exclusives and further agrees that Lessee will not use the Premises or permit the Premises to be used for any use in violation of any existing exclusives. If Lessee desires to change the use of the Premises to one which is permitted but which is other than a grocery store or Supermarket Facility, it shall give prior written notice to Lessor in which case Lessor will provide Lessee with a list of then existing exclusives within fifteen (15) days of such notice and Lessee shall not violate such exclusives.

13.3. Lessee shall surrender the Premises to Lessor on the Expiration Date or earlier termination in good order and repair (except in case of termination upon a Total Taking or a Constructive Total Taking), reasonable wear and tear excepted, and also except as Lessee may have been prevented from maintaining the Premises in good order and repair by occupation thereof pursuant to a temporary Taking by any entity which is then in possession of the Premises. Lessee shall also deliver to Lessor on the Expiration Date all plans, records, registers and all other papers and documents in Lessee's possession which may be reasonably necessary or appropriate for Lessor's operation of the Premises. All Lessee additions other than Trade Fixtures will, following the expiration or termination of this Lease, remain in the Premises as Lessor's property. Provided Lessee is not in default, it may remove its Trade Fixtures, inventory, and other personal property upon the expiration of the Term. In the event the Lease is terminated prior to the end of the Term pursuant to an Event of Default by Lessee, Lessor may direct Lessee to remove all or any portion of Lessee's additions, except those additions previously approved by Lessor or additions not requiring Lessor's approval, and Trade Fixtures, whereupon Lessee agrees that it shall, at its expense, remove such Lessee additions and Trade Fixtures (or portion thereof directed by Lessor). Lessee shall repair any damage to the Premises caused by the removal of Lessee additions, Trade Fixtures, or other items. In no event will any fire sprinklers, fire suppression equipment, HVAC System components, floor tiles, carpeting, ceiling tiles, plumbing fixtures, or similar building system items or any equipment or fixtures attached to the realty be considered "Trade Fixtures". Lessee

agrees that following an Event of Default, Lessor may, at its option, allow any party claiming to be a lessor or lender of Lessee to remove equipment, Trade Fixtures, and similar items leased from such lessor or securing obligations to such lender. Lessor shall have no liability to Lessee therefor. Lessor may condition its consent upon such lessor or lender agreeing to repair any damage to the Premises caused by such removal and providing adequate financial assurances of its ability to pay for any such damages. Provided, however, no such agreement by any such lessor, or Lessor's failure to obtain such an agreement, shall relieve Lessee of its obligations hereunder including without limitation, Lessee's obligation to repair said damage even if the damage is caused by the lessor, lender or their contractors or agents. Lessee shall remove all Hazardous Materials brought onto the Premises or Center by Lessee. Any Trade Fixtures or Lessee additions not removed by Lessee as required herein shall be deemed abandoned. Provided Lessor gives notice to Lessee prior to storage removal or disposition, such abandoned Trade Fixtures and Lessee additions may be stored, removed and disposed of by Lessor at Lessee's expense should Lessee not remove the same, and Lessee waives all claims against Lessor for any damages resulting from Lessor's retention or disposal of same. Lessee shall be entitled to no payment for the value of any such property and shall pay on demand all costs incurred by Lessor in connection with such removal or disposal. All obligations of Lessee hereunder not fully performed as of the termination or expiration of the Lease shall survive such termination or expiration.

13.4. Lessee shall permit Lessor and the holder of the Mortgage and their authorized representatives to enter the Premises at all reasonable times during usual business hours upon reasonable Notice to inspect the Premises and to exhibit the Premises to prospective purchasers or mortgagees thereof. Lessor and the holder of the Mortgage and their authorized representatives shall not interfere adversely with Lessee's business at the Premises during any such inspections.

13.5. Notwithstanding anything to the contrary contained elsewhere in this Lease, Lessor understands and agrees that Lessee shall have the right to cease operations at the Premises without being in default under this Lease; provided that Lessee shall continue to fully perform all other obligations hereunder including, without limitation, payment to Lessor of the Basic Rent, Lessee's Share of Operating Expenses, and all other charges due under this Lease during the period that Lessee ceases operations at the Premises. Notwithstanding the above or any other provision of this Lease to the contrary, (i) should Lessee cease operations at the Premises for a period exceeding one hundred twenty (120) days, for any reason other than labor disputes, remodeling or repair of the Premises, or (ii) upon the occurrence of an Event of Default under this Lease, in addition to any other remedies provided herein, Lessor may, at its option during such cessation of operations or after the occurrence of an Event of Default : (1) terminate this Lease; (2) terminate any and all non-compete agreements between the original Lessee and/or subsequent Lessee, and Lessor or Adrian Baca (collectively the "Noncompete") and/or (3) terminate that certain Licensing Agreement dated January 11, 1999, between the original Lessee and Adrian Baca ("Licensing Agreement"). Additionally, in the event Lessor terminates this Lease as contemplated in the preceding sentence, Lessor shall have the right, but not the obligation, to: (1) purchase at book value from Lessee any and all equipment and/or fixtures owned by Lessee on the Premises; and/or (2) assume any and all leases held by Lessee of equipment and/or fixtures on the Premises.

ARTICLE 14

PARKING AND USE OF COMMON AREA, FACILITIES  
AND UTILITIES

14.1. As used herein, the term "Common Area" shall mean all parking areas, access roads and facilities, including the Parking Facilities, driveways, sidewalks not included within the Premises, landscaped areas, retaining walls, fences and rock walls, lighting facilities, and other areas and improvements provided by Lessor for the general use in common of all lessees of the Center and their customers in the Center as identified in Exhibit "B". The CAM Maintenance Party shall, subject to reimbursement as provided in Section 2.4, maintain the Common Areas in a reasonably good condition and repair.

14.2. Lessee and Lessee's business invitees, employees and customers shall have the nonexclusive right, in common with Lessor and all others to whom Lessor has granted or may hereafter grant rights, to use the Common Area, for ingress and egress and automobile parking. Lessee's use of the Common Area is limited to the purpose herein stated and subject to: (i) reasonable rules and regulations for the use thereof as prescribed from time to time by Lessor and applicable to all Tenants of the Center; and (ii) other provisions of this Lease. Neither Lessor or Lessee shall interfere with any other occupant's rights to use any part of the Common Area. Without limitation of the foregoing, Lessee will not use any portion of the Common Areas for: (a) the storage, display or sale of any merchandise or services; (b) the placement, installation, use or operation of any machine, improvement, device, ride, vending machine, telephone or similar items; or (c) advertisements, solicitations or promotions of any kind.

14.3. Nothing herein shall obligate the CAM Maintenance Party to maintain or provide any security services or systems for the Center. Lessee agrees that Lessor shall not be liable to Lessee for, and Lessee waives any claim against Lessor with respect to, any loss by theft or any other damage suffered or incurred by Lessee in connection with any unauthorized entry into the Premises or other criminal or willful acts of third parties.

14.4. The CAM Maintenance Party shall have the right, but not the obligation, at any time and from time to time to temporarily close any portion of the Common Areas to make repairs, replacements, alterations, deletions or other changes as long as such closure would not cause the Premises or the Existing Building to be in violation of any governmental laws, ordinances, rules or regulations. Upon closing of the Common Areas, the CAM Maintenance Party shall diligently pursue such repairs and alterations and shall use reasonable efforts to perform the repairs and alterations in a manner to cause the least interference with the use of the Center by all lessees. However, nothing herein shall be construed to require the CAM Maintenance Party to perform such repairs during non business hours. Further during hours in which the Premises and other establishments in the Center are not open to the public, in order to prevent the acquisition of public rights in such area, to discourage non-customer parking, or to do such other acts in and to the Common Areas as are necessary, the CAM Maintenance Party and Lessor, if Lessor is not the CAM Maintenance Party, may close the Common Areas.

14.5. Lessee agrees to pay before delinquency all charges for all utilities (including but not limited to gas, heat, sewer, power, electricity, telephone, garbage removal, water meter charges and

hookup or connection fees or charges) which may accrue with respect to the Premises during the term of this Lease. Lessor shall in no event be liable to Lessee for any interruption in the service of any utilities to the Premises or Common Area except for Lessor's gross negligence or intentional misconduct, howsoever such interruption may be caused and this Lease shall continue in full force and effect despite any such interruptions. Lessee acknowledges that it has inspected the utilities available to the Premises and that it has determined that such utilities are sufficient for all anticipated uses of the Premises.

14.6 On the Term Commencement Date, some of the light poles within the Common Area are metered at the Premises and some of the light poles within the Common Area are metered at the Existing Building. During the Term, Lessee shall be responsible for all utility costs relating to the light poles metered at the Premises and Lessor shall be responsible for all utility costs relating to light poles metered at the Existing Building. The cost of repair, maintenance and/or replacing the light poles within the Common Area shall be included as an Operating Expense. Further, Lessor and Lessee agree to keep the Common Area lights metered within areas under their respective control, lit during business hours reasonably agreed upon by Lessor and Lessee.

14.7 Beginning on the "Term Commencement Date", Lessee shall assume responsibility for maintenance and operation of the Common Area and shall be designated as the CAM Maintenance Party. In the event Lessee wishes to withdraw from its duties as the CAM Maintenance Party, Lessee shall give Lessor written notice, and beginning on the first day of the first full month following sixty (60) days after the date Lessor has received notice of Lessee's intent to withdraw as the CAM Maintenance Party, Lessor shall be substituted as the CAM Maintenance Party and shall maintain and operate the Common Area. Thereafter, Lessee shall be designated as the Non-CAM Maintenance Party. In the event the Lessee is the CAM Maintenance Party and refuses or fails to perform such maintenance after receipt of notice and any applicable cure periods, Lessor may after thirty (30) days additional notice, remove Lessee as the CAM Maintenance Party and thereafter Lessor shall be the CAM Maintenance Party and Lessee shall be the Non-CAM Maintenance Party. In the event of a change in CAM Maintenance Party, the parties agree to provide each other with an accounting and proration of the Common Area Expenses. The CAM Maintenance Party and the Non-CAM Maintenance Party shall have all of the rights and obligations set forth in Article 2 and this Article 14.

## ARTICLE 15

### SIGNS, AWNINGS AND CANOPIES

Lessee shall keep all Lessee's lighted signage on the Premises, if any, lit during the operating hours of the Center as such hours are determined by Lessor regardless of whether Lessee's business is open during this time. Lessee shall remove such sign upon termination of this Lease. Such installation and removal shall be done in such a manner as to avoid injury, defacement or overloading of the Premises. Lessee shall not be permitted to individually install a street-side sign on its behalf. Lessee shall have the right to use such portion of the Center sign as is currently occupied by La Feria.

## ARTICLE 16

### ASSIGNMENT AND SUBLETTING

Lessee may not assign this Lease or sublease all or any portion of the Premises without the prior written consent or approval of Lessor, such consent or approval not to be unreasonably withheld or delayed. Notwithstanding the foregoing, Lessee may assign this Lease or sublease all or any portion of the Premises to any person or entity which acquires all or substantially all of Lessee's assets and/or stock, without the prior consent or approval of Lessor. Lessee may sublease a portion of the Premises (which shall include the granting of franchises, concessions and licenses) without Lessor's consent to subleasees who do not occupy more than ten percent (10%) of the square footage of the Premises. Notwithstanding any assignment or subletting even with the approval of Lessor, Lessee shall remain fully liable for the performance of their respective obligations, covenants and agreements under this Lease, unless Lessee is expressly released by Lessor. Consent to any assignment shall not be deemed a consent to any further assignment. Without limitation on Lessor's approval rights hereunder, Lessee shall provide a copy of any executed sublease or assignment to Lessor within ten (10) days of execution thereof. Lessee may mortgage its leasehold interest in the Premises for the benefit of a third party lender provided no such mortgage shall grant to such mortgage holder greater rights under this Lease than are granted to Lessee, nor shall Lessor be required to: (i) excuse such Mortgage holder from curing pre-foreclosure defaults under the Lease; or (ii) agree to any assignment rights in favor of a Mortgage holder in excess of those allowed to Lessee under this Lease.

## ARTICLE 17

### DEFAULT PROVISIONS -- CONDITIONAL LIMITATION

17.1. If any of the following events (an "Event of Default") occurs:

(a) default is made in the payment of Basic Rent when due, and such default continues for a period of ten (10) days after Lessor gives Lessee a Notice specifying such default, or default is made in the payment of any other item of additional rent and such default continues for a period of ten (10) days after Lessor gives Lessee a Notice specifying such default, or default is made in the payment of insurance premiums as required by Article 4 and such default continues for a period of ten (10) days after Lessor gives Lessee a Notice specifying such default; or

(b) default is made in the performance of any other covenant or agreement on the part of Lessee to be performed hereunder, and such default continues for a period of thirty (30) days after Lessor gives Lessee a Notice specifying such default; provided, however, in the case of a default which cannot with due diligence be remedied by Lessee within a period of thirty (30) days, if Lessee proceeds as promptly as may be reasonably possible after the service of such Notice and with all due diligence to remedy the default and thereafter to prosecute the remedying of such default with all due diligence, the period of time after the giving of such Notice within which to remedy the default shall be extended for such period as may be necessary to remedy the same with all due diligence. If Lessee within fifteen (15) days after the giving of such Notice disputes the existence of a non-monetary default, the matter shall be determined by arbitration as provided in Article 24

(except to the extent specifically provided therein, the existence of a monetary default under Articles 3 or 4 shall not be subject to arbitration pursuant thereto) and if it is determined that Lessee is so in default, the time within which Lessee shall have to remedy the same shall be computed from the date of such determination;

17.2. Upon the occurrence of any event of default specified in this Lease, Lessor, without grace period, demand or notice (the same being hereby waived by Lessee), and in addition to all other rights or remedies Lessor may have for such default, shall have the right to pursue any one or more of the following remedies: (a) terminate this Lease in which event Lessee shall immediately surrender the Premises to Lessor, and if Lessee fails to do so, Lessor may, without prejudice to any other remedy which it may have for possession or rent, enter upon and take possession of the Premises and expel or remove Lessee and any other person who may be occupying said Premises or any part thereof, by force if necessary, without notice or the need to resort to legal process and without being deemed guilty of trespass or becoming liable for any loss or damage occasioned thereby; and, in either event, Lessor may recover from Lessee the amount of all loss and damage which Lessor may suffer by reason of such termination, including, without limitation, all costs of retaking the Premises, and the total rent and charges provided for in this Lease for the remainder of the Term of this Lease (i.e., the duration of this Lease had it not been terminated) all of which shall accelerate and be deemed accrued unpaid obligations as of the date of termination, shall survive such termination and shall be immediately due and payable by Lessee to Lessor as damages for Lessee's breach hereof; (b) without terminating this Lease, enter upon and take possession of the Premises, and expel or remove Lessee and any other person who may be occupying said Premises, or any part thereof, by force if necessary, without notice or the need to resort to legal process and without being deemed guilty of trespass or becoming liable for any loss or damage occasioned thereby; (c) sue for rent as it comes due from time to time in one or more actions; and/or (d) treat Lessee's breach as an anticipatory breach and recover from Lessee in damages the total rent and charges provided for in this Lease for the remainder of the Term, all of which will be deemed accelerated and immediately due. Lessor may make such alterations and repairs as it deems advisable to relet the Premises, and relet the Premises or any part thereof for such term or terms (which may extend beyond the term of this Lease) and at such rentals and upon such other terms and conditions as Lessor in its sole discretion deems advisable. No such reletting shall relieve Lessee or any guarantors from their obligations under this Lease or any guaranty. Upon any such reletting all rentals received by Lessor therefrom shall be applied: first, to any indebtedness other than rent due hereunder from Lessee to Lessor; second, to pay any costs and expenses of reletting, including brokers' and attorneys' fees and costs of alterations and repairs; third, to rent due hereunder; and fourth, the residue, if any, shall be held by Lessor and applied in payment of future rent as it becomes due hereunder. If rentals received from such reletting during any month are less than that to be paid during that month by Lessee hereunder, Lessee shall pay any such deficiency to Lessor within ten (10) days from the date of invoice. In no event shall Lessee be entitled to any excess rent obtained by reletting the Premises over and above the rent reserved herein.

17.3. No re-entry or taking possession of the Premises by Lessor shall be construed as an election to terminate this Lease unless a written notice of such termination is given by Lessor to Lessee. Notwithstanding any such reletting or re-entry or taking possession, without termination, Lessor may at any time thereafter terminate this Lease for any prior uncured breach or default. Lessor shall have the right to dispose of any property left in the Premises upon the expiration or termination of this Lease or Lessor's re-entry following a default by Lessee, in any manner, Lessor

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deems desirable, including without limitation, discarding such items in a refuse container. Lessee shall be entitled to no payment or offset for the value of any such property (even if sold by Lessor) and shall pay to Lessor on demand, all costs incurred by Lessor in connection with such disposal. Pursuit of any of the foregoing remedies shall not preclude pursuit of any of the other remedies herein provided or any other remedies provided by law or in equity, nor shall pursuit of any remedy herein provided constitute a forfeiture or waiver of any rent due to Lessor hereunder or of any damages accruing to Lessor. No delay or omission in the exercise of any right or remedy of Lessor on any default by Lessee shall impair such a right or remedy or be construed as a waiver. The receipt and acceptance by Lessor of delinquent rent shall not constitute a waiver of any other default; it shall constitute only a waiver of timely payment for the particular rent payment involved. Exercise by Lessor of any one or more remedies hereunder or otherwise available shall not be deemed an acceptance of surrender of the Premises and/or a termination of this Lease by Lessor, whether by agreement or operation of law, it being understood that such surrender and/or termination can be effected only by the express written declaration of Lessor. Lessor's consent to or approval of any act by Lessee requiring Lessor's consent or approval shall not be deemed to waive or render unnecessary Lessor's consent to or approval of any subsequent act by Lessee. Any waiver by Lessor of any default must be in writing and shall not be a waiver of any other default concerning the same or any other provision of the Lease. Except as provided herein, Lessee agrees that Lessor shall have no obligation to relet or attempt to relet the Premises or any portion thereof following termination of this Lease, re-entry or repossession of the Premises or to otherwise mitigate its damages in the event of a Lessee default. In the event of a default hereunder and Lessee has been excluded from the Premises, Lessor shall use reasonable efforts to mitigate its damages. Lessee agrees that Lessor's duty to mitigate shall be limited to listing the Premises for lease with a licensed real estate broker of Lessor's choosing (which may be an affiliate of Lessor) for a period of three (3) months. If no party acceptable to Lessor executes a lease with Lessor on terms acceptable to Lessor (in Lessor's sole discretion) within this three (3) month period, Lessee agrees that Lessor shall conclusively have satisfied any such duty to release or mitigate. In no event will Lessor be considered to be acting unreasonably in refusing to lease to any party if: (i) the prospective lessee has a financial condition which is unacceptable to Lessor or Lessor's lenders; (ii) the prospective lessee requires any alterations which are unacceptable to Lessor or Lessor's lender; (iii) the prospective lessee requires Lessee improvements to be paid by Lessor; (iv) the prospective lessee requires lease terms different from this Lease or which are otherwise unacceptable to Lessor or Lessor's lender; (v) the prospective lessee requires a rental rate less than that required hereunder plus any costs of reletting, including without limitation, lease commissions; or (vi) if percentage rent is payable and the prospective lessee is likely (in Lessor's sole discretion) to generate percentage rental less than that previously generated (on an average annual basis over the Lease term to date) by Lessee.

17.4. If the Lessee shall continue in default in the performance of any of the covenants or agreements herein contained after the time limit for the curing thereof, then without limitation or any other remedy available to Lessor for such default Lessor may, but shall not be obligated to, perform the same for the account of Lessee. Any amount paid or expense or liability incurred by Lessor in the performance of any such matter for the account of Lessee shall be deemed to be additional rent and the same (together with interest thereon at the highest lawful rate, herein the "Maximum Rate" from the date upon which any such expense shall have been incurred) may, at the option of Lessor, be added to any rent then due or thereafter falling due hereunder, or shall be payable by Lessee to Lessor on demand.

## ARTICLE 18

### INDEMNIFICATION OF LESSOR

18.1. Lessee shall indemnify and save harmless Lessor from and against all claims by or on behalf of any person arising from the conduct or management of, or from any work or thing whatsoever done in and on, the Premises which accrue during the Term. Lessee shall also indemnify and save Lessor harmless against and from all claims arising during the Term (a) from any condition of the Premises or any sidewalk included within the Premises, or of any space therein or appurtenant thereto, (b) from any breach or default by Lessee in the performance of any covenant or agreement on the part of Lessee to be performed pursuant to this Lease, (c) from any act of negligence or alleged act of negligence of Lessee, or any occupant of the Premises or any part thereof, or of its or their agents, contractors, servants, employees, invitees, licensees or of trespassers, and (d) from any accident, injury, or damage whatsoever caused to any person or property occurring during the Term in or about the Premises, or upon or under the sidewalks and the land adjacent thereto.

18.2. Lessee shall also indemnify and save Lessor harmless from and against all judgments, costs, expenses, and liabilities incurred in or about any claim or action or proceeding brought with respect to any of the matters enumerated in Section 18.1. If any action or proceeding is brought against Lessor by reason of any such claim, Lessee shall, upon Notice from Lessor, defend such action or proceeding by counsel reasonably satisfactory to Lessor. Counsel furnished by Lessee's insurance carrier shall be satisfactory to Lessor. The indemnity obligations in this Article 18 shall survive the expiration or termination of this Lease.

18.3. Under no circumstances shall Lessee be required to indemnify or hold Lessor harmless from Lessor's gross negligence or willful misconduct.

## ARTICLE 19

### SUBORDINATION AND ATTORNMENT

Lessee accepts this Lease subject and subordinate to any mortgage, deed of trust, or other lien presently existing or subsequently created on the Premises or the Center as a whole, and to any amendments, renewals, extensions, consolidations, modifications, assignments and refinancing thereof without the necessity of any further instrument or act on the part of the Lessee. Lessee agrees that any such mortgagee shall have the right at any time to subordinate such mortgage, deed of trust, or other lien to this Lease. Lessor is hereby irrevocably vested with full power and authority to subordinate this Lease to any mortgage, deed of trust, or other lien hereafter placed on the Premises or the Center as a whole. Lessee agrees on demand to execute such instruments confirming such subordination of this Lease to any such mortgage, deed of trust or other lien and provide such further assurances as Lessor or such mortgagee may request, provided the rights of Lessee shall remain in full force and effect during the term of this Lease so long as Lessee shall continue to perform all of the covenants and conditions of this Lease. No such mortgagee shall be required to assume any liabilities for defaults occurring prior to its ownership of the Center. Lessee covenants

and agrees that upon foreclosure of any deed of trust, mortgage or other instrument of security and the sale of the Premises or Center pursuant to any such document, to attorn to any purchaser at such a sale and to recognize such purchaser as the Lessor under this Lease. The agreement of Lessee to attorn to any purchaser pursuant to such a foreclosure sale or trustee's sale in the preceding sentence shall survive any such sale. Notwithstanding anything herein to the contrary, Lessee's duty to subordinate its interest in the Lease to any future Mortgage or lien on the Premises or Center shall be contingent upon the agreement of such lien holder not to disturb or interfere with Lessee's possession of the Premises or Common Area as long as Lessee is not in default under this Lease.

## ARTICLE 20

### SALE OF PREMISES BY LESSOR

In the event of any sale of the Premises by Lessor, Lessor shall be and is hereby entirely freed and relieved of all liability under any and all of its covenants and obligations contained in or derived from this Lease arising out of any act, occurrence or omission occurring after the consummation of such sale; and the purchaser, at such sale or any subsequent sale of the Premises shall be deemed, without any further agreement between the parties or their successors in interest or between the parties and any such purchaser, to have assumed and agreed to carry out any and all of the covenants and obligations of the Lessor under this Lease. Furthermore, in the event of a sale or conveyance by Lessor of the Premises, or the property of which the Premises are a part, this Lease shall not be affected by any such sale, and Lessee agrees to attorn to the purchaser thereof. Notwithstanding the provisions of this Article 20 to the contrary, the sale of the Premises by Lessor shall not relieve Lessor or Adrian Baca from the terms and conditions of that certain non compete agreement dated January 11, 1999.

## ARTICLE 21

### HOLDING OVER

If Lessee holds over or occupies the Premises after the termination of this Lease or demand by Lessor to vacate (it being agreed there shall be no such holding over or occupancy without Lessor's written consent), Lessee shall pay Lessor for each day of such holding over a sum equal to one hundred ten percent (110%) of the monthly rent applicable hereunder at the expiration of the term or termination of the Lease, prorated for the number of days of such holding over. If Lessee holds over with or without Lessor's written consent, Lessee shall occupy the Premises as a Lessee-at-sufferance and all other terms and provisions of this Lease shall be applicable to the period of such occupancy. Lessee agrees that Lessor may institute a forcible detainer or a forcible entry and detainer action against Lessee without serving any demand for possession, demand to vacate, notice of termination or similar demand or notice upon Lessee.

## ARTICLE 22

### BROKERS AND FINDERS

Lessee and Lessor represent and warrant to the other that they have not engaged any broker or finder and that no claims for brokerage commissions or finders' fees will arise in connection with execution of this Lease other than as provided below and each party agrees to indemnify, defend and hold the other harmless from any liability or expense (including attorney's fees) arising from a breach of this warranty and representation asserted against the other party for any such claims caused by a breach. The indemnity obligation shall survive the termination or expiration of this Lease.

## ARTICLE 23

### RENEWAL PRIVILEGES

23.1. If the Lessee is not in default under the Lease at the end of the Term, Lessee may renew the Term by giving Notice as provided in Section 23.2, for five (5) additional five (5) year Terms upon all of the terms, covenants and conditions set forth in the Lease, the Basic Rent for such renewal Terms being adjusted by the increased in the CPI-U as set forth in Article 1(b) of the Lease.

23.2. Lessee shall exercise its right to a renewal Term by giving Lessor Notice of its election so to do not less than six (6) months prior to the commencement date of the renewal term, and, upon the giving of such Notice, this Lease, subject to the provisions of this Article, shall be deemed renewed and the Term shall be deemed extended for the period of the relevant renewal Term without the execution of any further lease or instrument. Notice of election to renew the Term for two or more successive renewal Terms may be given simultaneously, provided that in each such instance, Notice to renew as to the preceding renewal Term or Terms shall have theretofore been given.

## ARTICLE 24

### ARBITRATION AND APPRAISAL

24.1. In cases where this Lease provides for the determination of any matter by arbitration, the matter shall be settled and finally determined by arbitration in accordance with the Rules of the American Arbitration Association, or its successor, except that the arbitrators shall be selected as provided in Section 24.2, and the judgment upon the award rendered therein may be entered in any court having Jurisdiction thereof.

24.2. In each instance under this Lease where it is necessary to resort to appraisal or arbitration, such appraisal or arbitration, as the case may be, shall be conducted as follows: the party desiring the appraisal or arbitration shall give Notice to that effect to the other party, specifying therein the name and address of the person designated to act as appraiser or arbitrator on its behalf. Within thirty (30) days after the service of such Notice, the other party shall give Notice to the first party specifying the name and address of the person designated to act as appraiser or arbitrator on its behalf. If either party fails to notify the other party of the appointment of its appraiser or arbitrator, as aforesaid, within or by the time above specified, then the appointment of the second appraiser or arbitrator shall be made in the same manner as hereinafter provided for the appointment of a third appraiser or arbitrator in a case where the two appraisers or arbitrators appointed hereunder

and the parties are unable to agree upon such appointment. The appraisers or arbitrators so chosen shall meet within ten (10) days after the second appraiser or arbitrator is appointed, and if, within sixty (60) days after such first meeting the two appraisers or arbitrators are unable to agree upon the valuation or a decision as to the question being arbitrated, they shall appoint a third appraiser or arbitrator who is a competent and impartial person; and if they are unable to agree upon such appointment within fifteen (15) days after the time aforesaid, such third appraiser or arbitrator shall be selected by the parties (if they can agree thereon) within a further period of fifteen (15) days. If the parties do not so agree, then either party, on behalf of both, may request such appointment by the then Chairman of the Board of Directors of the local Chamber of Commerce (or any organization successor thereto) or in his absence, failure, refusal, or inability to act within thirty (30) days, then either party, on behalf of both, may apply to the Presiding Justice of the highest court in the county in which the Premises are located, for the appointment of such third appraiser or arbitrator, and the other party shall not raise any question as to the court's full power and jurisdiction to entertain the application and make the appointment. If any appraiser or arbitrator fails, refuses or is unable to act, his successor shall be appointed within ten (10) days by the party who originally appointed him or, if such party fails so to appoint such successor, or in the case of the third appraiser or arbitrator, his successor shall be appointed as hereinbefore provided. Any appraiser selected or appointed pursuant to this Section shall be a member of the American Institute of Real Estate Appraisers (or a successor organization), shall be an appraiser, and shall have been doing business as such in the county in which the Premises are located for a period of at least ten (10) years before the date of his appointment. Any arbitrator acting under this Section shall be qualified in the field in which the arbitration is involved, and shall have been actively engaged in such field in the county in which the Premises are located for a period of at least ten (10) years before the date of his appointment as arbitrator hereunder. Each appraiser and arbitrator chosen or appointed pursuant to this Section shall be sworn fairly and impartially to perform his duties as appraiser or arbitrator. Within sixty (60) days after the appointment of such third appraiser or arbitrator, each of the first two appraisers or arbitrators shall submit their valuation or determination as the case may be, to the third appraiser or arbitrator who must select one of the valuations or determinations, and the selection so made shall in all cases be binding and conclusive upon the parties and judgment upon the decision may be entered in any court having jurisdiction. Each party shall pay the fees and expenses of its appraiser or arbitrator, and both shall share the fees and expenses of the third appraiser or arbitrator, if any.

## ARTICLE 25

### REMEDIES

25.1. The specified remedies to which Lessor may resort under this Lease are cumulative and are not intended to be exclusive of any other remedies or means of redress to which Lessor may be lawfully entitled in case of any breach or threatened breach by Lessee of any provision of this Lease. The failure of Lessor to insist in any one or more cases upon the strict performance of any of the covenants of this Lease or to exercise any option herein contained shall not be construed as a waiver or a relinquishment for the future performance of such covenant or exercise of such option. A receipt by Lessor of Basic Rent or additional rent with knowledge or the breach of any covenant hereof shall not be deemed a waiver of such breach, and no waiver by Lessor of any provision of this Lease shall be deemed made unless expressed in writing and signed by Lessor. In addition to the other remedies provided in this Lease, Lessor shall be entitled to the restraint by injunction of the

violation, or attempted or threatened violation, of any of the covenants, conditions, or provisions of this Lease and the provisions hereof requiring arbitration shall not in any way diminish Lessor's ability to pursue such ancillary remedies.

25.2. Lessor shall in no event be charged with default of any of its monetary obligations unless Lessor has failed to pay such sums within ten (10) days after written notice to Lessor by Lessee specifically describing Lessor's failure, or in any of its non-monetary obligations hereunder unless and until Lessor shall have failed to perform such obligations within thirty (30) days (or such additional time as is reasonably required to correct any such default) after written notice to Lessor by Lessee, specifically describing such failure. All obligations of Lessor hereunder shall be construed as covenants, not conditions; and, except as may be otherwise expressly provided in this Lease, Lessee may not terminate this Lease for breach of Lessor's obligations hereunder. All obligations of Lessor under this Lease will be binding upon Lessor only during the period of its ownership of the Premises. The term "Lessor" in this Lease shall mean only the owner, for the time period that such owner holds title to the Premises. In the event of the transfer of the Land or Building by sale/operation of law or otherwise, of such owner's interest in the Premises, such owner shall thereupon be released and discharged from all obligations of Lessor thereafter accruing and the transferee shall be deemed to assume all future obligations of Lessor under the Lease. Any liability of Lessor under this Lease shall be limited solely to its interest in the Center and Lessee's offset rights, and in no event shall any personal liability be asserted against Lessor in connection with this Lease nor shall any recourse be had to any other property or assets of Lessor.

25.3. In the event of any litigation regarding this Lease, the losing party shall pay to the prevailing party reasonable attorney's fees.

25.4. This Lease shall be construed in accordance with the laws of the State of Texas and venue shall be in the courts located in El Paso County.

## ARTICLE 26

### CERTIFICATE OF LESSOR AND LESSEE

Lessor and Lessee shall, at any time and from time to time, upon not less than twenty (20) days prior Notice from the other, execute, acknowledge and deliver to the requesting party a statement in writing certifying that this Lease is unmodified and in full force and effect (or if there have been modifications, that this Lease is in full force and effect as modified and stating the modifications), and the dates to which Basic Rent and additional rent have been paid in advance, and stating whether or not to the best knowledge of the signer of such statement the requesting party is in default in keeping, observing or performing any covenant or agreement contained in this Lease and, if any Event of Default has occurred and is continuing, specifying each such Event of Default. Any such statement delivered pursuant to this Section may be relied upon by the requesting party and any prospective purchaser or mortgagee of its estate, but reliance on such statement may not extend to any Event of Default as to which the signer had no actual knowledge.

## ARTICLE 27

### NOTICES

27.1. Each Notice must be in writing, and must be given by personal delivery or certified mail, return receipt requested, addressed to the respective party at its address above set forth, with a copy, in case of Notices to Lessee, to James S. Pleasant, Esq., Gardere & Wynne, L.L.P., 1601 Elm Street, Suite 3000, Dallas, Texas 75201, and in case of Notices to Lessor, to Darren G. Woody, Esq., P.O. Box 1322, El Paso, Texas 79947-1322. Either party, and the holder of any Mortgage which has made the request referred to in Section 27.2, may designate by Notice a new or other address to which Notices to that party shall thereafter be given. All Notices shall be deemed given when personally delivered or deposited in the mails, postage prepaid, addressed to the party as herein provided.

27.2. If the holder of any Mortgage so requests by Notice to Lessor and Lessee (which Notice shall specify an address for Notices to the holder of the Mortgage) all Notices given hereunder shall also be given contemporaneously to such holder. Notwithstanding any other provision of this Lease, Lessor shall be under no obligation to give any Notice to the holder of any Mortgage unless such holder has made the request referred to in this Section 27.2.

## ARTICLE 28

### QUIET ENJOYMENT

If Lessee timely pays the Basic Rent and all other additional rent provided for in this Lease, and if Lessee observes and keeps all of the covenants, agreements and provisions of this Lease on its part to be observed and kept, then Lessee shall lawfully and quietly hold, occupy and enjoy the Premises during the Term without hindrance or molestation, subject to all matters of record on the date of this lease, and to all laws, rules and regulations imposed by governmental authorities regardless of when they become effective.

## ARTICLE 29

### INVALIDITY OF PARTICULAR PROVISIONS

If any 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 provision to person or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each provision of this Lease shall be valid and be enforced to the fullest extent permitted by law.

## ARTICLE 30

WAIVER OF LANDLORD'S LIEN

Lessor does hereby waive all contractual and statutory landlord's liens.

ARTICLE 31

COVENANTS TO BIND AND  
BENEFIT THE PARTIES; ETC.

The covenants and agreements herein contained shall bind and inure to the benefit of Lessor and Lessee and their respective successors and assigns.

ARTICLE 32

MEMORANDUM OF LEASE

Lessor shall, if requested by Lessee, execute a memorandum of this Lease for recordation in the county where the Premises are located; provided, however, no mention shall be made therein of the amount of rent due hereunder.

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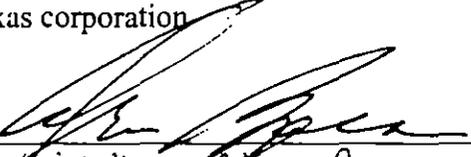
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IN WITNESS WHEREOF, Lessor and Lessee have duly executed and delivered this Lease as of the day and year first above written.

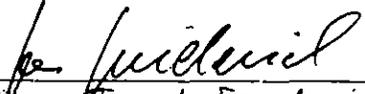
**LESSOR:**

**LA FERIA PARK N SHOP, INC.,**  
a Texas corporation

By:   
Name (printed): Adrian Baca  
Title: President

**LESSEE:**

**FURR'S SUPERMARKETS, INC.,**  
a Delaware corporation

By:   
Name (printed): Jan V. Friedrich  
Title: Vice President

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E

**EXHIBIT "A"**

**LEGAL DESCRIPTION**

Parcel 1: Tracts 12A, 12B, 12E, 12F, 12G and 13B, Block 24, UPPER VALLEY SURVEYS, in El Paso County, Texas, according to the resurvey of said Upper Valley Surveys made by El Paso County, Texas for tax purposes, together with that certain portion of Houston Street lying to the West of Third Street that was closed by the Anthony Town Council as evidenced by Item 6 of the Minutes of the Anthony Town Council Meeting, dated September 27, 1977.

Parcel 2: Lot 4, Block 17, LA TUNA TOWNSITE, an addition to El Paso County, Texas, according to the plat thereof on file in Volume 13, Page 55, Real Property Records, El Paso County, Texas.

Parcel 3: Lots 1 and 2 and the Northern 21.67 feet of Lot 3, Block 2, MUNDY ADDITION TO LA TUNA in El Paso County, Texas.

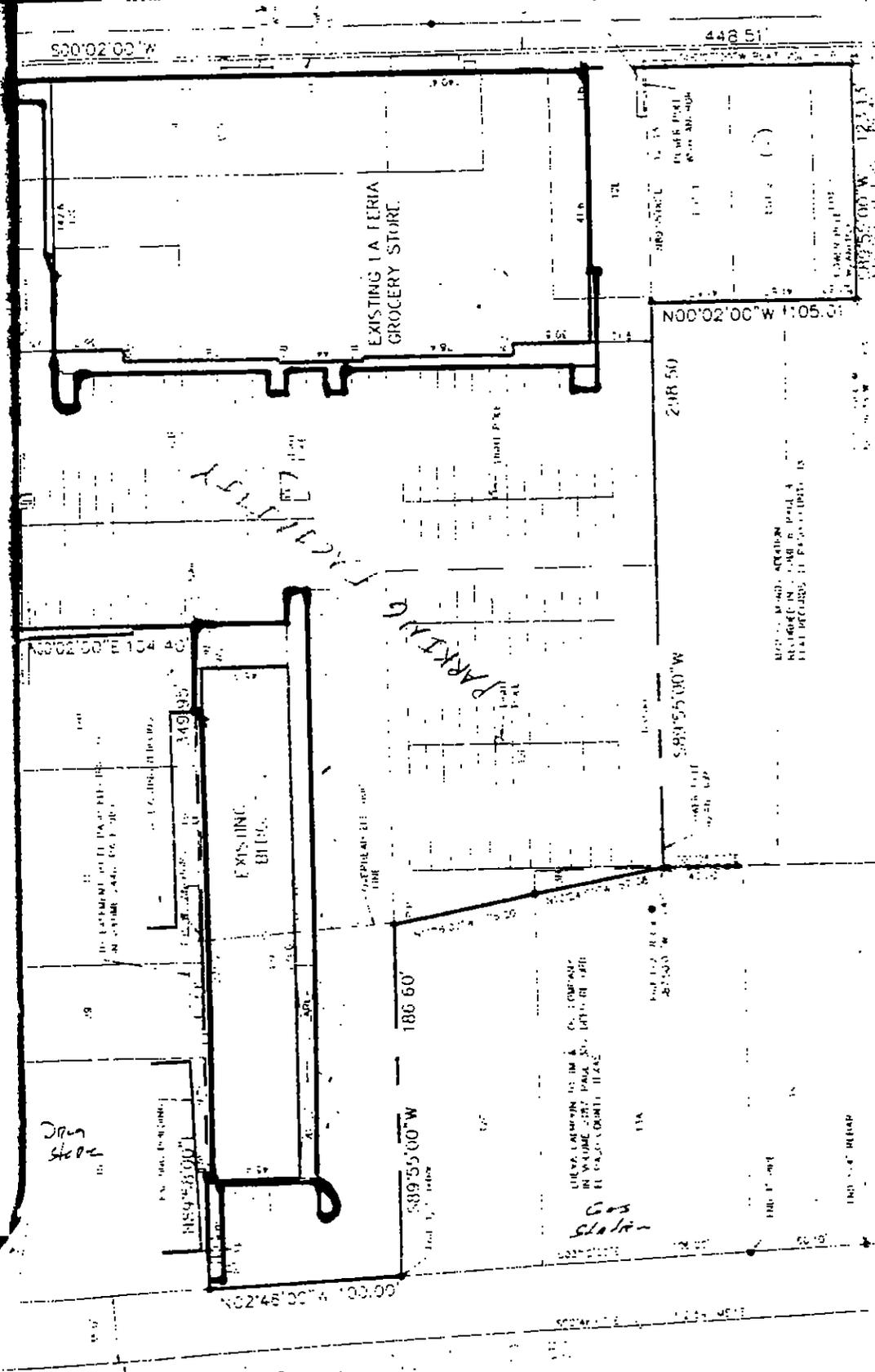
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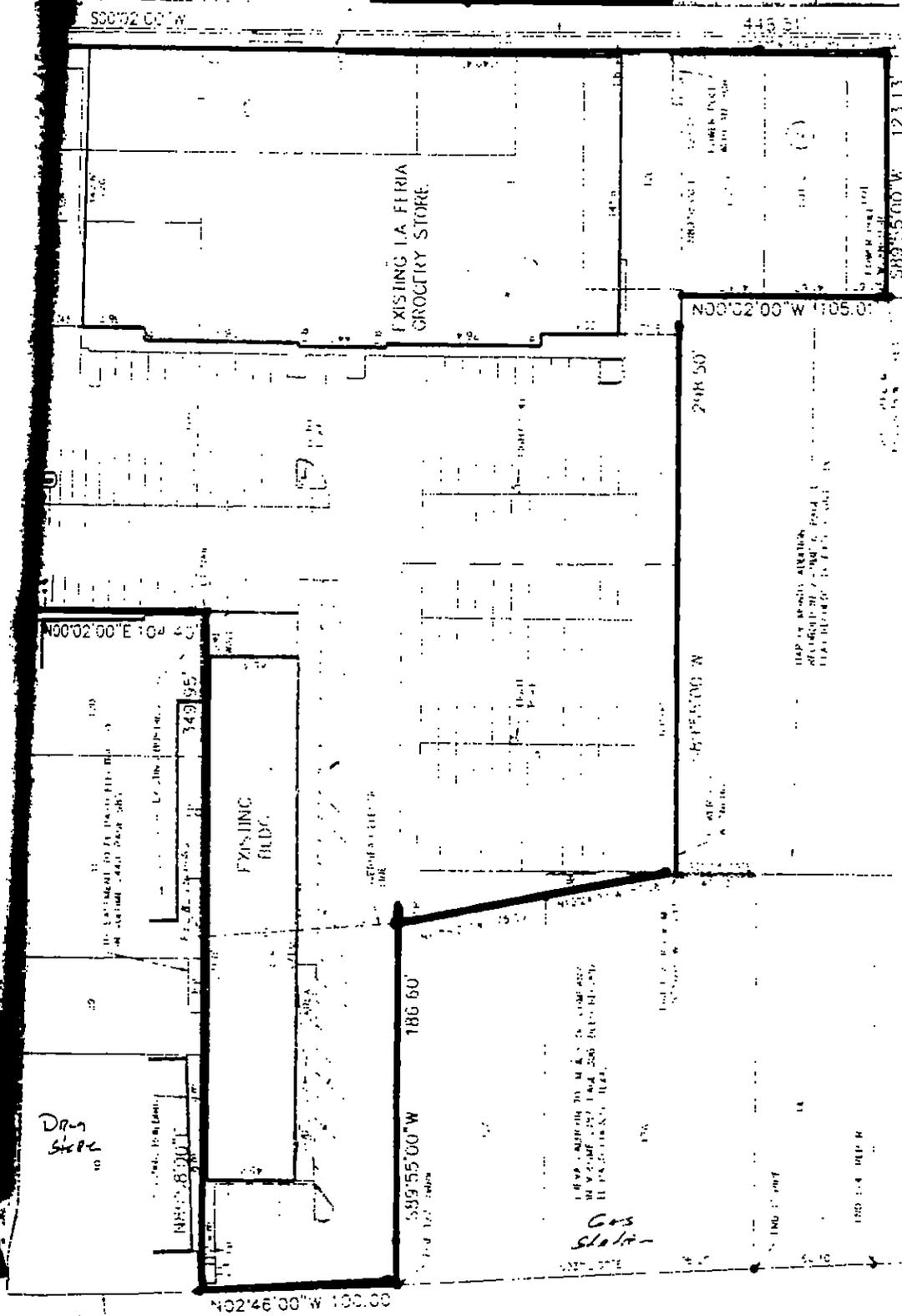
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**TRADEMARK LICENSING AGREEMENT**

THIS TRADEMARK LICENSING AGREEMENT (the "Agreement") is entered into by and between ADRIAN BACA (the "Licensor") and FURR'S SUPERMARKETS, INC., a Delaware corporation (the "Licensee").

**RECITALS**

A. Licensor owns certain common law and Federal trademarks and/or applications therefor identified in Exhibit A to this Agreement (the "Trademarks").

B. Licensee desires to use the Trademarks in the operation of supermarkets in the States of Texas and New Mexico using the La Feria name (the "Supermarkets").

C. Licensor is willing to grant to Licensee the exclusive right to use the Trademarks in the operation of the Supermarkets subject to the terms and conditions of this Agreement, and Licensee is willing to accept and assume such rights and obligations.

**AGREEMENT**

In consideration of the mutual covenants and conditions contained herein and intending to be legally bound, the parties hereby agree as follows:

**ARTICLE I  
DEFINITIONS**

Section 1.1. Affiliate or Affiliates. "Affiliate" or "Affiliates" shall mean any corporation, firm, partnership, or other entity, whether de jure or de facto, that directly or indirectly owns, is owned by, or is under common ownership with a party to this Agreement to the extent of at least 50 percent of the equity having the power to vote on or direct the affairs of the entity and any person, firm, partnership, corporation or other entity actually controlled by, controlling, or under common control with a party to this Agreement.

Section 1.2. Effective Date. "Effective Date" of this Agreement shall be the date concurrent with the closing of that certain asset purchase transaction contemplated between Licensee and La Feria Park N Shop, Inc.

Section 1.3. Licensee. "Licensee" shall mean Furr's Supermarkets, Inc., a Delaware corporation, and its successors and assigns.

Section 1.4. Licensor. "Licensor" shall mean Adrian Baca, his heirs, administrators, executors, successors and assigns.

Section 1.5. Net Sales. "Net Sales" shall mean the aggregate of all amounts received by Licensee in the applicable period from sales of goods, wares, merchandise and services to the public made for cash or credit on the premises during the term of this License, after deducting (i) merchandise which is returned by the purchaser and accepted by Licensee; (ii) allowances made by Licensee to its customers or returned or defective merchandise; (iii) returns or refunds, and credits received in settlement of claims for loss or damage to goods, wares or merchandise; (iv) all sales taxes, excise taxes, gross receipt taxes and similar taxes imposed by any governmental agency having jurisdiction, upon articles sold from the Supermarkets, under any existing or future rules, regulations, laws or ordinances, but not any income, excess profits, franchise or other taxes based upon or measured by income; (v) all receipts from the transfer of goods, wares or merchandise from the Supermarkets to any other store or warehouse of Licensee or any of its affiliates; (vi) all receipts from the delivery of goods, wares or merchandise from the Supermarkets to any manufacturer or supplier thereof for any purpose except a sale; (vii) all receipts from vending machines, weighing machines, stamp machines, telephones, and like coin-operated machines; (viii) all receipts from sales to employees made at a discount; (ix) all receipts from the sale of Licensee's fixtures or equipment; (x) all

receipts from any exchange of merchandise pursuant to a stamp redemption register tape or like plan; and (xi) direct expenses of credit card sales paid by Licensee to the issuers of such credit cards (however such exclusion not to exceed three percent (3%) of Licensee's credit card sales).

Section 1.6. Product. "Product" shall mean groceries, general merchandise, tobacco products, produce, bakery goods, sundries, alcoholic beverages and other merchandise sold in or by the Supermarkets.

Section 1.7. Supermarkets. "Supermarkets" shall mean the supermarkets operated by Licensee under the name "La Feria" but only for those time periods during the Year that the name "La Feria" is used by Licensee.

Section 1.8. Third Party or Third Parties. "Third Party" or "Third Parties" shall mean any entity other than a party to this Agreement or an Affiliate.

Section 1.9. Trademark or Trademarks. "Trademark" or "Trademarks" shall mean any one of the trademarks listed in Exhibit A hereto.

Section 1.10. Year. "Year" shall mean a 12-month period ending on December 31.

Section 1.11. Supermarket. "Supermarket" shall mean any one of the Supermarkets as defined in Section 1.7.

## ARTICLE II GRANT OF RIGHT TO USE TRADEMARKS

Section 2.1. Grant by Licensor. Licensor grants to Licensee the exclusive right to use within a two-mile radius of each Supermarket operated by Licensee, and Licensee shall use only, the Trademarks with respect to the sale of Products solely in the operation of the Supermarkets. During the term of this Agreement, Licensee shall not use, or grant to any other party the right to use, the Trademarks anywhere in any manner except in connection with the operation of the Supermarkets.

Section 2.2. No Further Transfer. Licensee shall not assign, sublicense, make available, or otherwise transfer or assign any right to use, develop or otherwise enjoy any of the Trademarks without the express written consent of Licensor.

Section 2.3. Quality.

a. The sale of Products by Licensee in the operation of the Supermarkets shall meet the quality control standards and specifications reasonably established from time-to-time by Licensor; *provided, however,* that Licensor hereby agrees that Licensor's quality control standards and specifications shall be deemed to be satisfied as long as Licensee reasonably meets or exceeds the quality control standards and specifications (i) in place by Licensor in the La Feria store in Anthony, Texas as of January 1, 1999, or (ii) in place from time-to-time by Licensee in the operation of a majority of the grocery stores owned and operated by Licensee, including any requirements of applicable regulatory agencies regarding the operation of grocery stores. Licensor shall have the right, at its expense, to audit Licensee's quality control of the sale of Products in the operation of the Supermarkets from time-to-time on a reasonable basis and on reasonable prior notice to Licensee.

b. In the event that quality control of Licensee falls below such standards and specifications, Licensor shall give Licensee written notice of such failures, and Licensee shall, at its expense and within the reasonable notice period set out in the notice, take such corrective action as is necessary to restore quality to the appropriate level or respond to Licensor why Licensee reasonably believes that Licensee is in compliance. Should a dispute arise regarding whether corrective action is necessary, the provisions of Section 2.3(c) shall be used to resolve the dispute. If, after the mediation described in Section 2.3(c) below, the mediator concludes that corrective action is required and Licensee fails to take corrective action in a timely

manner, Licensor shall have the right and option to terminate this Agreement in accordance with Sections 6.2 and 6.3.

c. If Licensee and Licensor disagree as to whether the quality control of Licensee falls below such standards and specifications or as to corrective action necessary to restore the quality to the appropriate level, Licensee and Licensor agree for a period of up to thirty (30) days to negotiate in good faith to settle the dispute and to meet at a mutually acceptable time and place and as often thereafter as they deem necessary in an effort to reach an amicable resolution. If no resolution of the dispute is reached within thirty (30) days of the first meeting, and if requested in writing by either parties, the parties shall endeavor to settle the dispute by mediation as follows:

(i) The mediation conference shall be conducted in accordance with the then current Procedure for Mediation of Business Disputes of the Center for Public Resources ("CPR"), except as otherwise provided herein,

(ii) The parties shall mutually select a mediator to mediate the dispute. If the parties cannot agree on the selection of a mediator within thirty (30) days of the request for mediation, either party may request that the CPR appoint a member of the CPR Panels of Neutrals as the mediator.

(iii) The parties shall exchange written statements of their positions concerning the dispute. The party requesting mediation pursuant to this Section shall provide the non-requesting party with its written statement of position with the request for mediation. The non-requesting party shall provide its written statement of position to the other party within two weeks of the request for mediation. Each party's written statement of position shall be accompanied by all documentation that the party intends to provide to the mediator at or before the mediation conference and shall identify persons it wishes to present as live witnesses at the mediation. The mediator may request additional documentation from the parties.

(iv) The mediation conference shall be conducted in a location agreed to by the parties, within three weeks of the exchange of the non-requesting party's written statement and shall be attended by the parties represented by executive officers with authority to negotiate in good faith to settle the dispute, and such counsel, experts, witnesses and others as either party deems appropriate. At the mediation conference, the parties shall attempt to reach an amicable resolution to all disputes.

### ARTICLE III ROYALTY PAYMENT

Section 3.1. Compensation. Subject to Section 3.2 of this Article III, as consideration for the rights granted under this Agreement, Licensee shall pay to Licensor a royalty in an amount equal to (a) \$3,000.00 per Year for each Supermarket using the Trademark (prorated by days for any partial year), plus (b) that percent of Licensee's Net Sales of Product during such Year in, on or from each of the Supermarkets as set forth on Exhibit B attached hereto, to the extent such percentage exceeds the payments to Licensor under Section 3.1(a).

Section 3.3. Payment and Accounting. Royalties due to Licensor under Section 3.1(a) above shall be due and payable by Licensee at the first of each Year (or the month that the Trademark is first used by Licensee at a new location, prorated for the balance of such Year). Royalties due to Licensor under Section 3.1(b), if any, shall be payable annually by March 1 of the Year following the immediately preceding Year. Each payment under Section 3.1(b) shall be accompanied by a written accounting of all Net Sales by Licensee during such Year from the Supermarket(s) (the "Royalty Notice").

Section 3.4. Currency. All royalties due under this Agreement shall be payable in U.S. dollars.

Section 3.5. Withholding Taxes and Related Matters. Any withholding or related tax or other obligations relating to the payments due under the terms of this Agreement shall be complied with by Licensee, shall be reflected in the Royalty Notice, and shall not alter the amount of the obligation of Licensee under this Article III.

Section 3.6. Net Sales Data. Licensee shall maintain complete and accurate records of all Net Sales of Product. Licensor and/or Licensor's accountant, attorney or other agent shall have the right, at Licensor's expense and on a reasonable basis with reasonable prior written notice to Licensee, to examine such records during regular business hours during the term of this Agreement and for six (6) months following the termination of this Agreement. If any such examination reveals an underpayment of royalties to Licensor, Licensee shall promptly remit such royalties to Licensor. If any such examination reveals an overpayment of any royalties by Licensee to Licensor, Licensor shall promptly refund any such overpayment to Licensee. Further, if any examination reveals an underpayment of royalties by Licensee to Licensor in excess of 5% of the total royalties paid to Licensor in any Year, Licensee shall also promptly reimburse Licensor all reasonable costs incurred by Licensor in conducting such examination and shall pay Licensor interest on such underpayment from the date such royalties were due until paid at the maximum rate of interest allowed by applicable law.

Section 3.7. No Obligation to Use Trademark. Licensor understands and agrees that Licensee is not required or obligated under this Agreement to use the Trademark in any of Licensee's Supermarkets and that Licensee may cease using (or resume or start using) the Trademark in any or all Supermarkets in Licensee's sole and absolute discretion.

#### ARTICLE IV WARRANTIES AND REPRESENTATIONS

Section 4.1. Warranties and Representations of Licensor. Licensor represents and warrants that:

- a. It owns the exclusive right, title, and interest in each Trademark and has the right to license such Trademarks to Licensee;
- b. Each Trademark is valid and enforceable;
- c. Use of any Trademark does not infringe any rights of Third Parties;
- d. It has the right and authority to enter into this Agreement; and
- e. It is not aware of any trademark or copyright which would infringe upon the Trademarks or which the Trademarks would infringe upon.
- f. Licensor, at its cost and expense, shall promptly enforce by appropriate means, including the bringing of a lawsuit if necessary, the Trademark against each Third Party who infringes upon the Trademark in the operation of a supermarket.

Section 4.2. Warranties and Representations of Licensee. Licensee represents and warrants that:

- a. It has the right and authority to enter into this Agreement;
- b. It shall use the Trademarks only in the manner and for the purposes specifically set forth in this Agreement and in no other manner and for no other purpose. It shall not alter or modify any Trademark without the express prior written consent of Licensor;
- c. It shall not infringe upon any Trademarks held by Licensor during the term of this Agreement or anytime after its expiration or termination; and

d. It will immediately notify Licensor if it knows or learns of any party who is infringing or who intends to infringe upon any Trademarks held by Licensor, and it will cooperate with Licensor in enforcing Licensor's rights against such infringing party.

ARTICLE V  
TRADEMARK OWNERSHIP

Licensee acknowledges Licensor's exclusive right, title, and interest in and to all Trademarks, including all United States or foreign patents, trademarks and copyrights or applications therefor, all trade secrets, and any and all other proprietary rights related to the Trademarks, whether now existing or hereafter arising. Licensee shall not at any time knowingly do or cause to be done, or fail to do or cause to be done, any act or thing, directly or indirectly, contesting or in any way impairing Licensor's right, title, or interest in any Trademark. Every use of any Trademark by Licensee shall inure to the benefit of Licensor. Further, Licensee acknowledges and agrees that all improvements, new applications, alterations and enhancements to the Trademarks shall be the property of Licensor. Licensor shall indemnify Licensee and hold Licensee harmless from and against any infringement or alleged infringement action or proceeding brought against Licensee by a Third Party on account of Licensee's lawful use of the Trademark.

ARTICLE VI  
TERM AND TERMINATION

Section 6.1. Term. The term of this Agreement shall be for a period concurrent with the term (including all renewal terms) of that certain lease agreement of even date herewith (the "Lease Agreement") between Licensee and La Feria Park N Shop, Inc. relating to the store at 319 S. Main Street, Anthony, Texas (the "Anthony Location"); provided, however, that Licensor shall have the right and option to terminate this Agreement upon written notice to Licensee if, during the term hereof, Licensee ceases to operate a Supermarket at the Anthony Location or defaults under the terms of such Lease Agreement such that the lessor terminates same, or Licensee or the lessor under such Lease Agreement otherwise terminates the Lease Agreement.

Section 6.2. Termination. In the event of a default by either party under this Agreement, the non-defaulting party shall have the right to terminate this Agreement at any time as long as such default continues, by giving written notice to the party in default of the occurrence of any of the following events (a "default"):

- a. Failure or neglect of a party to perform covenants or provisions of this Agreement if such default is not corrected within thirty (30) days after receiving written notice from the other party with respect to such default;
- b. Any act, determination, filing, judgment, declaration, notice, appointment of receiver or trustee, failure to pay debts, or other events under any law applicable to a party indicating the insolvency or bankruptcy of such party; or
- c. Any extraordinary governmental action, including, without limitation, seizure or nationalization of assets, stock, or other property relating to a party.

Section 6.3. Rights and Duties Upon Termination. On termination of this Agreement:

- a. If Licensor is not the defaulting party, Licensor shall have the right to retain any sums already paid by Licensee under this Agreement, and Licensee shall pay all sums accrued that are then due and owing under the terms of this Agreement.
- b. If Licensee is not the defaulting party, Licensee shall be responsible for payment of sums due to Licensor through the date of termination of this Agreement; *provided, however*, if Licensee has prepaid any amounts to Licensor for periods extending after the date of termination of this Agreement,

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Licensor shall promptly reimburse Licensee for all such prepaid amounts, prorated through the date of termination.

c. Licensee shall immediately discontinue all use of any Trademark and shall have no further right, title, or interest in any Trademark. Licensee shall immediately return to Licensor any and all materials, merchandise or other media bearing any Trademark and shall immediately cover and promptly remove any exterior or interior signs bearing any Trademark.

## ARTICLE VII MISCELLANEOUS

Section 7.1. Notices. Any and all notices, elections, offers, acceptances, and demands permitted or required to be made under this Agreement shall be in writing, signed by the person giving such notice, election, offer, acceptance, or demand and shall be delivered personally, or sent by registered or certified mail, to the party, at its address on file with the other party or at such other address as may be supplied in writing. The date of personal delivery or the date of mailing, as the case may be, shall be the date of such notice, election, offer, acceptance, or demand.

Section 7.2. Force Majeure. If the performance of any part of this Agreement by either party, or of any obligation under this Agreement (except an obligation to pay money), is prevented, restricted, interfered with or delayed by reason of any cause beyond the reasonable control of the party liable to perform, unless conclusive evidence to the contrary is provided, the party so affected shall, on giving written notice to the other party, be excused from such performance to the extent of such prevention, restriction, interference or delay, provided that the affected party shall use its reasonable best efforts to avoid or remove such causes of nonperformance and shall continue performance with the utmost dispatch whenever such causes are removed. When such circumstances arise, the parties shall discuss what, if any, modification of the terms of this Agreement may be required in order to arrive at an equitable solution.

Section 7.3. Successors and Assigns. This Agreement shall be binding on and shall inure to the benefit of the parties, Affiliates, their respective successors, successors in title, and permitted assigns, and each party agrees, on behalf of it, its Affiliates, successors, successors in title, and permitted assigns, to execute any instruments that may be necessary or appropriate to carry out and execute the purpose and intentions of this Agreement and hereby authorizes and directs its Affiliates, successors, successors in title, and permitted assigns to execute any and all such instruments. Each and every successor in interest to any party or Affiliate, whether such successor acquires such interest by way of gift, devise, assignment, purchase, conveyance, pledge, hypothecation, foreclosure, or by any other method, shall hold such interest subject to all of the terms and provisions of this Agreement. The rights of the parties, Affiliates, and their successors in interest, as among themselves, shall be governed by the terms of this Agreement, and the right of any party, Affiliate, or successor in interest to assign, sell, or otherwise transfer or deal with its interests under this Agreement shall be subject to the limitations and restrictions of this Agreement.

Section 7.4. Amendment. No change, modification, or amendment of this Agreement shall be valid or binding on the parties unless such change or modification shall be in writing signed by the party or parties against whom the same is sought to be enforced.

Section 7.5. Remedies Cumulative. The remedies of the parties under this Agreement are cumulative and shall not exclude any other remedies to which the party may be lawfully entitled.

Section 7.6. Further Assurances. Each party hereby covenants and agrees that it shall execute and deliver such deeds and other documents as may be required to implement any of the provisions of this Agreement.

Section 7.7. No Waiver. The failure of any party to insist on strict performance of a covenant hereunder or of any obligation hereunder shall not be a waiver of such party's right to demand strict compliance therewith in the future, nor shall the same be construed as a novation of this Agreement.

Section 7.8. Integration. This Agreement constitutes the full and complete agreement of the parties.

Section 7.9. Captions. Titles or captions of articles and paragraphs contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend, or describe the scope of this Agreement or the intent of any provision hereof.

Section 7.10. Number and Gender. Whenever required by the context, the singular number shall include the plural, the plural number shall include the singular, and the gender of any pronoun shall include all genders.

Section 7.11. Counterparts. This Agreement may be executed in multiple copies, each of which shall for all purposes constitute an Agreement, binding on the parties, and each partner hereby covenants and agrees to execute all duplicates or replacement counterparts of this Agreement as may be required.

Section 7.12. Applicable Law. This Agreement shall be governed by and construed in accordance with the laws of the United States and the State of Texas.

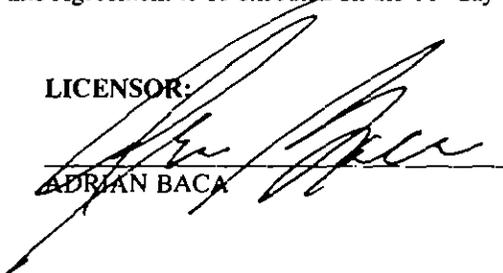
Section 7.13. Computation of Time. Whenever the last day for the exercise of any privilege or the discharge of any duty hereunder shall fall on a Saturday, Sunday or any public or legal holiday, whether local or national, the person having such privilege or duty shall have until 5:00 p.m. on the next succeeding business day to exercise such privilege, or to discharge such duty.

Section 7.14. Severability. In the event any provision, clause, sentence, phrase, or word hereof, or the application thereof in any circumstances, is held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remainder hereof, or of the application of any such provision, sentence, clause, phrase, or word in any other circumstances.

Section 7.15. Costs and Expenses. Unless otherwise provided in this Agreement, each party shall bear all fees and expenses incurred in performing its obligations under this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the 11<sup>th</sup> day of January, 1999.

LICENSOR:

  
ADRIAN BACA

LICENSEE:

FURR'S SUPERMARKET, INC.,  
a Delaware corporation

By:

Name:

Title:

  
Dan V. Foederich  
Vice President

EXHIBIT A  
TRADEMARKS

Trademark: LA FERIA service mark

Goods: Class 042; U.S. Patent and Trademark Application filed 9/29/98; Serial No. 75/561129  
Class 035; U.S. Patent and Trademark Application filed 11/11/98; Serial No. Pending

Applicant: Adrian Baca

Trademark: LA FERIA design

Goods: Class 042; U.S. Patent and Trademark Application filed 9/29/98; Serial No. 75/561128  
Class 035; U.S. Patent and Trademark Application filed 11/11/98; Serial No. Pending

Applicant: Adrian Baca

EXHIBIT B

ROYALTY PERCENTAGE

Year 1	0.01%
Year 2	0.02%
Year 3	0.03%
Year 4	0.04%

Example: If, in Year 4, Licensee has Net Sales of \$40 million in the Supermarkets, the royalty for such year would be \$16,000.00 ( $\$40,000,000 \times 0.04\%$ ).

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## NON-COMPETITION AGREEMENT

This NON-COMPETITION AGREEMENT (this "Agreement") has been executed and delivered as of the 11<sup>th</sup> day of January, 1999, by and among ADRIAN BACA ("Baca"), LA FERIA PARK N SHOP, INC., a Texas corporation ("Seller"), and FURR'S SUPERMARKETS, INC., a Texas corporation (the "Buyer").

### RECITALS

- A. Seller and Buyer are each engaged in the retail grocery business.
- B. Buyer has entered into that certain Asset Purchase Agreement dated January 11, 1999 (the "Asset Purchase Agreement"), by and among Buyer and Seller pursuant to which Buyer is purchasing certain assets of Seller used in the operation of a supermarket located at 319 South Main, Anthony, Texas (the "Location") under the tradename "La Feria." (the "Business").
- C. Baca is the sole shareholder of Seller.
- D. Buyer is unwilling to proceed with the transactions contemplated by the Asset Purchase Agreement (the "Purchase") unless Seller and Baca (the "Selling Parties") each agree to refrain from engaging in certain activities described herein, and has conditioned its commitment to proceed with the Purchase upon the receipt of this Agreement from the Selling Parties.

### AGREEMENT

In consideration of the mutual promises and covenants contained herein, the agreement of the Buyer to consummate the Purchase and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Seller and each of the Selling Parties agree as follows:

1 Definitions. As used in this Agreement, the term "Business" means (i) engaging in the retail grocery business; (ii) acting as an agent or representative on behalf of any person engaged in the business described in (i) above; and (iii) promotional, sales and marketing activities related to the business described in (i) above.

2 Non-Competition Commitment.

(a) Agreement Not to Compete. Each of the Selling Parties agrees that, after the date of this Agreement and for a period of three (3) years after the termination of Baca's employment by Buyer as an employee or consultant (the "Covenant Period"), he, or it (as the case may be), shall not, directly or indirectly, in any manner or capacity (e.g., as an advisor, principal, agent, partner, officer, director, stockholder, employee, member of any association or otherwise) engage in the Business within the geographic area described in Section 2(b) below except on behalf of Buyer as



Buyer's employee or consultant. Notwithstanding anything herein to the contrary, this Agreement shall terminate and shall not bind or be enforceable against the Selling Parties if, during the Covenant Period, Buyer ceases to operate a supermarket at the Location or defaults under the terms of, or otherwise terminates, that certain lease agreement of even date herewith between Seller and Buyer relating to the Location.

(b) Geographic Extent of Covenant. The obligations of each of the Selling Parties under Section 2(a) shall apply to those areas within a two (2) mile radius of each of the stores currently operated by Buyer.

(c) Indirect Competition. Each of the Selling Parties further agrees that, during the term of this Agreement, he or it (as the case may be) will not, directly or indirectly, assist or encourage any other person in carrying out, directly or indirectly, any activity that would be prohibited by the foregoing provisions of this Section 2 if such activity were carried out by any of the Selling Parties, either directly or indirectly.

(d) Limitation on Covenant. Ownership by a Selling Party, as a passive investment, of less than five percent (5%) of the outstanding shares of capital stock, outstanding debt instruments or other securities convertible into capital stock or debt instruments of any corporation listed on a national securities exchange or publicly traded on any nationally recognized over-the-counter market shall not constitute a breach of this Section 2.

(e) No Interference; Nonsolicitation. During the Covenant Period, each of the Selling Parties agrees that he or it (as the case may be) shall not take any action to interfere with the relationships between Buyer and its customers, including, without limitation, former customers of Seller. During the Covenant Period, each of the Selling Parties agrees that he or it (as the case may be) shall not, directly or indirectly through another entity (i) induce or attempt to induce any employee of Buyer to leave the employ of Buyer, or (ii) induce or attempt to induce any customer, supplier, licensee or other business relation of Buyer to withdraw, curtail or cease doing business with Buyer.

(f) Severability Provision. To the extent that any provision of this Agreement shall be determined to be invalid or unenforceable, such provision shall be deleted from this Agreement, and the validity and enforceability of the remainder of this Agreement shall be unaffected. In furtherance of and not in limitation of the foregoing, it is expressly agreed that, should the duration or geographical extent of, or business activities covered by, this Agreement be finally determined to be in excess of that which is valid or enforceable under applicable law, such provision shall be construed to cover only that duration, extent or activities which may validly or enforceably be covered. Each of the Selling Parties acknowledges the uncertainty of the law in this respect and expressly stipulates that this Agreement shall be construed in a manner which renders its provisions valid and enforceable to the maximum extent (not exceeding its express terms) possible under applicable law.

(g) Remedies. Each of the Selling Parties acknowledges that it would be difficult to fully compensate Buyer for damages resulting from any breach by such party of the provisions of this Agreement. Accordingly, in the event of any actual or threatened breach of such provisions, Buyer shall (in addition to any other remedies which it may have) be entitled to temporary and/or permanent injunctive relief to enforce such provisions, and such relief may be granted without the necessity of proving actual damages. Each of the Selling Parties further acknowledges that this Agreement constitutes a material inducement to Buyer to complete the Purchase and Buyer will be relying on the enforceability of this Agreement in completing such acquisition. If either party brings an action to enforce the terms of this Agreement or declare rights hereunder, the prevailing party in any such action shall be entitled to its reasonable attorneys' fees to be paid by the other party.

(h) Remedies Cumulative. No remedy conferred by any of the specific provisions of this Agreement is intended to be exclusive of any other remedy, and each and every remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute or otherwise. The election of any one or more remedies by any party hereto shall not constitute a waiver of the right to pursue other available remedies.

3. Consideration. As consideration to the Selling Parties for their covenants against competition hereunder, Buyer shall pay to Selling Parties the aggregate lump-sum amount of ONE MILLION SIX HUNDRED THOUSAND AND NO/100 DOLLARS (\$1,600,000.00) (the "Non-Competition Payment"), of which \$1,500,000.00 shall be payable to Baca and \$100,000.00 shall be payable to Seller, respectively. The Non-Competition Payment shall be made by Buyer to Seller and Baca by wire transfer payable at the direction of Seller and Baca in immediately available federal funds upon the execution hereof.

4. Complete Agreement. This Agreement constitutes the entire agreement, and supersedes all other prior and contemporaneous agreements and undertakings, both written and oral, among the parties hereto relating to the subject matter hereof. There are no representations, warranties, covenants, statements, conditions, terms or obligations, other than those contained herein, relating to the subject matter hereof. No amendments or modifications to or variations of this Agreement shall be deemed valid unless in writing and executed by the Seller and by Buyer.

5. Governing Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Texas, without regard to conflicts of law principles.

6. Assignment. The rights of Buyer under this Agreement may be assigned to any third party who succeeds to the Buyer's business.

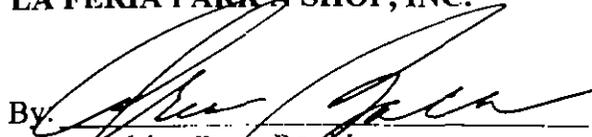
7. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which counterparts shall together constitute a single agreement.

8. Headings. Section headings contained in this Agreement are inserted for convenience of

reference only, shall not be deemed to be a part of this Agreement for any purpose, and shall not in any way define or affect the meaning, construction or scope of any of the provisions hereof.

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

**LA FERIA PARK N SHOP, INC.**

By:   
Adrian Baca, President

  
**ADRIAN BACA**

**FURR'S SUPERMARKETS, INC.**

By:   
Name: Jan V. Friedrich  
Title: Vice President

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