

24

6201683

6201683  
10/30/95 4:37 PM 24-00  
NANCY WORKMAN  
RECORDER, SALT LAKE COUNTY, UTAH  
FIRST AMERICAN TITLE  
REC BY: B GRAY DEPUTY - WI

ASSIGNMENT OF RENTS AND LEASES

THIS ASSIGNMENT OF RENTS AND LEASES (this "Assignment") is made this 25<sup>th</sup> day of October, 1995, by Ninigret Park Development, L.C., a Utah limited liability company ("Borrower"), to Allianz Life Insurance Company of North America, a Minnesota corporation ("Lender").

RECITALS:

A. Lender intends to loan \$4,100,000.00 to Borrower, which will be evidenced by that certain Promissory Note of even date herewith (the "Note") executed by Borrower in favor of Lender. The payment and performance of Borrower's obligations under the Note will be secured, in part, by that certain Deed of Trust, Security Agreement and Financing Statement dated the same date as the Note and recorded concurrently with this Assignment (the "Mortgage") among Borrower, Lender and the trustee named therein, encumbering the Property described on Exhibit A attached hereto and the other Mortgaged Estate defined in the Mortgage.

AGREEMENT:

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Borrower agrees as follows:

1. Definitions. Capitalized terms used herein shall have the respective meanings given them in the Mortgage (of even date herewith securing the Loan evidenced by the Loan Documents) and the other Loan Documents, unless otherwise defined herein.
2. Assignment; Certain Rights of Borrower. To further secure the Secured Obligations, Borrower hereby assigns, transfers, conveys and sets over to Lender all of Borrower's estate, right, title and interest in, to and under all leases, whether existing on the date hereof or hereafter entered into (including any extensions, modifications or amendments thereto) relating to the Property, including, without limitation, that certain Lease Agreement (the "Lease Agreement") dated August 31, 1995 between Borrower, as Landlord and Huish Detergents, Inc., a Utah corporation, as Tenant (the "Leases"), together with all rights, powers, privileges, options and other benefits of Borrower as the lessor under the Leases, including both current tenants and any future tenants, and all the rents, issues, royalties, revenues, profits, and income from the Mortgaged Estate (collectively the "Rents"), including those now due, past due or to become due. Borrower irrevocably appoints Lender its true and lawful attorney-in-fact, at the option of Lender at any time and from time to time, to take possession and control of the Mortgaged Estate, pursuant to

BOOK 7260 PAGE 164

Borrower's rights as lessor under the Leases, and to demand, receive and enforce payment, to give receipts, releases and satisfaction and to sue, in the name of Borrower or Lender, for all Rents. It is intended by Borrower and Lender that this Assignment constitutes an absolute assignment and not merely an assignment for additional security.

Notwithstanding the foregoing, however, so long as no Event of Default has occurred, Borrower shall have a revocable license to possess and control the Mortgaged Estate and collect and receive all Rents. Upon the occurrence of an Event of Default, such license shall be automatically revoked by Lender.

Upon the occurrence of any Event of Default, Lender may, either in person, by agent or by a court-appointed receiver, regardless of the adequacy of Lender's security, enter upon and take possession and control of the Mortgaged Estate, or any part thereof, to perform all acts necessary and appropriate to operate and maintain the Mortgaged Estate including, but not limited to, execute, cancel or modify the Leases, make repairs to the Mortgaged Estate, and execute or terminate contracts providing for the management or maintenance of the Mortgaged Estate, all on such terms as are deemed best to protect the security of this Assignment, and in Lender's or Borrower's name, sue for or otherwise collect such Rents from the Mortgaged Estate as specified in this Assignment as the same become due and payable, including, but not limited to, Rents then due and unpaid.

All Rents collected shall immediately be held by Borrower as trustee for the benefit of Lender only. Borrower agrees that commencing upon the occurrence of such Event of Default, each tenant of the Mortgaged Estate shall make its Rent payable to and pay such Rent to Lender on Lender's written demand therefor, without any liability on the part of said tenant to inquire further as to the existence of an Event of Default by Borrower.

All Rents collected subsequent to the occurrence of any Event of Default shall be applied, at the discretion of, and in such order as determined by, Lender, to the costs, if any, of taking possession and control of and managing the Mortgaged Estate and collecting such amounts, including, but not limited to, attorney's fees, costs and fees of appeal, receiver's fees, premiums on receiver's bonds, costs of repairs to the Mortgaged Estate, premiums on insurance policies, taxes, assessments and other charges on the Mortgaged Estate, and the costs of discharging any obligation or liability of Borrower as lessor or landlord of the Mortgaged Estate and to the Secured Obligations. Lender or the receiver shall have access to the books and records used in the operation and maintenance of the Mortgaged Estate and shall be liable to account only for those Rents actually received. Lender shall not be liable to Borrower, anyone claiming under or through Borrower, or anyone having an interest in the Mortgaged Estate by reason of anything done or left undone by Lender hereunder.

If the Rents are not sufficient to meet the costs, if any, of taking possession and control of and managing the Mortgaged Estate and collecting the same, any funds expended by Lender for such purposes shall become Secured Obligations.

Any entering upon and taking possession and control of the Mortgaged Estate by Lender or the receiver and any application of Rents as provided herein shall not cure or waive any Event of Default or invalidate any other right or remedy of Lender.

Borrower hereby represents and agrees that it is and will be the sole owner of the entire landlord's interest in all Leases, subject only to Permitted Encumbrances.

3. Certain Agreements of Borrower. Borrower hereby agrees as follows:

(a) If any of the Leases provide for a security deposit paid by the tenant thereunder to Borrower, this Assignment shall transfer to the Lender all of Borrower's right, title and interest in and to such security deposits; provided that, Borrower shall have the right to retain such security deposits so long as no Event of Default shall have occurred; and provided further that Lender shall have no obligation to any such tenant with respect to such security deposits unless and until Lender comes into actual possession and accepts control of such security deposits;

(b) Borrower has not and shall not collect during any calendar year rent more than one (1) month in advance of the date on which it becomes due under the terms of each Lease from tenants of the Mortgaged Estate;

(c) Borrower shall faithfully perform and discharge all obligations of the landlord under the Leases. Borrower shall appear in and defend, at no cost to Lender, any action or proceeding arising under or in any manner connected with the Leases;

(d) Upon the request of Lender, Borrower shall promptly provide to Lender a true and correct copy of all existing Leases;

(e) After the date of this Assignment, Borrower shall obtain Lender's prior written approval to enter into new Leases (or Lease renewals), provided however, such prior written approval shall not be required if (i) the new Lease or Lease renewal is accomplished using a form of lease acceptable to and approved by Lender, (ii) the new Lease or Lease renewal contains material terms and provisions that are at least as favorable as the terms of the Lease Agreement, and is with a tenant that is as commercially strong and credit-worthy as the tenant under the Lease Agreement, and (iii) a true and correct copy of the executed Lease is delivered to Lender within five (5) business days after execution thereof.

(f) Nothing herein shall be construed to constitute Lender as a "mortgagee in possession" in the absence of its taking of actual possession of the Mortgaged

Estate pursuant to the powers granted herein, or to impose any liability or obligation on Lender under or with respect to the Leases. Borrower shall indemnify and hold Lender harmless from and against any and all liabilities, losses and damages (including attorneys' fees and costs and fees of appeal) that Lender may incur under the Leases after the date hereof, or by reason of this Assignment, and of and from any and all claims and demands whatsoever that may be asserted against Lender by reason of any alleged obligations to be performed or discharged by Lender under the Leases or this Assignment. Any Rent collected by Lender may be applied by Lender in its discretion in satisfaction of any such liability, loss, damage, claim, demand, costs, expense or fees.

4. Event of Default. The following shall constitute an "Event of Default" hereunder:

(a) the occurrence of an Event of Default, as said phrase is defined in the Mortgage;

(b) if at any time any representation or warranty made by Borrower in this Assignment shall be or become materially incorrect; or

(c) the breach of any agreement by Borrower under this Assignment.

5. Additional Rights and Remedies of Lender. If an Event of Default occurs, Lender shall have the following rights and remedies, all of which are cumulative, in addition to all other rights and remedies provided under the Loan Documents, or any other agreement between Borrower and Lender, or otherwise available at law or in equity or by statute:

(a) Lender shall be deemed to be the creditor of each tenant in respect of any assignments for the benefit of creditors and any bankruptcy, arrangement, reorganization, insolvency, dissolution, receivership or other debtor-relief proceedings affecting the tenant (without obligation on the part of Lender, however, to file timely claims in such proceedings or otherwise pursue creditor's rights therein); and

(b) Lender shall have the right to assign Borrower's right, title and interest under this Assignment in any of the Leases to any subsequent holder of the Note or any participating interest therein or to any person acquiring title to the Mortgaged Estate or any part thereof through foreclosure or otherwise. Any subsequent assignee shall have all the rights and powers herein provided to Lender.

6. Additional Security. Lender may take or release other security for the Secured Obligations, may release any party primarily or secondarily liable therefor and may apply any other security held by it to the satisfaction of Secured Obligations, without prejudice to any of its rights under this Assignment.

7. Absolute Assignment: Release. The assignment made hereby is an absolute and unconditional assignment of rights only, and not a delegation of duties. The assignment contained herein and all rights herein assigned to Lender shall cease and terminate as to all Leases upon the satisfaction of all Secured Obligations.

It is expressly understood that no judgment or decree that may be entered on any debt secured or intended to be secured by this Assignment shall operate to abrogate or lessen the effect of this Assignment, but that the same shall continue in full force and effect as herein provided. The provisions of this Assignment shall also remain in full force and effect during the pendency of any proceedings for the foreclosure and/or sale of the Mortgaged Estate, or any part thereof, both before and after sale, until the issuance of a deed pursuant to a decree of foreclosure and/or sale, unless all Secured Obligations are fully satisfied.

8. Effect on Rights Under Other Documents. Nothing contained in this Assignment and no act done or omitted by Lender pursuant to the powers and rights granted it hereunder shall prejudice or be deemed to be a waiver by Lender of its rights and remedies under the Loan Documents. The right of Lender to collect the Secured Obligations and to enforce any other security therefor held by it may be exercised by Lender either prior to, simultaneously with, or subsequent to any action taken by it hereunder. This Assignment is intended to be supplementary to and not in substitution for or in derogation of any assignment of rents contained in the Mortgage or in any other document.

9. Further Assurances. Borrower hereby agrees that it shall, whenever and as often as it shall be requested to do so by Lender, execute, acknowledge and deliver, or cause to be executed, acknowledged, and delivered, any and all such further conveyances, approvals, consents, memoranda of the subject matter hereof, duplicate originals hereof, and any and all other documents and to do any and all other acts as may be necessary or appropriate to carry out the terms of this Assignment. This Assignment or a memorandum hereof may be recorded by Lender at any time.

10. No Waiver. A waiver by Lender of any of its rights hereunder or under the Leases or of a breach of any of the covenants and agreements contained herein to be performed by Borrower shall not be construed as a waiver of such rights in any succeeding instance or of any succeeding breach of the same or other covenants, agreements, restrictions or conditions.

11. Marshalling. Notwithstanding the existence of any other security interest in the Mortgaged Estate held by Lender or by any other party, Lender shall have the right to determine the order in which any of the Mortgaged Estate or any part thereof shall be subjected to the remedies provided herein. Lender shall have the right to determine the order in which any or all portions of the Secured Obligations are satisfied from the proceeds realized upon the exercise of the remedies provided herein. Borrower and any party who now or hereafter acquires a security interest in any of the Mortgaged

Estate and who has actual or constructive notice hereof hereby waives, to the extent permitted by law, any and all right to require the marshalling of assets in connection with the exercise of any of the remedies permitted by applicable law or provided herein.

12. Notices. All notices, demands, requests, consents, approvals or communications required under this Assignment shall be in writing and shall be deemed to have been properly given if sent by hand delivery, overnight courier, or certified mail, postage prepaid, addressed to the parties as specified in the Mortgage.

13. Governing Laws; Severability. This Assignment shall be governed by and construed in accordance with the laws of the State of Utah. In case any of the provisions of this Assignment shall at any time be held by a court of competent jurisdiction to be illegal, invalid, or unenforceable for any reason, such illegality, invalidity or unenforceability shall not affect the remaining provisions of this Assignment, and this Assignment shall be construed and enforced as if all such illegal, invalid or unenforceable provisions had never been inserted herein.

IN WITNESS WHEREOF, Borrower has executed this Assignment as of the date first above written.

**BORROWER:**

NINIGRET PARK DEVELOPMENT, L.C., a  
Utah limited liability company

By Ninigret Group, L.C.  
Its Manager

By Randolph G. Abood  
Randolph G. Abood, Member of Ninigret  
Group, L.C.

STATE OF Utah )  
 : ss.  
COUNTY OF Salt Lake )

*244*

The foregoing instrument was duly acknowledged before me this 25<sup>th</sup> day of ~~September~~ October, 1995, by Randolph G. Abcod, the Member of Ninigret Group, L.C., a Utah limited liability company that is the Manager of Ninigret Park Development, L.C., a Utah limited liability company.



ROBERT C. HYDE  
201 South Main Street  
Salt Lake City, Utah, U.S.A.  
My Commission Expires  
January 17, 1998  
STATE OF UTAH

Robert C Hyde  
NOTARY PUBLIC  
Residing at: Salt Lake City, Utah

My Commission Expires:  
1-17-98

**EXHIBIT "A"**

**LOT 1, NINIGRET PARK, PLAT 1, according to the official plat thereof, as recorded in the office of the Salt Lake County Recorder.**