

2008-012523

Klamath County, Oregon



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Fee: \$86.00

Prepared by and return to:

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1st 1032014

AMENDED AND RESTATED MEMORANDUM OF LEASE

THIS AMENDED AND RESTATED MEMORANDUM OF LEASE ("Restated Memorandum") made this 29th day of August 2008 ("**Effective Date**"), by and between **JAMES ANDROPOULOS**, an individual, successor-in-interest to Eltinge, Graziadio & Sampson Development Co., and O'Connor & Company, a partnership doing business as Sixth Avenue Enterprises, (hereinafter referred to as "**Landlord**"), and **KMART CORPORATION**, a Michigan corporation, successor-in-interest to S.S. Kresge Company (hereinafter referred to as "**Tenant**").

WITNESSETH:

WHEREAS, Landlord's predecessor and Tenant's predecessor entered into a Lease dated October 15, 1973, as amended by that certain First Lease Modification Agreement dated February 7, 1974; as amended by that certain Second Lease Modification Agreement dated October 1, 1974; and as amended by that certain Third Lease Modification Agreement executed November 30, 1974 (collectively, the "**Lease**") for the lease by Tenant of certain property located at City of Klamath Falls, County of Klamath, State of Oregon, which property is more specifically described in the Lease (the "**Demised Premises**").

WHEREAS, the Lease is evidenced by that certain Memorandum of Lease dated October 15, 1973 ("**Original Memorandum**") by and between Landlord's predecessor and Tenant's predecessor recorded with the Klamath County Recorder, Oregon on March 5, 1974 in Volume M 74 of Deeds, Page 3072 Official Record of said County. The Original Memorandum is made a part hereof and incorporated by reference herein.

WHEREAS, Landlord and Tenant have entered into that certain Fourth Amendment to Lease dated August 29, 2008 ("Fourth Amendment").

WHEREAS, the Fourth Amendment, among other things, reduces the Demised Premises

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being leased by Tenant and grants to Landlord a driveway and access easement.

WHEREAS, Landlord and Tenant desire to enter into this Restated Memorandum in order to evidence the Lease as amended by the Fourth Amendment.

NOW, THEREFORE, for and in consideration of the sum of One Dollar (\$1.00) and other valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, the parties agree as follows:

1. The foregoing recitals are hereby incorporated as if fully re-written and restated at length herein.

2. Capitalized terms used, but not defined in this Restated Memorandum, shall have the same meaning ascribed to such terms as defined in the Lease.

3. As of the Effective Date, and subject to the terms and conditions herein, Landlord and Tenant agree that Tenant's Demised Premises shall be reduced by approximately, but by no greater than, 14,577 square feet (the "**Released Premises**"). The Released Premises is identified on the attached Exhibit B. The legal description of Tenant's Demised Premises under the Lease is hereby amended to reflect this change and Exhibit A of the Lease is deleted in its entirety and is replaced with Exhibit A-1 which is attached hereto. As of the Effective Date, all references in the Lease to Exhibit A are changed to Exhibit A-1.

4. As of the Effective Date, and subject to the terms and conditions herein, Tenant grants to Landlord a permanent non-exclusive easement over, upon and across that portion of Tenant's Demised Premises legally described on Exhibit A-2 and identified on the attached Exhibit B as **Easement Area** for the benefit of the parcel adjoining the Released Premises ("**Parcel M**") with the following terms relating to the Easement Area:

(a) Parcel M shall have a perpetual, non-exclusive easement and right of way for driveway purposes upon and for ingress and egress of pedestrian and vehicular traffic upon, over and across the Easement Area for the benefit of Parcel M for use by Landlord and its successors and assigns, and their respective tenants, subtenants, invitees and licensees.

(b) Neither Tenant nor Landlord or its tenants or subtenants shall obstruct, impede or interfere with the reasonable use of the Easement Area for the purposes described in this Fourth Amendment. No fence or other barrier shall be erected or permitted within or across the Easement Area which would prevent or obstruct the passage of pedestrian or vehicular travel; provided, however that the foregoing shall not prohibit: (i) the temporary erection of barricades which are reasonably necessary for security and/or safety purposes in connection with the construction, repair or maintenance of the Easement Area, it being acknowledged, however, that all such work shall be conducted in the most expeditious manner reasonably possible to minimize interference with the use of the Easement Area, and that all such work shall be diligently prosecuted to completion.

(c) Tenant's grant of the easement herein shall not change, amend or modify the parties' repair and maintenance obligations as set forth in the Lease.

5. As of the Effective Date, Exhibit B of the Lease is hereby modified to be consistent with the legal description of Exhibit A-1 of this Restated Memorandum thereby excluding the Released Premises from Tenant's Demised Premises.

6. Within thirty (30) days after execution of this Restated Memorandum, Tenant shall no longer be responsible for real estate taxes, assessments or other charges levied against the 14,577 square feet of Released Premises.

7. Landlord's Covenants. Landlord covenants and agrees that:

- (a) the improvements to be constructed on the Released Premises shall only be performed in accordance with good construction practice and in such manner as to not unreasonably interfere with the business of Tenant nor to interrupt utility services to or upon Tenant's Demised Premises. No later than at the conclusion of the construction of the improvements on the Released Premises, Landlord shall, at its sole cost and expense, promptly repair any damage to the Demised Premises and restore the Demised Premises to the same condition that it was found prior to the commencement of the construction.
- (b) Landlord and its agents shall, or shall cause, the work to be performed on the Released Premises in such manner so that no construction vehicles, equipment or materials are placed anywhere on the Demised Premises, including the parking area, and in no event shall construction block the ingress to Tenant's store.
- (c) prior to the commencement of any construction activity related to the redevelopment of the Released Premises, Landlord shall submit to Tenant for its review and written approval, such approval not to be unreasonably withheld or delayed, the construction schedule and staging and traffic flow plans for the construction of the improvements. Tenant shall, at no cost to Landlord, approve or note objections in writing to the construction schedule or staging and traffic flow plans within thirty (30) days of receipt of the same from Landlord.

8. Landlord, at Landlord's sole cost and expense, shall relocate the parking lot light pole from the Released Premises to the Demised Premises to the location identified on the attached Exhibit B. The relocation of the parking lot light pole shall be completed in a workmanlike manner and with a parking lot light pole similar to the existing light pole, shall commence concurrent with the Released Premises redevelopment, and shall be completed within ninety (90) days after commencement of construction.

9. Landlord agrees to indemnify, defend and hold Tenant harmless against and from any and all claims, liability and costs for any and all injuries to persons and for any and all damage to property occurring on the Demised Premises arising out of the Released Premises redevelopment.

10. This Restated Memorandum is entered into pursuant to the provisions of the Lease and is subject to all of the terms, covenants and conditions contained therein, all of which are incorporated by reference herein. This Restated Memorandum is not a complete summary of the Lease and is not intended to and shall not change any of the terms and conditions of the Lease. In the event of any conflict between this Restated Memorandum and the Lease, the Lease shall control.

11. THE RECORDING OF THIS RESTATED MEMORANDUM IS TO SUPPLEMENT THE RECORDATION OF THE ORIGINAL MEMORANDUM AND NOT DELETE OR CHANGE THE PRIORITY OF THE RECORDATION OF THE ORIGINAL MEMORANDUM. THE EFFECTIVENESS OF THE RECORDING OF THIS RESTATED MEMORANDUM SHALL BE FOR ALL INTENTS AND PURPOSES EFFECTIVE AS OF THE DATE OF THE RECORDATION OF THE ORIGINAL MEMORANDUM.

Signatures appear on the following page

IN WITNESS WHEREOF, Landlord and Tenant have executed this Amended and Restated Memorandum of Lease by their respective authorized officers as of the date set forth above.

LANDLORD:

JAMES ANDROPOULOS

By: [Signature]
Name: _____
Its: _____

TENANT:

KMART CORPORATION

By: [Signature]
Name: J. Kal Gibran
Its: Divisional Vice President



IN WITNESS WHEREOF, Landlord and Tenant have executed this Amended and Restated Memorandum of Lease by their respective authorized officers as of the date set forth above.

LANDLORD:

JAMES ANDROPOULOS

By: _____
Name: _____
Its: _____

TENANT:

KMART CORPORATION

By: J. Kal Gibron
Name: J. Kal Gibron
Its: Divisional Vice President



STATE OF Georgia)
COUNTY OF Forsyth) SS:

THE undersigned, a Notary Public in and for the County and State aforesaid, does hereby certify that **JAMES ANDROPOULOS**, appeared before me this day in person and acknowledged under oath that he signed and delivered the attached instrument.

GIVEN under my hand and seal this 2 day of September, 2008.

My Commission Expires:

1/14/2010



[Signature]
Notary Public

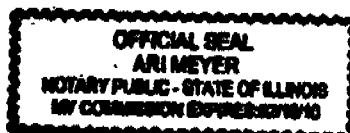
STATE OF ILLINOIS)
COUNTY OF COOK) SS:

THE undersigned, a Notary Public in and for the County and State aforesaid, does hereby certify that **J. KAL GIBRON**, personally known to me to be the Divisional Vice President of **KMART CORPORATION**, a Michigan corporation, appeared before me this day in person and acknowledged under oath that in such capacity he signed and delivered the said instrument pursuant to authority duly given to him by said corporation.

GIVEN under my hand and seal this 29th day of August, 2008.

My Commission Expires:

2/16/10



[Signature]
Notary Public

STATE OF _____)
) SS:
COUNTY OF _____)

THE undersigned, a Notary Public in and for the County and State aforesaid, does hereby certify that **JAMES ANDROPOULOS**, appeared before me this day in person and acknowledged under oath that he signed and delivered the attached instrument.

GIVEN under my hand and seal this _____ day of _____, 2008.

Notary Public

My Commission Expires:

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

THE undersigned, a Notary Public in and for the County and State aforesaid, does hereby certify that **J. KAL GIBRON**, personally known to me to be the Divisional Vice President of **KMART CORPORATION**, a Michigan corporation, appeared before me this day in person and acknowledged under oath that in such capacity he signed and delivered the said instrument pursuant to authority duly given to him by said corporation.

GIVEN under my hand and seal this 29th day of August, 2008.

Ari Meyer
Notary Public

My Commission Expires:

2/16/10

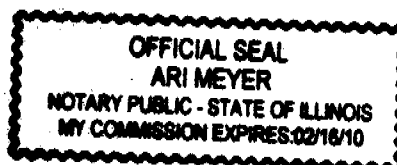


EXHIBIT A-1

LEGAL DESCRIPTION OF DEMISED PREMISES

(see attached)

EXHIBIT A-1

Legal Description of Demised Premises

A description of a parcel of land being a part of tracts 36 and 43, Enterprise Tracts, located in the Northwest one-quarter (N.W. $\frac{1}{4}$) of the Northwest one-quarter (N.W. $\frac{1}{4}$) of Section 3, Township 39 South, Range 9 East of the Willamette Meridian, Klamath County, Oregon. Said parcel of land being more particularly described as follows:

Beginning at the Northwest corner of said Section 3, thence South 00°00'30" East a distance of 73.00 feet; thence North 89°54'00" East a distance of 510.00 feet to the true point of beginning. Said true point of beginning being on the Southerly boundary line of Shasta Way.

Thence continuing North 89°54'00" East along said Southerly boundary line a distance of 555.00 feet; thence South 29°34'00" East a distance of 171.97 feet (previous deed calls this 172.28); thence North 89°54'00" East a distance of 40.21 feet (previous deed calls this 40.10 feet) to a point on the Westerly boundary line of Avalon Street; thence South 30°37'00" West a distance of 636.15 feet (previous deed calls this South 30°38'30" West a distance of 636.41 feet) to the Northeasterly corner of that tract of land deeded to McDonald Corporation in Volume M-71, Page 9231, Microfilm Records of Klamath County, Oregon. Thence North 59°17'30" West (previous deed calls this 59°21'20" West) along the Northeasterly line of said McDonald Tract a distance of 200.00 feet to the Northwesterly corner of said McDonald Tract; thence South 30°37'30" West (previous deed calls this South 30°38'30" West) along the Northwesterly line of said McDonald Tract a distance of 140.00 feet to the Southwest corner of said McDonald Tract; thence North 59°17'30" West a distance of 131.13 feet to the Northwesterly corner of that certain parcel described in Mortgage given by Rickfalls, Inc., to the United States National Bank of Oregon, dated March 28, 1961, recorded April 4, 1961, in Volume 201, Page 355, Mortgage Records of Klamath County, Oregon (previous deed calls this North 59°21'30" West a distance of 130.67 feet); thence North 00°00'30" West a distance of 647.38 feet to the true point of beginning.

Said parcel of land contains an area of 8.245 Acres.

LESS AND EXCEPT:

A PORTION OF TRACTS 36 AND 43 OF ENTERPRISE TRACTS, BEING LOCATED IN THE NW 1/4 OF THE NW 1/4 OF SECTION 3, TOWNSHIP 39 SOUTH, RANGE 9 EAST, WILLAMETTE MERIDIAN, KLAMATH COUNTY, OREGON, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE INTERSECTION OF THE NORTHWESTERLY RIGHT-OF-WAY LINE OF AVALON STREET, 50.00 FEET FROM CENTERLINE WHEN MEASURED PERPENDICULAR TO SAID CENTERLINE, WITH THE NORTHEASTERLY RIGHT-OF-WAY LINE OF PERSHING WAY, 30.00 FEET FROM CENTERLINE WHEN MEASURED PERPENDICULAR TO SAID CENTERLINE, THENCE NORTH 30°38'30" EAST ALONG SAID NORTHWESTERLY RIGHT-OF-WAY LINE, 180.04 FEET TO A RAILROAD SPIKE; THENCE LEAVING SAID RIGHT-OF-WAY LINE NORTH 59°21'23" WEST 200.00 FEET TO A 5/8" IRON ROD WITH A 1.5" ALUMINUM CAP AND THE POINT OF BEGINNING. THENCE CONTINUING NORTH 59°21'23" WEST 95.77 FEET; THENCE NORTH 30°37'42" EAST 60.88 FEET; THENCE SOUTH 74°39'14" EAST 137.77 FEET; THENCE SOUTH 59°26'34" EAST 200.05 FEET TO SAID NORTHWESTERLY RIGHT-OF-WAY LINE; THENCE SOUTH 30°38'30" WEST ALONG SAID NORTHWESTERLY RIGHT-OF-WAY LINE 20.00 FEET TO A 5/8" IRON ROD WITH A 1.5" ALUMINUM CAP; THENCE NORTH 59°26'34" WEST 200.02 FEET TO A 5/8" IRON ROD WITH A 1.5" ALUMINUM CAP; THENCE SOUTH 30°37'42" WEST 140.00 FEET TO A 5/8" IRON ROD WITH A 1.5" ALUMINUM CAP AND THE POINT OF BEGINNING.

CONTAINING APPROXIMATELY 14,577 SQUARE FEET OR 0.33 ACRES, MORE OR LESS.

EXHIBIT A-2

LEGAL DESCRIPTION OF EASEMENT AREA

(see attached)

EXHIBIT A-2

Legal Description of Easement Area

A PORTION OF TRACTS 36 AND 43 OF ENTERPRISE TRACTS, BEING LOCATED IN THE NW 1/4 OF THE NW 1/4 OF SECTION 3, TOWNSHIP 39 SOUTH, RANGE 9 EAST, WILLAMETTE MERIDIAN, KLAMATH COUNTY, OREGON, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE INTERSECTION OF THE NORTHWESTERLY RIGHT-OF-WAY LINE OF AVALON STREET, 50.00 FEET FROM CENTERLINE WHEN MEASURED PERPENDICULAR TO SAID CENTERLINE, WITH THE NORTHEASTERLY RIGHT-OF-WAY LINE OF PERSHING WAY, 30.00 FEET FROM CENTERLINE WHEN MEASURED PERPENDICULAR TO SAID CENTERLINE; THENCE NORTH 30°38'30" EAST ALONG SAID NORTHWESTERLY RIGHT-OF-WAY LINE, 180.04 FEET TO A RAILROAD SPIKE; THENCE LEAVING SAID RIGHT-OF-WAY LINE NORTH 59°21'23" WEST 295.77 FEET TO THE POINT OF BEGINNING. THENCE CONTINUING NORTH 59°21'23" WEST 25.00 FEET; THENCE NORTH 30°37'42" EAST 70.98 FEET; THENCE SOUTH 74°39'14" EAST 158.46 FEET; THENCE SOUTH 59°26'34" EAST 210.67 FEET TO SAID NORTHWESTERLY RIGHT-OF-WAY LINE; THENCE SOUTH 30°38'30" WEST ALONG SAID NORTHWESTERLY RIGHT-OF-WAY LINE 25.00 FEET; THENCE LEAVING SAID NORTHWESTERLY RIGHT-OF-WAY LINE NORTH 59°26'34" WEST 200.05 FEET; THENCE NORTH 74°39'14" WEST 137.77 FEET; THENCE SOUTH 30°37'42" WEST 60.88 FEET TO THE POINT OF BEGINNING.

CONTAINING APPROXIMATELY 10,485 SQUARE FEET OR 0.24 ACRES, MORE OR LESS.

EXHIBIT B

SITE PLAN

(see attached)

