

ORIGINAL

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CLERK U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
BY: Deputy Clerk

6 Attorneys for Creditor
7 Maxtana Avenue, LLC

8 UNITED STATES BANKRUPTCY COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 In re

Case No. 2:08-bk-13518-SB

12 ESTYLE, INC., a Delaware
corporation, dba babystyle, Cadeau and
13 Cadeau Designs,

Chapter 11

14 Debtor.

LIMITED OPPOSITION TO DEBTOR'S
MOTION FOR ORDER EXTENDING
TIME TO ASSUME OR REJECT
UNEXPIRED LEASE OF
NONRESIDENTIAL REAL PROPERTY;
DECLARATION OF JAMES S.
ROSENFELD

Date: June 24, 2008
Time: 2:00 p.m.
Courtroom: 1575
255 East Temple Street

Los Angeles, California 90012

GREENBERG GLUSKER FIELDS CLAMAN
& MACHTINGER LLP
1900 Avenue of the Stars, 21st Floor
Los Angeles, California 90067-4590

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1 Maxtana Avenue, LLC ("Maxtana") hereby submits its limited Opposition to the
2 Debtor's motion for an Order extending the time to assume or reject its lease with
3 Maxtana ("Motion") for the reasons set forth herein.
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6 I. The Time to Assume or Reject the Debtor's Lease with Maxtana Cannot Be
7 Extended Past the Expiration of the Lease Term and the Debtor has Not Exercised
8 Its Option for a Second Lease Term

9 Maxtana and the Debtor, as landlord and tenant respectively, are parties to a
10 nonresidential lease (the "Lease") that is scheduled to expire on October 8, 2008.
11 Declaration of James Rosenfield ("Rosenfield Decl."), ¶¶ 2-3, Exhs. A-B. Presently, the
12 Debtor's deadline to assume or reject the Lease is July 17, 2008. 11 U.S.C. §
13 365(d)(4)(A)(i). Pursuant to Section 365(d)(4) of the Bankruptcy Code, granting the
14 Debtor's Motion would extend the deadline to October 15, 2008 -- one week after the
15 Lease expires by its own terms. 11 U.S.C. § 365(d)(4)(B)(i). This is improper. The
16 decision period cannot be extended beyond the scheduled expiration of the Lease. See
17 e.g.: *In re Escondido West Travelodge*, 52 B.R. 376, 378 (S.D.Cal. 1985) ("An
18 examination of § 365 reveals that a debtor may not assume a lease once it has expired").

19 Moreover, the Debtor has not properly exercised its option to renew the Lease for
20 an additional term of five years. Under Section 2.03(a) of the Lease, Maxtana granted the
21 Debtor one option to extend the Lease for an additional five years if the Debtor delivered
22 written notice to Maxtana exercising the Debtor's option at least 180 days before the
23 scheduled expiration of the Lease. Rosenfield Decl., ¶ 2, Exh. A. Accordingly, the
24 Debtor had until April 12, 2008 to exercise its option to extend the Lease term.

25 The Debtor filed its petition under chapter 11 of the United States Bankruptcy
26 Code on March 19, 2008 (the "Petition Date"). Maxtana received a letter dated April 1,
27 2008 in which the Debtor asserted that pursuant to Section 108(b) of the Bankruptcy
28 Code, the Debtor had 60 days from the Petition Date to exercise the Lease option.

1 Rosenfield Decl., ¶ 4, Exh. C; see also 11 U.S.C. § 108(b)(2). The Debtor gave notice in
2 this letter that it would use the extension period under Section 108(b) “to determine
3 whether to exercise the option to extend the term of the Lease.” *Id.* (emphasis added).

4 However, in order to protect itself in case Maxtana were to object to the applicability of
5 Section 108(b), the Debtor concluded the letter by stating that “in the event [the Court]
6 were to determine that Section 108(b) does not apply to the subject option to extend the
7 term of the Lease, this notice shall be deemed to be notification of [the Debtor’s] election
8 to exercise the option to extend the term of the Lease.” *Id.* (emphasis added).

9 Maxtana made no objection to the application of Section 108(b), which allowed the
10 Debtor until May 17, 2008 to exercise its option to extend the Lease. Maxtana has
11 received no further written communication from the Debtor. Rosenfield Decl., ¶ 6.

12 The Debtor's April 1 letter claimed that the Debtor was entitled to an extension
13 until May 19 in order to decide whether to exercise the option. Only in the event of an
14 adverse ruling from this Court on the applicability of Section 108(b) could the notice of
15 extension be considered a notice to exercise the option. No such ruling was ever sought
16 by the Debtor, much less made by the Court.

17 The Debtor cannot have it both ways. It cannot leave Maxtana in limbo (from
18 April 1 until May 19) about whether or not the option will be extended, not actually
19 exercise the option, and then later take the position, when convenient, that in fact the
20 option was timely exercised. The Debtor should not be allowed to enjoy this self-created
21 flexibility. Undoubtedly, if the Debtor were to determine that the Lease should be
22 rejected, the Debtor will take the position that the option was never exercised. However,
23 if the Debtor were to decide to assume the Lease, or assume and assign the Lease, it will
24 say that the option was properly exercised. The Court should find that the Lease option
25 was never exercised and deny the Motion to the extent that it seeks an extension beyond
26 October 8, 2008.

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1 II. The Debtor's Motion for Authority to Close its Store is Consistent with a Non-
2 Exercise of the Option to Extend the Lease

3 The Debtor failed to give Maxtana written notice of its intent to exercise its option
4 to extend the Lease by the May 17, 2008 deadline pursuant to Section 108(b). Moreover,
5 the Debtor filed a motion on May 9, 2008 seeking an order from the Court authorizing the
6 Debtor to conduct a store closing sale and to discontinue operations at the Lease premises
7 (the "Store"). On May 28, 2008, the Court entered an interim order granting the Debtor's
8 motion and authorizing the Debtor to immediately begin liquidating its inventory.¹
9 Liquidating inventory and closing the Store are acts not consistent with an additional five-
10 year extension of the Lease. Rather, the Debtor's motion to conduct store closing sales
11 was entirely consistent with its decision not to exercise its option.

12 Faced with the prospect of an expiring Lease and a soon-to-be empty building,
13 Maxtana has expended considerable time and incurred significant expense to locate a new
14 tenant. Rosenfield Decl., ¶ 7. As a result, the Debtor should be estopped from asserting
15 that its April 1 letter constituted an exercise of the Lease option.

16 Unlike in many landlord-tenant disputes in bankruptcy, the landlord here, Maxtana,
17 has remained largely silent. For example, Maxtana did not object to the Debtor's motion
18 to conduct store closing sales even though such sales would alter the provisions of the
19 Lease. Indeed, Maxtana does not seek to impede the Debtor's path to its Chapter 11 plan.
20 However, the Debtor has now sought an order extending time to assume or reject the
21 Lease past its scheduled expiration date. Such requested relief creates inherent
22 uncertainty as to the Debtor's position with respect to the remaining duration of the Lease
23 term. In the context of this Motion, the Court should resolve the uncertainty by finding
24 that the Debtor has not exercised the option.

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28 ¹ A final hearing on the motion is set for June 24, 2008, also the date of the hearing on the instant Motion.

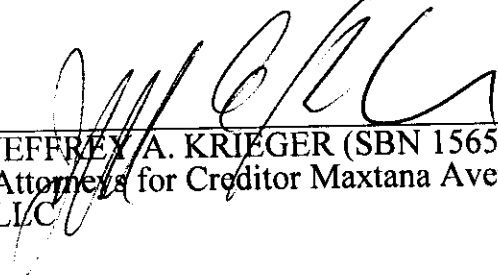
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III. CONCLUSION

For all of the foregoing reasons, the Debtor's Motion should be denied, or at a minimum, any extension of the time to assume or reject the Lease should be limited to the duration of the existing Lease term.

DATED: June 10, 2008

GREENBERG GLUSKER FIELDS
CLAMAN & MACTINGER LLP

By: 
JEFFREY A. KRIEGER (SBN 156535)
Attorneys for Creditor Maxtana Avenue,
LLC

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1900 Avenue of the Stars, 21st Floor
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DECLARATION OF JAMES S. ROSENFELD

I, James S. Rosenfield, declare:

1. I am a member of Maxtana Avenue, LLC ("Maxtana") and a signatory to the Lease at issue. I have personal knowledge of the facts set forth in this declaration and, if called as a witness, I would and could competently testify thereto under oath.

2. Maxtana and eStyle, Inc. dba babystyle (the "Debtor") entered into a lease dated August 8, 2003 for the real property located at 1324 Montana Avenue, Santa Monica, California (the "Lease"). A true and correct copy of the Lease is attached as Exhibit "A."

3. The term of the Lease was for a period of five years, beginning on October 9, 2003 and expiring on October 8, 2008, as set forth in the Confirmation Notice executed by the parties subsequent to the Lease. A true and correct copy of the Confirmation Notice is attached as Exhibit "B."

4. I received a letter from Robert S. Kelleher, Chief Executive Officer of the Debtor, dated April 1, 2008, a true and correct copy of which is attached as Exhibit "C."

5. I received notice of a motion to the Court by the Debtor, dated May 9, 2008, for an order authorizing the Debtor to conduct store closing sales and discontinue operations at the Lease premises. Based on this motion, I believed that the Debtor did not intend to exercise its option to renew the Lease.

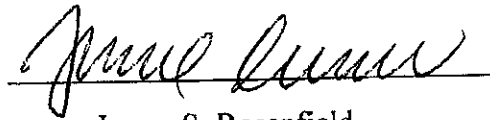
6. Maxtana has not received written notice from the Debtor exercising its option to renew the Lease.

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7. Maxtana has expended considerable time and incurred significant expense in locating a new tenant to begin a new lease in October 2008.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 9 day of June, 2008, at Los Angeles California.



James S. Rosenfield

GREENBERG GLUSKER FIELDS CLAMAN
& MACHTINGER LLP
1900 Avenue of the Stars, 21st Floor
Los Angeles, California 90067-4590

AERO THEATRE BUILDING

LEASE

by and between

**Maxtana Avenue, L.L.C.,
a Delaware limited liability company**

"Landlord"

and

**eStyle, Inc.,
a Delaware corporation,**

"Tenant"

Dated: August 8, 2003

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AERO THEATRE BUILDING LEASE

ARTICLE ONE: BASIC TERMS

This Article One contains the Basic Terms of this Lease between the Landlord and Tenant named below. Other Articles, Sections and Paragraphs of the Lease referred to in this Article One explain and define the Basic Terms and are to be read in conjunction with the Basic Terms.

Section 1.01. **Date of Lease:** August 8, 2003

Section 1.02. **Landlord:** Mxtana Avenue, L.L.C., a Delaware limited liability company

Address of Landlord: c/o J.S. Rosenfield & Co., 919 Montana Avenue, Santa Monica, California

Section 1.03. **Tenant:** eStyle, Inc., a Delaware corporation, doing business as babystyle

Address of Tenant: c/o eStyle, Inc., 865 S. Figueroa Street, Suite 2700, Los Angeles, California 90017; Attention: Laurie McCartney, Chairman and CEO

Section 1.04. **Property and Project:** The Property is the real property located at 1324 Montana Avenue, Santa Monica, California, consisting of approximately 2,000 Rentable Square Feet (as defined below), and more particularly depicted on Exhibit "A" attached hereto. The Project, of which the Property comprises a part, is the real property located at 1318-1328 Montana Avenue, consisting of approximately 9,994 Rentable Square Feet, and more particularly depicted on Exhibit "A" attached hereto. In calculating "Rentable Square Feet" under this Lease, measurement is to the exterior of exterior walls, and to the center line of any demising walls. The size of the Premises and the Project as set forth in this Section 1.04, and Tenant's Proportionate Share (as defined below), shall be final, conclusive and binding on Lessor and Lessee for all purposes under this Lease.

Section 1.05. **Lease Term:** five (5) years beginning on the later of September 15, 2003, or the date Landlord delivers possession of the Property to Tenant, and ending five (5) years thereafter ("Expiration Date"), subject to one (1) five (5) year option to extend, as more particularly described in Section 2.03 below. Within thirty (30) days after the date that the Lease Term commences ("Commencement Date"), Landlord and Tenant shall confirm the actual dates comprising the Commencement Date and the Expiration Date by executing a Commencement Date Confirmation Notice in the form of Exhibit "B" attached hereto, provided that the failure to do so shall not affect the obligations of Landlord and Tenant under this Lease.

Section 1.06. **Permitted Uses** (See Article Five): the retail sale and display of maternity wear, baby and children's clothes and related items such as gear, and related services such as gift registry, birth announcements and such other directly related services as Tenant provides in substantially all of its "babystyle" stores.

Section 1.07. **Tenant's Guarantor:** None.

Section 1.08. **Brokers** (See Article Fourteen):

Landlord's Broker: J.S. Rosenfield & Co.

Tenant's Broker: Austin & Associates (Ron Austin)

Section 1.09. **Initial Security Deposit:** (See Section 3.03)
Eighteen Thousand Five Hundred Dollars (\$18,500).

Section 1.10. **Rent and Other Charges Payable by Tenant:**

(a) **BASE RENT:** Monthly Base Rent during the Initial Term shall be as follows:

<u>months</u>	<u>monthly Base Rent</u>
1-12	\$15,000.00
13-24	\$17,000.00
25-36	\$17,500.00
37-48	\$18,000.00
49-60	\$18,500.00

(b) **TENANT'S PERCENTAGE RATE:** six percent (6%)

(c) **TENANT'S PROPORTIONATE SHARE:** 20.01%

(d) **OTHER PERIODIC PAYMENTS:** (i) Real Property Taxes (See Section 4.02); (ii) Utilities (See Section 4.03); (iii) Insurance Premiums (See Section 4.04); (iv) Impounds for Insurance Premiums and Property Taxes (See Section 4.07); (v) Maintenance, Repairs and Alterations (See Article Six).

Section 1.11. **Landlord's Share of Profit on Assignment or Sublease** (See Section 9.05): fifty percent (50%) of the Profit ("Landlord's Share").

Section 1.12. **Permitted Trade Name:** babystyle.

ARTICLE TWO: LEASE TERM

Section 2.01. **Lease of Property For Lease Term.** Landlord leases the Property to Tenant and Tenant leases the Property from Landlord for the Lease Term. The Lease Term is for the period stated in Section 1.05 above and shall begin and end on the dates specified in Section 1.05 above, unless the beginning or end of the Lease Term is changed under any provisions of this Lease. The "Commencement Date" shall be the date specified in Section 1.05 above for the beginning of the Lease Term, unless advanced or delayed under any provision of this Lease.

Section 2.02. **Delay in Commencement.** Landlord shall use reasonable efforts to deliver possession of the Property to Tenant by the date which is forty-five (45) days after the mutual execution of this Lease, provided that in no event shall Landlord be liable to Tenant if Landlord does not deliver possession of the Property to Tenant on such date. Landlord's non-delivery of the Property to Tenant on that date shall not affect this Lease or the obligations of Tenant under this Lease except that the Commencement Date shall be delayed until Landlord delivers possession of the Property to Tenant and the Lease Term shall be extended for a period equal to the delay in delivery of possession of the Property to Tenant, plus the number of days necessary to end the Lease Term on the last day of a month. If Landlord does not deliver possession of the Property to Tenant by the date which is six (6) months after the mutual execution of this Lease, Tenant may elect to cancel this Lease by giving written notice to Landlord within ten (10) days thereafter. If Tenant gives such notice, the Lease

shall be cancelled and neither Landlord nor Tenant shall have any further obligation to the other, except that the Security Deposit and Base Rent for the first month of the Lease Term (to the extent paid to Landlord) shall be refunded to Tenant on or before thirty (30) days after receipt by Landlord of written notice from Tenant cancelling this Lease pursuant to this Section 2.02. If Tenant does not give such notice, Tenant's right to cancel the Lease shall expire and the Lease Term shall commence upon the delivery of possession of the Property to Tenant. If delivery of possession of the Property to Tenant is delayed, Landlord and Tenant shall, upon such delivery, execute an amendment to this Lease setting forth the actual Commencement Date and expiration date of the Lease. Failure to execute such amendment shall not affect the actual Commencement Date and Expiration Date of the Lease.

Section 2.03. Option to Extend Lease Term.

(a) **Grant of Option.** Landlord hereby grants to Tenant one (1) option (the "Option") to extend the Lease Term for an additional term of five (5) years (the "Extension"), on the same terms and conditions as set forth in the Lease, but at an increased rent as set forth in Section 2.03(b) below. The Option shall be exercised only by written notice delivered to Landlord not more than three hundred (300) days before, and at least one hundred eighty (180) days before, the expiration of the Lease Term. If Tenant fails to deliver to Landlord written notice of the exercise of the Option within the prescribed time period, then the Option shall lapse, and there shall be no further right to extend the Lease Term. The Option shall be exercisable by Tenant on the express conditions that (a) at the time of the exercise, and at all times prior to the commencement of the Extension, Tenant shall not be in material default under any of the provisions of the Lease, and (b) Tenant has not been ten (10) or more days late in the payment of rent more than a total of five (5) times during the Lease Term.

(b) **Calculation of Rent.**

The monthly Base Rent during the first twelve (12) months of Extension shall equal the greater of (i) Twenty-Three Thousand One Hundred Twenty-Five Dollars (\$23,125.00) per month, or (ii) the "fair rental value" of the Property during the Extension, determined in the manner set forth below. On the first day of each of the thirteenth (13th), twenty-fifth (25th), thirty-seventh (37th) and forty-ninth (49th) months of the Extension, the Base Rent in effect immediately prior to the applicable adjustment date shall be increased by three percent (3%).

(1) Not later than one hundred (100) days prior to commencement of the Extension, Landlord and Tenant shall meet in an effort to negotiate, in good faith, the fair rental value of the Property as of the commencement of the Extension. If Landlord and Tenant have not agreed upon the fair rental value of the Property at least ninety (90) days prior to the commencement of the Extension, the fair rental value shall be determined by appraisal, by one or more brokers (herein called "Appraiser(s)") who shall have at least five (5) years' experience in the sales and leasing of retail real property in the area in which the Property is located.

(2) If Landlord and Tenant are not able to agree upon the fair rental value of the Property within the prescribed time period, then Landlord and Tenant shall attempt to agree in good faith upon a single Appraiser not later than seventy-five (75) days prior to the commencement of the Extension. If Landlord and

Tenant are unable to agree upon a single Appraiser within such time period, then Landlord and Tenant shall each appoint one Appraiser not later than sixty-five (65) days prior to the commencement of the Extension. Within ten (10) days thereafter, the two (2) appointed Appraisers shall appoint a third (3rd) Appraiser. If either Landlord or Tenant fails to appoint its Appraiser within the prescribed time period, the single Appraiser appointed shall determine the fair rental value of the Property. If both parties fail to appoint Appraisers within the prescribed time periods, then the first Appraiser thereafter selected by a party shall determine the fair rental value of the Property. Each party shall bear the cost of its own Appraiser, and the parties shall share equally the cost of the single or third Appraiser, if applicable.

(3) For the purposes of such appraisal, the term "fair rental value" shall mean the price that a ready and willing tenant would pay, during the Extension, as monthly rent to a ready and willing landlord of property comparable to the Property if such property were exposed for lease on the open market for a reasonable period of time and taking into account all of the purposes for which such property may be used. If a single Appraiser is chosen, then such Appraiser shall determine the fair rental value of the Property. Otherwise, the fair rental value of the Property shall be the arithmetic average of the two (2) of the three (3) appraisals which are closest in amount, and the third appraisal shall be disregarded. Landlord and Tenant shall instruct the Appraiser(s) to complete the determination of the fair rental value not later than thirty (30) days prior to the commencement of the Extension. If the fair rental value is not determined prior to the commencement of the Extension, then Tenant shall continue to pay to Landlord the Base Rent applicable to the Property immediately prior to such Extension, until the fair rental value is determined. When the fair rental value of the Property is determined, Landlord shall deliver notice thereof to Tenant, and Tenant shall pay to Landlord, within ten (10) days after receipt of such notice, the difference between the Base Rent actually paid by Tenant to Landlord and the new Base Rent determined hereunder.

(c) **Personal Option.** The Option is personal to the Tenant named in Section 1.03 of the Lease. If Tenant subleases any portion of the Property or assigns or otherwise transfers any interest under the Lease prior to the exercise of the Option (whether with or without Landlord's consent), then the Option shall lapse. If Tenant subleases any portion of the Property or assigns or otherwise transfers any interest of Tenant under the Lease after the exercise of the Option but prior to the commencement of the Extension (whether with or without Landlord's consent), then the Option shall lapse and the Lease Term shall expire as if such Option were not exercised. Notwithstanding anything to the contrary set forth in this Section 2.03(c), the Option may be exercised by any permitted assignee or subleasee pursuant to Section 9.01(b) below.

Section 2.04. **Early Occupancy.** If Tenant occupies the Property prior to the Commencement Date, Tenant's occupancy of the Property shall be subject to all of the provision of this Lease. Early occupancy of the Property shall not advance the expiration date of this Lease. Tenant shall not pay Base Rent, but Tenant shall all other charges specified in this Lease for the early occupancy period.

Section 2.05. **Holding Over.** Tenant shall vacate the Property upon the expiration or earlier termination of this Lease. Tenant shall reimburse Landlord for and indemnify Landlord against all damages which Landlord incurs from Tenant's delay in vacating the

Property. If Tenant does not vacate the Property upon the expiration or earlier termination of the Lease and Landlord thereafter accepts rent from Tenant, Tenant's occupancy of the Property shall be a "month-to-month" tenancy, subject to all of the terms of this Lease applicable to a month-to-month tenancy, except that the Base Rent then in effect shall be increased by fifty percent (50%).

ARTICLE THREE: BASE RENT; PERCENTAGE RENT

Section 3.01. Time and Manner of Payment of Base Rent. Upon execution of this Lease, Tenant shall pay Landlord the Base Rent in the amount stated in Paragraph 1.10(a) above for the first month of the Lease Term for which Base Rent is payable by Tenant hereunder. On the first day of the second month of the Lease Term and each month thereafter, Tenant shall pay Landlord the Base Rent, in advance, without offset, deduction or prior demand. Notwithstanding the foregoing, subject to Section 10.04 below, Tenant shall not be required to pay, and Landlord hereby excuses Tenant from paying, Base Rent for the second full calendar month of the Lease Term.

Section 3.02. Percentage Rent. From and after the Commencement Date, Tenant also shall pay "Percentage Rent" in a sum equal to the "Gross Sales" (defined in Section 3.02(e) below) each month in excess of (i) during months 1 through 12, Two Hundred Fifty Thousand and 00/100 Dollars (\$250,000), (ii) during months 13 through 24, Two Hundred Eighty Three Thousand Three Hundred Thirty Three and 33/100 Dollars (\$283,333.33), (iii) during months 25 through 36, Two Hundred Ninety One Thousand Six Hundred Sixty Six and 66/100 Dollars (\$291,666.66), (iv) during months 37 through 48, Three Hundred Thousand and 00/100 Dollars (\$300,000.00) and (v) during months 49 through 60, and, if applicable, each month of the Extension, Three Hundred Eight Thousand Three Hundred Thirty Three and 33/100 Dollars (\$308,333.33), in each case, multiplied by the Percentage Rate specified in Section 1.10(b). On or before the tenth (10th) day of each calendar month, Tenant shall compute and pay to Landlord the Percentage Rent due for the preceding month. Within thirty (30) days after the close of each calendar year (and within thirty (30) days following any termination of this Lease), Tenant shall calculate the amount due and the amount previously paid to Landlord as Percentage Rent for such calendar year, it being understood and agreed that the actual Percentage Rent which Tenant shall be obligated to pay Landlord with respect to each full calendar year during the Lease Term shall equal the "Gross Sales" during such year in excess of the sum of the applicable twelve monthly breakpoints attributable to such year as set forth above multiplied by the Percentage Rate, with such amount appropriately prorated for any partial calendar years during the Lease Term. If Tenant shall have paid to Landlord an amount greater than Tenant is required to pay as Percentage Rent for such calendar year under the terms hereof, Landlord shall refund the difference to Tenant or, at Landlord's option, Tenant may credit the amount of overpayment against Tenant's next payment of Base Rent. If Tenant shall have paid an amount less than the Percentage Rent required to be paid hereunder, then Tenant shall pay such difference to Landlord within thirty (30) days of the close of such calendar year.

(a) Monthly and Annual Statements of Gross Sales. Tenant shall furnish to Landlord a monthly statement of Gross Sales within ten (10) days after the close of each calendar month, and an annual statement of Gross Sales, including a monthly breakdown of Gross Sales, within ten (10) days after the close of each calendar year (and within thirty (30) days following any termination of this Lease), on such statement form as may be adopted by Landlord from

time to time. Such statements shall be certified as accurate by Tenant (if Tenant consists of individuals), or by a responsible officer or duly authorized agent of Tenant, if Tenant is a corporation or other entity. If Tenant fails to furnish or cause to be furnished to Landlord such statements in the form as required in this Section, Landlord or its designated agent may, in Landlord's sole discretion and at Tenant's sole cost and expense, either audit the Gross Sales earned at or from the Property for the period in question (and the result of any such audit shall be final and binding upon Tenant), or charge Tenant an amount equal to two (2) times the monthly Base Rent payable for the period in question.

(b) **Computation.** For the purpose of computing Percentage Rent, the Gross Sales in the first or last fractional calendar month (if any) of the Lease Term shall be added to the Gross Sales for the first or last full calendar month of the Lease Term, as applicable. Any Percentage Rent due and payable for such period shall be such sum as may be in excess of the Base Rent which is payable by Tenant for such period.

(c) **Records.** Tenant shall record at the time of sale, in the presence of the customer, all receipts from sales or other transactions, whether for cash or credit, on sales slips, in registers, or by computer point-of-sale program, having a cumulative total and which numbers consecutive purchases, segregates each department or concession, and keeps a cumulative record of returns, credits, or refunds ("Gross Sales Record"). Upon request of Landlord, Tenant shall furnish to Landlord a copy of the Gross Sales Record, Tenant's financial reports, relevant portions of (i.e., pertaining to the Property only) Sales Tax Returns (State and Local Sales and Use Tax Return), relevant portions of (i.e., pertaining to the Property only) income tax returns and other records pertaining to Gross Sales. Tenant shall keep such books, records, registers, returns and other information for a minimum of three (3) years following the end of each calendar year. The receipt by Landlord of any statement, or any payment of Percentage Rent for any period, shall not bind Landlord as to the correctness of the statement or the payment. If Tenant shall at any time cause an audit of Tenant's business to be made for any reason, Tenant shall furnish Landlord with a copy of said audit without any cost or expense to Landlord.

(d) **Audit.** Landlord and its designated employees and agents shall be entitled to inspect, copy and audit all books and/or records regarding Gross Sales upon notice to Tenant, during reasonable business hours. If such audit shows that there has been a deficiency in the payment of Percentage Rent, then such deficiency shall be deemed due and payable as of the date on which such Percentage Rent was otherwise due and payable hereunder, with interest at the maximum lawful rate (or if there be no prescribed maximum rate, then eighteen percent (18%) per annum) from the date when such payment should have been made. In addition, if Tenant's Gross Sales statement for any calendar year shall be found to have understated Gross Sales by more than three percent (3%), then Tenant shall pay all of Landlord's costs and expenses incurred with respect to such audit.

(e) **Definition of "Gross Sales".** "Gross Sales" shall mean gross receipts of every kind and nature derived from all merchandise or services sold, leased, licensed, delivered or ordered in or from the Property (including, without limitation, internet sales that occur in or from the Property), whether such sales are evidenced by check, cash, credit, credit card, charge account, exchange, gift certificate or otherwise, and whether such sale is filled at the Property or elsewhere. Gross Sales shall not

Section 4.03. **Utilities.** Tenant shall pay, directly to the appropriate supplier, the cost of all natural gas, heat, light, power, sewer service, telephone, water, refuse disposal and other utilities and services supplied to the Property. However, if any services or utilities are jointly metered with other property, Landlord shall make a reasonable determination of Tenant's proportionate share of the cost of such utilities and services and Tenant shall pay such share to Landlord within fifteen (15) days after receipt of Landlord's written statement.

Section 4.04. **Insurance Policies.**

(a) **Liability Insurance.** During the Lease Term, Tenant shall maintain a policy of commercial general liability insurance (sometimes known as broad form comprehensive general liability insurance) insuring Tenant against liability for bodily injury, property damage (including loss of use of property) and personal injury arising out of the operation, use or occupancy of the Property. Tenant shall name Landlord as an additional insured under such policy. The initial amount of such insurance shall be Two Million Dollars (\$2,000,000) per occurrence and shall be subject to periodic increase based upon inflation, increased liability awards, recommendation of Landlord's professional insurance advisers and other relevant factors. The liability insurance obtained by Tenant under this Section 4.04(a) shall (i) be primary and non-contributing; (ii) contain cross-liability endorsements; and (iii) insure Landlord against Tenant's performance under Section 5.05, if the matters giving rise to the indemnity under Section 5.05 result from the negligence of Tenant. The amount and coverage of such insurance shall not limit Tenant's liability nor relieve Tenant of any other obligation under this Lease. Landlord may also obtain comprehensive public liability insurance in an amount and with coverage determined by Landlord insuring Landlord against liability arising out of ownership, operation, use or occupancy of the Property. The policy obtained by Landlord shall not be contributory and shall not provide primary insurance.

(b) **Property and Rental Income Insurance.** During the Lease Term, Landlord shall maintain policies of insurance covering loss of or damage to the Project in the full amount of its replacement value. Such policy shall contain an Inflation Guard Endorsement and shall provide protection against all perils included within the classification of fire, extended coverage, vandalism, malicious mischief, special extended perils (all risk), sprinkler leakage and any other perils which Landlord deems reasonably necessary. Landlord shall have the right to obtain flood and earthquake insurance. Landlord shall not obtain insurance for Tenant's fixtures or equipment or building improvements installed by Tenant on the Property. During the Lease Term, Landlord shall also maintain a rental income insurance policy, with loss payable to Landlord, in an amount equal to one year's Base Rent, plus estimated Percentage Rent, real property taxes and insurance premiums. Tenant shall be liable for the payment of any deductible amount under Landlord's (provided, however, Tenant shall only be required to pay Tenant's Proportionate Share of such deductible amount, amortized over the remaining Lease Term) or Tenant's insurance policies maintained pursuant to this Section 4.04. Tenant shall not do or permit anything to be done which invalidates any such insurance policies.

(c) **Personal Property/Leasehold Improvements Insurance.** During the Lease Term, Tenant shall maintain policies of insurance covering loss of or damage to Tenant's trade fixtures, furnishings, equipment, inventory, leasehold and/or building improvements made

by Tenant and other personal property belonging to Tenant at the Property in the full amount of their replacement value. Such policy shall contain an inflation guard endorsement and shall provide protection against all perils included within the classification of fire, extended coverage, vandalism, malicious mischief, special extended perils (all risk), sprinkler leakage and other perils which Landlord may reasonably require.

(d) **Payment of Premiums.** Subject to Section 4.07, Tenant shall pay all premiums for the insurance policies required to be maintained by Tenant under this Section 4.04, and Tenant's Proportionate Share of all premiums for any insurance policies described in this Section 4.04 obtained by Landlord, within fifteen (15) days after Tenant's receipt of a copy of the premium statement or other evidence of the amount due, except Landlord shall pay all premiums for non-primary comprehensive public liability insurance which Landlord elects to obtain as provided in Paragraph 4.04(a). In addition, Landlord shall not in any year collect in excess of one hundred percent (100%) of the amount of any insurance premiums paid or required to be paid by Landlord during such period. If insurance policies maintained by Landlord cover improvements on real property other than the Property, Landlord shall deliver to Tenant a statement of the premium applicable to the Property showing in reasonable detail how Tenant's share of the premium was computed. If the Lease Term expires before the expiration of an insurance policy maintained by Landlord, Tenant shall deliver to Landlord a copy of any policy of insurance which Tenant is required to maintain under this Section 4.04. At least thirty (30) days prior to the expiration of any such policy, Tenant shall deliver to Landlord a renewal of such policy. As an alternative to providing a policy of insurance, Tenant shall have the right to provide Landlord a certificate of insurance, executed by an authorized officer of the insurance company, showing that the insurance which Tenant is required to maintain under this Section 4.04 is in full force and effect and containing such other information which Landlord reasonably requires.

(e) **General Insurance Provisions.**

(i) Any insurance which Tenant is required to maintain under this Lease shall include a provision which requires the insurance carrier to give Landlord not less than thirty (30) days' written notice prior to any cancellation or modification of such coverage.

(ii) If Tenant fails to deliver any policy, certificate or renewal to Landlord required under this Lease within the prescribed time period or if any such policy is cancelled or modified during the Lease Term without Landlord's consent, Landlord may obtain such insurance, in which case Tenant shall reimburse Landlord for the cost of such insurance within fifteen (15) days after receipt of a statement that indicates the cost of such insurance.

(iii) Tenant shall maintain all insurance required under this Lease with companies holding a "General Policy Rating" of at least B+, V or better, as set forth in the most current issue of "Best's Insurance Guide". Landlord and Tenant acknowledge the insurance markets are rapidly changing and that insurance in the form and amounts described in this Section 4.04 may not be available in the future. Tenant acknowledges that the insurance described in this Section 4.04 is for the primary benefit of Landlord. If at any time during the Lease Term, Tenant is unable to maintain the insurance required under the Lease, Tenant shall nevertheless maintain

insurance coverage which is customary and commercially reasonable in the insurance industry for Tenant's type of business, as that coverage may change from time to time. Landlord makes no representation as to the adequacy of such insurance to protect Landlord's or Tenant's interests. Therefore, Tenant shall obtain any such additional property or liability insurance which Tenant deems necessary to protect Landlord and Tenant.

(iv) Notwithstanding anything to the contrary contained in this Lease, unless prohibited under any applicable insurance policies maintained, Landlord and Tenant each hereby waive any and all rights of recovery against the other, or against the officers, employees, agents or representatives of the other, for loss of or damage to its property or the property of others under its control, if such loss or damage is covered by any insurance policy (whether or not described in this Lease) in force, or required by the terms of this Lease to be in force at the time of such loss or damage at the time of such loss or damage. Each party shall obtain for the benefit of the other on any property insurance policy required hereunder, to the extent such waiver is available at commercially reasonable rates, (or, if not available at commercially reasonable rates, as reasonably determined by Landlord, the party unable to procure such waiver may deliver a written notice to the other party and such other party may pay the excess amount of such coverage, in which event, the first party shall obtain such waiver) a waiver of any right of subrogation which the insurer might otherwise acquire against such other party (or such party's agents, servants, or employees) by virtue of the payment of any loss covered by insurance or otherwise.

Section 4.05. **Late Charges.** Tenant's failure to pay rent promptly may cause Landlord to incur unanticipated costs. The exact amount of such costs are impractical or extremely difficult to ascertain. Such costs may include, but are not limited to, processing and accounting charges and late charges which may be imposed on Landlord by any ground lease, mortgage or trust deed encumbering the Property. Therefore, if Landlord does not receive any rent payment within ten (10) days after it becomes due, Tenant shall pay Landlord a late charge equal to ten percent (10%) of the overdue amount. The parties agree that such late charge represents a fair and reasonable estimate of the costs Landlord will incur by reason of such late payment.

Section 4.06. **Interest on Past Due Obligations.** Any amount owed by Tenant to Landlord which is not paid when due shall bear interest at the rate of fifteen percent (15%) per annum from the due date of such amount. However, interest shall not be payable on late charges to be paid by Tenant under this Lease. The payment of interest on such amounts shall not excuse or cure any default by Tenant under this Lease. If the interest rate specified in this Lease is higher than the rate permitted by law, the interest rate is hereby decreased to the maximum legal interest rate permitted by law.

Section 4.07. **Impounds for Insurance Premiums and Real Property Taxes.** If requested by any ground lessor or lender to whom Landlord has granted a security interest in the Property, or if Tenant is more than ten (10) days late in the payment of rent more than once in any consecutive twelve (12) -month period, Tenant shall pay Landlord a sum equal to one-twelfth (1/12) of the annual real property taxes and insurance premiums payable by Tenant under this Lease, together with each payment of Base Rent. Landlord

shall hold such payments in a non-interest bearing impound account. If unknown, Landlord shall reasonably estimate the amount of real property taxes and insurance premiums when due. Tenant shall pay and deficiency of funds in the impound account to Landlord upon written request. If Tenant defaults under this Lease, Landlord may apply any funds in the impound account to any obligation then due under this Lease.

ARTICLE FIVE: USE OF PROPERTY

Section 5.01 **Permitted Use; Permitted Trade Name.** Tenant shall use the Property solely for the Permitted Use and under the Permitted Trade Name or such other trade name as may be used by Tenant in all of Tenant's other locations in California. The parties acknowledge that tenant name recognition is of material importance to Landlord, and Tenant acknowledges that Landlord would not enter into this Lease without the covenants by Tenant under this Section 5.01.

Section 5.02. **Manner of Use; Continuous Operation.**

(a) **Manner of Use.** Tenant shall not cause or permit the Property to be used in any way which constitutes a violation of any law, ordinance, or governmental regulation or order, which annoys or interferes with the rights of tenants of the Project or which constitutes a nuisance or waste. Tenant shall obtain and pay for all permits, including a Certificate of Occupancy, required for Tenant's occupancy of the Property and shall promptly take all actions necessary to comply with all applicable statutes, ordinances, rules, regulations, orders and requirements regulating the use by Tenant of the Property, including the Occupational Safety and Health Act.

(b) **Continuous Operation.** From and after the Commencement Date (subject to Article 7 (Damage or Destruction) or Article 8 (Condemnation) and except during any period during which Tenant is authorized to cease operations to perform any renovations or repairs), throughout the Lease Term, Tenant shall occupy the entire Property and operate its business therein for the Permitted Use continuously during the minimum hours of 10:00 a.m. to 6:00 p.m. Monday through Saturday (legal holidays excepted). Tenant shall have the right (subject to the provisions of Sections 6.04 and 6.05) to close the store for a period not to exceed fifteen (15) days in any twelve (12) month period to perform any required repairs to the Property or make alterations, additions or improvements to the Property, without any abatement or reduction of rent. Tenant acknowledges that Landlord is executing this Lease in reliance upon the Tenant's covenant in the preceding sentence and that the same is a material element inducing Landlord to execute this Lease. Tenant further agrees that if it vacates or abandons the Property or fails to so conduct its business therein then, in addition to constituting a default and without constituting a waiver of Tenant's obligations or limiting Landlord's remedies herein, Base Rent shall be adjusted thereafter to equal the greater of the Base Rent payable under this Lease or the average Base Rent plus Percentage Rent, if any, payable for the 24 month period prior to such default. Tenant shall adequately illuminate all window displays, exterior Signs and exterior advertising displays continuously during those hours Tenant is required to be open.

Section 5.03. **Hazardous Materials.** As used in this Lease, the term "Hazardous Material" means any flammable items, explosives, radioactive materials, hazardous or toxic substances, material or waste or related materials, including any substances

defined as or included in the definition of "hazardous substances", "hazardous wastes", "hazardous materials" or "toxic substances" now or subsequently regulated under any applicable federal, state or local laws or regulations, including without limitation petroleum-based products, paints, solvents, lead, cyanide, DDT, printing inks, acids, pesticides, ammonia compounds and other chemical products, asbestos, PCBs and similar compounds, and including any different products and materials which are subsequently found to have adverse effects on the environment or the health and safety of persons. Tenant shall not cause or permit any Hazardous Material to be generated, produced, brought upon, used, stored, treated or disposed of in or about the Property by Tenant, its agents, employees, contractors, sublessees or invitees without the prior written consent of Landlord. Landlord shall be entitled to take into account such other factors or facts as Landlord may reasonably determine to be relevant in determining whether to grant or withhold consent to Tenant's proposed activity with respect to Hazardous Material. In no event, however, shall Landlord be required to consent to the installation or use of any storage tanks on the Property.

Section 5.04. **Signs and Auctions.** Except as provided below, Tenant shall not place any signs on the Property. Tenant shall not conduct or permit any auctions or sheriff's sales at the Property. Tenant may place signs or other graphics in the interior of the Property without first obtaining the prior written consent of Landlord provided that such signs or other graphics are not visible from the exterior of the Property (only if such signs or graphics are to be placed permanently on some portion of the interior of the Property or are to be affixed permanently to any storefront windows), such signs or other graphics are consistent with the signs or other graphics routinely placed in other "babystyle" stores and are prepared professionally, and otherwise comply in all respects with any applicable law, ordinance or regulation affecting the Property or the Project. Tenant shall be permitted signage on the exterior of the Property consistent with the signage of other tenants at the Project (except to the extent that any other tenant has been granted superior signage rights), subject to Landlord's prior written approval (which approval Landlord shall not unreasonably withhold or delay) and the approval of the applicable governmental authority exercising jurisdiction over the Property and the Project. All costs and expenses related to such signage and display, including, without limitation, installation costs, maintenance costs, utilities, repair costs, restoration and removal, shall be paid entirely by Tenant. Tenant shall remove all of its signs at its sole cost and expense upon the termination of this Lease and repair any damage to the Property resulting from the removal of such signs.

Section 5.05. **Indemnity.** Tenant shall indemnify Landlord and Landlord's Broker against and hold Landlord harmless from any and all costs, claims or liability arising from: (a) Tenant's use of the Property; (b) the conduct of Tenant's business or anything else done or permitted by Tenant to be done in or about the Property, including any contamination of the Property or any other property resulting from the presence of use of Hazardous Material caused or permitted by Tenant; (c) any breach or default in the performance of Tenant's obligations under this Lease; (d) any misrepresentation or breach of warranty by Tenant under this Lease; (e) other acts or omissions of Tenant; and (f) any claims for a commission or other compensation by Tenant's Broker. Tenant shall defend Landlord against any such cost, claim or liability at Tenant's expense with counsel reasonably acceptable to Landlord or, at Landlord's election, Tenant shall reimburse Landlord for any legal fees or costs incurred by Landlord in connection with any such claim. As

a material part of the consideration to Landlord, Tenant assumes all risk of damage to property or injury to persons in or about the Property arising from any cause, and Tenant hereby waives all claims in respect thereof against Landlord, except for any claim arising out of Landlord's gross negligence or willful misconduct. As used in this Section, the term "Tenant" shall include Tenant's employees, agents, contractors and invitees, if applicable.

Section 5.06. Landlord's Access. Landlord or its agents may enter the Property at all reasonable times and upon reasonable notice to Tenant (except in the event of an emergency) to show the Property to potential buyers, investors or tenants or other parties; to do any other act or to inspect and conduct tests in order to monitor Tenant's compliance with all applicable environmental laws and all laws governing the presence and use of Hazardous Material; or for any other purpose Landlord deems necessary. Landlord shall give Tenant prior notice of such entry, except in the case of an emergency. Landlord may place customary "For Sale" or "For Lease" signs on the Property, but not in the windows or doors of the Property.

Section 5.07. Quiet Possession. If Tenant pays the rent and complies with all other terms of this Lease, Tenant may occupy and enjoy the Property for the full Lease Term, subject to the provisions of this Lease.

Section 5.08. Compliance with Rules. Tenant shall comply with all rules and regulations which Landlord may, from time to time, establish for tenants of the Project. In the case of any conflict between the rules and regulations and the provisions of this Lease, the provisions of this Lease shall control. Landlord shall not be responsible to Tenant for the violation or nonperformance by any other tenant or occupant in the Project with regard to such rules and regulations. Landlord agrees to apply such rules and regulations in a nondiscriminatory fashion for the benefit of the Project.

Section 5.09. Other Business of Tenant. Tenant acknowledges that the individuality of Tenant is a material inducement to Landlord to enter into this Lease with Tenant. In consideration of the foregoing, Tenant covenants that neither Tenant nor any "Tenant Party" (defined below) will directly or indirectly operate or own any interest in any business similar to Tenant's business or operated under the Permitted Trade Name (or any similar tradename or other tradename used by the majority of Tenant's stores in Southern California) (a "Similar Business") within a radius of two and one-half (2½) miles from the Property. In addition to all other rights and remedies of Landlord, this covenant shall be specifically enforceable by mandatory or prohibitory injunction by Landlord. Any breach of this covenant may be conclusively deemed by Landlord to be a material and incurable breach of this Lease. In addition, and without limiting Landlord's remedies, violation of this covenant shall entitle Landlord, at its option and for so long as Tenant is operating such other business, to include the Gross Sales of such other business in the Gross Sales made from the Property for the purposes of computing the Percentage Rent due hereunder, and Landlord shall be entitled to receive all statements and reports with respect to such other premises as Landlord is entitled to receive with respect to the Premises under Section 3.02 above. As used herein, the term "Tenant Party" means any person or entity owned or controlled by, under common ownership with, or owning or controlling, Tenant. For purposes hereof, a "controlling" or "ownership" interest shall be deemed to refer to any interest which, in the aggregate, has 50% or more of the voting

power of such entity, or any interest which has the right to control or direct the management decisions of such entity.

ARTICLE SIX: CONDITION OF PROPERTY; MAINTENANCE, REPAIRS AND ALTERATIONS

Section 6.01. **Existing Conditions.** Tenant accepts the Property in its "AS IS AND WITH ALL FAULTS CONDITION" as of the execution of the Lease, subject to all recorded matters, laws, ordinances, and governmental regulations and orders. Tenant acknowledges that neither Landlord nor any agent of Landlord has made any representation as to the condition of the Property or the suitability of the Property for Tenant's intended use. Tenant represents and warrants that Tenant has made its own inspection of and inquiry regarding the condition of the Property and is not relying on any representations of Landlord or any Broker with respect thereto.

Section 6.02. **Exemption of Landlord from Liability.** Landlord shall not be liable for any damage or injury to the person, business (or any loss of income therefrom), goods, wares, merchandise or other property of Tenant, Tenant's employees, invitees, customers or any other person in or about the Property, whether such damage or injury is caused by or results from: (a) fire, steam, electricity, water, gas or rain; (b) the breakage, leakage, obstruction or other defects of pipes, sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures or any other cause; (c) conditions arising in or about the Property or from other sources or places; or (d) any act or omission of any other tenant of Landlord. Landlord shall not be liable for any such damage or injury even though the cause of or the means of repairing such damage or injury are not accessible to Tenant. The provisions of this Section 6.02 shall not, however, exempt Landlord from liability for Landlord's gross negligence or willful misconduct.

Section 6.03. Landlord's Obligations.

(a) Subject to the provisions of Article Seven (Damage or Destruction) and Article Eight (Condemnation), and except for damage caused by any act or omission of Tenant, or Tenant's employees, agents, contractors or invitees, Landlord shall keep the foundation, roof of the Project, structural portions of exterior walls, and electrical and plumbing systems located within the Project but outside of the Property, in good order, condition and repair. Except as provided in the immediately preceding sentence, Landlord shall have absolutely no responsibility to repair, maintain or replace any portion of the Property or Project at any time. Without limiting the generality of the preceding sentence, Landlord shall not be obligated to maintain or repair windows, doors, plate glass or the surfaces of walls. Landlord shall not be obligated to make any repairs under this Section 6.03 until a reasonable time after receipt of written notice from Tenant of the need for such repairs.

(b) Tenant shall pay or reimburse Landlord for Tenant's Proportionate Share of all costs Landlord incurs under Section 6.03(a) above within fifteen (15) days after Landlord delivers its invoice therefor to Tenant. Tenant's obligation to reimburse Landlord for costs incurred by Landlord for capital expenditures under Section 6.03(a) shall include only Tenant's Proportionate Share of the annual amortization calculated on a straight line basis (over the anticipated useful life) of the cost of a capital improvement, plus Tenant's Proportionate Share of any interest or financing charges thereon actually incurred by

Landlord. Tenant waives the benefit of any present or future law which might give Tenant the right to repair the Property at Landlord's expense or to terminate the Lease due to the condition of the Property.

Section 6.04. Tenant's Obligations.

(a) Except as provided in Section 6.03, Article Seven (Damage or Destruction) and Article Eight (Condemnation), Tenant shall keep all portions of the Property (including structural, nonstructural, interior, exterior and landscaped areas (except to the extent actually maintained by the City of Santa Monica), portions, systems and equipment) in good order, condition and repair (including interior repainting and refinishing, as needed). If any portion of the Property or any system or equipment in the Property which Tenant is obligated to repair cannot be fully repaired or restored, Tenant shall promptly replace such portion of the Property or system or equipment in the Property, regardless of whether the benefit of such replacement extends beyond the Lease Term; but if the benefit or useful life of such replacement extends beyond the Lease Term (as such term may be extended by exercise of any options), the useful life of such replacement shall be prorated over the remaining portion of the Lease Term (as extended), and Tenant shall be liable only for that portion of the cost which is applicable to the Lease Term (as extended). Tenant shall maintain a preventative maintenance contract providing for the regular inspection and maintenance of the heating and air conditioning system by a licensed heating and air conditioning contractor. If any part of the Property is damaged by any act or omission of Tenant, Tenant shall pay Landlord the cost of repairing or replacing such damaged property, whether or not Landlord would otherwise be obligated to pay the cost of maintaining or repairing such property. It is the intention of Landlord and Tenant that at all times Tenant shall maintain the portions of the Property which Tenant is obligated to maintain in an attractive, first-class and fully operative condition.

(b) Tenant shall fulfill all of Tenant's obligations under this Section 6.04 at Tenant's sole expense. If Tenant fails to maintain, repair or replace the Property as required by this Section 6.04, Landlord may, upon ten (10) days' prior notice to Tenant (except that no notice shall be required in case of an emergency), enter the Property and perform such maintenance or repair (including replacement, as needed) on behalf of Tenant. In such case, Tenant shall reimburse Landlord for all costs incurred in performing such maintenance or repair immediately upon demand.

Section 6.05. Alterations, Additions, and Improvements.

(a) Tenant shall not make any alterations, additions or improvements to the Property in connection with Tenant's initial build out and fixturation without Landlord's prior written consent. Following completion of Tenant's initial build out and fixturation of the Property, Tenant shall not make any alterations, additions or improvements to the Property without Landlord's prior written consent, except for nonstructural alterations which do not exceed Ten Thousand Dollars (\$10,000) in cost cumulatively over the Lease Term and which are not visible from outside the Property. Landlord may require Tenant to provide demolition and/or lien and completion bonds in form and amount satisfactory to Landlord. Tenant shall promptly remove any alterations, additions, or improvements constructed in violation of this Paragraph 6.5(a) upon Landlord's written request. All alterations, additions, and improvements shall be done in a good and workmanlike manner, in conformity with all applicable laws and

regulations, and by a contractor approved by Landlord. Upon completion of any such work, Tenant shall provide Landlord with "as built" plans, copies of all construction contracts, and proof of payment for all labor and materials.

(b) Tenant shall pay when due all claims for labor and material furnished to the Property. Tenant shall give Landlord at least twenty (20) days' prior written notice of the commencement of any work on the Property, regardless of whether Landlord's consent to such work is required. Landlord may elect to record and post notices of non-responsibility on the Property.

(c) Landlord and Tenant hereby acknowledge and agree that Tenant shall perform at Tenant's sole cost and expense, all work which is required to prepare the Property for Tenant's occupancy (collectively, "Tenant Work"). Tenant shall cause all Tenant Work to be performed (i) pursuant to plans and specifications approved in advance and in writing by Landlord; (ii) by a contractor approved in advance and in writing by Landlord; (iii) in a good and workmanlike manner; and (iv) in strict compliance with all applicable laws, regulations and ordinances, including, without limitation, the Americans with Disabilities Act. Within seven (7) business days after the receipt by Landlord of any proposed plans and specifications, Landlord shall advise Tenant in reasonable detail of any changes or additional information required to obtain Landlord's approval. If Landlord disapproves, or requests additional information, Tenant shall revise the proposed plans and specifications disapproved by Landlord and resubmit such plans and specifications to Landlord or otherwise provide such additional information to Landlord. Landlord shall, within seven (7) business days after receipt of Tenant's revised plans, advise Tenant of further changes, if any, required for Landlord's approval. This process shall continue until Landlord has approved Tenant's revised plans. Tenant shall not make any changes to any plans and specifications approved by Landlord without Landlord's prior written approval, which shall not be unreasonably withheld and which shall be either approved or disapproved, in writing, within seven (7) business days after receipt by Landlord; provided that Landlord may, in the exercise of its sole and absolute discretion, disapprove any propose change that will adversely affect the Project's structure, systems, equipment or exterior appearance, or which may be visible from the exterior of the Property. Landlord, by Landlord's approval of the plans and specifications for the Tenant Work, shall not be deemed to be making any representations or warranties concerning compliance of the plans and specifications with applicable laws, the sufficiency of the same for Tenant's business at the Property, or any other matter whatsoever.

(d) Tenant shall keep the Property free and clear of all liens, security interests and encumbrances (collectively, 'Liens') arising out of or in connection with the Tenant Work, any alterations, additions or improvements made by or for Tenant, or any labor, services or materials provided for or at the request of Tenant. Tenant shall indemnify and defend Landlord, and hold Landlord harmless, from and against (i) all Liens; (ii) the removal of all Liens and any actions or proceedings related thereto; and (iii) any and all losses, costs, damages, liabilities and expenses (including, without limitation, attorneys' fees) incurred by Landlord in connection with the foregoing. If Tenant fails to keep the Property free from Liens, then (A) without in any way limiting any other rights or remedies available to Landlord as a result thereof, (B) without inquiry into the validity of such Liens, and (C) without regard to any defense or offset Tenant may have against the claimant on whose behalf the Lien was filed, Landlord may take

such action as Landlord deems necessary to discharge such Liens, including, without limitation, making payment to the claimant on whose behalf the Lien was filed, in which event Tenant shall pay to Landlord upon demand any such sum so paid by Landlord.

Section 6.06. Condition upon Termination. Upon the termination of the Lease, Tenant shall surrender the Property to Landlord, broom clean and in the same condition as received, except for ordinary wear and tear which Tenant was not otherwise obligated to remedy under any provision of this Lease, and except for permitted alterations, additions and improvements which Tenant is not required to remove pursuant to the provisions hereof. However, Tenant shall not be obligated to repair any damage which Landlord is required to repair under Article Seven (Damage or Destruction). In addition, Landlord may require Tenant to remove any alterations, additions or improvements (whether or not made with Landlord's consent) prior to the expiration of the Lease and to restore the Property to its prior condition, all at Tenant's expense. All alterations, additions and improvements which Landlord has not required Tenant to remove shall become Landlord's property and shall be surrendered to Landlord upon the expiration or earlier termination of the Lease, except that Tenant may remove any of Tenant's machinery or equipment which can be removed without material damage to the Property. Tenant shall repair, at Tenant's expense, any damage to the Property caused by the removal of any such machinery or equipment. In no event, however, shall Tenant remove any of the following materials or equipment (which shall be deemed Landlord's property) without Landlord's prior written consent: any power wiring or power panels; lighting or lighting fixtures; wall coverings; drapes, blinds or other window coverings; carpets or other floor coverings; heaters, air conditioners or any other heating or air conditioning equipment; fencing or security gates; or other similar building operating equipment and decorations. Landlord shall not acquire any rights to any proprietary or trademarked items or trade dress items of Tenant and Tenant may "de-brand" or "de-identify" any such items prior to the expiration of the Lease Tenn provided that Tenant, at Tenant's sole cost and expense, repairs any damage to the Property caused by doing so.

ARTICLE SEVEN: DAMAGE OR DESTRUCTION.

Section 7.01. Partial Damage to Property.

(a) Tenant shall notify Landlord in writing immediately upon the occurrence of any damage to the Property. If the Property is only partially damaged (i.e., less than fifty percent (50%) of the Property is untenable as a result of such damage or less than fifty percent (50%) of Tenant's operations are materially impaired) and if the proceeds received by Landlord from the insurance policies described in Paragraph 4.04(b) are sufficient to pay for the necessary repairs, this Lease shall remain in effect and Landlord shall repair the damage as soon as reasonably possible. Landlord may elect (but is not required) to repair any damage to Tenant's fixtures, equipment, or improvements.

(b) If the insurance proceeds received by Landlord are not sufficient to pay the entire cost of repair, or if the cause of the damage is not covered by the insurance policies which Landlord maintains under Paragraph 4.04(b), Landlord may elect either to (i) repair the damage as soon as reasonably possible, in which case this Lease shall remain in full force and effect, or (ii) terminate this Lease as of the date the damage occurred. Landlord shall notify Tenant within thirty (30) days after receipt of notice of the occurrence of the damage whether Landlord elects to repair the

damage or terminate the Lease. If Landlord elects to repair the damage, Tenant shall pay Landlord the "deductible amount" (if any) under Landlord's insurance policies and, if the damage was due to an act or omission of Tenant, or Tenant's employees, agents, contractors or invitees, the difference between the actual cost of repair and any insurance proceeds received by Landlord. If Landlord elects to terminate this Lease, Tenant may elect to continue this Lease in full force and effect, in which case Tenant shall repair any damage to the Property and any building in which the Property is located. Tenant shall pay the cost of such repairs, except that upon satisfactory completion of such repairs, Landlord shall deliver to Tenant any insurance proceeds received by Landlord for the damage repaired by Tenant. Tenant shall give Landlord written notice of such election within ten (10) days after receiving Landlord's termination notice.

(c) If the damage to the Property occurs during the last six (6) months of the Lease Term and Tenant has not exercised the Option pursuant to Section 2.03(a) of this Lease, and such damage will require more than thirty (30) days to repair, either Landlord or Tenant may elect to terminate this Lease as of the date the damage occurred, regardless of the sufficiency of any insurance proceeds. The party electing to terminate this Lease shall give written notification to the other party of such election within thirty (30) days after Tenant's notice to Landlord of the occurrence of the damage.

Section 7.02. Total or Substantial Destruction. If the Property is substantially or totally destroyed by any cause whatsoever (i.e., the damage to the Property is greater than partial damage as described in Section 7.01), and regardless of whether Landlord receives any insurance proceeds, this Lease shall terminate as of the date the destruction occurred. Notwithstanding the preceding sentence, if the Property can be rebuilt within six (6) months after the date of destruction, Landlord may elect to rebuild the Property at Landlord's own expense, in which case this Lease shall remain in full force and effect. Landlord shall notify Tenant of such election within thirty (30) days after Tenant's notice of the occurrence of total or substantial destruction. If Landlord so elects, Landlord shall rebuild the Property at Landlord's sole expense, except that if the destruction was caused by an act or omission of Tenant, Tenant shall pay Landlord the difference between the actual cost of rebuilding and any insurance proceeds received by Landlord.

Section 7.03. Temporary Reduction of Rent. If the Property is destroyed or damaged and Landlord or Tenant repairs or restores the Property pursuant to the provisions of this Article Seven, any rent payable during the period of such damage, repair and/or restoration shall be reduced according to the degree, if any, to which Tenant's use of the Property is impaired. However, the reduction shall not exceed the sum of one year's payment of Base Rent, insurance premiums and real property taxes. Except for such possible reduction in Base Rent, insurance premiums and real property taxes, Tenant shall not be entitled to any compensation, reduction, or reimbursement from Landlord as a result of any damage, destruction, repair, or restoration of or to the Property.

Section 7.04. Waiver. Tenant waives the protection of any statute, code or judicial decision which grants a tenant the right to terminate a lease in the event of the substantial destruction of the leased property. Tenant agrees that the provisions of Section 7.02 above shall govern the rights and obligations of Landlord and Tenant in the event of any substantial or total destruction to the Property.

ARTICLE EIGHT: CONDEMNATION.

If all or any portion of the Property is taken under the power of eminent domain or sold under the threat of that power (all of which are called "Condemnation"), this Lease shall terminate as to the part taken or sold on the date the condemning authority takes title or possession, whichever occurs first. If more than twenty percent (20%) of the floor area of the building in which the Property is located, or which is located on the Property, is taken, either Landlord or Tenant may terminate this Lease as of the date the condemning authority takes title or possession, by delivering written notice to the other within ten (10) days after receipt of written notice of such taking (or in the absence of such notice, within ten (10) days after the condemning authority takes title or possession). If neither Landlord nor Tenant terminates this Lease, this Lease shall remain in effect as to the portion of the Property not taken, except that the Base Rent and Additional Rent shall be reduced in proportion to the reduction in the floor area of the Property. Any Condemnation award or payment shall be distributed in the following order: (a) first, to any ground lessor, mortgagee or beneficiary under a deed of trust encumbering the Property, the amount of its interest in the Property; (b) second, to Tenant, only the amount of any award specifically designated for loss of or damage to Tenant's trade fixtures or removable personal property; and (c) third, to Landlord, the remainder of such award, whether as compensation for reduction in the value of the leasehold, the taking of the fee, or otherwise. If this Lease is not terminated, Landlord shall repair any damage to the Property caused by the Condemnation, except that Landlord shall not be obligated to repair any damage for which Tenant has been reimbursed by the condemning authority. If the severance damages received by Landlord are not sufficient to pay for such repair, Landlord shall have the right to either terminate this Lease or make such repair at Landlord's expense. Tenant shall be entitled to any award separately made in Tenant's name for and/or allocable to the cost of any improvements to the Premises made by Tenant pursuant to Section 6.05 of this Lease to the extent paid by Tenant (and provided that Tenant shall not have been reimbursed by Landlord for such amounts).

ARTICLE NINE: ASSIGNMENT AND SUBLETTING.

Section 9.01. Landlord's Consent Required.

(a) No portion of the Property or of Tenant's interest in this Lease may be acquired by any other person or entity, whether by sale, assignment, mortgage, sublease, transfer, operation of law, or act of Tenant, without Landlord's prior written consent. Landlord has the right to grant or withhold its consent as provided in Section 9.04 below. Any attempted transfer without consent shall be void and shall constitute a non-curable breach of this Lease. A change in the control of Tenant, and the sale of all or substantially all of Tenant's assets, shall each constitute an assignment requiring Landlord's consent. The transfer, on a cumulative basis, of fifty percent (50%) or more of the voting control of Tenant shall constitute a change in control for this purpose; provided, however, in no event shall (i) the issuance of new stock to raise capital or (ii) the transfer of stock comprising fifty percent (50%) or more of the voting control of Tenant be deemed a Transfer (as hereinafter defined), in each case, provided that the day-to-day management of Tenant remains substantially the same. The transactions with respect to which Landlord's consent is required under this Section 9.01 are sometimes collectively referred to herein as "Transfers."

(b) If Tenant is a corporation, the transfer (by one or more transfers) of a majority of the stock of Tenant shall be deemed a voluntary assignment of this Lease; provided, however, that the provisions of this Section 9.01 shall not apply to the transfer of shares of stock of Tenant if and so long as Tenant is publicly traded, or becomes publicly traded, on a nationally recognized stock exchange. For purposes of this Section 9.01(b), the term "Transfers" shall be deemed to include the issuance of new stock which results in a majority of the stock of Tenant being held by a person or entity which does not hold a majority of the stock of Tenant on the date hereof. The provisions of Sections 9.01(a) and 9.03 shall not apply to transactions with a corporation into which Tenant is merged or consolidated or to which substantially all of Tenant's assets or stock are transferred so long as (i) such transfer was made for a legitimate independent business purpose and not for the purpose of transferring this Lease, (ii) the successor of Tenant has a net worth computed in accordance with generally accepted accounting principles at least equal to the greater of (1) the net worth of Tenant immediately prior to such merger, consolidation or transfer, and (2) the net worth of the original Tenant on the date of this Lease, and (iii) proof satisfactory to Landlord of such net worth is delivered to Landlord at least ten (10) days prior to the effective date of such transaction. Tenant may also, upon prior written notice to Landlord, permit any corporation or other business entity which controls, is controlled by, or is under common control with the original Tenant (a "Related Corporation") to sublet all or part of the Premises for any use permitted under Section 1.06 hereinabove, provided the Related Corporation is in Landlord's reasonable judgment of a character and engaged in a business which is in keeping with the standards for the Project and the occupancy thereof. Tenant may sublet all or part of the Premises to a Related Corporation without triggering Landlord's rights arising under Section 9.03 below. Such sublease shall not be deemed to vest in any such Related Corporation any right or interest in this Lease or the Property nor shall it relieve, release, impair or discharge any of Tenant's obligations hereunder. For the purposes hereof, "control" shall be deemed to mean ownership of not less than fifty percent (50%) of all of the voting stock of such corporation. Notwithstanding the foregoing, Tenant shall have no right to assign this Lease or sublease all or any portion of the Property without Landlord's consent pursuant to this Section 9.01(b) if Tenant is not the initial Tenant herein named or a person or entity who acquired Tenant's interest in this Lease in a transaction either approved by Landlord or not requiring the approval of Landlord.

Section 9.02. No Release of Tenant. No transfer permitted by this Article Nine, whether with or without Landlord's consent, shall release Tenant or change Tenant's primary liability to pay the rent and to perform all other obligations of Tenant under this Lease. Landlord's acceptance of rent from any other person is not a waiver of any provision of this Article Nine. Consent to one transfer is not a consent to any subsequent transfer. If Tenant's transferee defaults under this Lease, Landlord may proceed directly against Tenant without pursuing remedies against the transferee. Landlord may consent to subsequent assignments or modifications of this Lease by Tenant's transferee, without notifying Tenant or obtaining its consent. Such action shall not relieve Tenant's liability under this Lease.

Section 9.03. Recapture Right. If Tenant desires to assign this Lease, sublease the Property or make any other Transfer, then Tenant shall give written notice of such desire to Landlord at least sixty (60) days before the effective date of any such proposed transaction. At any time within thirty (30) days after

Landlord's receipt of such notice from Tenant, Landlord shall have the right to terminate this Lease by notifying Tenant of the same in writing. If Landlord timely so notifies Tenant of Landlord's election to terminate this Lease, such termination shall be effective as of the date specified in Landlord's notice, which date shall be not sooner than sixty (60) days, nor more than one hundred twenty (120) days, after the date of Landlord's notice. If Landlord does not elect to terminate this Lease within such thirty (30) day period, but Tenant does not, within a period expiring six (6) months after the expiration of such thirty (30) day period (or, if sooner, the date Landlord notifies Tenant in writing that Landlord does not intend to terminate the Lease) assign this Lease, sublease the Property, or make any other Transfer, then Tenant again shall comply with the provisions of this Section 9.03 before consummating any such assignment, sublease or other Transfer. Nothing in this Section shall limit Landlord's rights under Section 9.04 below.

Section 9.04. Landlord's Election.

(a) Tenant's request for consent to any transfer described in Section 9.01 shall set forth in writing the details of the proposed transfer, including the name, business and financial condition of the prospective transferee, financial details of the proposed transfer (e.g., the term of and rent and security deposit payable under any proposed assignment or sublease), and any other information Landlord deems relevant. Landlord shall have the right to withhold consent, if reasonable, or to grant consent, based on the following factors: (i) the business of the proposed assignee or subtenant and the proposed use of the Property; (ii) the net worth and financial reputation of the proposed assignee or subtenant; (iii) Tenant's compliance with all of its obligations under the Lease; (iv) Percentage Rent that Landlord reasonably anticipates receiving from the proposed transferee is less than that which Landlord has received or anticipates receiving from Tenant; and (v) such other factors as Landlord may reasonably deem relevant. If Landlord objects to a proposed assignment solely because of the net worth and/or financial reputation of the proposed assignee, Tenant may nonetheless sublease (but not assign), all or a portion of the Property to the proposed transferee, but only on the other terms of the proposed transfer.

(b) If Tenant assigns or subleases, the following shall apply:

(i) Tenant shall pay to Landlord as Additional Rent under the Lease the Landlord's Share (stated in Section 1.11 of the Profit (defined below) on such transaction as and when received by Tenant, unless Landlord gives written notice to Tenant and the assignee or subtenant that Landlord's Share shall be paid by the assignee or subtenant to Landlord directly. The "Profit" means (A) all amounts paid to Tenant for such assignment or sublease, including "key" money, monthly rent in excess of the monthly rent payable under the Lease, and all fees and other consideration paid for the assignment or sublease, including fees under any collateral agreements, less (B) costs and expenses directly incurred by Tenant in connection with the execution and performance of such assignment or sublease for real estate broker's commissions and costs of renovation or construction of tenant improvements required under such assignment or sublease. Tenant is entitled to recover such costs and expenses before Tenant is obligated to pay the Landlord's Share to Landlord. The Profit in the case

of a sublease of less than all of the Property is the rent allocable to the subleased space as a percentage on a square footage basis.

(ii) Tenant shall provide Landlord a written statement certifying all amounts to be paid from any assignment or sublease of the Property within thirty (30) days after the transaction documentation is signed, and Landlord may inspect Tenant's books and records to verify the accuracy of such statement. On written request, Tenant shall promptly furnish to Landlord copies of all the transaction documentation, all of which shall be certified by Tenant to be complete, true and correct. Landlord's receipt of Landlord's Share shall not be a consent to any further assignment or subletting. The breach of Tenant's obligations under this Paragraph 9.04(b) shall be a material default of the Lease.

Section 9.05. **No Merger.** No merger shall result from Tenant's sublease of the Property under this Article Nine, Tenant's surrender of this Lease or the termination of this Lease in any other manner. In any such event, Landlord may terminate any or all subtenancies or succeed to the interest of Tenant as sublandlord under any or all subtenancies.

ARTICLE TEN: DEFAULTS; REMEDIES.

Section 10.01. **Covenants and Conditions.** Tenant's performance of each of Tenant's obligations under this Lease is a condition as well as a covenant. Tenant's right to continue in possession of the Property is conditioned upon such performance. Time is of the essence in the performance of all covenants and conditions.

Section 10.02. **Defaults.** Tenant shall be in material default under this Lease:

(a) If Tenant abandons the Property or if Tenant's vacation of the Property results in the cancellation of any insurance described in Section 4.04;

(b) If Tenant fails to pay rent or other charge within five (5) days after such payment is due.

(c) If Tenant fails to perform any of Tenant's non-monetary obligations under this Lease for a period of thirty (30) days after written notice from Landlord; provided that if more than thirty (30) days are required to complete such performance, Tenant shall not be in default if Tenant commences such performance within the thirty (30)-day period and thereafter diligently pursues its completion. However, Landlord shall not be required to give such notice if Tenant's failure to perform constitutes a non-curable breach of this Lease. The notice required by this Paragraph is intended to satisfy any and all notice requirements imposed by law on Landlord and is not in addition to any such requirement.

(d) (i) If Tenant makes a general assignment or general arrangement for the benefit of creditors; (ii) if a petition for adjudication of bankruptcy or for reorganization or rearrangement is filed by or against Tenant and is not dismissed within thirty (30) days; (iii) if a trustee or receiver is appointed to take possession of substantially all of Tenant's assets located at the Property or of Tenant's interest in this Lease and possession is not restored to Tenant within thirty (30) days; or (iv) if

substantially all of Tenant's assets located at the Property or of Tenant's interest in this Lease is subjected to attachment, execution or other judicial seizure which is not discharged within thirty (30) days. If a court of competent jurisdiction determines that any of the acts described in this subparagraph (d) is not a default under this Lease, and a trustee is appointed to take possession (or if Tenant remains a debtor in possession) and such trustee or Tenant transfers Tenant's interest hereunder, then Landlord shall receive, as Additional Rent, the excess, if any, of the rent (or any other consideration) paid in connection with such assignment or sublease over the rent payable by Tenant under this Lease.

Section 10.03. **Remedies.** On the occurrence of any material default by Tenant, Landlord may, at any time thereafter, with or without notice or demand and without limiting Landlord in the exercise of any right or remedy which Landlord may have:

(a) Terminate Tenant's right to possession of the Property by any lawful means, in which case this Lease shall terminate and Tenant shall immediately surrender possession of the Property to Landlord. In such event, Landlord shall be entitled to recover from Tenant all damages incurred by Landlord by reason of Tenant's default, including (i) the worth at the time of the award of the unpaid Base Rent, Additional Rent and other charges which Landlord had earned at the time of the termination; (ii) the worth at the time of the award of the amount by which the unpaid Base Rent, Additional Rent and other charges which Landlord would have earned after termination until the time of the award exceeds the amount of such rental loss that Tenant proves Landlord could have been reasonably avoided; (iii) the worth at the time of the award of the amount by which the unpaid Base Rent, Additional Rent and other charges which Tenant would have paid for the balance of the Lease term after the time of award exceeds the amount of such rental loss that Tenant proves Landlord could have reasonably avoided; and (iv) any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform its obligations under the Lease or which in the ordinary course of things would be likely to result therefrom, including, but not limited to, any costs or expenses Landlord incurs in maintaining or preserving the Property after such default, the cost of recovering possession of the Property, expenses of reletting, including necessary renovation or alteration of the Property, Landlord's reasonable attorneys' fees incurred in connection therewith, and any real estate commission paid or payable. As used in subparts (i) and (ii) above, the "worth at the time of the award" is computed by allowing interest on unpaid amounts at the rate of fifteen percent (15%) per annum, or such lesser amount as may then be the maximum lawful rate. As used in subpart (iii) above, the "worth at the time of the award" is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award, plus one percent (1%). If Tenant has abandoned the Property, Landlord shall have the option of (i) retaking possession of the Property and recovering from Tenant the amount specified in this Paragraph 10.03(a), or (ii) proceeding under Paragraph 10.03(b);

(b) Maintain Tenant's right to possession, in which case this Lease shall continue in effect whether or not Tenant shall have abandoned the Property. In such event, Landlord shall be entitled to enforce all of Landlord's rights and remedies under this lease, including the right to recover the rent as it becomes due;

(c) Pursue any other remedy now or hereafter available to Landlord under the laws or judicial decisions of the state in which the Property is located.

Section 10.04. **Repayment of "Free" Rent.** If this Lease provides for a postponement of any monthly rental payments, a period of "free" rent or other rent concession, such postponed rent or "free" rent is called the "Abated Rent". Tenant shall be credited with having paid all of the Abated Rent on the expiration of the Lease Term only if Tenant has fully, faithfully, and punctually performed all of Tenant's obligations hereunder, including the payment of all rent (other than Abated Rent) and all other monetary obligations and the surrender of the Property in the physical condition required by this Lease. Tenant acknowledges that its right to receive credit for the Abated Rent is absolutely conditioned upon Tenant's full, faithful and punctual performance of its obligations under this Lease. If Tenant defaults and does not cure within any applicable grace period, the Abated Rent shall immediately become due and payable in full and this Lease shall be enforced as if there were no such rent abatement or other rent concession. In such case Abated Rent shall be calculated based on the full initial rent payable under this Lease.

Section 10.05. **Automatic Termination.** Notwithstanding any other term or provision hereof to the contrary, the Lease shall terminate on the occurrence of any act which affirms the Landlord's intention to terminate the Lease as provided in Section 10.03 hereof, including the filing of an unlawful detainer action against Tenant. On such termination, Landlord's damages for default shall include all costs and fees, including reasonable attorneys' fees that Landlord incurs in connection with the filing, commencement, pursuing and/or defending of any action in any bankruptcy court or other court with respect to the Lease; the obtaining of relief from any stay in bankruptcy restraining any action to evict Tenant; or the pursuing of any action with respect to Landlord's right to possession of the Property. All such damages suffered (apart from Base Rent and other rent payable hereunder) shall constitute pecuniary damages which must be reimbursed to Landlord prior to assumption of the Lease by Tenant or any successor to Tenant in any bankruptcy or other proceeding.

Section 10.06. **Cumulative Remedies.** Landlord's exercise of any right or remedy shall not prevent it from exercising any other right or remedy.

ARTICLE ELEVEN: PROTECTION OF LENDERS.

Section 11.01. **Subordination.** Landlord shall have the right to subordinate this Lease to any ground lease, deed of trust or mortgage encumbering the Property, any advances made on the security thereof and any renewals, modifications, consolidations, replacements or extensions thereof, whenever made or recorded. Tenant shall cooperate with Landlord and any lender which is acquiring a security interest in the Property or the Lease. Tenant shall execute such further documents and assurances as such lender may require, provided that Tenant's obligations under this Lease shall not be increased in any material way (the performance of ministerial acts shall not be deemed material), and Tenant shall not be deprived of its rights under this Lease. Tenant's right to quiet possession of the Property during the Lease Term shall not be disturbed if Tenant pays the rent and performs all of Tenant's obligations under this Lease and is not otherwise in default. If any ground lessor, beneficiary or mortgagee elects to have this Lease prior to the lien of its ground lease, deed of trust or mortgage and gives written notice thereof to Tenant, this Lease

shall be deemed prior to such ground lease, deed of trust or mortgage whether this Lease is dated prior or subsequent to the date of said ground lease, deed of trust or mortgage or the date of recording thereof.

Section 11.02. Attornment. If Landlord's interest in the Property is acquired by any ground lessor, beneficiary under a deed of trust, mortgagee, or purchaser at a foreclosure sale, Tenant shall attorn to the transferee of or successor to Landlord's interest in the Property and recognize such transferee or successor as Landlord under this Lease. Tenant waives the protection of any statute or rule of law which gives or purports to give Tenant any right to terminate this Lease or surrender possession of the Property upon the transfer of Landlord's interest.

Section 11.03. Signing of Documents. Tenant shall sign and deliver any instrument or documents necessary or appropriate to evidence any such attornment or subordination or agreement to do so. If Tenant fails to do so within ten (10) days after written request, Tenant hereby makes, constitutes and irrevocably appoints Landlord, or any transferee or successor of Landlord, the attorney-in-fact of Tenant to execute and deliver any such instrument or document.

Section 11.04. Estoppel Certificates.

(a) Upon Landlord's written request, Tenant shall execute, acknowledge and deliver to Landlord a written statement certifying: (i) that none of the terms or provisions of this Lease have been changed (or if they have been changed, stating how they have been changed); (ii) that this Lease has not been cancelled or terminated; (iii) the last date of payment of the Base Rent and other charges and the time period covered by such payment; and (iv) that Landlord is not in default under this Lease (or, if Landlord is claimed to be in default, stating why); and (v) such other representations or information with respect to Tenant or the Lease as Landlord may reasonably request or which any prospective purchaser or encumbrancer of the Property may require. Tenant shall deliver such statement to Landlord within ten (10) days after Landlord's request. Landlord may give any such statement by Tenant to any prospective purchaser or encumbrancer of the Property. Such purchaser or encumbrancer may rely conclusively upon such statement as true and correct.

(b) If Tenant does not deliver such statement to Landlord within such ten (10)-day period, Landlord, and any prospective purchaser or encumbrancer, may conclusively presume and rely upon the following facts: (i) that the terms and provisions of this Lease have not been changed except as otherwise represented by Landlord; (ii) that this Lease has not been cancelled or terminated except as otherwise represented by Landlord; (iii) that not more than one month's Base Rent or other charges have been paid in advance; and (iv) that Landlord is not in default under the Lease. In such event, Tenant shall be estopped from denying the truth of such facts.

Section 11.05. Tenant's Financial Condition. Within ten (10) days after written request from Landlord, Tenant shall deliver to Landlord such financial statements as Landlord reasonably requires to verify the net worth of Tenant or any assignee, subtenant, or guarantor of Tenant. In addition, Tenant shall deliver to any lender designated by Landlord any financial statements required by such lender to facilitate the financing or refinancing of the Property. Tenant represents and warrants to Landlord that each such financial statement is a true and accurate statement as of the

date of such statement. All financial statements shall be confidential and shall be used only for the purposes set forth in this Lease

ARTICLE TWELVE: LEGAL COSTS.

Section 12.01. **Legal Proceedings.** If Tenant or Landlord shall be in breach or default under this Lease, such party (the "Defaulting Party") shall reimburse the other party (the "Nondefaulting Party") upon demand for any costs or expenses that the Nondefaulting Party incurs in connection with any breach or default of the Defaulting Party under this Lease, whether or not suit is commenced or judgment entered. Such costs shall include legal fees and costs incurred for the negotiation of a settlement, enforcement of rights or otherwise. Furthermore, if any action for breach of or to enforce the provisions of this Lease is commenced, the court in such action shall award to the party in whose favor a judgment is entered, a reasonable sum as attorneys' fees and costs. The losing party in such action shall pay such attorneys' fees and costs. Tenant shall also indemnify Landlord against and hold Landlord harmless from all costs, expenses, demands and liability Landlord may incur if Landlord becomes or is made a party to any claim or action (a) instituted by Tenant against any third party, or by any third party against Tenant, or by or against any person holding any interest under or using the Property by license of or agreement with Tenant; (b) for foreclosure of any lien for labor or material furnished to or for Tenant or such other person; (c) otherwise arising out of or resulting from any act or transaction of Tenant or such other person; or (d) necessary to protect Landlord's interest under this Lease in a bankruptcy proceeding, or other proceeding under Title 11 of the United States Code, as amended. Tenant shall defend Landlord against any such claim or action at Tenant's expense with counsel reasonably acceptable to Landlord or, at Landlord's election, Tenant shall reimburse Landlord for any legal fees or costs Landlord incurs in any such claim or action.

Section 12.02. **Landlord's Consent.** Tenant shall pay Landlord's reasonable attorneys' fees incurred in connection with Tenant's request for Landlord's consent under Article Nine (Assignment and Subletting), or in connection with any other act which Tenant proposes to do and which requires Landlord's consent.

ARTICLE THIRTEEN: MISCELLANEOUS PROVISIONS.

Section 13.01. **Non-Discrimination.** Tenant promises, and it is a condition to the continuance of this Lease, that there will be no discrimination against, or segregation of, any person or group of persons on the basis of race, color, sex, creed, national origin or ancestry in the leasing, subleasing, transferring, occupancy, tenure or use of the Property or any portion thereof.

Section 13.02. **Landlord's Liability; Certain Duties.**

(a) As used in this Lease, the term "Landlord" means only the current owner or owners of the fee title to the Property or the leasehold estate under a ground lease of the Property at the time in question. Each Landlord is obligated to perform the obligations of Landlord under this Lease only during the time such Landlord owns such interest or title. Any Landlord who transfers its title or interest is relieved of all liability with respect to the obligations of Landlord under this Lease to be performed on or after the date of transfer. However, each Landlord shall deliver

to its transferee all funds previously paid if such funds have not yet been applied under the terms of this Lease.

(b) Tenant shall give written notice of any failure by Landlord to perform any of its obligations under this Lease to Landlord and to any ground lessor, mortgagee or beneficiary under any deed of trust encumbering the Property whose name and address have been furnished to Tenant in writing. Landlord shall not be in default under this Lease unless Landlord (or such ground lessor, mortgagee or beneficiary) fails to cure such non-performance within thirty (30) days after receipt of Tenant's notice. However, if such non-performance reasonably requires more than thirty (30) days to cure, Landlord shall not be in default if such cure is commenced within such thirty (30) -day period and thereafter diligently pursued to completion.

(c) Notwithstanding any term or provision herein to the contrary, the liability of Landlord for the performance of its duties and obligations under this Lease is limited to Landlord's interest in the Property, and neither the Landlord nor its partners, shareholders, officers or other principals shall have any personal liability under this Lease.

Section 13.03. **Severability.** A determination by a court of competent jurisdiction that any provision of this Lease or any part thereof is illegal or unenforceable shall not cancel or invalidate the remainder of such provision or this Lease, which shall remain in full force and effect.

Section 13.04. **Interpretation.** The captions of the Articles or Sections of this Lease are to assist the parties in reading this Lease and are not a part of the terms or provisions of this Lease. Whenever required by the context of this Lease, the singular shall include the plural and the plural shall include the singular. The masculine, feminine and neuter genders shall each include the other. In any provision relating to the conduct, acts or omissions of Tenant, the term "Tenant" shall include Tenant's agents, employees, contractors, invitees, successors or others using the Property with Tenant's expressed or implied permission.

Section 13.05. **Incorporation of Prior Agreement; Modifications.** This Lease is the only agreement between the parties pertaining to the lease of the Property and no other agreements are effective. All amendments to this Lease shall be in writing and signed by all parties. Any other attempted amendment shall be void.

Section 13.06. **Notices.** All notices required or permitted under this Lease shall be in writing and shall be personally delivered or sent by certified mail, return receipt requested, postage prepaid. Notices to Tenant shall be delivered to the address specified in Section 1.03 above. Notices to Landlord shall be delivered to the address specified in Section 1.02 above. All notices shall be effective upon delivery. Either party may change its notice address upon ten (10) days' prior written notice to the other party.

Section 13.07. **Waivers.** All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provision of this Lease or its acceptance of rent shall not be a waiver and shall not prevent Landlord from enforcing that provision or any other provision of this Lease in the future. No statement on a payment check from Tenant or in a letter accompanying a payment check shall be binding on Landlord. Landlord may, with or

without notice to Tenant, negotiate such check without being bound to the conditions of such statement.

Section 13.08. No Recordation. Tenant shall not record this Lease without prior written consent from Landlord. However, either Landlord or Tenant may require that a "Short Form" memorandum of this Lease executed by both parties be recorded. The party requiring such recording shall pay all transfer taxes and recording fees.

Section 13.09. Binding Effect; Choice of Law. The Lease binds any party who legally acquires any rights or interest in this Lease from Landlord or Tenant. However, Landlord shall have no obligation to Tenant's successor unless the rights or interests of Tenant's successor are acquired in accordance with the terms of this Lease. The laws of the state in which the Property is located shall govern this Lease.

Section 13.10. Corporate Authority; Partnership Authority. If Tenant is a corporation, each person signing this Lease on behalf of Tenant represents and warrants that he has full authority to do so and that this Lease binds the corporation. Within thirty (30) days after this Lease is signed, Tenant shall deliver to Landlord a certified copy of a resolution of Tenant's Board of Directors authorizing the execution of this Lease or other evidence of such authority reasonably acceptable to Landlord. If Tenant is a partnership, each person or entity signing this Lease for Tenant represents and warrants that he or it is a general partner of the partnership, that he or it has full authority to sign for the partnership and that this Lease binds the partnership and all general partners of the partnership. Tenant shall give written notice to Landlord of any general partner's withdrawal or addition. Within thirty (30) days after this Lease is signed, Tenant shall deliver to Landlord a copy of Tenant's recorded statement of partnership or certificate of limited partnership.

Section 13.11. Joint and Several Liability. All parties signing this Lease as Tenant shall be jointly and severally liable for all obligations of Tenant.

Section 13.12. Force Majeure. If either Landlord or Tenant cannot perform any of its obligations due to events beyond Landlord's or Tenant's control, the time provided for performing such obligations shall be extended by a period of time equal to the duration of such events. Events beyond Landlord's control include, but are not limited to, acts of God, war, civil commotion, labor disputes, strikes, fire, flood or other casualty, shortages of labor or material, government regulation or restriction and weather conditions. In no event, however, shall the occurrence of an event of force majeure be deemed to extend the time for payment by Tenant of any amounts required to be paid by Tenant to Landlord, including, without limitation, the payment of rent.

Section 13.13. Execution of Lease. This Lease may be executed in counterparts and, when all counterpart documents are executed, the counterparts shall constitute a single binding instrument. Landlord's delivery of this Lease to Tenant shall not be deemed to be an offer to lease and shall not be binding upon either party until executed and delivered to both parties.

Section 13.14. Survival. All representations and warranties of Landlord and Tenant shall survive the termination of this Lease.

Section 13.15. **Exhibits.** All exhibits attached hereto are hereby incorporated herein by this reference.

Section 13.16. **Sidewalks.** Tenant hereby acknowledges and agrees that (i) Landlord does not own the sidewalks adjacent to the Property; (ii) any use by Tenant of such sidewalks shall be in compliance with all applicable laws, regulations and ordinances, including, without limitation, those promulgated by the City of Santa Monica; and (iii) Tenant shall be solely responsible for cleaning and maintaining such sidewalks, or making appropriate arrangements with the City of Santa Monica for the cleaning and maintaining of such sidewalks.

Section 13.17. **Parking.** Tenant hereby acknowledges and agrees that (i) the Property does not include any parking spaces; and (ii) Tenant shall be solely responsible for making appropriate parking arrangement for the employees and customers of Tenant, as well as anyone else visiting the Property.

ARTICLE FOURTEEN: BROKERS

Section 14.01. **Broker's Fee.** When this Lease is signed by and delivered to both Landlord and Tenant, Landlord shall pay a real estate commission to Landlord's Broker named in Section 1.08 above as provided in the separate written agreement between Landlord and Landlord's Broker for services rendered to Landlord by Landlord's Broker in this transaction. If a Tenant's Broker is named in Section 1.08 above, Tenant shall pay to Tenant's Broker a commission if so provided in any agreement between Tenant and Tenant's Broker. Nothing contained in this Lease shall impose any obligation on Landlord to pay a commission or fee to any party other than Landlord's Broker. Without in any way limiting the generality of the foregoing, neither Landlord nor Landlord's Broker shall have any obligation to pay any commission or other compensation to Tenant's Broker.

Section 14.02. **Broker's Disclosure of Agency.** Landlord's Broker hereby discloses to Landlord and Tenant, and Landlord and Tenant hereby consent to Landlord's Broker acting in this transaction as the agent of (check one):

- Landlord exclusively; or
- both Landlord and Tenant.

Section 14.03. **No Other Brokers.** Tenant represents and warrants to Landlord that the brokers named in Sections 1.08 above are the only agents, brokers, finders or other parties with whom Tenant has dealt who are or may be entitled to any commission or fee with respect to this Lease or the Property.

IN WITNESS WHEREOF, Landlord and Tenant have signed this Lease at the places and on the dates specified adjacent to their signatures below.

"LANDLORD"

Maxtana Avenue, L.L.C., a Delaware limited liability company

Signed on Sept. 2, 2003

at Chicago, IL

By: [Signature]
Its: MEMBER LLC

Signed on Sept 4, 2003

at Santa Monica, CA

By: [Signature]
Its: Member

"TENANT"

eStyle, Inc., a Delaware corporation

Signed on _____, 2003

at _____

By: Aurie McCartney
Its: Chairman and CEO

Signed on _____, 2003

at _____

By: _____
Its: _____

EXHIBIT "A"

Depiction of Property and Project

EXHIBIT "B"

Confirmation Notice

DATE: _____

eStyle, Inc.
1324 Montana Avenue
Santa Monica, California 90403

Re: Lease dated August 8, 2003 between
Maxtana Avenue, L.L.C., as Landlord, and
eStyle, Inc., as Tenant

Reference is hereby made to the lease referenced above
("Lease"). Capitalized terms used herein and not otherwise defined
shall have the same definitions as set forth in the Lease.

Please acknowledge the following:

1. The Commencement Date of the Lease is _____.
2. The Rent Commencement Date of the Lease is _____.
3. The Lease Term is scheduled to expire on _____, subject to one (1) five (5) year option to extend.

Very truly yours,

"LANDLORD"

Maxtana Avenue, L.L.C., a
Delaware limited liability company

By: _____
Its: _____

Tenant hereby confirms the information set forth above.

"TENANT"

Date: _____

eStyle, Inc.,
a Delaware corporation

By: Laurie McLaetney
Its: Chairman and CEO

By: _____
Its: _____

EXHIBIT "B"

Confirmation Notice

DATE: October 9, 2003

eStyle, Inc.
1324 Montana Avenue
Santa Monica, California 90403

Re: Lease dated August 8, 2003 between
Maxtana Avenue, L.L.C., as Landlord, and
eStyle, Inc., as Tenant

Reference is hereby made to the lease referenced above ("Lease"). Capitalized terms used herein and not otherwise defined shall have the same definitions as set forth in the Lease.

Please acknowledge the following:

1. The Commencement Date of the Lease is August 8, 2003
2. The Rent Commencement Date of the Lease is October 9, 2003
3. The Lease Term is scheduled to expire on October 8, 2008, subject to one (1) five (5) year option to extend.

Very truly yours,

"LANDLORD"

Maxtana Avenue, L.L.C., a
Delaware limited liability company

By: [Signature]
Its: member

Tenant hereby confirms the information set forth above.

"TENANT"

Date: _____

eStyle, Inc.,
a Delaware corporation

By: [Signature]
Its: Chairman and CEO

By: _____
Its: _____

April 1, 2008

Maxtana Avenue L.L.C.
c/o J. S. Rosenfield & Co.
919 Montana Avenue
Santa Monica, CA 90403
Attn: James Rosenfield

Re: Lease dated August 8, 2003
for Premises located at 1324 Montana Avenue, Santa Monica, California

Gentlemen:

Please take notice that eStyle, Inc., tenant under the lease (the "Lease") of the real property located at 1324 Montana Avenue (as described in section 1.04 of the Lease), commenced a case under chapter 11 of the United States Bankruptcy Code on March 19, 2008 (the "Petition Date"). Pursuant to 11 U.S.C. section 108(b), eStyle has 60 days from the Petition Date to exercise the option to extend the lease term set forth in section 2.03(a) of the Lease. You are hereby provided with notice that eStyle shall use the extension period provided under section 108(b) to determine whether to exercise the option to extend the term of the Lease. In the event that the court presiding over eStyle's chapter 11 case were to determine that section 108(b) does not apply to the subject option to extend the term of the Lease, this notice shall be deemed to be notification of eStyle's election to exercise the option to extend the term of the Lease.

Sincerely,

Robert S. Kelleher

Robert S. Kelleher
Chief Executive Officer

Cc: David Kupetz, Esq.
SulmeyerKupetz

PROOF OF SERVICE
1013A (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action; my business address is 1900 Avenue of the Stars, Suite 2100, Los Angeles, California 90067-4590.

On June 10, 2008, I served the foregoing document described as **LIMITED OPPOSITION TO DEBTOR'S MOTION FOR ORDER EXTENDING TIME TO ASSUME OR REJECT UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY; DECLARATION OF JAMES S. ROSENFELD** on the interested parties in this action

by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

by placing _ the original _ a true copy thereof enclosed in sealed envelopes addressed as follows:

BY U.S. MAIL:

I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on June 10, 2008, at Los Angeles, California.

BY PERSONAL SERVICE:

I delivered such envelope by hand to the offices of the addressee.

Executed on _____, at Los Angeles, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Fed) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CYNTHIA C. STREMMEL

Cynthia C. Stremmel

Signature

SERVICE LIST

In re ESTYLE, Inc., USBC Case No. 2:08-bk-13518-SB

Debtor

eStyle, Inc.
865 South Figueroa Street, Suite 2700
Los Angeles, CA 90017

Debtor's Counsel

David S. Kupetz, Esq.
SulmeyerKupetz
333 South Hope Street, 35th Floor
Los Angeles, CA 90071

United States Trustee

Bruce S. Schildkraut, Esq.
Office of the United States Trustee
725 South Figueroa Street, 26th Floor
Los Angeles, CA 90017

Committee of Unsecured Creditors

Craig G. Margulies, Esq.
Landsberg Margulies LLP
16030 Ventura Boulevard, Suite 470
Encino, CA 91436

