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MISC 1989 19940

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## PARTICIPATION AGREEMENT

THIS PARTICIPATION AGREEMENT made and entered into this 29 day of November, 1989 by and between OMAHA LIVESTOCK MARKET, INC., a Nebraska corporation (hereinafter called "OLMI") and STOCKYARDS PLAZA, LIMITED PARTNERSHIP, a Nebraska Limited Partnership ("PLAZA").

## WITNESSETH:

WHEREAS, OLMI and PLAZA have heretofore entered into a real estate purchase agreement for the sale of real estate, more particularly described on Exhibit A attached hereto (the "Premises"), and in pursuance thereto, OLMI has conveyed the Premises to PLAZA, and

WHEREAS, it has been agreed between the parties, that as part of the consideration of the purchase price for the sale of the Premises to PLAZA, that PLAZA will enter into a Participation Agreement with OLMI, in order to allow OLMI to participate in the net cash flow received or generated by PLAZA, its successors and assigns from the development, leasing, operation, management and sale of all or any portion of the Premises.

NOW, THEREFORE, in consideration of Ten Dollars (\$10.00) and other good and valuable consideration, the receipt, sufficiency and adequacy of which is hereby acknowledged, the parties do hereby agree as follows:

1. Participation Proceeds. PLAZA does hereby agree to pay participation proceeds to OLMI in semi-annual installments on or before the last day of the month following the end of each semi-annual period, commencing July 31, 1990 for the semi-annual period ending June 30, 1990. Participation proceeds shall be equal to ten percent (10%) of the net operating income from the operation of that part of the Premises known as Lot 3 ("Lot 3") for the preceding semi-annual period.

2. Net Operating Income..

- (a) Definition. Net operating income is herein defined as the difference between the total gross receipts from Lot 3 and the aggregate expenses of Lot 3. The total gross receipts from the premises shall include, but shall not be limited to, fixed or guaranteed rentals, percentage rentals, participation rentals, overage rentals, rentals from concessions and garage rentals received by the mortgagor or other owner of the premises. The term aggregate expenses is herein defined as the total expenses paid by PLAZA or other owners of the premises for: (i) debt service, consisting of principal and interest, (ii) real estate taxes with respect to the premises, (iii) total

property and liability insurance premiums, (iv) water and utility costs, (v) total unreimbursed expenses to prepare any part of the premises for occupancy by a tenant divided by the number of years in the term of the lease, not including renewal periods, (vi) management expenses and (vii) building operating expenses including but not limited to salaries, janitorial services, maintenance and repair costs, legal and accounting costs and other reasonable operating expenses. The net cash flow shall include total gross receipts actually received during semi-annual period and aggregate expenses actually paid during semi-annual period irrespective of the period to which any item of gross receipts or aggregate expense applies, except for semi-annual or annual payments of insurance premiums, real estate taxes and capitalized expenses of preparing the premises for occupancy by a tenant, which shall be computed on a pro rata basis each semi-annual period. Expenses shall not include any provision for depreciation or replacement reserve.

- (b) Financial statements. Each semi-annual payment of participation proceeds shall be accompanied by an unaudited financial statement prepared by PLAZA's chief financial officer or an independent accounting firm engaged by it. Said financial statement shall reflect the net operating income from the premises as defined in section 2 (a) above.
- (c) Examinations of financial statements. OLMI, at its sole cost and expense, shall have the right to examine the books and records of PLAZA or other owner of the premises for the purpose of verifying the amounts of net cash flow reported by the PLAZA or other owner of the premises on the aforementioned unaudited financial statements. Such examinations shall be conducted by OLMI or any agent of OLMI during normal business hours at the office of PLAZA or other owner of the premises in the city of Omaha or at such other place in the city of Omaha as may be designated by PLAZA or other owner of the premises. OLMI hereby agrees to provide at least ten (10) working days prior written notice for each examination and further agrees that there shall be no more than two (2) examinations during any fiscal year. If an examination discloses either an overpayment or an underpayment of any installment of additional participation proceeds, the parties hereby agree to make reimbursement of the amount of the overpayment or underpayment within five (5) days of the conclusion of the examination.

3. Sale of Theater Parcel. If PLAZA sells any portion of Lot 3, PLAZA shall pay to OLMI a sum equal to ten percent (10%) of the net proceeds, being the gross sale price less (i) land

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~~shall pay to OLM I a sum equal to ten percent (10%) of the net proceeds, being the gross sale price less (i) land costs allocable to the parcel; (ii) actual construction costs of the improvements; (iii) interim interest allocable; (iv) loan fees allocable to the parcel; (v) customary closing costs; and (vi) reasonable sales commissions.~~

4. Outlot Sale Provisions. If PLAZA sells all or any portion of Outlot 1 or Outlot 2 PLAZA shall pay OLM I a sum equal to ten percent (10%) of the gross sale price of each outlot, being the sale price of the lots, or portions of lots less (i) reasonable fees and expenses customarily incidental to the sale of real property including commission (not to exceed seven percent (7%) of the sales price) and to unrelated brokers or commission (not to exceed 3.5% of the sales price) paid to an affiliate of PLAZA; (ii) PLAZA's actual land costs allocable to the Outlot being sold, calculated on the basis of 86 cents per square foot.

5. Parties intend debtor/creditor relationship. The parties hereby intend that the relationship created under this instrument be solely that of debtor and creditor. No part of this instrument shall be construed as creating at any time, a partnership, joint venture or any other equity interest in the premises for the mortgagee.

6. Duration. The duration of this Participation Agreement shall continue, and be in full force and effect, until said Lots have been sold and OLM I has received its participation in the net proceeds received from such sale(s).

7. Binding. The participation provisions hereinabove contained shall run with the land, and shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

STOCKYARDS PLAZA, LIMITED  
PARTNERSHIP, a Nebraska Corporation  
By Stockyards Plaza, Inc., a  
Nebraska Corporation, General  
Partner

By [Signature]  
President

OMAHA LIVESTOCK MARKET, INC. a  
Nebraska Corporation

By [Signature]  
President

STATE OF NEBRASKA )  
 ) ss  
COUNTY OF DOUGLAS )

On this 29<sup>th</sup> day of November, 1989, before me, a Notary Public in and for said county, personally came Donald F. Day, President of Stockyards Plaza, Inc., a Nebraska corporation, general partner of Stockyards Plaza, Limited Partnership, known to me to be the identical person who signed the foregoing Participation Agreement and acknowledged the execution thereof to be his voluntary act and deed, and the voluntary act and deed of said partnership.

WITNESS my hand and notarial seal at Omaha, Nebraska, on the day and year last above written.



Kristine K. Dergan  
Notary Public

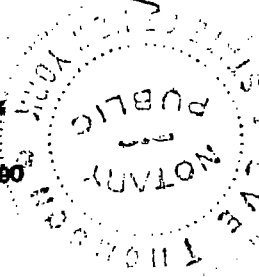
STATE OF NEW YORK )  
 ) ss  
COUNTY OF NEW YORK )

On this 22<sup>nd</sup> day of NOVEMBER, 1989, before me, a Notary Public in and for said county, personally came Raymond French President of Omaha Livestock Market, Inc., a Nebraska corporation, known to me to be the identical person who signed the foregoing Participation Agreement and acknowledged the execution thereof to be his voluntary act and deed, and the voluntary act and deed of said corporation.

WITNESS my hand and notarial seal at New York, New York, on the day and year last above written.

[Signature]  
Notary Public

EVE THOMSON  
Notary Public, State of New York  
No. 31-9327500  
Qualified in New York County  
Commission Expires April 30, 1990



## EXHIBIT "A"

## LEGAL DESCRIPTION

PARCEL 1: Part of Tax Lot 10 located in the Southwest Quarter (SW1/4) of Section 4, Township 14 North, Range 13 East of the 6th P.M., in the City of Omaha, in Douglas County, Nebraska, described as follows:

Commencing at the point of intersection of the Northerly right-of-way line of Edward Babe Gomez Avenue and the Easterly right-of-way line of 33rd Street; thence North 07°00'14" East (assumed bearing), along the Easterly right-of-way line of said 33rd Street, a distance of 205.23 feet; thence South 88°52'32" East, along the Easterly right-of-way line of 33rd Street, as dedicated and recorded in Book 823, Page 100 of the Douglas County Register of Deeds, a distance of 46.52 feet, to the Point of Beginning; thence North 01°07'28" East, along said Easterly right-of-way line of 33rd Street, a distance of 263.50 feet; thence North 86°46'42" East, along the proposed "L" Street right-of-way line, a distance of 132.08 feet; thence South 89°02'07" East, along said right-of-way line, a distance of 13.41 feet; thence South 01°07'28" West, a distance of 293.55 feet; thence North 88°52'32" West, a distance of 145.11 feet; thence North 01°07'28" East, a distance of 20.00 feet, to the Point of Beginning.

NOTE: The above premises is to be known as Lot 1, in STOCKYARDS PLAZA II.

PARCEL 2: Part of Tax Lot 10 located in the Southwest Quarter (SW1/4) of Section 4, Township 14 North, Range 13 East of the 6th P.M., in the City of Omaha, in Douglas County, Nebraska, described as follows:

Commencing at the point of intersection of the Northerly right-of-way line of Edward Babe Gomez Avenue and the Easterly right-of-way line of 33rd Street; thence North 07°00'14" East (assumed bearing), along the Easterly right-of-way line of said 33rd Street, a distance of 205.23 feet; thence South 88°52'32" East, along the Easterly right-of-way line of 33rd Street, as dedicated and recorded in Book 823, Page 100 of the Douglas County Register of Deeds, a distance of 46.52 feet; thence North 01°07'28" East, along said Easterly right-of-way line of 33rd Street, a distance of 275.00 feet; thence South 88°52'32" East, along the South line of "L" Street, a distance of 445.11 feet; thence South 01°07'28" West, a distance of 6.24 feet, to the Point of Beginning; thence South 84°26'48" East, along the proposed right-of-way line of "L" Street, a distance of 79.74 feet; thence South 89°02'07" East, a distance of 91.50 feet; thence South 01°07'28" West, a distance of 192.86 feet; thence North 88°52'32" West, a distance of 171.00 feet; thence North 01°07'28" East, a distance of 198.76 feet, to the Point of Beginning.

NOTE: The above premises is to be known as Lot 2, in STOCKYARDS PLAZA II.

PARCEL 3: Part of Tax Lot 10 located in the Southwest Quarter (SW1/4) of Section 4, Township 14 North, Range 13 East of the 6th P.M., in the City of Omaha, in Douglas County, Nebraska, described as follows:

Beginning at the point of intersection of the Northerly right-of-way line of Edward Babe Gomez Avenue and the Easterly right-of-way line of 33rd Street; thence North 07°00'14" East (assumed bearing), along the Easterly right-of-way line of said 33rd Street, a distance of 205.23 feet; thence South 88°52'32" East, along the Easterly right-of-way line of 33rd Street, as dedicated and recorded in Book 823, Page 100 of the Douglas County Register of Deeds, a distance of 46.52 feet; thence South 01°07'28" West, a distance of 20.00 feet; thence South 88°52'32" East, a distance of 145.11 feet; thence North 01°07'28" East, a distance of 293.55 feet; thence South 89°02'07" East, along the proposed South right-of-way line of "L" Street, a distance of 229.95 feet; thence South 84°26'48" East, along said right-of-way line, a distance of 70.26 feet; thence South 01°07'28" West, a distance of 198.76 feet; thence South 88°52'32" East, a distance of 171.00 feet; thence North 01°07'28" East, a distance of 192.86 feet; thence South 89°02'07" East, along the proposed South right-of-way line of "L" Street, a distance of 50.00 feet; thence South 01°07'28" West, a distance of 339.00 feet; thence North 88°52'32" West, a distance of 264.81 feet; thence South 01°07'28" West, a distance of 225.72 feet; thence North 78°25'46" West, along the proposed Northerly right-of-way line of Edward Babe Gomez Avenue, a distance of 457.29 feet; thence North 51°24'31" West, along said right-of-way line, a distance of 24.10 feet, to the Point of Beginning.

NOTE: The above premises is to be known as Lot 3, in STOCKYARDS PLAZA II.

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REGISTER OF DEEDS  
DOUGLAS COUNTY, NE